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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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UNITED STATES

CIRCUIT AND DISTRICT COURTS

WITH THE

SUBJECTS OF THE OPINIONS REPORTED IN THIS VOLUME.

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CASES REPORTED.

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

DISTRICT COURT, S. D. NEW YORK.

CIRCUIT COURT, D. VERMONT.

THIRD CIRCUIT.

CIRCUIT COURT, D. NEW JERSEY.

DISTRICT COURT, D. NEW JERSEY.

FOURTH CIRCUIT.

FIFTH CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

HAMPTON, EX'R, etc., *v.* TRUCKEE CANAL CO.

(*Circuit Court, D. Nevada.* November 24, 1883.)

JURISDICTION—FORECLOSURE OF MECHANICS' LIENS—SUIT BY ASSIGNEE—AVERMENT AS TO CITIZENSHIP—ACT OF MARCH 3, 1875.

Where the assignee of a mechanic's lien seeks to enforce and foreclose such liens in a circuit court of the United States, it must affirmatively and clearly appear from the bill filed that the court had jurisdiction as to all of the original lien claimants, and where no averment as to the citizenship of some of such claimants is made in an amended bill, it will be presumed that they are citizens of the state where the suit is brought, and the bill will be dismissed for want of jurisdiction.

Suit in Equity to foreclose certain mechanics' liens. The opinion states the facts.

W. E. F. Deal, for complainant.

C. S. Varian, *R. H. Lindsey*, and *R. M. Clarke*, for defendant.

Before SAWYER and SABIN, JJ.

SABIN, J. This suit was brought in this court by C. P. Hubbell, since deceased, a citizen of the state of California, against the defendant, a Nevada corporation, to foreclose certain liens, usually called mechanics' liens, set forth in the bill of complaint. The liens sought to be foreclosed and enforced against defendant are 122 in number, aggregating $115,059.66 in amount. They are classified as contractors', subcontractors', material-men's, and laborers' liens. Complainant, Hubbell, derived title to these liens through various assignments, direct and intermediate, to himself. Of these liens, 112 were assigned by the original lienholders to J. C. Hampton, and by him assigned to Hubbell; three were assigned to J. C. Hampton & Co., and by

said firm to Hubbell; two to S. W. Lee, and by him to Hubbell; and five were assigned by the original lienholders directly to Hubbell.

The original bill of complaint was silent as to the citizenship of all of the original lienholders, and also as to the citizenship of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of 117 of these liens, and the immediate assignors of complainant. Objection having been raised as to the sufficiency of the bill on this point, complainant filed an amended bill, June 5, 1882, alleging that 113 of the original owners of said liens named in the amended bill were Chinamen, and subjects of the emperor of China at the date of the filing of both the original and amended bill of complainant. The amended bill, however, was wholly silent as to the citizenship of the other nine original lien-owners, and also as to the citizenship of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of 117 of the liens sought to be foreclosed. The demands of the nine lienholders whose citizenship is not set forth aggregate the sum of $4,890.52, in amounts varying from $2,584.66 to $33.

This omission in the amended bill of any averment as to the citizenship of these nine original lien claimants may be considered as an admission that they were citizens of Nevada at the time of the commencement of this action, since, had their citizenship been such as to bring them within the statute giving this court jurisdiction, it certainly would have been set forth in the amended bill prepared and filed expressly to obviate any supposed jurisdictional defect in the original bill. If, however, this presumption is not in fact true, still the bill is fatally defective on this point. The jurisdiction of the court as to all parties must affirmatively and clearly appear by the pleadings, and this not by way of description or recital, but by positive averment.

The rulings of the supreme court upon this point have been uniform, and without exception. In *Brown* v. *Keene*, 8 Pet. 112, the court says: "The decisions of this court require that the averment of jurisdiction shall be positive that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its avertments." In *Ex parte Smith*, 94 U. S. 455, the court says: "No presumptions arise in favor of the jurisdiction of the federal courts."

The statute of March 3, 1875, controlling the jurisdiction of the court in this matter, reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law-merchant and bills of exchange."

In this case it does not appear by the original or amended bill that any one of these nine original lien-owners, whose citizenship is not

set forth in the amended bill, could have prosecuted an action in this court, upon any of those liens, "if no assignment had been made." But such fact must appear, or the court has not jurisdiction. Section 11 of the judiciary act of 1789 does not materially differ, upon the point here involved, from the act of 1875, *supra*, and the rulings of the supreme court upon section 11 of the act of 1789 are applicable in this case. *Brown* v. *Keene*, 8 Pet. 112; *Jackson* v. *Ashton*, Id. 148; *Montalet* v. *Murray*, 4 Cranch, 46; *Corbin* v. *County of Black Hawk*, 105 U. S. 659; *Sere* v. *Pitot*, 6 Cranch, 332; *Bradley* v. *Rhine's Adm'rs*, 8 Wall. 393; *Mollan* v. *Torrance*, 9 Wheat. 537; *Morgan's Ex'r* v. *Gray*, 19 Wall. 81. We think there is no conflict, upon the point here involved, in the rulings of any of the national courts.

It was suggested, upon argument, that the citizenship of these nine original lienholders was immaterial, since complainant owned all of the 122 liens, and hence none of the other lien claimants could be prejudiced; and, further, that the amount claimed by them is embraced in the lien filed by Linn Chung & Co., as original contractors, for $50,000, and is also embraced in the lien filed by Ah Wan, as a subcontractor, for the same amount. The merit of the suggestion is not clear; but were it so, it could scarcely prevail against the positive provision of the statute. While the national courts may be invoked, in proper cases, to give effect to and enforce statutory liens and remedies provided by a state, yet in such proceedings they are guided by the state statute, and follow, as nearly as possible, the course indicated therein. Should the court proceed to examine this case upon the merits, it would be as necessary for it to investigate and determine how much, if anything, was due upon each of these nine liens, as it would to investigate and determine how much might be due upon any or all of the other 113 liens. The liens cannot be singled out, or segregated, and some of them considered and others not considered. Some of the liens might be valid under the state statute, and others be fatally defective, for non-compliance with the statute in perfecting them. It might appear that the lien of Linn Chung & Co., and that of Ah Wan, for $50,000 each, were defective and could not be enforced, and that all of the other liens were valid and binding upon the defendant, and complainant entitled to judgment thereon. The liens must each be examined, and their validity under the statute determined, as well as the amount due, and the rank of each declared. St. Nev. 1875, c. 64, § 11. And this is evidently the theory on which the bill of complaint was framed. If it was immaterial to complainant whether or not these nine liens be adjudicated upon, why were they set forth in the bill, and judgment invoked upon them as well as upon the other 113 liens, and why did complainant purchase them if not beneficial to him in some way? And, if beneficial, he is entitled to such benefit.

It is further insisted by complainant "that the liens in this case

are, in no sense of the word, contracts," and hence are not within the act of congress. While it may be true that a lien *per se* is not a contract, yet all liens of the nature set forth in the bill in this action arise and are based upon contract, express or implied. The lien itself is merely an instrumentality, a special remedy given, by which the contract may be enforced. The assignment of a mere lien would be idle—would confer no right of action upon the assignee thereof—if such assignment did not also transfer the debt secured by the lien. A debt is a sum of money due upon contract, express or implied, or established by judgment. The debt transferred is the substantial thing; the lien is an incident thereto,—a statutory remedy which the assignee may pursue, or he may wave it and pursue his common-law remedy, to recover the debt. The lien itself may expire by limitation, if suit be not commenced to enforce it within six months after the same has been filed for record. St. Nev. 1875, *c.* 64, § 8. But the debt would not be extinguished by the expiration of the lien, and it could be enforced by proper remedy. The statute above cited cannot bear the construction sought to be put upon it. Section 5 of the act makes it obligatory upon the lien-claimant that he state in his claim the "terms, time given, and conditions of his contract;" and the entire act is based upon the supposition of a contract, express or implied, between the parties. The words "contractor," "subcontractor," "debt," "creditor," etc., are of constant recurrence in the act. And it is not clear how a state can authorize or empower one person to charge an arbitrary lien against the property of another person, no privity, or contract, express or implied, existing between such persons. Without considering this objection further, it will be sufficient to observe that this action is certainly brought to enforce the terms of a contract fully set forth in the bill of complaint. As it does not appear from the amended bill that any of these nine original lienholders, whose citizenship is not set forth, could have maintained an action in this court to foreclose or enforce any of those liens, it follows that their assignee could not do so. On this point there is no conflict in the decisions.

We do not deem it necessary to decide whether or not this action could be maintained by complainant, as the assignee of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of a portion of the liens, they being presumably citizens of Nevada, and defendant being a Nevada corporation. The decisions on this point seem to be somewhat conflicting. *Bradley* v. *Rhine's Adm'rs*, 8 Wall. 396; *Mollan* v. *Torrance*, 9 Wheat. 537; *Morgan's Ex'r* v. *Gray*, 19 Wall. 81. *Contra*, see *Wilson* v. *Fisher's Ex'rs*, Bald. 133; *Dundas* v. *Bowler*, 3 McLean, 204; *Milledollar* v. *Bell*, 2 Wall. Jr. 334. But upon the case as presented in the original and amended bills, we think this court has no jurisdiction in this case. We call attention to the fifth section of the act of March 3, 1875, and to the ruling of the supreme court thereon, in *Williams* v. *Nottawa*, 104 U. S. 209. It is a

matter of regret that the decision of the court on this question of jurisdiction was not had before the case had gone to the extent to which it has proceeded, it being now submitted for judgment upon the testimony and proofs taken. But we cannot examine the case upon the merits. It must, therefore, be dismissed from this court for want of jurisdiction, without costs, and without prejudice to complainant.

Let decree be entered accordingly, and without prejudice.

CHICAGO M. & ST. P. RY. CO. *v.* STEWART.

(*Circuit Court, D. Minnesota.* December, 1883.)

1. AWARD—SPECIFIC PERFORMANCE.
   An agreement for the conveyance of land at a price to be fixed by an arbitrator named in the agreement, will not be specifically enforced unless the award is made within a reasonable time.
2. SAME—REASONABLE TIME.
   In such a case a delay of six months in making the award, when the value of the land is rapidly increasing, is unreasonable.
3. SAME—ENTIRE TRACT TO BE APPRAISED.
   Specific performance will not be decreed of an agreement to convey a tract of land by warranty deed, with covenants against imcumbrances, at a price to be appraised by an arbitrator, unless the award of the arbitrator appraises the entire tract without reference to easements and other incumbrances thereon.

Bill in equity brought to obtain decree for the specific performance of a written agreement for the sale by defendant to complainant of certain land. The agreement is dated April 21, 1879, and provides that the defendant—

"In consideration of one dollar to him in hand paid, the receipt of which is hereby acknowledged, and other considerations hereinafter named, has bargained and sold unto the said second party, and upon payment of the further consideration therefor as hereinafter provided doth hereby covenant and agree to convey to the said party of the second part, by a good and sufficient warranty deed, free and clear from all incumbrances, on demand of the party of the second part, all that piece or parcel of land situate in said Hennepin county and state of Minnesota described as follows."

Here follows a particular description of the land by metes and bounds, and the remainer of the agreement is as follows:

"And said parties do mutually agree to submit to D. R. Barber, Esq., of said Minneapolis, the question of the value of said piece or parcel of land, and the compensation to be paid therefor by said second party to said first party, and that his decision shall be final. And upon the payment of such sum as shall be so fixed and determined by said Barber, the party of the first part will at once execute his waranty deed of the same as aforesaid, free and clear of all incumbrances except a certain lease to Wiggins & Thompson; the party of the second part to take the same subject to such lease, and to receive any

and all rents hereafter accruing under said lease. The award of said Barber is to be made in writing and a copy thereof to be delivered to each of said parties."

On the first day of October, 1879, the said arbitrator made his award, by which he fixed the value of said land at the date of said agreement, and the compensation to be paid therefor, at the sum of $3,350. The respondent resists the claim of the complainant upon various grounds, among which are the following: (1) That the arbitrator, after his appointment, refused to accept the same, and declined to act, continuing his refusal for about four months, but afterwards, and at the expiration of about six months, he decided to act, and did so against the objection and protest of defendant, who in the mean time had revoked his authority; (2) that the arbitrator, in making his award, did not include, but on the contrary omitted, a part of the land included in the agreement.

McNair & Gilfillan, for complainant.

Geo. B. Young, for defendant.

McCRARY, J. We will first consider the question whether the powers of the arbitrator had ceased prior to the time when he undertook to act. The agreement is silent as to the time within which the award was to be made. In such a case the arbitrator must act within a reasonable time. What is a reasonable time must be determined in each case upon its own peculiar facts and circumstances. If the property to be sold is situated in or near a growing and prosperous city, and in a place where the value of real estate may be expected to increase rapidly, it would be fair to presume that the parties contemplated promptness. A delay in fixing the price for a period of five or six months, under such circumstances, would be unreasonable, because the value of the property within that time would be very materially changed. Much would depend, in such a case, upon the question whether the agreement contemplates the fixing of the price according to the value at the date of the contract or at the date of the award. If the former, then the seller would certainly be entitled to a prompt appraisement, and a delay of five or six months would, as to him, be unreasonable, because it would require him to sell at a price which might and probably would be much below the value of the land at the time of the conveyance and at the time of the payment of the purchase money.

The contract in the present case is silent as to the question whether the value at date of contract or at date of award shall constitute the price to be paid for the land; but the arbitrator evidently considered it his duty to ascertain the value at the former period, and to fix the price accordingly, as he expressly states in his award that he fixes the value of the property at the time when the agreement was entered into, which was the twenty-first day of April, 1879, while the award is dated October 1, 1879. The delay was for more than five months, and the arbitrator acted in the end against the pro-

test of the defendant. The property is situated very near to the cities of Minneapolis and St. Paul, both of which have grown with marvelous rapidity within the past 10 years, and at the time of the agreement it was known that the land in question was advancing in value. It is scarcely to be presumed that defendant intended to bind himself to sell his land in October for its appraised value in the previous April, and if not, he must have understood that the arbitrator was to act at once, or at least without unnecessary delay. That such was his understanding is apparent from the fact which appears in evidence that he urged the arbitrator to accept the duty and proceed to act soon after his appointment, which the latter declined to do. After waiting some four months for action by the arbitrator, the defendant concluded not to consummate the sale, and accordingly notified the arbitrator that he objected to his acting after so long a delay. If the arbitrator was right in assuming that the land was to be appraised according to its value at the date of the contract, we think defendant had a right to object to the delay. If the arbitrator was wrong in that, then his award must be set aside on that ground. The evidence sufficiently shows that the land increased in value between April and October, 1879.

Nothing appears on the face of the agreement or in the evidence to show that the parties to the contract contemplated any unnecessary delay in making the award as to the value of the land, and it is plain that no great delay was necessary. We do not, of course, mean to say that the arbitrator was bound to act immediately. He was at liberty to take a reasonable time in which to determine as to his acceptance of the trust, and thereafter a further reasonable time in which to investigate the question of value and make his award. But it is manifest that no great length of time was needed in which to determine the question submitted to the arbitrator in this case. Under the circumstances of the case, we do not think the delay of over five months was contemplated by the parties when they entered into the contract, nor do we think it reasonable. We should, therefore, in the exercise of the discretion which belongs to courts of equity, decline to decree a specific performance of the award, even if this were the only objection to its validity.

It is, however, further insisted that the arbitrator excluded from consideration, in making his appraisement, the quantity of land included in certain streets, or supposed streets, being a part of the land to be conveyed, and of which complainant now asks a conveyance by warranty deed. Whether there were any streets or highways constituting easements upon the land was not a question for the arbitrator to determine. The contract called for a deed of general warranty against all adverse claims, except a lease mentioned therein, and it was provided that the arbitrator should appraise the entire tract. The arbitrator was not authorized to go into an inquiry as to the effect upon the value of the land of the supposed public ease-

ments for street purposes, for the conveyance with covenants of warranty, as provided for by the contract, would have bound defendant to remove or vacate the streets, if any lawfully existed, or to pay to complainant the damages resulting to it in consequence thereof. If the award fixed the price subject to an easement, and the contract be specifically performed by the execution of a warranty deed as therein provided, and now demanded by complainant, then the defendant will be called upon to convey more than he is paid for. He would convey free of all easements, and, if any are found to exist, would be bound by his covenants to remove them. He would be paid only for the land subject to the easement.

Upon consideration of the proof we find that it clearly appears that the arbitrator took into account at least one street in fixing the price of the land, and reduced the price by the sum of $150, on account of the same. In his own testimony he distinctly says: "If I had known certain that that road did not come out, the award would have been $3,500, instead of $3,350." And again: "If I had known certain that no road would cross there, $3,500 was the net sum." And still further: "The award would have been $3,500 instead of $3,350 for the tract, as the papers show that I had seen, if I had known that there wasn't any road there to be taken off. That I say."

It is clear that the duty of the arbitrator was to appraise the whole tract without inquiry as to the incumbrances or easements. These were to be removed by the grantor. It is also clear that in deducting $150 from the value of the tract on account of easements, he departed from or varied the contract. In order to enforce a contract by specific performance, the court must be enabled to specifically perform every part of it. We cannot decree a specific performance with a variation. 1 Sugd. Vend. 221; *Jordan* v. *Sawkins*, 4 Brown, Ch. 477; *Nurse* v. *Seymour*, 13 Beav. 254; *Carnochan* v. *Christie*, 11 Wheat. 446. The award is also bad for the reason that it does not cover the entire matter submitted, to-wit, the value of the whole tract without reference to easement.

It is well settled that a failure to include in the appraisement any part of the property is fatal to the award. Morse, Arb. 361; *Emery* v. *Wase*, 5 Ves. 846; S. C. on appeal, 8 Ves. 505; *Nickels* v. *Hancock*, 7 De Gex, M. & G. 300, 318. It matters not that the portion of the property which was omitted from the appraisement was small in comparison with that which was appraised. It is enough if it was a substantial and material portion of the property, and whether in the present case it was worth only $150, or more or less than that sum, is immaterial. Nor can the award be now amended by adding to the appraisement the value of the property omitted. The parties agreed to be bound, not by a price to be fixed by any court, but by the judgment of the arbitrator named, upon the entire matter submitted. Should the court now attempt to add anything to the award it would violate the agreement, instead of enforcing it specifically. *Nickels* v.

Hancock, supra; Wakefield v. *Llanelly Ry. & Dock Co.* 68 Eng. Ch. 11; *Skipworth* v. *Skipworth*, 9 Beav. 135. The fact that the arbitrator omitted from the appraisement a part of the property, may be shown by evidence *aliunde* the award. *Bean* v. *Farnam*, 6 Pick. 269; *Hale* v. *Huse*, 10 Gray, 99.

The other questions discussed by counsel need not be considered. We deem it proper, however, to say that the proof does not, in our judgment, sustain the charge of defendant that the arbitrator was guilty of improper conduct or of partiality. His errors were simply errors of judgment, but they were nevertheless such as to preclude us from decreeing a specific performance of the contract and award. It is therefore ordered that the bill be dismissed.

NELSON, J., concurs.

Specific Enforcement of Awards and Contracts to Arbitrate.

A party to an award has several remedies at his disposal in case the person against whom the award is made refuses to abide by or to perform it. If both parties are in court, the award may be made an order of court, and performance may be compelled by the usual means resorted to by a court to compel obedience to its orders. If the parties are not in court, an action for damages will lie upon the award. In this note it is proposed to discuss the equitable remedy of specific enforcement, and its application to awards and arbitration contracts.

1. AWARDS—GENERAL RULE. A party is entitled to come into equity to compel the specific performance of an award whenever he cannot obtain, by proceeding at law, all that was intended to be given him by the award. Inadequacy of the remedy at law is the basis of the jurisdiction in equity.[1] This basis is broad enough to warrant the specific enforcement of awards relating to personalty, as well as of those relating to realty; for at law a party can only get damages for the breach of an award, which may be a very inadequate remedy even where the award is of personalty; *e. g.*, where a rare picture, or shares of stock in a private company, or a patent are awarded. Damages in such case would be inadequate, because impossible of ascertainment. What jury can estimate the value of a rare picture, or of a patent, or of private stock? Here, therefore, as in an award of real property, is it especially appropriate to apply the equitable remedy of specific enforcement.

Illustrations. A partner can, as against his copartner, enforce the specific performance of an award that the partnership stock on hand and accounts be equally divided.[2] Especially will specific performance be decreed after one party has partly performed the award. Thus, where the award was that A. pay B. £900, and seal a release to B., B. to assign several securities he had from A., and A. sold lands to raise the £900, expecting B. to receive it, as he intended he would, and then tendered him the amount, together with the release, the lord chancellor decreed specific performance by B., even though the award was extrajudicial, and not strictly good in law.[3] So, an award relative to the partition of lands will be enforced.[4] A bill in equity

[1] Jones v. Blalock, 31 Ala. 180.
[2] Kirksey v. Fike, 27 Ala. 383.
[3] Norton v. Mascall, 2 Vern. 24. See, also, Cook v. Vick, 2 How. (Miss.) 882; Viele v. T. & B. Ry. Co. 21 Barb. 381; Hall v. Hardy, 3 P. Wms. 187.
[4] Whitney v. Stone, 23 Cal. 275.

also lies to compel the execution of a deed of land ascertained by an award of arbitrators appointed to settle the boundary line between the lands of the parties;[1] and, generally, equity may compel the specific performance of awards concerning real estate, or for the purchase and sale thereof, even though it involves the enforcement of an award to pay money;[2] and in any proper case specific performance of an award will be decreed, although it be by parol;[3] and although it award costs, which it is beyond the authority of arbitrators to do;[4] and the fact that the submission contains a clause by which each party binds himself to the other in a sum certain, as a penalty, in case he refuse to abide by and perform the award, does not deprive a court of equity of the power to decree a specific performance of the award, even though the party refusing to perform offers to pay the penalty agreed upon;[5] and the court will enjoin proceedings at law until the award can be specifically enforced.[6] Nor is the fact that the arbitrators have received incompetent evidence an objection to their award being enforced.[7] Neither is mere inadequacy of the price awarded to be paid for land a valid objection to enforcing the award, the inadequacy not amounting to conclusive proof of fraud.[8] Fraud may also give a court of equity jurisdiction to enforce an award. Thus, where an award provided that, in the event of the non-payment of a certain sum of money, judgment should be rendered against the defendants in a suit then pending for its recovery, and by the connivance of defendants, and a third party, who assumed to act as plaintiff's assignee, the plaintiff was nonsuited without his knowledge or consent, so that the specific remedy provided by the award was defeated, held, that these facts brought the case within equitable cognizance, and that the direct payment of the money might be ordered by the court.[9] The party seeking specific enforcement must show a readiness to perform all the award on his part.[10]

Exceptions. In the following instances specific enforcement of the award was refused: The parties to a submission bound themselves to perform the award which certain arbitrators should "make and publish in writing under their hands," concerning a boundary line in dispute. The arbitrators executed a paper as an award, read it to the parties, and delivered copies to them, with an oral statement of the actual decision, and that it was uncertain whether the award expressed it, but that, if it did not, it should be afterwards amended when the mistake should be ascertained. The chairman afterwards learned that the line actually agreed upon was not correctly stated, and he accordingly amended the original award, which he had retained, but which was not again presented to the other arbitrators for signature, nor republished. Held, that equity would not enforce either the amended or original award.[11] Where it appeared that the arbitrators were deceived, and the award was made clandestinely by part of the arbitrators, without hearing each party, the court set aside and refused to enforce the award.[12] Where arbitrators to determine the value of real estate omitted to take into consideration the value of a water power, and appraised it at much less than the real value, specific performance was refused.[13] So, also, in *Parker* v. *Whitney*,[14] wherein the price was fixed considerably below the real value of the property. Specific performance of an award for the payment of money merely, will not be compelled.[15] And where an award was that A. should pay B. a certain number of dollars "in currency" and an additional sum "in gold," specific enforcement

[1] Caldwell v. Dickinson, 13 Gray, 365.
[2] M. & O. R. Co. v. Scruggs, 50 Miss. 284.
[3] Marsh v. Packer, 20 Vt. 198.
[4] Caldwell v. Dickinson, supra.
[5] Whitney v. Stone, 23 Cal. 275.
[6] Jones v. Blalock, supra.
[7] Viele v. T. & B. Ry. Co., supra.
[8] Id.
[9] Story v. N. & W. R. Co. 24 Conn. 94.
[10] McNeill v. Magee, 5 Mason, 245.
[11] Caldwell v. Dickinson, 13 Gray, 365.
[12] Ives v. Medcalfe, 1 Atk. 64.
[13] Buys v. Eberhardt, 3 Mich. 524.
[14] Turn. & R. 366.
[15] Wood v. Shepard, 2 Pat. & H. (Va.) 442.

was refused as to the portion directed to be paid "in gold."[1] Laches may lead a court of equity to refuse specific enforcement of an award. Thus a bill for a reconveyance of an estate pursuant to an agreement and subsequent award, the bill being brought as against purchasers after a considerable lapse of time, and the original vendee being dead and insolvent.[2] An agreement to sell at a price to be fixed by arbitration will not be enforced, where some of the parties to it are married women, one of whom had not executed it.[3]

2. CONTRACTS TO ARBITRATE—GENERAL RULE. Contracts to arbitrate are not specifically enforceable. The reasons upon which this rule rests are several, and seemingly good ones. At common law (however it may be by statute) arbitrators cannot compel the attendance of witnesses or administer an oath. They cannot compel the production of documents, books of account, and papers, or insist upon a discovery of facts from the parties under oath. One reason, therefore, of the refusal of equity to specifically enforce contracts to arbitrate is this: Equity will not compel a party to submit the decision of his rights to a tribunal which confessedly does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice. Another reason is that equity will not make a vain decree, incapable of enforcement. Suppose it decrees specific enforcement. How can it compel the parties to name the arbitrators? How can it compel them to agree upon the arbitrators? The court has no authority to select arbitrators for the parties. This subject is elaborately discussed by Mr. Justice STORY in *Tobey* v. *Bristol Co.*,[4] who concludes that "the very impracticability of compelling the parties to name arbitrators, or upon their default for the court to appoint them, constitutes, and must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration. It is essentially, in its very nature and character, an agreement which must rest in the good faith and honor of the parties, and, like an agreement to paint a picture, or to carve a statue, or to write a book, or to invent patterns for prints, must be left to the conscience of the parties, or to such remedy in damages for the breach thereof as the law has provided." Another reason why courts of equity refuse specifically to enforce an agreement to arbitrate is because so to do would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration.[5] Finally, perhaps the best reason for refusing specific enforcement in such cases is that so to do ousts the courts of jurisdiction, and tends to refer the decision of difficult legal questions to inexperienced and incompetent persons.

Illustrations. Among the cases which illustrate the refusal of the courts to compel an arbitration are the following: A statute authorized county commissioners to submit certain claims of A. to arbitration. They ordered a reference of part of the claims. Held, that A. could not present a schedule of names of persons who would be acceptable as arbitrators, and compel, by decree in equity, the selection of some of them by the commissioners, and a reference of all the claims to them.[6] A testator, in his will, provided that any disputes regarding it should be decided by certain arbitrators, and that any party who should refuse to submit to arbitration should forfeit his rights under the will. Held, that such provision was *in terrorem* merely, and that no such forfeiture could be incurred by contesting any disputable matter in relation to it in a court of justice.[7] A. agreed, in writing, with B. that if B. would buy certain shares in a corporation held by C., the company should employ him at a certain yearly salary, and that, if the company should fail or

[1] Howe v. Nickerson, 14 Allen, 400.
[2] McNeill v. Magee, 5 Mason, 244.
[3] Emery v. Wise, 5 Ves. Jr. 846.
[4] 3 Story, 826.
[5] Greason v. Keteltas, 17 N. Y. 491.
[6] Tobey v. Bristol Co. 3 Story, 800.
[7] Coutee v. Dawson, 2 Bland, (Md.) 264.

refuse to give him employment, A. would purchase the shares of him at a fair price; that, if the parties could not agree as to what was a fair price, the same should be determined by arbitrators, whose decision should be binding. Held that, even if the agreement was not void as against public policy, specific performance of it would not be compelled.[1] Under a mortgage of real estate to secure a bond containing this stipulation: "That should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to certain persons, (named,) and their decision shall be final,"—the mortgagee may enter forclosure for a breach of the mortgage without resorting to the opinion of the arbitrators named.[2] Further, to the effect that a mere agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court, see *Mitchell* v. *Harris*[3] and *Street* v. *Rigby*.[4]

Insurance Policies. It is not infrequently provided in policies of insurance that any dispute arising under the policy shall be referred to arbitrators. Such agreements to arbitrate, it has been decided, do not oust the courts of their jurisdiction.[5] So, where the underwriters refused to pay the loss of the assured, his right of action was held immediately to accrue, although there was a clause in the policy that payment was not to be made until 90 days after proof and adjustment of the loss, and that, in case of dispute, the same might be settled by arbitrators.[6] The action may be sustained without any offer to refer;[7] although, if there be a reference depending, or made and determined, it might have been a bar.[8] But in *Scott* v. *Avery*[9] it was decided that, although an agreement which ousts the courts of their jurisdiction is illegal and void, yet an agreement in a policy of insurance as to arbitration was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or arbitrators. In *Goldstone* v. *Osborne*[10] it was held that the insured might maintain an action on such a policy, notwithstanding the condition, when it appeared that the insurers denied the general right of the insured to recover, and did not merely question the amount of damage. So he may, if the insurance company waive the right to a submission to arbitration, as by taking possession and repairing the thing insured.[11]

Valuations—Renewal of Leases. It is not uncommon to insert in leases stipulations for a renewal upon a rent to be a percentage of a valuation by appraisers or arbitrators. The parties to such a lease do not waive the jurisdiction of the ordinary tribunals.[12] But in these cases the courts will not compel the parties to name arbitrators.[13] It is not meant to say, however, that the courts will not enforce contracts to renew leases; on the contrary, many cases decide that the courts will compel a renewal of such contracts. Thus, where A. filed a bill in equity alleging that he had demised certain premises to B., with the agreement that near the end of the lease A. and B. were each to appoint an assessor, and the assessors a third, who should unanimously assess the value of the improvements and the yearly

[1] Noyes v. Marsh, 123 Mass. 286.
[2] Hill v. More, 40 Me. 515.
[3] 2 Ves. Jr. 129.
[4] 6 Ves. Jr. 814.
[5] Allegre v. Maryland Ins. Co. 6 Har. & J. 408; Robinson v. George's Ins. Co. 17 Me. 131; Kill v. Hollister, 1 Wils. 129; Amesbury v. Bowditch Ins. Co. 6 Gray, 596.
[6] Allegre v. Maryland Ins. Co., supra.
[7] Robinson v. George's Ins. Co. 17 Me. 131.
[8] Kill v. Hollister, 1 Wils. 129.
[9] 8 W., H. & G. 497.
[10] 2 Car. & P. 550.
[11] Cobb v. N. E. M. Ins. Co. 6 Gray, 193.
[12] Gray v. Wilson, 4 Watts, 39.
[13] Johnson v. Conger, 14 Abb. Pr. 195; Kelso v. Kelly, 1 Daly, 419; Biddle v. Ramsey, 52 Mo. 153; Hopkins v. Gilman, 22 Wis. 476; Greason v. Keteltas, 17 N. Y. 491; Gourlay v. Duke of Somerset, 19 Ves. Jr. 429; Agar v. Macklew, 2 Sim. & Stu. 418; Strohmeir v. Zeppenfeld, 3 Mo. App. 429; Chichester v. McIntire, 4 Bligh, (N. S.) 78.

rental, and that A. should then have the privilege of buying the improvements, or should grant a renewal of the lease at the rental so fixed, and with the old covenants, and that B. had always appointed partial assessors, so that no unanimous decision could be obtained, and had occupied the premises for a number of years since the expiration of the original lease without paying any rent, held, that the bill was proper, and that equity would entertain the suit on the grounds of fraud, account, the prevention of a multiplicity of suits, and because a remedy at law would be neither plain, adequate, nor complete.[1] In New York it is decided that the court will fix the rent, or direct a renewal at the former rent,[2] or order a reference to ascertain what the amount of rent should be.[3] In England, in one case, the court refused to substitute the master for the arbitrators, holding that that would be to bind the parties contrary to their agreement.[4] In another case, the question arose whether a reference to settle a lease to be made by defendant to plaintiff should be to the master, or to G. under an agreement that certain matters in the lease should be judged by G., or, in case of his death, by some other and competent person to be mutually agreed upon by the parties. It was held that the lease must be settled by the master, no steps having previously been taken to secure G.'s approval.[5] And where the concurrence of one of the arbitrators was secured by the influence of the tenant's wife, and the award was especially favorable to the tenant, the latter was denied specific enforcement.[6]

Valuation in Contracts of Sale. Nor will courts of equity decree specific enforcement of contracts of sale upon a valuation to be made by arbitrators.[7] But where standing timber was sold, and by the contract the quantity was to be determined by referees named, after an examination and measurement of the timber one of the referees fell sick, and the others made an estimate and report, held, that the sale of the timber was the subject of the contract, and that, to prevent a failure as to the principal matter, equity would furnish means of ascertaining the quantity, but would not compel specific execution of the contract.[8]

Partnership Contracts to Arbitrate. A. and B., partners, agreed that A. should withdraw, and that, if afterwards B. should desire to retire, A. should have the privilege of purchasing the good-will, stock, etc., to be valued "in the usual way" by two valuers, one to be named by A. and another by B., or by an umpire. B. refused to allow his valuer to proceed. Held, that there was no contract that a court of equity would enforce.[9] Nor is such an agreement a defense to a suit between partners.[10] But where two partners agreed that upon dissolution one should purchase the share of the other, at a price to be fixed by two arbitrators appointed by each partner, the court held the valuation not of the substance of the agreement, and that it would substitute itself for the arbitrators in order to carry the agreement into effect.[11]

Contracts for Work. In contracts with railway and other companies it is usual to stipulate that a reference to the engineer or to some other officer shall be made a condition precedent to recovery in case of dispute under the contract. In such case neither party can sustain an action on the contract

[1] Biddle v. Ramsey, 52 Mo. 153. See, also, Strohmeir v. Zeppenfeld, 23 Mo. App. 429.
[2] Johnson v. Conger, 14 Abb. Pr. 195.
[3] Kelso v. Kelly, 1 Daly, 419.
[4] Agar v. Macklew, 2 Sim. & Stu. 418.
[5] Gourlay v. Duke of Somerset, 19 Ves. Jr. 429.
[6] Chichester v. McIntire, 4 Bligh, (N. S.) 78.
[7] Milners v. Gery, 14 Ves. Jr. 400; Blundell v. Brettargh, 17 Ves. Jr. 231; Griffith v. Frederick Co. Bank, 6 Gill & J. 424; Richardson v. Smith, L. R. 5 Ch. 643; Morse v. Merest, 6 Mad. 25; Smith v. Peters, L. R. 20 Eq. 511.
[8] Backus' Appeal, 58 Pa. St. 186.
[9] Vickers v. Vickers, L. R. 4 Eq. 529.
[10] Wellington v. McIntosh, 2 Atk. 569; Tattersal v. Groot, 2 B. & P. 131.
[11] Dinham v. Bradford, L. R. 5 Ch 519.

without performance, or an offer to perform.[1] In such a case an engineer's award or finding may be conclusive on a *sub*-contractor.[2] But where an agreement was made between a land-owner, through whose land a railway was about to be laid, and the company, whereby it was agreed that an estimate should be made by the company's engineer as to the damages, which should be submited to A., the land-owner's agent, "for approval," "the amount, when agreed upon or determined," to be paid to the land-owner in discharge of all obligations as to the road. A. died before the engineer's estimate was sent in. Held, that submission to A. for approval was of the essence of the contract, and that inasmuch as by A.'s death the contract could not be performed in the manner agreed, the court refused specific enforcement.[3] And the courts have refused to appoint arbitrators to value works, erections, buildings, or the damage caused thereby.[4]

Exceptions. Although a court of equity will not in general decree specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the master for the arbitrator, yet the party who refuses to supply the deficiency by naming a new arbitrator may be denied relief from a court of equity except upon the terms of his doing equity, which may consist in his consenting to the accounts being taken by the master.[5] And although equity will not decree specific performance of a contract to arbitrate, yet where a question of damages arises it is not error for the court, by consent of parties, to permit the amount to be ascertained by arbitrators and to decree the amount thus found.[6]

ADELBERT HAMILTON.

Chicago.

[1] See Monongahela Nav. Co. v. Fenlon, 4 Watts. & S. 205.

[2] Faunce v. Burke, 4 Harris, 469.

[3] Firth v. Midland Ry. Co. L. R. 20 Eq. 100.

[4] Haggart v. Morgan, 4 Sandf. 198; Haggart v. Morgan, 1 Seld. 422; Gibbons v. Edwards, 2 Dru. & War. 80.

[5] Chislyn v. Dalby, 2 Younge & C. Exch. 170.

[6] Conner v. Drake, 1 Ohio St. 166.

SPARE *v.* HOME MUT. INS. CO.

(Circuit Court. D. Oregon. January 21, 1884.)

1. AGENT ADVERSELY INTERESTED TO PRINCIPAL.
   The law will not allow a person to act as agent when he has an interest adverse to his principal; and therefore an agent of an insurance company to receive and transmit applications for insurance, when making an application therefor on his own property, directly or indirectly, for his own benefit, is acting for himself, and cannot be considered the agent of the insurance company.
2. SUIT TO REFORM A CONTRACT.
   The evidence necessary to support a bill to reform a contract must show certainly in what the mistake consists, and that it was mutual.
3. CASE IN JUDGMENT.
   The owners of a warehouse applied to an insurance company, of which they were agents, to receive and transmit applications for insurance for a policy on the same, as the property of their judgment creditor, and the company, knowing nothing to the contrary, issued the policy accordingly, and upon the destruction of the property by fire refused to pay the insurance, on the ground that the assured had no insurable interest therein, the assured having failed in an action on the policy to recover the insurance, on the ground that it did not appear but that his debt could be otherwise made out of the remaining property of his debtors,—8 Sawy. 518, [S. C. 15 FED. REP. 707,]—brought a

suit in equity to reform the policy, alleging that by mistake it was issued in the name of the creditor, as owner, when it should have been issued in the name of the debtor and for his benefit, in case of loss, *held*, that the evidence did not support the allegation of mistake, but, on the contrary, showed that the company was induced to issue the policy by the false representation of the owners and applicant, on account of which deception it was entitled to rescind the contract or treat it as null.

Suit to Correct a Mistake in a Policy of Insurance.

W. Scott Bebee and *W. Cullen Gaston*, for plaintiff.

Cyrus A. Dolph, for defendant.

DEADY, J. This suit was commenced on April 28, 1883. It is brought by the plaintiff, a citizen of Oregon, against the defendant, a corporation formed under the law of California and doing business in this state, to reform and enforce a policy of insurance against fire, issued by the defendant on a warehouse in Cottage Grove, Oregon, for a period of one year from July 26, 1881, in the sum of $900, by correcting an alleged mistake therein, whereby said property appears to have been insured as the property of the plaintiff, when in fact it was agreed and understood that it should be insured as the property of Aaron and Ben Lurch, whose property it was and is, for the benefit of the plaintiff. The answer of the defendant denies the allegations of the bill, as to the alleged mistake, and avers that Lurch Bros. applied to it, as the agents of the defendant, to have the property insured as that of the plaintiff, and that it never was otherwise informed until after the loss and readjustment, when it refused to pay the same and offered to return the premium of $18.90, which was refused. The answer also contains a plea of limitation to the effect that the suit is barred by the stipulation in the policy, which provides that no suit shall be maintained thereon unless commenced within 12 months after the loss occurs. On August 13th this cause was before this court on a demurrer to the bill, when it was held that the stipulation in the policy limiting the right to sue thereon to the 12 months next after the loss did not commence to operate until the expiration of the 60 days thereby given to the insurer in which to make payment. 17 FED. REP. 568.

But now it is contended by the defendant that because it gave notice of its intention not to pay and the reason therefor, before the expiration of the 60 days, that the plaintiff was at liberty to commence his suit at once, and therefore the period of 12 months commenced to run from that time and expired more than a month before the commencement of this suit, namely, March 23, 1883. This is a plausible proposition, but I do not think it a sound one. The stipulation for a delay of 60 days after notice and proof of loss within which to make payment, being intended for the benefit of the defendant, doubtless it might waive it. And by giving notice on March 23d that it would not pay the loss, for the reason stated, it evidently did so. Thereafter the plaintiff may have been at liberty to sue without further delay. But I doubt if the defendant could by this means

compel the plaintiff to commence sooner than he otherwise would be required, or that the limitation of 12 months would thereby commence to run, as against the plaintiff, before the previous period of 60 days had expired.

The defendant also contends now, upon the proof, that the suit is barred, even allowing that the 12 months did not commence to run until after the expiration of the 60 days, because it appears that the notice and proof of loss were made as early after the fire as February 16th. The evidence in the case consists of the testimony of the plaintiffs, Aaron and Ben Lurch, the defendant's Oregon manager, Mr. George L. Story, and its traveling agent, D. B. Bush, and sundry exhibts, consisting of prior policies of insurance on this property and letters and documents relating thereto. From these proofs and the pleadings it satisfactorily appears that the property was destroyed by fire on February 14, 1882, and the loss adjusted by the defendant within a few days, and not exceeding a week, thereafter, at $900, and that on March 23d the defendant gave notice to the plaintiff that it declined to pay the loss because it had ascertained at and since the adjustment that the plaintiff had no interest in the property. Aaron and Ben Lurch both testify that they gave notice of the loss on the next day thereafter, and that within a week, the agent, Bush, was at Cottage Grove and adjusted the same. Bush swears that he was there and made the adjustment on February 16th, and as he speaks positively, and from written *memoranda*, this is probably the fact. The plaintiff does not appear to have had anything to do with the business personally, and knows nothing about it, except the offer to refund the premium in Lurch's store when he and they declined it—he saying that he had nothing to do with it.

But taking the statement most favorable to the plaintiff on this point, and assuming that a full week elapsed before the adjustment, which necessarily included notice and proof of loss, or waiver of the same by defendant, the period of 60 days commenced to run from and after February 21st, and expired on April 22d. Within the next 12 months this suit should have been commenced, whereas it was delayed until six days thereafter. The plaintiff claims, however, that the 60 days did not commence to run until Bush returned to Cottage Grove and notified the plaintiff on March 23d that the defendant would not pay the loss. But according to the language of the policy the 60 days is to be counted from the giving of notice and proof of loss, which was either made or waived before the adjustment, and not the refusal of payment. Indeed, this 60 days is manifestly given to the defendant for the very purpose of ascertaining and determining whether, admitting the loss or the sufficiency of the notice and proof thereof, it is bound to or will pay the claim of the assured. Nor is there any ground to claim that the matter was kept open from the first to the second visit of Bush to Cottage Grove for further proof in any particular. The proof of loss and ownership was made on the

first visit, and it was explicit and satisfactory. The plaintiff swore that he had no interest in the property, and the Lurch Bros. claimed to own it, which claim was supported by the county record of deeds. So it is quite plain that this suit is barred by lapse of time. It was commenced just six days too late. But if this were otherwise, the plaintiff is not entitled to the relief sought. I have examined the circumstances of the case as disclosed by the evidence, and they do not lead to the conclusion that there was any mistake made in the wording of this policy as alleged, but the contrary.

Briefly, it appears that in 1878 the Lurch Bros. were doing business at Cottage Grove as commission merchants when they failed, claiming to owe the plaintiff, who is a person of comparative wealth, living in the same place, nearly $5,000, with interest at 1 per centum per month, for which he obtained or had a judgment against them on December 9, 1878. Upon this he sold and purchased their store, but retained them as clerks and managers of the business for a year or two, when they succeeded in making a settlement with their creditors, and took the store back again, still owing him, as they allege, about $2,000, which was the value of the stock when returned to them. Aaron Lurch says that after the failure he told the plaintiff that, as he was a creditor of theirs, he would have this property insured for his benefit, without stating how or in what manner he expected to accomplish it, and the plaintiff says he assented to the suggestion, but it does not appear that he ever gave the matter any further attention, or that the Lurches were under any legal obligation to him to do so. On July 26, 1879, Aaron Lurch had the property insured in the Connecticut Fire Insurance Company, for one year from that date, for the sum of $900, as the property of the plaintiff, the application therefor, which was made by him in person, being in his handwriting, and signed by him, "A. H. Spare." In 1880, and before July 24th, the Lurch Bros. became the agents of the defendant at Cottage Grove to solicit and receive applications for fire insurance, and on that day they, as such agents, wrote to the manager of the defendant, at Portland, inclosing the said Connecticut policy on this property, as the property of the plaintiff, and asked to have it renewed in the Home Mutual; and that they might be allowed the proper commission therefor, which was done; and on July 14, 1881, on their written application, the policy was renewed with the defendant for another year. This was all the communication there ever was, until after the fire, between the defendant and any of these parties on this subject; and all the knowledge which the defendant or its manager or agents had, as to the ownership of this property, prior to the loss, was derived from, and in accordance with, the information thus obtained.

Upon this state of facts it is preposterous to claim that the plaintiff or his agents, the Lurches, ever intended or thought of insuring

this property as the property of the latter, for the benefit of the former, or otherwise than it was done. It was insured for three years in succession, at the request of the Lurches, as the property of the plaintiff, and exactly as Aaron Lurch described it in the first application made and written by him in 1879. What was the reason or purpose of this misrepresentation it is not material now to inquire. The Lurches may have honestly intended to insure this property for the benefit of the plaintiff, but were mistaken as to the proper method of so doing. But in that case, the plaintiff must abide the result of their action, just as he would if they had refused or neglected to insure it at all. He had no control over them in this respect,—they were not under any legal obligation to insure the property for him,—and in fact were acting for themselves. But on the evidence, the whole case of the plaintiff is so vague, improbable, and contradictory that it is difficult to assign any reasonable and correct motive for their action. But counsel for the plaintiff insist that the Lurches in procuring this policy to issue were acting as the agents of the defendant, and, therefore, their mistake, if any, is the mistake of the defendant, of which it cannot now take advantage. When the alleged understanding between the plaintiff and the Lurches about this insurance was first had, and when it was first effected, the latter were not the agents of the defendants for any purpose, and what followed thereafter was in strict conformity with what had been done. But it is not worth while to refine on this point. The Lurches were evidently acting for themselves in this matter. They were not under any legal obligation to have this property insured for the benefit of the plaintiff, and if they voluntarily did so, it was in fact for their own benefit rather than his. In such case, if the property was destroyed by fire, they would so far pay their debt with the insurance, and the plaintiff would get nothing but what he was otherwise entitled to, and they might be otherwise able to pay.

Before commencing this suit this plaintiff brought an action at law in this court, on this policy, as it is, claiming an insurable interest in the property, as a judgment creditor of the Lurches, and, on a demurrer to the complaint, the court held that he had such an interest, but he could not recover unless it also appeared that the debtor had not other property sufficient to satisfy the judgment. 8 Sawy. 618; [S. C. 15 FED. REP. 707.] The plaintiff did not amend his complaint so as to make this allegation, as he certainly would if he could; and the only inference is that he suffered no loss by the fire and was not benefited by the insurance. But another sufficient answer to this claim is that the Lurches could not act as the agents of the defendants in this matter of the insurance of their own property for either the direct or indirect benefit of themselves. The law has too much regard for the infirmity of human nature to allow a person to be subject to the temptation of acting as an agent in a matter in

which he has an interest adverse to his principal. The law, dealing with the average integrity and disinterestedness, wisely assumes that no man can faithfully serve two masters, whose interests are in conflict. Story, Ag. §§ 9, 10, 210, 211; 4 Kent, 438.

Assuming, then, that the Lurches were acting for themselves and not the defendant, because as a matter of fact it appears they were so acting, and because, as a matter of law, they could not act otherwise, what possible ground is there for the claim that this policy does not truly state the contract of the parties? None whatever. The Lurches applied in writing to have this property insured as that of the plaintiff, and the defendant knowing nothing to the contrary, accepted the application and issued the policy accordingly. The minds of the parties met on this proposition and no other. But it was essentially false; and as soon as the defendant ascertained that the Lurches had misrepresentod the matter and attempted to procure an insurance on their own property, substantially for their own benefit, in the name of Spare, it refused to be bound by the contract, as it had a right to, both under the general law and the express stipulation of the policy, and offered to return the premium.

A party seeking to have a mistake in a written instrument corrected must show exactly in what the mistake consists. It must be a mutual mistake whereby both parties have, in fact, done what neither intended. And the evidence must be sufficient to prove this satisfactorily—to a moral certainty. *Brugger* v. *State Ins. Co.* 5 Sawy. 310. There was no mutual mistake here. There was, indeed, in the proper sense of the term, no mistake at all. The defendant was deceived by the deliberate misrepresentation of the Lurches as to the ownership of this property, whereby, according to the testimony of its manager, it was misled to accept a greater moral hazard than it was aware of or otherwise might have done. For this reason the defendant had a right to rescind the contract or treat it as null, independent of the clause in the policy making it void on that account.

There is still another point made by the plaintiff, and that is a subsequent waiver of the misrepresentation by the defendant. The Lurches testify that during the year 1881, and after this policy was issued, Bush was at Cottage Grove, and in conversation with them learned that the warehouse was not the property of Spare, but of the Lurches, whereupon he called their attention to the irregularity, but said, as they were the agents of the defendant, it might stand so until the next year, when it must be corrected. The time, circumstances, and details of this alleged conversation are very vaguely and conflictingly stated by the Lurches, while the whole story is flatly and explicitly contradicted by Bush, who also swears positively that he was was not at Cottage Grove from March 11, 1881, to February 16, 1882. Without stopping to consider the legal effect of such a conversation or understanding, or the power or authority of Bush to thus validate a void contract, it is sufficient to say that the burden

of proof is on the plaintiff to establish the fact, and that in my judgment it is not proven that the conversation ever occurred.

There must be a decree dismissing the bill for want of equity, and for costs for the defendant.

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

(*Circuit Court, D. Oregon.* January 25, 1884.)

1. EXPRESS FACILITIES.
   Whether an express company doing business over a line of railway or steamboats is entitled to the services of the pursers and conductors thereon, as its messengers, depends on circumstances; but when one express company doing business over any such line of transportation is allowed such service, the same thereby becomes an express facility, as to all other express companies doing business thereon, and cannot lawfully be withheld from them.
2. INJUNCTION TO BE OBEYED.
   When a party to an injunction doubts its extent or significance, he ought not to disobey or disregard it, with a view of testing it in this particular, but he should apply to the court for a modification or construction of it.
3. PUNISHMENT FOR CONTEMPT.
   In a proceeding for contempt between the parties to a suit for disobedience to an injunction, causing a pecuniary loss or injury to the party instituting the proceeding, the court, in imposing punishment upon the wrong-doer, may do so for the benefit of the party injured.

Proceeding for Contempt in the Violation of an Injunction.

M. W. Fechheimer, for plaintiff.

Rufus Mallory and *Byron C. Bellinger*, for defendant.

DEADY, J. On December 11, 1882, plaintiff commenced a suit in this court to compel the defendant to allow and furnish it express facilities on its lines of transportation; and on March 19th, after a hearing on the bill, an injunction was allowed requiring the defendant to furnish the plaintiff such facilities on and over its lines of railway and steam navigation as it then was and had been doing before the commencement of the suit and upon the same terms. On November 20, 1883, the plaintiff filed a petition in the cause, verified by the oath of its superintendent, Mr. Dudley Evans, asking that the manager of the defendant, Mr. C. H. Prescott, and certain of its pursers and conductors, be ordered to show cause why they should not be punished as for contempt, for not obeying said injunction as therein alleged. The petition and affidavits in support of it show that at and before the allowance of said injunction and since, the defendant was and is the owner and operator of two certain steamboats, then and now plying on the Columbia river, between Portland and Astoria and way ports, and also a certain steam-ship plying between Portland and San Francisco, as well as the lessee and operator of a certain narrow gauge railway running from White Station to

Sheridan and Airlie, in Oregon; that until October 1, 1883, the defendant allowed the plaintiff to have the services of pursers and conductors on said vessels and road, to take charge of its treasure-box and letter-bag, and deliver and receive all matter transported therein, as its agents and messengers along the routes traveled by them, for which it has and is willing to pay a reasonable compensation and indemnify the defendant against any loss by reason of the carriage of such express matter; and that since said date the defendant had refused to allow or furnish the plaintiff these facilities, contrary to the injunction herein, and notwithstanding it is furnishing the same to the Northern Pacific Express Company, a corporation, the stock of which is largely owned by the persons who control the defendant.

The order was made as asked for, and on December 4th the manager of the defendant answered for it and himself, admitting the facts alleged in the petition, and stating that he did not understand that the defendant was required by the injunction to allow its pursers and conductors to act as the agents and messengers of the plaintiff; that acting upon this impression and the advice of counsel that such services were not included in the injunction, and were not express facilities anyhow, he had directed the pursers and conductors of the defendant not to act as the agents and messengers of the plaintiff; and that the respondent did not intend to violate or disobey the injunction of the court. Only two of the pursers and conductors—C. A. Gould, of the narrow gauge, and John B. Maynard, of the steamship Columbia—appear to have been served with the order to show cause, and they answered jointly, saying that the injunction was not served on them, and they were not aware of its terms, and did not suppose that it required them to act as agents of the plaintiff, but that in refusing to do so they did not intend to disobey the injunction, and were simply acting in obedience to the orders of their superior.

The scope and meaning of the phrase "express facilities" does not admit of absolute definition. Its force and effect must often depend on circumstances, of which local usage, the conduct, and convenience of the parties may be important considerations. For instance, take the service which the plaintiff claims at the hands of the purser of the steam-ship. It consists simply of receiving the plaintiff's treasure-box and letter-bag in his office, on the vessel, and putting it in the safe and keeping it there until the arrival of the vessel at Portland or San Francisco, as the case may be, and there delivering the same, on board, to the agent of the plaintiff. Thereby the defendant incurs neither expense nor risk, and the plaintiff saves the hire and transportation of a special agent between these ports. The inconvenience to the defendant is nothing, while the inconvenience to the plaintiff is very considerable. It is an arrangement which commends itself at once, as reasonable and well calculated to promote the conduct of the business in which the parties are engaged,

namely, the transportation and delivery of parcels with certainty and celerity on the one hand, and the furnishing the means and conveniences for so doing on the other.

And it is not apparent on what ground the defendant can reasonably refuse this facility, unless it desires to impede rather than promote the plaintiff's business, which is contrary to its duty and obligations as a common-carrier. While the plaintiff was the only company doing business on the defendant's routes, it was furnished this facility as a matter of course. It was mutually profitable. Under the circumstances, the defendant could furnish it much cheaper than the plaintiff could supply it. That it was the proper and convenient thing to do, seems then not to have been questioned. But when a rival corporation enters this field to compete with the plaintiff in the express business, the defendant withdraws this facility from the latter, and extends it to the former. The only reasonable explanation of this conduct is that the defendant intends to favor the one company, which is in fact itself or its near ally in interest, and hinder the other in the conduct of its business. The same may be said of the services of the conductors on the narrow guage road. Presumably the business thereon is so light that it is a burdensome expense to send a special messenger over the road with the express matter, while the duties of the conductor are so inconsiderable that he can attend to it as well as not.

The injunction requires the defendant to furnish the plaintiff with the express facilities that it was allowed at and before the filing of the bill; and this facility, as we have seen, was one of them. If, however, the defendant or its manager thought that this was such a facility or convenience as it ought not, under the circumstances, to be required to furnish, and would not if the court's attention was specially called to the matter, he should have applied for a modification of the injunction in this respect, and not have undertaken to disregard it, with a view of testing the matter or otherwise. The merit or propriety of the injunction is not open to consideration in this proceeding. It is the duty of all the parties to obey the injunction until it is set aside or modified. *Craig* v. *Fisher*, 2 Sawy. 345. As it is, the respondents are clearly guilty of a violation of the injunction, and are liable to be punished as for a contempt, regardless of the question whether this service is one which the defendant ought to furnish the plaintiff as an "express facility" or not. But even if the defendant had never furnished the plaintiff with this facility, and even if it is not, under the circumstances or otherwise, an absolute express facility, yet the defendant has by its conduct, so far made it one that it is bound, both by the terms of the injunction and its duty and obligation as a common carrier, to furnish it to the plaintiff. Having voluntarily furnished the Northern Pacific with this convenience in the transaction of its business, it cannot refuse it to Wells, Fargo & Co. In giving this convenience to the one com-

pany doing an express business over its lines of transportation, the defendant, as to all other companies doing such business thereon, has thereby made it an absolute express facility, to which all are equally entitled. As was said in *Wells* v. *O. & C. Ry. Co.* 18 FED. REP. 672.

"The defendant is bound to furnish the express company with reasonable facilities for the conduct of its business, and if there is more than one company doing business over its road it must furnish equal facilities to all. To deal fairly and justly in this respect, and according to its obligation, the defendant must serve the express companies equally, and neither directly nor indirectly favor the one nor hinder the other. Whatever terms or favors it extends to one, it must extend to the other, because that other becomes thereby entitled to them. No discrimination can be allowed; but equality of service, conditions and compensation is the fundamental rule governing the business or transaction."

This case is also referred to generally as authority in the premises. The two cases are in principle, if not in instance, exactly alike. Disobedience to an injunction is a contempt of court which may be punished by fine or imprisonment. *Atlantic G. P. Co.* v. *Dittmar P. M. Co.* 9 FED. REP. 316; section 725, Rev. St. Either the corporation committing the contempt may be punished, or the agent through whom it acts. *U. S.* v. *Memphis & L. R. R. Co.* 6 FED. REP. 237.

The purser and conductor are discharged. It does not appear that they were ever served with the injunction or made aware of its terms in this respect. The defendant corporation and its manager are adjudged to be guilty of a contempt, as alleged in the petition herein, by the violation of the provisional injunction heretofore issued in this case in pursuance of the order of this court made and entered on March 19, 1883. But as this is a proceeding between the parties to the suit, having a remedial purpose rather than a punitive one, the matter will now be referred to the master to ascertain what loss, expense, or injury the plaintiff has sustained by reason of the misconduct of the defendant, with a view of enabling the court to impose, by way of punishment, a corresponding penalty on the defendant for the benefit of the plaintiff; and as to any further proceeding the matter is continued until the coming in of the master's report. *Craig* v. *Fisher, supra; Fischer* v. *Hayes,* 6 FED. REP. 63; *Macaulay* v. *White S. M. Co.* 9 FED. REP. 698; *In re Mullee,* 7 Blatchf. 23.

CROSWELL *v.* MERCANTILE MUT. INS. CO.

(*Circuit Court, D. Minnesota.* January, 1884.)

MARINE INSURANCE—DESCRIPTION OF VESSEL.

Where an insurance certificate, issued under a policy of marine insurance, described the goods as "shipped on board of the Great Western Steam-ship Company," *held* that shipment upon a vessel not owned by the company, but chartered by it and placed upon its line as one of its vessels, satisfied the terms of the contract.

Stipulation is filed waiving a jury. On March 8, 1879, the plaintiff shipped a quantity of flour, by through bill of lading, from Minneapolis to Bristol, England. He applied to an insurance agent in Minneapolis, who gave him a certificate insuring him to the extent of $1,100. The certificate is in the following form:

"*Insurance Certificate,*

"$1,100, Gold. No. 63,203.

"OFFICE OF THE MERCANTILE MUTUAL INSURANCE COMPANY,

"NEW YORK, March 8, 1879.

"This is to certify that on the eighth day of March, 1879, this company insured under policy No. 135,723, dated ———— 187–, and made for H. J. G. Crosswell, ——— ——— dollars in gold, on three hundred and twenty (320) sacks of flour, valued at eleven hundred dollars, shipped on board of the Great Western Steam-ship Company, at and from Minneapolis to Bristol, England; and it is hereby understood and agreed that in case of loss, such loss is payable to the order of Chamberlain, Pole & Co. on surrender of this certificate.

"This certificate represents and takes the place of the policy, and conveys all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums.

"C. J. PESPARD, Secretary. A. W. MONTGOMY, JR., President."

Indorsed on the side:

"Not valid without the counter-signature of agent.

"S. S. EATON.

"NOTICE. To conform with the revenue laws of Great Britain, in order to collect a claim under this certificate, it must be stamped within sixty days after its receipt in the united kingdom."

The Mercantile Mutual Insurance Company had issued a running policy to S. S. Eaton, of St. Paul, and given him blank certificates to fill up when a risk was taken. He was its agent, with full authority to act. The running or open policy to Eaton, on account of whom it may concern, is dated March 16, 1878, and did not restrict insurance on merchandise to or from any particular ports, nor prohibit the insurance upon any particular vessel or vessels. The flour was shipped on the steamer Bernina, rated "A No. 1," which had been recently charted by M. Whitwill & Son, promoters and owners of the

Great Western Steam-ship Line, and was lost, with all on board, on the outward trip. Suit is brought to recover amount of insurance.

Warner & Stevens, for plaintiff.

Young & Lightner, for defendant.

NELSON, J. This action is brought on a marine insurance policy to recover for loss of flour shipped from Minneapolis to Bristol, England. The insurance was effected on a running policy to the defendant's agent in St. Paul, and the blank certificate of the amount of the insurance issued by the company, and indorsed by the persons therein named, was filled up by an insurance agent in Minneapolis, to whom the shipper applied. The certificate declares the goods are "shipped on board of the Great Western Steam-ship Company," without naming any particular vessel, and the special policy which forms a part of the certificate adds, "or by whatever other name, or names, the said vessel * * * is or shall be named or called." No name of the vessel on board of which the freight was laden being named in the policy, the question arises, which, in my opinion, is decisive of the case, does the contract confine the risk to a shipment on board vessels owned by or constituting the Great Western Steam-ship Company's line at the date of the policy? The shipment was made on board the steam-ship Bernina, chartered by the steam-ship company and placed in the line as one of its vessels. This was its first voyage. The shipper, when notified that the flour was laden on this vessel, an extra one of the line, reported the fact to Ames, the insurance agent who had filled up and given the certificate, and was told by him in substance that it would make no difference about the insurance if the vessel was the equal of others in the line. It may well be urged, under all the circumstances, that Ames, who was intrusted with the blank certificates, and authorized to fill them up and take risks, represented the insurance company, and that *his* assent binds it; but in the view entertained it is not necessary to so decide. The name of the vessel and the voyage should be correctly given, according to the terms of the policy, and, ordinarily, when the shipper resides at the port of shipment, or can consult the officers of the insurance company it is done; so that, before concluding the contract, it may have all the *data* with which to fix the rate of premium. In this case the shipper resided far away from the seaport, and by this contract he was enabled to insure his flour on the presentation of a through bill of lading, it being impossible to designate and name in the policy the particular vessel. No deceit has been practiced, and there can be no prejudice to the insurance company unless this vessel was so unseaworthy, or of a class rated less than the vessels owned by or running in the Great Western Steam-ship Company's line prior to this voyage.

It is claimed that the premium is greater upon chartered vessels not belonging to a regular line, and testimony has been introduced apparently sustaining this position. I think, however, when we look

at the policy and the manner in which the insurance was taken, the name of the vessel has little to do with the risk, and I do not see the mischief supposed to result in this case. It is true the rate of premium depends upon the character of the vessel, the port of destination, the season of the year, and circumstances tending to increase or diminish the hazards, but I do not think the circumstances in this case, that the vessel had been chartered and recently brought into the line, was calculated to increase the risk. If she was fully equal to the other vessels in the class, and had efficient officers and a competent crew, the degree of hazard is not greater. The evidence is complete and conclusive on these points. But the language of the certificate does not limit the shipment on vessels at that time comprising the line. For anything appearing to the contrary, the company could sell out all its vessels and purchase or charter new ones, and operate them, and the shipment on a vessel of the line thus constructed would satisfy the terms of the policy. The only restriction is that the flour must be laden on some vessel of the line of the Great Western Steam-ship Company. This is a reasonable construction of the contract, and the testimony of the officers of this and other insurance companies about the increase of hazard upon chartered vessels, cannot affect its terms and conditions.

Judgment for plaintiff for amount claimed in proof of loss, with interest and costs.

In re ROBB.

(*Circuit Court, D. California.* January 19, 1884.)

1. FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.

   The governor of a state, in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state in which the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the Revised Statutes, act under the authority of the laws of the United States, and *pro hac vice* are officers or agents of the United States.

2. WRIT OF HABEAS CORPUS—JURISDICTION.

   Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction in such case is exclusively in the courts of the United States.

3. SAME—DUTY OF CUSTODIAN.

   Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that

the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner.

4. SAME—EFFECT OF PRODUCTION OF PRISONER.

The effect of the production of the prisoner would be to place him in the physical control of the court, and to deprive the agent of all power to execute the superior commands of the laws of the United States, to which he owes obedience.

Application for a Writ of *Habeas Corpus*. The opinion states the facts. Before SAWYER and SABIN, JJ.

Alfred Clarke, for the petitioner.

J. D. Sullivan, Dist. Atty. for the city and county of San Francisco, for sheriff.

W. M. Fitzmaurice, of counsel.

SAWYER, J. W. L. Robb filed his petition in the circuit court for a writ of *habeas corpus*, in which he states:

"That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by P. Connolly, sheriff of the city and county of San Francisco, at the city and county of San Francisco, in the state of California; that the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit, that petitioner is the duly appointed agent of the state of Oregon to convey to said state Charles H. Bayley, a fugitive from justice from said state, who is in the custody of this petitioner under a warrant issued by the governor of California, a copy of which warrant is hereto annexed and made a part of this petition; that on the twenty-first day of November, 1883, this petitioner was served with a writ of *habeas corpus* from the superior court of the city and county of San Francisco, commanding him to produce in said court said Charles H. Bayley; that petitioner respectfully informed said court by his return that he held said Bayley under the authority of the United States, and refused to produce said Bayley, and said superior court committed petitioner therefor for an alleged contempt of its authority. Wherefore, petitioner is in custody for an act done in executing a law of the United States, and for refusing to do an act contrary to a law of the United States."

The warrant annexed to the petition and made a part thereof is the same, a copy of which, with the return thereon, is hereinafter set out in the commitment as a part of the judgment for contempt.

A writ of *habeas corpus* having been issued according to the prayer and duly served, P. Connolly, sheriff, on January 11, 1884, made return as follows:

"Now comes P. Connolly and makes this his return to the within writ, and shows that he holds the within named W. L. Robb under a commitment, a copy of which is hereto annexed and made a part hereof.

"P. CONNOLLY,
"Sheriff City and County of San Francisco.
"By M. F. CUMMINGS, Under Sheriff.

"*Dated January*, 11, *A. D.* 1884."

The following is a copy of the commitment annexed to the return:

"In the superior court of the city and county of San Francisco, state of California, Department No. 1, Wednesday, November the 21st, A. D. 1883.

Present, Hon. T. K. Wilson, judge. In the matter of the application of Charles H. Bayley for a writ of *habeas corpus*.

"The application of Charles H. Bayley for a writ of *habeas corpus* coming on regularly to be heard, and it appearing to my satisfaction that a writ of *habeas corpus* was duly and regularly issued, directed to and served upon one W. L. Robb, commanding him, the said W. L. Robb, to have and produce before me, the undersigned, one of the judges of the superior court of the city and county of San Francisco, at the court-room of Department No. 1 of said court, at the hour of half past one o'clock P. M. of said day, the body of Charles H. Bayley, and at the time and place last aforesaid.

"The said W. L. Robb appearing by his counsel and submitting his return to said writ, *from which it appears that the said W. L. Robb holds the said Charles H. Bayley under the authority of the United States under and by virtue of the following warrant:*

"'*State of California, executive department.* [Vignette.] The people of the state of California, to any sheriff, constable, marshal, or policeman of this state, greeting:

"'Whereas, it has been represented to me by the governor of the state of Oregon that C. H. Bayley stands charged with the crime of embezzlement, committed in the county of Clatsop, in said state, and that he has fled from the justice of that state, and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said C. H. Bayley to be arrested and delivered to W. L. Robb, who is authorized to receive him into his custody and convey him back to the state of Oregon; and, whereas, the said representation and demand is accompanied by a certified copy of the information filed in the office of the justice of the peace of the precinct of Astoria, Clatsop county, state of Oregon, whereby the said C. H. Bayley stands charged with said crime and with having fled from said state and taken refuge in the state of California, which is certified by the governer of the state of Oregon to be authentic; you are, therefore, required to arrest and secure the said C. H. Bayley wherever he may be found within this state, and to deliver him into the custody of the said W. L. Robb, to be taken back to the state from which he fled, pursuant to the said requisition, he, the said W. L. Robb, defraying all costs and expenses incurred in the arrest and securing of said fugitive. You will make return to this department of the manner in which this warrant has been executed.

"'In witness whereof I have hereunto set my hand and caused the great seal of the state to be affixed this the twentieth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"'[Seal] GEORGE STONEMAN,

"'Governor of the State of California.

"'By the governor:

"'THOS. L. THOMPSON, Secretary of State.'

" 'SAN FRANCISCO, CAL.

"'I hereby certify that I have this day arrested the within-named C. H. Bayley, and delivered him to W. L. Robb, as herein demanded.

"'*November* 20, 1883. P. CROWLEY, Chief of Police.'

"And the said W. L. Robb has in his custody and possession the body of the said Charles H. Bayley, and is able to and can produce the said Charles H. Bayley before me at the time and place specified in and in accordance with the directions contained in said writ; and it further appearing that the said W. L. Robb willfully neglects and refuses to obey said writ of *habeas corpus* or to have or produce the said Charles H. Bayley before the undersigned as above mentioned, and that no good or sufficient cause has been shown or ex-

ists for said refusal, it is therefore ordered and adjudged that the said W. L. Robb is guilty of contempt of this court, in refusing to obey said writ of *habeas corpus*, and refusing to have and produce the body of Charles H. Bayley before me at the time and place specified in said writ; and further ordered that the sheriff of the city and county of San Francisco do forthwith arrest the said W. L. Robb, and confine him in the county jail of the city and county aforesaid until he, the said W. L. Robb, obeys said writ and produces the body of the said Charles H. Bayley before me, or until he be legally discharged.

"Given under my hand this twenty-first day of November, 1883.

"T. K. WILSON,

"Judge of Superior Court of the City and County of San Francisco, Cal."

At the hearing, a copy of the record of proceedings in the superior court, in which the judgment and commitment for contempt were had, was put in evidence, and it was agreed by counsel that this was the authority under which petitioner, Robb, is restrained of his liberty.

The record shows:

(1) A petition to T. K. Wilson, judge of the superior court of the city and county of San Francisco, for a writ of *habeas corpus* by Charles H. Bayley, in which he alleges:

"That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. L. Robb, at the old city hall, in the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit, that petitioner *is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof*. That said warrant is issued without authority of law and against the law in this, that no copy of an indictment found, or affidavit made, before a magistrate, charging petitioner with any crime, has been produced to the governor of California."

The warrant of arrest issued by the governor of California, annexed to and made a part of the petition, is the same warrant hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon, and need not be repeated.

(2) A writ of *habeas corpus*, in the usual form, addressed to W. L. Robb, requiring him to produce the body of said Bayley, etc.

(3) The return to the writ made by said Robb, petitioner herein, which is as follows:

"In the superior court of the city and county of San Francisco, state of California. *Ex parte* Charles H. Bayley. *Habeas corpus*.

"Now comes W. L. Robb, and makes this his return to the annexed writ, and shows that he holds the within-named prisoner under the authority of the United States, as will more fully appear on inspection of the warrant of the governor of California and a commission from the governor of Oregon, a copy of which is hereto annexed and made a part hereof, and the originals produced. Respondent respectfully refuses to produce said C. H. Bayley, on the ground that under the laws of the United States he ought not to produce said prisoner, because the honorable superior court has no power or authority to proceed further in the premises. W. L. ROBB.

"Subscribed and sworn to before me this twenty-first day of November, 1883. J. F. CARPENTER, Deputy County Clerk."

The warrant of the governor of California, annexed to said return and made a part thereof, is the same hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon. The commission of the governor of Oregon, also annexed to said return and made a part thereof, is as follows:

"State of Oregon. [Vignette.] Executive department. To all to whom these presents shall come:

"Know ye, that I have authorized and empowered, and by these presents do authorize and empower, Walter L. Robb to take and receive from the proper authorities of the state of California one C. H. Bayley, fugitive from justice, and convey him to the state of Oregon, there to be dealt with according to law.

"In witness whereof, I have hereunto set my hand and affixed the great seal of the state, at the city of Salem, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[Seal] (Signed) Z. Z. MOODY,
"Governor of the State of Oregon.

"By the governor:
"R. P. EARHART, Secretary of State."

The original of said commission of the governor of Oregon under the seal of the state of Oregon, and the original of the said warrant of the governor of California under the seal of the state of California, were also produced and exhibited to the court at the time of making said return.

The constitution of the United States provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Article 4, § 2.

The last clause of section 8 of article 1 confers upon congress power "to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this constitution in the government of the United States." And article 11 provides that "this constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Thus, any laws passed by congress under those constitutional provisions for the arrest of fugitives from justice found in any state, and their delivery to the state from which they fled, are a part of the supreme law of the land, to which all state laws upon the subject must be subordinate. This power, like the power conferred in the same section to return fugitives from labor, the power to regulate foreign and interstate commerce, to declare war, raise armies, provide for a navy, make peace, etc., it was thought ought not to be reposed in the states. State jealousies, and

diverse state interests and policies, might prevent the return of fugitives from justice and labor, and to guard against inconvenience in these matters, the power was conferred upon the general government over these subjects, and it is supreme. So, also, the constitution provided for courts to administer the laws of the United States. In pursuance of the provisions cited relating to the return of fugitives from justice and labor, congress, in 1793, passed an act for the return of both classes of fugitives. 1 St. 302. Sections 1 and 2 of that act, relating to fugitives from justice, have been carried into the Revised Statutes of the United States, and constitute sections 5278 and 5279, which, so far as applicable to this case, read as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody *shall be empowered to transport him to the state or territory* from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent, while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year."

When the governor of a state, acting under this statute, upon the demand of the authorities of another state, issues his warrant for the arrest of a party charged with a crime, and that party is arrested by any proper officer, and delivered over to the party empowered by the state in which the offense was committed, to be carried to that state and delivered to its proper authorities, we have no doubt that the governor issuing the warrant, the officer executing it, and the party to whom he is delivered, are acting by virtue and under the authority of the act of congress, and no other, and *pro hac vice* are officers or agents of the United States. *Ex parte Smith*, 3 McLean, 129; *Prigg's Case*, 16 Pet. 539. From the time of arrest till he is delivered to the authorities of the state demanding his surrender, the party is in the custody of the law,—and that law a law of the United States, and the supreme law of the land. In this case Bayley had been arrested upon a warrant issued by the governor of California, on a demand by the governor of Oregon, and delivered into the custody of the petitioner, Robb, who was duly commissioned and authorized by the governor of Oregon to receive him and convey him to Oregon, which duty he was engaged in performing, in pursuance of the provisions of the act of congress, when he was served with the writ of

habeas corpus from the superior court, to which he made the return hereinbefore set out, stating that he held Bayley for the purpose of conveying him to Oregon, under and in pursuance of the laws of the United States, by virtue of the commission from the governor of Oregon, and the warrant of arrest of the governor of California, and arrest under it, annexing thereto copies of said documents, and exhibiting the originals, and respectfully declined to produce the body of Bayley on the expressed ground that, it appearing to the court that Bayley was in custody under the laws of the United States, the court had no jurisdiction to proceed further, or to require him to produce the body of said prisoner.

The court took a different view on this point, adjudged petitioner to be guilty of contempt in declining to produce the body of Bayley, and to be imprisoned until he should comply with the commands of the writ in this particular. If the court, after being informed of the cause of restraint, had jurisdiction and authority to proceed further, and compel the production of the body of Bayley, notwithstanding the facts shown, then the judgment for contempt is lawful, and petitioner must be remanded; but if it had no authority to proceed and compel the production of the body of Bayley, then it had no power to punish petitioner for contempt, and he could not be in contempt in not producing him, and the authority of the court to proceed is the question to be determined. As we understand the decisions, this very question has been distinctly determined by the supreme court of the United States, under circumstances that compelled the most deliberate and mature consideration, in the cases of *Ableman* v. *Booth* and *U. S.* v. *Booth*, 21 How. 507. In the first case, Booth had been arrested for an offense against the laws of the United States, and held to answer by a court commissioner, and committed to the custody of the marshal of the district. A justice of the supreme court of Wisconsin discharged Booth from custody on *habeas corpus*, on the ground that the act under which Booth was held was unconstitutional and void, and his action was affirmed by the state supreme court. Booth was then indicted and tried, and convicted in the United States district court for the district of Wisconsin, and sentenced to imprisonment, whereupon the same justice of the supreme court of the state discharged him again on *habeas corpus*, on the same grounds as before; which action was also affirmed by the supreme court of the state. This action of the justice of the supreme court, and of the supreme court of the state, was reversed by the supreme court of the United States, upon the ground that the court and justice were wholly without jurisdiction to consider these matters. So earnest was the supreme court of Wisconsin in its determination to maintain its authority that it even disobeyed the writ of the United States supreme court, commanding it to send up its record, and peremptorily ordered its clerk not to send a transcript of the record, which order was obeyed;

and the cases were heard upon copies of the records, permitted by the supreme court to be filed, upon affidavits stating the facts.

In discussing the powers of the state and national courts, the court, speaking by its chief justice, says:

"If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the courts of the state in which the party happened to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

"It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its *own tribunals*, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

"The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges, or courts, to exercise judicial power by *habeas corpus*, or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned." 21 How. 514.

Again:

"Questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad, and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the states then possessed, should be ceded to the general government, and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its *own laws by its own tribunals*, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interest, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice, by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals." 21 How. 516, 517.

After showing the relation of the state and national courts to each other, and to the laws of the United States passed within the scope of the powers of the national government, the court, in language so clear and precise that it can not well be misunderstood, lays down the rule directly applicable to this case, as follows:

"We do not question the authority of the state court, or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, *provided it does not appear, when the application is made, that the person imprisoned is in custody under authority of the United States.* The court, or judge, has a right to inquire, in this mode of proceeding, for what cause, and and by what authority, the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or *other person* having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action, prescribed by the constitution of the United States, independent of the other. *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States.* If he has committed an offense against their laws, their tribunals alone can punish him. *If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.* And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, *it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to*

the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge or court after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process, or otherwise, should attempt to control the marshal, or *other authorized officer or agent* of the United States, in any respect, in the custody of his prisoner, *it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume,* can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; *and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.*" 21 How. 523.

This decision was fully affirmed nearly 25 years afterwards, in *Tarble's Case*, 13 Wall. 397. Tarble had enlisted in the United States army, deserted, and been arrested, and he was restrained of his liberty on that ground, by Lieut. Stone, in charge of the station. A writ of *habeas corpus* having been issued by a state commissioner having jurisdiction to issue such writs, and served, Lieut. Stone made return that the petitioner had enlisted, deserted, and been captured, and he claimed to hold him rightfully as a soldier under the laws of the United States. It was replied that he was a minor under 18 years of age; that he had been inveigled into enlisting without the consent of his father, and that the enlistment was void, on this and other grounds set out, and it was claimed that the petitioner was unlawfully restrained of his liberty. The commissioner took testimony, heard the case, and discharged him. The proceedings of the commissioner were affirmed by the supreme court of Wisconsin. The judgment of the state supreme court was subsequently reversed by the supreme court of the United States, after an elaborate review of the questions involved, not on the ground that the state commissioner and court erred on the facts, or the unlawfulness of the imprisonment, but upon the ground that they had no right, or jurisdiction, to examine or determine the question as to the lawfulness of the imprisonment at all, after the fact was brought to the attention of the court issuing the writ that the officer, in good faith, claimed to hold him under authority of the laws of the United States —that upon these facts appearing the jurisdiction was ousted. Said the court upon this question:

"State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the*

marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, *to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States,* and to exclude the suspicion of imposition or oppression on his part. And the process, or orders, under which the prisoner is held should be produced with the return, and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority."

An attempt was made, upon other authorities cited, to distinguish the case from Booth's cases, and to *limit* the application of the doctrines established by them; but the court emphatically repudiated any such limitation, as appears by the following explicit language:

"Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman* v. *Booth*, and the *United States* v. *Booth*, to cases where a prisoner is held in custody under *undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation.* It would have been unnecessary to enforce, by any extended reasoning, such as the chief justice uses, the position that when it appeared to the judge or officer issuing the writ that the prisoner was held under undisputed lawful authority, he should proceed no further. No *federal* judge, *even*, could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is that the state judge or state court *should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States;* that is, *an authority, the validity of which is to be determined by the constitution and laws of the United States.* If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."

The court concludes:

"It follows, from the views we have expressed, that the court commissioner of Dane county *was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States under claim and color of the authority of the United States,* as an enlisted soldier mustered into the military service of the national government; *and the same information was imparted to the commissioner by the return of the officer.* The commissioner *was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.* The conclusion we have reached renders it *unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.*"

Now, the case of the petitioner in this proceeding, except that th officer or agent of the United States having Bayley in charge i

neither a judge, commissioner, nor military officer, acting under the judiciary or military laws of the United States, but a person expressly authorized to act by other statutes of the United States, is precisely in the condition of *Tarble's Case*. The petition of Bayley on its face showed that he *was claimed*, at least, to be held in custody in pursuance of the laws of the United States. It was so explicitly stated in the petition, and a copy of the warrant showing the authority was annexed to and made a part of the petition for the writ; and this being so, if the doctrine asserted in the *Booth* and *Tarble Cases* is correct—and whether correct or not it is controlling in this court—then, in the language of the court in *Tarble's Case*, already quoted, the judge who issued the writ to the petitioner "*was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case*, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer" or agent "of the United States, under claim and color of authority of the United States," as a fugitive from justice, to be delivered over to the authorities of the state of Oregon. But if it were necessary to go further, the petitioner did exactly what the supreme court of the United States said he was bound to do under such circumstances, and made return to the writ showing his authority, giving copies of his commission from the governor of Oregon, and warrant from the governor of California, and return of the chief of police, and exhibited the originals under the seals of the respective states, his authority thus appearing upon the representations of both the petitioner and the party restraining him of his liberty, and this state of facts satisfactorily appeared to the court, for the court itself so adjudged in its judgment for contempt. And the petitioner further did exactly what the supreme court of the United States said he must do—respectfully declined to produce the body of the prisoner. Fortunately, he did not have occasion to go further, as the court said he must do, if necessary, and resist by all the force at his command any attempt to compel a production of his body, other than to defend himself in the courts in response to the writ of *habeas corpus* issued to and served upon him, and in the proceedings for contempt now under consideration.

Now, if it was lawful for petitioner to decline to produce the body of Bayley upon the facts disclosed to the court upon the face of the petition itself, or upon the face of the petition and the return made to the writ; if it was lawful to resist by force, with all the power at his command, any attempt to compel him to produce the body of the prisoner; if, upon the facts of the case appearing, as they did appear, the judge had no jurisdiction to proceed further or examine at all into the regularity of the proceeding under which Bayley was held,—then there certainly was no jurisdiction or lawful authority to force a production of Bayley through proceedings for contempt. The two propositions are incompatible, and their co-existence legally im-

possible. There is strong reason for maintaining this position. If a judge of a state court—another sovereignty as distinct from the national sovereignty as if it ruled over a different terrritory—can, under the circumstances indicated, compel the production of a prisoner held under the laws of the United States,—the supreme law of the land,—he has the physical power to discharge him when produced, however lawless the discharge may be, as was done, in fact, in the *Booth* and *Tarble Cases*. The production of the body in court, by means of which the court has the physical power to assume control, is equivalent to a surrender of a prisoner. And if one person can be discharged by a state officer, so can all, and it would be impossible for the United States, in some contingencies, to discharge the duty imposed upon them by the national constitution relating to fugitives from justice, as well as to fugitives from labor, or to execute the laws of congress passed to give effect to those constitutional rights of the several states, as between themselves. It would be as difficult to perform their duties as the supreme court in *Booth's Cases* said it would be to execute the criminal laws of the United States under similar conditions.

By producing the body as required by the writ, the petitioner necessarily places his prisoner within the control of the court issuing it, and deprives himself of all power to perform the requirements of his commission, enjoined by the superior authority of the laws of the United States. He cannot, and he does not, owe a divided duty to two distinct sovereignties. He cannot serve two masters. He cannot produce his prisoner, which is equivalent to his surrender, in obedience to the commands of the writ of *habeas corpus*, and at the same time retain power to obey the mandate of the laws of the United States and deliver him to the authorities of the state of Oregon. He must obey one command or the other, and the command to be obeyed is the one which is superior or supreme in its authority. But whether these reasons and others given are sound or not, the rule as to the jurisdiction of the state courts, under the circumstances indicated, appears to us to be clearly established by the highest tribunal in the land, and are not open even to question here, and cannot be disregarded by us.

We are of opinion, under the authoritative decisions cited, that the judge of the superior court on the petition of Bayley, as presented, had no jurisdiction to issue the writ, and certainly, upon the petition and the return made to the writ by Robb, that neither the judge nor the court over which he presides had jurisdiction or authority to proceed further, or to compel the production of the body of Bayley, or to punish him for contempt for respectfully declining to produce the body under the circumstances of the case, in pursuance of the commands of the writ.

We should not have thought it necessary to go into the case so fully, or to have done anything beyond referring to the *Booth* and

Tarble Cases, but we found ourselves in the delicate, embarrassing, and very unpleasant position of reaching a conclusion different from that attained by the supreme court of the state in this case, for whose judgment we entertain the very highest respect. That tribunal held, on a writ of *habeas corpus* heretofore issued on petition of Robb, that the superior court had jurisdiction and authority to compel petitioner, by imprisonment for contempt, to produce the body of his prisoner, Bayley, and remanded him to suffer the punishment adjudged by that court. *In re Robb*, 1 Pac. Rep. 881. Had there been no decisions of the supreme court of the United States settling the question, as we conceive there are, we certainly should have hesitated long before declining to follow this ruling of the supreme court of the state. But where that court differs from the supreme court of the United States as to rights depending upon the statutes of the United States, over which the latter court has final jurisdiction, and we must follow one or the other, as we must do in this case, our duty is to yield obedience to the latter. As no reference is made to the *Booth* and *Tarble Cases* in the opinion of the supreme court of the state, those cases may not have attracted the attention of the court.

The prisoner is entitled to be discharged from imprisonment, and it is so ordered.

UNITED STATES *v.* MOORE.

(*District Court, N. D. Illinois.* November 20, 1883.)

SENDING MATTER CONCERNING LOTTERIES THROUGH THE MAILS—DECOY LETTERS. The offense of sending letters or circulars concerning lotteries through the mails is complete under section 3894 of the Revised Statutes, although the circulars in question are sent in reply to letters written by a detective, under a fictitious name, for no other purpose than to obtain evidence of the commission of the offense.

Indictment under Section 3894, Rev. St.

J. B. Leake, U. S. Dist. Atty., for the prosecution.

A. S. Trude, for defendant.

BLODGETT, J., (*charging jury.*) The law under which this indictment is found provides that no letter or circular concerning lotteries shall be carried in the mails. The statute, as originally passed by congress, provided that no letter or circular concerning *illegal* lotteries should be so carried. At that time a great many of the states in the Union had prohibited lotteries within their jurisdiction, while in others they were permitted; and difficulty arose in the administration of this statute by reason of the contention that in some states lotteries were still legal, and therefore not within the scope of this act. In 1876, congress, by an amendment of the statute, struck out the word *illegal*, so that the statute, as amended, now reads, that no letter or

circular concerning lotteries shall be carried in the mails, thereby making all matter concerning lotteries unmailable matter. The supreme court of the United States has stated, in two different opinions, that the intention of congress, in passing the statute in question, was to prohibit the sending of matter concerning lotteries through the mails, because of the immoral tendencies of lotteries, it being contrary to public policy to carry, as mail matter, anything concerning them, inasmuch as they tended to demoralize the public mind. *Stone* v. *Mississippi*, 101 U. S. 821; *Ex parte Jackson*, 96 U. S. 736. By the same decisions the constitutionality of this statute is sustained.

I understood the learned counsel for the defense to state, in his opening addressed to you, that he conceded it was useless to deny that the defendant was engaged in the lottery business, but he insisted that the defendant had not used the mails, and challenged the government to prove that the defendant had used the mails for the purpose of carrying on the business. This narrows the issues in this case down to the simple question, does the proof in this case satisfy you that the defendant deposited, or caused to be deposited, in the mails the matter concerning lotteries charged in this indictment?

The charges in the indictment, which the government has attempted to prove, specify three distinct offenses: The first is that the defendant mailed at the post-office in Chicago a letter directed to Jim C. Holmes, Virden, Illinois, containing certain circulars and lottery tickets; the second is that the defendant mailed at the Chicago post-office a letter containing certain circulars and lottery tickets directed to R. W. Williams, box 302, Collinsville, Illinois; and the third offense charged is the mailing of a letter at the Chicago post-office containing similar inclosures directed to Sam Moorey, at Shiloh, Illinois. It is admitted by the witnesses for the government that the names of Holmes, Williams, and Moorey are fictitious names, and that the letters which it is charged the defendant mailed, containing these circulars and tickets, were in answer to letters written by Mr. McAfee and Mr. Mooney, respectively, using the fictitious names of Holmes, Williams, and Moorey, addressed to the defendant, B. Frank Moore, 127 La Salle street, Chicago, inclosing money, and requesting that he invest it for them, respectively, in pursuance of an advertisement of certain lotteries, which had been cut from a newspaper, and in which they also requested a reply by mail.

It is claimed, on the part of the government, that the proof tends to show that these letters mailed in Chicago, addressed to Holmes, Williams, and Moorey, were mailed by the defendant in response, or answer, to the Holmes, Williams, and Moorey letters, written by McAfee and Mooney. This court in several cases has had occasion to pass upon the question as to whether the detection of crime, by means of decoy letters, is allowable under the law, and has uniformly charged the jury that it is an allowable method of detecting crime, stating in

two cases, which I have in mind, that it is hardly possible to detect crimes against the postal laws in any other way.

Allusion was made, by the counsel for defendant, to certain comments made by a learned brother on the bench, Judge TREAT, of St. Louis, in some case in which McAfee appeared before him as a witness. I do not know what peculiar facts appeared in that case which gave occasion for the comments said to have been made by my learned brother as to the conduct of this witness, but must presume that it was a case which justified what he then said, but there is nothing in this case, in my estimation,—and I say it to you with due regard as to the responsibility of the court,—that discredits the testimony of Mr. McAfee. His testimony stands before you like that of any other witness. The question for you to determine is whether you will believe McAfee under oath, taking into consideration the explanation which he has given in reference to his methods of work. It certainly ought not to discredit any witness before a jury to have it brought out that he, as an individual member of society, has voluntered to detect crime without appointment or without any official position. Nor ought it to discredit a witness, perhaps, any more because he is the agent of some organization and is employed to carry out its objects for the suppression of vice. If it is a part of the purpose of that organization to suppress lotteries, you must say whether an individual, acting towards the ends of that orginazation, as its agent, is to be discredited, while using methods allowable under the law. If the defendant received the letters, copies or which are in evidence, purporting to come from Holmes, Williams, and Moorey, he could have answered them without violating the law. He must be presumed to know what the law is in regard to sending matter concerning a lottery through the mails; and sending such matter in response to a letter from a fictitious person is just as clear a violation of the law as if sent to a real person described by the name to which the letter was addressed. The name of the person to whom the inhibited matter is addressed is no part of the offense, but the question is, did the defendant send through the mails a letter or circular concerning lotteries; and you have no concern with the good faith of the person who incited or induced, by a decoy letter, the sending of such matter any more than you have with the good faith of a person who sends marked money through the mails in order to detect one who is stealing from the mail. When defendant received the letters in question he was under no obligation to so answer them as to violate the law.

It is for you to determine whether the proof on the part of the government shows that, in response to these registered letters, confessedly written by McAfee and Mooney, addressed to the defendant at his place of business in this city, certain letters were received containing these lottery circulars and tickets. There can be no doubt, on an inspection of these circulars and tickets, that they concern or

refer to lotteries; they will speak for themselves, and you will have them in the jury-room, so that you may see just what they are.

The testimony on the part of the government shows without dispute that, some time in January, 1882, the defendant gave an order in writing to the assistant postmaster of this city, authorizing the delivery of his registered mail matter to a Mr. Halsey, and the testimony on the part of the government shows without dispute that his registered mail, since that time, has been delivered to Mr. Halsey, and that the three letters in question, postmarked at Virden, Collinsville, and Shiloh, Illinois, were delivered to Halsey, and receipted for by him. The question of fact for you to pass on is, "Does this connect the defendant with the sending of these circulars and tickets?" Are you satisfied, beyond a reasonable doubt, that these letters written by McAfee and Mooney, from Virden, Collinsville, and Shiloh, were registered letters, and were delivered in due course of mail to defendant's agent here in this city, and that, in response to those letters, these letters containing circulars and tickets were mailed, either by the defendant himself, or by his direction, and sent through the mail as addressed? That is the question. Does the fact that these registered letters from Holmes, Williams, and Moorey, which came into the hands of the agent, Halsey, and were responded to in the manner exhibited by the proof, satisfy you, beyond a reasonable doubt, that defendant sent through the mail the lottery tickets and circulars in evidence? If so, you should find the defendant guilty; but if you are not satisfied by the testimony of the government, beyond a reasonable doubt, that the defendant did send these circulars, then he should have the benefit of that doubt, and you should render your verdict accordingly.

See *Bates* v. *U. S.* 10 FED. REP. 92, and note, 97.

UNITED STATES *v.* KANE.

(*District Court, D. Oregon.* January 26, 1884.)

1. OBSTRUCTING THE PASSAGE OF THE MAIL.

The defendant and others, discharged railway laborers, to the number of 150, assembled at Pendleton, Oregon, and by threats of violence prevented the daily train of the Oregon Railway & Navigation Company, including the mail car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money and the company having "passed them up," ought to "pass them down;" and for the same reason and by the same means prevented the conductor from detaching said mail car from said train and sending it to Portland with the United States mail therein. *Held* that, whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail car on to Portland, as he did; and that the conduct of the defendant and his associates being unlawful and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and, therefore, he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the Revised Statutes.

2. PASSENGER ON TRAIN.

A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off, on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does his act is unlawful.

Information for Violation of Section 3995, Rev. St.

James F. Watson, for the United States.

George Kane, in propria persona.

DEADY, J. This is an information charging the defendant with a violation of section 3995 of the Revised Statutes, which provides that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, carrying the same, shall, for every such offense, be punishable by a fine of not more than $100." The defendant pleads "not guilty," and submits the case to the judgment of the court on the facts stated in the deposition of the witnesses, including his own, examined before the commissioner who committed him to answer the charge, and which, by the stipulation signed by the district attorney and the defendant, is to have the effect herein of a special verdict. From this it appears that on January 10, 1884, there were at Pendleton, Oregon, about 150 discharged railway laborers, including the defendant, who had lately been employed by contractors in the construction of a railway in that vicinity, and wanted to come to Portland on the regular train of the Oregon Railway Navigation Company, then running between Pendleton and Portland, and carrying, among other things, the United States mail, without paying their passage, on the ground that they were without money, and the company ought to pass them down as it had passed them up, which the conductor of the train refused to permit; that the defendant, acting as spokesman for himself and the crowd, told the conductor that the train should not move without them, and that if he undertook to pull out and leave them behind, there would be trouble, and he would be hurt; that thereby the train with the United States mail in the postal car was detained at Pendleton until the next day, January 11th, when the conductor concluded and undertook to cut off the postal car containing the United States mail, then being carried thereon from Pendleton to Portland, and proceed with it to the latter place, as it was his duty to do, but the defendant forbade him to do so, and told him there would be trouble if he attempted to uncouple the car; and when the conductor, notwithstanding the threat, undertook to have the pin removed, and the mail car detached from the rest of the train for the purpose of proceeding with it to Portland, the defendant, backed by several of his associates, prevented the brakeman from taking out the pin, by putting his foot upon it, and threatening violence if the attempt was persisted in; but also, according to his own statement,

saying that the conductor might take "his mail, but if the train goes we are going with it," whereby the passage of said mail, mail carriage, and carrier, was further obstructed and retarded until the arrival on the ground of a detachment of United States soldiers, and the arrest of the defendant by the deputy United States marshal.

In the case of *U. S.* v. *Kirby*, 7 Wall. 482, the defendant was charged with arresting the carrier of the mail, and detaining the steam-boat on which it was being carried for that purpose. The defendant, in his plea to the indictment, alleged that he made such arrest as sheriff, upon a lawful warrant charging the carrier with murder, and without any intent or purpose to obstruct the mail or the passage of the steamer. Upon a demurrer to this plea, the judges in the court below were divided in opinion as to whether the conduct of the defendant constituted, under the circumstances, an obstruction of the mail within the meaning of the act of congress, and certified the question to the supreme court. The court answered the question in the negative, saying, "that the act of congress which punishes the retarding or obstruction of the mail or of its carrier, does not apply to a case of a temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." In the course of his opinion, Mr. Justice FIELD says, substantially, that the statute only applies to persons who do some act with a knowledge that it will retard the passage of the mail and do it with that intention, but adds: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object."

That the conduct of the defendant and his associates had the effect to obstruct and retard the passage of the mail is self-evident; and that this effect was knowingly caused by them, although it was not the primary object of their action, is also plain enough. They directly and purposely obstructed the passage of the mail, not as an end, it is true, but as a means of coercing the conductor to carry them on his train to Portland. I suppose the passage of the mail is seldom obstructed, except by robbers, otherwise than as a means of attaining some other end. In all such cases the question to be decided is whether the act causing the obstruction is in itself lawful? If it is, the obstruction necessarily caused thereby is not a crime. It can hardly be pretended, upon the facts stated, that these men who stopped this train had any legal right to travel thereon without payment of their fare or the consent of the conductor. No contract, understanding, or usage is alleged or shown, under or by virtue of which they could claim such a privilege with a shadow of right. Because, as they allege, the company "passed them up," they claimed it ought to "pass them down." There is an old adage that "one good turn deserves another," but this application of it would make the doing of good works dangerous to the doer. How long would it be before they

would stop an ascending train on the ground that they ought to be "passed up again" because they had been "passed down." The act of detaining the train, including the mail car, was unlawful, and therefore the intention to retard the passage of the mail by such act is imputed to the defendant and his associates. In other words, the law holds them responsible for the necessary consequences of their unlawful conduct, without reference to the motive or purpose which actually induced it. But even supposing that they had, at the time, a legal right to transportation on this train free of charge, or had even paid for their passage to Portland thereon, the act was unlawful.

Under such circumstances it may be admitted that the defendant would have a right peacefully to board the passenger car and to remain there until he reached his destination. If the conductor disputed his right and sought to put him off, he might lawfully resist force with force; and if the conductor chose to detain the train at any point until he got off, and the passage of the mail was thereby retarded, the responsibility therefor would lie at the door of the company, and not the defendant. But in my judgment, the defendant, even under those circumstances, would not be justified in preventing the conductor from detaching the mail car from the train and sending it on to its place of destination; and this is what the defendant and his associates did on January 11th. The railway company, it should be remembered, was under an obligation to carry the mail without delay as well as the defendant. And however derelict it may have been in the performance of the latter obligation, the defendant was not thereby authorized to prevent the company from doing what it could to keep its contract to carry the mail for the purpose of thereby coercing a performance of its supposed obligation to him. In the case of a mail-carrier, or a person on board a mail carriage, charged with the commission of a crime, it may be absolutely necessary to temporarily obstruct the passage of the mail to secure the arrest of such carrier or person. But the arrest of these persons, under the circumstances, is a lawful act, and the temporary inconvenience caused thereby is submitted to rather than that persons guilty of serious crimes should escape punishment. One public convenience yields something to another. But it is not only unlawful, but riotous, to prevent, as the defendant and his associates did, the passage of a locomotive drawing a mail car with the United States mail therein for the mere purpose of constraining the person charged with the conduct thereof to do or refrain from doing some act collateral thereto, and which he may even be under a legal obligation to do or omit. If the railway company was under any legal obligation to carry these men to Portland, and refused or failed to do so, the law gave them the same remedy for this breach of contract that it does other people. But it did not give them any right to coerce the company by preventing it from carrying the mails according to con-

tract until it should acquiesce in their demand, to the great hindrance, inconvenience, vexation, and possible loss of the public. The transmission of the mail from place to place throughout the civilized world with certainty and celerity is one of the greatest and most useful labors of modern society. And it cannot be admitted for a moment that a great overland link in this endless chain of communication and intelligence can be broken for days to allow a mob of discharged railway laborers to coerce a railway company into giving them a free ride of 200 or more miles.

In contemplation of law, upon the facts stated, the defendant is guilty as charged in the information. The maximum punishment for this offense is only $100 fine. Why so serious a matter as this may be, is so limited in punishment, as compared with other crimes of no greater moral turpitude or inconvenience to the public, it is impossible to say. But taking this measure of punishment for my guide, and considering that the defendant has practically declined to make any contest in the premises, he is sentenced to pay a fine of $25 and to stand committed to the jail of this county until the same is paid or he is by law discharged therefrom.

THE PEGASUS.[1]

(Circuit Court, D. Connecticut. January 7, 1884.)

COLLISION—WHEN LOSS RESULTING FROM, SHOULD BE DIVIDED.

Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed, the collision would have been avoided, the loss should be divided.

See *The Maria Martin*, 12 Wall. 31.

The following are the findings of fact on this appeal:

(1) About half past 10 o'clock in the evening of July 21, 1882, the steam-tug Whipple, having in tow the barge Allandale, both owned by the libelant, lashed to her starboard side, left Jersey City, bound for pier 8, East river. The tug and tow had all their regulation lights properly set and brightly burning. The night was dark, but the lights were easily visible for a distance of over a mile, but her green and red lights were obscured to the view of any vessel bearing on the starboard of the tug, by the barge. The tide was running flood. (2) As the tug and tow passed abreast of pier 1, North river, about 100 yards off in the river, their officers saw the colored lights of the Pegasus, an iron steam-boat then off Castle William, about a mile distant. At that time the Whipple was on a course about south, and the Pegasus was on a course about north, or meeting respectively head and head. Thereupon the tug and the Pegasus both commenced to swing to the eastward in the East river, upon courses converging towards each other, the tug to reach pier 8, and the steamer,

[1] See S. C. 15 FED. REP. 921.

as was her uniform custom when there was a flood tide, to make a sheer on a north-east course to facilitate her landing on the south side of her pier. (3) At this time the Whipple lost the green light of the Pegasus and saw only her port light, but blew two whistles to inform the Pegasus that she wanted to go on her starboard side, and, without getting any reply, continued under a starboard wheel without giving any further signal. The Pegasus continued on her north-easterly sheer until she was about a fourth of a mile from her landing place, when she starboarded her helm and swung to the westward, as she usually did, in order to make her customary landing. She did not see the tug or barge until too late to avoid a collision. (4) The collision occurred at a point about 300 yards south-west of the upper bath-house on the battery. The barge was seriously injured by the blow of the Pegasus. (5) The Pegasus was going at the speed of about 12 miles an hour until she starboarded her helm, when she slowed down to four or five miles an hour. The speed of the tug was about three miles an hour all the time. (6) The Pegasus did not hear the signal of the tug, nor did she see the lights of the tug at any time until the collision. (7) The captain of the tug knew the course the Pegasus was accustomed to take in order to make her landing, but assumed that as he had signaled her that he was going on her starboard side, she would conform her movements accordingly.

As conclusions of law, I find:

(1) That both vessels were in fault,—the tug for going to starboard and keeping on that course when she lost the green light of the Pegasus, without any signal from the Pegasus assenting to that course; and the Pegasus for failing to see the lights of the tug and not adopting necessary precautions accordingly. (2) That the damages should be divided between the parties.

Beebe, Wilcox & Hobbs, for libelant.

MacFarlane & Adams, for claimant.

WALLACE, J. The proofs in this case fully sustain the conclusions of the court below, as expressed in the opinion of the district judge, except as to his finding that there was no fault or negligence on the part of those in charge of the Pegasus in not seeing the tug and barge until too late to avoid a collision. The learned district judge states in his opnion that he cannot find why the two vertical white lights on the flag-staff of the tug and barge were not visible to the steamer, although they were burning brightly. The reason why the the red and green lights on the tug were not seen, is obviously, as he finds, because they were hidden by the barge from the time the tug swung under her starboard wheel for the East river, thus bringing the barge between her and the Pegasus. The two vertical white lights were suspended on the flag-staff of the tug, one about a foot above the other, and the lower light was 21 feet above the water. It is possible that these lights may have been somewhat obscured from the Pegasus by the pilot-house of the barge at times while the vessels were approaching each other, but in the constanstly shifting positions of the vessels they could not have been hidden continually; and those in charge of the Pegasus do not rely upon any such theory, but insist that there were no lights on the tug, and that none were to be seen when the vessels collided. These lights ought to have been

seen during the time the Pegasus was on her north-east course, which covered three quarters of a mile; and in the absence of any fact to explain why they were not seen, there can be no other rational conclusion except that it was owing to some relaxation of vigilance on the part of the Pegasus. Precisely where this negligence should be located is not important; it suffices that there was failure to see them when they were plainly visible to those in charge of the steamer, if they had used due diligence.

Agreeing with the district judge that the tug was in fault, and that the conduct of her captain was grossly negligent in keeping under his starboard wheel when the green light of the Pegasus had been closed upon him for so long a distance, and in attempting to keep his course when his signals had not been answered, and when he had reason to know that the Pegasus was making for her usual landing, nevertheless the collision was not attributable solely to the tug. As the district judge states in his opinion: "It is manifest that if the Pegasus had seen or ought to have seen the lights of the tug and barge, her management was negligent, and she was in fault." In such a case the damages must be apportioned between the offending vessels. Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed the collision would have been avoided, the loss should be divided. *The Maria Martin*, 12 Wall. 31.

A decree is accordingly ordered dividing the loss, with a reference to a master to ascertain the amount. No costs are allowed to either party as against the other in the court below, but costs of the appeal are awarded to the libelant.

FRELINGHUYSEN v. BALDWIN.

(*Circuit Court, S. D. New York.* January 7, 1884.)

REMOVAL OF CAUSE—REV. ST. § 639, SUBD. 3—CITIZENSHIP AT INSTITUTION OF SUIT.

Where a case is removed under Rev. St. § 639, subd. 3, the requisite diversity of citizenship must exist both when the suit is begun and when the petition for removal is filed.

Motion to Remand.

Martin & Smith, for plaintiff.

Abbett & Fuller, for defendant.

WALLACE, J. Since the decision in *Miller* v. *Chicago, B. & Q. R. Co.* 17 FED. REP. 97, the supreme court, in *Gibson* v. *Bruce*, 2 Sup. Ct. Rep. 873, has construed the language of sections 2 and 3 of the removal act of 1875 to require as a condition of removal that the requisite diversity of citizenship exist both when the suit was begun and when the petition for removal is filed. That decision seems to control the present case, where the removal was procured by the plaintiff under subdivision 3 of section 639 of the Revised Statutes, the parties both being residents of New Jersey when the suit was brought, but the defendant having removed subsequently to New York. The language of this subdivision is substantially similar to that of section 2 of the removal act of 1875, so far as it relates to the question now under consideration, and the reasons stated in the opinion of the court in *Gibson* v. *Bruce* apply with equal force to a removal under subdivision 3 of section 639.

The motion to remand is granted.

POOLE and others v. THATCHERDEFT, Defendant, and another, Garnishee.

(*Circuit Court, D. Minnesota.* December 13, 1883.)

1. REMOVAL OF CAUSES—GARNISHMENT UNDER THE STATUTE OF MINNESOTA.

Proceedings in garnishment, instituted under the Minnesota statute, are to be considered as auxiliary to the main action, when considered with reference to the right of removal to the federal court.

2. CASE STATED.

The main action against the defendant had proceeded to judgment in the state court; garnishee proceedings had been instituted in the same court, and in the same action, to enforce the judgment; during the pendency of this proceeding the plaintiff had the cause removed to the federal court. On motion to remand the cause to the state court, *held*, that the removal having been made after judgment had been rendered in the main action, was too late, and the cause must be remanded.

Motion to Remand Cause.

McCRARY, J. This is before the court as a motion to remand. The plaintiff Horace Poole brought his action in the state court against Thatcherdeft, the defendant. In the case in the state court a process of garnishment was issued and served upon the garnishee, Mr. Rolph. A regular action was prosecuted to final judgment against Thatcherdeft. Rolph answered, denying any liability on the part of the garnishee under a provision of the statutes of Minnesota which are in chapter 66, Rev. St. 1878. The plaintiff obtained from the state court leave to file what is called a supplemental complaint, making the garnishee a party, and seeking to recover against him upon the ground that the original defendant, Thatcherdeft, had fraudulently conveyed to him a stock of goods. After the filing of this supplemental petition, the plaintiff in the case applied to the state court for the removal of the case to this court. It is perfectly clear that the original action against the defendant Thatcherdeft cannot be removed, because in the case final judgment had been rendered some time before application was made to the state court for the removal. But the proceedings under the supplemental petition can be removed only when the case is such that it would constitute a new original independent suit, and did not constitute a mere appendage to the original suit. If it was an original proceeding in itself, and not a mere auxiliary proceeding, it could be removed, otherwise it cannot. Questions very similar to this have frequently been before the court, and I think it has been uniformly held that all proceedings in the nature of garnishee proceedings for the purpose of merely enforcing a judgment of the state court are auxiliary in their character, and not original and independent proceedings. A bill in equity may be filed to set aside a fraudulent conveyance for the purpose of collecting an amount due by a judgment in the state court, and that cause of action may be transferred to the circuit court of the United States; but when the action is brought for the purpose of enforcing a judgment in the state court, whatever the form of proceedings may be, it is auxiliary in its character and cannot be removed, and we think that the rulings which have been announced in previous cases in other districts, applying the proceedings now before us under the statutes of Minnesota, and that it is in substance and in effect a garnishee proceeding and it cannot be maintained as an independent suit, but only as a part of the original suit against the original defendant. If the original judgment cannot be brought here we can have no jurisdiction in the supplemental proceeding. One reason is that if a judgment were removed and the money collected upon that supplemental proceeding, the court would be called upon to direct the application for the payment of the original judgment; it might be that upon this proceeding the judgment might be for more than the original judgment, if it was a separate proceeding conducted without any reference to the original case at all. At all events, it is brought, we think, for the pur-

pose of enforcing the payment of a judgment in the state court, and as that judgment is not before us we cannot take jurisdiction of the supplemental proceeding.

These views, we think, are supported by the following cases: *Pratt* v. *Albright*, 9 FED. REP. 634; *Weeks* v. *Billings*, 55 N. H. 371; *Chapman* v. *Bargar*, 4 Dill. 557; *Bank* v. *Turnbull*, 16 Wall. 190; *Barrow* v. *Hunton*, 99 U. S. 80; *Buford* v. *Strother*, 10 FED. REP. 406.

The statutes under consideration in those cases were not always exactly the same as the statute of this state, but we think they were in substance the same. We think the authorities are conclusive as to the question here.

The motion to remand is sustained.

WELLMAN and others *v.* HOWLAND COAL & IRON WORKS.

(*Circuit Court, D. Kentucky.* January 2, 1884.)

1. PETITION FOR REMOVAL—JURISDICTION.
   After the filing of a petition for the removal of a cause to a federal court, and the tender of a valid bond, if the petition and record show good ground for removal, the jurisdiction of the state court is superseded, and an amendment of the pleadings subsequently allowed in the state court is invalid.
2. SAME—SEPARATE CONTROVERSY—NECESSARY PARTIES—DEFUNCT CORPORATION.
   A corporation which has sold all its property and franchises, except the mere right to exist, and which has no officers or place of business, is not a necessary party in a suit against a stockholder to make him liable for his unpaid subscription, notwithstanding the fact that the corporation has still the power to reorganize and collect the stockholders' dues.

In Equity.

W. W. Thum and *George Du Relle*, for complainants.

Otto A. Wehle, for defendant.

BARR, J. The motion of complainant to remand to the state court must be determined by the relation which the Howland Coal & Iron Works bears to this litigation. The suit is to make defendant Small liable for his unpaid subscription to that company's stock to the extent, at least, of complainant's debt. The allegation of complainant in his original petition is that "the Howland Coal & Iron Works is now, and has been for several years, insolvent, its entire property and franchises having been sold out several years ago, and said corporation has long since ceased to do business, and has no officers or agents or office in this state, and has had none for three years or more last past." After the filing of the petition for removal in the state court and the tender of the bond, the complainant, by leave of state court, amended his petition, and alleged "that the defendant, the Howland Coal & Iron Works, is a resident of this state, and has a corps of or-

ganic officers maintaining and keeping up the corporate existence of the said defendant, but that none of the officers or agents of said defendant reside in this state, and residences of each and all its officers and agents are unknown to those plaintiffs. The plaintiffs desire to further amend their said petition, and say that by the charge that said defendant had ceased to do business they meant to say, and now so charge the fact to be, that said defendant Howland Coal & Iron Works has ceased to do business in the way of operating its mines, and transporting and selling the coal taken therefrom in the markets, which mining and selling coal was the chief business of said corporation."

This amendment should not have been allowed to be filed by the state court, as it came too late. The petition for removal had then been filed and the bond tendered, and thereby the state court had ceased to have jurisdiction over the cause, if the petition, with the record as it then existed, made a good ground for removal. *Railroad Co.* v. *Mississippi*, 102 U. S. 141. The allegations of the pleadings and the exhibits then and now in the record show that all of the visible property of this corporation had been sold, also its franchises, except the right to exist as a corporation. The corporation still had a legal existence, but not an actual one. It had no organization, no officers, or agents, but the stockholders still have the right to reorganize and elect officers. If this were done the corporation could sue and be sued, and it could collect the unpaid stock subscription and apply it to the payment of the debts of the company.

The complainant did not bring this suit against the corporation, but against Small, the stockholder. In its present condition no personal judgment could be rendered against the company, and it is exceedingly doubtful whether the company will be bound by the judgment should one be rendered against Small. It is true that complainant, after he had sued Small, who was a non-resident, and seized his property by process of attachment, attempted to bring the corporation before the court by a constructive summons; but if the corporation has no organization, officers, or agents anywhere, how can this corporation be even constructively summoned? While, therefore, this corporation is not defunct, it has no living, active existence, although in law it may survive sufficiently to have the power of reorganization for some purposes. Its present *status* makes the reasons which apply to a defunct corporation apply to this one. The Howland Coal & Iron Works is only a nominal party, if a party at all.

The motion to remand to the state court is overruled.

MASON and others, Adm'rs, *v.* HARTFORD, P. & F. R. Co. and others.

(*Circuit Court, D. Massachusetts.* January 18, 1884.)

1. JURISDICTION OF CIRCUIT COURTS—WHEN CONCURRENT WITH DISTRICT COURT.
   By section 4979 of the Revised Statutes of the United States the several circuit courts have concurrent jurisdiction with the district courts "of all suits at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bankrupt transferable to or vested in such assignee." By this section jurisdiction is conferred upon the circuit courts to ascertain and adjust all lien and other specific claims upon the property vested in the assignee claimed by any person adversely to the assignee representing the general creditors, without regard to the citizenship of the parties. Nor is such jurisdiction affected by the change of interest created by a conveyance made under the decree of the district court. Having once acquired jurisdition of the subject-matter and the parties, the court will retain it for all purposes within the scope of the equities to be enforced.
2. EFFECT GIVEN TO TESTIMONY OF PARTIES ON FORMER TRIAL.
3. BILL OF REVIVOR—STATUTE OF LIMITATIONS—LACHES.
   Ordinarily a bill of revivor may be filed at any time before it is barred by the statute of limitations, which, when the suit is abated by the death of the plaintiff, begins to run from his decease, or, according to some authorities, from the time administration is taken out. Where one acquires title with full notice and subject to an incumberance of a lien, he cannot charge laches on the part of the person bringing suit to enforce the lien if the suit is brought within the time prescribed by the statute.

In Equity.

S. E. Baldwin, for defendants.

A. Payne, T. E. Graves, and *W. S. B. Hopkins*, for complainants.

NELSON, J. This is a bill of revivor and supplement filed by the administrators of Earl P. Mason, to revive a suit abated by his decease, and to bring in as defendants parties who have succeeded to the interest of some of the original defendants. The facts and proceedings in the suit, so far as it is necessary to state them, are as follows:

The original bill was filed in this court by Earl P. Mason in December, 1871, against the Hartford, Providence & Fishkill Railroad Company, whose road and franchises had been previously conveyed to and formed part of the railroad of the Boston, Hartford & Erie Railroad Company, the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, adjudicated bankrupt by the district court of this district in March, 1871, the trustees under mortgages of the Hartford, Providence & Fishkill Railroad made prior to the consolidation, the trustees of the Berdell mortgage of the Boston, Hartford & Erie Railroad, made subsequent to the consolidation, and the treasurer of the state of Connecticut. The object of the bill was to enforce against that part of the Boston, Hartford & Erie Railroad in the states of Rhode Island and Connecticut, which was formerly the Hartford, Providence & Fishkill Railroad, a lien claimed by the plaintiff to exist on account of certain preferred stock issued by the Hartford, Providence & Fishkill Railroad Company in 1854, before the consolidation, the certificates of which stock contained a clause that the par value thereof was "demandable by the holder of the same from the company, at any time after April 1, 1865," and a demand of payment made upon the company in March, 1871. To that bill answers were filed in 1873, and replications were filed October 15, 1875.

On July 27, 1875, the trustees under the Berdell mortgage conveyed the whole railroad to the New York & New England Railroad Company.

On July 21, 1875, the district court, upon the application of the assignees, made an order authorizing and directing them to sell and convey their interest as assignees in the Boston, Hartford & Erie Railroad to the New York & New England Railroad Company, and in the order directed, at the request of Mason, that the deed of conveyance should contain a proviso and condition that "nothing in the same should be construed to affect the rights of any person or corporation, if any, holding stock, whether common or preferred, in the Hartford, Providence & Fishkill Railroad Company." In pursuance of this order, the assignees on July 28, 1875, conveyed their interest in the road to the New York & New England Railroad Company by a deed which contained the proviso and condition above mentioned, and also contained a stipulation by the grantee that it would assume the defense of this and of other suits then pending against the assignees, and would protect them therefrom.

On September 21, 1876, before any further proceedings were had in the suit, Earl P. Mason died intestate, and July 25, 1881, the present plaintiffs took out administration upon his estate in this district. The present bill was filed March 23, 1882, against the original surviving defendants, the New York & New England Railroad Company and Aldrich, Cooley & Gardener, who have been appointed trustees under the mortgages of the Hartford, Providence & Fishkill road, in place of three deceased defendants in the original bill.

In December, 1875, Earl P. Mason joined with the Boston & Providence Railroad Company and others, as owners of stock in the Hartford, Providence & Fishkill Railroad Company, in filing a bill in equity in the supreme court of Rhode Island, against the New York & New England Railroad Company and others, to set aside, as unauthorized and void, the conveyance of the Hartford, Providence & Fishkill road to the Boston, Hartford & Erie Railroad Company. That suit terminated March 12, 1881, by the entry of a final decree dismissing the bill.

The bill of revivor states the proceedings subsequent to the death of Earl P. Mason, and prays that the original suit may be revived for the benefit of his administrators. To this bill the New York & New England Railroad Company filed a demurrer to part, and plea to the residue, and three other defendants filed a plea to the whole bill. The case was heard upon the pleas and demurrer, and upon certain agreed facts which were made part of the case by stipulation of the parties.

1. By the demurrer of the New York & New England Railroad Company, objection is taken to the jurisdiction of the court for want of the requisite citizenship of the parties. Objection to the jurisdiction of the court, when the defect appears of record, may be taken at any stage of the proceedings; and the record in this case shows that in the original suit, and also in the bill of revivor, citizens of Rhode Island appear both as plaintiff and defendant. But we are of opinion that in this case jurisdiction does not depend upon the citizenship of the parties. By section 4979 of the Revised Statutes the several circuit courts have concurrent jurisdiction with the district courts "of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee." By this section jurisdiction

is conferred upon the circuit courts to ascertain and adjust all liens and other specific claims upon the property vested in the assignee, claimed by any person adversely to the assignee as representing the general creditors, without regard to the citizenship of the parties. This has been settled by repeated decisions of the supreme court. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *Lathrop* v. *Drake*, 91 U. S. 516; *Eyster* v. *Gaff*, Id. 521; *Burbank* v. *Bigelow*, 92 U. S. 179; *Dudley* v. *Easton*, 104 U. S. 103. This case comes within the very letter of the statute. The plaintiff sets up, and seeks to enforce against a part of the railroad which was transferred to the assignees, by virtue of their assignment, a lien alleged to have been created, under the laws of Rhode Island and Connecticut, by the issue of preferred stock. That this court has jurisdiction to determine its validity, and if found valid to enforce it against the property, is clear. Nor is the jurisdiction affected by the change of interest created by the conveyance made under the order of the district court. Having once acquired jurisdiction of the subject-matter and the parties, the court will retain it for all purposes within the scope of the equities to be enforced. *Ober* v. *Gallagher*, 93 U. S. 199; *Ward* v. *Todd*, 103 U. S. 327. The conveyance to the New York & New England Railroad Company was made expressly subject to any lien which can be enforced against the road in this suit, and the case must therefore proceed as if no such conveyance had been made.

2. At the hearing of the Rhode Island suit, the present plaintiffs, the Rhode Island administrators of Earl P. Mason, were called as witnesses, and when asked whether in their capacity as administrators they were the possessors of any stock of the Hartford, Providence & Fishkill Railroad Company, answered that they had found among the effects of the deceased 281 shares of the common stock and 139 shares of the preferred stock. The defendants insist that by thus testifying they elected to treat the preferred shares as stock, and have thereby waived the right to treat it as an indebtedness in this suit. We do not think such a result can fairly be claimed from their testimony. Upon an inspection of the bill in that case, it is apparent that the plaintiffs in it sought relief as holders of the common stock, and not of the preferred stock. Their ownership of the common stock was the material point in issue, and so much of their answer as declared their ownership of the preferred stock was immaterial and unimportant. It would be unjust and inequitable to hold that their testimony amounted to an election to waive all rights acquired by their intestate by his demand of payment of the par value of the shares. That was plainly not their meaning, and no such effect should be now given to their testimony.

3. The next defense is laches. Ordinarily a bill of revivor may be filed at any time before it is barred by the statute of limitations, which, when the suit is abated by the death of the plaintiff, begins to run from his decease, or, according to some authorities, from the time

administration is taken out. Story, Eq. Pl. § 831; 56th Equity Rule. In this case the bill of revivor was filed within six years after the death of the original plaintiff, and within eight months after administration was taken out. But the New York & New England Railroad Company charges that before the filing of the bill of revivor it had expended over $4,000,000 in obtaining possession of the road, in paying off liens, and in improving and completing it. But it acquired its title with full notice and subject to the incumbrance of the lien claimed in this suit. By its deed of conveyance it assumed the defense of the suit, and became from that time the real defendant. It can therefore stand in no better position than its grantors, the original defendants. During the pendency of the Rhode Island case this suit was allowed to lie dormant, with the acquiescence of both parties, since the success of the plaintiffs in that suit would have rendered this case of no importance. The expenditures of the New York & New England Company were not induced by the conduct of these plaintiffs or their intestate. They were made at its own risk, and ought not to preclude the plaintiffs from enforcing their lien.

The merits of the original bill are not open at this stage of the suit, and have not been considered. *Fretz* v. *Stover*, 22 Wall. 198.

Other points were urged at the hearing by the learned counsel for the defendants, but none of them appear to be of sufficient importance to require comment, and they are overruled.

Plea and demurrers overruled.

SCOTT and others *v.* BALTIMORE, C. & R. STEAM-BOAT CO.

ODELL and others *v.* SAME.

PURCELL and others *v.* SAME.

(Circuit Court, D. Maryland. January 15, 1884.)

1. CARRIER—LIABILITY FOR GOODS DESTROYED BY FIRE ON WHARF.
   Goods were delivered to the defendant, a steam-boat company, for transportation. The bills of lading did not designate any particular vessel. The goods were burned on the wharf by a fire not occurring through any neglect of the defendant. *Held* that, even though the goods were negligently delayed by the defendant, the delay was not the proximate cause of the loss.
   Railroad Co. v. *Reeves*, 10 Wall. 190.
2. SAME—BILL OF LADING.
   The bills of lading stipulated, "dangers of the seas, fire, breakage, leakage, accidents from machinery and boilers, excepted, and with liberty to tow and assist vessels in all situations." *Held*, that this was an exemption from liability from loss by fire while the goods were on the wharf awaiting transportation, as well as when on board the vessel.

At Law.

Bernard Carter, for plaintiffs.

John H. Thomas, for defendant.

MORRIS, J. These are three suits instituted to recover from the defendant steam-boat company for goods which the plaintiff delivered on the company's wharf at Baltimore, on December 21, 1877, to be transported by it, and which were burned on the wharf by a fire during that night. It is admitted that the fire was not occasioned by any want of care on the part of the company, and that after the fire broke out all possible effort was made to extinguish it and save the goods. By agreement the cases have been tried before the court without a jury. The steam-boat company had, at the time the goods were received by it, a daily line of steamers from Baltimore to West Point on the York river, and these goods were to be transported by that line, and thence by railroad to Richmond and other more southern points. The steamers sailed daily at 4 P. M., and it was known that goods received after 3 P. M. were not usually sent by that day's steamer. In fact, goods were received by the company during all the business hours of the day, and bills of lading given; none of them, however, specifying that the goods were to be forwarded by any particular vessel; and whenever goods were received during the day, which for any reason could not go by that day's boat, they were sent forward the next day.

Evidence has been submitted by the plaintiffs tending to prove that the goods were delivered at the company's wharf before 3 o'clock, and in time to have gone by that day's boat; but the evidence was not entirely convincing, and in the face of the positive testimony of the agent of the steam-boat company, that at 3 o'clock of that day there were no goods for the south remaining on the wharf, I am not prepared to find as a fact that the goods were delivered in time for that day's boat. I do not, however, consider the finding of this fact of any importance, for, as I understand the law, even if the company could have forwarded the goods by that day's boat and negligently omitted to do so, it would not affect its liability in these suits. The law is settled that in cases of this kind, unless the delay in forwarding the goods is so unreasonable in its nature as to be equivalent to a deviation, or unless the loss of the goods is the direct and proximate result of the delay, the carrier is not liable unless he would be answerable under his liability as carrier without reference to the delay. And where goods in the custody of a carrier are destroyed by storms, floods, or fire, in a place in which they would not have been but for the negligent delay of the carrier, the courts hold that the direct and proximate cause of the injury is the flood or the fire, and that the delay in transportation is only the remote cause. The supreme court of the United States so decided in *Railroad Co.* v. *Reeves*, 10 Wall. 190, and it was so held by the supreme court of Massachusetts in *Hoadley* v. *Northern Transp. Co.* 115 Mass. 304. This latter case was a suit to recover for the loss of goods by fire, which the

carrier had delayed forwarding, and which were burned at the place where they were delivered into his custody. The bill of lading in that case exempted the carrier from liability for loss from fire while the goods were in transit, or while in depots or warehouses or places of transhipment. It was held that the destruction of the goods by fire could not reasonably have been anticipated as a consequence of the detention; that the delay did not destroy the goods; and that there was no connection between the fire and the detention.

The important question in these cases, therefore, is whether, by the language of the bills of lading, the steam-boat company has exempted itself from its common-law liability for the loss of the goods by fire while on its wharf; for if, by the bills of lading, it is exempt for the loss by fire, it makes no difference, in my judgment, that the company was to blame for the detention; and if, by the bills of lading, it has not exempted itself, it is liable notwithstanding it was not to blame for the detention. The right of common carriers, by proper stipulations in a bill of lading, to limit their common-law liability for losses by fire, when the fire is not attributable to their misconduct, or that of any persons or agencies employed by them, is well settled, (*York Co.* v. *Central R. R.* 3 Wall. 107;) and by the act of congress of March 3, 1851, (Rev. St. § 4282,) it was enacted that the owners of vessels, except those used in rivers or inland navigation, shall not be answerable for loss by fire of any goods *on board*, unless the fire is caused by their design or neglect. If, therefore, the language of the bill of lading is sufficiently explicit to exempt the company from loss by fire, there can be no doubt as to the lawfulness of such an exemption. The language contained in the bill of lading given for the goods of the plaintiffs J. W. Scott & Co. and Odell, Ragan & Co. is: "Dangers of the seas, *fire*, *leakage*, *breakage*, accidents from machinery and boilers, excepted, and with liberty to tow and assist vessels in all situations." The language of the bill of lading for the goods of the plaintiffs Purcell, Ladd & Co. is: "And it is expressly contracted and agreed that loss or damage by *weather*, *fire*, *leakage*, *breakage*, and dangers of the seas are excepted."

It is contended on behalf of the plaintiffs that under the strict rules of construction applicable to stipulations by which the carrier seeks to limit his common-law liability the word "fire" in these bills of lading, and more particularly in the one first mentioned, being classed with dangers of the seas and other risks of navigation, it is to be taken as applicable only to fire after the goods are laden on board. After careful consideration I find myself unable to assent to this construction. The liability of the carrier as carrier begins from the moment of the receiving the goods, (Hutch. Carr. § 89,) and although preparatory to the transportation they are detained by him on his wharf or in his storehouse his responsibility then is in no respect different from his responsibility after the actual transportation has commenced. It is difficult, therefore, to see why, if he stipulates gen-

erally for exemption from losses from fire, he should not be understood to mean exemption while the goods are in his possession preparatory to their being laden, as well as afterwards. In most instances there must be some interval of time between the reception of the goods and their being actually laden on board the vehicle of transportation, and as the law sanctions contracts by which the carrier exempts himself from the risks of fire, it seems to me it would be a very strained and forced construction of these contracts now before me to hold that the exemptions in them from "*fire, leakage, and breakage*" do not apply to losses from those risks while on the wharf, because they are mentioned in the same sentences with other risks which are only encountered on the voyage itself.

I have not failed to consider the argument urged on behalf of the plaintiffs, based on the inconvenience and hardship occasioned by such an exemption as now upheld, arising from the fact that after the goods are delivered to the carrier the usual fire insurance which covers the goods while in the warehouse of the shipper is at an end, and that the ordinary marine policy does not attach until the goods are laden on board, and that as the shipper does not know whether the carrier has detained the goods on the wharf or has put them on board, he is at loss how to protect himself. This is, however, but one of the hardships resulting from the exemptions which carriers have been allowed to contract for. The lawfulness of such an exemption as that claimed in these present cases is too firmly settled by authoritative cases to be now doubted, and the difficulty is not to be cured by the court's refusing to give to the words of the contract their fair and reasonable meaning.

Verdict for defendant.

JONES *v.* VESTRY OF TRINITY PARISH.

(*Circuit Court, W. D. North Carolina.* November Term, 1883.)

1. MONTHLY SALARY—PRESUMPTION AS TO PERIOD OF EMPLOYMENT.
   There is a presumption of law that a person employed at a monthly salary is engaged by the month, so that either party may terminate the contract at the end of any month, unless it affirmatively appears that a definite period of employment was contemplated by the parties to the contract.
2. FALSE REPRESENTATIONS—RESCISSION OF CONTRACT—RECOVERY OF DAMAGES.
   A person who secures employment for a stated period by false and fraudulent representations may be dismissed at any time, and his employer may recover from him for any damage sustained by reason of the deceit.
3. CONTRACT OF SERVICE—INCOMPETENCY—RESCISSION.
   A person who, representing himself as competent to discharge any duty, is employed for that purpose, may be dismissed upon his incompetency being shown.

4. SAME—BREACH—NEGLECT TO DISCHARGE—WAIVER.
One who, after a material breach of contract on the part of a person employed by him, continues to accept his services without reasonable cause for delay in discharging him, is presumed to have waived the breach, and will not be allowed to set it up afterwards.

5. SAME—BREACH OF CONFIDENCE.
A person in whom peculiar confidence is reposed may be discharged by his employer for misleading him with respect to the matter of confidence, even though the truth might have been ascertained by inquiry elsewhere.

6. SAME—WRONGFUL DISCHARGE—DAMAGES.
A person wrongfully discharged can recover the contract price for the full time of service agreed upon, without showing constant readiness to perform the work from which he has been dismissed.

7. SAME—SPECIAL CONTRACT—QUANTUM MERUIT.
One employed by special contract cannot recover on a *quantum meruit* for his services.

At Law.

J. H. Merrimon, for plaintiff.

McLoud, Davidson & Jones, for defendants.

DICK, J., (*charging jury.*) If the terms of the contract declared upon were in writing, or were admitted, or undisputed in the pleadings, it would be the duty of the court to construe them, and declare the rights and liabilities arising therefrom. As the contract was verbal, and the parties dispute about the terms of the agreement, it is your duty to ascertain those terms from the evidence, and apply the principles of law announced by the court to the facts proved. For the purpose of assisting you in performing such duty I will first refer briefly to some circumstances surrounding the parties at the time the contract was made, and to certain facts established by the pleadings or by uncontroverted evidence. A jury in ascertaining the terms of a contract, and a court in construing their meaning, clearly have the right to consider the language employed, and also the subject-matter and the surrounding circumstances, so as to ascertain as nearly as possible the intention of the parties. The vestry of Trinity parish desired to build a new edifice, which would afford more suitable accommodation for the members of the church and other citizens. For this purpose the vestry had collected about $2,500 in cash, and had obtained about $1,000 in reliable subscriptions. With this cash fund and subscription list, and confidently relying upon the liberality of the members of the parish and other citizens of the community, the vestry determined to commence the erection of the church edifice. They applied to Prof. Babcock, of Ithaca, New York, an experienced, skillful, and accomplished architect, to furnish appropriate plans and specifications for the building, suitable to the convenience and wishes of the congregation, and within the limits of the means accumulated, and such as could be reasonably expected to be realized from future donations. Under these circumstances, the plans and specifications were prepared and forwarded by the architect, who also recommended Mr. Richardson, of Ithaca, New York, as an experienced and skillful contractor and builder. After some correspondence, Mr.

Richardson came to Asherville, and being made acquainted with the views and wishes of the vestry and other surroundings, he offered to furnish material, and to construct the *nave* and *transept* of the edifice according to the plans and specifications, for the sum of $3,500. Upon further consideration, he offered to build the chancel and tower for an additional thousand dollars. These offers were not accepted at the time. In a few months afterwards the vestry determined to accept the offers; but Mr. Richardson declined, as he was then engaged in other work, and the price of labor had greatly advanced. The vestry then concluded to commence the work under the superintendence of a building committee. Mr. King, of Raleigh, an experienced and skillful builder, was employed to have immediate charge of the work, and he made some preparation for the undertaking, but he soon became sick and died. About this time the plaintiff came to Asherville, and had several conferences with the building committee and with other members of the vestry, and engaged with them to superintend the erection of the church edifice according to the plans and specifications furnished by the architect. In the course of his employment he was to procure skilled workmen, and direct them in their labor; he was to make contracts for the delivery of suitable materials for building; he was to pay wages and for materials with the funds placed in his hands by the vestry, and keep and render proper weekly accounts of such transactions, and for his services he was to receive $125 per month.

There is no evidence directly showing that any specific time for the continuance of such employment was expressly agreed upon, and there is now a difference in the understanding of the parties upon this question. As a general rule, in an employment at monthly wages, without any definite time as to the continuance of service, either party may terminate the contract at the end of a current month. This rule will not apply when it appears from the language and other terms of the contracts, the nature of the services, and the surrounding circumstances, that the parties evidently intended that the employment should continue until the accomplishment of a definite object. In this case the object of the parties to the contract was the erection of a building according to certain plans and specifications. The plaintiff represented himself as having a long and large experience in such business, and had thus fully qualified himself for the employment, and the defendants were desirous of procuring the services of a prompt, faithful, and skillful superintendent, who would, as speedily as possible, erect the edifice designed by the architect. You can consider the evidence as to all the facts and circumstances which attended and induced the making of the contract, in forming your conclusion as to the mutual intent of the parties as to the time of service which was to be rendered by the plaintiff. If you should find that the parties contemplated the continuance of the employment of the plaintiff for the entire time necessary for the completion,

of the edifice, and that such was their mutual understanding of the agreement, then you will proceed to inquire whether the defendants had sufficient legal excuse for his discharge before the work was finished. It is conceded that the plaintiff was prompt and diligent in business, and rendered correct accounts for money expended for materials and labor.

It is insisted by the defendants that, before the contract was entered into with the plaintiff, he made representations as to the probable cost of the building, which were reasonably relied on, and were a material inducement to his employment; and that those representations were false and fraudulent, and caused much injury and loss. You have heard the evidence upon this subject, and if you find that the allegation is sustained, then I instruct you that such a fraud was sufficient legal excuse for his dismissal from service.

It is further insisted on the part of the defendants that the plaintiff was not competent in scientific and mechanical knowledge and skill to construct the building in accordance with the plans and specifications furnished by the architect. Upon this question of competency you have heard the depositions and testimony of several witnesses on both sides, who are acquainted with the plaintiff and have some knowledge of his qualifications as a builder. The evidence is conflicting, and if you find, from a preponderance of evidence, that the allegation is sustained, then I instruct you that the defendants were justified in discharging the plaintiff from their employment.

It is further insisted by the defendants that the plaintiff made a material, injurious, and expensive departure from the plans and specifications without their knowledge and consent. To this charge the plaintiff replies that there was no material and injurious departure, as alleged; and even if he did not strictly follow the plans and specifications, the defendants were informed of such departure, and by continuing his employment this alleged breach of contract was waived, and, after such condonation, was not sufficient cause for his discharge. If a person is continued in employment after a material breach of contract is fully known to the employer, a waiver and condonation is presumed by the law, and such breach cannot subsequently be relied upon as sufficient cause for the discharge of the employe. This presumption of law may be rebutted by evidence showing that there was in fact no waiver, and the jury may consider all the facts and circumstances in evidence, and determine whether there was reasonable cause for delay in discharging the employe.

It is further insisted by the plaintiff that some of the defendants very often saw the work as it progressed, and they could easily have obtained information from skilled workmen who were engaged in or saw the work, in regard to any departure from the plans and specifications, and yet his employment was continued for several months after the alleged departure. The principles embraced in the

legal maxim referred to by the counsel of plaintiff have no application to this case. As a general rule "the laws assist those who are vigilant, not those who sleep over their rights." This maxim is usually applied to persons seeking remedies in the courts, and it is the foundation of statutes of limitation, but it has a more extensive signification. In ordinary business transactions a person must avail himself of his own knowledge and all means of information within reach and easily accessible. If the truth or falsehood of a representation can be ascertained by ordinary vigilance and attention, it is a man's own fault if he neglects to inform himself by inquiry and investigation, and the law will not afford him relief from injury caused by such neglect. This rule does not apply to a case where a gross fraud has been perpetrated, or where a person has a right to rely upon the statements of another in whom peculiar confidence has been reposed. The defendants were unskilled in the work which they had undertaken, and they employed the plaintiff, upon his representations that he had the requisite knowledge and skill, to construct the edifice according to the plans and specifications. They reposed special trust and confidence in him, and they had the right to rely implicitly upon his statements in relation to his employment; and it was his duty to fully answer their inquiries and make them acquainted with his proceedings, and give them the benefit of all the information which he possessed, or by reasonable exertion could have possessed upon the subject; and there was no legal obligation requiring them to seek other sources of information. If the plaintiff misled the defendants upon these matters, or failed to give them correct and full information upon their inquiries, then they were justified in discharging him from their employment.

It is further insisted by the plaintiff that at the time he entered into the contract he reserved the right of exercising his own judgment and discretion in performing the work, when there was any discrepancy between the plans and the specifications, or when there was any uncertainty about the matter. This reservation did not authorize him to make any material departure from the plans and specifications against the will or without the consent of the defendants after they had been fully advised as to the proposed changes. You have heard the evidence and arguments of counsel upon the questions of fact in relation to a special contract for the entire time that would have been required for the erection of the building, and as to the causes for discharging the plaintiff from employment; and, guided by the principles of law which I have announced, I hope you will be able to come to a correct conclusion on this part of the case. If you find that there was a special contract for the employment of the plaintiff until the work entered upon was finished, and that the performance of his part of this entire contract was prevented by his discharge from service without legal excuse, then he is entitled to recover by way of damages $125

per month for such time as the evidence shows would have been required to construct the edifice. Under such circumstances as would induce this finding it is not necessary for the plaintiff to aver and show that he made useless efforts to have himself reinstated in employment, and was able and ready to perform the work from which he had been improperly discharged. In this place I will not refer to the question whether the defendants have a right to recoupment or diminution of damages for defects in the work, and for loss and injury sustained by unnecessary expenses incurred by the action of the plaintiff as under the system of code pleading adopted in this state, and observed and used in this court, the defendants in their answer seek to recover such damages by way of counter-claim. I will instruct you as to their rights in such proceeding when I come to consider their answer. If you should find that there was no special contract as alleged, or that the plaintiff was properly discharged, then he cannot recover upon the first cause of action stated in his complaint.

In the second cause of action the plaintiff declares upon a *quantum meruit*, and avers that he is entitled to recover the value of the work and labor performed by him, as the defendants received and used the benefits of his services. The defendants were obliged to receive and use the work which had been done under the superintendence of the plaintiff, as it was on the church lot, and they had paid for the materials, and for the work executed by the actual builders; and the structure could not be abandoned or removed without great inconvenience, loss, and expense. I am of the opinion that the plaintiff cannot recover upon this count founded upon an implied contract. The law will not imply a contract when there is an express one, unless such express contract has been rescinded, abandoned, or varied by the consent of the parties. In this case the evidence on both sides establishes a special contract, certain and definite in all its terms, except as to the duration of the employment, in which the value of the services of the plaintiff is fixed by mutual agreement, and the plaintiff cannot, upon an implied contract, obtain any other measure of damages.

It is unnecessary to further consider this count, as the plaintiff, in his third cause of action, claims his stipulated wages for seven months of actual employment. The special contract, as admitted by both parties, expressly provides that the plaintiff shall receive the sum of $125 per month, and is only indefinite as to the time of service. In considering the first cause of action in the complaint, I stated to you that upon a contract for wages payable monthly there is a legal presumption that the employment was by the month, and either party may rightfully terminate the engagement at the end of such period. I directed you to consider the evidence as to the language of the parties, the nature of the service, and surrounding circumstances, to ascertain whether this legal presumption was rebutted by it appearing that the mutual understanding and agreement of the

parties was that the employment should continue until the edifice was completed. If you find that there was such an entire contract, then upon this third cause of action I instruct you that the plaintiff is entitled to recover his stipulated wages for seven months, and his neglect to call for monthly payments in no way impaired this right. The services were performed for that period, and they were of value to the defendants, and of benefit in the subsequent construction of the edifice.

I will now proceed to consider the legal right of the defendants to recover damages under their counter-claim, which is in the nature of a cross-action. They aver that before they employed the plaintiff he was fully advised of the amount of funds which they had on hand and could reasonably anticipate for the purpose of erecting the building; and also of the offers which had been made by Mr. Richardson to undertake the construction, and plaintiff told them that he could probaly save them $500 on such offers. That this representation was reasonably relied on, and constituted a material inducement to the contract of employment, and it was false and fraudulent, and all the funds on hand were expended by plaintiff before all the foundation walls of the edifice had reached the water-table, and before a large part of the dressed stones, mentioned in the specifications, had been finished. When representations are made by one party to a contract, which are material, and may be reasonably relied upon by the other party, and such representations are false and fraudulent, and cause loss and injury, the party thus deceived is entitled to recover damages for the loss and injury sustained. You have heard the evidence upon this subject, and if it supports the allegation you should return a verdict for the defendants, assessing the damages in accordance with the loss and injury sustained, as shown by the evidence.

The defendants further insist that the plaintiff, before his employment, assured them that he was fully competent in knowledge, experience, and practical skill to construct the building according to the plans and specifications of the architect; and that, without their consent or approval, he willfully or ignorantly made material departures from such plans and specifications, which made the foundation walls insecure, and caused a much larger expenditure in construction than was contemplated by the architect; that the plans and specifications required that the walls should be bound together by bond-stones placed at certain distances from each other, and passing entirely through the wall, and that the walls should be built with uncoursed rubble-stones laid in horizontal lines and vertical joints; that the plaintiff used no such bond-stones, and the outside of the wall was built of ashlar stones of uniform thickness, cut, and dressed smoothly in bed and joints, and laid in continuous courses; and that the walls were rendered less secure, and the cost of material

and labor was far more expensive, than contemplated in the specifications. You have heard the statements and explanations of the plaintiff. Several intelligent and experienced builders and artisans have, in their testimony, explained the terms of art used in the plans and specifications, and, after a careful examination of the work, they have given you their opinion upon the matters in controversy. Although there is some conflict in the testimony, I hope you may be able to understand the subject, and correctly decide the questions of fact involved. If you find that the plaintiff departed from the plans and specifications without the consent or approval of the defendants, and such departure rendered the foundation walls insecure, and caused greater expense in the work than was contemplated by the architect, then the defendants are entitled to such damages as the evidence shows that they sustained by reason of defective work and increased expenditures.

The pleadings and trial in this case have been conducted in accordance with the mode of procedure provided in the Code system of this state, and there are substantially cross-actions between the parties. If you find that one party alone is entitled to recover, you will so render your verdict; but if you should think that the plaintiff has sustained the allegations of his complaint, and the defendants have proved their counter-claim, then you will assess the amount to which each party may be entitled, and deduct the less sum from the greater, and render your verdict for the party in whose favor the balance may appear.

MISSOURI RIVER, F. S. & G. R. CO. *v.* UNITED STATES.

(*Circuit Court, W. D. Missouri, W. D.* January, 1884.)

1. INCOME TAX — CORPORATIONS — PERIOD FROM AUGUST 1, 1870, TO JANUARY 1, 1871.
   The case of *Blake* v. *Nat. Bank*, 23 Wall. 307, 320, followed, which held that corporations were not exonerated from the payment of income tax during the last five months of the year 1870.
2. ACTION TO RECOVER TAXES—DEDUCTION OF OVERPAID AMOUNTS.
   In a suit by the United States for the recovery of taxes, the defendant is entitled to a deduction of any amount admitted by the plaintiff to have been previously overpaid, even though there is no plea of offset

Error to the District Court.

The United States brought suit in the court below to recover of the Missouri River, Fort Scott & Gulf Railroad Company the sum of $19,474.93, claimed as due for taxes, under the revenue laws, as income tax upon the earnings of said company for the year 1870. The case was heard by the court without a jury, upon an agreed

statement of facts, from which it appears that the gross receipts of said company for the 12 months ending December 31, 1870, were—

	$1,199,220 58
That the expenses for the same period were -	707,222 18
Leaving net earnings, - - -	$491,998 40

It also appeared that said company had overpaid the taxes due on gross receipts for that year the sum of $209.50, but that it had paid no tax for that year upon the undivided net earnings during said year. The court found for the plaintiff for the whole amount claimed, and rendered judgment accordingly. The said railroad company, defendant below, brings the case here and assigns errors, as stated in the opinion.

Wallace Pratt, for plaintiff in error.

Wm. Warner, U. S. Atty., for defendant in error.

McCRARY, J. The errors assigned are (1) that the district court erred in finding the sum of $5,124.98 due from the railroad company to the United States for taxes on net earnings from August 1 to December 31, 1870; (2) that the district court erred in not deducting from the amount it found due the sum of $209.50, overpayment by the railroad company upon the taxes upon its gross receipts for the year 1870.

As to the first assignment, it presents a question which was settled by the supreme court in *Blake* v. *Nat. Banks*, 23 Wall. 307, 320. In that case, as here, it was insisted that, by oversight or otherwise, congress omitted to impose an income tax upon corporations from August 1, 1870, till January 1, 1871; that there was a hiatus of five months, so far as corporations were concerned, while as to individuals the tax was imposed for the entire year. This contention is expressly overruled by the case cited, and requires no discussion here.

As to the second error assigned, I think it ought to be sustained. The government agreed upon a statement of facts which became the only evidence in the case. That statement shows upon its face an overpayment to the government by the company upon one item of $209.50. True, the government does not expressly agree to credit this sum upon the remaining claim against the company, but it does, in effect, agree that the court shall determine from the facts stated what sum, if any, is due. It is not a question as to the force and effect of a certified statement of account under the act of congress on the subject. The question is, what judgment is the United States entitled to upon the facts admitted? And the answer must be that the United States is entitled to the amount of tax due, less whatever sum has been paid. Nor is it necessary that the company should plead an offset. The government is bound to prove the amount due, and if in making proof it shows affirmatively that it has received into its treasury a partial payment, the court will take that fact into account.

The judgment is reversed, and remanded to the district court with direction to render judgment for the United States for the sum heretofore found due, less the sum of $209.50 overpaid, as above stated, and interest thereon.

SENSENDERFER *v.* PACIFIC MUT. LIFE INS. CO.

(*Circuit Court, W. D. Missouri, E. D.* November Term, 1882.)

LIFE INSURANCE—POLICY TAKEN OUT FOR THE BENEFIT OF A CREDITOR—PROOF OF DEATH—NATURE OF EVIDENCE.

Absence of a person alone does not raise a presumption of his death; but such absence, in connection with surrounding circumstances, such as the failure by his family and friends to learn of his whereabouts, his character, and business relations, together with the fact that he was last known to be seen near the place where a murder is supposed to have been committed, and the reputation in his family and with his friends that he is dead, creates a very strong presumption of death, the law being satisfied with less than certainty, yet requiring a preponderance of proof. On the other hand, evidence to overcome the presumption of death, that the party supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator, or visionary, in his business or trades, is all proper evidence to be considered by the jury in establishing the fact.

At Law.

S. P. Sparks and *L. C. Krauthoff*, for plaintiff.

William McNeall Clough, for defendant.

KREKEL, J., (*charging jury.*) The plaintiff, William Sensenderfer, sues the Pacific Mutual Insurance Company on a policy of insurance issued by the Alliance Mutual Life Insurance Society to said Sensenderfer on the life of John La Force. It is claimed by plaintiff, Sensenderfer, that the Pacific Mutual Life Insurance Company is liable to him, because it has assumed to become responsible for the company which issued the policy, under a contract between the Alliance Mutual and the Pacific Mutual, read in evidence, and you are instructed that if the policy issued by the Alliance Mutual, and the contract between it and the Pacific Mutual, are found to be true and genuine, the Pacific Mutual is liable for the policies of the Alliance Mutual under the conditions and limitations hereinafter stated. La Force had a right to insure his life for the benefit of a creditor; and if you are satisfied from the testimony that La Force was indebted to the plaintiff, Sensenderfer, at the time the policy was issued, Sensenderfer has a right to recover thereon under the conditions hereinafter stated. The plaintiff, Sensenderfer, under the provisions of the policy, was bound to make satisfactory proof of the death of La Force, the insured, and it is this which constitutes the real issue in the case, the defendant company claiming that the proof of death is not satisfactory. This proof—the proof of the death of La Force—the plaintiff,

Sensenderfer, is bound to make, and he cannot recover on the policy sued on unless he satisfies you by a preponderance of evidence that La Force is dead, and that he died prior to the first day of December, 1877. The policy sued on requires the annual premium to be paid in advance,—and the proof shows that the said premiums have been paid up to the first of December, 1877,—so that if La Force died after that day, the policy had by its terms been forfeited, and no recovery could be had therein. If La Force is still living, or if the plaintiff, Sensenderfer, has not satisfied you by a preponderance of evidence that he is dead, and that he died prior to the first of December, 1877, the plaintiff cannot recover, and your verdict should be for the defendant. As already stated, the plaintiff, Sensenderfer, has to prove to your satisfaction that La Force is dead, and that he died prior to the first day of December, 1877. By proof to your satisfaction is meant that when you come to weigh and balance the evidence, as to the probability of La Force having been alive or dead before the first day of December, 1877, your mind shall arrive at the conclusion of his death; the law is satisfied with less than a certainty, yet requires a preponderance of proof establishing the fact of his death.

There are two theories regarding the life or death of La Force suggested by the testimony and in argument: The first, the theory of plaintiff, is that La Force is dead, as shown by reason of his continued absence; the failure to learn of his whereabouts; the attraction of his family and his not returning to it; his business relations; La Force's character and standing; and his being at or near the place where a murder is supposed to have been committed about the time of his (La Force's) disappearance. Each of these suggestions should be carefully examined by you, under the evidence and the allusions to them by me, and are intended to guide you in their consideration. Absence alone cannot establish the death of La Force, for the law presumes that an individual shown to have been alive and in health, at the time of his disappearance, continues to live, following in that particular the presumptions acted on in the daily affairs of life. While the death of La Force is not to be presumed from absence alone, it is yet a circumstance which should be taken into consideration, with other evidence in the case, and the conclusion of life or death arrived at from the whole facts and circumstances, including his continued absence. The length of absence is an important element in estimating the weight of this evidence, which increases or diminishes in importance when received in connection with the efforts made to ascertain his whereabouts or death.

There is evidence before you as to the family and social relation of La Force, which is not to be overlooked. There is also testimony as to La Force being in a neighborhood when a murder is supposed to have been committed. The testimony bearing thereon, and the disappearance of La Force about the same time, is to be carefully considered by you so far as it bears upon the question of La

Force being the murdered man, if a murder occurred. If, from the testimony in the case, you shall come to the conclusion that La Force was exposed to any extraordinary danger, it should have due weight in arriving at the fact of his death. The reputation in the family, of the death of one of its members, is proper evidence for you to consider, but not the *opinion* of any one. You have thus an outline of the evidence which the plaintiff claims establishes the fact of the death of La Force,—that is, that the probabilities of his death are greater than that he is living. If you shall come to this conclusion, your verdict should be for the plaintiff.

To weaken or destroy any presumption tending to establish the death of La Force, the defendant has introduced testimony and presents arguments, such as that La Force's financial condition may have induced him to abscond. This is proper testimony for you to consider. In this particular the disposition of La Force as a speculator on a larger or smaller scale, whether visionary or otherwise, in his trades, his being embarrassed, or in good financial circumstances, come in for consideration, and should receive such at your hands. Whatever bearing the testimony or the circumstances of the case present, calculated to weaken or destroy the probabilities of the death of La Force, introduced by the defendant, should be carefully considered by you in connection with the testimony introduced by the plaintiff in support of the conclusion of his death. If, in thus weighing the testimony and circumstances of the case for and against the probabilities of La Force's death, you shall come to the conclusion of the death of La Force, prior to the first of December, 1877, you should find the issues for the plaintiff; otherwise for the defendant. In case you find the issues for the plaintiff, you will allow him the amount stipulated in the policy, together with interest at 6 per cent. from the date of beginning this suit. If you find the issues for the defendant, you will so state in your verdict.

KELLOG and others *v.* RICHARDSON.

(*Circuit Court W. D. Missouri, E. D.* April Term, 1883.)

1. ATTACHMENT—WHEN CREDITOR MAY RESORT TO—UNDER THE MISSOURI STATUTES—ASSIGNMENT LAW OF MISSOURI.
   Under the Missouri statutes a creditor may obtain an attachment against the property of his debtor on the affidavit that the debtor has conveyed and assigned or disposed of his property and effects, so as to hinder and delay his creditors, or is about to further fraudulently convey, assign, and dispose of the same with such intent. In order to maintain such an attachment it is not necessary to prove the act of the debtor to be fraudulent in fact; it is fraudulent in law if it hinders and delays creditors in the collection of their debts.
2. ASSIGNMENT UNDER LAW OF MISSOURI.
   A debtor, under the laws of Missouri, may prefer certain creditors to others, by mortgage or deed of trust in part or all of his property, but he cannot make

such a preference in an instrument or instruments by which he disposes of the *whole* of his property at one and the same time. Such an act would be a virtual declaration of insolvency and would bring the debtor under the assignment law, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Neither can a debtor in failing circumstances, and unable to pay all his debts, convey his property in trust, and reserve to himself any benefit.

At Law.

John A. Gilliam and *C. W. Thrasher*, for plaintiffs.

Goode & Cravens, for defendant.

KREKEL, J., (*charging jury.*) Aside from the ordinary mode of collecting debts by suit and summons, the laws of Missouri in certain cases provide that a creditor may attach the property of his debtor, and thus secure the collection of his debt. There are 14 different causes mentioned in the Missouri statute, for which an attachment may issue. Under two of them,—the seventh and ninth, —the plaintiffs in this case have sued out their attachment; they have made affidavit as required in the provision of the law; mentioned that they had good reasons to believe, and did believe that defendant, Richardson, had fraudulently conveyed and assigned and disposed of his property and effects so as to hinder and delay his creditors; and that he is about to further fraudulently convey, assign, and dispose of his property and effects so as to hinder and delay his creditors. After the making of the affidavit and filing their bond, the plaintiffs were entitled to and obtained their attachment, under which they seized the property of the defendant, Richardson. The law provides that the facts sworn to by the plaintiffs to obtain their attachment, may be denied by the defendant under oath, and when so denied, the plaintiffs are bound to prove the existence of the facts alleged by them as ground of the attachment. This is what has been done by Richardson; that is, he has denied, under oath, that the facts set out in the affidavit of plaintiffs are true, virtually saying that he did not fraudulently convey, assign, or dispose of his property, nor was he about doing so, for the purpose of hindering and delaying his creditors in the collection of their debts. It is not denied that Richardson conveyed his property, but he says he did not do it fraudulently and for the purpose of hindering and delaying creditors in the collection of their debts. By hindering and delaying creditors in the collection of their debts is meant the doing of an illegal act which causes or presents an obstacle in the collection of the debt by a creditor. The act done by the debtor may not defraud the creditor in fact, and yet be fraudulent in law, because it hinders and delays creditors in the collection of their debts. Thus, for instance, a debtor may have property more than sufficient to pay all his debts, yet if he puts his property out of his hands so that it cannot be reached by the ordinary process in law, it is hindering and delaying in the eyes of the law, and a legal fraud. Such hindering and de-

laying of creditors in the collection of their debts, the law denounces and treats as a fraud.

Having thus given you the law regarding fraudulent conveyances for the purpose of hindering and delaying creditors, I proceed to define the right which a failing debtor has to deal with his property. Under the laws of Missouri a debtor has a right to select among his creditors, if he cannot pay all of them, whom he will pay or secure, in other words, whom he will prefer, but he cannot make such a preference in an instrument or instruments by which he disposes of the whole of his property at one and the same time. Such instruments fall within the provisions of the assignment law of Missouri, which provides that "every voluntary assignment of lands, tenement, goods, chattels, effects, and credits made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors in proportion to their respective claims." Under this provision of law a merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing. The law further is that no debtor in failing circumstances, and unable to pay all his debts, can convey his property in trust and reserve to himself any benefit. You are therefore instructed that if you find from the testimony that Richardson, in the instrument in evidence called a mortgage, conveyed more property than was necessary to pay the claims secured and provided, as the conveyance in this case does, for the delivery back of the balance of property not needed to pay the preferred creditors, to himself, such a reservation in the deed makes it void as to creditors not secured thereby, and hinders and delays them in the collection of their debts. You will remember the evidence as to the amount of claims secured, about $4,500, and the value of the property conveyed by the mortgage, estimated at $9,000. Richardson could not legally convey his stock of merchandise to certain preferred creditors, have them sell the property, pay themselves, and return the balance of the proceeds or property to him. Such conveyance and holding under it by the preferred creditors would amount in this case to a withdrawal of the property conveyed from the reach of creditors, and constitute a fraudulent conveyance for the purpose of hindering and delaying creditors, and fully justifying you in finding the issue for the plaintiffs, and you are instructed to do so if the facts are found by you as stated.

The time during which the sale by the preferred creditors is to be made is another matter to which your attention is specially directed.

The law is that even though the conveyance by which the transfer is made be otherwise valid, yet, if by virtue of its provisions the dealing with the property is such as necessarily delays creditors in reaching any remainder or surplus by creditors not secured, such a delay is a hindering and delaying of creditors, and fraudulent in law. Creditors are entitled to their pay when due. A reasonable time to dispose of the property conveyed may be taken, but it must not be with a view of earning profits and making gains. You are, therefore, instructed that if you shall find from the testimony that the property conveyed by Richardson to the preferred creditors could be disposed of in less time than provided for in the deed of trust, and without serious loss, in such case it hinders or delays creditors. It is no answer to this to say that creditors may resort to extraordinary remedies to reach the property conveyed and not needed to pay preferred creditors. The debtor has no right to compel creditors to resort to any of the extraordinary remedies alluded to in the argument of counsel. The conveyance in this case provides that the preferred creditors may sell the property conveyed at retail for two months and more, then advertise twenty days, and sell at public auction. It also provides that the creditors may hire clerks, pay store rents, and report monthly all their doings for Richardson. But for the fact that the conveyance does not set out the value of the property conveyed, the deed would be declared void as a question of law. If the property conveyed by Richardson to the preferred creditors was less in value than necessary to pay them, it might be a question as to whether such a condition as the one made for the sale, of the property contained in the conveyance in evidence would not be valid. In this case Richardson made a general assignment afterwards, thereby showing that in his view at least, there was an overplus. On this branch of the case you are instructed that if you find the value of the property so conveyed by Richardson to the preferred creditors greater than the debts secured, and further find that Richardson intended that the property should be disposed of at retail, and that the property not needed to pay preferred creditors should be returned to him, you should find the issue for the plaintiffs.

NEW HAMPSHIRE LAND CO. *v.* TILTON and others.

(*Circuit Court, D. New Hampshire.* January 11, 1884.)

1. FOREIGN CORPORATION—POWER TO HOLD LAND.
   A corporation, even though it does little or no business in the state where it is organized, is not necessarily incapable of holding and dealing in land in another state.
2. DEED—ACKNOWLEDGMENT—AFTER EXPIRATION OF AUTHORITY.
   A deed executed by a commission empowered to convey public land may be lawfully acknowledged by the commissioners after their authority has been revoked.

3. SAME—HOW FAR ACKNOWLEDGMENT IS NECESSARY.
An unacknowledged deed is good against all persons having actual notice of its existence.

4. SAME—UNCERTAINTY ARISING AFTER EXECUTION.
A valid deed does not become void because, by reason of the loss of a plat referred to therein, it has become difficult to define the boundaries.

5. DEED—ESTOPPEL.
The joint proprietors of a tract of land, who have accepted other land in exchange therefor, are estopped to deny the validity of a deed executed by a part of them only, on behalf of all, without power of attorney.

At Law.

W. S. Ladd, A. F. Pike, D. Barnard, C. H. Burns, J. Y. Mugridge, and *Chase & Streeter,* for plaintiffs.

H. Bingham, G. A. Bingham, G. Marston, I. W. Drew, E. Aldrich, A. S. Batchellor, and *D. C. Remich,* for defendants.

LOWELL, J. This case has occupied some weeks in the trial, and has, at the end, been submitted to me, as judge and jury, under the statute. It is a land case of much importance to the parties, and to others having similar actions now pending in the court. Notwithstanding the great mass of documentary evidence, the points in dispute are few and well defined. I will state first my findings of fact:

The plaintiffs are a corporation organized under the general laws of Connecticut, Revision of 1875, two days before the law of that state was modified by the act of 1880, which repealed the act of 1875. The defendants contend that the plaintiff corporation cannot hold lands in New Hampshire, excepting as incidental to any business which they may carry on in Connecticut; and that a foreign corporation is not authorized to deal in lands in New Hampshire as its principal business, or one chief part of its business. I find that there was no evidence that the corporation carries on any business in Connecticut. My ruling of law is given below.

Both parties claim under the state of New Hampshire. The plaintiffs demand nine twenty-fourth undivided parts of the Sargent & Elkins' grant, of about 50,000 acres, made by James Willey, land commissioner, in October, 1831. The tract is bounded by the easterly line of the town of Franconia, and by the same line extended northerly to the south-west corner of the town of Breton Woods, (now called Carroll;) thence by the south line of Carroll to Nash & Sawyer's location; thence by the same to the notch of the White mountains; thence southerly by Hart's location to land granted to Jasper Elkins and others in 1830; thence westerly to the first-mentioned bounds. The tenants claim 36 lots of 100 acres each, to which they trace a clear paper title from the state, beginning in 1796, provided the deeds from the state were valid and effectual.

In 1796 the legislature appointed Edwards Bucknam, John McDuffie, and Andrew McMillan, a committee to alter and repair the old road leading from Conway to the Upper Coos, and to make a new road from that road to Littleton, with power to sell, in lots of 100 acres each, lands

of the state through which this new road should pass. Lands were sold by the committee at four different public "vendues," and the tenants claim under the fourth sale. The description of the lands in the deeds of the second, third, and fourth sales is by ranges and lots on a plan of Nathaniel Snow, made by order of the committee. I find that two range lines were adopted, not precisely parallel, so that when the lots were extended there was a gore of a triangular form which remained ungranted. Nearly all of what is now the town of Bethlehem was granted by this committee. The deeds are all alike, and are carefully and well drawn, and the objections which the plaintiffs take to them apply to all. They may be spoken of, for convenience, as one deed. The objections are that one of the committee acknowledged the deed after the law appointing the commission was repealed, and that the deed is void for uncertainty in its description of the land. The plan of Snow, by which all these lots are described, cannot be found at the office of the secretary of state, if it ever was returned there, and cannot now be produced. Several copies of plans by Snow have been introduced in evidence, coming from the families of persons interested in the subject, but they differ from each other in some particulars, and no testimony shows clearly how, and when, and from what, they were severally copied. I find, however, as a fact that the copy called the "Cilley plan" contains internal evidence of having been taken from an older plan than those produced by the plaintiffs, and that it is sufficiently proved to be considered a copy of the original for the purposes of this case. I find that there was an original Snow plan by which the sales were made, and that it was made from actual knowledge of the base lines, but not from actual knowledge of the lines of the lots. I further find that the base lines being given, the lots can now be laid out upon the ground. When so laid out, the easterly part or corner will overlap the earlier grant to Nash & Sawyer; but it is not proved to my satisfaction that the committee or their surveyor knew this, but the contrary supposition is the more probable.

The grant by Willey in 1831 was made to Jacob Sargent, Jr., David Elkins, Enoch Flanders, Samuel Alexander, and John A. Prescott, and they at once sold an undivided equal interest to Joseph Robbins, so that the proprietors held by undivided sixth parts. In May, 1832, it was discovered that the road committee had conveyed away, or was supposed to have conveyed away, in 1796, all, or nearly all, of the upper portion (about one-half) of the Sargent & Elkins' grant of 1831; and thereupon an arrangement was made by which Willey granted the six proprietors another tract of about equal extent, and allowed them $50 in money, and they made a deed of quitclaim, reconveying to him for the state about 23,000 acres, by metes and bounds, in which description is embraced the lots now in controversy, excepting lot 32, in range 18, and parts of lots 30 and 32, in range 17. This deed of reconveyance in its premises, or granting

part, after the descriptien, contained these words: "Excepting and reserving all the right and title we should have had by James Willey's deed to us, dated October 27, 1831, of the above-described tract of land, provided all or any part of [the] land mentioned in the above-named bounds has not been lawfully disposed of by the authority of the state of New Hampshire previous to the deed given to us as above mentioned." This reservation is referred to again in the *habendum* and the clause of warranty. This deed, which purported to be made by all six of the proprietors, was executed by two of them, for themselves and the others. It is proved that the arrangement was made with all the proprietors, and that they all accepted and dealt with the land granted in exchange. The proprietors proceeded to divide the remaining land, and to deal with it in severalty, and no claim was made by or under them to this upper or regranted land for some 40 years or more afterwards, when the plaintiffs' predecessors in title bought from the heirs and devisees of some of the proprietors the nine twenty-fourth parts now demanded. As to the lot, and parts of two others, which are not included in the description of the reconveyance, I find that the plaintiffs never acquired a title thereto, because they had been divided and conveyed in severalty to third persons by the proprietors before the plaintiffs' predecessors purchased their undivided interest.

I now proceed to the points of law:

1. I rule, for the purposes of this case, that the plaintiff corporation has authority to hold and deal in lands in New Hampshire.

2. I rule that the deeds from the road committee are not rendered invalid by the fact that one of the committee acknowledged them after his commission had expired. A deed in New Hampshire is good, without acknowledgment, against purchasers with notice, *Montgomery* v. *Dorion*, 6 N. H. 250; *Wark* v. *Willard*, 13 N. H. 389; and by their deed of reconveyance, the proprietors of Sargent & Elkins' grant acknowledged notice of all preceding deeds. Independently of notice, the formal act of acknowledgment could be done after the commission had expired. See *Lemington* v. *Stevens*, 48 Vt. 38, and for cases somewhat analogous; *Bishop* v. *Cone*, 3 N. H. 513; *Gibson* v. *Bailey*, 9 N. H. 168; *Welsh* v. *Joy*, 13 Pick. 477; *Fogg* v. *Willcutt*, 1 Cush. 300.

3. The burden is on the plaintiffs to prove what lands are excepted out of the reconveyance; and they have failed to show this.

4. If the base lines of the plan were known by survey when the plan was made, and can now be pointed out, both of which facts I find to be established, the deeds of the committee are not void for uncertainty. However difficult it may now be, in the confusion of the various copies of the plan, to fix the exact boundaries of particular lots, the deed of reconveyance holds good, if the lands had been once lawfully disposed of by the state. The loss of the plan cannot make deeds void which once were good. It may be found to-morrow. The deeds have been assumed and acted on as good for more than 80 years;

and, whether a true copy of the plan can now be proved or not, the plaintiffs have no title if these deeds were good when made. Immense tracts of wild land have been sold by ranges and lots upon a plan; and all the authorities agree that if the lots can be laid out upon the ground in substantial accordance with the plan, the grants are effectual. *Corbett* v. *Norcross*, 35 N. H. 99; *Browne* v. *Arbunkle*, 1 Wash. C. C. 484; *Jones* v. *Johnston*, 18 How. 150, 154; *Wells* v. *Iron Co.* 47 N. H. 235, 259.

5. The plaintiffs contend, and I find it to be true, that certain lots of the fourth sale, if the Cilley plan be taken as a copy of the Snow plan, are laid out upon land which had before been granted to Nash & Sawyer. The argument deduced from this fact against the Cilley copy is legitimate, because the committee cannot be supposed to have intended to sell land which the state did not own. I have given the argument due weight in this connection; but finding, as I do, by the preponderance of all the evidence, that the Cilley copy is substantially accurate after all arguments for and against it are considered, it merely results that the committee did undertake to grant land which turns out to be part of Nash & Sawyer's location. This mistake cannot vitiate the title to all the rest of the town of Bethlehem; but, either the persons who took those lots get nothing, or all the lots abate in proportion. It does not matter in this case which of these alternatives is the true one.

6. The deed of reconveyance is to be considered the act of all six of the proprietors, though no power of attorney by which two of them executed the deed for the others is produced, because, by accepting the lands granted in exchange, they were estopped to deny that they authorized the execution of the deed.

My verdict, therefore, is (1) that the plaintiff corporation has not proved a title to the 36 lots in dispute; (2) that the defendants have proved a title to the same.

Sixty days are given the parties to file exceptions. If the plaintiffs except, the defendants have the right to except to my ruling as to the authority of the plaintiffs to hold lands in New Hampshire.

CRŒSUS MINING, MILLING & SMELTING CO. *v.* COLORADO LAND & MINERAL CO.[1]

(*Circuit Court, D. Colorado.* January, 1884.)

1. LOCATION OF MINING CLAIM—END STAKES.
   The statute of Colorado (Rev. St. 630) affords no support to one who, in locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set.
2. SAME—CHANGE OF LINES.
   The locator of a mining claim cannot, after the location, change the lines of his claim so as to take in other ground, when such change will interfere with the previously-accrued rights of others.
3. ACTION FOR REALTY—DEFENSE.
   A defendant in an action for the possession of real estate, when he claims only a part of the tract sued for, must show what part he claims.
4. ALIEN—RIGHT TO LOCATE MINING CLAIM.
   Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands.
5. SAME—STATE COURT MAY NATURALIZE.
   The necessary oath declaratory of intention by an alien to become a citizen of the United States may be administered in the courts of record of the state. One who has so declared his intention to become a citizen may make a valid location of a mining claim.

At Law.

L. B. Wheat, for plaintiff.

W. P. Thompson and *T. M. Patterson,* for defendant.

HALLETT, J. This controversy arises out of conflicting locations of mining claims on the public mineral lands. At the trial plaintiff had a verdict, which defendant now moves to set aside, on various grounds. The errors alleged with reference to defendant's title will first be mentioned.

Defendant's title: May 12, 1881, D. E. Huyck and C. M. Collins located the Maximus lode, in Pollock mining district, Summit county, Colorado. July 8th, in the same year, they filed a certificate of location. The lode was discovered on the eastern or south-eastern slope of a very steep mountain, and about 160 feet below the crest of the mountain. The locators intended to lay the claim across the mountain, so that one-half or more should be on the north-western slope. At that point the mountain is almost impassable at any season of the year, and on the eighth of July, when the survey was made, it was thought to be wholly so. What was done towards setting stakes at the north-western end of the claim is described by the surveyor by whom the work was done, as follows:

"We then went back to the discovery cut and chained up the mountain some distance, when we came to a perpendicular precipice, or cliff of solid

[1] From the Colorado Law Reporter.

rock, over or around which we could not climb, owing to its precipitous nature and the fact that the crevices in the rock, and places where a foothold might have been had by one active enough to climb up the cliff, were filled with snow and ice, and it was both impracticable and dangerous to life and limb to get at the points where the stakes should be set. The side posts or stakes were set on the boundary lines of the survey somewhat short of or below the middle of the claim, and the end posts were placed further on, in conspicuous places, as near the side boundary lines as we could find places to put them. With my instrument I took the direction of the proper places of the upper end and side posts, and calculated the distances between the places where we did set them and their proper places, and marked its distance and direction from its proper place on each stake. The two middle side stakes and the two end stakes were set in such a way as to be evident and most likely to attract the attention of any one going up the gulch, and were within plain view of any one coming to the edge of the precipice above and looking down."

At the time of this survey there was a practicable trail at no great distance south, and a wagon road some miles north, upon either of which it would have been possible to go to the other side of the mountain for the purpose of setting the north-western end stakes. And later in the season it was possible to pass over the mountain at the place where the Maximus claim was located, or very near that place. The same surveyor surveyed another location, called the Bernadotte, which covered a part of the Maximus territory, for the same parties, on the thirtieth day of August in the same year. With reference to the matter of getting over the mountain at that time, he testified as follows:

"This survey was made much later in the season than the other, and the difficulties of snow and ice which we had encountered in surveying the Maximus did not then exist, and we were able to climb up to the top of the ridge and set the end stakes in their proper places."

Because of the difficulty or impossibility of getting over the mountain on the line of the Maximus claim on the eighth of July, when the survey was made, no stakes were set at the north-western end of the claim. In lieu thereof, witness stakes were placed on the south-eastern slope of the mountain, as described by the surveyor in his testimony quoted above. The north-western end of the claim was not inaccessible from that side of the mountain. The stakes were properly set at that end of the claim in August, 1882, and it is not claimed that the point was then or at any time inaccessible, except as to the matter of getting over the mountain in a direct line from the discovery cut. Upon these facts a question was presented at the trial whether the Maximus claim was properly marked on the surface at the north-western end in July, 1881, or at any time before August, 1882, when a survey for patent was made, and stakes were properly set. Defendant relies on a statute of the state, (Rev. St. 630,) in these words:

"Where in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and

valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

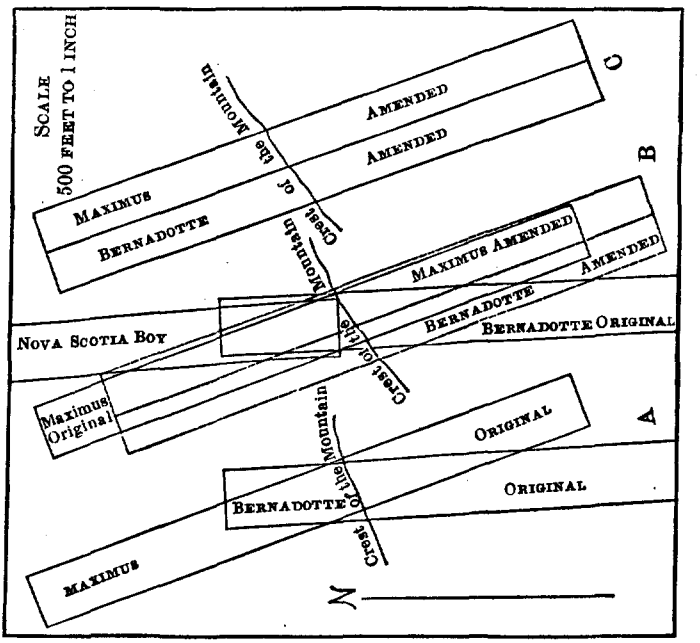
But the act affords no support to the defendant's position. It relates to the matter of setting stakes where the point or place where they should be set is inaccessible, and not to such circumstances as were shown in the evidence. The locators of the Maximus claim could have reached the north-western end of the claim, at the date of the location, by routes which, although circuitous, were entirely practicable; and later in the season they could have passed over the mountain at the very place where the claim is located. To hold such marking of boundaries to be sufficient would be to disregard the act of congress (section 2324) and of the state (Rev. St. 630) which manifestly require something more. Upon full argument and mature consideration, the ruling at the trial that the Maximus claim cannot have effect on the north-western side of the mountain before the date of the patent survey in August, 1882, when the stakes were properly set, seems to be correct. Defendant also asserts title to some part of the ground in dispute under another location called the Bernadotte, made in the latter part of August, 1881. No question was made as to the manner of setting the stakes on this location, but there was a controversy as to the situation of the discovery cut with reference to the side lines of the claim, the existence of a lode therein, and perhaps some other matters. During the trial but little attention was bestowed on that location, but at the close counsel for defendant proposed to discuss its validity before the jury and to ask a verdict for some part of the ground in dispute on that title, and he now complains that he was not permitted to do so.

The ruling of the court in respect to that matter was founded on a change in the location at the time of the survey for a patent in August, 1882, which as to the ground in dispute, was supposed to defeat the earlier location in 1881. In the first location of the Maximus and Bernadotte, in the year 1881, they were relatively to each other and the crest of the mountain in the position shown in diagram, A.

In the survey for patent in August, 1882, the Maximus was carried something like 190 feet in a south-easterly direction, so as to give it greater length on the south-eastern slope of the mountain, and less on the north-western slope; and the general direction of the claim was changed so as to carry it over on plaintiff's claim a distance of 30 feet more than was previously covered by it. The Bernadotte claim was changed to the north-easterly side of the Maximus and parallel with the latter, so as to make them uniform in length and direction. The relative position of these claims thus changed is shown in diagram, C. And the position of the claims as originally located and in the survey for patent, together with plaintiff's claim, the Nova Scotia Boy, is shown in diagram, B.

The most that can be demanded on behalf of the Bernadotte claim

is, that the territory embraced in the original and amended locations of that claim, and which is also within the lines of plaintiff's location, shall be regarded as subject to and held by defendant under the first location certificate. Where rights have accrued to others in respect to some part of the territory covered by the location, and the change of lines is radical and complete, as in this instance, that proposition may be open to discussion. But conceding it to be indisputable, there was no evidence that any part of the ground in dispute was in that situation. It is true that in some of the plats used by the witnesses, a small triangular piece of ground appeared to be covered by the original and amended locations of the Bernadotte, and in



plaintiff's location called the Nova Scotia Boy, No. 2. It is so represented in the diagram last above mentioned. But no description of the place was given, and the jury would not have been able to define the tract if required to do so. A party must always show the nature and extent of his demand, and where, as in this case, it is real estate and a part of a larger tract claimed, he must show what part. Failing in that respect, defendant was not entitled to go to the jury on the first location of the Bernadotte, nor on the first location of the Maximus, for want of boundary stakes, as already explained. The jury was correctly instructed that the Maximus and Bernadotte locations could have no earlier date than that of the survey for patent in August, 1882, and the question to be determined was whether the plan-

tiff's title to the Nova Scotia Boy, No. 2, had then accrued by the previous performance of all acts necessary to a valid location.

Plaintiff's title: The first work on the Nova Scotia Boy, No. 2, was done in 1879 by Benjamin T. Vaughn, the locator of the claim, who was an alien. A discovery shaft or cut, as required by the statute, was not made in that year, however, and it became a question throughout the trial whether such work was done at any time before suit. Plaintiff offered evidence tending to prove that the work was completed in 1880, and annual work was done on the claim in the years 1881 and 1882. This was denied by witnesses for defendant, and the matter was contested before the jury in the usual way. As already stated, Vaughn, who located the claim, was an alien, and it was shown that he declared his intention to become a citizen in a district court of the state, May 30, 1881. Defendant objected that he was not qualified to make a location in the year 1880, when the claim was said to have been located; nor was he so qualified at any time before the discovery of the Maximus lode by defendant's grantors on the twelfth day of May, 1881. As to the declaration of Vaughn of his intention to become a citizen, a court of the state was not competent to receive it. Defendant maintained that authority to naturalize an alien could not be exercised by any state tribunal, and it resides only in the federal courts. To this plaintiff replied, that any one, citizen or alien, may make a location, and the competency of the latter cannot be questioned except by the government. A location by an alien who has not declared his intention to become a citizen shall be maintained until the government avoids it. These propositions, renewed with some energy on the motion for new trial, do not demand much consideration. If Vaughn was not qualified to make a location before May 30, 1881, his declaration of that date made him so. And as defendant's right, whatever it may be, to the ground in controversy accrued long after that time, Vaughn's prior incompetency cannot avail. The only doubt touching that matter is whether, on declaring his intention to become a citizen, Vaughn could have advantage of what he had previously done towards locating the claim, and as to that, assuming that no other claim to the ground had intervened, no reason is perceived for denying his right to the fruits of his labor. Indeed, it may be contended that he should hold, from the first act done, his qualification to locate a claim, beginning with his declared purpose to enjoy the bounty of the government. But we are not concerned with that inquiry in this case. It is enough to say that Vaughn became qualified under the act of congress, in May 1881, and that what he had then done towards locating the claim should accrue to him as of that date.

The authority of courts of record in the several states, under the act of congress, (Rev. St. 2165,) to confer the right of citizenship, has been accepted in practice and recognized without discussion by courts since the act was passed. *Campbell* v. *Gordon*, 6 Cranch, 176; *Stark*

v. *Chesapeake Ins. Co.* 7 Cranch, 420; *Lanz* v. *Randall*, 4 Dill. 425. A discussion of the question in a court of original jurisdiction at this time would seem to be unnecessary. If defendant wishes to deny the power of congress to confer such jurisdiction on courts of states, the supreme court is a more appropriate forum for the discussion. The position of the plaintiff, that an alien who has not declared his intention to become a citizen may make a valid location of a mining claim, finds no support in the statute. Rev. St. 2319. But this also was an immaterial question at the trial, since Vaughn was held to be qualified after his declaration of intention to become a citizen in May, 1881, and the jury supported his title as having become full and complete prior to August, 1882.

The motion will be overruled.

COLLINS, Adm'r, *v.* DAVIDSON.

(Circuit Court, D. Minnesota. December 7, 1883.)

1. CONTRIBUTORY NEGLIGENCE.
   A person cannot recover for injuries sustained by reason of the negligence of another, when he has himself been guilty of negligence, but for which the mischance would not have occurrred.
2. SAME—SUDDEN FRIGHT.
   Imprudent conduct growing out of sudden fright is chargeable to the person whose negligence gave rise to the alarm.
3. ACTION FOR INJURIES CAUSING DEATH—MEASURE OF DAMAGES.
   Damages, in an action by personal representatives for injuries causing death, are measured by the pecuniary loss, including the deprivation of future pecuniary advantage occasioned thereby to those who take the benefit of the judgment

At Law.

E. M. Card, for plaintiff.

C. K. Davis and *Williams & Goodenow*, for defendants.

MCCRARY, J., (*charging jury.*) This suit is brought by the plaintiff, as administrator of the estate of Frank Collins, deceased, to recover damages for personal injuries causing the death of said Frank Collins, which injuries, as plaintiff alleges, were caused by the negligence of the defendant or his agents. The suit is brought under and by virtue of the provisions of section 2 of chapter 77 of the Statutes of Minnesota, which is as follows:

"When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission by which the death was caused. The damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person."

The deceased, Frank Collins, came to his death by reason of a collision between the steam-boat Centennial and a small boat or skiff of which he was one of the occupants, at or near Lake City, on the Mississippi river, in this state, on the twelfth day of June, 1882. It is admitted that the defendant was at the time of the accident the owner, master, and captain of the said steamer, Centennial, and that at said time and place he and his agents and servants were navigating the said steam-boat. The plaintiff alleges that the collision, and consequent injury and death of the deceased, were caused by the wrongful act of the defendant, his agents and servants, in negligently running the said steam-boat upon the small boat aforesaid. This allegation is denied by the defendant, and this question, to-wit, was the defendant, through his servants and agents, guilty of negligence? is the first question for your consideration.

It was the duty of the defendant, and his agents and servants in charge of said steamer, to exercise ordinary care and prudence to avoid injury to persons in other boats or vessels in the river, and to avoid collision with other boats and vessels. A failure to exercise such care and prudence would be negligence, within the legal definition of the term. Negligence is the want of ordinary care; that is to say, the want of such care as a person of ordinary intelligence and prudence would exercise under the circumstances. If you find from the evidence, and upon due consideration of all the facts and circumstances shown thereby, that the persons in charge of the steamer Centennial were guilty of negligence within the rule as I have stated it, and that such negligence was a cause of the collision which resulted in the death of Frank Collins, then it will be your duty to find for plaintiff, unless you further find that said Frank Collins, or some of those in the small boat with him, were also guilty of negligence which contributed to—that is, had a share in causing—the collision. And in considering this question of contributory negligence you will be governed by the same rule as to what constitutes negligence that I have already given you; that is to say, the deceased, and those in the boat with him, were bound to use ordinary care and prudence in order to avoid the danger of collision, or such care as a person of ordinary intelligence and prudence would have exercised under the same circumstances, and a failure to do so would be negligence; and if it contributed to the injury it would be contributory negligence, and would defeat the plaintiff in the present action. It was the duty of the persons in charge of the steamer to keep a lookout and to avoid collision with the small boat, if by the exercise of ordinary care and diligence it was possible to do so. It was also the duty of Collins and the other persons with him in the small boat to look out for passing steamers and to keep out of the way of such steamers, if by the exercise of ordinary care and diligence they were able to do so. A failure of the persons on the steamer to perform this duty will, if proved, amount to negligence; a failure of the persons in the small

boat to perform this duty will, if proved, amount to contributory negligence. You will see, therefore, that you are to inquire and decide upon the evidence before you, and in the light of these instructions, these questions: (1) Were the servants and agents of the defendant who were in charge of the steamer guilty of negligence, which caused, or was one of the causes of, the collision? (2) If this question is answered in the affirmative, then was the deceased, Frank Collins, or any of the persons in the small boat with him, guilty of negligence which contribute to the collision and injury?

If you decide the first question in the negative, you need not consider the second, because the plaintiff's case must fail if the negligence of the defendant's agents and servants is not established. But if you decide the first question affirmatively, then you must consider the second, because the plaintiff cannot recover if the alleged contributory negligence has been established. In other words, in order to recover, the plaintiff must establish the negligence of defendant or his agents, and you must also find from the evidence that the deceased and those in the small boat with him were free from contributory negligence. By going into the small boat with the other persons on board of it, the deceased subjected himself to the consequences of their negligence, if any, in the control and management of the said boat.

In considering the question of the negligence of the persons in charge of the steamer, you will inquire whether the pilot saw or could have seen the small boat in time to avoid a collision; and if so, whether ordinary care was used to avoid such collision. And in this connection you will consider the question whether the course of the steamer was directly towards the small boat, or so far to one side as to have avoided the danger of collision, if the small boat had not been moved towards the line upon which the steamer was proceeding. In considering the question of contributory negligence, you will inquire, in the light of the evidence, whether, in the effort to lift the anchor by some one on the small boat or by any other means, the small boat was moved towards the line upon which the steamer was advancing, and if so, whether such movement of the small boat was negligence and contributed to the collision; or, in other words, whether, but for such negligent movement, if there was such, the collision would have occurred. In the light of all the evidence, and with special reference to these inquiries, you will determine the material question of fact as to negligence and contributory negligence, upon which your verdict must depend. In considering the evidence, you will bear in mind that the question, what is negligence? depends in some degree upon the circumstances of the particular case under consideration. The degree of care to be exercised depends upon the nature of the duty being performed and the extent of the danger attending the situation. The greater the danger, the greater the care required. A person having control of the machinery by which a steam-boat is propelled and guided, is bound to use such care to avoid collision with other vessels

as ordinary prudence would suggest. And so a person occupying a small boat in or near the usual channel of passing steamers, should use like care and caution. In the case of sudden and unexpected peril, endangering human life and causing necessary excitement, the law makes allowance for the circumstance that there is little time for deliberation, and holds the party accountable only for such care as an ordinarily prudent man would have exercised under these circumstances.

If the defendant was guilty of negligence in running his boat in a direction to bring him into collision with, or dangerously near to, the small boat, and if, by reason of such negligence, the persons in charge of the small boat were suddenly and greatly alarmed, and rendered for the moment incapable of choosing the safest course, then if what they did was the natural result of such fright and alarm, even if not the safest thing to do, it would not amount to contributory negligence. But if the steamer was proceeding in the usual course, and so guided as to avoid the small boat in case it had remained stationary, and so as not to go so near it as to endanger in any way the safety of the small boat, then the defendant was not guilty of negligence. If the pilot of the steamer directed his course so as to be sure of doing no injury to the small boat, he had a right to assume that the small boat would not be moved towards the line of the steamer. You will observe, therefore, that if you find that the persons in the small boat were suddenly alarmed and took measures for their safety when excited, and when incapable, by reason of the alarm and excitement, of deliberating and acting wisely, then you will consider and decide, from the evidence, whether such alarm was caused by the negligence of the persons in charge of the steamer. If it was, it will excuse the persons in the small boat of the charge of contributory negligence, provided they acted as men of ordinary prudence would have done under the circumstances. If the alarm was not the result of the negligence of the persons in charge of the steamer, or if it was a rash apprehension of danger which did not exist, it would not excuse the persons in the small boat for having adopted an unsafe course, if they did so.

If you find from the evidence that the persons in the small boat were not guilty of negligence, within the rule as I have stated, and that the accident was occasioned by the negligence of the persons in charge of the steamer, then you will find for plaintiff; otherwise, you will find for defendant. The burden is upon the plaintiff to show by a preponderance of evidence that the defendant was guilty of negligence. The burden is upon the defendant to show by a preponderance of evidence that the persons in the small boat were guilty of contributory negligence. If you find for plaintiff, you will then come to the question of damages; and in considering that question, if you come to it, you will bear in mind that you cannot find more than $5,000, but you may find that sum or any less sum. The measure of damages in cases of this character is as follows: If you find for

the plaintiff, you will allow him such damages as you deem to be reasonably sufficient to make good to the heirs of the deceased the pecuniary loss to them occasioned by his death, not exceeding the sum of $5,000. In determining this amount, if you come to the question, you may consider any evidence before you tending to show what was the reasonable expectation of pecuniary benefit to said heirs from the continuance of his life. The age of deceased, his pecuniary circumstances, his habits of industry, his accustomed earnings, measure of success in business, and the like, as far as they appear in evidence, are proper to be considered.

MOWAT and others *v.* BROWN and others.

(*Circuit Court, D. Minnesota.* January 10, 1884.)

1. COUNSEL'S FEES—LAW OF ONTARIO.
   In the province of Ontario it is settled, by the case of *McDougal* v. *Campbell*, that a barrister can maintain an action to recover his fees for services rendered as counsel.
2. SAME—BILL OF EXCHANGE—CONSIDERATION.
   Even in those jurisdictions where a counsel cannot collect his fees by process of law, an action will lie upon a bill of exchange or promissory note given in consideration of his services.

Stipulation is filed waiving a jury, and the case is tried by the court. The action is brought upon a bill of exchange accepted by the drawee:

[Stamp.]

"$1,000. TORONTO, April 20, 1880.

"Three months after date pay to the order of ourselves, at the Bank of Commerce, here, one thousand dollars, value received, and charge to the account of MOWAT, MACLENNAN & DOWNEY.

"*To Mess. Brown & Brown, St. Catherines, Ontario.*"

Indorsed across the face:

"Accepted. BROWN & BROWN."

Issue is joined by the answer that the consideration for the bill is barristers' fees, and it is claimed that, by the law of the province of Ontario, in Canada, suit to recover such fees cannot be maintained.

Atwater & Atwater, for plaintiffs.

Welsh & Botkin, for defendants.

NELSON, J. It is admitted that the law of the province of Ontario governs the contract; and this case has been argued upon the single point whether or not, in this province, a counsel, who is also an attorney, can recover his fees for services rendered as counsel in matters in litigation. It appears to have been decided by the court of queen's bench, in that province, contrary to the law of England, that

counsel can sue for fees. HARRISON, C. J., dissenting. See *McDougall* v. *Campbell*, Easter Term, 1877, (U. C. 41 Q. B. 332.) The chief justice vigorously combats the progressive views asserted by the majority, "as tending to lessen the standard of professional rectitude at the bar." I shall accept this decision of the court as settling the case upon the point controverted, and hold that, in the province of Ontaro, a counsel can maintain a suit for his fees, and that the common-law rule is modified. It may be stated here that in England, where seven-eighths of the barristers reside in the city of London, a change in the organization of the legal profession is mooted[1] to unite the functions of the attorney and barrister in one person, which, if adopted, (as is not unlikely,) will extend to a complete revolution of the common-law doctrine.

But there is another reason for giving the plaintiff judgment which is satisfactory to my mind. The suit is upon a bill of exchange accepted by the defendant. The fact that the common-law doctrine prevails in the province of Ontario, should we admit it, cannot be urged to defeat a recovery in this case. There is nothing in the doctrine of an *honorarium*, or a gratuity, which forbids the client, or attorney, who engages counsel, to give, for the services rendered, his note or similar obligation. An action will lie for its non-payment, as the consideration is not illegal. This is a different thing from suing for fees. See *Mooney* v. *Lloyd*, 5 Serg. & R. 412.

Upon full consideration, I think judgment must be rendered for the amount of the bill of exchange, with interest and costs, and it is so ordered.

In re JAY COOKE & Co.[2]

(*District Court, E. D. Pennsylvania.* December 22, 1883.)

BANKRUPTCY—EQUITABLE ASSIGNMENT—SUBROGATION—CONSTRUCTIONS OF STATUTES—ACTS JUNE 22, 1874, (18 ST. AT LARGE, 142,) AUGUST 8, 1882, (ST. 1882, P. 376.)

The Soldiers' & Sailors' Orphans' Home proved a claim against the bankrupts, and subsequently, by act of congress, an appropriation was made to the home of the amount of the claim, and the attorney general was directed "to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money, or any part of the same, now involved in the bankruptcy of Jay Cooke & Co." In pursuance of a subsequent act, the home by deed transferred all its property, real and personal, to the Garfield Memorial Hospital. *Held*, that the United States had not acquired any title to the claim, either by subrogation or equitable assignment, and that the hospital was entitled to receive the claim against the bankrupts.

In Bankruptcy. Exceptions to examiner's report.

[1] See article by "English Lawyer" in the *Nation*, December 20, 1883

[2] Reported by Albert Guilbert, Esq., of the Philadelphia bar.

The examiner (Joseph Mason) reported that on the twenty-fifth day of May, 1874, a claim for $11,350.97 had been duly proved against the bankrupts by the Soldiers' & Sailors' Orphans' Home.

By an act of congress approved June 22, 1874, it was provided, *inter alia*,—

"That the following sums be and they are hereby appropriated out of any moneys in the treasury not otherwise appropriated, to supply deficiencies in the appropriations for the services of the government for the fiscal year ending June 30, 1874, and for former years, and for other purposes, namely:

"For the Soldiers' & Sailors' Orphans' Home, Washington city, District of Columbia, to be expended under the direction of the secretary of the interior, eleven thousand three hundred and fifty dollars and ninety-seven cents: provided, that hereafter no child or children shall be admitted into said home except the destitute orphans of soldiers and sailors who have died in the late war on behalf of the union of these states, as provided for in section 3 of the act entitled 'An act to incorporate the National Soldiers' & Sailors' Orphans' home,' approved July 25, 1866: and provided, further, that no child, not an invalid, shall remain in said home after having attained the age of sixteen years.

"And the attorney general is hereby directed to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money, or any part of the same, now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co." 18 St. 142.

The act of July 25, 1866, referred to, provided, *inter alia*,—

"That said corporation shall have power to provide a home for, and to support and educate, the destitute orphans of soldiers and sailors who have died in the late war in behalf of the union of these states, from whatever state or territory they may have entered the national service, or their orphans may apply to enter the home, and which is hereby declared to be the objects and purposes of said corporation."

But there appears to be no provision in said act for any aid, assistance, or appropriation from or the exercise of any control over the management of the affairs of the corporation by the United States, except the provision that congress may at any time thereafter repeal, alter, or amend the act.

On December 15, 1879, the attorney general of the United States gave an official opinion to the secretary of the treasury, in answer to a letter from him as to an offer made to him to purchase the claim in question, from which opinion are taken the following extracts:

"On examining the statutes, it seems to me quite clear that an appropriation was made for the purpose of reimbursing the Soldiers' & Sailors' Orphans' Home for the moneys lost by the failure of Jay Cooke & Co., and that the United States treated the claim against that firm as one which was thereafter its own. This reappropriation was accepted upon these terms by the home when it received the money.

"The present legislation seems to me ample to enable the secretary of the treasury to demand and receive the amount of dividend from the bankrupt estate. In case there should be a refusal by that estate, it would also seem that the attorney general had, under the act, ample power to enforce the claim, and to collect, in the name of the United States, or that of the home,

the amount which was due as a dividend on account of the deposit, and pay the same into the treasury." Op. Atty. Gen. vol. 16, p. 407.

To obtain a direct payment of the dividends upon this claim to the United States is the purpose of the present petition. It avers that the sum appropriated has been paid by the United States to the said home, and that under the provisions of the act of congress of June 22, 1874, it was intended that the United States should be substituted for the said home, as to any claim which might exist for this amount against the said firm of Jay Cooke & Co. It was therefore contended by the attorney of the United States that the act referred to, *ipso facto*, effected an equitable assignment of the claim to the United States, but he was unprepared to prove either the fact of payment of the appropriation, or the matters set forth above in the opinion of the attorney general, as to the nature of the acceptance of the appropriation. It appeared, further, upon the hearing, that by an act of congress, approved June 20, 1878, an appropriation of $10,000 was made for the support of the said corporation, including salaries, etc., with the following proviso:

"Provided, that the institution shall be closed up and discontinued during the ensuing fiscal year, and that the title to the property, real and personal, shall be conveyed to the United States before any further payments are made to the trustees of the said institution." 20 St. 209.

And that by another act of congress, approved August 8, 1882, it was provided as follows:

"That the board of trustees of the National Soldiers' & Sailors' Orphans' Home, of the District of Columbia, are hereby empowered to transfer and convey all the property, real, personal and mixed, of the National Soldiers' & Sailors' Orphans' Home to the Garfield Memorial Hospital, located in said district; and the said Garfield Memorial Hospital is hereby empowered to sell and convey the same, and apply the proceeds to the object for which it was incorporated: provided that this act shall not be construed to make the United States liable in any way on account of said transfer, or the changing of the direction of the trust." St. 1881–82, p. 376.

On June 2, 1883, a petition for intervention, (in the proceedings pending as to the claim in question,) of the Garfield Memorial Hospital was presented, praying that it be substituted to the rights and title of said Soldiers' & Sailors' Orphans' Home, and that the award be made in its favor, and that its petition be taken and considered as an answer to the petition filed by the United States. This petition of intervention set forth, *inter alia*, the incorporation of said Garfield Memorial Hospital and the act of congress of August 8, 1882, (recited in the register's former report,) and that by deed dated October 2, 1882, duly executed and recorded, the trustees of the said orphans' home, conveyed, transferred, and assigned all the assets of that corporation, including said award, to the Garfield Memorial Hospital. A copy of said deed was produced *reciting* a resolution of the board of trustees of said orphans' home, to transfer and convey all the property real, personal, and mixed, of said orphans' home to said Gar-

field Memorial Hospital, and that for the purpose of carrying out the transfer and conveyance, David K. Cartter, president, and Marcellus Bailey, secretary of the board, be and they were thereby authorized and empowered to execute, acknowledge, and deliver for and in the name of said orphans' home, a deed or deeds conveying and transferring all of said property to said Garfield Memorial Hospital, *followed* by appropriate terms of conveyance of certain real estate in the city of Washington, described by metes and bounds, "and also all other property of said party of the first part, whether real, personal, or mixed, in said District of Columbia," but containing no specific reference to or statement of the claim against Jay Cooke & Co.

Pending the consideration of the subject before the register, the depositions of David K. Cartter, president, and Marcellus Bailey, treasurer of the orphans' home, were taken on behalf of the United States. By their testimony, it was proposed to prove the purpose and payment of the appropriation in the act of June 30, 1874, (recited in the former report,) and that upon its receipt it was agreed that the claim of the orphans' home against Jay Cooke & Co. should be transferred to the United States. The *purpose* of the appropriation and its *payment* are clearly established and are not disputed by any of the parties to the present controversy. As to the nature of the acceptance, the president testifies as follows:

"It was an understanding by me that inasmuch as there was an appropriation to supply a deficiency of Henry D. Cooke, the treasurer, whose funds as such officer to a like amount were on deposit with Jay Cooke & Co., at the time of their failure, that it would be reimbursed the United States out of the assets of the bankrupt firm. I cannot say with certainty as to the understanding of the board. I have not the records in my possession, which may show what the understanding was."

The treasurer, after testifying that the payment of the appropriation had been made to him as treasurer, in answer to the question whether said money was not received by said home with the understanding that the United States was to be entitled to receive all moneys that might thereafter be recovered from the firm of Jay Cooke & Co., says:

"I am not able to state whether such an understanding as that referred to in the interrogatory was had prior to the time I became connected with the home. I do not recall any action of the board of trustees after I became a member of it, touching this matter, nor do I believe there was any."

Several objections were made on behalf of the Garfield Memorial Hospital to these depositions, but as the testimony fails to prove any corporate action of the orphans' home as to the receipt of the money, it is unnecessary to consider them. While the orphans' home appears to have refrained from drawing the dividends from the bankrupt estate, there is no evidence of any actual assignment by it of the claim to the United States or that the appropriation of the act of June 20, 1878, of $10,000, with the proviso (recited in the former report) of conveyance of the property of the home to the United States

was accepted by the home, or that anything was done in accordance with the terms of said proviso. The subsequent act of August 8, 1882, was evidently a repeal of or substitute for this proviso.

The principal question for determination, therefore, seems to be simply whether the acceptance of the appropriation made by the act of June 30, 1874, worked an assignment of the claim of the orphans' home to the United States, or, in other words, whether such an assignment was an expressed or implied condition of the gift by the United States.

In the first place, it is to be observed that the sentence, "and the attorney general is hereby directed to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money or any part of the same now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co.," is, if taken literally, inexplicably obscure and without intelligible meaning; for the only money mentioned is the money then being appropriated, and how that can be involved in any bankruptcy, or that there can be any right or claim of the United States to be enforced with respect to *it*, is utterly incomprehensible. It is therefore very apparent that some words necessary to give coherence to the language have been omitted. Another part of the same statute, however, very clearly suggests what these words are.

Henry D. Cooke, it appears, was also treasurer of the reform school of the District of Columbia, and as such officer had deposited the funds belonging to said corporation also with Jay Cooke & Co. To supply the deficiency in this case occasioned by their failure, it was likewise provided by the act of June 30, 1874, (18 St. 146,) that the sum of $31,772.29 should be appropriated to reimburse the fund of the reform school in the District of Columbia, for work done and materials furnished in the erection and furnishing of the buildings and grounds of the same; and the attorney general was also directed "to take such measures as should be most effectual to enforce any right or claim which the United States have to this amount of money, or any part thereof, now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co., the same having been in the hands of Henry D. Cooke as treasurer of said reform school at the time of his bankruptcy, and being then moneys belonging to the United States, and to inquire into this loss of the public moneys and ascertain who is responsible therefor, and institute such prosecutions as public justice may require, and that he report his proceedings therein to congress in his next annual report." Interpolating, therefore, the words "amount of" in the sentence quoted from the section of the orphans' home appropriation, and adding thereto (in accordance with the fact) "the same having been in the hands of Henry D. Cooke as treasurer of said Soldiers & Sailors' Orphans' Home," remove all ambiguity and obscurity of expression.

As I assume that it will not be pretended that the mere gift to this

charity, to relieve its temporary embarrassment, caused by the failure of its bankers, entitles the donor to its claim against the bankers as a matter of right, (irrespective of what gratitude might suggest,) the determination of the true construction and purpose of this *addendum* to the act of appropriation will be decisive of the present controversy.

Fortunately, as to the meaning of the similar words in the other appropriation, there is the judicial interpretation of the late judge of this court given in the present case, upon the presentation of the question by the direction of the attorney general of the United States, who, pursuant to the requirement of the statute, caused a proof to be made of the moneys due the reform school as a debt to the United States. In disallowing this proof (in an opinion filed February 4, 1875) the court, CADWALADER, J., said:

"The present purpose of tendering proof in the name of the United States is manifestly to obtain a statutory preference to the whole amount of the debt in question instead of a simple dividend, to which alone the local corporation, if the creditor, is entitled. I am of opinion that the debt is to the local corporation, and is not entitled to a preference. When the fund, of which that now claimed is the balance, was paid from the treasury of the United States to the treasurer of the local corporation, it became the money of that corporation, which is therefore the creditor entitled to make proof."

No appeal was taken from this decision. The local corporation subsequently made proof and appears to have received all the dividends, and no further claim of any nature appears to have been made by the United States therefor.

Now, while it is true that the present contention on behalf of the United States of subrogation to the claim of the creditor for a dividend (and not a preference) does not appear to have been made in argument or passed upon by the court, and therefore this opinion may not be justly considered as altogether conclusive of the present question, yet the absence of suggestion of such a right of the United States, and the subsequent payment of the dividends to the corporation claimant, show that no other view was entertained by the court, or the law officers of the United States, than that the whole object of the *addendum* to the act of appropriation was simply to endeavor to secure a preference in the distribution of the estate of the bankrupts. Such a purpose was entirely consistent with the spirit of the legislation, the relief of the charities; to obtain for them, if possible, in the name of the United States, a position in the court of bankruptcy, which in their own names could not be accorded to them. To attribute to the words used the further purpose of endeavoring to obtain for the United States reimbursement for the moneys then being donated, seems unwarrantable, because an express proviso that the charity assign its claim to the United States could have been readily added to the provisos already annexed to the gift. That there is no such proviso is conclusive that such was not the legislative intent. The addition of it would have rendered unnecessary any action by the attorney general, and would indeed have been inconsist-

ent with the claim for a preference; for the United States, as assignee, could have no greater right than its assignor. *U. S.* v. *Buford*, 3 Pet. 12.

It seems, therefore, reasonably clear that upon the assumption that because the United States had made large appropriations of money to both the orphans' home and the reform school, portions of which moneys were on deposit with the bankrupts at the time of their failure, it was supposed that possibly a claim might be sustained against their estate, as if the money had been deposited by the United States directly, and a priority in distribution be thus obtained. Congress, therefore, when making an appropriation to supply the loss by the insolvency, thought expedient to direct the attorney general to consider this view of the matter and endeavor to enforce it by appropriate action. Greater prominence was probably given to the case of the reform school, as appears from the greater particularity of specification of its supposed right in this respect, because it seemed to gather additional support from the fact that the reform school was an auxiliary to the administration of justice in the District of Columbia, was wholly supported by congressional grant, and was under direct governmental supervision; but by a suggestion of the right of the United States in either case it was not intended to stipulate for any return for the gift then made, and no such condition, it is respectfully submitted, can be found either by actual expression or implication in the act of appropriation.

The register therefore recommends that the prayers of the petition of the Garfield Memorial Hospital be granted, and that the costs of the present proceedings be paid by the trustee of the estate of Jay Cooke & Co., out of the dividends upon the claim of the National Soldiers' & Sailors' Orphans' Home.

The United States excepted to this report.

J. K. Valentine, Dist. Atty., and *Henry P. Brown*, Asst. Dist. Atty., for the United States.

L. W. Barringer and *Reginald Fendall*, for Garfield Memorial Hospital.

BUTLER, J. Exceptions dismissed and report affirmed

In re JESSUP, Bankrupt.

(*District Court, S. D. New York.* January 10, 1884.)

1. BANKRUPTCY—DISCHARGE—SECTION 5110, SUBD. 2.

Where a bankrupt, after his adjudication, but before the appointment of an assignee, sold a piano which he had included in his schedules of property, received the proceeds, and paid them from time to time in part for fees to his attorneys for use in the bankruptcy proceedings, *held*, this act was in violation of subdivision 2, § 5110, Rev. St., and forfeited his right to discharge.

2. SAME—SALE OF PROPERTY AFTER PETITION FILED.
The bankrupt, after filing his petition, has no right to sell any of his property even to raise money to pay lawful fees.

Bankrupt's Discharge.

J. W. Culver, for the bankrupt.

P. & D. Mitchell, for opposing creditors.

BROWN, J. The only objection which is available to the opposing creditors is that in relation to the sale by the bankrupt of a piano belonging to him at the time of his petition in bankruptcy, and included in the schedules filed by him. The exact date of the sale is not in proof; but as the bankrupt has failed to show that the sale of it was prior to his petition, and as it is included in the schedules filed by him, it must be assumed to have been made after the filing of his petition and schedules in 1877. Section 5110, subd. 2, provides that "a discharge shall not be granted if the bankrupt has been guilty of any fraud or *negligence* * * * in the delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, except such as he is permitted to retain under the provisions of this title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof." The piano was not an article which the law authorized the bankrupt to retain. He sold it to the Chickerings, according to his own testimony, for about "$240 or $250—,might have been $200." He says he applied the proceeds to pay for "legal proceedings in this bankruptcy proceeding;" that he paid it to his attorneys. "*Question.* All that you got for the piano? *Answer.* I don't recollect, as I paid by installments,—sometimes one amount, sometimes another, as the case demanded." The evidence of one of his attorneys shows various payments to the register, clerk, and marshal during the pendency of the bankruptcy proceedings, amounting altogether to about $150.

The sale of the piano by the bankrupt after the filing of his petition was a plain violation of subdivision 2 of section 5110. It makes no difference whether the sale was before the appointment of the assignee or after. Before the appointment of an assignee the bankrupt was himself a trustee in respect of his property for the benefit of his creditors; he was bound to preserve it for delivery to the assignee when appointed. *March* v. *Heaton*, 1 Low. 278; *In re Steadman*, 8 N. B. R. 319. The resolution for a composition not having been presented to the court for approval for a long period, the delay of the bankrupt in this respect, as well as his acts in the mean time, were entirely at his own risk. When, in 1883, after slumbering nearly six years, the composition proceedings were revived, presented to the court, disapproved, and set aside, and an assignee appointed, this revival of the old proceedings could not be available for the bankrupt's discharge, except on the condition that his acts in the mean time had not violated any of the provisions of section 5110.

Even if the sale of the piano, or of other property, after filing his petition and schedules, for the purpose of defraying expenses of bankruptcy proceedings, could in any case be justified, the explanation in this case is not sufficient, since it does not cover the whole proceeds, taking as it stands every word of the testimony given by the bankrupt and his attorney on that subject. While a portion of the expenses testified to might doubtless have been allowed out of the proceeds of the estate, it does not appear that this would apply to all or even the major part of the expenses testified to. It is plain, also, from the bankrupt's testimony, that there was no specific application of the proceeds of the piano to these expenses; but that, having got from $200 to $250 by this sale in 1877, he afterwards, as the proceedings in bankruptcy required,—most of which have been within a year past,—paid to his attorneys such sums as they demanded. I would not intimate, however, that a bankrupt, after having filed his petition and schedule, may dispose of his property even for the payment of bankruptcy fees. Such a course is incompatible with the rights of the assignee, would be liable to manifest abuses, would raise embarrassing questions concerning the manner and *bona fides* of such sales and the disposition of the proceeds, and is, I think, wholly inadmissible; and it is, also, so far as I have found, wholly unsupported by any authority. The provisions above quoted very plainly forbid any such disposition by the bankrupt, and make it his duty to turn over all the property belonging to him at the time of the presentation of his petition and inventory to his assignee, unless that is superseded by a composition approved by the court. The advice of counsel is, in such a case, no defense; nor is the absence of a fraudulent intent material. The statute declares the "discharge shall not be granted if he has been *negligent* in such delivery, or has caused or suffered any loss or waste of his property." I must hold his acts in regard to the sale of the piano unauthorized and unlawful, and such as section 5110 visits with a denial of his discharge. *In re Finn*, 8 N. B. R. 525; *In re Thompson*, 13 N. B. R. 300.

The discharge cannot, therefore, be granted.

HELLER and another *v.* BAUER and others.[1]

(*Circuit Court, C. D. Missouri.* January 7, 1884.

PATENT FOR PROCESS—INFRINGEMENT.

Where a patent process consists of a number of steps, all well known except the first and last, the use of all except the first and last steps will not infringe the patent.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

In Equity.

M. McKeag for plaintiffs.

E. J. O'Brien for defendants.

TREAT, J. This is a suit for an alleged infringement of plaintiffs' rights under patent No. 164,858. The patent is for a process "intended for all oil-finished work when it is desired to represent a rich veneering, or imitation of wood." The successive steps of the process are enumerated in the claim and set out in the specifications. There is nothing new in the pigments used, nor in their mixtures with oil. Such mixtures were known long before the patent was issued,—not only in oil, but also in water and beer. Nor was there anything new in the use of a crumpled cloth, for the manipulation mentioned, to work out the blending of colors, so as to imitate different kinds of woods. The patent contains no disclaimers, and therefore it is somewhat vague in its terms. A proper construction, however, shows clearly enough that it is for a process for enameling wood, consisting essentially of successive steps to be taken in the use of various pigments, etc., as described; each of which steps is an essential part of the process itself.

It appears from the evidence that the defendants did not use either the first or last of the steps named, and it is doubtful whether the plaintiffs have ever used either of them. The other steps were well known, and had long been in use, and no patent therefor would have been grantable. If the addition of the first and last steps enumerated made a new process within the purview of the patent law, it is obvious that there could be no infringement unless those were used. It is doubtful whether the patent is not void for want of novelty, but it is not necessary to decide that question. It is clear that no infringement has been proved.

The bill will be dismissed, with costs.

UNITED STATES DAIRY CO. and others *v.* SMITH.

(*Circuit Court, S. D. New York.* August 4, 1880.)

PATENTS FOR INVENTIONS—PATENT NO. 146,012—MOTION FOR INJUNCTION DENIED.

BLATCHFORD, J. Patent No. 146,012 seems to make the use of the udder necessary in divisions 6 and 7 of the specification, in obtaining from margarine the resulting material. There is no suggestion that it may be dispensed with, or that any good result can be obtained without using it. In the reissue the udder is omitted in the description, and in claims 5 and 6, and then it is stated that the use is "expedient." If the use of the word "expedient" brings in the ud-

der as parts of claims 5 and 6, the defendant does not infringe. If the use of the udder is no part of those claims, then the reissue, as to those claims, claims inventions not suggested or indicated in No. 146,012, and is invalid. It may be that the proofs for final hearing may put the case in a different aspect, but, as the case now stands, the foregoing considerations are sufficient to require that the motion for injunction be denied. The same disposition is made of the motions as to Flagg and Boker.

ROEMER *v.* NEWMAN and others.

(Circuit Court, D. New Jersey. December 22, 1883.)

1. PATENTS FOR INVENTION—INJUNCTION—CONTEMPT.
   Where defendants have consented to a decree that a patent is valid, and an injunction restraining them from using the mechanism which it embraces, they must obey the writ until it is dissolved, and cannot, in a proceeding for contempt, assail the validity of the patent.
2. SAME—AGREEMENT BETWEEN PARTIES—EVIDENCE—DECREE REOPENED.
   As the evidence in this case is conflicting, and leaves the question as to whether complainant allowed defendants the privilege of using the fastening claimed to infringe his patent, the rule to show cause why they should not be attached for contempt should not be made absolute, but the decree *pro confesso* should be reopened, the release of damages canceled, and the case proceed to final hearing.

On Attachment for Contempt.

Briesen & Betts, for the motion.

A. Q. Keasbey & Sons, contra.

NIXON, J. This is a motion for attachment for contempt against the defendants for violating an injunction. The petitioner brought an action in this court against the defendants for the infringement of letters patent No. 195, 233. No answer was filed. A decree *pro con.* was entered, and an injunction was issued restraining the defendants from any further infringement of said letters patent. The allegation of the petition is that the injunction has been violated. The defendants set up three grounds of defense: (1) That the complainant's patent is void; (2) that before the decree *pro con.* was taken the complainant conceded to the defendants the right to use the fastening which is now complained of; and, (3) that there has been no infringement.

1. With regard to the first defense, it is only necessary to say that the defendants are not allowed in this proceeding to assail the validity of the patent on which the injunction has been issued. They consented to the decree that the patent was valid, and to the injunction restraining them from using the mechanism which it embraced, and they must obey the order of the writ until it is dissolved. *Phillips* v. *City of Detroit*, 16 O. G. 627.

2. The bulk of the testimony has been directed to the second point, to-wit, whether the complainant agreed with the defendants that the manufacture and use of a certain fastening, marked in this proceeding Exhibit A, would be regarded by the complainant as a violation of the injunction. There is no doubt that the manufacture complained of, and which is alleged to be a violation, no more nearly resembles the invention claimed by the complainant's patent than does Exhibit A; and if the testimony shows that at the time of agreeing to the decree it was understood between the parties that Exhibit A was not an infringement, the complainant should not be allowed, on this motion for contempt, to stop its manufacture and use. The testimony is conflicting. The complainant denies that there was any admission made or license granted for the use of Exhibit A, and the defendants produce several witnesses who are sworn to prove it. It is difficult to determine where the truth lies, and it is charitable to hope that there was an honest misunderstanding between them. At the time that the decree *pro con.* was allowed against the defendants, the complainant signed a paper releasing them from all claims for damages and profits. Possibly both parties were acting under a misapprehension, and the best solution of the case, in my judgment, is for both to agree that the decree should be opened, the release of damages canceled, and the suit proceed to a final hearing.

At all events, I am not willing, on the evidence taken, to make the rule to show cause why the defendants should not be attached for contempt absolute. The same is discharged, but, under the circumstances, without costs.

DAVIS *v.* FREDERICKS.

(*Circuit Court, S. D. New York.* January 2, 1884.)

1. PATENTS FOR INVENTIONS—PATENTABILITY.
   Letters patent No. 84,803, granted to Thomas B. Davis, on December 6, 1868, for an improvement in scoops, *held* to embody a patentable invention.
2. SAME—CALCULATION AND EXPERIMENT CONTRASTED WITH MECHANICAL SKILL.
   A result which required calculation and experiment beyond mechanical skill and good workmanship is entitled to be classed as inventive. A new thing produced, better for some purposes than had been produced before, although it appears easy of accomplishment when seen, is such success as is within the benefits of the patent law.
3. SAME—PUBLIC USE.
   Where an inventor gives another an article embodying his invention, and, without his knowledge or consent, it is shown to others, who manufacture and sell the same for two years prior to an application for a patent, this will not constitute a public use within the meaning of the acts of 1836 and 1839, and render the patent void

In Equity.

Andrew J. Todd, for orator.

Charles F. Moody, for defendant.

WHEELER, J. This suit is brought upon a patent granted to the orator, numbered 84,803, dated December 6, 1868, for an improvement in scoops. The defenses relied upon are want of invention, and prior public use. The orator appears to have made the invention in the fall of 1865, and to have made application for the patent June 6, 1868. The first scoops, so far as shown, were struck up by hammering, in one piece, except the handle. Then they were made of sheet-metal, cut into shape in one piece, bent up, and fastened at the joints, ready for the handle. They had oval surfaces, and would not rest firmly and hold their contents securely when set down. The orator's scoop was made from one piece of sheet-metal, cut into such peculiar shape that when bent up and fastened it had a flat surface on which it would rest when set down, full or partly full, so as to hold the contents securely; and the acting parts were well shaped and strengthened in making them of this form. To fix upon the necessary pattern for the sheet-metal to produce this result must have required calculation and experiment beyond the practice of mere mechanical skill and good workmanship. It seems to be entitled to be classed as inventive. A new thing was produced, better for some purposes than had been produced before, although many skilled workmen had been practicing the making of those known before, and making as good as they could without reaching this. He hit upon this while no one else did, although it appears to be easy of accomplishment when seen. This success seems to be within the benefits of the patent law.

From the evidence it appears that the orator showed his invention to one Ray, and gave him a scoop embodying it, and afterwards another at his request, but not to sell. Without the orator's knowledge he gave them to others, who commenced making them for sale, so that they were in public use and on sale, but without his consent or allowance, more than two years prior to his application. It is not considered that this being in public use and on sale without the consent or allowance of the inventor invalidates the patent, under the acts of 1836 and 1839, by force of which it was granted, and by the construction of which its validity is to be determined. *Campbell* v. *Mayor, etc., of New York*, 9 FED. REP. 500. The case of *Shaw* v. *Cooper*, 7 Pet. 292, cited for the defendant upon this point, arose under the act of 1800, (2 St. at Large, 37,) in which it was provided that every patent which should be obtained pursuant to that act for any invention, art, or discovery which it should afterwards appear had been known or used previous to the application, should be utterly void, and is not an authority upon this question. In *Egbert* v. *Lippmann*, 104 U. S. 333, the language of the opinion of the majority of the court, as well as that of Mr. Justice MILLER, dissenting, seems to

favor the view that consent or allowance of the inventor is necessary to invalidate the patent under these acts, although this question was expressly left open.

Let there be a decree for the orator, with costs.

THE TITANIA. (Two Cases.)

(District Court, S. D. New York. December 29, 1883.)

1. SHIPPING—LEX LOCI.
   On a shipment of goods in England, upon an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag.
2. SAME—INSURANCE—BILLS OF LADING—EXCEPTION—DAMAGE THAT MAY BE INSURED AGAINST.
   A clause in a bill of lading that the ship-owner shall "not be liable for any damage to goods capable of being covered by insurance," *held*, to refer only to insurance obtainable of the ordinary insurance companies, in the usual course of business, or on special application, and not to insurance which might possibly be obtained in special or peculiar insurance associations, and thus construed, was a valid exception.
3. SAME—STOWAGE—INJURY TO GOODS.
   Where goods in one of the compartments of the steamer T. were injured by a spare propeller which was stowed and fastened in the same compartment, and on the T.'s sixth voyage broke loose during a severe gale, and, in being tossed about, broke through the sides of the ship, whereby water was taken aboard, *held*, that the damage thus caused was a damage by a "peril of the seas," and within the exceptions of the bill of lading, it being found that the propeller was properly stowed.
4. SAME—SEAWORTHINESS.
   Proper stowage of articles which, on becoming loose, may imperil the safety of the ship, is one of the elements of seaworthiness.
5. SAME—AVOIDING DAMAGE—NEGLIGENCE.
   Where the damage might have been avoided by the use of ordinary care and diligence on the part of the ship, the insurers are not liable; the negligence, and not the perils of the seas, is then considered the proximate cause of the loss.
6. SAME—CUSTOMS AND USAGE.
   The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship, or her owners.
7. SAME—SHIP-OWNERS' LIABILITY.
   Though ship-owners are liable for latent defects, this principle does not affect the seaworthiness of the vessel where, if all the facts were known at the time she sails, she would still be regarded by competent persons as reasonably fit for the voyage, according to the existing knowledge and usages.
8. SAME—PROPER STOWAGE.
   Stowage, according to custom and usage, and the best judgment of experienced persons, is sufficient to protect the ship from the charge of negligence, as against insurers.
9. SAME—CASE STATED.
   Upon the facts in this case, *held*, that the spare propeller was sufficiently stowed, according to such knowledge and judgment; that the vessel was sea-

worthy at the time she sailed; that the injury to the goods could be covered by an ordinary policy of insurance; and that the libelants could not, therefore, recover of the ship or her owners for the damage in question.

The libels in these two cases were filed to recover damages for injuries to merchandise, consisting of burlaps and paper stock, during the voyage of the steamship Titania from Dundee to New York, through the spare propeller becoming unfastened and being tossed from side to side in the ship in the compartment where these goods were stowed. The Titania was a steamship belonging to the Red Cross line of steamers, plying between Dundee and New York. The goods were shipped on the ninth of October; the vessel sailed from Dundee on the 11th. On the forenoon of Saturday, the 22d, when about two days off from Halifax, she encountered a "hard gale and very heavy sea, and the ship labored heavily, the ship lurching at times 35 degrees," according to the statement in the log. The gale increased throughout the day, the ship rolling fearfully. At half past 9 in the evening, it being found that the ship was making water, an examination was made, and the spare propeller between decks was found to be adrift, and that it had knocked holes through the iron plates on each side of the ship in that compartment; and parts of the cargo and dunnage were afloat in the water taken in through these holes. The Titania thereupon put into Halifax, accompanied by another vessel, where she arrived on the morning of the 25th; after repairs she proceeded to New York, which she reached on the second of November. The Titania was a steamer of about 1000 tons, and her building was completed in May, 1880. This was her sixth trip across the Atlantic. The spare propeller, weighing from four to five tons, was put between-decks near the mainmast, and secured by chains carried through the boss at the axis of the propeller, and fastened to four ring bolts, secured to iron plates, which were riveted through the iron deck, one between each blade of the propeller, with wooden chocks near the ends of the blades.

A good deal of evidence was given on the part of the claimants tending to show that it was customary for steamers to carry a spare propeller, and that this one was fastened in one of the most approved modes, and in the usual manner, with the best material, and in strict accordance with Lloyd's rules, special survey, and believed sufficient by persons having very large experience in fastening and securing such propellers. Before leaving Dundee on the last trip, the chief officer, as he testified, examined the fastening of the propeller careiully, feeling each turn of the chain, and found it taut and tight, as on the previous voyages. After the accident the chain was found in pieces; one of the ring-bolts broken, and one of the plates torn and rent; the rivets were out of their holes; but the margin of the holes did not present the appearance of the bolts having been drawn out through them. The chains had been made taut by wooden wedges, driven between the top of the boss and the chains above, near where

the chains pass down through the holes in the center of the boss. The bill of lading contained the usual exception of injury through "perils of the sea," and various other special clauses, among which it was provided that the ship-owner is "not to be liable for any damage to any goods which is capable of being covered by insurance."

The libelants contended that the vessel was unseaworthy, when she sailed, through the insufficient fastening of the propeller. The defects alleged were, chains of insufficient size; an insufficient number of rivets fastening the plates to the deck; that the deck beneath was not strengthened; that the chocks were not bolted to the deck; but, most important of all, that the wedges which were used for tightening were of yellow pine, and too small in size. Through the loosening of these wedges, as it was surmised by the libelants, some play was probably first afforded for the motion of the propeller, and after that, in the heavy rolling of the ship, breaking loose naturally and inevitably followed. There was no evidence, however, to show what first gave way, or in what particular manner the propeller broke loose. The Titania on this voyage was very light, and in consequence rolled more than she otherwise would in the heavy seas. The claimants contend that the ship was in all respects seaworthy; that the fastenings of her propeller were in all respects proper and sufficient; and that the accident was properly to be ascribed to the perils of the seas; and also that the loss in question was subject to the special exception above referred to, because it was capable of being covered by insurance.

Treadwell Cleveland, for libelants.

Goodrich, Deady & Platt, for claimants.

BROWN, J. The bills of lading in these cases contain numerous exceptions from liability on the part of the ship-owner, only two of which seem applicable to this case, namely, the general exception of "perils of the seas," and the special exception that "the ship-owner is not to be liable for any damage to any goods which is capable of being covered by insurance." If the breaking loose of the propeller and the consequent damages to the goods arose through negligence in the proper stowage or fastening the propeller, then it cannot be covered by either of these exceptions. The shipment being made in England, and on an English vessel, the law of the flag governs. *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *Chartered, etc.*, v. *Netherlands*, 9 Q. B. Div. 118; 10 Q. B. Div. 521; *The Gaetano & Maria*, 7 Prob. Div. 137; *Woodley* v. *Mitchell*, 11 Q. B. Div. 51. But although, under the English decisions, it seems to be settled that ship-owners may exempt themselves from damages caused even by their own negligence, provided this intention be unequivocally expressed, (Macl. Ship. 409, note; *Chartered Mercantile, etc.*, v. *Netherlands, etc.*, 9 Q. B. Div. 118, 122; 10 Q. B. Div. 521; *Steel* v. *State Line, etc.*, 3 App. Cas. 88;) yet such causes of special exemption, being inserted for the benefit of the ship-owner, are construed most favorably to the shipper and most

strongly against the ship-owner, and will not be held to embrace the latter's own negligence, unless that be specially excepted in connection with the actual cause of the loss. Macl. 409, 509, 510; *Hayn* v. *Culliford*, 3 C. P. Div. 410; 4 C. P. Div. 182; *Taylor* v. *Liverpool, etc.*, 9 Q. B. 549.

The clause in relation to insurance cannot reasonably be construed as intended to mean any possible insurance, in any possible company, and upon any possible premium. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies, either in the usual form, or in the customary mode of business, on special application. The evidence on the part of the libelant shows, however, that no insurance against negligent stowage of the propeller could be obtained in any ordinary insurance company either in the usual course of business or on special application. On cross-examination one of the witnesses stated that he had heard of companies or associations in England that insured against everything; but he did not know of any such company, and he had never seen any such policy. An association somewhat like that, with the terms of the mutual obligations of its members, appears in the case of *Good* v. *London Steam-ship Owners' Mut. Prot. Ass'n*, L. R. 6 C. P. 563. The defendants, however, gave no further evidence in regard to such associations, and it seems clear to me, even if their existence had been proved, that possible insurance or indemnity in such mutual protective associations, with their peculiar terms and conditions, is not to be construed as the insurance referred to in this clause of the bill of lading. I see no reason, however, for not regarding the clause as valid, construed as referring only to insurance which might be effected in the ordinary course of insurance business. Thus construed, it exempts the ship-owners from loss which might be thus insured against, and which might be recovered of the insurers, if not directly caused by negligence on the part of the ship.

The question in this case is, therefore, practically, a question between the ship-owners and the insurers; for if the libelant under this restrictive clause did not obtain insurance, it was his own fault, and the liability of the ship-owners is not increased. And the question is, whether the injury to the goods is to be deemed caused by a peril of the seas as the proximate cause of the loss which would be covered by an ordinary marine insurance, or whether it was caused directly by negligence on the part of the ship. The damage itself is within the terms of ordinary marine policies; but if it might have been avoided by the use of ordinary care and diligence on the part of the defendants, then the insurers would not be liable; for in such cases the negligence, and not the peril of the seas, is deemed the proximate cause of the loss. Story, Bail. § 512*a*; *Clark* v. *Barnwell*, 12 How. 280; *Gen. Mut. etc.*, v. *Sherwood*, 14 How. 351, 364; *Lamb* v. *Parkman*, 1 Sprague, 353; *Woodley* v. *Mitchell*, 11 Q. B. Div. 47; *Ionides*

v. *Universal Marine, etc.*, 14 C. B. (N. S.) 259; *Chartered Mercantile Bank* v. *Netherlands, etc.*, 9 Q. B. Div. 118, 123; 10 Q. B. Div. 521, 543. And if the ship is to be deemed unseaworthy at the commencement of the voyage, by reason of any improper or negligent stowage of the propeller, the policy of insurance would not attach; and the ship would also be answerable upon an implied warranty of seaworthiness. Arn. Ins. 4; 1 Pars. Mar. Ins. 367, 368; Macl. 406, 407.

There is no suggestion of any fault on the part of the ship after she sailed. If there was any negligence in regard to the spare propeller, it existed at the time of sailing. Moreover, the shape and weight of the propeller were such as manifestly to endanger the safety of the ship, if improperly stowed and fastened. Hence, the stowage of the propeller directly affected the seaworthiness of the ship, and the question, therefore, comes down to this; was there any such negligence or want of care in the stowage and fastening of this spare propeller as made the ship unseaworthy at the time of sailing on this voyage, or such as would prevent a recovery on an ordinary policy of insurance for this damage? The evidence shows, in this case, that the propeller broke loose during severe gales, and while the ship was rolling in an extraordinary manner. This great rolling was doubtless in part due to her lightness on the voyage, the deck on which the propeller was fastened being four feet nine inches above the water-line. But it is not suggested or claimed that there was any such lightness of the vessel as rendered her in any way unseaworthy or unfit for the voyage. Where a ship becomes unseaworthy during severe weather, or one part of the cargo does damage to another part, it is manifest that neither is the ship, from a consideration of the result alone, to be pronounced unseaworthy when she sailed, nor is the cargo necessarily to be held improperly or insufficiently stowed. The question is essentially the same as respects each. If, upon all the evidence no negligence is recognizable, the damage in either case is set down to perils of the sea.

To determine the question upon the facts of this case, it will be useful to consider—*First*, what is the test or criterion of seaworthiness, and the extent of the ship-owner's obligations in that respect? As between the ship-owner and the insurer, the former is bound to provide against *ordinary* perils, while the latter undertakes to insure against *extraordinary* ones; "although," as DUER, J., observes in the case of *Moses* v. *Sun Mutual Ins. Co.* 1 Duer, 170, "to discriminate between ordinary and extraordinary losses is, in some cases, a matter of great nicety and difficulty." By extraordinary is not meant what has never been previously heard of, or within former experience, but only what is beyond the ordinary, usual, or common. By seaworthiness is meant "that the ship shall be in a fit state, as to repair, equipment, crew, and in all other respects, to encounter the *ordinary perils* of the contemplated voyage." *Dixon* v. *Sadler*, 5 Mees. & W. 414; 2 Arn. Ins. *c.* 4; 1 Pars. Mar. Ins. 367; Macl. 410; *Biccard* v.

Shepherd, 14 Moore, P. C. 471. In the case of *Gibson* v. *Small*, 4 H. L. Cas. 418, Lord CAMPBELL says: "With regard to its (seaworthy) literal or primary meaning, I assume it to be now used and understood that the ship is in a condition in all respects to render it *reasonably safe* where it happens to be at the time referred to." In *Knill* v. *Hooper*, 2 Hurl. & N. 277, 284, the court say: "Seaworthy or not, is always a question for the jury, and in all cases the question for the jury will be, whether the ship was, at the commencement of the voyage, in such a state as to be *reasonably capable* of performing it." In *Turnbull* v. *Jansen*, 36 Law T. (N. S.) 635, BRETT, L. J., says: "A contract of sea insurance is against extraordinary perils; therefore, the implied warranty of seaworthiness is that the vessel will be fit to encounter *ordinary* perils." Substantially the same language is employed by THOMPSON, J., in *Barnewell* v. *Church*, 1 Caines, 234; and in *Dupont, etc.*, v. *Vance*, 19 How., CURTIS, J., defines seaworthiness of the hull to be competency "to resist *ordinary* action of the sea." In the case of *Adderly* v. *American Mut. Ins. Co.* Taney, 126, it is said if the leak was such "that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak, there could be no recovery; but if he might reasonably have supposed that the vessel was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account omitted to examine and repair, such an omission would be no bar." In *The Reeside*, STORY, J., defines perils of the seas to be those "which cannot be guarded against by the ordinary exertions of human skill and prudence." 2 Sumn. 567, 571.

The standard of seaworthiness, moreover, does not remain the same with advancing knowledge, experience, and the changed appliances of navigation. 3 Kent, *288. In *Tidmarsh* v. *Washington, etc., Ins. Co.* 4 Mason, 439, 441, STORY, J., in charging the jury as to the defense of unseaworthiness, said:

"The standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation. In many ports, sails and other equipments would now be deemed essential which, at an earlier period, were not customary on the same voyages. There is also, as the testimony abundantly shows, a considerable diversity of opinion, among nautical and commercial men, as to what equipments are or are not necessary. Many prudent and cautious owners supply their vessels with spare sails and a proportionate quantity of spare rigging; others do not do so, from a desire to economize or from a different estimate of the chances of injury or loss during the same voyage. * * * It would not be a just or safe rule in all cases to take that standard of seaworthiness, exclusively, which prevails in the port or country where the insurance is made. * * * It seems to me that where a policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to equipments of vessels of that class, for the voyage on which she is destined. He must be presumed to underwrite upon the ground that the vessel shall be seaworthy in her equipments, *according to the general custom of the port*, or at least of

the country to which she belongs. It would be strange that an insurance upon a Dutch, French, or Russian ship should be void, because she wanted sails which, however common in our navigation, never constituted a part of the maritime equipments of those countries. We might as well require that their sails and rigging should be of the same form, size, and dimensions, or manufactured of precisely the same materials as ours. In short, the true point of view, in which the present case is to be examined, is this, was the Emily equipped for the voyage in such a manner as vessels of her class are usually equipped in the province of Nova Scotia and port of Halifax for like voyages, so as to be there deemed fully seaworthy for the voyage and sufficient for all the usual risks? If so, the plaintiff on this point is entitled to a verdict."

The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners. Where actual defects, though latent, are established by the proofs, that is, such defects as at the time when the vessel sailed would, if known, have been considered as rendering the vessel unseaworthy for the voyage, such as rotten timbers, defective machinery, leaks, etc., such defects, though latent, are covered by the implied warranty of seaworthiness, and are at the risk of the ship and her owners, and the policy does not attach. 2 Arn. Ins. *c.* 4; 1 Pars. Mar. Ins. 369; Abb. Ship. †340; 3 Kent, *205; *Lee* v. *Beach*, 1 Park, Ins. 468; *Quebec Marine, etc.*, v. *Commercial, etc.*, L. R. 3 P. C. 234; *Work* v. *Leathers*, 97 U. S. 379; *The Vesta*, 6 FED. REP. 532; *Hubert* v. *Recknagel*, 13 FED. REP. 912. But this principle cannot be applied to cases where, all the circumstances being known, the vessel would still be deemed by competent persons, and according to existing knowledge and usages, entirely seaworthy, and reasonably fit for the voyage, although subsequent experience might recommend additional precautions. It was long ago held, (*Amies* v. *Stevens*, 1 Strange, 128,) and is laid down in Abb. Ship. †389, as elementary law, that "if a vessel reasonably fit for the voyage be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril." This principle applies equally to the stowage of the cargo.

The same result is derived from a consideration of the question as a matter of stowage only, not affecting the seaworthiness of the ship. For it is well settled that in determining what is proper stowage, the customs and usages of the place of shipment are to be considered, and if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty, or negligence, can be imputed to the ship; and in case of

damage under great stress of weather, the injuries will be ascribed to perils of the seas, and held to be chargeable upon the insurers. In 3 Kent, *217, it is said: "What is an excusable peril depends a good deal upon usage and the sense and practice of merchants, and it is a question of fact to be settled by the circumstances peculiar to the case." This point was much discussed in the case of *Lamb* v. *Parkman*, 1 Sprague, 343, in which SPRAGUE, J., says, (page 350:)

"The question before the court is whether there was a want of proper skill and care in stowing the cargo. Improper stowage is distinctly set up in the answer as the first ground of defense. Now, it having been shown that this cargo was stowed in accordance with an established usage, why is not that decisive in favor of the libelants? * * * Suppose a question had arisen whether this cargo was sufficiently protected by dunnage at the bottom or sides, must it not have been decided by usage? And if so, why not as to the top? It must be presumed that the parties intended that this cargo should be stored throughout in the usual manner."

The same point was decided in *Baxter* v. *Leland*, Abb. Adm. 348, and in *Carao* v. *Guimaraes*, 10 FED. REP. 783. And in the case of *Clark* v. *Barnwell*, 12 How. 283, the court say, in reference to any possible negligence in the stowage: "For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question;" thereby clearly indicating the rule of diligence applicable to such cases.

I have not been referred by counsel to any case closely resembling the present; that of *Kopitoff* v. *Wilson*, 1 Q. B. Div. 377, is, however, similar, though much stronger in its evidence of negligence than the present. There the defendant's ship had taken aboard large quantities of armor plates to carry to Cronstadt. They weighed from 15 to 18 tons each, and were placed on the top of a quantity of railway iron and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not a proper mode of stowing them. The plaintiffs contended that it was improper, and made the ship unseaworthy for the voyage. She encountered bad weather, rolled heavily, and after she had been out at sea some hours one of the armor plates broke loose and went through the side of the ship, which, in consequence, went down in deep water and was totally lost with all her cargo. On the trial before BLACKBURN, J., and a jury, to recover for the loss of the plates, the question was left to the jury to determine whether the vessel, as regards the stowing, was *reasonably fit* to encounter the ordinary perils that might be expected at that season from Hull to Cronstadt; if not, was the loss occasioned by that unfitness. The jury found on the first question, in the negative, and on the second, in the affirmative; and thereupon a verdict was directed for the plaintiff. The court *in banc*, upon a rule *nisi*, held these instructions correct.

In the present case no fault is found with the place or general method of stowing and securing this spare propeller. The general plan of securing it was approved by the libelant's witnesses; and

the expert upon whose testimony the libelant chiefly relies as to the unseaworthiness of the ship, suggested for her return voyage, after this accident, no change in the place or general method of securing the spare propeller, but only the addition of a few more rivets, a heavier chain, and the fastening of the chocks to the deck. These are obviously matters of detail necessarily depending upon the judgment of persons in charge of such work.

From the large mass of evidence on this subject put in by the claimants, it seems to me impossible to hold that this propeller was not stowed and secured in a manner believed and judged, by persons having the largest experience and who were most competent in such matters, to be sufficient and safe in all respects. The ship was built, and this propeller was stowed and fastened, under the inspection of one of the Lloyd's surveyors, who testified that it was well and properly done, and was approved by him as the representative of the underwriters. And even in view of the accident which afterwards happened, he still gives it as his opinion that it was well and sufficiently secured, and that something extraordinary must have happened to account for its breaking loose. What did happen to cause its getting loose does not appear. The proof of the good quality of the material and work, and of its strength, was ample. Nearly a score of witnesses, many of whom had stowed and fastened from 20 to 200 propellers each, testified that it was done according to the best and most approved method, and in all respects in the usual manner. As I have said above, the vessel had already crossed the Atlantic five times from May to October, not only without accident, but, according to the testimony of the mate, without loosening any of the propeller's fastenings. No evidence was given on the part of the libelant in any way discrediting the statements of so many witnesses, or showing that this propeller was not secured in the usual manner, and with all the usual precautions adopted in connection with that mode of stowing; and there is no reason to doubt that it was in fact secured in the same manner in which hundreds of other propellers had theretofore been usually secured, and always hitherto regarded as sufficient. No previous accident in any of this large number, similarly fastened, is known; and this accident occurred in the course of a heavy gale, accompanied by extraordinary rolling of the ship. I think, therefore, the loss should be fairly attributed to perils of the sea, as under somewhat similar circumstances was held in the case of *Barnewell* v. *Church*, 1 Caines, 217, 235, and *Dupont, etc.*, v. *Vance*, 19 How. 162, 168.

The libelant's principal objection to the mode of fastening the propeller was the use of wedges too small in size, and made of yellow pine instead of oak. The objection to the use of yellow pine was upon the ground of its liability to be "chawed" under the heavy pressure of the chains. But the testimony of the expert on this point seems to rest principally upon his experience in English ship-yards

some years ago, when, as he says, only oak wedges were in use. But as this vessel was built and the propeller fastened in the customary manner in one of the largest English ship-yards in 1880, little weight can be given to the former experience of this witness in the use of oak wedges only, if yellow pine had come into subsequent use; and that yellow pine wedges were not liable to any such injury from the "chawing" of the chains as was supposed—if yellow pine wedges were in fact used—seems to me sufficiently evident from the fact that during five voyages across the Atlantic no perceptible injurious effect was produced upon them; for if there had been any such effect it would have been discovered on the examination previous to the last voyage.

I do not consider it by any means certain, however, that the wedges used were of yellow pine. This rests upon the testimony of Mackie, towards the close of the trial. He also gave the size of these wedges, first as three and one-half inches; subsequently he undertook to make a correction of his testimony in regard to the size of the wedges, when it became manifest that the wedges must have been larger than that, in order to support the four chains which ran through each ring. His testimony on this point must be considered so grossly erroneous that I should be unwilling to rest an important part of the case on his evidence. The libelant, at the close of the case, ingeniously and naturally seeks to make the most of this testimony, both in regard to the small size of the wedges and their being of yellow pine. No question was made in regard to them in the pleadings, nor at the time when the bulk of the claimant's evidence was taken upon commission abroad, from witnesses who best knew what was used, and the defendants had no available opportunity for direct proof in regard to them. Mackie necessarily spoke only from memory in regard to what he had observed on the previous voyages, as the wedges formerly used were not on board when the ship arrived; and it is possible that in the three years since this accident, the wedges which he remembers seeing may have been those put in at Halifax, where the Titania went for repairs, or those put in here for the voyage after the accident. In the subsequent survey, moreover, and in the particular directions given by the chief expert for the libelant, no directions whatever were given in regard to wedges. This, it seems to me, is strong contemporaneous evidence that the particular kind of wedges to be used was not considered material; if so, some directions on that point would naturally have been embodied in his recommendations. The same observations apply in regard to the wedges being single or double. In a matter of detail of this kind arising near the close of the trial, and resting upon the doubtful testimony of a single witness, who had no particular call to observe the matter attentively, I think much greater weight should be given, if the matter be regarded as in fact very material, to the mass of testimony showing that in all the details of the work the propeller was secured in the usual and customary manner, and in the mode fully approved by

competent judges and by previous experience. Every conceivable motive existed on the part of the owners to secure this, and I think the evidence requires me to find that this was done, notwithstanding the criticisms of the libelant's witnesses as to a few details, made after the event.

I must hold, therefore, that the vessel, in respect to the stowage of the propeller, was seaworthy at the time of sailing on this voyage; and that the damage to the libelant's goods arose through the perils of the seas in the severe gale and the extraordinary rolling of the ship consequent therefrom; that the damage would be covered by ordinary marine insurance, and was, therefore, within the excepted perils of the bill of lading, both under the general clause, and also under the special clause, as a risk which might be insured against, covered by the ordinary marine policy.

The libels should therefore be dismissed, with costs.

THE CHARLEY A. REED.

THE CITY OF TROY.

(District Court, S. D. New York. January 4, 1884.)

COLLISION—ERIE CANAL—SUCTION—CANAL REGULATIONS.

Where the canal-boats D. C. S. and C. A. R. were approaching each other in opposite directions on the Erie canal, the former on the tow-path side and both towed by horses, and the steam canal-boat City of T. overtaking the C. A. R., attempted to pass her on the left, and as she did so, the effect of the steam-boat, by the swell from her bows and the suction from her propeller, was to render the C. A. R., for the time being, unmanageable by her helm, and sent her bows across to the other side of the canal, so that she struck and injured the D. C. S., *held*, that the steamer was in fault for attempting to pass the C. A. R. when the two were so near meeting, instead of waiting until they had passed each other, and that the C. A. R. was also in fault for not having stopped her team of horses when the City of T. had approached within 20 feet of her stern, as required by canal regulation No. 49; *held further*, that a vessel, which in her navigation violates any express regulation will be held chargeable with contributory negligence unless she shows clearly that such violation could not have contributed to the collision.

Actions for Collision.

J. A. Hyland, for libelant Peters.

E. G. Davis, for libelant Linihan and the Charley A. Reed.

Beebe & Wilcox, for the City of Troy.

BROWN, J. The above libels were filed to recover damages for injuries through a collision on the Erie canal, near Buffalo, east of Black Rock, at about noon of October 1, 1880, between the canal-boats D. C. Sutton and the Charley A. Reed, by which both were damaged. The D. C. Sutton had a full cargo, was towed by horse, and was go-

ing westward, and, according to custom, near the tow-path which was there on the south side of the canal. The Charley A. Reed was coming eastward, loaded, and towed by horse, and was about in the middle of the canal, which was there 85 feet wide. The steam canal-boat City of Troy was at the same time astern of the Charley A. Reed, and overtaking her from the westward, proceeded to pass her by going between her and the heel-path side of the canal. In doing so, as it is alleged by the libelants, she rendered the Charley A. Reed unmanageable, and threw her bows across the canal, so that the latter ran into the Sutton, the bluff of the starboard bow of each canal-boat striking the other and inflicting some damage on each. The owner of the Sutton libeled both the other vessels, alleging that both were in fault; and the owner of the Charley A. Reed has libeled the City of Troy, as the one solely in fault.

It is evident that the collision arose through the steamer's undertaking to pass the Reed when the Reed and Sutton were approaching each other from opposite directions. Whether the City of Troy was justified in this must depend partly upon the regulations and partly upon the distance the canal-boats were apart when she undertook to pass. The evidence shows clearly that a steamer in passing a canal-boat renders the latter for the time unmanageable by her tiller; the swell from the bows of the steamer first throwing the stern of the canal-boat away from the steamer, and afterwards, as the steamer approaches the bows of the canal-boat, having the same effect on her bows, while at the same time the strong suction from the propeller of the steamer, as it approaches and passes the stern of the canal-boat, draws the stern powerfully towards the steamer. The latter co-operating with the repelling effect of the swell on the bows of the canal-boat, is frequently sufficient to send the latter upon the opposite bank of the canal, from which the steamer often assists by a line in jerking her off. These ordinary effects of a steamer's passing a canal-boat in the canal were well known to all the parties to this controversy. It is clearly dangerous, therefore, for a steamer to attempt to pass a canal-boat when there is any other craft in the canal, which may be met, not merely before the steamer herself has passed, but before the canal-boat would have time to recover her proper position in the canal. Regulation No. 49 of the canal board (Manual of Canal Laws, 349) requires that a horse-boat, when approached within 50 feet by another horse-boat overtaking it, and proceeding in the same direction, shall turn from the tow-path, and give the rear boat every practical facility for passing, and stop whenever necessary, until the rear boat shall have passed. The same regulation requires a horse-boat, when approached within 20 feet by a steam-boat moving in the same direction, "to turn towards the tow-path, and cause their horse to cease towing until the steamer has passed five feet ahead" of it.

According to the steamer's witnesses she was going about two and one-half miles an hour, while the canal-boats were going from one and

one-half to two miles. They testify that when about a length and a half astern of the Reed, two steam-whistles were given as a signal to the Reed that the steamer would pass. These were not heard on the Reed, and the latter's witnesses testify that when she was about a length off they shouted to the City of Troy not to attempt to pass until they had got by the Sutton. These shouts were also unheard. The steamer proceeded to pass along the berme bank, there being sufficient room for her to do so without any change in the Reed's position. The City of Troy's witnesses say that when her signals were given the horses of the two teams were 200 feet apart, which would make the Sutton and the Reed at that time from 500 to 600 feet apart. But when the bows of the City of Troy began to lap the stern of the Reed, as all the other witnesses testify, the teams of the Reed and the Sutton had passed each other, and the two boats were not more than from 100 to 200 feet apart. The captain of the City of Troy testifies that he slowed down while passing the Reed, the object of which was to lessen the effect of the swell and the suction upon the Reed. When the Reed and the Sutton were about 200 feet apart the Sutton's team was stopped; the Reed's team was stopped when the City of Troy had lapped the stern of the Reed. The stopping of the teams, however, affected the progress of the canal-boats only measurably. The Sutton at the time of the collision was nearly stopped by land, as there was a considerable current in the canal against her; while the progress of the Reed, with the same current in her favor, could not have been much checked during the short time that elapsed between her team's stopping and the collision.

As the canal-boat was going only some two and one-half miles an hour, it was very plain that she could not possibly have passed the Reed before the Sutton was reached, even if at the time when her signals were given the distance between the Reed and Sutton was 600 feet, and the distance between the City of Troy and the Sutton 750 feet. The boats were all about 100 feet long, and at those rates of speed, respectively, the City of Troy would gain but two lengths while the Reed was going three. Even if the former had not slowed down while passing, she had three and one-half lengths to gain from the time when the signals were given before she would have cleared the Reed, and the latter would still have to recover her proper place in the canal in order to avoid running into the Sutton. And as the Sutton, moreover, was approaching the Reed at about the same rate, it is clear that at the time the City of Troy's whistles were given the Reed and the Sutton were not far enough apart to enable the City of Troy to pass the Reed before the Sutton would comè abreast, unless she was going at a more rapid rate than her witnesses admit; and if she was, there was the greater danger through the greater disturbing effect upon the Reed while passing. On the evidence, therefore, I cannot entertain any doubt that the attempt to pass the Reed, with

its known hazards, was rash and foolhardy, and that the City of Troy must be held liable on the general ground of want of due care and regard for the safety of the other boats in the canal.

Regulation No. 50, although not in terms including this case, does, I think, by analogy, condemn, if it does not prohibit, a steamer's ever undertaking to pass another boat when a third would come abreast of them before they had sufficiently cleared. That regulation provides that, where two boats "coming in opposite directions, shall approach each other in the vicinity of a *raft*, so that if both should continue they would meet by the side of such raft, the boat going in the same direction as the raft shall stop until the other boat shall have passed the raft." The evident purpose is to prevent passing three abreast, with all the dangers incident to that situation. The Reed in this case was in a situation analogous to the raft referred to in this regulation. The steamer was going in the same direction, and by this regulation would be required to wait until the Sutton should have passed the Reed. There was nothing in this case to prevent the City of Troy from waiting until the Sutton and Reed had passed each other, which they would have done in less than two minutes after the City of Troy had reached the stern of the Reed. There is no obligation in the regulations, and none which reason can suggest, that the Sutton should have stopped rather than the City of Troy which could easily control her own motions; but manifestly the contrary. When the City of Troy was seen about to pass the Reed, the Sutton did stop and hugged the tow-path bank, and no fault is attributable to her.

With regard to the Charley A. Reed, I am obliged to find a violation of regulation 49 on her part, in not stopping when the steam-boat approached within 20 feet. Her helmsman first testified that his team did not stop until the City of Troy "was right broad-side of us." He afterwards said that when he first slowed up, the City of Troy had lapped about 10 feet. The regulation is explicit in such cases that the boat ahead shall cease towing when the steamer has approached "within 20 feet." Considering the precautions necessary for the safety of the boats, there was no reason why the Reed, even independent of this regulation, should not have stopped as soon as the Sutton's team was stopped. No regulation required the Sutton to stop; her captain acted as a prudent person should act in view of probable danger. The Reed not only did not act with this care and prudence, though the danger was sooner visible to her, but she neglected the express requirement of the regulation as well. It is impossible to say that if she had slowed sooner this could have had no effect in avoiding the collision. The blow was a comparatively light one; she had a line thrown out to the City of Troy at the time for the purpose of keeping her off, and timely slowing by the Reed, as the regulation required, might possibly have been sufficient to avoid the collision altogether. The Reed must, therefore, be held liable for

contributory negligence in this respect. *The Pennsylvania*, 19 Wall. 125.

It results from this that the owner of the Sutton is entitled to a decree against both the Reed and the City of Troy, and that the owner of the Charley A. Reed is entitled to a decree against the City of Troy for half his damages, with costs to the libelant in each case.

RED WING MILLS *v.* MERCANTILE MUT. INS. CO.

(*District Court, S. D. New York.* January 9, 1884.)

1. SHIPPING — THROUGH BILL OF LADING — INSURANCE — CONSTRUCTION — STATE LINE.

   The words used in insurance contracts are to be understood according to their ordinary scope and meaning, unless a more restricted use is established by general mercantile usage, or expressly brought to the notice of both parties.

2. SAME—TRANSFER OF GOODS.

   Where flour was shipped by the Merchants' Dispatch Transportation Company, at Red Wing, Minnesota, for Glasgow, Scotland, by a through bill of lading of that company and the State Line, and the shipper thereupon effected insurance with the respondents upon a certificate of marine insurance "from New York to Glasgow on board of the State Line," and a portion of the flour, on arrival at New York, was loaded on board the steam-ship Zanzibar, which was not one of the regular steam-ships of the State Line, but of which that line had taken an assignment of a charter-party for a single trip from New York to Glasgow, the charter-party being a contract of affreightment merely, and the possession and the control of the Zanzibar remaining with her owners, and not with the State Line, *held*, that the Zanzibar did not form, even temporarily, a part of the State Line, and that the insurance did not attach, but that the loading on the Zanzibar was a transfer by the State Line of the flour so loaded to another steamer, in accordance with one of the provisions of the through bill of lading. *Secus*, had the possession and control of the Zanzibar, though for a single voyage only, been in the State Line

In Admiralty.

On the fourteenth of December, 1878, the libelants delivered to the Merchants' Dispatch Transportation Company, at Red Wing, Minnesota, 800 barrels of flour, to be transported from Red Wing to Glasgow, Scotland, and received what is known as a through bill of lading, entitled "The Merchants' Dispatch Transportation Company and the State Line." On the sixteenth of December the libelants took out a certificate of insurance from the respondents' company, to the amount of $2,800, upon the 800 barrels of flour insured, to be shipped "on board of the State Line, at and from New York to Glasgow, Scotland." On the arrival of the flour at New York, one of the regular vessels of the State Line having been totally lost, and there being an accumulation of goods, the agents of the State Line, Austin, Baldwin & Co., took to themselves an assignment of a charter-party of the steam-ship Zanzibar, from the agent of the New York Central Railroad Company, who held a charter of the Zanzibar, for a

return voyage to Great Britain, and thereupon, on account of the State Line, Austin, Baldwin & Co. loaded her with wheat and peas in bulk, and other cargo, including 400 barrels of the flour in question. The Zanzibar shortly after sailed from New York and has never been heard from. The claim of the libelants for these 400 barrels of flour was adjusted by the respondents' agents in London as a total loss. Payment, however, was resisted, on the ground that the policy never attached as respects the Zanzibar, because, as alleged, she was not a vessel belonging to the State Line.

The through bill of lading contained, among others, the following clauses:

"(6) It is further agreed that the said Merchants' Dispatch Transportation Company have liberty to forward the goods or property to port of destination by any other steamer or steam-ship company than that named herein, and this contract is executed and accomplished, and the liability of the Merchants' Dispatch Transportation Company, as common carriers thereunder, terminates on delivery of the goods or property to the steamer or steam-ship company's pier in New York, when the responsibility of the steam-ship company commences, and not before. (7) And it is further agreed that the property shall be transported from the port of New York to the port of Glasgow by the said steam-ship company, with liberty to ship by any other steam-ship or steam-ship company."

The charter-party of the Zanzibar is dated December 18, 1878, and provided that the Zanzibar, classed as 100A11, in measurement 2,245 tons, should proceed from Liverpool to New York, and thence back, with a cargo of provisions and grain or cotton, at a specified rate of freight, to some one safe direct port in the united kingdom of Great Britain and Ireland, etc. On the twenty-eighth of December, the ship being then in New York, all right, title, and interest in the charter-party was transferred to the agents of the State Line. By the terms of the charter-party the navigation of the ship remained entirely under the control and at the expense of her owners; and not of the charterers.

Evidence was given at the trial to the effect that on vessels belonging to regular and known lines of transportation the rate of insurance is less than upon independent vessels. Evidence was also given by several agents of insurance companies that they would not consider a vessel employed upon a single trip, like the Zanzibar, to come within the description of "The State Line" referred to in the certificate of insurance.

Sidney Chubb, for libelant.

Scudder & Carter, for respondents.

BROWN, J. I do not think that this case should be determined with any reference to what the agents of the insurance companies in New York might consider as coming within the description of "The State Line." The merchants who ship these goods by a through bill of lading, a thousand miles away in the interior, and who deal with the insurance company's agents there, have a right to rely upon the

ordinary meaning and scope of the terms used in the certificate of insurance, unless a more restricted meaning is proved to have been recognized and established by general mercantile usage, or else expressly brought to their notice, neither of which in this case has been proved. This insurance was not upon any particular vessel. It was manifestly intended to be as broad as "The State Line," which was acting in conjunction with the Transportation Company in obtaining goods on through bills of lading. In my judgment, therefore, "The State Line" must be held to embrace all vessels which were navigated under the possession, control, and management of the State Line, whether the vessels were such as existed on the date when the certificate of insurance was issued, or were new vessels introduced into that line afterwards, on board of which the goods might be shipped; or whether the vessels were owned or were merely chartered by that line, either before or after the date of the certificate, provided they were in its possession and control. Nor can I deem it of any consequence that the vessel performed but a single voyage, provided that upon the voyage on which she sailed she was in the possession and under the management and control of the State Line. If so, she was during that voyage a part of the State Line, and was one of the vessels of the State Line *pro hac vice*. If, on the other hand, the vessel which carried the flour was not in the possession or under the management or control of the State Line, then the case would be that of a carriage of the goods by another steamer to which the State Line had transferred them.

The express conditions of the through bill of lading gave the State Line the right "to transfer the goods to any other steam-ship or company;" and if the State Line did thus transfer the carriage of 400 barrels, a part of this consignment, to any other vessel, in accordance with this provision, it seems plain that the certificate of insurance would not attach to the latter vessel. The existence of this provision in the through bill of lading was notice to the libelants of the necessity of watchfulness on their part in respect to any transfer of the goods by the State Line to any other steamer, and of the need of provision for such a contingency in their insurance.

After the loss of the Zanzibar was suspected, some correspondence between the parties to this suit arose on that very point, from which it is clear that the libelants were aware of this contingency in regard to the insurance, and of the necessity of an assent by the insurance company in order to hold them as respects any other vessel to which the flour or any part of it might have been transferred by the State Line.

The terms of the charter of the Zanzibar, of which the agents of the State Line took the transfer, are such as show clearly that the State Line did not acquire the possession or have any control of the navigation of the latter vessel. It was a contract of affreightment only, and the assignment of it to the agents of the State Line gave

them the right only to lade the ship with such and such goods. The possession and the responsibility and control of the navigation of the Zanzibar remained solely with her general owners. And it was under such a charter-party that the 400 barrels in question were laden on board the Zanzibar by the State Line. This, in my judgment, was a transfer of so much of this flour to another steamer within the terms of the clause of the through bill of lading above quoted. The State Line had no possession of the Zanzibar and no control over her. They loaded the flour on board of her, as any merchant might have done, at a specified rate of freight, for which, under the terms of the charter-party, the vessel and her owners contracted to deliver these goods at Glasgow.

On the ground, therefore, that neither the possession nor the control of the Zanzibar upon this voyage was in the State Line, I must hold that the Zanzibar was not one of the vessels of the State Line, even temporarily or *pro hac vice;* that the certificate of insurance, therefore, did not attach; and that the libel must be dismissed, with costs.

The B. B. Saunders. (Two Cases.)

(*District Court, S. D. New York.* January 7, 1884.)

1. Collision—Action for Damages—Tort.
   An action for damages occasioned by collision is an action of tort founded upon negligence.
2. Same—Answer—Negligence.
   Where the answer denies any negligence, the burden of proof is upon the libelant, unless the answer states, or by not denying admits, facts from which negligence is legally presumed.
3. Same—Inspectors' Rules—Fifth Situation.
   The supervising inspectors, under the act of Feburuary 28, 1871, (section 4412, Rev. St.,) have authority to frame additional regulations in regard to steamers passing each other, not in conflict with the statutory rules. Their rules requiring steamers in the fifth situation to pass ordinarily to the right, but permitting vessels in peculiar situations to pass to the left upon sounding a signal of two whistles, is within the scope of their powers, and obligatory on vessels navigating the harbors.
4. Same—Answering Signals.
   The requirement that the signal in answer to the exceptional signal of two whistles shall be given "promptly," is not complied with except by an immediate answer, before other maneuvers are taken, where no reason for delay appears.
5. Same—Case Stated.
   Where the tugs B. B. S. and O. were approaching each other upon crossing courses in the East river in the fifth situation, and the O., having the B. B. S. on her starboard hand, sounded a signal of two whistles, and the B. B. S., without first replying thereto, immediately signaled to her engineer to stop and back his engines,—a proper maneuver in accordance with that signal,—but did not immediately answer the two whistles, and very shortly after the O. gave a signal of one whistle, which was immediately answered by one whistle, and a collision ensued, and the case was submited by both sides without other evidence, *held*, that the B. B. S. was in fault in not answering promptly the O.'s

signal of two whistles before proceeding to maneuver in accordance with it; that it is impossible to say that the delay and the change of signals may not have contributed to the collision; and that the B. B. S. was therefore liable.

The above libels were filed to recover $9,500 damages for injuries sustained by the canal-boat H. B. Wilbur and cargo, which was in tow of the B. B. Saunders, through a collision with the steam-tug Orient, on the twenty-sixth of September, 1879, in the North river, opposite Harrison street. The Saunders, at about 12 M., had left pier 40, North river, with the Wilbur lashed to her port side to be towed to Newark. The day was clear and the tide slack. About 10 minutes after leaving the slip, when the tug was about a third of the way across the river and heading down stream, the Orient was seen coming out of the Harrison-street slip. She bore about three or four points off the Saunders' port bow. Shortly afterwards, as the answer states, the Orient "blew a signal of two blasts of her steam-whistle to signify to the Saunders that the Orient desired to pass across the river in front of the Saunders; that the pilot of the latter thereupon gave a signal to the engineer of his vessel to slow her engine; that almost instantly, and before said pilot had time to do anything further, the Orient blew a signal of one blast of her steam-whistle to signify to those on board the Saunders that the Orient intended to pass astern of her; that the Saunders immediately replied to said second signal with a single blast of her steam-whistle, and signaled the engineer of the Saunders to go ahead at full speed, and then put her helm to port; that these orders were obeyed, but the Orient continued upon her former course across the river without change until she struck the Wilbur."

The libelants called one witness, who was on board the Wilbur, who testified that he saw the Orient coming straight out of either Harrison or Canal street slip, apparently going across the river ahead of him; that he did not notice her again, being occupied, until she was within 30 or 40 feet of him, and that she came straight upon the Wilbur, striking her about amid-ships; and that at that time the head of the Saunders was canted towards New York, and that the captain only was in the pilot-house. They also read the deposition of the engineer of the Orient, showing that at the time of the collision the engines of the latter were backing, but he did not know whether her headway was stopped or not. Upon this evidence and the pleadings the libelant rested, and the claimants submitted the case upon this testimony, claiming that no *prima facie* case had been made out against the Saunders requiring any exculpating evidence on their part. The answer also states that shortly before the collision, and when it was seen to be inevitable, the pilot of the Saunders starboarded his helm to ease the blow.

T. L. Ogden and *Chas. M. Da Costa*, for insurance company.

E. D. McCarthy, for libelant, Toole.

Butler, Stillman & Hubbard and *W. Mynderse*, for claimant.

BROWN, J. The libelants contend that it is a point of great practical importance in this case, and in others similar, that they should not be compelled to call unfriendly witnesses when not absolutely necessary; and they rested their case upon the pleadings, and the slight testimony of two witnesses, as making out a *prima facie* case of negligence in the Saunders, at the same time claiming, also, that the Saunders, having taken the tug in tow under a contract to transport her to Newark, should be legally treated as a bailee, bound affirmatively to excuse herself for not having fulfilled her engagement. The engagement to tow the tug to Newark is averred in the libels and is not denied in the answer. It is unnecessary to inquire how the burden of proof would stand if the libels were filed upon such a contract only. That is not the case here. They expressedly state that they are filed in a cause "of collision." Both tugs were originally proceeded against; the averments are equally against both; negligence is charged against both; and the little evidence given does show that the Wilbur was run into by the Orient. Shortly after the commencement of the first suit, the Orient was sold for seamen's wages, and no surplus remained after satisfying that decree, and the case now proceeds against the Saunders alone. The case as presented is not one of contract, but of tort; and the foundation of the actions against both vessels is negligence in the tugs. A *prima facie* case of negligence must therefore be made to appear, either from the pleadings or from the evidence, or else the libels must be dismissed.

In the case of *The L. P. Dayton*, 10 Ben. 430, 433, 18 Blatchf. 411, the libelant in a somewhat similar case rested without any proof, both tugs being there before the court, and each by its own answer exculpating itself, and showing the whole fault to have been in the other. The canal-boat in that case was in tow of the Dayton. BLATCHFORD, J., says:

"As respects the Dayton, no *prima facie* case of negligence is shown by her answer. The fact that the collision occurred while the Centennial was under the control and direction of the Dayton, and had neither propelling nor steering power of her own, is not *prima facie* evidence of negligence in the Dayton."

See, also, the English cases there cited, and *The Florence P. Hall*, 14 FED. REP. 408, 416, 418; *The Morning Light*, 2 Wall. 550, 556.

I do not think the evidence sufficient to show that there was no lookout on duty, or no other pilot than the captain on board. The evidence is sufficient, however, to show that the two tugs were approaching each other upon crossing courses, so as to be in the fifth situation, the Orient having the Saunders on her own starboard hand. It was the duty of the Orient, therefore, to keep out of the way. She blew two whistles to indicate that she would cross the bows of the Saunders. The supervising inspector's rules of 1875 required that the Orient, in such a situation, should ordinarily go

astern of the Saunders, having previously given one blast of the steam whistle. Rule 2, and the illustrations, pp. 37, 38. The note under rule 6, however, states that—

"The foregoing rules are to be complied with in all cases except when steamers are navigating in a crowded channel, or in the vicinity of wharves. Under such circumstances, steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents."

And at page 38, under the illustrations, it is further said:

"When, for good reason, in rivers, and narrow and difficult channels, a pilot finds it necessary to deviate from the standing rule just stated, he shall give early notice of such intention to the pilot of the other steamer by giving two blasts of the steam-whistle, and the pilot of the other vessel shall answer promptly with two blasts of his whistle, and both boats shall pass to the left."

In these rules I do not perceive anything beyond the scope of the powers conferred upon the supervising inspectors by section 4412 of the Revised Statutes, (Act of February 28, 1871, § 29, 16 St. at Large, 450; Act of 1852, § 29, 10 St. at Large, 72.) Under rule 19 of the statutory rules of navigation, (section 4233,) considered alone, when steam-vessels are crossing in the fifth situation, the steam-vessel which has the other on her starboard hand would doubtless have an option to go on either side of the other; but that option would exist, not by force of any statutory authority, but simply through the absence of any limitation as to the mode in which she might perform her duty of "keeping out of the way." But after the statutory rules were adopted in April, 1864, (13 St. at Large, 58, p. 60, arts. 14, 18,) the authority of the supervising inspectors was renewed by the Act of 1871 (section 4412) to establish additional "regulations to be observed by all steam-vessels in passing each other." Regulations thus established, and not in conflict with the statute rules, are manifestly binding.

It seems to me entirely competent for the inspectors, under this authority, to establish by rule in what particular mode vessels meeting in the fifth or sixth situation shall pass each other. The statute makes no provision as to the mode of passing, but requires only that the one vessel shall keep out of the way of the other. Where there are two ways of doing this, equally available, it is not inconsistent with the statute for the supervising inspectors to provide that it shall ordinarily be done in one of those ways, and not in the other; and by going to the right, rather than to the left, when there is nothing to prevent this course. All that I understand BENEDICT, J., in the case of *The Atlas*, 4 Ben. 30, to have disapproved in the former rules, was in so far as the regulation required a port helm *in all cases*. The vessel required to keep out of the way, he says, "may proceed according as the case requires, and it was a fault in her to port if starboarding afforded the only opportunity of avoiding the disaster." The present regulations of the supervisors, with the provisions above

quoted, provide fully for these contingencies and exceptions. The mere fact that rule 2 of the present regulations limits the course of the vessel bound to keep out of the way, in ordinary circumstances, to one of the two alternatives which she would otherwise have an option of choosing, is no objection, as it seems to me, to this rule. All regulations necessarily restrict, and are intended to restrict and make definite, what was previously undefined and subject to the choice of the parties; and the regulation in question seems to me to be clearly calculated to promote certainty in navigation, and to avoid danger, as well as to permit all reasonable and necessary means of doing so. In effect, it re-establishes what was regarded as the rule previously existing in ordinary cases. *The Johnson*, 9 Wall. 146, 153; *The St. John*, 7 Blatchf. 220; *The Washington*, 3 Blatchf. 276. Rule 2, requiring vessels meeting obliquely to pass ordinarily to the right, subject to the qualifications above quoted, and the requirement of signals to be given and answered "promptly," I must regard as strictly obligatory. Non-observance of these requirements has been repeatedly held to be a fault sufficient to charge the offending vessel with contributory negligence. *The Grand Republic*, 16 FED. REP. 424, 427; *The Clifton*, 14 FED. REP. 586; *The Wm. H. Beaman*, 18 FED. REP. 334.

The pilot of the Orient, presumably for good reason, desiring to pass ahead or to the left, gave two blasts of his steam-whistle, as required by the exceptions above quoted. The pilot of the other vessel heard these signals, and was thereupon required to "answer promptly." Instead of doing so, the pilot of the Saunders, as appears from her answer, proceeded to maneuver his own vessel upon the basis of that signal by an order to slow his engine, but without previously informing the Orient of that intention or maneuver, but "almost instantly," as the answer continues, "and before he had time to do anything further, the Orient blew a signal of one whistle, to which the Saunders replied with one, and put her engine full speed ahead. The collision followed, though, as the answer of the Saunders alleges, wholly through the fault of the Orient. The answer states no reason, however, why the signal of two whistles was not responded to "promptly" before signaling to her engineer to slow her own engines. The case as submitted, therefore, presents only the extremely narrow, but naked, technical question, whether, where no reason appears for a contrary course, an answering signal is required, by the inspectors' rules, to be given at once, and before any other maneuvers are taken; for if the rule does require that, then the Saunders is *prima facie* in fault, and is called upon either to justify her departure from the rule, or else to show that such departure in no way contributed to the collision. I think this question must be answered in the affirmative, and especially so where the signal received is one proposing an exceptional course, as in this case. The vessel first giving such an exceptional, though lawful, signal, certainly ought to

be informed immediately whether it is assented to or not, in order that her own navigation may be guided accordingly. She cannot rightly be kept in suspense, not knowing whether her proposal is to be assented to or not, or which way to shape her course. The object of mutual signals is the mutual understanding of each other's course. The rule requires a prompt reply to prevent suspense and miscalculation. To act upon exceptional signals received by maneuvering accordingly, without previous notice of acceptance, is a double wrong, and misleads in two ways: *First*, by inducing in the other vessel the belief of dissent through the delay; and, *second*, by a change of course or rate of speed without notice. If the rule requiring the answer to be given "promptly" is not enforced literally, so as to exclude all other maneuvers before answering which are not shown to be necessary by the circumstances, the regulation requiring an answer to signals can be of little avail, and might rather prove a snare than a help to safe navigation. It is impossible to say that the result of the delay in this case, however small it may have been, was not the cause of the Orient's changing her signal of two whistles to that of one whistle, and thereby the cause of the collision which followed.

As the evidence and pleadings, therefore, are sufficient to show that the rule of the fifth situation is applicable, and that the Saunders failed to respond promptly to the signal given, as required by the inspectors' regulations, and no reason for this failure to respond promptly being alleged in connection with this admission in the answer, or proved, I must hold that there is a *prima facie* fault shown in the Saunders in this respect; and, as it is impossible to say that this fault did not contribute to the collision, the libelant is entitled to a decree, with costs. *The Pennsylvania*, 19 Wall. 125, 137.

THE QUERINI STAMPHALIA, etc.

THE CREDIT LYONNAIS.

(*District Court, S. D. New York.* December 31, 1883.)

1. SHIPPING—BILL OF LADING—BONA FIDE INDORSEE—FREIGHT PAYABLE—LUMP SUM—QUANTITY UNKNOWN.
   Where a bill of lading, after reciting receipt of a given quantity, weight, etc., contains a further express provision, "quantity, weight, and contents unknown," the vessel may show that less than the amount stated was received, and will not be liable, as for short delivery, even to a *bona fide* indorsee of a bill of lading, if she delivers all that she received.

2. SAME—RECEIPT FOR MORE THAN ACTUALLY PUT ON BOARD.
   If the master acknowledges receipt, knowingly, for a greater amount than has been put on board, *quære*, whether the vessel is liable, in an action *in rem* for more than the amount actually laden on board.

3. SAME—CHARTER-PARTY.
The *bona fide* indorsee of a bill of lading is not affected by the provisions of a charter-party, of which he has no knowledge or notice, so as to be put on inquiry. In such a case he is liable for freight only, according to the provisions of the bill of lading.

4. SAME—CASE STATED.
Where the bill of lading provided, "freight to be paid for 410 tons, £451," etc., and "to pay in New York £300.13.4," *held*, this was notice of a specific sum to be paid, though the cargo was short of 410 tons, it appearing that the kilos actually receipted for amounted to only 400 tons.

In Admiralty.

Condert Bros., for libelant.

Butler, Stillman & Hubbard, for claimant.

BROWN, J. The libelant is the *bona fide* indorsee of a bill of lading given by the master of the Querini Stamphalia for certain iron shipped at Odessa on August 5, 1880, to be transported to New York. This suit was brought to recover for an alleged short delivery of iron to the amount of a little over 38 tons. The cross-libel was filed to recover £300 for unpaid freight. The evidence shows satisfactorily that all the iron was delivered which was received on board the vessel. No question is made but that this would be a good defense as against the shipper. The libelant, the Credit Lyonnais, however, contends that as *bona fide* indorsee of the bill of lading for value, it has a right to rely upon the representation as to the amount of iron shipped contained in the bill of lading, and a right to hold the vessel and her owners for the delivery of this amount. The bill of lading, however, expressly states that the "quantity, weight, and contents are unknown." In the body it recites the receipt of 406,000 kilos; and this is equal to only 400 tons. Only about 362 tons were delivered. In the margin of the bill of lading, however, is an entry "freight to be paid for 410 tons," etc. Numerous authorities establish the rule that a clause in the bill of lading reciting that the weight or quantity is unknown qualifies the effect of other statements as to the amount or weight, and authorizes proof to show that a less amount was in fact received on board. *Clark* v. *Barnewell*, 12 How. 272; *630 Quarter Casks of Sherry*, 7 Ben. 506; 14 Blatchf. 517; *Shepherd* v. *Naylor*, 71 Mass. 591; *Kelley* v. *Bowker*, 11 Gray, 428; *The Nora*, 14 FED. REP. 429.

In the cases on this subject I find no distinction made in favor of an indorsee of a bill of lading. Most of the cases above cited are those of such an indorsee. Nor do I perceive any reason why any such distinction in his favor should be made; for upon the face of the bill of lading itself he has notice of the qualification which authorizes the master to show that a less amount was actually received. He cannot be, therefore, in the legal sense, a *bona fide* holder relying upon a representation by the master of a specific amount received on board. There is no room, therefore, for any such estoppel as exists in favor of a *bona fide* indorsee where no such qualification appears on the

face of the bill of lading. *Bradstreet* v. *Heran*, 2 Blatchf. 116; *Meyer* v. *Peck*, 28 N. Y. 598; *112 Sticks of Timber*, 8 Ben. 214.

The case of *Jessel* v. *Bath*, L. R. 2 Exch. 267, is almost identical with the present. There the plaintiff was the assignee for full value and *bona fide* holder of the bill of lading of goods shipped on the defendant's vessel, and brought his action to recover for a short delivery of manganese. The bill of lading was similar to the present, stating "weight, contents, and value unknown." The court unanimously held that the action could not be maintained, either at common law or on the statute of 18 & 19 Vict., it appearing that the defendants delivered all that they had received, though less than the number of kilogrammes stated in the bill of lading. KELLY, C. B., says the bill of lading "may be reasonably and fairly read as meaning that a quantity of manganese had been received on board, appearing to amount to thirty-three tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight."

MARTIN, B., says:

"The person, therefore, signing the bill of lading by signing for the amount, with this qualification, 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable, and I do not understand how a statement so qualified binds any one."

BRAMWELL, B., says:

"This document, though apparently contradictory, means this: A certain quantity of manganese has been brought on board, which is said by the shipper, for the purpose of freight, to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present."

These cases seem decisive on this branch of the present controversy.

Again, the indorsee of the bill of lading brings this action *in rem* against the vessel for short delivery. The case of *Pollard* v. *Vinton*, 105 U. S. 7, the case of *Hubbersty* v. *Ward*, 8 Exch. 330, and other authorities cited in *Pollard* v. *Vinton*, seem to me to hold that the vessel cannot be bound, whatever may be the liability of the master, for goods not put on board. In Maude & P. Law Merch. Shipp. 343, it is said, generally, that "the master has, as against his owners, no authority to sign bills of lading for goods not received on board; nor has he power to, nor does he, charge his owners by signing bills of lading for a greater quantity of goods than those on board; and all persons taking bills of lading by indorsement, or otherwise, must be taken to have notice of this." The vessel cannot, in this case, be

held liable for any short delivery, and the libel of the Credit Lyonnais must be dismissed, with costs.

In the libel for freight, there is a question how much freight can be claimed. The vessel was chartered by her owner to H. J. Morrens, who agreed to load from 410 to 420 tons of old, heavy, wrought, scrap-iron, at the rate of 22 shillings per 20 cwt., one-third payable on signing bills of lading, and the rest on delivery of the cargo, "the owner and master to have an absolute lien on the cargo for all freight, dead freight, and demurrage." The iron shipped at Odessa belonged to the charterer. It was weighed in the city and thence brought several miles to the dock. After it had arrived there, a considerable amount was thrown out, before shipment, as unfit, by the charterer's agent, and other portions were stolen, so that considerably less than the lowest amount, namely, 410 tons, stipulated for in the charter, was furnished to the vessel. Under the stipulation for dead freight, the vessel had a lien on the 368 tons shipped for the full freight, at the rate of 22 shillings per 20 cwt., upon the 410 tons agreed to be furnished. The bill of lading was made out for 406,000 kilos, equal to 400 tons, or 10 tons only less than the stipulated amount; but the master was confident that there was even less than this, and he hesitated about signing the bill of lading for that amount, but was assured by the shipper's agent that any difference would be deducted. In the body of the bill of lading, freight was specified "to be paid on the said goods, 22 shillings per 1,015 kilos, as per margin," and in the margin were the following entries, "freight to be paid for four hundred ten tons, £451. Received ⅓—£150.6.8. To pay in New York, £300.13.4. Signed for shipper. G. WERTH."

There is no reference in the bill of lading to the charter-party; the indorsee of the bill of lading is not, therefore, affected by its provisions, except in so far as he had notice of it, and so put on inquiry, equivalent to notice. He has a right to rely upon the bill of lading, and cannot be held liable for dead freight, which is the subject of the present controversy, beyond what is required by the bill of lading itself. Conceding this to the fullest extent, it is impossible for me to read this bill of lading all together, without holding that the Credit Lyonnais were not only put upon inquiry by the peculiar character of the several clauses which this bill of lading contained in regard to payment of freight, and the amount, but also that they had express notice that the sum of £451, less the one-third already paid, was to be paid upon delivery of the cargo, as for 410 tons. The statement in the body of the bill of lading that freight was to be paid, 22 shillings for 1,015 kilos, is qualified by reference to the margin, which shows that 410 tons was to be paid for, while the amount stated to be received on board, namely, 406,000 kilos, amounted to only 400 tons. Here was a very plain ambiguity, even in this part of the bill of lading, which was of itself sufficient to put the indorsee on inquiry; and inquiry could not have failed to disclose the existence of the

charter-party, and the right of the vessel to receive freight on 410 tons. But again, the indorsements in the margin of the bill of lading, made and signed by the agent of the shipper, expressly direct "freight to be paid for 410 tons," namely, £451, which 410 tons amount to, at the rate of 22 shillings per ton. Deducting £150, the margin then reads "to pay in New York, £300.13.4." Here, then, is a specific adjustment of the amount of freight to be paid in New York, arrived at by computation, with the shipper's direction that that amount is to be paid and collected in New York, although it disagrees with the prescribed rate and weight, as given in the body of the bill of lading. The object of this indorsement by the shipper's agent was, as seems to me, plainly to give express notice, both to the captain that he must collect the full amount on delivery, not holding the charterer upon his charter for any deficiency in freight, and also to notify the indorsee of the amount which he must pay. That this amount was irrespective of the actual weight of iron receipted for, and, therefore, necessarily irrespective of the amount of weight delivered, appears upon the very face of the bill of lading.

By force of the terms of the bill of lading itself, therefore, I must hold that the Credit Lyonnais is liable for the full balance of the stipulated freight, and a decree should be entered therefor, with costs.

THE JENNIE B. GILKEY.

BAKER and others *v.* LORING.

(*Circuit Court, D. Massachusetts.* January 22, 1884.)

1. ADMIRALTY LAW — SCHOONER'S LIABILITY FOR NECESSARY SUPPLIES — WHAT CONSIDERED THE "HOME PORT" OF A VESSEL — RESIDENCE OF OWNER OR MASTER.

   It is well established that the port of registry is *prima facie* the home port of a vessel, and this presumption must be overcome by clear proof, before any other home is taken as the true one; but it has often been decided, too, that the place of residence of the owners of a vessel is to be considered the home port, even when the registration is in another state, if the facts of ownership and residence were known, or might have been known, to the material-man. But as to majority and minority ownership, or as between the managing or not managing ownership, *quære.*

2. SAME — NAME OF PORT ON THE STERN.

   The statute requiring the name of the port of registry to be painted on a vessel's stern is intended to give to all persons interested notice of the home of the vesssel.

3. SAME — MASTER — "ACTING AND MANAGING OWNER" — SAILING ON SHARES.

   Where a schooner was sailed by the master on shares, he to supply and man her, and pay a certain part of the net earnings to the owners, *held*, that he was not the "acting and managing owner," in the sense of Rev. St. § 4141, but the charterer; and that his sailing on foreign voyages from New York more or less often would not make New York his "usual residence," under that section, if his family lived in Massachusetts.

4. SAME—INSURANCE—PREMIUM.

It seems that premiums of insurance are not necessaries for a ship; and *held* that where the account of a material-man was insured with the consent of the master and of one part owner, and the account was a charge on the ship but not on the owners personally, there was no privilege for the premiums.

In Admiralty.

C. T. Russell and *C. T. Russell, Jr.*, for libelants, appellants.

Geo. M. Reed, for claimant.

LOWELL, J. The schooner Jennie B. Gilkey was sold in the district court, and certain debts which were admitted to be privileged were paid out of the proceeds. The libel of H. M. Baker & Co., of New York, for necessary supplies furnished the master in New York, for his last voyage, was rejected, because, according to the evidence in that court, New York appeared to be the home port of the schooner. A new case is made in this court, and has been very thoroughly prepared and argued, both upon the facts and the law. The claimant, Mr. Loring, owns the greater part of the vessel, and contests the lien of the libelants. When these supplies were furnished, the vessel was owned in Massachusetts, Maine, and New Hampshire, excepting that Loud & Co., of New York, owned one sixty-fourth part. The case for the libelants is, that the schooner was built and largely owned in Boston, and had a permanent register in that port; that "Boston" was painted on her stern; that they believed, and had reason to believe, that she was a Boston vessel; and that in fact she was so. The contention of the claimant is, that New York was the home port of the vessel, because Loud & Co., of that city, were her managing owners; or that the master was such owner, and usually resided in New York; that, therefore, she should have been registered there; and that admiralty, like equity, will hold that to be done which ought to have been done. If Loud & Co. were the husbands, or acting and managing owners, of the vessel, the registration should have been changed to New York when they were appointed to that office. Rev. St. § 4141. It does not necessarily follow that New York became, *ipso facto*, the home port, without change of registration. I have seen no case which decides that the home port shifts as often as the managing owner is changed, without change of papers, or that material-men are bound to discover who is the managing owner of a vessel, or what place is his usual place of residence. One case decides that the port of enrollment is the home port, if the managing owner lives there, though a majority of the owners live in another state. *The Indiana*, Crabbe, 479. In that case the decree was that the vessel changed her home port from a certain day, which was that of her new enrollment at the port of the managing owner, and not that of the sale to him; but the time between the conveyance and the enrollment was trifling, and the point does not appear to have attracted attention.

It has often been decided that the place of residence of the owners

is to be considered the home port, even when the registration is in another state, if the facts of ownership and residence were known, or might have been known, to the material-man, (*The Golden Gate*, Newb. 308; *The Albany*, 4 Dill. 439; *The E. A. Barnard*, 2 FED. REP. 712; *The Mary Chilton*, 4 FED. REP. 847;) but I have seen no case which brought up any question between majority and minority ownership, or between the managing and not managing ownership, in a case of this kind. It is equally well established that the port of registry is, in a case of this kind, *prima facie* the home port, to be over come by clear proof, before any other home is taken as the true one. *The Superior*, Newb. 176; *The Sarah Starr*, 1 Sprague, 453; 2 Pars. Shipp. & Adm. 326. Mr. Justice CLIFFORD said that the statute requiring the name of the port of registry to be painted on the stern is intended to give to all persons interested notice of the home of the vessel, and this statement is quoted in an opinion in the supreme court. *The Martha Washington*, 1 Cliff. 463, 466; *Morgan* v. *Parham*, 16 Wall. 471, 475. As I find the facts to be in this case, it will not be necessary to go beyond these decisions.

Loud & Co. testify that they acted merely as brokers or consignees of the vessel, and neither had, nor assumed to have, any of the powers of managing owners; and this is confirmed by all the evidence. The schooner's voyages, during some years, were chiefly between New York and foreign ports, and, as is so common with New England vessels, the master sailed her on shares. He undoubtedly took the responsibility, and gave the orders for all the voyages and business of the vessel; and Loud & Co. acted precisely as they did for all other vessels which they disbursed. The fact that New York was the headquarters of the vessel, as it must be of general freighting vessels on this coast, has no effect to make it the home port. *Hayes* v. *Pacific Mail Co.* 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471.

In taking out registration, Mr. Loring, the present claimant, represented himself to be the managing owner. He says that he signed the papers because he was told by Capt. Gilkey, his brother-in-law, that they were necessary, and knew nothing about their contents, which I take to be the fact. Still, Mr. Loring was the largest owner, and all the managing owner that the vessel had, unless the master shall be considered so. I agree with the claimant that it is doubtful whether the master can be the ship's husband, or acting and managing owner in the sense of this statute; but, however this may be, I do not find, as a fact, that Capt. Gilkey was such husband, or acting and managing owner, nor that he usually resided in New York. He managed the voyages of the vessel, as charterer and special owner, not as ship's husband, in the sense of the statute; nor did he reside in New York. Judge WARE decided that a merchant who passed most of his time in New York might be considered as usually residing there, though he was domiciled in Maine. *The St. Lawrence*, 3 Ware, 211. I have my doubts of the soundness of this opinion, but

do not now controvert it. Capt. Gilkey was often in New York, but it was because his vessel happened to be there at the end of his voyages. He called himself a resident of Boston, or of Somerville, which is a suburb of Boston, and his family lived in Somerville, and it is not proved that either he, or any one else, ever supposed that he usually resided in New York. I cannot think that, if the statute would ever admit the master to be the managing owner, it intends to say that his usual residence shall shift with the shifting business of his vessel. Seamen are considered to reside, for all municipal purposes, of voting, taxation, distribution of estates, etc., where their families live, and they consider themselves to have their home. *Guier* v. *O'Donnell*, 1 Bin. 349, note; *Boothbay* v. *Wiscasset*, 3 Greenl. 354; *Hallet* v. *Bassett*, 100 Mass. 167. While I do not, at the present time, dissent from Judge WARE's opinion that a business man may have a usual residence apart from his family, I hold that the master of a vessel does not acquire such a residence by putting into a foreign port more or less often. I hold, therefore, that the schooner was properly registered in Boston, and was a foreign vessel in New York, and that the libelants have a privilege for the supplies furnished her.

The only disputed items of the account are the premiums of insurance. The evidence upon this point is not very full. I understand that the vessel sailed on her last voyage in 1878, and suffered damage which caused heavy expenses in a foreign port; that the owners contributed funds to redeem her, and afterwards became dissatisfied with the conduct of Capt. Gilkey, and sent out another master who brought the vessel to Boston in 1881. The libelants, in the mean time, having had general authority or instructions from the master to that effect, kept themselves insured by annual policies, and the principal charges of this kind are for these insurances. There is, besides, a charge for insurance on freight in one of the voyages, which was authorized by the master. In August, 1880, the claimant, in answer to a letter from the libelants, which is not in evidence, wrote: "Think your bill against schooner Jennie B. Gilkey should be covered by a yearly policy, so to get the best rate you can, at the same time be able to cancel at any time." The next year he wrote a much more cautious letter, in which he referred them to any instructions they may have had from the master. It is apparent, on the face of this second letter, that he was afraid that he had committed himself in 1880. I am of opinion that neither the master nor the claimant had authority to charge the ship with premiums of insurance paid in New York to secure the libelant's account.

There is some difference of opinion whether insurance, though duly authorized, gives the underwriters a privilege for the premiums. The better opinion appears to be that it does not, because insurance is not a necessary supply for the ship itself, but only a prudent security for the proprietary interests of her owners. Compare *The Collier*,

3 West. Law M. 521; *The John T. Moore*, 3 Woods, 61; *The Heinrich Bjorn*, 8 Prob. Div. 151; *The Dolphin*, 1 Flippen, 580, and the reporter's note; *The Guiding Star*, 9 FED. REP. 521; *The Riga*, L. R. 3 Adm. & Ecc. 516.

The strongest argument made by the libelants is that the premiums may be regarded like interest, as a charge for delay of payment. In some bottomry bonds such a charge is made by agreement; but whether the courts will uphold it, is doubtful. See *The Boddingtons*, 2 Hagg. 422; *The Robert L. Lane*, 1 Lowell, 388; where the question was not decided, but only referred to. If it were proved that by a general, long-established, and well-known custom, premiums of insurance are to be added to the account by way of consideration for the forbearance, they might possibly be allowed, on the theory that the charge for interest was proportionally diminished, or that the arrangement was an entire one, from which no one item was to be separated. No such evidence was offered.

It must be remembered that the schooner was sailed on shares under a parol charter, which required the master to supply the vessel for her voyage, though not to repair her. The schooner is liable for necessaries by virtue of a fiction of the admiralty courts, known to all the parties, and admitted in this case. But the insurance did not benefit the owners, for they were not personally responsible for this debt. The case appears somewhat stronger against the charge than if it were made in bottomry, inasmuch as the exigency was less. In bottomry, the owner is communicated with, in most cases, and if he cannot advance the money, the master must raise it on the best terms he can get. Here the libelants supposed, though they did not inquire, that the master was sailing the vessel on shares, and they therefore supposed it to be important for them to insure, because they had no resort to the owners. They protected their own interest, as a mortgagee might do, and can no more charge the premium against the ship than a mortgagee could charge it against the estate in the absence of a positive stipulation to that effect. I reject the items for premiums of insurance.

Decree for the libelants.

THE COLINA.

(*District Court, D. Maryland.* January 15, 1884.)

SHIPMENT OF CATTLE—UNFIT DRINKING WATER—LIABILITY OF VESSEL.

The owners of the steam-ship having contracted to supply ample condensed water for a cargo of 340 live cattle from Baltimore to Glasgow, and the court finding on all the testimony that the water furnished was unfit for cattle, and caused the death of 41 and deterioration in the value of all the remainder, *held*, that the ship was liable to the owner of the cattle for the losses suffered.

In Admiralty.

Sebastian Brown and *Henry M. Rogers*, for libelant.

Thomas & Thomas, for respondent.

MORRIS, J. This is a libel against the steam-ship Colina, of Glasgow, for the value of 41 cattle which died on the voyage from Baltimore to Glasgow, and for damages for the deterioration of the remaining 299. The ship sailed from Baltimore, April 18, 1882, with 340 of libelant's cattle on board, and on May 5th arrived at Glasgow. The voyage lasted 17 days. On the twenty-ninth and thirtieth of April quite heavy weather was experienced, during part of which the hatches were put down and the ship rolled considerably, but on the whole the voyage was a favorable one, and not beyond average duration. The libelant alleges that the death and deterioration of his cattle was solely in consequence of the unfit drinking water supplied them by the ship. The contract of shipment provides that an ample supply of condensed water is to be supplied by the ship, and the controversy turns upon the single issue of fact, did the ship supply suitable condensed water for the cattle? and if not, was that the cause of the loss? The testimony is quite contradictory, but every witness, apparently, who could have any knowledge of the matter in issue has been examined by one side or the other, and the court has been greatly aided by the very thorough manner in which the evidence has been presented, and by the able arguments of counsel. A careful consideration of all the testimony has satisfied me that the libelant is entitled to recover. I am led to this conclusion by the combined weight of very many different items of proof, some of which I will mention. In the first place, there is nothing whatever to indicate that the cattle were not good, healthy cattle when shipped. The testimony in behalf of the libelant shows them to have been in fine condition, fat, and suitable for exportation, and there is no testimony to the contrary. Starting on the voyage in this good condition, it is an uncontroverted fact that 41 died from time to time during the voyage, and that all the rest became more or less deteriorated, and that all were still rapidly losing flesh and strength from day to day up to the moment of arrival at Glasgow. This steady deterioration is proved, not only by all the cattle men who had them in charge, but is admitted by Capt. Maxwell, the master of the steam-ship. He says:

"They were thin when landed; not nearly in so good condition as when put on board. They were all more or less skinny looking, and in as poor condition as I have ever seen cattle after a voyage. They showed no signs of the bruises and knocking about of a rough voyage, and had a great craving for drink after they got ashore, unlike ordinary shipments on landing."

The testimony of the cattle men is that at first the cattle refused to drink the water, and that, to induce them to drink, they gave it to them mixed with bran; that when they did come to drink it, it did not quench thirst, and they craved drink all the time; that one after

another they became feverish and weak, their eyes bloodshot, their hair rough and staring, their bowels loose and very offensive, and those which died appeared to become delirious, and died in great agony. These various symptoms of distress, as detailed by the cattle men who observed them, are said by men of long experience in handling cattle, and by surgeons, to be such as would result from some sort of irritant salt, or other poisonous substance, taken into the stomach. There is no proof to show that such symptoms appear in any disease to which cattle are subject. Then it is testified that those of the cattle, which, in an almost dying condition, were butchered soon after arrival at Gasgow, appeared different from ordinary cattle, their bladders being greatly distended and dark in color, the urine dark, the kidneys fat and soft, and their eyes bloodshot. There are numbers of witnesses to all these facts, many of them persons of independent positions, long established and well known in Glasgow, and it is fair to presume that their testimony, if biased at all, would more likely be colored by a bias in favor of the owners of the steamship, who are their fellow-townsmen, than in favor of the libelant, an unknown American, residing in Chicago.

As to the difference in its effects between the ordinary drinking water of the ship and the condensed water supplied the cattle there is the testimony with respect to a certain bullock, which, for their amusement, some of the engineers made a pet of and supplied with drinking water because he refused the other. All the cattle men testify that his condition at the end of the voyage was exceptional, and that he alone showed no signs of the sickness which prevailed among the others, and was the only beast which went off the ship in as good condition as when shipped, and that he was lively and active, while the others were dull and sluggish, and difficult to get ashore.

There is, too, the chemical analysis of the bottle of water taken ashore by the head cattle man, and which he swears was a fair sample of the condensed water furnished. If it be true, as he swears, that the sample was a fair and honest one, then the chemical analysis and the testimony of the veterinary surgeon prove that it was unfit for cattle, and that its use would produce the symptoms in the cattle and the injuries complained of. It is true that the fact that the bottle of water taken ashore was a fair sample, rests only on the evidence of the dead cattle man, and, although not in any way impeached the court might hesitate to rest so vital and disputed a fact on the testimony of one man; but, as one of a great many corroborating items of proof, it has its weight. Certainly it is proof that the complaint about the water was not an after-thought, but was present in the minds of these cattle men during the voyage, and seriously considered by them. When complaint was made to the captain during the voyage, the cattle men testify that he admitted on tasting the water that it was salty. He says that he found it only brack-

ish or flat, but I think his offer to supply the water from the smaller condenser is proof that he did not then think the objection frivolous. The offer of water from the smaller condenser was declined by the cattle men, and, I think, from necessity, as the testimony of the officers of the ship shows that the cattle men would have been unable to have performed the labor of pumping and carrying the water from this small condenser to the casks in which it was to be cooled.

On behalf of the respondents there are several explanations suggested to account for the unusual, increasing, and fatal sickness among the cattle throughout the voyage; and, *first*, it is suggested that as the cattle were brought from Chicago to Baltimore in cars and were put directly from the cars on board the steam-ship, they may have been neglected and abused on that journey, and their subsequent ailments be attributable to that. But that journey on the railroad was about the middle of April, a season when they could not be exposed to any extremes of weather, and their appearance when shipped indicated no abuse or privation of food or water, or failing health from any cause; and if they had been injured on the railroad they would have got better as the effects of it passed off. The contrary was the case: the cattle during the voyage grew weaker and more distressed, and died more rapidly the longer they were on board. And, indeed, the cattle men swear that in their opinion, judging from the increasing severity of the sickness, if the voyage had lasted much longer all would have died.

Another explanation offered, and one which is supported by the testimony of the officers of the ship, is that the cattle men neglected the cattle on the voyage; that they did not feed and water them regularly, and allowed them when they got down to lie without assisting them to get up, so that the lying down prevented their passing urine, and that this caused the disorders of the bladder and kidneys, which resulted in their death. While I do not question that such retention of the urine would have caused most of the symptoms of distress and disease they exhibited, I am disposed to think that this complaint about the neglect of the cattle men is an after-thought. The captain could not have thought it to be a fact at the end of the voyage, for he gave a written certificate to the head cattle man that he "had been most attentive to his duties in tending the cattle during the whole passage, and that he was a most competent person for taking charge of cattle on board ship." The cattle men generally were men of experience in their duties, and had made frequent Atlantic voyages in charge of cattle. Another answer to this theory, that it was neglect that brought on the injuries, is that all the cattle suffered in the same way, although not to the same extent,—some resisting the disorder better than others, but all being appreciably affected. It can hardly be supposed that on a favorable voyage, with little rough weather, all the cattle got down. They are placed in narrow stalls to keep them

on their feet, and do not get down unless they are sick and too weak to stand, or are thrown down by the violent rolling of the ship and the breaking of the stalls.

It is said by the ship's officers that the two men who had charge of the cattle on the forward part of the upper deck were the only ones properly attentive to their duties, and that this explains why only one beast died in that part of the ship. These two men themselves, however, testify that all the cattle men helped each other to get cattle up when they were down, and that they gave only the same attention to their cattle that others did, and that they tasted the water repeatedly and found it very salty; that their cattle refused to drink it at first, as did the others; and, while as many cattle did not die in that part of the ship, they did all show more or less of the same symptoms, the same distress and thirst, and were deteriorated in the same way.

Another suggestion is that, by the carelessness of the cattle men, the casks containing the condensed water were left uncovered, and spray and sea-water was washed into them in the rolling of the ship. As there was a large number of these casks in different parts of the ship, and many of them below in the between-decks, this theory is too improbable to be accepted, and if true must have happened, more or less, on every voyage, and certainly should have been remedied by the shipowners by differently placing the casks.

A consideration of the testimony, as a whole, has brought me to the conclusion that the water was unsuitable for cattle, and that it caused the deaths and deterioration by which the libelant has suffered the losses complained of; and I adhere to this finding of fact, nothwithstanding the positive testimony that the same apparatus on other voyages, both before and after the one in question, supplied condensed water for quite as large cargoes of cattle which were carried by the same steam-ship without their suffering any injury. The fact that the water was bad, and that the cattle suffered from it on this voyage, is, in my judgment, established, and the libelant is not to lose his remedy because he cannot explain why it was bad.

As to the amount of the pecuniary loss which resulted from the deterioration of the cattle there is decided conflict of testimony. I have not found this question free from difficulty, and have been obliged to deal with it in some spirit of compromise. The cattle were not injured all to the same extent, and they would seem to have improved in appearance and strength after landing, and before the sale, and the sale seems to have been well managed in the interest of the libelant. Comparing the sales with the reported market prices, the cattle which survived seem to have sold better than was expected, and the loss to have been not so great as was estimated by those who judged by the appearance of the cattle as they came off the ship. I allow 30 shillings a head for the deterioration on all that were sold. For those that died I allow the average price brought by those that were sold. I have not allowed the additional sum for de-

terioration on those that died, because in all probability these were not the best beasts; and as to these, all further risks of the voyage, and all further expense of attending their keep and sale, ended with their death, and was saved the libelant.

The amount of the decree will therefore be:

STATEMENT.

Cattle consigned to A. & T. Tierman, and stowed between-decks, total	179	
For 25 died, at £24 each,		£600
For depreciation on 154 arrived, at 30 shillings each,		231
		£831
Cattle consigned to Young & McQuade, carried on main deck, total,	161	
For 16 died, £23 each,	£368	
Less one carcass,	16	
		352
For depreciation on 145 arrived, at 30 shillings each,		217.10
		£569.10
Tiernan's,	831	
Young & McQuade,	569.10	
	£1,400.10	

At current rate of exchange, say $4.89.
(No interest.)

HOUGE *v.* WOODRUFF and others.

(*District Court, S. D. New York.* January 8, 1884.)

1. SHIPPING—DEMURRAGE—REASONABLE TIME—CARGO OF SALT.
   A merchant who buys cargo on board ship after her arrival, taking no transfer of the bill of lading or charter-party, and having no knowledge of either, is bound only to the use of reasonable diligence in discharging in conformity with the custom of the port.
2. SAME—CHANGE OF BERTH.
   Where a vessel has obtained a berth at the place assigned by the merchant, and is ready to discharge, and she proceeds at his request to another berth, where a further delay arises, the vessel is entitled to be paid for the expense and delay caused by such removal, in the absence of any special usage of the port or trade authorizing such a change at the vessel's expense.
3. SAME—CUSTOM.
   By usage in the salt trade, rainy weather is deducted, salt not being removable without damage during such weather.

The bark Elliseff, of which the libelant was master, brought in ballast about 257 tons of salt from Lisbon to New York, where she arrived on the twenty-sixth of December, 1880. The salt came under a charter-party and bill of lading consigned to Hagemeyer &

Brun, who entered it in the custom-house and sold it on board to the respondents. The latter had no knowledge of the charter-party or the bill of lading, and took no transfer of either. The vessel went to Merchants' stores on the twenty-seventh of December, obtained a berth on the 28th, and gave respondents notice that the ship would be ready to deliver on the 29th. On the afternoon of the 28th the respondents, by letter, requested the captain to go to Wallabout to discharge. The captain at once called on the respondents, and, as he testified, refused to go unless the respondents would guaranty that there was sufficient water, which he said the respondents did guaranty. Mr. Woodruff, with whom this interview was held, denied this statement, and testified that he stated only that larger vessels than this had discharged at the Wallabout; that he did not think there would be any difficulty about it, and that the captain must examine and satisfy himself; that the captain went out and afterwards came back and said he would go, whereupon the vessel was taken, on the 29th, to the Wallabout by a tug hired by respondents for that purpose. On arrival there, the harbor-master stated that no berth could be had until the 31st, owing to the presence of other vessels. On the 31st a berth was in readiness, but in the mean time, owing to extreme and unusual cold, the vessel got frozen in, so that she was unable to reach her berth until the fourth of January. The discharge was commenced on that day and finished on the 12th. One thousand bushels per day, equaling 33 tons, was proved to be a reasonable and customary rate of receiving and discharging a cargo of salt, and that rainy days were not counted in the salt trade, as that article cannot be discharged in bad weather with safety. The charter-party provided for a discharge at the rate of 50 tons per day; the bill of lading contained no provision on the subject.

Butler, Stillman & Hubbard, for libelant.

Beebe, Wilcox & Hobbs, for respondents.

BROWN, J. As the respondents bought this salt from the consignee, who had entered it as his own, and took no transfer of the charter-party or bill of lading, and had no knowledge of either, they are not responsible upon any of the provisions of those instruments. 1 Maude & P. Merc. Shipp. 393. The whole evidence, however, makes it clear that upon the purchase of the salt, which was by verbal contract only, they were to receive it from the ship. Their obligations with respect to the discharge are, therefore, only to use reasonable diligence, in conformity with the customs of the port, as in cases of the absence of any bill of lading, or of any stipulation in the bill of lading on the subject of discharge. *Coombs* v. *Nolan*, 7 Ben. 301; *The Hyperion's Cargo*, 2 Low. 93; *Cross* v. *Beard*, 26 N. Y. 85; *Henley* v. *Brooklyn Ice Co.* 14 Blatchf. 522; *Kane* v. *Penney*, 5 FED. REP. 830.

Considering the sworn testimony of the captain shortly after the transaction, and the contents of his letter of the 28th, I cannot doubt

that the vessel went to Merchants' stores by direction of the respondents. On the 27th she obtained a berth and was ready to discharge there on the 29th, after a delay of two days. She then went to the Wallabout, at the request of the respondents, where there was a further unavoidable delay of two days; but after those two days she could have obtained a berth had the ice not further delayed her. It cannot be assumed, in the absence of positive proof to the contrary, that the directions of the harbor-master were improper, or that there was any other vacant berth which she could have procured earlier. Where a vessel has once obtained a berth at a dock, directed by the merchant, and is in readiness to discharge there, the merchant certainly has no right, in the absence of a particular usage, or of some stipulation authorizing it, to send the vessel to another berth, except at his own expense for the removal, and for any delay which properly arises from it. Where an established usage has been proved giving the merchant a right to, at least, one change of berth in the discharge of the cargo, he is not liable for the delay caused by the removal, because that is a part of the vessel's obligation. *Smith* v. *60,000 Feet of Yellow Pine Lumber*, 2 FED. REP. 396, 400; *Moody* v. *500,000 Laths*, Id. 607. No such usage was proved in this case; nor, in fact, was any part of the cargo discharged at Merchants' stores.

The Wallabout basin was a proper and customary place for the discharge of salt. The respondents might properly have directed the vessel there in the first instance, but as the vessel had already lost two days' time in obtaining a berth at Merchants' stores under the respondents' direction, and the same time would have been necessarily lost at the Wallabout in obtaining a berth by the 31st, the respondents must be charged with the two days' double delay caused through their own change of direction. The master, it is true, seems to have acquiesced in this removal, because the charter-party required him to make one removal in delivery, if desired; and he does not appear to have understood that the respondents were not bound by the terms of the charter-party. The respondents cannot claim the benefit of this provision, unless they are willing to be bound to discharge at the rate of 50 tons per day, which they do not accept. The charter-party must therefore be wholly disregarded. As the first of January was a holiday, and the 2d was Sunday, there was but one additional day's lost time, namely, the 3d, before the vessel had got along-side her berth and commenced her discharge. This delay was caused by the ice, and not by the fact that the vessel grounded in the mud at low water. The ice arose from extreme and unusual cold,—a fortuitous accident of the elements, for which the owner of the cargo is not responsible, in the absence of specific lay days, and when liable only under the obligation to use reasonable diligence in receiving cargo. *Cross* v. *Beard*, 26 N. Y. 85; *Coombs* v. *Nolan*, *supra*; *The Mary E. Taber*, 1 Ben. 105; *The Glover*, 1 Brown, Adm. 166; *Fulton* v. *Blake*, 5 Biss. 371; *Kane* v. *Penney*, *supra*. After the 4th, one day, the

9th, being Sunday, there was no delay in discharging beyond the customary rate, which would allow eight working days.

Decree for the libelants for two days' demurrage, at the customary rate of 10 cents per ton per day, amounting to $84.

THE ALPS.

(*District Court, S. D. New York.* December 28, 1883.)

1. SEAMEN'S WAGES—FINES—DISCIPLINE.
   In modern maritime law fines upon seamen being a forfeiture of wages, *pro tanto*, cannot be imposed by the master by way of discipline and punishment for minor offenses, except as regulated and provided by statute.
2. SAME—MERCHANTS' SHIPPING ACT OF GREAT BRITAIN.
   The merchants' shipping act of Great Britain provides that the shipping articles may contain such stipulations for fines as may be approved by the board of trade. When such approved stipulations are a part of the shipping articles signed by the seamen, fines may be imposed accordingly by the master.
3. SAME—SHIPPING ARTICLES.
   Such fines, however, cannot be allowed in diminution of a seaman's wages except upon proof by the shipping articles that such stipulations were agreed upon.
4. SAME—SUMMARY PROCEEDINGS.
   In summary actions for seamen's wages, the authority of the statute is sufficiently pleaded by a general reference to the law of Great Britain. The court is authorized by section 4597 of the Revised Statutes to inflict partial forfeiture of wages for disobedience of lawful commands.
5. SAME—CASE STATED.
   Where a British seaman on a British vessel was fined by the master two dollars for foul language and quarrelsome conduct, and afterwards, on being required to listen to the reading of the entry on the log, imposing the fine, he refused to attend or listen, and was fined two dollars, being two days' pay for the last offense, *held* that, in the absence of proof of the shipping articles, the first fine could not be allowed or deducted from his wages, but that the last fine should be allowed by the court for the seaman's disobedience of a lawful command, under section 4597 of the Revised Statutes, as well as section 243 of the merchants' shipping act.

In Admiralty.

Hyland & Zabriskie, for libelant.

McDaniel & Souther, for claimants.

BROWN, J. This is an action for seaman's wages upon an English ship, for 45 days, from June 12 to July 26, 1883. When the libelant was discharged at this port his wages for that period unpaid amounted to $29.50, of which $25.50 has been tendered and paid into the registry of the court. The difference of $4 is a deduction by way of fines imposed by the master upon the seaman for alleged misconduct during the voyage; the first, a fine of $2 for violent and abusive language to the steward in the hearing of the master, upon some controversy in reference to the food, about 12 days before the arrival of the vessel in this port. An entry was made in the log as follows:

"Thomas McCormick came aft and made use of profane and abusive language to the chief steward, also trying to provoke a quarrel by calling the steward 'a bald-headed son of a bitch;' for each of the above offenses he (Thomas McCormick) is liable to a fine of one dollar, which will be enforced."

The seaman was not notified of the fine or of the entry in the log until the day preceding the arrival of the vessel at this port. He was called to hear the entry read, when he refused to attend or to listen to it; and for this offense the further fine of two dollars was imposed by the master, and entered in the log. The libelant claims that the deduction of these fines cannot be allowed in this action, because the right to impose them is not properly pleaded nor properly proved. The answer, after alleging the profane, abusive, and quarrelsome conduct of the libelant, states that he was "thereupon fined by the master, as was his power and duty to do, pursuant to said shipping articles and to the laws of said kingdom." The previous part of the answer avers that the ship was a British ship, and that the libelant signed shipping articles, to which reference was made as a part of the answer. No copy of the shipping articles is annexed to the answer, nor have they been put in evidence. So far as the right to impose a fine rests upon a foreign statute, it must undoubtedly be properly pleaded, (*Holmes* v. *Broughton*, 10 Wend. 75; *Andrews* v. *Herriot*, 4 Cow. 525; *Ennis* v. *Smith*, 14 How. 400, 426; *Harris* v. *White*, 81 N. Y. 544;) but under the brief and somewhat informal pleadings allowed by the rules of this court in small causes (rules 164–175) this objection should not be entertained where, as in this case, the opposite party cannot possibly have been misled.

The authority to impose these fines rests upon section 149, sub. 7, of the merchants' shipping act of Great Britain, which permits the shipping articles to provide stipulations in regard to fines and other lawful punishments for misconduct, provided these stipulations have been sanctioned by the board of trade. Such stipulations thus sanctioned, and forming a part of the shipping articles, become obligatory upon the seamen shipping under them; but as these shipping articles have not been introduced in evidence, no authority for the deductions here claimed is proved. They cannot, without proof, be presumed to have existed in a given case, because the allowance of such stipulations is merely permissive, and is never obligatory. They may have formed a part of the articles, or they may not.

Aside from these stipulations, the first fine of $2 cannot be sustained. Fines are *pro tanto* a forfeiture of wages, and under the modern maritime law, aside from statue, a forfeiture of wages is imposed only for misconduct of an aggravated character. By article 12 of the Laws of Oleron and article 24 of the Laws of Wisby, if one seaman "give another the lie, a fine of four deniers" was imposed; and if a mariner "impudently contradicted the master and gave him the lie, a fine of eight deniers." These small disciplinary fines have become obsolete with the currency in which they were imposed; and

under our statutes, (section 4596,) which is, in general, similar to section 243 of the British merchants' shipping act, no forfeiture of wages is incurred by quarrelsomeness or the use of foul language. The general maritime law empowers the master by means of other punishments to enforce proper discipline in these respects. Both of these statutes, however, authorize a forfeiture of wages for disobedience of lawful commands, in the discretion of the court, not exceeding two days' pay by the British statute, nor more than four days' pay by the statute of this country.

As the shipping articles have not been introduced in evidence, the first fine cannot be sustained; but the requirement on the twenty-sixth of July that the libelant attend to hear the entry in the log read, was a lawful command. Any such fines are by law required to be read to the seamen before entering the next port. Mer. Ship. Act, §§ 256, 244; Rev. St. § 4597. The libelant willfully disobeyed this last lawful command, for which the further penalty of two dollars was imposed, equal to two days' pay. I have very little doubt that the shipping articles, if produced, would show that the fines were lawfully imposed. The articles had been returned to England, and could not be obtained without some expense. Irrespective of them, the court may enforce, and in this case, I think, should enforce, a forfeiture of two days' pay for the libelant's disobedience to the lawful command to attend and hear the entry in the log read.

It is said that this court ought not to enforce fines imposed by an English statute not proved; but as the suit is within the discretion of this court to entertain, all parties being foreign, the libelant cannot complain that the court takes judicial notice of a statute of which there is no doubt.

Decree for the libelant for $27.50, and his disbursements, without other costs.

THE QUAKER CITY.

(*District Court, S. D. New York.* January 10, 1884.)

COLLISION—OLD BOATS—REPAIRS—EXCESSIVE DEMANDS—COSTS.

Where a steam-tug maneuvering in a slip rubs against or strikes a barge moored at the wharf with unjustifiable force, she is chargeable with the damages properly attributable to her negligent act, though the boat struck was old and weak. In dealing with old boats, however, the repairs made should be closely scrutinized to prevent imposition, and nothing allowed for repairs beyond those made necessary by the blow. In this case but one-third of the claim allowed, and costs denied.

In Admiralty.

J. A. Hyland, for libelant.

Owen & Gray, for claimants.

BROWN, J. On May 18, 1881, the canal-boat Shady Run lay in the slip on the north side of the pier at the foot of Fortieth street, North river, discharging a cargo of ice. Her bows lay to the westward and about 12 feet inside of the end of the pier. At about 7 o'clock of that morning the steam-tug Quaker City, with the canal-boat L. D. Cummings lashed upon her starboard side and projecting somewhat ahead of the tug, came down the river and into the slip for the purpose of landing her along-side and outside of the boat next to the Shady Run. Owing to the shallow water, as stated by her pilot, the tug and tow not obeying the helm as usual, the stem of the Cummings struck the starboard bow of the Shady Run and inflicted some damage, on account of which this libel was filed. The claimants do not deny that the Cummings hit the Shady Run, but allege that it was but a slight blow or rub, such as is usual in the landing of canal-boats, and that the damage to the Shady Run arose from her rotten and unseaworthy condition.

Without going into the details of the evidence, there are various circumstances which satisfy me that the blow was one of more violence than the claimants' witnesses acknowledge, and that the claimants must be held responsible for the damages properly arising therefrom. The chief difficulty arises from the contradictory evidence in regard to the sound or rotten condition of the Shady Run. Complaint being made the same day by the owner of the canal-boat at the claimants' office, their agent and the captain of the Quaker City, on the afternoon of the same day, examined the bows of the Shady Run to ascertain the damage. They testify that no damage was visible on the outside; that on going down the hatch, inside the boat, with the owner, one beam was found loose or broken, and that the captain, on taking hold of it with the hand, pulled off a handful of rotten wood and showed it to the owner. The latter denies that any such circumstance occurred, or that the timbers were at all unsound or rotten. The evidence on the part of the canal-boat, including her owner and captain, and the carpenter who did the repairs on her, shows that from six to seven planks on her starboard bow were broken, each about six feet long, and one plank 16 feet long. The carpenter states that the repairs which he did were to renew the plank specified; to put in one new timber, about six or eight feet in length; to brace two adjoining ones; and he testified that the timber taken out was sound. He also put in a new bumper along the bow, and one new plank upon the deck.

Upon the evidence it is very difficult to form any satisfactory conclusion with regard to the seaworthy condition of the Shady Run. The fact that she brought a considerable cargo of ice, and without much leakage, if the testimony is to be believed, has considerable force. I can only repeat what was said in the recent case of *The Syracuse*, 18 FED. REP. 828, that the claimants should have procured further evidence than that of interested witnesses, if they intended

to rely for their defense upon the fact that the Shady Run was so rotten and unseaworthy as not to be entitled to any recovery. Having, as I must find, hit her bows with a blow more violent than justifiable in the ordinary handling of boats, whether new or old, I think she must be held answerable for the damage properly attributable to that negligent act, though the boat were old or weak. *The Granite State*, 3 Wall. 310. *The Syracuse*, *supra*.

The evidence satisfies me, however, that the repairs in this case went far beyond the natural effects of such a blow, even if the canal-boat was not staunch enough to resist ordinary handling. The bill of items of the repairs done shows nearly 800 feet of timber and plank used in these repairs, with numerous other items in proportion. This, as appears from the examination of the carpenter, was sufficient for many times the amount necessary to replace and repair the broken and injured parts.

The captain and agent of the claimants testify that on visiting the ship-yard while the repairs were going on they found the whole bow of the canal-boat taken out and in course of repair. This is denied by the carpenter and the owner of the boat. I am entirely satisfied from the evidence that the repairs were very greatly in excess of the injury done. The evidence is perhaps insufficient to determine exactly the proper amount. I shall allow provisionally what I gather from the present evidence, viz.: one-third of the bill of repairs; one-third of the demurrage claimed; one-half the amount claimed for the broken lines; and the whole of the bills for towage and dockage, as they would have been necessary in any event. These together amount, with interest to date, to $72.20, for which a decree may be entered, but without costs, as the amount of repairs claimed is evidence of bad faith on the part of the libelant; except, however, that if either party is dissatisfied with my estimate of the damages, they may take an order of reference to compute the amount, at the risk of paying the expenses of the reference if not successful in obtaining a more favorable result.

GRONN v. WOODRUFF and others.

(*District Court, S. D. New York.* January 8, 1884.)

1. SHIPPING—ASSIGNMENT OF BILL OF LADING—CHARTER-PARTY.
   A merchant purchasing goods on board a vessel after arrival, and taking an assignment of the bill of lading, is bound by its terms, but not by the terms of the charter-party, any further than it is adopted by the bill of lading.
2. SAME—BILL OF LADING—DEMURRAGE—REASONABLE TIME.
   Where the bill of lading provides no stipulated days for the discharge, the merchant is bound only to reasonable diligence, according to the custom of the port.

3. SAME—REMOVAL OF VESSEL FROM BERTH.

Where a merchant procures the removal of a vessel from a berth already secured to another, for his own benefit, pays the cost of removal, and procures the cargo to be discharged within the average time allowed by the custom of the port from the day when she was first ready to discharge, *held*, no demurrage can be claimed.

In Admiralty.

Butler, Stillman & Hubbard, for libelant.

Beebe, Wilcox & Hobbs, for respondents.

BROWN, J. The bark Spess arrived at New York on January 3, 1881, with 265 tons of salt in ballast from Lisbon, upon a bill of lading which was transferred to the respondents. They entered the salt at the custom-house, paid the freight, and directed the vessel to Atlantic docks, where the vessel arrived on January 4th, and gave notice of her readiness to discharge on the 5th. On that day, at the respondents' request, the master consented to go to Twenty-third street and unload, where she was taken at the respondents' expense, and arrived at about 4 P. M. One wagon load was delivered on the evening of the 6th, and the discharge was ended early on the 15th, and might have been completed had the ship desired on the evening of the 14th. The bill of lading provided no stipulated days for the discharge, and it referred to the charter-party only as regards the payment of freight. The provisions of the charty-party, therefore, as respects the rate of delivery, did not bind the respondents. *112 Sticks of Timber*, 8 Ben. 214; *Kerford* v. *Mondel*, 5 Hurl. & N. Exch. 931. It was proved that 1,000 bushels, or 33 tons, per day was a reasonable and customary rate of discharge. This would leave eight working days for the discharge of this cargo.

Although the vessel had given notice that she would be ready to discharge on the 5th, I think the evidence shows that she did not get a permit, or tubs, and did not get ready, so that she could actually commence the discharge, before the 6th; and it does not appear that the removal from Atlantic docks to Twenty-third street, which occupied only some three hours, made any difference in her want of preparation. But even if the vessel had been ready upon the 5th, deducting Sunday, and the rainy days in the mean time, only eight working days were consumed in the discharge. Although on several of the working days considerably more than 33 tons per day were in fact discharged, I think the merchant cannot be held liable, in the absence of any stipulated lay days or agreement for dispatch, provided he gets the whole cargo discharged within the time which custom allows. As this time was not exceeded, the libel must be dismissed, with costs.

BOYD v. GILL and others.

CUTTER v. WHITTIER and others.

NOTT v. CLEWS and others.

PERKINS v. DENNIS and others.

(*Circuit Court, S. D. New York.* December 14, 1883.)

1 REMOVAL OF CAUSE—CONTROVERSY WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

A controversy is not the same thing as a cause of action; and a suit against two persons jointly does not, merely because it might have been brought against either separately, involve a controversy wholly between the plaintiff and one of them, within the meaning of the act authorizing the removal of a suit to the federal courts where there is a controversy wholly between citizens of different states.

2. SAME—SEPARATE CONTROVERSIES.

When, however, the separate causes of action could both be pursued against different defendants, and settled independently of each other, the suit, even though it contain a joint cause of action also, involves separate controversies and falls within the term of the act.

3. SAME—BILL AGAINST FRAUDULENT TRUSTEES.

A cause of action against several trustees for the fraudulent misappropriation of trust funds, being *ex delicto* and involving, therefore, no right of contribution between the defendants, may in equity as well as at law be pursued either jointly or severally; and a bill in equity founded upon such a claim, and demanding a joint and several accounting by the trustees, involves such a separate controversy with each defendant that if one of the defendants is a non-resident the cause is removable.

4. SAME—FILING OF PETITION BEFORE TRIAL.

The trial of a cause upon demurrer is a trial within the meaning of the act requiring a petition for the removal of a cause to be filed before the trial thereof.

On Motion to Remand.

H. F. Averill and *Geo. F. Betts*, for plaintiff in each case.

Sewell, Pierce & Sheldon, for defendant Plumb.

Sherman & Sterling, for defendant Whittier.

Abbot Bros., for defendant Clews.

Arnoux, Ritch & Woodford, for defendant Dewing.

Before WALLACE and BROWN, JJ.

WALLACE, J. These cases and the case of *Langdon* v. *Fogg*,[1] decided by Judge BROWN, but in which he ordered a reargument, have been heard together, the questions being substantially identical, upon motions to remand the suits to the state court. In each case the action was brought in the state court by a resident plaintiff against a non-resident defendant and several resident defendants, and was removed to this court upon the petition of the non-resident defend-

[1] 18 FED. REP. 5.

ant. The right to a removal is challenged upon the ground that there is not a controversy in the suit which is wholly between the plaintiff and the non-resident defendant, and which can be fully determined between them, within the meaning of the second section of the removal act of March 3, 1875.

There are some immaterial differences in the allegations of the bills of complaint in the several cases, but the bill in each may be fairly treated as one brought by a stockholder in a mining corporation to enforce a cause of action which exists in favor of the corporation against the directors for a fraudulent appropriation of its assets, but which the corporation does not assert because it is controlled by the unfaithful directors, and the directors and corporation are consequently joined as defendants. The relief sought is that the individual defendants account jointly and severally concerning the profits they have made by the misappropriation of the corporate property, and be adjudged to pay the amount found due to the corporation into court for the benefit of the stockholders. This being the cause of action disclosed by the bill, it will be treated as one upon which a separate action could be maintained as between the plaintiff and the non-resident defendant. The rule may now be deemed established that where a *cestui que trust* seeks in equity to charge trustees with personal liability for their fraudulent acts, he may join all who have participated, or proceed against one or more of them severally at his election. The right of action in such a case arises *ex delicto*, and in equity as well as at law the tort may be treated as several as well as joint. *Heath* v. *Erie Ry. Co.* 8 Blatchf. 347; *May* v. *Selby*, 1 Younge & C. Ch. 235; *Franco* v. *Franco*, 3 Ves. 75; *Wilkinson* v. *Parry*, 4 Russ. 272; *Atty. Gen.* v. *Wilson*, 4 Lond. Jur. 1174. A proceeding against trustees for a fraudulent breach of trust is an exception to the rule that in a suit against trustees all of them must be made parties. *Cunningham* v. *Pell*, 5 Paige, 607. The reason is obvious. A trustee may insist that his co-trustees be joined, when he is sued for a breach of duty in which the other trustees are involved, because he is entitled to contribution. In cases of breach of trust not involving actual fraud, contribution may be enforced by trustees, as between themselves,—Hill, Trust. 814 and notes, (4th Amer. Ed.;)—but no right of contribution exists where the demand sought to be enforced is *ex delicto*. *Ellis* v. *Peck*, 2 Johns. Ch. 131; *Miller* v. *Fenton*, 11 Paige, 18. The cause of action disclosed by the bill is therefore one capable of being determined as between the plaintiff and the non-resident defendant without the presence of the other defendants. The plaintiff, at his election, can dismiss his bill as against all the other defendants at any stage of the action and proceed against the non-resident defendant alone, and obtain against him the complete relief to which he would be entitled if the other defendants were joined.

The question, then, is whether the act of 1875 gives the right of removal whenever there is a cause of action in the suit between a

resident party on the one side and a non-resident party on the other, upon which a several recovery may be had against the latter, or whether the right exists only when there is a separate and distinct controversy to which all the substantial parties on one side are residents, and all those upon the other are non-residents. The language of the act declares that when in "any suit * * * between citizens of different states * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants * * * may remove," etc. Two diverse views of the meaning of this language are indicated by the adjudications of the federal courts. In *Peterson* v. *Chapman*, 13 Blatchf. 395, the action was one of trover, in which the plaintiff was a citizen of New York, and the defendants were one a citizen of New York, and one a citizen of Connecticut. It was held that, although the cause of action was such that the suit could be maintained by the plaintiff against either defendant alone, it was not a removable suit, because all the parties to the controversy were not residents upon the one side and non-residents upon the other; and that the plaintiff having elected to proceed against all jointly, the case disclosed but a single controversy, and that was one which could be fully determined only between all the parties to the suit. This decision was approved and followed by other judges in this circuit in *Sawyer* v. *Switzerland Ins. Co.* 14 Blatchf. 451, and *Van Brunt* v. *Corbin*, Id. 496. The latter case was an action of ejectment, and one, therefore, in which the plaintiff at his election might have proceeded against the defendants severally instead of jointly. The more recent case of *Tuedt* v. *Carson*, 13 FED. REP. 353, in the eighth circuit, is to the same effect. That was an action brought by the plaintiff against several defendants for a tort. Some of the defendants were residents of the same state with the plaintiff, and others were residents of a different state. It was held not to be such a separable controversy that the non-resident defendants could remove the case, although the plaintiff could at his election have proceeded against them alone. On the other hand, *Clark* v. *Chicago, etc., Ry. Co.* 11 FED. REP. 355; *Kerling* v. *Cotzhausen*, 16 FED. REP. 705; *People ex rel.* v. *Illinois Cent. R. Co.* Id. 881, are authorities for the broad proposition that whenever the suit is founded on a cause of action upon which, at the election of the plaintiff, the defendants might have been sued severally, a non-resident can remove the suit, although the other defendants with whom he is sued jointly are residents of the same state as the plaintiff.

It is urged that, since the decisions in this circuit referred to, the supreme court has considered the construction of the second clause of the second section of the act of March 3, 1875, and in the light of its decision in *Barney* v. *Latham*, 103 U. S. 205, the former judgments of this court should be reconsidered, and it should now be decided that whenever in a suit between a resident plaintiff and several defendants,

one only of whom is a non-resident, there is a cause of action which might be fully determined as between the plaintiff and the non-resident defendant, if the other defendants were not parties, the suit is removable. *Barney* v. *Latham* does not seem to sanction any such contention. Some misapprehension of that decision may have arisen by overlooking the distinction between a separable cause of action and a separate or separable controversy. The cases in the seventh and eighth circuits seem to interpret that decision as holding that whenever a separate action could have been maintained by the plaintiff upon the cause of action sued upon against one of the several defendants, as to such defendant there is a separate or separable controversy in the suit. In *Barney* v. *Latham* there were two separate and distinct controversies, as to one of which the requisite diversity of citizenship existed between all the parties to it, plaintiff and defendant, to authorize a removal of the suit. Speaking of this controversy the court, through Mr. Justice HARLAN, say that "such a controversy does not cease to be one wholly between the plaintiffs and the defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and other defendants." That decision was commented on in the subsequent case of *Hyde* v. *Ruble*, 104 U. S. 407, and its result is tersely and clearly stated by the chief justice as follows:

"To entitle a party to removal under this clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other. Thus, in *Barney* v. *Latham*, two separate and distinct controversies were directly involved,—one, as to the lands held by the Winona & St. Peter Land Company, in respect to which the land company was the only necessary party on one side, and the plaintiff on the other; and the second, as to the moneys collected from the sales of lands before the land company was formed, as to which only the natural persons named as defendants were the necessary party on the one side and the plaintiffs on the other; one was a controversy about the land, and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in such suit as to the particular controversy involved. In that about the land the land company would have been the only necessary defendant, and in that about the money the natural persons need only have been brought in. In that about the land there could not have been a removal because the parties on both sides would have been citizens of the same state; while in that about the money there could have been, as the plaintiffs would all be citizens of one state, while the defendants would all be citizens of another."

It does not necessarily follow that a controversy is wholly between a plaintiff and each one of several defendants, and can be fully determined as between them, merely because such a controversy might have been presented if the plaintiff had elected to present it in that form. The controversy in a suit is the one which is actually presented, not the one that might have been. It is not wholly between the plaintiff and one of the defendants because it might have been if the plaintiff had so elected. Nor can a controversy be fully deter-

mined between a plaintiff and one of the defendants when in the form and substance which it has assumed the plaintiff insists, and has a right to insist, that so far as he is concerned it shall be determined as to both of the defendants. The controversy is the claim in form and substance as it is presented for determination; and if a joint recovery against several defendants is claimed upon a cause of action which justifies a joint recovery, the controversy is between the plaintiff and all the defendants against whom the claim is asserted. The opinions of Judge JOHNSON in *Peterson* v. *Chapman*, and of Judge TREAT in *Tuedt* v. *Carson*, are replete with satisfactory reasons against such a construction of the removal act as is insisted upon. There seem to be no controlling reasons, therefore, for receding from the former decisions in this circuit.

It remains to consider whether, under the bill here, which seeks a decree that the defendants account severally concerning the gains and profits received by each through the fraudulent acts complained of, there is not a controversy which is separate as between the plaintiff and each defendant, and which can be fully determined as between them. If the defendant has elected to pursue each defendant separately, and the cause of action disclosed by the bill justifies him in doing so, it would seem that the suit presents a separate controversy as to that defendant notwithstanding there is also a controversy between the plaintiff and all the defendants jointly. If this separate controversy can be fully determined between the plaintiff and defendant without the presence of the other defendants, the language of the removal act is satisfied. That it can be thus determined has already been shown, because the other trustees are not necessary parties to a suit brought against one for a fraudulent breach of trust. There is, therefore, a distinct controversy here between the plaintiff and each defendant. Some of the transactions assailed by the bill are not joint transactions on the part of the defendants. All of the defendants may not be liable to the same extent. The prayer as to this branch of the bill is against each defendant for a several accounting, and that is only necessary upon the theory that some of them are liable for a different amount than others.

It is no answer to the suggestion that the suit presents a separate and distinct controversy as between the plaintiff and each defendant, to assert that the decree obtained will be a single decree as to all the defendants. The same thing may be said of every decree in suits in equity, and could have been said in *Barney* v. *Latham*. For these reasons the actions were properly removed.

In the case of *Nott* v. *Clews* the additional point is made that the petition for removal was not filed by the removing defendant before the trial of the cause. As to four of the defendants separate demurrers were interposed and brought to a hearing. The demurrers were overruled, but leave was given to the defendants to answer upon payment of costs of the demurrers within 20 days. As the removal was

at the instance of one of the defendants who demurred, it is not material that when the demurrer was heard service of process had not been made on some others of the parties named as defendants. If the cause was not in a condition to be heard on demurrer, the objection should have been taken in time. As it is, after the removing defendant has elected to treat the action as severed, he cannot now be heard to say that the hearing and decision upon the demurrer is to go for nothing. The real question is whether the hearing and decision of a cause upon a demurrer is a trial of the cause within the meaning of the removal act. This precise question has been decided adversely to the defendant by Judge BENEDICT in *Langdon* v. *Fish*, and it was there held that such a hearing was a trial which precluded the subsequent removal of the suit. It was not held in that case that the hearing upon a special demurrer, or one which is addressed to merely formal objections in a bill or complaint, is a trial within the contemplation of the act. But if a defendant chooses to have the action tried upon the pleadings, instead of upon issues of fact, it is his right to do so, and the decision is a final determination of the action, unless in the discretion of the court a new pleading is permitted. By the Code of this state, and a large number of other states, the hearing of a demurrer is the trial of an issue of law. The term "trial" has thus acquired a more enlarged signification than it possessed when Blackstone defined it as "the examination of the matter of fact in issue in a cause." *Babbitt* v. *Clark*, 103 U. S. 606, is authority for the proposition that the trial of a cause upon an issue of law is a trial which will preclude the removal of the suit afterwards. In this case, therefore, the motion to remand is granted; in the other cases it is denied.

BROWN, J., concurs in the results.

SHARP *v.* WHITESIDE and others.[1]

WHITESIDE *v.* SHARP.[1]

(Circuit Court, E. D. Tennessee, S. D. July 4, 1883.)

REMOVAL OF CAUSE—CITIZENSHIP—SEPARATE CONTROVERSY.

Where the question to be decided in a cause is the right of a plaintiff to carry passengers into a certain park owned by one of the defendants, the other defendants being the lessees of such park, a separate controversy exists between the lessor and plaintiff, and if they are citizens of different states the cause is removable under the second section of the act of 1875.

In Equity

[1] See S. C., *post*, 156.

Lewis Shepherd, Key & Richmond, and *Clarke & Snodgrass*, for Sharp.
W. H. Dewitt and *Wheeler & Marshall*, for Whiteside.

KEY, J. The first question to be determined in this case is whether the cause has been removed from the chancery court of the state to the circuit court of the United States. If it has been removed there other questions must be considered. If not, no order can be made or step taken except to remit the case to the chancery court of the state. It is conceded in argument that if this cause has been removed, or if it be removable, it is done, or it must be done, under the second clause of the second section of the act of 1875, declaring and defining the jurisdiction of the circuit courts of the United States. There are other defendants to the original cause, and all the defendants, except Florence Whiteside, are residents and citizens of the same state as L. J. Sharp, the complainant in the original bill. It is not denied that Florence Whiteside is a citizen of a different state from that of complainant, or that the allegations of her petition for removal, or the bond executed under it, are not in due form, or that the amount in controversy is sufficient, or the application made in time. The contention on this point is whether the controversy is so entirely between Mr. Sharp and Miss Whiteside that it can be fully determined between them. There is no question, for the fact is admitted, that Miss Whiteside has title to the turnpike road and the park described in the pleadings. The controversy is whether Sharp as a livery-stable man, has the right to carry his passengers into the park to which Miss Whiteside has title. In other words, is her title, in its character, servient to a right on the part of Sharp to enter the inclosed park against her consent. The alleged right of the other defendants is that they have leased the turnpike road and park from Miss Whiteside for the term of five years.

It appears to me that whether her co-defendants have made such a contract of lease or not, has no effect upon the point in controtroversy between the chief parties. Anything in regard to the lease is subordinate to and dependent upon the decision of the controversy between the principal parties. If Sharp has the right to enter the park, as he insists, he has it against the lessor and lessees alike. If he has no such right against the lessor he has not against the lessees. There is no complication of the question in controversy between the parties by the joinder of the defendants, and the case between the principals can as well be tried without Miss Whiteside's co-defendants as with them. Their controversy is perfectly, completely, and distinctly separable from that with the other defendants, in my opinion. It must follow, therefore, that the case is removable, and that it was removed under the petition of Miss Whiteside. This being so, the last bill, or amended bill, filed by Sharp was without any authority, force, or effect, and all the orders of the chancery court, or chancellor under it, are void. That portion of the record in the chancery court is out of the case. It appears, also, that upon the

same day upon which the petition for removal was presented, the petitioner took some other steps in the cause, upon which no action was taken by the court. I think these steps must also be taken as having no force or effect, as either having been taken after the petition was presented, or completely annulled and superseded by it.

In this state of the pleadings, and the record sent from the state court, I think it best to give the parties opportunity to perfect and present, if they desire to do so, the case it appears to have been their purpose to have done, and in doing so I do not mean that they must present the same or even similar papers or pleadings, but such as they may deem proper and necessary to present the issues raised, or to be raised. Until opportunity has been given to do this I think it best to postpone action on the application of Miss Whiteside for an injunction, so that we may have the whole case in a tangible and perfect shape. The exception made by Sharp's solicitors in this state of the case will be without force.

Leave is now given to Miss Whiteside to file the bill, she having given bond and surety for costs, but no new process and copy need issue.

WALSER and others *v.* MEMPHIS, C. & N. W. RY. CO.[1]

(Circuit Court, E. D. Missouri. December 3, 1883.)

1. JOINDER OF PARTIES—CORPORATIONS.
   A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders.
2. JURISDICTION—SUIT NOT WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.
   Where there are two or more plaintiffs and two or more defendants, and one of the plaintiffs and one of the defendants are citizens of the same state, this court has no jurisdiction.
3. SAME—REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT—AMENDMENTS.
   Where a case has been brought here from a state court, no change of pleadings or in the relationship of the parties, by amendments in this court, can give jurisdiction not disclosed by original proceedings in the state court.

Motion to remand, on the ground that this court has not jurisdiction of this case and the same was illegally removed because the claims and demands of the complainants are several and not joint, and some of them do not exceed the sum of $500, and because the controversy herein is not wholly between citizens of different states, but on the contrary is between citizens of the same state, and the controversy cannot be severed. For a report of the opinion of the court on a former motion to remand, and a fuller statement of facts, see 6 FED. REP. 797.

Joseph Shippen and *John P. Ellis*, for motion.

Broadhead, Slayback & Haeussler, for petitioning defendant.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

TREAT, J. A similar motion was made and decided by this court at the March term, 1881, by Judge MCCRARY, in which I concurred. Since then many proceedings and orders have been improvidently had. It may be that in the recent case of *Barney* v. *Latham*, 103 U. S. 205, it was supposed that opposite views to those expressed by this court had been established. It seems, however, that after the order of this court to remand the case to the state court and an appeal allowed, a subsequent order was entered vacating said appeal, and leaving open the motion to remand for further consideration. The right to vacate said appeal is questionable. Since that order, an amended bill, a demurrer, and a new motion to remand have been filed. The right to remove the cause was dependent solely upon the condition thereof at the time of the motion made in the state court; and no change of pleading or relationship of the parties, by amendments thereafter in this court, could give jurisdiction not disclosed by the original proceedings in the state court. The opinion by Judge MCCRARY, in 1881, has been fully confirmed by the many decisions of the United States supreme court since rendered. It is obvious, therefore, that the cause must be remanded, and all orders made since the original order to remand vacated.

An order will be entered accordingly.

DINSMORE *v.* CENTRAL R. CO. and others.

(*Circuit Court, D. New Jersey.* December 7, 1883.)

1. JURISDICTION—COLLUSIVE SUIT—OBJECTION, HOW RAISED.
   The objection to a bill that it was not exhibited in good faith, but collusively and in the interests of others, goes to the jurisdiction of the court, and should be raised by plea in abatement and not by answer.
2. SAME—EVIDENCE NOT SUFFICIENT TO ESTABLISH COLLUSION.
   The fact that some of the officials of a rival corporation, with which complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case, will not sustain a charge of bad faith and render his suit collusive.
3. SAME—PRELIMINARY INJUNCTION REFUSED.
   Upon examination of the bill, answer, and affidavits, no circumstances entitling complainant to a preliminary injunction appearing to exist, the motion, therefore, is denied.

In Equity. Motion for preliminary injunction.

Roscoe Conkling, Clarence A. Seward, Barker Grunmere, and *Edward T. Green,* for plaintiff.

1. Neither the act of March 3, 1875, nor the common law gives this court or any court jurisdiction of a suit which is simulated and fictitious, or in which the *reus* on either side is not the real party in interest. Such suits are called "collusive," (*Gardner* v. *Goodyear,*

3 O. G. 295,) and when the collusion is proved the case is summarily dismissed as not within the proper jurisdiction of the court. *American M. P. Co.* v. *Vail*, 15 Blatchf. 315; *Cleveland* v. *Chamberlain*, 1 Black, 426; *Lord* v. *Veazie*, 8 How. 254.

2. The allegation of collusion—that is, the want of real interest in one of the actors—is an allegation that the court has no jurisdiction by reason of the character in which one of the parties sues or defends. This exception to the jurisdiction is called by the courts a "personal" exception; asserts that the position of a litigant is assumed, and that the party is not an honest *reus* or actor. *Forrest* v. *Manchester, etc., Ry. Co.* 4 De G., F. & J. 131; *Colman* v. *Eastern Cos. Ry. Co.* 10 Beav. 1; *Salisbury* v. *Metrop. Ry. Co.* 38 L. J. Ch. 251.

3. That a suit is collusive must be objected to by plea in abatement, and if a defendant answers upon the merits he waives the objection, and cannot thereafter contest the jurisdiction. Story, Eq. Pl. § 721; Daniell, Ch. Pr. (15th Ed.) 630; *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 339, 367; *Conard* v. *Atlantic Ins. Co.* 1 Pet. 386, 450; *Dodge* v. *Perkins*, 4 Mason, 435; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Wood* v. *Mann*, 1 Sumn. 581; *Evans* v. *Gee*, 11 Pet. 85; *Rhode Island* v. *Massachusetts*, 12 Pet. 719; *Nesmith* v. *Calvert*, 1 Wood. & M. 37; *Brown* v. *Noyes*, 2 Wood. & M. 81; *Webb* v. *Powers*, Id. 510; *Sims* v. *Hundley*, 6 How. 1; *Bailey* v. *Dozier*, Id. 30; *Smith* v. *Kernochen*, 7 How. 216; *Sheppard* v. *Graves*, 14 How. 509; *Wickliffe* v. *Owings*, 17 How. 51; *Jones* v. *League*, 18 How. 76; *Dred Scott* v. *Sandford*, 19 How. 397; *Whyte* v. *Gibbes*, 20 How. 542; *De Sobry* v. *Nicholson*, 3 Wall. 423; *Van Antwerp* v. *Hulburd*, 7 Blatchf. 427; *Pond* v. *Vermont V. R. Co.* 12 Blatchf. 297; *Gause* v. *Clarksville*, 1 FED. REP. 355; *Kern* v. *Huidekoper*, 103 U. S. 485; *Williams* v. *Nottawa*, 104 U. S. 211; Equity Rule, 39; *Livingston's Ex'r* v. *Story*, 11 Pet. 351, 393.

B. Williamson, George M. Robeson, Franklin B. Gowen, James E. Gowen, A. C. Richey, and *G. R. Kaercher*, for defendants.

NIXON, J. Two questions are presented for the consideration of the court—the first having reference to the *bona fide* character of the suit, and the second, to the propriety of the interference of the court, under the present aspect of the case, by ordering a preliminary injunction.

1. The answer of the defendants, after responding to the material allegations of the bill, charges that the bill of complaint was not exhibited in good faith, or for the honest purpose of asserting the complainant's rights as a stockholder of the New Jersey Central Railroad Company, but in the interests of a rival company to the Philadelphia & Reading and the New Jersey Central roads. This is an exception personal to the complainant, and going to the jurisdiction of the court, and if introduced into the pleadings for contestation, it should have been by a plea in abatement. It has no proper place in the answer, and is always regarded as waived after the defendants have answered upon the merits. But as a very large amount of testimony has been

taken upon the subject, I have deemed it best to lay aside all technical objections to the informal manner in which the matter has been presented, and to ascertain, if possible, whether the defendants have sustained their allegations by their proofs. After a careful examination of the testimony furnished, I am of the opinion they have not sustained them. The most that has been done is to show that some of the officials of a rival company, with which the complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case. I have never understood that a lawsuit is of such an exclusive and sacred character that parties may not have the sympathies and accept the aid of associates and friends in carrying it on without subjecting themselves to the charge of collusion.

2. With regard to the second point, the learned counsel, on the argument, took even a wider range than the testimony, and much time was spent in the discussion of questions that more appropriately belong to the final hearing. I do not propose to follow them now. Without intending to intimate any opinion on the merits of the controversy, it is sufficient for my present purpose to say, that, looking at the bill, answer, and affidavits, which furnish to the court the evidence on which to act on the question of a preliminary injunction, I find no circumstances existing and no facts developed which, in my judgment, authorize me to interfere, at this stage of the proceedings, by ordering such an injunction to issue.

The motion is therefore denied, but without prejudice to the complainant to renew it if any subsequent acts of the defendants, before final hearing, should render its renewal necessary or proper.

FERRY v. TOWN OF WESTFIELD.

(Circuit Court, W. D. Wisconsin. December Term, 1883.)

JURISDICTION—CITIZENSHIP.

Ferry v. *Town of Merrimack*, 18 FED. REP. 657, followed, and cause remanded to state court.

Decision Remanding Cause to the circuit court of Sauk county.

James G. Flanders, complainant's solicitor.

H. W. Chynoweth, defendant's solicitor.

BUNN, J. This cause was argued and submitted upon general demurrer to the complainant's bill. But in the examination of the case there appears upon the face of the bill a certain defect of jurisdiction, which will render it unnecessary to remand the cause to the state court. The suit is brought by William F. Ferry, a citizen of Illinois, against the defendant, a citizen of Wisconsin, upon a claim arising upon a

non-negotiable contract between the defendant town and the Chicago & Northwestern Railway Company, also a citizen of Wisconsin, and who assigned the claim to the plaintiff. The plaintiff is therefore suing upon a contract, his title to which is derived through a formal written assignment from a resident of the same state with the defendant, and who was itself incorporated by virtue of section 1 of the act of March 3, 1875, to maintain a suit thereon in the federal court.

The question was before us and decided in the case of the same plaintiff against the town of Merrimack, at the present term of this court, where the same defect appeared in the record. And we beg leave to refer to that decision for the grounds of the opinion that this court cannot take cognizance of such a case, whether originally brought here, or begun in the state court and afterwards removed to this court on the application of the plaintiff.

The case will be remanded to the circuit court of Sauk county, Wisconsin, from where it came to this court.

HARLAN, J., concurs.

SHARP *v.* WHITESIDE and others.

WHITESIDE *v.* SHARP.[1]

(Circuit Court, E. D. Tennessee, S. D. October 1, 1883.)

1. JURISDICTION—REMOVAL OF CAUSE—DISSOLVING PRELIMINARY INJUNCTION GRANTED IN STATE COURT.

   A circuit court of the United States has no revisory power over the chancery court of a state, but when, before removal of a cause from the state court, an *ex parte* preliminary injunction has been granted, it may in a proper case dissolve such injunction.

2. PRIVATE PROPERTY USED FOR PARK—CONTRACT TO EXCLUDE PERSONS NOT BROUGHT BY CERTAIN PARTY—TAX ON PROFITS—INJUNCTION.

   The owner of what is known as the Point of Lookout mountain, a favorite resort on account of the extended view therefrom, who was also the owner of a chartered turnpike which was a regular toll road leading up the mountain nearly to the Point, inclosed her ground as a park and charged an entrance fee from visitors. Subsequently she entered into a contract with a certain party, by the terms of which he was to carry all passengers over her turnpike instead of over another route leading to the Point, and was to have the exclusive privilege of bringing or conveying persons into the park. Complainant, who was engaged principally in the business of carrying visitors to and from the park, sought to enjoin the owner from refusing admission thereto to such parties carried there by him as might tender the usual admission fee. *Held*, that the fact that the park had long been a popular resort for sight-seers, that an admission fee was charged, and that a tax was imposed by the state on the owner for the privilege of keeping a park, did not render the use to which the property was devoted a public use, or change the character of the property, and that the court could not invade the rights of the owner and enjoin her

[1] See S. C., *ante*, 150.

from carrying out the terms of her contract. *Held, further*, that if she had attempted to interfere with any of the rights of complainant in the use of the chartered turnpike such interference would not have been tolerated.

3. SAME—TAXATION BY STATE—EFFECT OF, ON CHARACTER OR BUSINESS.
That the state imposes a tax on the privilege of deriving a profit from the use of property in a certain manner does not render such use public, but rather recognizes the fact that the property is private, and subject to the control of its owner.

Motion to Modify an Injunction granted in favor of complainant Sharp in the state court, and to grant an injunction in favor of Whiteside, under her cross and supplemental bill.

Lewis Shepherd, Key & Richmond, and *Clarke & Snodgrass*, for Sharp.

W. H. Dewitt and *Wheeler & Marshall*, for Whiteside.

KEY, J. A short time since it was held that this cause had been removed to the circuit court of the United States, and the parties were allowed to perfect their pleadings. The injunctions in the cause have hitherto been granted in the state court, and a motion to modify or dissolve the injunction granted complainant Sharp under the original bill made by respondent Whiteside in the state court, has been denied by that court. It is insisted that this court has no power or right to review, change, or modify the action of the state court as to this injunction; that the question is *res judicata*. If the decree of the chancellor, under a proper condition of the cause, had been for a perpetual injunction, the truth of the position would be undeniable. This court has no revisory power over the chancery court. It cannot reverse or change its judgments or decrees. The case stands here just as it would stand had it remained in the chancery court. The authority or power of this court over the case is no greater or less than that of the chancery court would be had this court never assumed jurisdiction of the cause. The injunction referred to was not perpetual or permanent, and does not profess to be; it is temporary and preliminary. The chancellor could have dissolved or modified it, whenever, in his opinion, equity demanded it. As the cause proceeded, the time must come when this preliminary injunction would have performed its office, and would have been swallowed by one perpetual in its character, or dissolved for want of merit. It has not the substantial elements or permanent qualities belonging to stable and unyielding judgments. If the chancellor had at any time concluded that the injunction had been improvidently granted, or had the subsequent proceedings developed to his satisfaction that the complainant was not entitled to the injunctive interference of the court, he could have modified or dissolved his injunction without awaiting the final hearing of the cause. Preliminary injunctions in the courts of this state are generally and essentially *ex parte*, and the fiat awarding them is not a decree. It is an order, and the fact that, upon the coming in of the answer, a motion to dissolve was overruled, does not make the order any more a decree; it simply in-

dicates that so far the court is satisfied with the injunction. It gives no decided assurance that it shall be permanent and perpetual. The same discretion and power the chancellor would have in his court I have in this.

This court would hesitate before it would disagree with the state court upon preliminary questions. It would dislike a disagreement exceedingly. If, however, its well-considered and deliberate judgment should differ from the action of the chancellor, the judge would be derelict in his duty and unworthy of confidence should he fail to declare the law and justice of the case as his judgment and conscience should dictate, from a sensitive regard for the action and opinion of his brother judge. Judges will disagree as well as doctors.

The vital inquiry at the threshold of the consideration of the motions before us is whether the injunction granted by the chancellor under the original bill should be maintained, or shall it be modified, or shall it be dissolved. In view of the unquestioned and admitted facts as developed by the pleadings, what should be done in this respect? The questions to be considered are questions of law and equity, rather than disputed facts. There is little disagreement as to the material, essential facts. As stated in the original bill, and admitted in the answer, respondent, Florence Whiteside, is the owner of a turnpike road running from the foot to the top of Lookout mountain, chartered by the state, and the people are charged toll fees for passing over it. It is a public turnpike road. The terminus of this road at the top of the mountain is about a mile and a quarter from what is known as the Point of Lookout mountain, a celebrated part of the mountain, which is visited by many for the fine view it affords of the surrounding country, and of several of the battle-fields of the late war. There is what is styled in the pleadings a dirt road between the end of the turnpike and the Point, which runs a great part of the way through the lands of respondent, Florence Whiteside. The mountain ends abruptly at the Point, and she owns the Point and the lands back of it for a considerable distance to both brows of the mountain, so that it is impossible for vehicles to reach the Point without traveling over or through her lands. She has erected a fence across the mountain a short distance from the Point, which extends across from brow to brow, and incloses the Point and the top of the mountain adjoining it, and a gate has been made for an entrance to this inclosure, and persons have been charged a fee of 25 cents for admission to this inclosure, which is called a park. There is no question but that Miss Whiteside, the respondent, has title to the Point and park. Complainant Sharp is the owner of and operates a livery stable, and has been accustomed to carry passengers to the Point for hire, and to do this is the most valuable part of the business in which he is engaged.

Before the filing of complainant's bill Miss Whiteside, through her agents, made a contract with Owen & Co., the owners of a livery

stable, by which they were to take all their passengers for Lookout mountain over her turnpike instead of a competing one, and no passengers using hired means of conveyance to the mountain were to be admitted to the park and Point unless they had been brought there by Owen & Co.'s vehicles or horses. Complainant could pay his toll and travel the pike, but he and his passengers could not enter the park and go to the Point, though the admission fee was tendered at the gate. This gives Owen & Co. the carrying business to the Point, and for the privilege it is said that Owen & Co. agree to pay $5,000 annually.

It is also said that this arrangement is ruinous to complainant's business. He insists that as Miss Whiteside charges an admission fee to the park and Point, they become a public institution in such sense that she is bound to admit all persons of good repute who ask for admittance and tender the fee; that she cannot discriminate in favor of Owen & Co. and against complainant, but should award the same rights and privileges to both, and all like concerns. He avers his willingness to conduct his conveyances over respondent's turnpike, paying the usual toll, and to pay the admission fees for entrance into the park. An injunction was ordered and issued in accordance with the prayer of his bill. Its terms are that respondents, "each and every of them, their servants, agents, and counselors, are enjoined from discriminating against complainant in his business of carrying passengers over said turnpike road to the Point of Lookout mountain and into the park at the Point; also from refusing to admit the carriages and horses of complainant to pass over said road, and his passengers to enter the park and Point on the same terms as the horses, carriages, and passengers of Owen & Co. are permitted to pass over the road and into the park and Point; also enjoining them from refusing complainant's passengers to enter the park and Point upon their paying the customary fees, and from refusing to furnish complainant's passengers with tickets of admission to the Point at the toll-gate, as they have been doing heretofore under the contract of Owen & Co. with respondent, Whiteside, and as they continue to do the passengers of Owen & Co.; also enjoining them strictly from making or enforcing any contract with Owen & Co., or any other person, which will directly or indirectly discriminate against complainant's business, or which will secure to said Owen & Co., or any other person, any rights and privileges whatever in respect to said turnpike road, and to said park and Point, which are not accorded to complainant on the same terms."

The power of the court here invoked and exercised is a tremendous one. It appropriates the use of the respondent's property to complainant's use against her consent. It takes the property from her control in an important sense against her will. We are now discussing the case under the theory of the original bill, and without reference to the supplementary proceedings. The sovereign power of

the state, in the exercise of its right of eminent domain, may appropriate private property to the public use upon giving just compensation therefor, but this appropriation is made by some legislative act, general or special, when public necessity demands it. The court has no power to make the appropriation. It may be the instrument by and through which the details of the appropriation are defined, declared, and worked out. But its act must be by reason of and within the scope of legislative authority. There is no need of the elaboration of this question, since there is no claim predicated upon the right of eminent domain.

Aside from the right of eminent domain, there is an inherent power in the state, when necessary for the public good, to regulate the manner in which each person shall use his own property, but this power of regulation rests upon public necessity. See *Munn* v. *Illinois*, 94 U. S. 125.

Whether, like the right of eminent domain, some legislative act must confer on the court authority to declare and effectuate this use, it is, perhaps, unnecessary to determine. There is probably no question, but that in the case of a common carrier, when the legislature has not, in the charter or in the general law, regulated the prices to be charged upon its business, the courts may, by injunction, prevent extortion or discrimination therein to a certain extent; nor can it be questioned that the courts may compel a common carrier to receive and carry for every person such property or freights as it usually transports on its line, when the shipper has tendered the freight, and its proper costs and charges. The common carrier is granted power to do business for the public, and owing to the public nature of its business and contracts, the courts may control it to some extent, if the legislature has failed to make any provision in regard thereto, or may confine it within the legislative boundaries, if such have been provided. But in such instances the legislative department has impressed the property with a public character and interest; not that the legislative act could of itself make it so, but because the legislative power is the proper source of authority to determine when the public necessity exists. Then courts may regulate the fees and charges for the use, but the court cannot impress, declare, and enforce the use.

The control which courts may have over railroads and business incidental to and necessary for their conduct and operation, such as warehousing in our great railroad centers, is based upon public necessity. Railroads do nearly all the business of interior transportation. The public is compelled to use them exclusively. There is scarcely anything to compete with them where they operate. Hence, discriminations or extortion cannot be tolerated in their management. If they refuse like facilities to their shippers, or discriminate in rates or otherwise, courts may compel them to be just. The cases of *Munn* v. *Illinois* and *Adams Exp. Co.* v. *L. & N. R. R.*,

and other cases referred to, proceed on this theory. There is no such ground for jurisdiction in the case under consideration. There is no necessity, public or other, for people to visit Lookout Point. That is a mere matter of taste, pleasure, curiosity. Commerce, the public weal, social order, the public health or comfort, have nothing to do with it. Already the courts have gone "to the verge of the law" in the direction asked for here, and it is apprehended that no authoritative case can be found which will carry us as far as we are now asked to go.

Now, take the case in hand, Miss Whiteside, as the owner of the Point and park, or her privies in estate, at one time might have excluded all persons from entering upon either. It, to say the least, has been private property. No legislative act has declared a public use in it. If such use has been impressed upon it, it has been done by her. Holding the absolute title, she could control it as she liked, so long as she did not use it to the injury of others. She could have donated it to a public use generally and absolutely, or to such limited use as she might prescribe, or she could have preserved its private character. As her private property she had the right to inclose it; after its inclosure she had the right to admit as many or as few within the inclosure as she pleased. Because she saw fit to admit some persons upon payment of a given fee gave to others no right to be admitted on the tender of a like fee. They were in no worse or different position than before any admissions were made. No loss had been sustained by them; no consideration had passed from them. Nothing can be found on which to predicate an equity in their favor. The fact that people may have been admitted to such an extent as to make the business of carrying passengers to the Point profitable to complainant raises no equity in his favor. It was brought about by no use of his property or expenditure of his money. Respondent has as much right to require him to contribute such portion of profits as might be deemed equitable, which she has enabled him to make by the allowance of great numbers to go to the Point, as he has to demand of her the use of her property that his business may prosper. Neither he nor the public has any greater right to the property than she has given them. There is no greater obligation on her part to contribute to the public use, gratification, or pleasure than rests upon others. She holds her property subject to her control just as others hold theirs, until it is applied to the public use by an act of the sovereign power through methods known to the law, or until she appropriates it by her voluntary act to the use of the public. A court cannot appropriate it to such purpose against her consent. She can determine who shall be admitted within her premises and who shall be refused admission. Of course, this remark has no reference to officers of the law armed with process.

There is no explicit allegation that she does not allow complainant

to take his conveyances over the turnpike. The contrary is to be inferred from the language used, and is established by the record. The *gravamen* of the averments are that she is owner of the Point and park, as well as turnpike, and that the use she makes of the park and Point is a discrimination in favor of one concern traveling the pike and against another. Her turnpike is authorized by legislative authority and is a public road, on which discriminations could not be tolerated. But because the owner of the pike may have other property under a totally distinct title from that of the pike, and of a different character, and applied to and appropriated for a different use, there is nothing in law or equity which compels the owner to subordinate the uses of the one to the purposes of the other. They are held as independently as though the title to each were in different persons. The law—the courts—cannot control the operations of private business. In a free government the people must be left to the control of their own business. Competition must be allowed, union and co-operations of interests must be permitted, so long as the law is not violated or private injuries done.

Complainant has engaged in a business in which he serves the public. He charges, as we will suppose, one customer three dollars for the use of a carriage and team, and another five dollars, and another still nothing for precisely the same service. Is there any law that will authorize the courts to control his action in thus discriminating? The pleadings show that another turnpike, St. Elmo, runs up Lookout mountain, (which may be traveled as well as respondent's in reaching the Point,) and yet complainant tells us in his bill that he is willing to carry all his vehicles and horses over respondent's pike if she will admit his passengers to the Point. Now, what rule of law or equity would allow complainant to discriminate against St. Elmo pike and in favor of respondent's, when it becomes his interest to do so, and yet not allow respondent to discriminate against complainant and in favor of Owen & Co. in the way of admission to the park and Point when she may think it to her interest to do so?

It is said that the state has imposed a tax on public parks, and that this is a legislative act, declaring the character and use of the park to be public. The taxation of the park indicates rather that the state considers it private property. It is not usual that public property, or property set apart for public uses, is taxed, and it does not seem that the imposition of the burden of a tax on the property should be construed as setting apart the property to public use. It would be strange if a citizen of the state were required by the state to pay a tax for the privilege of having his property placed beyond his control. On the contrary, it would seem that this taxation indicates that the state believed that the owner ought to pay a tax for the privilege of using her private property to raise money by charging the people for its use. So far from considering it an appropriation of her property to a public use, by which the public is benefited, and

through which it acquires to it such rights and equities as may be enforced by the courts, it is declared a privilege to allow the public to use it by the payment of a fee for admission thereto, for which the owner should be taxed. The benefit is to the owner and not to the public. Complainant is taxed for the privilege of charging his customers for his services, but that does not make his a public business. There is little question, probably, but that the public necessities may require, under the proper conditions, that private property may be taken for the use of the public for purposes of recreation and pleasure, but the courts cannot undertake so to appropriate and apply it without legislative authority. It follows from the views expressed that the conclusion is that the injunction granted under the original bill, especially with the light thrown upon the case by the subsequent proceedings, ought to be dissolved.

The first amended bill of complainant presents no features so different from the original bill as to demand additional consideration. The last amended bill of the complainant presents a case very different from the theory of the original bill. It has a twofold aspect: *First.* It alleges that respondent's turnpike road was chartered to run from the foot to the summit of Lookout mountain, and that the summit is not at the brow of the mountain, but is near the Point, and that the dirt road from the brow to the Point is a part of the turnpike, and was opened and used as such; that the park fence is built across the road and obstructs it, and is therefore a nuisance, by which complainant suffers irreparable injury. *Second.* It is alleged that if the dirt road is not a part of the turnpike, it was opened by the owners of the lands over which it passed, and dedicated to the public as a public road, and is obstructed as above shown.

The last position is strongly fortified and strengthened, to say the least, by the use of the road for a period of 30 years and more, and by the terms and declarations of deeds executed by the owners of the land for various lots of land bounded by this road. The Point, however, is not part of this road. The road does not quite reach it. If the road were thrown open from end to end to the public, every person might be excluded from the Point by its inclosure, or otherwise. The whole pleadings show that admission to the Point is what is wanted. This road leads to nothing but the Point. There is little or no value in the free and unobstructed use of the road by complainant, unless his passengers can be admitted to the Point after coming to the end of the road. This they cannot do without respondent's consent, and no case is made by which a court would be justified in forcing her assent. This obstruction of the road does not present such an instance of irreparable damage as would authorize the interference of a court of chancery by its injunction.

Miss Whiteside comes and files a bill in the nature of a cross-bill, in the cause, in which she gives a history of the case and recounts the steps taken in it. She asserts her right to the property and to

its absolute control, and asks that Sharp be enjoined from taking his vehicles and passengers into the park and Point. Substantially, she asks this court to enjoin the injunction of the state court, which could hardly be done. The disposition made of the injunction under the the original bill destroys the foundation for Miss Whiteside's application anyway, and no injunction will be granted her.

There remains the injunction on Miss Whiteside's cross-bill, filed in the state court. No action is invoked in regard to it, and therefore no order is made in reference to it. It appears to be innocent and harmless, anyway.

The reasons given by Judge KEY for the distinction taken by him in the text are so clearly and forcibly stated that they call for no further exposition. The question, however, of illegality of contracts in restraint of business is one of such growing interest that it may well claim a more minute and copious discussion than is consistent with the adjudication of a single contested issue, such as that more immediately before us. Contracts of this class may be ranged under the following heads:

(1) RESTRICTION OF PUBLIC DUTIES. Wherever a public duty is lawfully accepted or imposed, a contract by the party who should discharge it, to limit its efficiency to a particular class of persons, is invalid. No one who is bound to perform a public duty to a particular line of customers, clients, or dependants, can, by contract, give a preference to certain persons over others among the persons privileged. We may illustrate this position by cases in which, when public offices are by the law of the land open to competition, those having the disposal of such offices contract to sell them to particular aspirants. Aside from the objection that such contracts are void on the ground of corruption, they are void for the reason that they unduly restrict the disposal of public duties which should not be so restricted.[1] The same reason avoids contracts for the influencing legislatures to pass bills for the benefit of some of the parties contracting. This is not merely because "lobbying" contracts of this class are against the policy of the law, but it is also because agreements restricting the discharge of a public duty are in themselves invalid. And the reasons given for the rulings in this relation show that this distinction is generally recognized. Persons rendering professional services before committees of the legislature may recover compensation for these services from the parties employing them. It is otherwise, however, when personal influence is used to induce legislators to discriminate between claimants for particular privileges. "We have no doubt," says SWAYNE, J., in a case in which this question came up before the supreme court, "that in such cases, as under all circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included draughting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing agreements, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered by a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the means and appliances

[1] Kingston v. Pierrepont, 1 Vern. 5; Blachford v. Preston, 8 T. R. 89; Card v. Hope, 2 Barn. & C. 661; Thomson v. Thomson, 7 Ves. 470; Waldo v. Martin, 4 Barn. & C. 319; Cardigan v. Page, 6 N. H. 183; Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Pa. St. 282; Grant v. McLestey, 8 Ga. 553.

which the correspondence shows were resorted to in this case."[1] These means were not payment of money, but application of social and political influence to obtain undue discrimination in legislation. And the same position has been subsequently repeatedly reaffirmed.[2] And, on the same principle, agreements to induce an executive to prefer particular parties in the distribution of patronage have been held invalid.[3]

(2) AGREEMENTS NOT TO DO BUSINESS OR WORK IN A PARTICULAR PLACE. The policy of law requires labor to be unrestricted; and even were it not so, it might be a serious question whether the enforcement of an agreement to labor permanently and exclusively for a particular person, at his absolute dictation, is not in conflict with that clause of the fourteenth amendment of the constitution of the United States which prohibits involuntary servitude. If an agreement to labor permanently and exclusively for a particular person, without discrimination as to the line of labor, is valid, and can be enforced, then an agreement for life service could be enforced. Aside from this difficulty, however, which will be considered more fully under the next head, the good of society requires that improvident bargains by laborers to work exclusively for certain employers should not, as permanent arrangements, be upheld. Hence, a special engagement to work for a particular employer for a particular time, will be sustained, but not a permanent and exclusive transfer of services.[4] It is true that if a tradesman or a professional man agree, upon selling the good-will of his business, not to interfere with his vendee, this agreement will be sustained by the courts, supposing that the restraint is reasonable.[5] But to be reasonable there must be a limit as to the space over which the exclusion is to operate, and a limit as to the particular kind of labor to be restricted. "When a limit of space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade; he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefits of the trade being carried on, because the party with whom the contract is made will probably, within those limits, exercise it himself. But where a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit in return."[6]

[1] Trist v. Child, 21 Wall. 441.

[2] Meguire v. Corwine, 101 U. S. 111; Oscanyon v. Arms Co. 103 U. S. 261; Powers v. Skinner, 34 Vt. 274; Bryan v. Reynolds, 5 Wis. 200; Gill v. Williams, 12 La. Ann. 219.

[3] Wakefield Co. v. Normanton, 44 Law T. (N. S.) 697; Tool Co. v. Norris, 2 Wall. 45; Pingry v. Washburn, 1 Atk. 264.

[4] Collins v. Locke, L. R. 4 App. Cas. 674; Farrer v. Close, L. R. 4 Q. B. 612; Spinning Co. v. Riley, L. R. 6 Eq. 551.

[5] Ronsillon v. Ronsillon, L. R. 14 Ch. Div. 351; Vickery v. Welch, 19 Pick. 523; Taylor v. Blanchard, 13 Allen, 370; Keller v. Taylor, 53 Pa. St. 467.

[6] Wood v. Byrne, 5 Mees. & W. 562.

Since the publication of my book on Contracts, in 1882, there have been several cases affirming the general principle there stated and repeated in this note. Thus, in Smith v. Martin, 80 Ind. 260, it was held that an agreement by a milkman not to sell milk at a particular town was good as to sales in such town, but did not prevent him from selling milk at his farm, out of town. In Jacoby v. Whitmore, (July, 1883,) reported in 49 Law T. (N. S.) 335, it was held that an agreement by a person employed by another not to carry on a business such as that of the employment at any time thereafter within a certain area, is, in the absence of a specific covenant or stipulation to the contrary, to be understood to continue during the whole of the employe's life-time, notwithstanding the employe has removed his business to another place, and assigned it to a third person. The defendant, the suit being for an injunction, on entering upon an employment as shopman to C., an Italian warehouseman, agreed with C. (there being no mention of assigns) not to carry on a similar business within a mile of C.'s then shop. C. afterwards moved his business to other premises, 450 yards distant, the defendant continuing with him as shopman. The defendant gave up his situation shortly after his removal, and then, some additional time elapsing, C. sold his interest and good-will in the business to J. It was held (BRETT, M. R., and COLTON and BOWEN, JJ., reversing BACON, V. C.) that the defendant should be enjoined, on

(3) AGREEMENTS TO LABOR EXCLUSIVELY FOR PARTICULAR PERSONS. In cases of this class two conflicting principles are to be reconciled. One of these principles is that no agreement is to be sustained when the effect of it would be to draw permanently and absolutely from the market any specific quota of labor by which the market would be improved. The other is that freedom of contract should not be impaired. These two principles are reconciled, in the relation here noticed, by the position that freedom to contract to withdraw from labor is to be sustained in all cases in which the withdrawal is limited to a particular place and to a particular line of business. The same distinction is applicable to agreements by parties to deal exclusively with each other in particular lines of business. The law of partnership assumes that such an agreement, when either for a limited time, or when dissoluble at the will of the parties, is promotive of the public good as well as of the good of those immediately concerned; and hence partnership articles, when so conditioned, have been sustained in all jurisprudences. Still more marked illustrations of the principle before us are to be found in the well-known English rulings in which it is held not to be against the policy of the law for a purchaser or lessee of land from a brewer to covenant that in case he opens a public house he will buy all his beer from such brewer.[1] It has even been held that a contract by an author to write exclusively for a particular publisher will be sustained;[2] though this must be on the supposition that the contract is reasonable, and does not put the author in a position in which his productive powers would be limited, or his services secured on an inadequate remuneration. And in *McCaull* v. *Benham*,[3] which was an application for an injunction to prevent an opera singer from violating an agreement to sing exclusively for the plaintiff, BROWN, J. said: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants, which are essential parts of

the application of J., from setting up a similar business at a spot within a mile from both of C.'s places of business. "Apart," said BOWEN, L. J., "from the question as to restraint of trade, a man may bargain as he chooses. Sometimes it is said that contracts as to personal service cease with the employment; but there is no doubt that a man may bind himself by a contract with a master so long as he is in trade; otherwise it could be said that the contract was that Cheek was only to have the benefit of it so long as he carried on business. The assigns are not mentioned in this agreement, but, reading it in the plainest way, it is that Whitmore (the defendant) was at no time thereafter to carry on business within a certain distance of this shop. Then how does the doctrine as to restraint of trade prevent that construction? If that construction would show that the contract was unreasonable, as being in restraint of trade, the agreement should not be so read. The only way other cases affect the point is that, if being construed in a particular way, the contract would be in restraint of trade, that construction should not be put upon it. What is restraint of trade? All contracts in restraint of trade are not void,—that is conclusively settled on the authority of cases in the exchequer chamber and other courts. It is not against public policy for a person entering an employment to enter into a covenant, restricted as to space, not to carry on the same business on his own account, even if his employer should leave the business. The employer wishes to have security given to the business not only while he is carrying it on himself, but in favor of his successors, and during the whole life of the covenantor; and, if reasonable when made, subsequent circumstances do not affect the operation of the contract under the rule as to contracts in restraint of trade. Therefore, the obvious reading of this contract does not make it unreasonable. Then is such a contract assignable? If it is for all time, it may, of course, be enforced after Cheek (the employer) has left the business. Another question is, whether the benefit of the contract was assigned or not. I think it was. It is part of the beneficial interest, and it is part of the good-will. It is said that the agreement did not bring customers to the shop, but it prevented them from being taken away."

[1] Cooper v. Twibill, 3 Camp. 286*n*; Gale v. Reed, 8 East, 80; Catt v. Tourle, L. R. 4 Ch. 654.

[2] Morris v. Colman, 18 Ves. 437.

[3] 16 Fed. Rep. 37, (U. S. Cir. Ct. N. Y. 1883.)

the agreement, as in this case, that the artist will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are to be observed in good faith and specially enforced in equity." To this effect are cited *Howard* v. *Hopkyns*,[1] *Fox* v. *Scard*,[2] *Jones* v. *Heavens*,[3] *Barnes* v. *McAllister*,[4] *Nessie* v. *Reese*,[5] *Trener* v. *Jackson*.[6] Contracts, therefore, by which a particular artist is bound to give his services for a specified season to a particular manager are valid and will be enforced, the reason being that the artist is not bound to render his services to all applicants indiscriminately, and that these services are in a special voluntary line. The same rule applies to contracts with physicians; though there can be no question that if a hospital or dispensary should be chartered for the express purpose of affording relief to all patients without discrimination, contracts made by it to confine its benefits to a particular line of applicants would be held invalid. But in any view contracts of this class will not, if oppressive, be enforced in equity. Thus, in a Pennsylvania case,[7] the evidence was that Keeler agreed to instruct Taylor in the art of making platform scales, and to employ him in that business. Taylor engaged to pay Keeler, or his legal representative, $50 for each and every scale he should thereafter make for any other person than Keeler, or which should be made by imparting his information to others. This was held to be an unreasonable restriction upon Taylor's labor, and therefore void as in restraint of trade and legitimate competition. The case being an application to a court of equity to enforce a bargain, it was held that, though "contracts for partial restraints may be good at law, equity is loath even then to enforce them, and will not do so if the terms be at all hard or even complex." It was added that, if it were not void, however, a chancellor would regard the hardships of the bargain, and the prejudice to the public, and would withhold his hand from enforcing it."

(4) AGREEMENTS ONLY TO PRODUCE OR LABOR FOR A PARTICULAR MARKET. An interesting distinction is here to be observed. It may be that a party owning particular staples, or having the control of labor to any large amount, is under no duty to offer these staples or labor to the community at large. If this is the case, agreements made by him, on a sufficient consideration, to give these staples or this labor exclusively to particular persons are valid. It is otherwise when the agreement is to give a monopoly to a particular party of a commodity which should be open to purchase to the community at large.[8]

(5) AGREEMENTS BY A COMMON CARRIER TO DISCRIMINATE AGAINST PARTICULAR PARTIES ENTITLED TO BE ACCEPTED AS CUSTOMERS. A common carrier is bound to afford equal facilities to all customers paying him a reasonable fare. A recent illustration of this rule is to be found in *Wells* v. *Oregon R. R.*[9] In this case, which was a bill in equity before FIELD, J., asking for an injunction, the plaintiff claimed to be a corporation under the laws of Colorado, engaged in the express business on the Pacific coast. The defendants were corporations under the laws of Oregon, owning steam-vessels on the Pacific waters and tributaries, and railroads on the Pacific coast. The plaintiff's business was that of a carrier of parcels under the direct supervision of agents accompanying them from the office of the owner or shipper, and delivering them at the office of the consignee. The plaintiffs, in other words, were express agents; the defendants proprietors of a steam-boat and railroad line; and the question presented, to adopt the language of FIELD, J.,

[1] 2 Atk. 371.
[2] 33 Beav. 321.
[3] 4 Ch. Div. 636.
[4] 18 How. Pr. 534.
[5] 29 How. Pr. 382.
[6] 46 How. Pr. 389.
[7] Keeler v. Taylor, 53 Pa. St. 468.
[8] See Whart. Cont. § 442.
[9] 18 Fed. Rep. 518.

was: "Shall the railway companies and steam-ship companies engaged in that trade be required to furnish facilities to the express companies in the transaction of this business? The business would entirely fail, and come to an end, if certain facilities for its transaction were not afforded them, such as allowing to them special cars or apartments, or definite spaces in them, for the transportation of such articles, with a messenger in charge thereof, having sufficient room for the assortment of the articles by him while in transit, so as to facilitate their delivery at the different stations to which they may be destined. It may be difficult to define with accuracy what should be deemed proper facilities in each case. That will depend very much upon the extent of the business, and the character of the articles carried by the express companies. In the present cases it is not necessary to designate what those facilities should be. The object of the two suits is to restrain the defendants from denying to the plaintiff the facilities which have heretofore been furnished to it." He proceeds to say: "The question is one of much difficulty, and its correct solution will be far-reaching in its consequences. It has been before different circuit courts of the United States in some cases, but has never been brought before the supreme court. In the case of *Southern Exp. Co.* v. *St. Louis, I. M. & S. R. Co.*, in the eighth circuit, it was considered by Mr. Justice MILLER of that court, sitting with Judge MCCRARY in holding the circuit court. 10 FED. REP. 210. The railroad company in that case was enjoined by them from refusing or withholding the usual express facilities from the plaintiff. In giving his conclusions, Mr Justice MILLER, among other things, held that the express business is a branch of the carrying trade, which, by the necessities of commerce and the usages of persons engaged in transportation, has become known and recognized so as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steam-boats and railroads; that the object of this express business is to carry small and valuable packages rapidly, in such manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attend the transportation of heavy or bulky articles of commerce; that it is one of the necessities of this business that the packages should be in the immediate charge of an agent or messenger of the company, or parties engaged in it, without any right on the part of the railway company to open and inspect them; that it is the duty of every railroad company to provide such conveyance, by special car or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads; that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business, at fair and reasonable rates of compensation, to be determined by the court when the parties cannot agree thereon; and that a court of equity has authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect. The same question has been decided substantially in the same way in other cases. From the decisions rendered in some of them, appeals have been taken to the supreme court, and the cases are now on its calendar. Under these circumstances I have come to the conclusion to follow the view expressed in them, rather than to go into an extended consideration of the question. The following cases are now pending in the supreme court: *Memphis & L. R. R. Co.* v. *Southern Exp. Co., St. Louis, I. M. & S. R. Co.* v. *Southern Exp. Co.*, and *Missouri, K. & T. R. Co.* v. *Dinsmore, President of Adams Express Company.* In their determination the question presented will be definitely and authoritatively settled."

For the reasons above given, the supreme court of Connecticut held invalid a contract by which the Hartford & New Haven Railroad agreed to deliver to the New York & New Haven Railroad at New Haven all passengers by

its line for New York; and the New York & New Haven Railroad was to prevent the construction of a railroad which would be a rival and a competitor of the Hartford & New Haven Railroad. This was declared by the court to be a contract void as against public policy.[1]

It has been held in New York[2] that a contract precluding one of the contracting railroads from building branches was void as an infringement of the rights of travel. The court says: "It is a compact between the parties intended to affect the facilities for public travel over a route of railroad which had been or might be authorized by law. * * * Such an arrangement was intended to prevent the extension of the New Haven & Northampton Railroad to any point north of its terminus at Granby, and to prevent any competition in travel detrimental to the interests of plaintiff's road, which had a monopoly of the carrying trade from Springfield, and points north of Springfield, via the Northampton & Springfield Railroad, which such extension might affect. The completion of the New Haven & Northampton Railroad to Northampton would open a new line for travel southward, which would be a competitive rival of the road of the plaintiffs. Such competition and rivalry it was not lawful for these parties to prevent, or attempt to prevent, and any contract to effectuate such a purpose is void. Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish; and the law will not uphold any agreement which does or may injuriously affect such rights or facilities;" citing *Doolin* v. *Ward*,[3] *Hooker* v. *Vandewater*,[4] and *Hood* v. *N. Y. & N. H. R. R.*[5]

In *Hooker* v. *Vandewater*[6] the proprietors of five several lines of boats, engaged in the business of transporting persons and freights on the Erie and Oswego canals, entered into an agreement among themselves to run for the remainder of the season for certain rates of freight and passage, then agreed upon, and to divide the net earnings among themselves, according to certain proportions fixed in the articles. This agreement was declared illegal. "It is a familiar maxim," said the court, "that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

In *Denver R. R.* v. *Atchison, Topeka, etc., R. R.*,[7] it was held by the circuit court for Colorado that a contract between two railroad corporations, by which they agreed to exchange their traffic, and not to "connect with or take business from or give business to any railroad" which might be constructed in Colorado or New Mexico after the date of the agreement, is void as against public policy. This ruling is sustained by an instructive note by Mr. Adelbert Hamilton, citing *Charlton* v. *R. R.*,[8] *Salt Co.* v. *Guthrie*,[9] *Central R. R.* v. *Collins*;[10] though it is admitted that the point is decided differently in *Hare* v. *R. R.*,[11] *Southsee Co.* v. *London R. R.*,[12] and *Eclipse Co.* v. *R. R.*[13]

In *Twells* v. *Penn. R. R.*[14] it was decided by the supreme court of Pennsylvania in 1863, that, though A., a railroad company, may have power to discriminate between "local" and other freights, it cannot make such a discrimination on the ground that the freight discriminated against is to be carried to its place of final delivery by another company after reaching the terminus of A.'s route. "The defendants," said STRONG, J., (afterwards a judge

[1] State v. Hartford & N. H. R. Co. 29 Conn. 538.
[2] Hartford R. R. v. N. Y. & N. H. R. R. 3 Rob. 411.
[3] 6 Johns. 194.
[4] 4 Denio, 349; 29 Conn. 538.
[5] 22 Conn. 502.
[6] 4 Denio, 349.
[7] 15 Fed. Rep. 650.
[8] 5 Jur. (N. S.) 1100.
[9] 35 Ohio St. 672.
[10] 40 Ga. 582.
[11] 2 Johns. & H. 80.
[12] 2 Nev. & Man. 341.
[13] 24 La. Ann. 1.
[14] 12 Amer. Law Reg. (O. S.) 728; 3 Amer. Law Reg. (N. S.) 728; 21 Leg. Int. 180.

of the supreme court of the United States,) giving the opinion of the supreme court of Pennsylvania, "are authorized by their charter to be common carriers on their railroad from Pittsburgh to Philadelphia, with power to establish, demand, and receive such rates of toll, or other compensation, for the transportation of merchandise and commodities as to the president and directors shall seem reasonable. It is admitted that, in the exercise of these powers, they must treat all customers alike. Now, it is clear that if they receive coal oil at Pittsburgh to be carried to Philadelphia, it can make no difference to them, either in the risk or cost of transportation, whether Philadelphia is the point of ultimate destination of the oil, or whether the consignee intends that it shall afterwards be started anew on another line, and forwarded from Philadelphia to New York. The point of final destination of the freight is a matter in which they have no interest as carriers over their own road. If it be admitted that they may contract to carry freight to points beyond Philadelphia or Pittsburgh, over connecting lines, it is still true that as to all carriage beyond the *termini* of their own road they stand in the position of third parties, and they can no more secure to themselves an advantage over other carriers on the connecting lines by discriminating in tolls on their own, than they could secure similar advantages to one shipper over another in the same way; yet this is the practical effect of the regulation which the defendants are seeking to enforce against the complainant, and we cannot doubt that such is their object in making it. They in reality say to him: 'Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you for its carriage to Philadelphia six cents per hundred pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia. Or, if you employ us to carry it to New York after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportion.' No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They cannot say to a shipper at Pittsburgh, of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A. to New York, we will carry it over our line at certain rates. If you send it by any other than A. our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it, would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties, or the railroad company itself. Of transportation along the line of their road the defendants practically have a monopoly. It is not consistent with the public interests, or with the common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road. If they contract to carry freight to distant points in other states and countries, they should stand on the same footing with other carriers, over other roads and lines than their own. If they may use their exclusive powers over their road so as to force into their own hands all external carrying trade, and do this at the expense of a shipper or class of shippers, it is quite possible for them to exclude one domestic product from all foreign markets. Shippers of such products might be compelled to seek a final market in Philadelphia, under penalty of such increased rates of toll beyond as to make it impossible for them to find any other place of sale. These consequences, more or less aggravated, according to the will of the defendants, and according to interests

they may have distinct from those which belong to them as owners of their road, flow naturally from permitting the destination or use to be made of freight, after it has left the road, to affect the price of carriage over it.

"In *Baxendale* v. *Great Western R. Co.* (14 C. B. N. S. 1; 16 C. B. N. S. 137) it was held that the company could not secure to themselves a monopoly of the delivery of goods beyond the termination of their road by a general regulation charging a gross price for carriage on the road, including the cost of such delivery, to all persons, whether they receive their goods at the station or beyond. In other words, they were not allowed to make use of their rights over their road to secure to themselves advantages beyond it. That there are special privileges to individuals or classes of men, makes no difference, for they are but declaratory of the common law. *Sanford* v. *Catawissa R. Co.* 12 Harris, 378. We hold, then, that the rule of the defendants, of which the complainant complains, is unreasonable, and such as they have no legal right to enforce. The apology set up for it is not sufficient. That the imposition of higher rates for carrying the complainant's oil to Philadelphia, because it is afterwards to be forwarded in some way to New York, is necessary to prevent his having an advantage in the New York market over those who employ the defendants to transport all the way, or over those who send oil from Pittsburgh to New York with through bills of lading, is a matter outside of their control. It has no proper relation to them as carriers."

Two points are worthy of notice in reference to this remarkable case. The first is that, though reported in two current Philadelphia perodicals, above noticed, it is not to be found in the regular Pennsylvania reports. The second point is that at the same term of the supreme court of Pennsylvania was decided, Judge STRONG also giving his opinion, the case of *Shipper* v. *Pennsylvania R. R.*, (reported in 47 Pa. St. 338,) in which it was held that the Pennsylvania Railroad Company had a right, under its charter, to charge a higher freight on goods coming to it from beyond the state than it had for freight delivered to it in the state. "There is nothing," so Judge STRONG closes his opinion, "in the constitution of the United States that prohibits a discrimination between local freight and that which is extraterritorial, when it commences its transit. Such a discrimination denies to no citizen of another state any privilege or immunity which it does not deny to our own citizens."

On the same reasoning it has been held that an agreement whereby a railroad corporation grants to a telegraph company the exclusive right to put on the railroad track a telegraph line, cannot be sustained. The reasons given are twofold: *First*, such a monopoly cripples competition, and is therefore in restraint of trade; *secondly*, telegraph companies are by act of congress authorized to operate telegraph lines on all roads used as post-roads.[1] On the question of the right of a railroad corporation to give the exclusive use of its track to a particular telegraph company, the supreme court of Illinois says: "The objection to the contract on the ground of public policy is that it gives to the appellant, the Western Union Telegraph Company, the monopoly of the telegraph business along the line of the railroad. However it may be as to the provision of the contract in this respect, taking in its full extent of an exclusive right of way and the discouragement of competition, in so far as it goes only to the exclusion of competitors from the line of poles occupied by a complainant, when direct injury to the actual working of complainant's line of wire might result, it is, in our view, not liable to this objection. So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly

[1] Western U. Tel. Co. v. Burlington R. R. 11 Fed. Rep. 1; Pensacola Tel. Co. v. Western U. Co. 96 U. S. 1. See Atlanta Tel. Co. v. Railroad, 1 McCrary, 541; Western U. Tel. Co. v. Railroad, Id. 565.

or the repression of competition." *Western U. Tel. Co.* v. *Chicago & P. R. R.* and *Atlantic & P. Tel. Co.* 86 Ill. 246.

In *Western U. Tel. Co.* v. *Atlantic, etc., Tel. Co.*, in the court of common pleas of Columbus, Ohio, Judge GREEN gave an opinion from which the following extracts are taken: "This contract embraces other provisions which, as it is alleged, the defendants propose to interfere with. It will be observed that it is not averred in the petition that the defendants propose to remove any but the one wire,—the railroad wire,—nor to prevent the plaintiff from using or continue to use, for the transaction of its business as a telegraph company, the other wires on the poles erected under the contract. The complaint is that the railroad company proposes to violate a term or covenant of the contract by permitting a competing line of telegraph to be erected on its right of way by a rival company, by which its profits will be greatly diminished. The covenant referred to will be found in the sixth clause of the contract, and is in these words: 'The railroad company is not to permit any other telegraph company or individual to build or operate a line of telegraph along its road or any part thereof.' The clause of this contract now under consideration, if it shall receive the construction claimed by the plaintiff, is, in my opinion, against public policy.

"In the case of *St. Joseph & D. C. R. Co.* v. *Ryan*, reported in 11 Kan. 602, a railroad company, in consideration of a grant of a right of way through certain lands, agreed with the owners to erect and maintain a depot upon said lands, and not to have any other within three miles thereof. It was held that the contract was against public policy. See, also, 24 Pa. St. 378. The public have a deep interest in the operation and establishment of lines of telegraphic communication; it would be inequitable that the rights of the community should be sacrificed to insure the alleged privileges of the plaintiff from all possible damages. In view of the facts of the case, showing that these corporations are not the only parties interested in the contract, and that the public at large have a deep interest in it, it would in my opinion be an unwarrantable exercise of power in a court of chancery to grant an injunction." This case, so it was stated in the argument in *Western U. Tel. Co.* v. *Baltimore & O. R. Co.*, was decided in 1876, and a competing line of telegraph has been operated upon the Central Ohio Railroad ever since.

In *Western U. Tel. Co.* v. *Union Pacific R. R.*,[1] Judge MILLER thus speaks: "It was one of the provisions of this contract that the railroad company should not send over its wire any commercial messages, or any paid messages, or messages for any other person than for its own business, the purposes of which evidently was to leave the exclusive right to convey such messages to the telegraph company. And it was to enforce this clause of the contract that the injunction was obtained by the Western Union Telegraph Company in the state court. And it is to get rid of this provision and permit the railroad company to convey such messages, and to unite the wires of the telegraph company with the American Union Telegraph Company that messages may be conveyed brought by the American Union Telegraph Company over the wires of the Western Union Telegraph Company, that the present motion is made. * * * We are both [MCCRARY and MILLER, JJ,] of opinion that the railroad company has the right, as it always had, to the exclusive use of the first wire on the telegraph poles, and we are of the opinion that, as the matter stands at this stage of the proceedings, that company should have the right, pending the further litigation of the case, to use that wire, not only for the ordinary business of the road, but for the purpose of transmitting commercial and paid messages for the public in general."

[1] McCrary, 585, 597; [S. C. 3 Fed. Rep. 725, 734.]

(6) WHEN THERE IS NO PUBLIC DUTY THEN THERE MAY BE DISCRIMINATION. The distinction between the cases rests on the question of public duty. When a party is bound to perform a public duty without discrimination, then an agreement to give preferences to particular persons is invalid. When, however, as in the case in the text, there is no such duty, then there may be a discrimination for the reasons given with much ability by Judge KEY. Had the defendant, Miss Whitesides, been under any public duty to permit no discrimination in the reception of persons visiting her estate, then a contract by her to admit only such persons as should come in a particular line of travel would be invalid. This would unquestionably be the case did she undertake to receive guests as at a public inn; since, as is pointed out by Mr. Justice BRADLEY in his opinions in the civil rights questions,[1] the proprietor of an inn or a hotel is not permitted to discriminate arbitrarily between different classes of guests. But Miss Whitesides was not in this position. A visit to her estate was not a necessity, as is the case with the accommodations obtained by travelers from hotel or common carrier. The visit was a matter of luxury, and on the enjoyment of this luxury she was entitled to impose whatever restrictions she chose. It is true that the line between the two classes of cases may sometimes be shadowy. When, however, we apply the criterion of public duty, the two classes of cases become readily distinguishable. We have this illustrated in some recent rulings as to contracts by which certain telephone companies agree to deal exclusively with certain telegraph companies. In Connecticut such a contract has been held to be valid.[2] On the other hand, a similar contract has been held to be invalid in Ohio; and the reason of this ruling may be found in the fact that in Ohio a statute exists prescribing the impartial transmission of all dispatches. A similar statute no doubt exists in Connecticut; but it was not regarded by the court as binding the telephone company. But, whatever we may think of this distinction, we may regard it as settled that the only cases in which a party is prevented from discriminating between persons seeking to do business with him are the following: (1) Where he has the monopoly of some staple whose use is essential to the community: (2) Where, as is the case with common carriers and innkeepers, he is required by law to place all applicants, not subject to exclusion on police grounds, on the same footing.

FRANCIS WHARTON.

[1] 3 Sup. Ct. Rep. 18.

[2] Amer. Rapid Tel. Co. v. Telephone Co. 13 Reporter, 329.

BENEDICT and others *v.* ST. JOSEPH & W. R. Co. and others.

(*Circuit Court, D. Kansas.* November 30, 1883.)

1. MORTGAGE OF RAILROAD PROPERTY—FORECLOSURE—WAIVER OF APPRAISEMENT—LAWS OF KANSAS.
   Under section 3983 of the Compiled Laws of Kansas no order for the sale of railroad property mortgaged with a waiver of appraisement can be made by the court until the expiration of six months after the decree of foreclosure. This statute regulates the transfer of land within the state, and is therefore binding upon the federal courts.
2. SAME—APPOINTMENT OF RECEIVER.
   After such foreclosure the income of the road, being the property of the bondholders for the liquidation of their claims, should be received by a disin-

terested trustee until the time of the sale; and the fact that certain of the bondholders are in possession, to the exclusion of others, is a sufficient reason for the appointment of a receiver, unless the interval between the decree and the sale is very brief.

In Equity.

John F. Dillon, J. P. Usher, and *A. J. Pappleton,* for Union Pacific Railroad Company.

Wager Swayne, John Doniphan, and *Melville Egleston,* for St. Joseph & Western Railroad Company.

Winslow Judson, for complainant.

Woodson, Green & Burnes, for receiver.

McCRARY, J. In this case a decree of foreclosure will be entered. We have carefully considered the motion for the appointment of a receiver. We are entirely satisfied that the St. Joseph & Western Railroad Company is insolvent, and that the property covered by the mortgages is inadequate security for the bonds secured thereby. The facts that no interest has ever been paid, that the debt is over $6,000,000, and that the current expenses have, until recently, about equaled the earnings, are sufficient upon this point. We are also clearly of the opinion that the road should not remain in the custody of the present management, which is in fact, if not in name, the Union Pacific Railway Company, unless a sale under the foreclosure can be had at an early day. The objection to continuing the present management for any protracted period of time is to be found in the fact that to do so would be to leave the mortgaged property in the hands of one set of bondholders, to be by them managed and controlled for themselves and another and hostile set of bondholders. The proof is satisfactory that there are two sets of bondholders,—the majority represented by the Union Pacific Railway Company, and a large minority whom that company does not represent. If a considerable time must inevitably elapse before a sale can be made and confirmed, we think the minority have a clear right to insist that the property shall, in the mean time, be in the hands of a disinterested party. It is not necessary to determine at present whether the charges of mismanagement made against the Union Pacific Company are sustained. It is enough to say that the holders of the minority of the bonds have a right to insist that the road shall not remain in the hands of an interest hostile to them.

This court is very reluctant to appoint a receiver, and we have considered very carefully the question whether, in justice to the interests in hostility to the present management, we can refuse to do so. If the time to elapse before the property can be transferred to a purchaser under a decree to be now rendered was not more than 60 or 90 days, we should not be willing to appoint a receiver for so short a period, and when the argument closed we were under the impression that there was nothing in the way of closing the sale and transfer within that period. But upon looking into the statutes of this state we find

a provision which seems to require in a case of this character a stay of execution for six months. The provision referred to is section 3983 of the Compiled Laws of Kansas, 1881, and is as follows:

"That if the words 'appraisement waived,' or other words of similar import, shall be inserted in any deed, mortgage, bond, note, bill, or written contract hereafter made, any court rendering judgment thereon shall order, as part of the judgment, that the same and any process issued thereon shall be enforced, and sales of lands and tenements made thereunder without any appraisement or valuation made of the property to be sold: provided, that no order of sale or execution shall be issued upon such judgment until the expiration of six months from the time of the rendition of said judgment."

Here the mortgages contain a waiver of appraisement, so that the case seems to fall clearly within the terms of the statute. This statute, in our opinion, confers upon mortgagors a substantial right, and if so, it must, we think, be respected and enforced by this court. It is the settled practice of this court to follow this provision of the statute in foreclosure cases. If the question were at all doubtful we should not be willing to take the chances of ordering the sale of property of the great value of that now in controversy, without following the statute and ordering the stay of six months which it requires.

It is contended that this statute has no application to a mortgage of railroad property, and *Hammock* v. *Loan & Trust Co.* 105 U. S. 86, is cited as supporting this condition. That case undoubtedly holds that the statute of Illinois providing for the redemption of real estate sold under a decree of mortgage foreclosure will not be followed by the federal courts of equity in that state in cases of the foreclosure of mortgages upon property, real, personal, and mixed, of a railroad company. The reason given for this ruling is that the property of such a company, consisting of real estate, personal property, and a corporate franchise, must be treated as a unit, and sold altogether, because, to attempt to divide it, and sell the real estate separately from the personal estate, would destroy its value. It is held that to apply the statute to such a case would leave the court with "no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately in parcels, when susceptible of division and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property." Such a result, the court held, could not have been contemplated by the legislature. It was shown that among other consequences one person might acquire title to the real estate, another to the personalty, and still another to the corporate franchise, each being practically valueless without the other. It is evident that no such serious results will follow from a compliance with the statute of Kansas now under consideration. It relates only to the time when an execution or order of sale shall issue. It is always within the power of a court of equity, in foreclosure cases, to fix a time when a sale of the mortgaged prop-

erty may be had. The complainants in the present case have no absolute right to an immediate sale even of the personal property and corporate franchises. It is not, therefore, necessary, in order to follow the statute, that we divide and dismember the mortgaged railroad property. The stay can be ordered as to the entire property and its unity thereby be preserved, and the statute at the same time enforced, and all rights under it maintained.

We are bound to follow the statute, since it is clearly a statute regulating the transfer of title to property in the state; unless, upon some such ground as that stated in *Hammock* v. *Loan & Trust Co.*, we can hold that it was not intended to apply to such a case as that now before us. *McGoon* v. *Scales*, 9 Wall. 23; *Brine* v. *Ins. Co.* 96 U. S. 627. Compliance with this statute must postpone the sale until it will probably be too late to obtain confirmation at the next June term. If that term is passed a delay of one year is inevitable. For reasons already suggested we cannot see our way clear to leave the property so long after default and decree of foreclosure in the hands of one portion of the bondholders, acting in hostility to another portion having equal equities.

The net income of the road, from this date, at least, (we decide nothing now as to past earnings,) is the property of the bondholders, and must be applied to the liquidation of their claims. Whoever controls the property, and collects and disburses the earnings, from this date, must do so as a trustee of the bondholders. The bondholders out of possession have a right to object to the collection and disbursement of this increase by other bondholders in possession and hostile in interest to them. They have a right to insist that a disinterested representative of all the bondholders shall perform that duty. The party to be left in possession and authorized to collect, care for, and pay over the income, being a trustee, and acting in a fiduciary relation, should have no personal interest in hostility to that of any of the *cestuis que trust*. The amount of the net increase to be divided among bondholders will depend upon the amount of expenditures, what improvements and repairs are made, and the like. Many questions must arise in the course of administration which should be decided by an unbiased representative of all the interests concerned, or by the court. It might be to the interest of the bondholders in possession to make extensive improvements. To this the bondholders out of possession might object. If a receiver is appointed, the court can direct and control these matters. As at least a year must probably elapse before a sale can be made and confirmed, we are constrained, most reluctantly, to appoint a receiver; but we give notice now that no delay that is not unavoidable shall be allowed in closing the receivership and delivering the property to the purchaser at the foreclosure sale; and, if possible, the sale shall be made and confirmed, and the property turned over, before the end of the year.

FOSTER, J., concurs.

CHICAGO, M. & ST. P. RY. CO. *v.* CITY OF SABULA and another.

(Circuit Court, N. D. Iowa, E. D. January 3, 1884.)

RAILROAD BRIDGE—TAXATION—LAWS OF IOWA.

The constitution of Iowa requires the property of all corporations for pecuniary profit to be taxed in the same way as that of individuals. In 1872 the legislature passed an act providing that railroad property within the state should be assessed for taxation by a special board appointed by the state, and not by the local authorities. This statute was held by the courts to be constitutional, on the ground that it applied to all railroad property whether owned by corporations or by individuals. Section 10 of the act of 1872 declared that no provisions of the act should apply to any railroad bridge across the Mississippi or Missouri river, but that such bridges should be taxed as individual property. At the time the act was passed none of the bridges over those rivers were owned by railroad companies, but the companies paid rent or toll for the use of them. In 1880 the Chicago, Milwaukee & St. Paul Railroad built a bridge of its own across the Mississippi at Sabula. *Held*, that the nature of the property and not the ownership determined whether it fell within section 10 of the act, and that the bridge was therefore subject to be taxed by the local taxing district.

Bill in Equity. Motion for temporary injunction.

W. J. Knight and *J. W. Cary*, for complainant.

Fouke & Lyon, *W. C. Gregory*, and *J. Hilsinger*, for defendants.

SHIRAS, J. The bill in this cause sets forth that the complainant is a corporation organized under the laws of the state of Wisconsin, and is the owner and lessee of about 5,000 miles of railroad in the states of Wisconsin, Illinois, and Iowa; that, among others, it operates a line running from Chicago, Illinois, to Council Bluffs, Iowa, which crosses the Mississippi river at the town of Sabula, by means of a bridge constructed by complainant under the authority of the act of congress, approved April 1, 1872, the said bridge being used solely for the passage of the trains of complainant, and being owned solely by complainant, the same as other portions of its track. The bill further alleges that in the years 1881, 1882, and 1883, the general manager of complainant made a statement of the number of miles of railroad operated by complainant in the state of Iowa, with the number of cars, and the amount of earnings, as required by the statute of Iowa, and furnished the same to the executive council, which statement included the length of so much of said railroad bridge at Sabula, Iowa, as is within the state of Iowa, and that the executive council, as required by law, assessed the total valuation of complainant's property, including so much of said bridge as is within the state of Iowa, and apportioned the same over the entire road of complainant, in accordance with the requirements of the statutes of Iowa, regulating the assessment and taxation of railroad property. The bill further charges that the town of Sabula, and county of Jackson, have each assessed the bridge in question and levied taxes thereon for the years 1881, 1882, and 1883, and are threatening to enforce the payment

thereof, by seizure and sale of complainant's property, to prevent which the court is asked to issue a temporary injunction.

The question presented is, therefore, whether, for the purposes of taxation, the bridge, owned and used by complainant across the Mississippi river at Sabula, Iowa, is to be deemed and taken to be a component part of the entire line of road owned by complainant, the same as the bridges across the Des Moines, the Iowa, and other streams within the state of Iowa, and, as such, to be valued and assessed by the executive council of the state, or whether it is to be deemed and taken to be a railway bridge within the meaning of section 808 of the Code of Iowa, and as such to be assessed and taxed the same as the property of individuals in the same county; that is, by the local assessors and the board of equalization. Previous to the year 1872, the property of railroads in Iowa was taxed through the gross earnings of the companies, 1 per cent. being levied upon such earnings, one-half of which tax was paid to the state, and the other half to the respective counties through which the roads were operated. In 1872 an act was passed by the legislature, providing for the assessment to be made by the census board or executive council. The act required the officers of each railroad company to furnish to the census board a statement showing the whole number of miles operated by the company within the state, and within each county in the state, with a detailed statement of the number of engines, cars, and other property used in operating the railroad within the state, and of the gross earnings of the entire road and of so much thereof as is situated within the state.

Section 1 of the act declares it to be the duty of the census board, on the first Monday of March in each year, "to assess all the property of each railroad company in this state excepting the lands, lots, and other real estate of a railroad company not used in the operation of their respective roads."

In section 3, it is provided that "the assessment shall be made upon the entire road within the state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel-beds, and all other property, real and personal, exclusively used in the operation of said railroad."

Having ascertained the total valuation, the value per mile is ascertained by dividing the total value by the number of miles, and this valuation, with the number of miles situated in each county, is transmitted to the board of supervisors of each county, by whom the length of the track, and the assessed value of the same within each city, town, township, and lesser taxing district within the county is determined.

By section 10 of the act it is declared that "no provision of this act shall be held to apply to any railroad bridge across the Mississippi or Missouri rivers, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

When this act of 1872 was adopted there were several bridges across the Mississippi and Missouri rivers, but these were, save the Rock Island bridge, which was owned by the United States, owned by bridge companies, by whom the bridges were constructed, and the use thereof was leased or otherwise contracted to the railroad companies, who paid a rental or toll for crossing the same. In 1880 the complainant constructed its bridge over the Mississippi river at Sabula, for the purpose of making a continuous line of road from Milwaukee and Chicago to Council Bluffs. The bridge is used only for the passage of the cars of the complainant's trains, and no rental or toll is paid for crossing the same by any shipper of freight or passenger upon complainant's road. In other words, this bridge forms part of complainant's line of railway, the same as any of the other bridges spanning the streams, great or small, that are crossed in going from Sabula, on the Mississippi, to Council Bluffs, on the Missouri.

On part of complainant it is claimed that as this bridge forms part of its continuous line of road, it comes within the enumeration of the property to be taxed by the census board, as found in section 3 of the act of 1872, and that section 10 does not take it out of this enumeration, that section being intended to cover the bridges across the Mississippi and Missouri rivers which are owned by bridge companies, and for the use of which the railroad companies pay a rental or toll. On part of the defendants it is claimed that the provisions of section 10 must be held applicable to all bridges across the rivers named, which are used for railroad purposes in the crossing of trains over the same; that it is the use made thereof, and not the ownership, which makes the structure a railroad bridge within the meaning of this section.

In the case of *City of Dubuque* v. *C., D. & M. R. Co.* 47 Iowa, 196, the question of the constitutionality of this act of 1872 came before the supreme court of Iowa, it being claimed that the act was in contravention of section 2, art. 8, of the state constitution, which provides that "the property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." The majority of the court held the act to be constitutional upon the theory that the mode of assessment and taxation provided in the act applied to all property of the character named, without reference to whether it was owned by a corporation, a partnership, or an individual. That the act does not provide a special manner of assessing the property of railroad companies as such, but rather of railroad property, and that such property would be properly taxable under its provisions, whether owned by an incorporated company, a partnership, or an individual. In other words, the court holds that the general provisions of the act were intended to apply to all property used for railroad purposes, and not solely to property owned by railroad corporations, the use, and not the ownership, determining the question whether the act was applicable thereto.

Under this construction of the act it follows that, as a general rule, all property used in the operation of a railroad, no matter whether the same is owned by a corporation or individuals, is to be assessed by the census board in the mode pointed out in the act in question. Section 10 of the act, however, provides for an exception to the general rule thus laid down, by enacting that the provisions of the act shall not "apply to any railroad bridge across the Mississippi or Missouri river, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

As already stated, the question at issue between the parties to these proceedings is whether this section shall be held to apply to all bridges used for railroad purposes, without regard to the ownership thereof, or shall be confined to bridges owned by bridge companies. In the latter case, the assessment of the bridge at Sabula would be made solely by the census board; but in the former case, the bridge would be assessed and taxed the same as any other structure erected in the town of Sabula. If it be true that the general provisions of the act of 1872 are intended to apply to property used in the business of railroading, without reference to the question of the same being owned by a corporation, partnership, or by individuals, then it would seem only consistent to hold that the same rule should be applied in construing section 10 of the act, and that therefore, when it is stated that "no provision of the act shall apply to any railroad bridge across the Mississippi and Missouri rivers," the meaning is that that particular species of railroad property is excepted from the operation of the act, without reference to whether it is owned by a railroad corporation, a company, or an individual. Within the meaning of this act, a railroad bridge is a structure used for the purpose of the passage of locomotives and cars over the same, by means of rails laid along the structure. If the structure is used for that purpose, it is a railroad bridge, no matter by whom it was built and is owned.

Under this construction of the act all bridges over the Mississippi and Missouri rivers used for the passage of railway trains will be assessed and taxed under one and the same statute. If it be held, however, that a bridge used solely for the passage of railway trains is to be taxed by the census board, if owned by a railway company, but if owned by an individual, is to be assessed and taxed by the local assessors, then we would have different modes of assessment and taxation, applied to similar property, used for a like purpose, and differing only in the ownership. It can hardly be supposed that the legislature intended to enact such a law, in view of the constitutional provision already quoted. As an illustration, take the bridge over the Mississippi river at Dubuque. It is owned by a bridge company, but is used solely for the passage of railway trains over the same. It is always spoken of as a railroad bridge, and is assessed and taxed, not by the census board, but by the local assessors, the same as other realty in the city and county of Dubuque. If the Illinois Central Rail-

road Company should purchase this bridge from its present owners, and continue the running of their trains over the same, it would then constitute a part of the main line of the company, connecting Cairo and Chicago with Sioux City, just as the Sabula bridge constitutes part of the line of the Chicago, Milwaukee & St. Paul Railroad Company, and, according to the contention of complainant, a change in the ownership of the bridge in the supposed case would be followed by a change in the mode of assessment and taxation of the bridge, although the structure and the use made thereof remains unchanged.

It is urged in argument that there is a difference between a bridge owned by a company, such as the one at Dubuque, and one owned by a railway company, as is the one at Sabula, in that a toll is charged by the bridge company and paid by the railway company for each car and passenger that passes over the bridge; whereas, in the latter case, the railway company treats the bridge as part of its continuous line, and makes no special charge for carrying freight and passengers over the same, in distinction from any other part of its line. This difference, however, so far as it affects the question under consideration, is more apparent than real. In both cases the companies use the bridges for the same purpose. In the one case the railway company meets the cost of transporting its trains over the river by paying for the use of the bridge, while in the other, the company meets the cost by paying for the erection of the bridge, and the current expenses of maintaining it. It is nevertheless true that the structures and the uses to which they are put are the same in both instances, and the mode of their construction, and the use to which they are put, show them to be alike railroad bridges, and no good reason is perceived why the modes of assessment and taxation should be varied by reason of a difference in the ownership.

The act of 1872, as construed by the supreme court of Iowa, is intended to provide for the taxation of property used in the operations of railroading, without regard to its ownership by a corporation, a partnership, or individuals. If there were no exceptions in the act, all railroad bridges crossing the Mississippi and Missouri rivers, being structures used in the operation of railways, would fall within the provisions of the act, and in that case would be assessable by the census board, and in no other manner. But by section 10 of the act, one kind of property used in the operation of railways is specially excepted, to-wit, all railway bridges across the Mississippi and Missouri rivers, it being declared that "such bridges shall be assessed and taxed on the same basis as the property of individuals." Under this section the census board have no right or authority to assess any railroad bridges spanning the rivers named, because the first clause of the section expressly declares that no provision of the act shall be held applicable to such bridges, and it is only by virtue of the provisions of this act that the census board have the right to assess any railroad property for taxation. The first clause, therefore, of section

10 negatives the claim that railroad bridges over the Mississippi and Missouri rivers are assessable by the census board, and the latter clause of the section expressly declares that these bridges shall be assessed and taxed on the same basis as the property of individuals, by which is meant that these bridges shall be assessed in the same mode as is pursued in regard to other property situated in the same taxing district, or, in other words, these bridges are to be assessed and taxed through the agency of the local assessors.

In considering the construction to be given to the act of 1872, I have viewed it in the form in which it was passed by the legislature, and not as it is now found incorporated in the Code of 1873. An examination of the Code shows that section 1 of the act of 1872 forms section 1317 of the Code, and sections 2, 3, 4, 5, 6, and 11 of the act of 1872 are condensed into sections 1318, 1319, 1320, 1321, and 1322 of the Code. Sections 8 and 10 of the act of 1872 are found incorporated together as section 808 of the Code. The changes thus made in the language used, and in the relative positions of these sections, do not change the legal effect thereof, so far as the question under consideration is concerned. These sections, 808 and 1318 to 1322, inclusive, deal with the same subject, and are therefore to be construed together. While section 1317 declares that the executive council shall assess all the property of each railway corporation in the state, "excepting the lands, lots, and other real estate belonging thereto not used in the operations of any railway," yet, section 808 declares that "lands, lots, and other real estate belonging to any railway company not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, shall be subject to taxation on the same basis as the property of individuals in the several counties where situated." Being *in pari materia*, the two sections must be construed together; and it follows that the general declaration in section 1317, that all the property of each railway corporation is to be assessed by the executive council, must be held to mean all property not excepted in some other section of the statutes dealing with the same subject-matter.

It is a familiar rule of construction that general statements or provisions in statutes may be restricted or qualified by special clauses found therein. Therefore, when we find that section 1317 declares, generally, that all the property of railway companies used in the operation of their roads is to be taxed by the executive council, and that section 808 provides for the taxation of lands, lots, and other property not used in the operation of the roads, and of railroad bridges, by the local assessors, we must hold that the special exceptions named in section 808 qualifies and restricts the general language used in section 1317. By this rule both sections are harmonized, and neither abrogates the other. That this construction effectuates the true intent of the legislature, is shown by a reference to the act of 1872, wherein, as already stated, we find the general de-

claration as now set forth in section 1317 of the Code, but with the proviso found in section 10, declaring that the provisions of the act should not apply to any railroad bridge across the Mississippi and Missouri rivers. To give this section the construction claimed for it on behalf of complainant would require the interpolation of the words, "unless owned by a railroad corporation," or the equivalent thereof, so as to make the section read, "that no provision of this act should be held to apply to any railroad bridge across the Mississippi or Missouri rivers, unless owned by a railroad corporation."

It is argued that this must have been the intent of the legislature, in effect, because, when the act of 1872 was passed there were no bridges across these rivers that were owned by the railway companies, and hence that the exception contained in section 10 could not have been intended to apply to such bridges when they were afterwards built. The act of 1872 was prospective in its operation. It was intended to provide a mode for the taxation of railway property in the future, and was intended to, and does apply to, all railways in the state, whether then built or not. While it may be true that in 1872 there were no railway bridges across the Mississippi or Missouri rivers owned by the railroad companies using the same, still it cannot be fairly claimed that the improbability of such bridges being built and owned by the railroad companies was so great that it must be presumed that the legislature did not contemplate such bridges being built, and therefore did not intend to include them within the general term of railroad bridges, as found in section 10 of the act of 1872.

It was certainly known to the legislature that railroad companies, both in Iowa and other states, were frequently in the habit of building and owning bridges across rivers of very considerable magnitude, and that there was no special reason why in the future some railway company might not build and own a bridge across the Mississippi. It was also undoubtedly known to the legislature, when the act of 1872 was passed, that congress had, in 1866, authorized the Chicago, Burlington & Quincy Railroad Company to construct and maintain a railroad bridge across the Mississippi river, connecting its lines in Illinois and Iowa, and in the same act had authorized the Winona & St. Peter Railroad Company to construct and maintain a railroad bridge across the Mississippi river at Winona, Minnesota, and that in 1870 had authorized the St. Joseph & Denver City Railroad Company to construct and maintain a railroad bridge across the Missouri river at St. Joseph, Missouri, and in 1871, had authorized the Louisiana & Missouri Railroad Company to construct and maintain a railroad bridge across the Mississippi river at Louisiana, Missouri, and in 1872, but a few days before the passage of the act of the legislature in question, had authorized the Western Union, and Sabula, Ackley & Dakota Railroad companies to construct and maintain a railroad bridge across the Mississippi at some point in Clinton or

Jackson counties, in Iowa,—the bridge in question at Sabula being afterwards built under the authority of this act of congress, by the present complainant, as the assignee of the rights of said Western Union, and Sabula, Ackley & Dakota companies. Under these circumstances, the claim made in argument, that the legislature could not have contemplated the possibility of the construction of any railroad bridges across the Mississippi and Missouri rivers by a railroad company, and hence, did not intend the exception found in section 10 of the act of 1872 to apply to such bridges, cannot be sustained, in view of the broad terms used in that section.

If the views herein stated are correct, it follows that the executive council of the state have no authority to include the bridge at Sabula in the enumeration of the property owned by complainant to be assessed by such council. Being a railroad bridge, it is to be assessed and taxed on the same basis and by the same modes that are applicable to other realty situated in the same taxing district; and, as a necessary consequence, it follows that the application for a temporary injunction must be overruled.

Recognizing the importance of the question presented in this case, I have given as much time to its investigation as was possible, since its submission, but its importance demands that it should not be left dependent upon the conclusions of a single judge reached upon an argument upon a motion for a temporary injunction, and it is the desire of the court that, upon the final hearing of the case upon its merits, the question may be presented to a full bench.

In re TUNG YEONG.

(*District Court, D. California.* February 1, 1884.)

1. CHINESE IMMIGRATION—CUSTOM-HOUSE CERTIFICATES.
   By the treaty of 1880, Chinese laborers then in the United States were accorded the privilege of coming and going at pleasure. The restriction act of 1882 extends this liberty to all who arrive before the expiration of 90 days after the passage of the act. This law also requires incoming Chinamen to produce custom-house certificates. The language of the act is ambiguous and might be so construed as to require the certificate from those who left the country between the adoption of the treaty and the passage of the restriction act, but as no provisions existed during that period for the issue of such certificates, this construction would be clearly repugnant to the treaty. The court, therefore, holds that Chinese laborers who were in the United States at the date of the treaty, and who departed before the act took effect, are entitled to land without producing custom-house certificates.
2. SAME—MERCHANTS.
   Only Chinese laborers are excluded. Those who come to engage, in good faith, in mercantile occupations are *held* to be entitled to land, and their Canton certificates are *prima facie* evidence of their mercantile character.
3. SAME—CHILDREN.
   Nothing in the law is held to prevent parents living here from sending for their children who are two young to be classed as laborers.

On *Habeas Corpus.*

S. G. Hilborn, U. S. Atty. for California, and *Carroll Cook*, Asst. U. S. Atty. for California, for the United States.

Lyman J. Mowry, for the detained.

Milton Andros, for Williams, Dimond & Co., agents Pacific Mail S. S. Co., who held petitioners.

HOFFMAN, J. The very great number of cases in which writs of *habeas corpus* have been sued out of this court by Chinese persons claiming to be illegally restrained of their liberty, and which were of necessity summarily investigated and disposed of, has rendered it impossible for the court to deliver a written opinion in each case. The evidence in the various cases and the rulings of the court have been very imperfectly reported by the press, and the latter, though much criticised, have not, it is believed, been thoroughly understood. It is deemed proper to set forth in an opinion, as succinctly as may be, the general nature of these cases, of the evidence upon which the decision of the court has been based, and its rulings upon the more important of the questions which have been presented for its determination.

The applications for discharge from a restraint claimed to be illegal may be divided into three classes:

First. Applications on the ground of previous residence. By the second article of the treaty it is provided that "Chinese laborers now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations." 22 St. 827. By the third section of the law, known as the restriction act, the same privilege is indirectly extended to laborers "who shall have come into the United States before the expiration of ninety days next after the passage of this act." The date of this treaty is November 17, 1880. The date of the passage of the law is May 6, 1882. During this interval large numbers of Chinese laborers, who were protected by the treaty, have left the country, of course, unprovided with custom-house certificates, for there was no law then existing which required them to obtain them or authorized the custom-house authorities to furnish them.

The language of the law is ambiguous, and perhaps admits the construction that the laborers who left this country during the interval I have mentioned should be required to produce the custom-house certificate provided for in the act. It was not doubted by the court that if the treaty and the law were irreconcilably conflicting, the duty of the court was to obey the requirements of the law, but it was considered that no construction should be given to the law which would violate the provisions of the treaty, if such construction could be avoided. It was therefore held that a Chinese laborer who was here at the date of the treaty, and who left the country before the law went into operation, might be admitted without producing a cus-

tom-house certificate, which it would be impossible for him to obtain, and that it was inadmissible, if not indecent, to impute to congress, when legislating to carry into effect our treaty with China, the intention to deprive laborers of the right to come and go of their own free will and accord, which was explicitly recognized and secured by the treaty, by exacting as a condition of its exercise the production of a certificate which it was out of their own power to obtain. *In re Chin A On*, 18 FED. REP. 506. It was also held that Chinese who were not in the country at the date of the treaty were not embraced within the provisions of the second article, and also that a Chinese laborer who, although in the country at the date of the treaty, had left after the law went into practical operation, and who neglected to procure a certificate, was not entitled to return. As to the soundness of the last ruling, doubts may be entertained. It is understood that the question will shortly be submitted to the circuit court.

If there be error in these rulings it is assuredly not in favor of the Chinese. The right of laborers who can prove they were in the country at the date of the treaty, and had left before the law went into effect, to be allowed to land without the production of a custom-house certificate, being thus recognized, the court held that the burden of proof was on them, and that satisfactory evidence of the facts would be rigorously exacted. In some cases this evidence was such as to establish the facts beyond all reasonable doubt; as, for instance, the former residence and departure of the petitioner was in one case proved by the testimony of the reverend gentlemen at the head of the Chinese mission in this city, who swore not only to his personal recollection of the fact, but produced a record of the proceedings of the sessions of his church, in which the departure of the petitioner and his resignation of the office of deacon, which he held, and the appointment of his successor, are recorded. These records, he testified, were in his own handwriting, and were made at the date which they bore. In another case a young lady connected with the mission proved the departure of the petitioner, (who was a convert and her pupil,) not merely by her own testimony as to the fact, but by the production of a religious book which she gave him at the time of his departure, on the fly-leaf of which were inscribed, in her own handwriting, and signed by herself, some expressions of regard, together with some texts of scripture. This book, she testified, was handed to him on board the vessel at the date of the inscription on the fly-leaf, with the injunction to keep it and bring it back on his return. It was accordingly brought back and produced in court. On proofs such as these no rational doubt could be entertained, and the petitioners were discharged.

But in the large majority of cases proofs hardly less satisfactory were exacted and furnished. The Chinese, on returning to their country, almost invariably procure permits from the companies of which they are members, and which are furnished them on payment

of their dues. The departure of the members and the payment of their dues are recorded in the books of the company. These books the court invariably required to be produced. It also appears that, in most cases, their savings, accumulated in this country, are remitted to China for their account by mercantile firms in this city, and also that their tickets are, in many cases, purchased through the agency of those firms. The production of the firm books showing these transactions was, in like manner, required, and they, together with the books of the companies, were subjected to the critical scrutiny of Mr. Vrooman, the very intelligent, competent, and entirely reliable Chinese interpreter.

In very many cases all these books were produced in court, and, in some instances, the evidence they afforded was corroborated by testimony of white persons in whose employ the petitioner had been, and who testified to the time of his departure. It is, of course, possible that, in some instances, the court has been deceived, but considering that in no case has a person been allowed to land on the plea of previous residence on unsupported Chinese oral testimony, the number of such instances cannot be large. The proofs were in all cases sufficient to satisfy any candid and unbiased mind. Of the whole number thus far discharged by the order of the court, it is believed that those discharged on the grounds stated constitute nearly one-half. In justice to the six companies I should add that their presidents have spontaneously offered to the court to cause copies of their books, with records of departures of their members during the interval I have mentioned, to be made at their own charges, such copies to be verified by Mr. Vrooman, by comparison with the original records, and then to be deposited with the court. When this is done no means will any longer exist of interpolating or adding new names on the books of the companies. It will still remain possible for a Chinese laborer to assume the name, and personate the character of some one whose name appears on the records; but this mode of deception it seems impossible wholly to prevent.

Secondly. Applications founded on the productions of Canton certificates. The investigation of this class of cases proved exceedingly embarrassing to the court, and is attended with difficulties almost insuperable. The certificates furnished at Canton by the agent of the Chinese government, the law declares, shall be *prima facie* evidence of a right to land. This provision of the law, whatever distrust might be felt as the reliability of these certificates, the court could not disregard. The counsel for the petitioner usually presented a Canton certificate to the court and rested his case. The district attorney was necessarily without the means of disproving the truth of the certificate except by such admissions as he might extract from the petitioner himself when placed on the stand, or had been gathered from him upon his examination by the custom-house officials.

The district attorney was therefore allowed to call the petitioner, and cross-examine him in a most searching manner, and contradict, if he could, his statements; in short, to treat him as an adverse witness called by the opposite side. This method, though somewhat irregular, seemed to be the only one to be adopted with any hope of arriving at the truth. Another embarrassment under which the court labored was the inability to attach any distinct and definite signification to the term "merchant;" but, inasmuch as the treaty expressly declares that the only class to be excluded are "laborers," and that no other class is within the prohibition of the treaty, it was held by the court that the inquiry was not so much whether the person was a merchant as whether he was a "laborer," and that that inquiry should relate, not to his occupation or *status* in China, but to the occupation in which he was to be engaged in in this country; as the intention and object of the law was to protect our own laborers from the competition and rivalry of Chinese laborers here.

At first sight it would seem that the production of the books of a respectable mercantile firm, in which the name of the petitioner was inscribed as a partner, would be sufficient to establish his *status* as a merchant. It was soon found, however, that this mode of proof was, to a great extent, unreliable; for, *first*, the books might be falsified, and the entry made to meet the exigencies of the case; and, *secondly*, it appeared that the Chinese are in the habit of placing their earnings in stores or mercantile establishments, and in virtue of this investment they are admitted to a share of the profits. It might, therefore, often happen that a Chinese laborer would appear on the books of the company as holding an interest to the amount of a few hundred dollars in the concern, while he himself remained a laborer, and could in no sense of the term be called a merchant or a trader. The books above spoken of were in all cases subjected to a rigid scrutiny, with a view of detecting interpolations and falsifications. I am satisfied that in spite of the efforts of the court, which in almost all cases itself subjected the petitioner to a rigid cross-examination, and, in spite of the efforts of the district attorney, some persons have been admitted on Canton certificates who have no right to land, in what numbers it is impossible to say, but this result seemed to be the necessary consequence of the fact that the law made the certificate *prima facie* evidence of the petitioner's right, and of the difficulty of ascertaining the facts. A considerable number of cases were also presented to the court, where the petitioner claimed to be about to enter some mercantile establishment in which his brother or his uncle or his father was interested. The existence of the establishment was usually proved beyond a doubt, but the court was at the mercy of oral testimony as to the intended adoption of the petitioner as a partner. In some instances letters were produced from his relatives in this city, addressed to him in Hong Kong, inviting him to come to

this country to be admitted to the business, but the genuineness of these letters was often doubtful, and no obstacle existed to their manufacture in this city after the arrival of the steamer.

In several cases it appeared by the petitioner's own admission that he was a laborer in China; that he came to this country wholly unprovided with money; and that he expected to enter the store of his brother, or uncle, or other relative, as a porter. In such cases he was remanded to the ship; but even in those cases where the petitioner, or his uncle, or other relatives declared that he was to be admitted to the business, the court became aware that it might be the victim of gross imposition if, on such testimony, any Chinese person engaged in mercantile pursuits here could import as many laborers as he might declare to be brothers, sons, or nephews, and testify that he proposed to admit them to the business. In some instances pretentions of this kind have been summarily rejected. In other instances the court has felt compelled to discharge the petitioner on a preponderance of proof, though not without serious misgivings as to the facts of the case.

Third. Children brought to or sent for by their parents or guardians in this city. In almost all these cases the petitions were filed on behalf of children of from 10 to 15 years of age. Their fathers or other relatives testified that they had sent for them to be brought to the United States with a view of placing them at school to learn the English language, and later to adopt them into their business. The parents who thus claimed to exercise the natural right to the custody and care of their children were, in almost every instance, Chinese merchants; sometimes of considerable substance, resident here, and entitled, under the provisions of the treaty, to all the rights, privileges, and immunities of subjects and citizens of the most favored nation. Absurdly enough, these children, in many instances, were provided with Canton certificates, but, though they were in no sense merchants, many of them being much too young to earn their living, they were certainly not laborers; and it was not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child, and to send the latter back across the ocean to the country from which he came.

The foregoing presents a general, but I think sufficient, statement of the various questions which have arisen in these cases, and of the rulings of the court upon them. If there be error in those rulings I am unable to discern it. It will be cheerfully corrected when found to exist by the judgment of a higher court, or even when pointed out by any one who shall first have taken the pains to ascertain what rulings of this court have actually been, a natural, and one would think necessary, preliminary which has hitherto been largely dispensed with by the more vehement of those by whom the action of the court has been assailed. That some persons have been suffered to land under Canton certificates who were in fact within the pro-

hibited class there is great reason to fear. How this could have been prevented by the action of any court, honestly and fearlessly discharging its duty under the law and the evidence, has not been pointed out.

By the constitution and laws of the United States, Chinese persons, in common with all others, have the right "to the equal protection of the laws," and this includes the right "to give evidence" in courts. A Chinese person is therefore a competent witness. To reject his testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and law which every one who sets a just value upon the uprightness and independence of the judiciary, would deeply deplore. But while according to Chinese witnesses the right to testify secured to them by the constitution and the law, no means of arriving at the truth within the power of the court have been neglected, and the ingenuity of the district attorney and the court has been taxed in the attempt to elicit the truth by minute, rigorous, and protracted cross-examinations. That it has frequently been baffled was naturally to be expected. But notwithstanding these unavoidable evasions, the practical operations of the act has been by no means unsatisfactory.

Returns obtained from the custom-house show that from the fourth of August, 1882, to the fifteenth of January, 1884, a period of nearly 16 months, there have arrived in this port 3,415 Chinese persons. During the same period there have departed no less than 17,088. It thus appears that not only has the flood of Chinese immigration, with which we were menaced, been stayed, but a process of depletion has been going on which could not be considerably increased without serious disturbance to the established industries of the state. It is stated that the wages of Chinese laborers have advanced from $1 to $1.75 *per diem*,—a fact of much significance, if true. It is much to be regretted that the notion that the law has, through its own defects, or the fault of the courts, proved practically inoperative, has been so widely and persistently disseminated. Such a misapprehension cannot have failed to be injurious to the state by preventing the immigration of white persons from the east to replace the Chinese who are departing.

Another circumstance which, though not contemplated by the law, has incidentally attended its enforcement, may be mentioned. The costs, the attorneys' fees, and the inconvenience and expense of attending upon the courts until their cases can be heard, must, in effect, have imposed upon the Chinese arriving here charges nearly or quite equal to the capitation tax, which in Australia has been found, it is said, sufficient to secure their practical exclusion. On this point I have no accurate information. But the liability to the charges I have mentioned cannot fail to exercise a strong deterring influence upon the lower classes of Chinese laborers.

In the case at bar the proofs establish beyond a rational doubt

that the petitioner was in the United States at the date of the treaty, and that he left the United States before the passage of the law which enabled or required Chinese laborers to procure custom-house certificates. He is therefore, in my judgment, entitled to be discharged.

MISSISSIPPI MILLS CO. *v.* RANLETT and others.[1]

(Circuit Court, E. D. Louisiana. December, 1883.)

INSOLVENT LAWS OF LOUISIANA.

The insolvent laws of Louisiana do not, by their declatory force solely, without any other investiture of title, the possession remaining in the debtor, remove the property of the debtor beyond the reach of a creditor who is a resident of another state, and who proceeds in the circuit court.

Ogden v. *Saunders*, 12 Wheat. 213, followed.

Bank of Tennessee v. *Horn*, 17 How. 159, distinguished.

On Rule to Dissolve Attachment.

E. H. Farrar, for plaintiff.

The court is asked to let go its jurisdiction over and its possession of the defendant's property, and to surrender the same to the state court and its appointed officer, to be there and by him administered under the state insolvent laws. Neither the state court nor its officer, the syndic, ever had any *actual* custody of the property. It was seized by the marshal in the hands of the defendants.

It is contended by the syndic that the cession made by the debtor and accepted by the state court *ipso facto* vested the creditors and the court with the title and the *constructive* possession of the property, so as to place it from that moment *in gremio legis*, and beyond the jurisdiction and control of this court.

The plaintiff contends—

(1) That the insolvent laws of Louisiana are not operative against the plaintiff, who is a citizen of another state, either in whole or in part; in other words, that those laws are to be considered as *not written*, either in a state or in a federal court. The syndic admits that they are inoperative *in part*, but not as a whole. For instance, he admits that they are powerless to stay proceedings in this court. He admits that a discharge of the debtor is inoperative here. But he contends that in one respect they *are operative*, and that one respect is that they have the effect *proprio vigore* to transfer to the state tribunals *sole* jurisdiction over the property of the insolvent, with the *sole* power to sell and distribute the same among his creditors.

The authorities repudiate specifically such a distinction. 5 Gill, 426; 4 Gill & J. 509; 2 Md. 457; 5 Md. 1; *Poe* v. *Suck*, quoted by the

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

supreme court of the United States in 1 Wall. 234; Judge TANEY's opinion, 8 Gill. 499; 1 Wall. 234; 4 Wall. 409; 5 La. Ann. 271; 10 La Ann. 145; 14 La. Ann. 261; 1 Bald. 301; 14 Pet. 67; 5 Blatchf. 279; 3 N. Y. 500. The effect of such a construction of the law would be to *compel* foreign creditors to subject themselves *voluntarily* to the jurisdiction of the state courts, and thus be bound by the insolvent's discharge. The state courts would thus hold all the insolvent's property in constructive possession and say to the foreign creditors: "Come in and take your dividend and *have your debt discharged* or get nothing."

(2) If the insolvent laws, *qua* laws, are inoperative in all respects as against foreign creditors, this case presents nothing but a question of the conflict of jurisdiction between two tribunals of concurrent jurisdiction, each having power to bind the goods of the defendant by its process. The rule in such cases is that *where the parties are not the same, nor the cause of action the same in both counts, i. e.*, to the extent of constituting *lis pendens*, that court holds the property which first obtained physical custody of it. In other words, in such cases there is no such thing as a constructive possession of property which is capable of actual possession—of *physical prehension*. The term *in gremio legis* is then, and under such circumstances, equivalent to *in manu ministres curiæ*. *Payne* v. *Drewe*, 4 East, 523; *Taylor* v. *Carryl*, 20 How. 594; *Freeman* v. *Howe*, 24 How. 450; *Wilmer* v. *Atlantic, etc., Air-line R. R.* 2 Woods, 409, opinion of Judges BRADLEY and ERSKINE.

It is clear that this court will not surrender its possession of and jurisdiction over *the property of the defendant* to a syndic, or officer of a state court, who had no legal existence when the jurisdiction of this court attached. That the property seized *belongs to the defendant*, notwithstanding the cession, is incontestable. The Code so declares in the most emphatic terms. Articles 2171, 2178, 2180, 2182. These articles of the Code, and the apparently conflicting section of the *subordinate* Revised Statutes, which declares that the cession "fully vests the property in the creditors," have been interpreted authoritatively. *Smalley* v. *Creditors*, 3 La. Ann. 387; *Nouvet* v. *Bollinger*, 15 La. Ann. 293. The contrary decision—the mere *dictum* of Judge PORTER, unbacked by the quotation of authority—in *Schroeder's Syndics* v. *Nicholson*, 2 La. 354, is directly in the teeth of the law. The decision of *Bank of Tenn.* v. *Horn*, 17 How. 517, is equally without foundation. The authority of that case is further weakened by the fact that the seizure was made after the appointment and confirmation of the syndic, and after his actual custody of the property had begun.

The case of *Crapo* v. *Kelly*, 16 Wall. 610, does not apply to this case, because the assignment made by the court under the Massachusetts insolvent law transferred the *absolute title* of the property to the assignee, and also operated as a tradition and delivery of the property to such assignee. Under the law of Louisiana the *cessio bonorum*

leaves the title in the insolvent, and simply transfers to the creditors a right to administer and sell the property ceded under the orders of this court; and it is admitted that if, under the insolvent law of Louisiana, the *cessio bonorum* divested the title of the insolvent, vested such title *ipso facto* in the syndic, and operated a tradition and delivery of the property into the possession of such officer, then there would be an end of their attachment. But, inasmuch as such *cessio bonorum* is simply equivalent to an application to appoint a receiver to administer the property of the insolvent under the orders of the court for the benefit of his creditors,—the absolute title remaining all the time in the insolvent, coupled with the express right to terminate the whole proceeding at any time by coming forward and paying the debts and costs of administration,—this court's rights to lay its hands on the property of the debtor cannot be ousted, unless by the previous actual possession of such property by a state court through its duly-appointed officer.

Thomas L. Bayne and *George Denegre*, for provisional syndic.

The surrender made by the insolvents under the laws of the state of Louisiana, and the acceptance of the same by the court under a judgment duly signed, vested the property in the creditors, and gave to the state court and the creditors complete control of said assets, and they were not subject to seizure by process from any other court, state or federal. Such is the language of the law:

Rev. St. § 1791. "*From and after such cession and acceptance all the property of the insolvent debtor mentioned in the schedule shall be fully vested in his creditors.*"

No other conveyance is ever made by the insolvents than that which is made at the time of the cession and acceptance as above.

The decisions of the supreme court of the state of Louisiana are uniform in declaring that all of the property of the insolvents passes to the creditors for the payment of their debts, at the moment of the cession and acceptance by the court, by mere operation of the law, *proprio vigore*. *Schroeder's Syndics* v. *Nicholson*, 2 La. 350. "By the laws of Louisiana, when an insolvent debtor makes a cession of his goods and they accept it, there is a transfer of his property,—it ceases to be his and becomes theirs;" or, as stated in *Orr* v. *Lisso*, 33 La. Ann. 478, "the final surrender of the property and the regular acceptance of the cession vested the title in the creditors." This is reiterated in all of the intervening cases. 4 La. 83; 7 La. 62; 12 La. Ann. 182; 4 La. Ann. 493; 19 La. Ann. 497; 23 La. Ann. 478; 6 La. Ann. 391.

The acceptance of the cession by the judge is "a judgment which can only be set aside by an action of nullity." *Sterling* v. *Sterling*, 34 La. Ann. 1029; 14 La. Ann. 424; 17 La. Ann. 88; 7 How. 624; 16 N. B. R. 303.

The law of Louisiana thus providing for the cession of the property by insolvents to all of their creditors, has been declared by the

supreme court of the United States to be constitutional, and this law, and its interpretation by the state courts, is declared to be a rule of property, effectual against all parties and in every forum. *Bank of Tennessee* v. *Horn*, 17 How. 159. And in this case it is said "that the surrender in the Second district court of New Orleans divested Conrey of all his rights of property and vested these in the creditors; * * * the right and title had, by operation of the law of the state, vested in the creditors." In *Crapo* v. *Kelly*, 16 Wall. 610, this is declared to be the effect of the insolvent law of Massachusetts, and Mr. Justice BRADLEY, who dissents on the ground that the property referred to was not within the limits of the state, says, (page 643:)

"In the case now decided the force and effect of the judicial assignment would have been regarded as conclusive in Massachusetts, had the ship, the subject of it, returned there, and become subjected to its local jurisdiction. * * * I do not deny that, if the property had been within Massachusetts jurisdiction when the assignment passed, the property would have been *ipso facto* transferred to the assignee by the laws of Massachusetts *proprio vigore*, and, being actually transferred and vested, would have been respected the world over." *Yonley* v. *Lavender*, 21 Wall. 279; 14 How. 34, 394; 8 How. 107; 3 Pet. 303; 10 Wheat. 165; 5 How. 72; 18 How, 502, 507; 2 Wall. 216; 91 U. S. 497; 3 Woods, 720; 93 U. S. 207; *Levi* v. *Columbia Ins. Co.* 1 FED. REP. 209; *Torrens* v. *Hammond*, 10 FED. REP. 900.

Under the state insolvent laws all writs of attachment are dissolved by the cession made by the debtor. Hennen, Dig. *verbo*, "Attachment, XI." p. 148, No. 1; 12 Martin, 32; 7 La. Ann. 39; 3 Rob. 457; 6 La. Ann. 444. Section 933 of the Revised Statutes declares:

"An attachment of property upon process instituted in any court of the United States to satisfy such judgment as may be recovered by the plaintiff thereon, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the law of the state where said court is held, such attachment would be dissolved in the court of said state." *Mather* v. *Nesbit*, 13 FED. REP. 872.

The cession was made by the insolvents and accepted by the court on the twenty-seventh of November; the attachment issued and seizure was made next day. The property had vested in the creditors and was not subject to seizure, and possession should be given to the syndic, their legal representative, and the attachment should be dissolved, as provided by section 933 of the Revised Statutes. The attachment issued by virtue of a state law, and falls under the above section of the law of the United States.

BILLINGS, J. The facts necessary to be considered are these: Messrs. Ranlett & Co., the defendants, had made a *cessio bonorum* under the insolvent law of the state of Louisiana, which had been accepted by the court before which the proceeding was pending, but no syndic had been appointed and no possession taken in behalf of the creditors. At this stage of the proceeding the plaintiff, who is a citizen of the state of Mississippi, sued out a writ of attachment in the circuit court of the United States in this state, and under his writ the marshal seized the property, the same being in the possession of

the defendants. The matter comes up on a motion of the syndic to release the seizure, on the ground that, inasmuch as the cession had been accepted by the court, according to the provisions of the insolvent law of the state, the property had vested in the creditors. Those provisions are as follows: "From and after such cession and acceptance all the property of the insolvent debtor mentioned in the schedule shall fully vest in his creditors." Rev. St. La. § 1791. So far as actual possession affects the question, the facts are with the plaintiff, for the marshal found the property in the possession of the defendant, seized it and holds it. The case is, therefore, free from any embarrassment arising from any possible disputed possession between the officers of this court and the court in which the insolvent case is pending. It is to be further observed that the law of the state of Louisiana, exclusive of the insolvent law of the state, requires tradition or delivery of personal property in order to transfer title. So that the sole point to be decided is whether the insolvent law, in and of itself, without any other investiture of title, the possession remaining in the debtor, removes the property beyond the reach of a creditor who is a citizen of another state. If that law operates upon such a creditor, the property, by the court's mere acceptance of the cession, was completely vested, though no possession had been taken, and must be surrendered to the syndic now appointed, to be administered under the insolvent law; if, on the other hand, that law is not operative upon such a creditor, there is nothing to prevent, and it becomes a manifest duty that this court should hold the property seized, and subject it to the payment of the debt of the attaching creditor.

The cases upon the general subject are numerous, but for the most part they deal with questions remote from the one before the court. The solution of this question stands with but little advance since the decision of *Ogden* v. *Saunders*, 12 Wheat. 213, which as late as *Baldwin* v. *Hale*, 1 Wall. 223, after an elaborate discussion, was, so far as relates to this matter, reiterated without qualification. The principle stated in both these cases, and in the last recognized as unqualified and unquestioned law, is: "When, in the exercise of their power to enact insolvent laws, states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which render the exercise of such a power incompatible with the rights of other states and with the constitution of the United States." I am unable to perceive how there should be doubt or hesitation in deducing the law of this case from the principle thus enunciated and adhered to. If any attempt on the part of a state "to act upon the rights of a foreign citizen be so opposed to the sovereign and the judicial powers of the United States as to be incompatible with the rights of other states and with the constitution of the United States,"

then it must follow that, so long as the insolvent court relies exclusively upon the words of the insolvent law, at any stage of its procedure, short of actual, physical possession, or such a state of facts as by the general law of the state are tantamount to physical possession, as against the process of the United States court, issued at the instance of a foreign creditor, the title of the syndic must be nugatory.

Mr. Justice WOODBURY, in *Towne* v. *Smith*, 1 Wood. & M. 136, with reference to this very question, says: "The actual seizure of the property of the bankrupt in another government or country, before his assignees take possession of it, creates a lien upon it in favor of a foreign creditor, which will be sustained;" and again upon the same page, says: The circuit court of the United States, sitting in Massachusetts, "is as different a tribunal from those belonging to Massachusetts alone as the court of any other state." Nor do we obtain any qualification of this rigid doctrine from the federal statute, that the rules of property in the several states control the courts of the United States sitting therein, for that statute contains an exception which removes this whole question from its dominion. That statute is as follows: "The laws of the several states, except when the *constitution, treaties, or statutes of the United States otherwise require* or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." Rev. St. § 721. Indeed, the statute, by its exception, declares that all state laws—be they insolvent laws, or laws prescribing rules of property, or of any other character—cease to be binding upon the federal courts whenever the constitution of the United States otherwise requires or provides.

The leading cases have arisen where only the validity of the debtor's discharge was involved. But the conclusion that until the state insolvent court has possession, its proceedings cannot affect the nonresident creditor, follows as conclusively with respect to exemption from process, or respite, or stay, or any intermediate action. In *Haydel* v. *Girod*, 10 Pet. 283, where the plaintiff, a resident creditor, had not been notified, and a respite and stay had been granted and were pleaded, the court say: "The plaintiff was in no sense made a party to the proceedings, and, consequently, his rights are in no respect affected by them." *A fortiori* must this be true where, as here, with reference to a party, the court had no authority to decree or proceed; for in *Gilman* v. *Lockwood*, 4 Wall. 411, the court say, "unless in cases where a citizen of another state voluntarily becomes a party to the proceedings, the state tribunal has no jurisdiction of the case."

Many cases have been cited by the counsel for the defendant, but they cannot avail to shake the settled law as thus explicitly declared by the supreme tribunal of the land.

There are numerous cases where the settlement of the estates of insolvent deceased persons has, by the same tribunal, been declared

to be exclusively vested in the appropriate state courts. It seems to me this large class of cases only affirm what is the universal law, and necessarily so, that the estates of the dead must be settled by the local mortuary courts, and that this is equally true whether they be solvent or insolvent. The jurisdiction in these cases springs not from the insolvency, but from the death, and the law which regulates is not an insolvent law, but a law controlling the administration of successions.

The case of *Bank of Tennessee* v. *Horn*, 17 How. 159, I have carefully considered. The point presented and decided seems to have been that a misdescription of real estate in the schedule of the insolvent debtor did not prevent its passing to the creditors by the cession. The contest was between a purchaser from the syndic under a sale ordered by the court of insolvency and those claiming title by a purchase under a judgment rendered in the United States circuit court after the cession. When we observe that the chief justice in giving the opinion of the court says, "the validity of the insolvent law of Louisiana has been fully recognized in the case of *Peale* v. *Phipps*, 14 How. 368," and further, that that case is placed upon the ground (page 374) that "while the property remained in the *custody and possession* of one court no other court had the right to interfere with it," it seems that it should be inferred that in the case of *Bank* v. *Horn* the syndic had possession at the time of the rendition of the judgment in the circuit court, and prior to any attempt to seize under it.

In the case presented here the plaintiff is in possession, and both as respects title and possession his right is absolute but for a right which, if it exists at all, comes from the inherent force of a state insolvent law, which, unaccompanied by possession, is, as to this plaintiff, like an extraterritorial bankrupt or insolvent law, and according to the summary of authorities in *Booth* v. *Clark*, 17 How. 322, (decided at the same term with the case of *Horn* v. *Bank*, *supra*,) gives to the foreign assignee no title as against local creditors who attach. The constitution of the United States operates within as well as without the state which enacts insolvent laws. No state laws in conflict with it can be rules of property. The doctrine of comity between the federal and state courts has been constantly extending in recognition and clear and rigid enforcement; but the rules of law as expounded in *Ogden* v. *Saunders*, *supra*, are, as it seems to me, unchanged. In accordance with that case, in this forum at least, the possession of a foreign citizen under an atttachment must prevail against the syndic who claims merely by the declaratory force of a state insolvent law. A mere declaration in a statute, which is by the settled adjudications inoperative against a party domiciled as is the plaintiff, cannot oust this court of administration of the property, which is, consistently with all the rules of judicial comity, in its possession.

The rule must be denied.

KUFEKE *v.* KEHLOR.[1]

(Circuit Court, E. D. Missouri. December 3, 1883.)

COMMISSION MERCHANTS—ADVANCES—BILL of LADING—INSURANCE.

The consignee of goods, who advances on the faith of the bill of lading and insurance certificate attached, can recover from the shipper an amount sufficient to reimburse him for the advance, if there should be an error in the bill of lading and insurance certificate, by which the insurance could not be recovered for goods lost in transit.

At Law. Motion for judgment *non obstante.*

This is a suit for a balance due plaintiff on account of a bill of exchange drawn on him by defendant and duly paid at maturity. The case was tried before a jury. The facts appeared from the evidence to be substantially as follows: On the twenty-eighth of November, 1879, in compliance with a promise previously made to an agent of plaintiff, the defendant consigned to plaintiff at Glasgow, Scotland, for sale on commission, 750 barrels of flour,—500 branded "Yours, Truly," and 250 "Olive Branch." The carrier from St. Louis to Glasgow was the Merchants' Dispatch Transportation Company, which, on the twenty-sixth of November, 1879, issued its bill of lading, agreeing to carry the flour from St. Louis to New York by rail, and from New York to Glasgow by sailing vessel. At the time the bill of lading was issued, the name of the particular sailing vessel which was to carry the flour from New York was not known to the agent of the Merchants' Dispatch Transportation Company in St. Louis, and it was accordingly agreed between it and the defendant that the carrier should notify the defendant, through its agent at St. Louis, by wire from New York, of the name of the vessel, so that the consignor could insure the flour on board such vessel. The bill of lading required that the flour be delivered to the defendant in good order, and also contained the words, "Notify Anton Kufeke." Accordingly, on the second day of December, 1879, the consignor was notified by the agent of the carrier at St. Louis that the flour would go from New York to Glasgow by the bark Cypres, a sailing vessel, and that on the strength of that information the consignor on that day insured the flour for the voyage as on board that vessel. The defendant thereupon advised the plaintiff by letter, dated December 5, 1878, of this consignment, and of the name of the vessel by which the flour would be shipped from New York to Glasgow, and that he had drawn on him at 60 days' sight, with bill of lading and insurance certificate attached, for £600. The defendant did draw as stated, the draft being dated November 28, 1878, indorsing the bill of lading and insurance certificate. The letter of advice, and also the draft and attached documents, reached Glasgow in due time, so that on the

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

eighteenth of December, 1878, the plaintiff accepted the draft, of which he duly advised the defendant. On the second of January the bark Cypres arrived at the port of Glasgow, but had none of the flour on board. There was no evidence that plaintiff or defendant knew of the arrival before May 15, 1879. Plaintiff notified defendant of the above fact by a letter dated May 15, 1879. On the sixteenth of January, 1879, the steamer State of Georgia arrived at Glasgow, having on board 259 barrels of the flour, of which the defendant had no knowledge. Thereupon the plaintiff paid said draft and received the flour then on board said steamer, but did not notify defendant of its arrival by that vessel. On the thirtieth of January, 1879, the plaintiff learned in Glasgow that the steamer Zanzibar, having on board the remainder of the flour, was overdue, and on that day he cabled the fact to defendant, and asked him to insure for the benefit of all concerned. The Zanzibar sailed from New York about January 14, 1879. This was the first information that defendant had that the flour did not go forward by the Cypres. Defendant endeavored to insure, as requested by the plaintiff, but was unable to do so, as the Zanzibar was already reported lost. The Zanzibar was lost, as reported, and the balance of the flour was never delivered to plaintiff. Defendant gave no permission to ship by any other vessel than the Cypres, and did not know of the shipment by another vessel until he received the cable dispatch from the plaintiff of January 30, 1879.

The court directed a verdict for plaintiff, subject to a motion for judgment *non obstante*. The defendant now moves for a judgment *non obstante*.

H. E. Mills, for plaintiff.

George M. Stewart, for defendant.

TREAT, J. As intimated at the trial, there is nothing in the facts shown to take the case out of the general rule. The authorities cited in defendant's brief establish no doctrine, whereby defendant could be relieved of his liability to plaintiff. The common carrier is liable to the defendant, and whether the plaintiff could, under some contingencies, have maintained an action against the carrier does not change the aspects of this case. Primarily, the defendant was bound to respond to the plaintiff; and the plaintiff had the right to rely on the accuracy of the papers forwarded by defendant on the faith of which the draft was accepted and paid. What was done by plaintiff on receipt of some portion of the shipment in the Georgia, and in cabling news concerning the Zanzibar, did not change the obligations or contract, but was merely for defendant's benefit, of which he cannot be heard to complain. The general rule is based on sound principles and should be enforced. Resort to commercial paper in foreign or domestic commerce carries therewith what the law-merchant exacts. A bill of exchange, with bill of lading and an insurance certificate annexed, does not compel the acceptor of the bill to rely for reim-

bursement on false bills of lading and certificates without recourse upon the drawer. True, the acceptor having received the bill of lading and acting as consignee, must do what the rules of agency require as to the receipt and sale of the shipments actually made as designated. In this case the bill of lading did not cover the shipment, and as to the certificate of insurance, the plaintiff had nothing to do, —that is, he was not bound to insure,—for the flour went forward on defendant's account, to whom, in the event of loss, the insurance money would have gone, or been applied on his draft.

The motion is overruled, and judgment will be entered according to the verdict.

KROPFF *v.* POTH.

(*Circuit Court, D. New Jersey.* December 11, 1883.)

DEATH OF PLAINTIFF—REV. ST. § 955—FOREIGN ADMINISTRATOR CONTINUING SUIT.

Under the provisions of section 955 of the Revised Statutes of the United States, when an alien sues in the circuit court and dies, the suit cannot be continued to final judgment by his executor or administrator, unless such executor or administrator has taken out letters testamentary or of administration on the estate in the state where the suit is brought.

In Debt.

A. Q. Keasbey & Sons, for plaintiff.

Sheppard & Lentz, for defendant.

NIXON, J. This is a personal action at law, brought by an alien against a citizen. On October 26, 1883, the death of the plaintiff was suggested upon the record, and an order entered that the suit proceed to final judgment in the name of his executor. A motion is now made to vacate said order as improvidently entered.

The executor of the deceased plaintiff is an alien, residing in the same country as the testator, to-wit, at Nordhausen, in the empire of Germany. There have been no letters testamentary or of administration on the estate taken out in New Jersey. It is well settled that such a person, whether administrator or executor, cannot begin a suit in the courts of the United States to enforce an obligation due his intestate or testator. See *Dixon's Ex'rs* v. *Ramsay's Ex'rs,* 3 Cranch, 319; *Noonan* v. *Bradley,* 9 Wall. 394. The counsel for the plaintiff concedes this, but claims that, under the provisions of section 955 of the Revised Statutes, when an alien sues and dies the suit may be continued to final judgment by his executor, whether foreign or resident. That section, which is section 31 of the judiciary act, was doubtless enacted to avoid the inconvenience of the common-law rule that all actions, personal as well as real, abated by the death of either of the parties before judgment. It expressly saves

all personal suits from abatement in cases when the cause of action survives by law. But it would be anomalous to allow a person to continue a suit which he is not authorized to begin. It is a more reasonable construction of the section to hold that when congress authorized the continuance of a pending suit in the name of the executor or administrator, it meant to refer to an executor or administrator who was competent to begin the action.

The present suit is saved from abatement by the statute. The death of the alien plaintiff suspends further proceedings until another lawful plaintiff be substituted. The order is vacated, but the personal representative of the plaintiff is allowed a reasonable time, to-wit, 60 days, in which to procure in New Jersey letters testamentary or of administration.

EGGLESTON and others *v.* CENTENNIAL MUT. L. ASS'N OF IOWA.[1]

(Circuit Court, E. D. Missouri. December 3, 1883.)

INSURANCE—MUTUAL ASSOCIATION POLICY—CONTRACT AS TO ENFORCEMENT.

Where a clause of a policy issued by a mutual insurance company provided that the only action maintainable on the policy should be to compel the association to levy the assessments agreed upon, and that if a levy were ordered by the court the association should only be liable for the sum collected, *held* that the provision was valid, and that the only mode of enforcing the policy in the first instance was by proceedings in chancery.

Lueders' Ex'r v. *Hartford L. & A. Ins. Co.* 12 FED. REP. 465, distinguished.

At Law. Suit upon a policy of insurance issued by defendant. Motion to strike out that part of defendant's answer in which it pleads in bar of the action the following clause of the policy sued on, viz.: "The only action maintainable on this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made." The other material facts are sufficiently stated in the opinion. For opinion on demurrer to the petition see 18 FED. REP. 14.

George D. Reynolds, for plaintiffs.

(1) The clause set up as a bar is void, as an attempt to oust the courts of law of all jurisdiction, and as an attempt by contract to control the courts of law in applying a remedy for the breach of the obligations of the contract. Cooley, Const. Lim. (3d. Ed.) §§ 288, 361; 1 Story, Eq. Jur. § 670; 2 Story, Eq. Jur. § 1457; *Stephenson* v. *Piscataqua F. & M. Ins. Co.* 54 Me. 55, and cases there cited; *Schollenberger* v. *Phœnix Ins. Co.* 6 Reporter, 43; *Yeomans* v. *Girard F. &*

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

M. Ins. Co. 5 Ins. Law J. 858; *Smith* v. *Lloyd*, 26 Beav. 507; *Trott* v. *City Ins. Co.* 1 Cliff. 439; *Millaadon* v. *Atlantic Ins. Co.* 8 La. 557; *Nute* v. *Hamilton Mut. Ins. Co.* 6 Gray, 174; *Cobb* v. *New Eng. M. M. Ins. Co.* Id. 192; *Amesbury* v. *Bowditch M. F. Ins. Co.* Id. 596; *Allegro* v. *Ins. Co.* 6 Har. & J. (Md.) 413.

(2) The condition at most is a collateral condition, not a condition precedent. Cases *supra;* also, *U. S.* v. *Robeson*, 9 Pet. 326; *Dawson* v. *Fitzgerald*, 24 W. R. 773, (also 3 Cent. Law J. 477;) *Scott* v. *Avery*, 5 H. L. Cas. 811.

(3) A plea setting up an agreement to arbitrate is bad in an action at law. *Tscheider* v. *Biddle*, 4 Dill. 55. See, further, *Liverpool, L. & G. Ins. Co.* v. *Creighton*, 51 Ga. 95; *Kill* v. *Hollister*, 1 Wils. 129; *Goldstone* v. *Osborn*, 2 Car. & P. 550; *Roper* v. *Lendon*, 28 Law J. Q. B. 260; *Alexander* v. *Campbell*, 41 Law. J. Ch. 478; *Robinson* v. *George's Ins. Co.* 17 Me. 131; *Tobey* v. *Co. of Bristol*, 3 Story, C. C. 800.

(4) In a case like this, where the company refuses to make an assessment, the amount of recovery is the maximum amount named in the certificate. *Lueders' Ex'r* v. *Hartford L. & A. Ins. Co.* 12 FED. REP. 471. And the averments are made in the amended petition sufficiently distinct to bring it within the rule announced in *Curtis* v. *M. B. L. Co.* 48 Conn. 98.

(5) The *prospectus* is a part of the policy and both are to be construed together. Bliss, Life Ins. §§ 397–400; May, Ins. §§ 355, 356; *Ruse* v. *Mut. L. Ins. Co.* 24 N. Y. 653; *Cent. Ry. Co.* v. *Kisch*, L. R. 2 H. L. Cas. 99; *Wheelton* v. *Hardisty*, 8 El. & Bl. 282; *Wood* v. *Dwarris*, 11 Exch. 493.

Davis & Davis and *Newman & Blake*, for defendant.

TREAT, J. A motion has been filed to strike out parts of the answer to this amended petition, which motion raises the same question heretofore decided, varied, it is contended, by new averments. It is stated in the amended petition that defendant "guarantied" payment of the maximum stated in the policy; but there is nothing to sustain such an allegation; indeed, the whole tenor and scope of the policy is to the contrary. It is further averred that the defendant refused, as agreed, to make the stipulated assessments on policy-holders, whereby it became liable for the maximum amount, despite the positive terms of the contract; and liable also, in an action at law, regardless of the express agreement that resort should be had only to proceedings in equity to enforce assessments. In deciding the demurrer to the original petition, leave was given to the plaintiff to file a bill to compel an assessment; but, instead of filing a bill for that purpose, he has filed an amended petition at law, which leaves the case just as it was before, so far as legal propositions are involved. The contract of insurance was peculiar, as under its terms the respective persons insured were bound to contribute to death losses according to the shifting provisions mentioned; and the defendant bound itself merely

to pay over what should be assessed and collected—nothing more; and to make it certain and definite that its obligation was not to extend further, it was expressly agreed that it should be liable only to the stipulated proceedings in equity.

It is contended that the restrictive clause as to the remedy is void, and many cases are cited in support thereof, supposed to be analogous. That question was previously before this court and involved in its decision on the demurrer, wherein an adverse conclusion was reached; from which there in no reason to depart. Indeed, if the subject were driven to a full analysis it would appear that a different conclusion would involve many strange absurdities. The parties agreed, one with the other, to many rules for determining their respective obligations and liabilities, dependent on the number of persons assured, the amounts for which they were respectively assured, etc., and to make sure as to the obligations of the defendant, and the means of enforcing the same in the only just, feasible, and equitable manner, stipulated that only a suit in equity should be resorted to. How else could it be ascertained what was done to the plaintiffs? An assessment must be made, dependent on the shifting conditions mentioned in the policy, collections enforced, etc.; defendant being liable only for the amount of assessments collected. It did not agree to pay any fixed sum, but merely to pay the amount collected from assessments, not exceeding the sum limited; and therefore provided for appropriate proceedings in equity to adjust the dispute, if any, between the parties. It is not for the court to comment on the wisdom or folly of such contracts. If parties choose to enter into them, they are bound by their terms, in the absence of fraud, unless they are *contra bonos mores*. There is nothing shown to void the agreement the parties voluntarily entered into, and hence this court adheres to the decision heretofore made in this case, viz., that redress must be sought in equity alone.

The views of this court in a case somewhat like that under consideration were limited, and suggestively, in the published opinion then given. *Lueders' Ex'r* v. *Hartford L. & A. Ins. Co.* 12 FED. REP. 465. It is not held that there may not be cases where resort can be had to a common-law remedy under contracts like that in question, but it is held, as expressed on demurrer in this case, that the clause in the contract as to the mode of ascertaining the rights of the parties is obligatory, (18 FED. REP. 14,) with the possible exceptions suggested.

Suppose there was not a valid defense, as in the *Lueders Case*, and it was ascertained that a mortuary loss had occurred, how could the amount to be recovered be ascertained? It was hinted that under the facts and circumstances of that case certain rules might obtain; but there was no question there raised as to a contract limitation with respect to the mode of ascertaining the *amount* of the liability. The mode prescribed in this case by the contract between the parties, considering their relations to each other, was the most practicable and

equitable that could be adopted, and does not fall within any of the prohibitory rules stated in the many cases cited, as to ousting courts of jurisdiction, and enforcing or refusing to enforce agreements for arbitration. The answer sets up as a defense the clause in the contract commented upon, which this court has heretofore held, and still holds, to be a valid defense to this action at law.

The motion to strike out is overruled, and the plaintiff left, as heretofore held, to the remedy in equity to which he agreed sole resort should be had.

McCRARY, J., concurs.

BLAKE and others *v.* HAWKINS and others.[1]

(*Circuit Court, E. D. North Carolina.* November Term, 1883.)

1. CLERK—AGENT OF THE LAW.
   Where money is paid to a clerk, under a judgment of court, he receives it, not as the agent of either party, but as the agent of the law.
2. JUDGMENT—ORDER OF COURT.
   A judgment is an order of court, within the meaning of section 828 of the Revised Statutes of the United States.
3. CLERK'S COMMISSIONS—COSTS—REV. ST. § 828.
   A clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of 1 per cent. on the amount so received, (Rev. St. § 828,) to be paid by the defendant as part of the costs.

At June term, 1883, the complainants recovered a judgment against the defendants for $29,355, and costs. Thereupon, before an execution was issued, the defendants paid into the clerk's office the amount of the judgment and costs, except a commission of 1 per cent., which the clerk claimed under Rev. St. § 828; the defendants denying the right of the clerk to any commission, and claiming that, in any view, they were not liable for it.

E. G. Haywood, D. G. Fowle, Reade, Busbee & Busbee, Hinsdale & Devereux, for complainants.

Merrimon & Fuller, for defendants.

SEYMOUR, J. At June term a final judgment was rendered in the above case in favor of the plaintiffs and against the defendants. The defendants have paid the amount of the judgment to the clerk of this court, who has paid said amount to the plaintiffs; reserving, however, the question of his commissions, and the amount claimed by him, $293.55, which is retained by the plaintiff's attorneys, to await the decision of this court upon the question whether these commissions ought to be paid out of the recovery, or by the de-

[1] Reported by John W. Hinsdale, Esq., of the Raleigh, N. C., bar.

fendants. The question depends upon the construction to be put by the court upon section 828 of the Revised Statutes. The clause of the section in controversy reads:

"Clerk's Fees. * * * For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid."

There is no question but that the clerk received, kept, and paid out the sum upon which he claims his 1 per cent. It is, however, contended by the defendants that he did not do so "in pursuance of any statute or order of the court." The controversy depends upon whether or not the clerk received the money under an order of this court. This seems too plain for discussion. The order of the court was its judgment. That was, that the defendants pay to the plaintiffs the amount to which they were entitled. It was under that order that the defendants paid the sum recovered to the clerk. They might have awaited an execution, or, if the money were in the hands of a trustee or officer who would be controlled by the order of the court, an order directing such officer or trustee to pay as should be ordered. But it was safe for them to pay the clerk. The judgment and his official bond, one or both, were their protection. Had there been no "order of the court," they could not have safely paid him. He would have been only their agent, or the agent of the plaintiffs. The judgment under which, and under which alone, they paid the money, made him the agent of the law, and threw around the payment the security of the bond which the statute requires. If the clerk had failed to pay the amount of the judgment to the plaintiffs, it could not have been again collected from the defendants.

The question, then, becomes simply one of who shall pay the costs. That has been already determined; the costs, which include those of the execution, or whatever means of collecting the amount of the judgment take its place, must be paid by the defendants. This opinion has the support of that of Judge DILLON in the eighth circuit, (*In re Goodrich*, 4 Dill. 230,) and of Judge DICK in the fourth circuit, (*Kitchen* v. *Woodfin*, 1 Hughes, 340.) If the amount paid is not sufficient to satisfy the decree and the commissions of the clerk, the judgment opens to include such commissions. *Peyton* v. *Brooke*, 3 Cranch, 92; *Kitchen* v. *Woodfin*, *supra*.

ROEMER *v.* HEADLEY.

(*Circuit Court, D. New Jersey.* December 15, 1883.)

PATENTS FOR INVENTIONS—ANTICIPATION—PUBLIC USE—INFRINGEMENT.

Letters patent No. 208,541, granted to William Roemer, October 1, 1878, for "improvement in locks for satchels," *held* valid, and infringed by the lock-case sold by defendant.

In Equity. On bill, etc.

F. C. Lowthorp, Jr., for complainant.

A. Q. Keasbey & Sons, for defendant.

NIXON, J. The bill is filed against the defendant for infringing letters patent No. 208,541, granted to complainant, October 1, 1878, for "improvement in locks for satchels." The answer denies (1) the infringement, and (2) that the complainant was the original and first inventor of the improvements claimed in said letters patent. The patentee, in his specification, states that the principal object of the invention is to reduce the expense of the lock-case, and to render the same more practical in form and construction, and that it consists principally in forming the body of the lock-case into open ends, and in combining the same with cast blocks or end-pieces, which are separately made.

(1) A satchel marked Exhibit D, for complainant, was produced, and also a witness who swore that he purchased the same at defendant's store in Broadway, New York. The slightest inspection shows that the lock-case thereon infringes the claims of the complainant's patent. (2) A number of exhibits are put in by the defendant to prove that the claims of the complainant's patent were anticipated.

After a careful examination of these I deem it necessary to advert to only two of them, to-wit, Exhibit D 1 and Exhibit D 3. There is nothing in the patent sued on which is not fairly embraced in these, and if the defendant has shown that they were in public use before the date of the complainant's invention, the patent must be held void for want of novelty. The testimony is very meager. The defendant offered only one witness to prove their prior use. Charles Kupper testified that he was a manufacturer of bag frames and locks; that he had made locks like Exhibit D 3, and had sold them to defendant; that the first he sold to him was on March 31, 1878, and that the first he ever made was a month or two before Christmas, in the year 1877.

When asked about locks like Exhibit D 1, he replied: "I made them a long time after Exhibit D 3, but I cannot say when."

There was no other testimony on the subject of public prior use. The complainant's patent was issued October 1, 1878. He was called to prove the date of his invention, and was asked:

Question. "When did you first conceive this lock in its present practical form?" *Answer.* "I made the invention in the early part of 1876, but made the first model in January, 1878, after which I constructed the lock. My idea was to make a lock that would, when finished, resemble a lock I invented a few months before, and which I would be able to make of cheaper material." *Q.* "Was that model of which you speak similar to the lock patented by you?" *A.* "It was the same thing."

Such are his statements, and his only statements, on the subject. They are not clear, but they show that the invention antedates the proof of the time of any prior use. There was no cross-examination

of the witness, and as the defendant seems willing to accept the account of this date without question, the court will do the same.

It must be held that the complainant was the first and original inventor of the improvements claimed in this patent. Let there be entered a decree for an injunction and an account.

THE ULLOCK.

(District Court, D. Oregon. February 7, 1884.)

1. OFFER OF PILOT SERVICE BY SIGNAL.
   The pilot commissioners of Oregon, under the pilot act of 1882, are authorized and required to declare by rule what shall constitute a valid offer of pilot service on the Columbia river bar pilot grounds, by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled.
2. SIGNAL FOR AN OFFER OF PILOT SERVICE.
   The statute of the United States does not prescribe any signal to be used on a pilot boat in making an offer of pilot service; and the light required by section 4233 of the Revised Statutes, to be carried by a sailing pilot vessel at night, is only used to prevent collision and incidentally to give notice of the character of such craft; but the usual signal by which an offer of pilot service is made, is the jack set at the main truck in the day-time, and "flare-ups" at night, and this jack is usually the ensign of the country in which the service is offered. In the United States it is a blue flag charged with a star for every state then in the Union, and called the "Union Jack."
3. THE TERM "STATE" CONSTRUED TO INCLUDE A "TERRITORY."
   The term "state" in the act of March 2, 1837, (5 St. 153; section 4236, Rev. St.,) regulating the taking of pilots on a water forming the boundary between two states, construed to include an organized "territory" of the United States.

In Admiralty.

Frederick R. Strong, for libelant.

Erasmus D. Shattuck and *Robert L. McKee*, for claimant.

DEADY, J. The libelant, George W. Wood, of the pilot schooner J. C. Cozzens, brings this suit to enforce a claim for pilotage against the British bark Ullock of $76, growing out of an offer to pilot said bark in and over the Columbia river bar on March 24, 1883, and a refusal to receive the same by the master and claimant, Alexander Swietoslawski. It appears that the alleged offer was made between 4 and 5 o'clock in the afternoon, at a distance of some 25 miles from the bar, and consisted in the schooner's setting her jack at the main truck until dark, when she set her mast headlight and burned "flare-ups" over the side. The bark was approaching the bar from the south-west. The schooner, which was lying to, north-west of the bar, on observing her, ran down before the wind across the course of the bark. The bark paid no attention to the schooner, but kept on her course about E. N. E., until half-past 7 o'clock, when she had the Cape Hancock light on her port bow, and was hailed by the steam-

tug Brenham and took therefrom a pilot. The schooner, in her run down the coast, passed astern of the bark, and then jibed sails and followed her. Between 9 and 10 o'clock the bark tacked and stood off shore, and soon after met the schooner with the libelant on board, who offered his services as pilot, which were declined by the pilot on board, the master being below.

In the testimony of the crews of the bark and schooner there is the usual amount of flat contradiction concerning the disputed circumstances of the case. The libelant swears that when the fog lifted and he first sighted the bark she was in plain sight, and not more than two or three miles distant, when he put the schooner before the wind and made sail to cut her off, and that when he came within a mile of her he expected the bark to lie to until he could go aboard, but that she kept on her course, and the schooner had to jibe her sails to follow, whereby the latter fell astern, and that thereafter he kept within from one to three-quarters of a mile of the bark until they met. The master of the bark swears that when he first sighted the schooner she was seven or eight miles away, and when night set in she was still four or five miles distant, and he did not see her afterwards until they met as above stated. But the master admits that he saw the schooner, and that he knew she was a pilot-boat from the flag at her mainmast, and that he did not lie to or signal for a pilot because he did not know certainly how far he was from the bar, and he did not want to take a pilot so far out as to incur the payment of "distance" or "off-shore" pilotage.

It is admitted that the master of the Ullock had been in the river four times; that the Cozzens is the only pilot-schooner that had been on the bar for about two years before this time; and that she put a pilot on the Ullock under the same master in 1882; that the libelant was a duly-qualified bar-pilot under the laws of Oregon; and that the pilot from the tug who brought in the bark was a duly-qualified one under the laws of Washington territory.

By section 30 of the Oregon "pilot act of 1882" (Sess. Laws 20) it is provided that "the pilot who first speaks a vessel * * * or duly offers his services thereto, as a pilot, on or without the bar pilot ground, is entitled to pilot such vessel over the same;" but the master may decline the offer, in which case he shall pay, if inward-bound, full pilotage. And section 34 provides that the pilot commissioners "must declare by rule what constitues a speaking of a vessel or an offer of pilot service on the bar pilot grounds," within the meaning of the act.

By rule 9, adopted by the commissioners in pursuance of this authority, on November 17, 1882, it is provided that "the term, 'speaking a vessel for pilot service,' shall be construed to mean either by the usual form of hailing, or, if out of hailing distance, and within one-half mile, then the usual *code of signal* shall be made use of." This rule preserves the distinction that is made in the pilot act be-

tween "speaking" or "hailing" a vessel and a mere "offer" of pilot service. The former implies that the parties are within speaking distance, and can only be done by word of mouth, supplemented, it may be, by some such device for projecting the sound of the voice as a speaking trumpet, or even personal gesticulation. *Com.* v. *Ricketson*, 5 Metc. 412; 2 Pars. Shipp. & Adm. 109. But an "offer" of pilot service may also be made by some arbitrary but established sign or demonstration, made from beyond ear-shot and addressed exclusively to the eye. And this offer, according to the rule, must be made with "the usual code of signal," whatever that is.

It is unfortunate that the commissioners did not declare definitely what signal constitutes an offer of pilotage, as required by the act. Declaring that the offer should be made by "the usual code of signal" has thrown no light on the subject, and may be darkened it. The expert witnesses, including one of the commissioners, do not seem to be very clear as to what this "usual code of signal" is; though the apparent confusion in their testimony may arise from the want of knowledge on the part of counsel who examined them. For instance, the commissioner having testified that an offer of service was customarily made by the pilot-boat putting her "head down toward the ship and showing her blue flag," her number being on her mainsail, "and at night by burning a flare," counsel for the libelant said: "Then I understand you to mean the use of the usual signals prescribed by the Revised Statutes of the United States to be used on board pilot-boats?" to which the witness answered, "Yes." Now, there are no signals prescribed by the statutes of the United States for the use of pilot-boats in making an offer of pilot services, nor had the witness in any way indicated that that was what he meant when he said that the pilot-boat must "show her blue flag." The question was based upon an erroneous assumption, both as to the statute and the previous statement of the witness, while the answer was apparently made upon a total misapprehension of both.

The rule assumes that there is a usual and well-understood signal by which a pilot-boat can make an offer of pilot service to a vessel not within hailing distance and be understood. But whether that signal is known throughout the civilized world, or whether its use is confined to this coast, or even this port, does not clearly appear from the evidence, or at all from the rule. But this is a subject concerning which I think the court may supplement the evidence by its judicial knowledge. And, first, the use of the word "code" in the rules is misleading. I think there is no "code" of pilot signals; although there may be, and doubtless is, a signal for "a pilot wanted" in the international code of signals, or that of any country. The usual signal by which an offer of pilot service is made in the day-time is a flag at the masthead. This, of course, will be the flag of the country in which the offer is made, or that modification or portion of it called the "Jack." In the United States it is a blue flag charged

with a star for every state in the Union, and called the "Union Jack."

By section 4233, subd. 11, Rev. St., a sailing pilot-vessel is required to carry a white light at her mast-head during the night, and "exhibit a flare-up light every fifteen minutes." But neither of these lights, thus required to be carried, are signals that indicate an offer of pilot service, for they must be carried although all the pilots on the boat have been distributed. Evidently the statute requires these lights to be burned for the purpose of making known the whereabouts and character of the boat in order to prevent collision, and incidentally to advise any one in need of or desiring the service of a pilot where to apply. But the burning of "flare-ups," or a flashing light, over the side of the boat, at short intervals, is also the customary method of making an offer of pilot service at night. It follows that the libelant made a proper tender of his service as a pilot to the Ullock, both in the day-time and after night, provided he did so within the distance prescribed by the ninth pilot rule. Without saying so directly, the neccessary effect of this rule seems to be to require that an offer of pilot service made otherwise than by hailing, as by signal, shall be made within a half-mile of the vessel signaled.

Counsel for the libelant contends, however, that the power of the commissioners does not extend to prescribing the distance within which such offer must be made. But in my judgment it does; and for manifest reasons. They are expressly authorized and required to declare what shall constitute a valid offer of pilot service; and when this may be done by a signal, as by setting a blue flag at the main-truck, the distance at which the pilot-boat is from the vessel signaled is a material element in the transaction. And, *first*, it ought not to be so far away as to leave any room for dispute as to whether the signal was made or seen; and, *second*, a vessel ought not to be compelled to wait for a pilot from a boat that signals her a great way off, when, in all probability, she can get one much sooner and nearer in shore if she is allowed to proceed on her way. And what distance is suitable and convenient for both the party making and receiving the signal is a matter committed by the pilot act to the judgment of the commissioners. It is urged that a half mile is a very short limit, and that it might well be a mile or two. But the commissioners are probably better judges of this matter than counsel; and if it is thought they have erred in this respect they must be asked to correct it. It is not in the power of the court to disregard or modify their action thereabout.

As to whether the offer of the libelant was made within a half mile of the Ullock, the testimony of the two crews is widely divergent. The reason given by the master of the Ullock for declining the offer is evidently not ingenuous, and ought to have some effect upon his general credibility. He says that he preferred to take a pilot from the schooner, because he knew the charges were less than those of the tug pilots; and at the same time, as a reason for not taking this

cheaper one when it was offered him, he says that he did not want to take a pilot so far from the bar and thereby incur the additional expense of "distance" or "off-shore" pilotage. But he knew very well that there is no such thing as "distance" or "off-shore" pilotage at the mouth of the Columbia river, and that the charge for piloting a vessel in and over the bar is all one, whether the pilot boards her at the outermost buoy or at any distance beyond. He had run his reckoning for the Columbia river, and been unable to take an observation for some days on account of the fog, and would naturally be glad to avail himself of the services of the first pilot that offered, unless there was some special and cogent reason to the contrary. It is certain that the reason assigned was not the true one. And probably the fact is that the master really desired to take a pilot from the tug so as to facilitate a deal for towage, which is a much weightier matter than the cost of pilotage. But I doubt, even on the evidence of the libelant and others of the crew of the schooner, if she was ever within a half mile of the Ullock on that occasion before the pilot of the tug boarded her. The burden of proof in this respect is on the libelant; and he cannot prevail unless it appears from the evidence that his offer was made to the Ullock within the legal distance. The strongest statement which the libelant is willing to make on this point is that he was within from one to three-quarters of a mile of the Ullock; and this being taken as it should be most strongly against himself, amounts to no more than that he was within three-quarters of a mile of said vessel.

But there is another point made in the case by the claimant, upon which, I think, the decision must be against the libelant. By the act of March 2, 1837, (5 St. 153; section 4236, Rev. St.,) it is provided that "the master of any vessel coming in or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot the vessel to or from such port." This act was passed, as is well known, on account of the conflicting legislation and the strife between New York and New Jersey and their pilots, for the pilotage of vessels entering the Hudson river and bound to New York or other ports thereon. It may be admitted that the Columbia river is not a boundary between two "states" in the sense in which the word is used in the constitution, but it is the boundary between one such state and an organized territory of the United States. The case is within the mischief intended to be remedied by the act of 1837. The subject is wholly within the power of congress, and it may apply the rule contained in the act to the case of a water forming the boundary between a state and territory, as well as between two states of this Union. The territory of Washington is an organized political body,—a state in the general and unqualified sense of the word,—with power to legislate on all rightful subjects of legislation, except as otherwise provided in its constitu-

tion, one of which is pilots and pilotage on the Columbia river bar. *The Panama*, 1 Deady, 31. True, this power is derived for the time being from congress. But the power of a state of the Union to legislate on this subject only exists until congress sees proper to exercise it. There being no constitutional limitation upon the power of congress in this respect, and it having the same right to regulate the taking of a pilot on a water that forms the boundary between a state and territory as it has between two states proper, I think the word "state" in the act of 1837 ought to be construed to include any organized body politic or community within the territorial jurisdiction of the United States, having the power to legislate on the subject of pilots and pilotage on a water forming a boundary between itself and a state of this Union.

In the case of *The Panama, supra*, in speaking of this act in 1861, I said:

"Whether the word 'state' as used in this act should be construed so as to include a territory, is a question not free from doubt. The case is within the *mischief* intended to be remedied by the act, and, it seems to me, might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in *Hepburn* v. *Ellzey*, 2 Cranch, 445, in which it was held that under the judiciary act, giving the national courts jurisdiction of controversies between citizens of different *states*, that a citizen of the District of Columbia could not sue in such courts as a citizen of a state, because such District was not a member of the Union."

The ruling in *Hepburn* v. *Ellzey, supra*, was afterwards applied in *New Orleans* v. *Winter*, 1 Wheat. 91, to the case of a territory, when it was said that although the district and the territory are both states, —political societies,—in the larger and primary sense of the word, neither of them is such in the sense in which the term is used in the constitution, in the grant of judicial power to the national government on account of the citizenship or residence of the parties to a controversy, when it is understood to comprehend only "members of the American confederacy." In *Barney* v. *Baltimore*, 6 Wall. 287, these rulings were followed without question, upon the principle of *stare decisis*.

In *Watson* v. *Brooks*, 8 Sawy, 321, [S. C. 13 FED. REP. 540,] it was said even of this construction:

"It is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown. By it, and upon a narrow and technical construction of the word 'state,' unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of privileges accorded to all other American citizens, as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home."

But the special reason for this narrow construction of the word "state" does not apply in this case. Congress had the power to ex-

tend the act of 1837 over a water constituting the boundary between the state of Oregon and the territory of Washington. The language actually used in the act may reasonably be construed so as to accomplish this object; and the case is within the mischief intended to be remedied thereby. The master of the Ullock being then entitled, upon this construction of the law, to take a pilot from either Oregon or Washington, without reference to which made the first offer of his services, the libelant is not entitled to recover as for an offer and refusal of pilot services, even though such offer was duly made.

There must be a decree dismissing the libel, and for costs to the claimant.

THE SCOTS GREYS *v.* THE SANTIAGO DE CUBA.[1]

THE SANTIAGO DE CUBA *v.* THE SCOTS GREYS.[1]

(*Circuit Court, E. D. Pennsylvania.* October 30, 1883.)

1. COLLISION—MEETING OF VESSELS IN NARROW CHANNEL—LIGHT AND HEAVY STEAMERS—DUTY ARISING FROM SPECIAL CIRCUMSTANCES.
   Where, in a narrow, dangerous channel, a light steamer stemming the tide, having her movements completely under command, observed a steamer of greater draught, deeply laden, coming with the tide, it was the duty of the light steamer to slow down or stop until the positions and courses of each should become known.
2. CROSSING COURSES—MANEUVER IN EXTREMIS.
   The light steamer having failed to do either, but having ported her helm and attempted to run across the track of the heavy vessel, when the vessels were in dangerous proximity and the heavy vessel near a shoal, in consequence of which maneuver a collision occurred, the light vessel was in fault.

In Admiralty.

Appeal from the decree of the district court sustaining the libel of the Scots Greys, and dismissing the libel of the Santiago de Cuba. The facts are set forth in the following opinion, and also in the report of the same case in the district court, 5 FED. REP. 369.

Curtis Tilton and *Henry Flanders*, for the Scots Greys.

John G. Johnson, for the Santiago de Cuba.

MCKENNAN, J. These are cross-libels, in which the district court adjudged the Santiago de Cuba in fault, in a collision between her and the Scots Greys, and decreed damages against her accordingly. The evidence touching the position, course, and government of the vessels before and about the time of the collision is of unusual volume, and consists chiefly of the testimony of the officers and crews of the respective vessels. Hence, as is almost always the case under such circumstances, it is conflicting and contradictory, and any attempt to

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

reconcile it would not advance the decision of the case. It can only be dealt with by adopting such conclusions of fact of material import as may seem to be supported by a preponderance of the probabilities of their truth.

FINDING OF FACTS.

(1) About midday on the nineteenth of July, 1879, a collision occurred between the steamer Scots Greys and the steamer Santiago de Cuba, in the Delaware river, a short distance above the Horseshoe buoy, on the western side of the channel, by which considerable injury was caused to both vessels.

(2) The Scots Greys was an iron steamer, about 300 feet in length, was loaded, and drew 21 feet of water, and was ascending the river towards the port of Philadelphia.

(3) The Santiago de Cuba was a wooden steamer, was light, and drew 13½ feet of water, and was descending the river.

(4) The tide was flood, and the current, deflected by the Horseshoe shoal, tended strongly to the eastern or New Jersey shore of the river.

(5) This shoal was somewhat in the shape of a horseshoe, with its base on the Pennsylvania or western shore and its apex in the river, leaving a channel about 400 yards in width between it and the New Jersey shore. Near this apex, on the eastern edge of the shoal, a buoy is anchored to indicate the turn of channel.

(6) Both vessels were in sight of each other for such a distance before they met as to involve no danger of collision, if they had been carefully and skillfully navigated.

(7) The Scots Greys first reached the buoy, and put her helm to starboard to make the turn of the channel, and when she rounded the buoy straightened up to proceed on the western side of the channel.

(8) At this time the Santiago de Cuba was several hundred yards above the Scots Greys, on the western side of the channel, but her course was eastward of that of the Scots Greys, and to her starboard.

(9) At the Horseshoe shoal the narrowness and shape of the channel and the tendency of the tide impose upon vessels sailing in opposite directions the duty of observing special caution as a necessary condition of their safety in passing each other.

(10) In starboarding her wheel to carry her past the buoy, and in straightening up after she rounded it that she might pursue the western line of the channel, the Scots Greys did what was proper for her under the circumstances.

(11) When the vessels were several hundred yards apart, the Santiago de Cuba sounded a signal with her whistle and put her helm hard a-port, indicating an intention to pass the Scots Greys on her port bow, and which gave her a direction across the track of the Scots Greys.

(12) Whether this signal was or was not heard on the Scots Greys, it was not answered, but she kept her course up the western side of the channel.

(13) The speed of the Santiago de Cuba was not diminished; at least, not soon enough. If she had stopped or slowed down when the Scots Greys was rounding the buoy and straightening up, the collision would not have occurred, because the Scots Greys would have passed the place of the collision before the Santiago de Cuba reached it. Nor would it have occurred if the Santiago de Cuba had not hard ported her helm and sought to pass the Scots Greys on her port side.

(14) If, in response to the Santiago de Cuba's movement, the Scots Greys had hard ported her helm, the vessels would probably have been brought together head on, with more disastrous consequences. But the impact of the former's bow was upon the starboard side of the latter, about 30 feet from her bow, thus indicating that if she had kept her course the vessels would have passed in safety.

CONCLUSIONS OF LAW.

Considering the condition of navigation at the locality in question, the size and depth in the water of the Scots Greys, the direction in which she was sailing, and the difficulty of controlling her movements, she was not in fault in adopting a course up the western side of the channel and in pursuing it without deviation.

In view of the same considerations, of the size and draught of the Santiago de Cuba, that she was light, that she was descending the river with the tide towards her head, and her movements completely under command, and that the passage of vessels such as the two in question at the Horseshoe buoy is attended with risk of collision, it was incautious in the Santiago de Cuba to pass the Scots Greys at that point, if she could avoid it. It was the duty of the Santiago de Cuba to stop or slow down when she observed the Scots Greys rounding the buoy. Failing to do either, and in porting her helm and attempting to run across the track of the Scots Greys, when the vessels were in such proximity to each other, she was in fault and must be held responsible for the collision.

There must, therefore, be a decree dismissing the libel of the Santiago de Cuba, with costs, and a decree in favor of the Scots Greys for the amount of damages sustained by her, and costs.

The Peer of the Realm.[1]

(*Circuit Court, E. D. Louisiana.* December, 1883.)

CHARTER-PARTY—BILLS OF LADING.

A charter-party contained the following stipulations: "The captain shall sign bills of lading at any rate of freight as presented, without prejudice to this charter-party; any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading, in cash, before sailing. * * * The owners or master of the steamer shall have an absolute charge and lien upon the cargo and goods laden on board for the recovery and payment of all freight, dead freight, demurrage, and all other charges whatsoever." The master refused to sign bills of lading unless there was stipulated or expressed therein, "other conditions as per charter-party." *Held* that the master had the right to insist upon such stipulation.

The Ibis, 3 Woods, 28, distinguished.

Admiralty Appeal.

Charles B. Singleton and *Richard H. Browne*, for libelants.

James McConnell, for claimants.

PARDEE, J. The libelants sue for a breach or a charter of the British steam-ship Peer of the Realm, made in Liverpool, England, September 28, 1878. The charter-party contains among others, the following stipulations:

"The captain shall sign bills of lading at any rate of freight as presented without prejudice to this charter-party; any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading, in cash, before sailing. If the steamer be not sooner dispatched, twenty working days (Sundays excepted) shall be allowed the charterers for loading, etc. And it shall be at the discretion of the said charterers or their agents to detain the steamer a further period not exceeding ten like days, for the purposes aforesaid; the charterers or their agents paying demurrage at the rate of 50 pounds per day. The owner or master of the steamer shall have an absolute charge and lien upon the cargo and goods laden on board for the recovery and payment of all freight, dead freight, demurrage, and all other charges whatsoever.

The breach and violation of the charter-party alleged is that the master refused to sign bills of lading unless there was stipulated or expressed thereon, "*other conditions as per charter-party.*" The question for decision is whether the master had the right to insist upon such stipulation. The charter-party, so far as it speaks within the law, furnishes the rule of conduct to the parties. It provides for a lien upon the cargo and goods laden, for the freight, dead freight, and demurrage. This is lawful and binding between the parties and as to all shippers with notice. According to the English authorities, which are clear upon the subject, "a lien may be created by contract between the parties, not only for freight, but for dead freight, demurrage, and as many more of the usual claims of the ship-owner as they choose to name." Macl. Merc. Shipp. (3d Ed.) 512. See

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

note 7, for authorities. And that shippers with notice of stipulations of charter-party are bound. See *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86, quoted in Macl. 351. *Peek* v. *Larsen*, L. R. 12 Eq. 378. See, also, Macl. 514.

In 1 Pars. Shipp. 302, 303, it is said:

"We have seen that the charter-party usually provides expressly that the owner binds the ship and the freight to the performance of his part of the bargain, and the shipper binds the cargo to the ship for his performance. But without these expressions the law-merchant creates or implies this mutual obligation in every case of a contract of affreightment whether by bill of lading or charter-party. *If, however, the parties choose to stipulate otherwise, as that there shall be no lien, or that the lien shall be other than it usually is, they may do so.*"

My attention has been called to no American case that holds to the contrary, and I have examined the following, cited by proctors: *The Volunteer and Cargo*, 1 Sumn. 551; *The Bird of Paradise*, 5 Wall. 559; *The Salem's Cargo*, 1 Spr. 389; *Perkins* v. *Hill*, Id. 124; *406 Hogsheads of Molasses*, 4 Blatchf. 319; *A Quantity of Timber and Lumber*, 8 Ben. 214. All are to the purport that the owners and charterers may make their own stipulations as to the terms of the charter-party, and all imply, though not expressly so deciding, that shippers with notice will be bound by such stipulations.

The case of *The Ibis*, 3 Woods, 28, relied upon by proctor for libelants, would be exactly in point, and partly support their pretensions, but for the fact that therein the shipper had no notice of the terms of the charter until after shipment. The case of *Kerford* v. *Mondel*, 5 Hurl. & N. (Ex.) 931, relied upon in *The Ibis Case*, was a case where a clean bill of lading was given which contained no lien for dead freight, and where the contract for shipment did not show notice of any charter-party. It may be that there is some conflict of authority as to the effect to be given against outside shippers of freight on a chartered vessel, so far as liens are concerned, even with notice of the stipulations of the charter-party, but I can see no reason why the rule as laid down in Maclachlan, *supra*, should not be taken as the correct one. If a shipper has notice, let him submit to the contract that furnishes the ship, or take his freight elsewhere. Neither he nor the charterer has the right to complain; the latter because he has pleased to bind himself, and the shipper because if his eyes are open he need not bind himself nor his goods unless he pleases.

It may be conceded for this case that a shipper, without notice of the terms of a charter-party, is not bound, nor his goods, for any liens not given by the law.

In *Gracie* v. *Palmer*, 8 Wheat. 605, it was held that the charterer and master could not, by a contract made with a shipper who acted in good faith, *i. e.*, without knowledge of the charter, destroy the lien of the owner on the goods shipped for the freight due under the charter-party. See, also, *The Schooner Freeman*, 18 How, 182. From all

of which it seems clear that the owner had a clear right to stipulate for a lien on the entire cargo for freight, dead freight, and demurrage; that such stipulation was good against the charterer, and probably good against all shippers with notice; that the master had no right to derogate from the charter-party or jeopardize the liens stipulated therein; and that the ship was not bound to take any cargo furnished by charterer, except according to the terms of the charter-party.

It is clear that if the master had given clean bills of lading, and shippers had been given no notice, the lien given by the charter-party might have been entirely defeated. It follows, therefore, that the master of the Peer of the Realm was not only justified in refusing to sign bills of lading, without adding, "other conditions as per charter-party," but he was pursuing the exact line of his duty in order to protect the owners' interest.

The master's conduct was no breach of the charter-party on the part of the ship, and therefore the libelants have no case. It is urged that they should recover certain advances made as per charter-party. I am unable to see why. The evidence shows great loss to the ship because the charterer failed, without sufficient cause, to furnish cargo. Argument has been made that shippers of cotton cannot, and will not, ship goods without what is called a clean bill of lading. This may be; but I do not see what the court has to do with the matter. If charterers of ships rely on outsiders to furnish a cargo, and such outside shippers require clean bills of lading, let charter-parties be made accordingly. Nothing would be easier, if the parties agree, than that the charter-party should stipulate that the master should give clean bills of lading for all cargo not furnished by charterer, or that the master should give bills of lading as presented, and the courts would undoubtedly enforce such stipulation.

A decree will be entered dismissing libel, with costs.

THE CHARLOTTE VANDERBILT.

(District Court, S. D. New York. January 4, 1884.

SHIPPING—SUPPLIES—MARITIME LIEN—MORTGAGE—PRIORITY—SECTION 4192.

For necessary supplies furnished a vessel in a state not that of her owner's residence, a maritime lien presumptively arises, and this lien will take precedence of a prior mortgage, duly registered, under section 4192 of the Revised Statutes. The mortgagee, by assenting to the use and possession of the vessel by the mortgagor for the purposes of navigation, without restriction, assents by implication to the creation of such maritime liens as by law arise incidentally in the ordinary business of the ship.

This libel was filed to recover a balance of $468.30, with interest, for coal furnished to the steam-boat Charlotte Vanderbilt, at Philadelphia, in July and August, 1880. The steam-boat was at that time owned by a New Jersey corporation, which purchased the boat on May 10, 1880, and gave a consideration mortgage of $25,500 to secure various promissory notes for the purchase price. The mortgage was duly recorded in the New York custom-house, and also in the custom-house at Camden, New Jersey, where the vessel was also enrolled by the corporation purchaser. The mortgage provided that the mortgagees should have possession of the ship until a default in its terms, and that, upon such default, the mortgagee might take possession. The bill of supplies for coal was incurred while the mortgagor was in possession and running the steam-boat, and before any default in the mortgage. This libel was filed on the second of September, 1880. On the thirtieth of August prior thereto, the mortgagee took possession of the steam-boat for a default in the terms of the mortgage, and advertised her for sale on the fifteenth of September, when she was sold for $12,000, the mortgagee having intervened as claimant in this suit, and given the usual bond for the release of the vessel.

Marsh, Wilson & Wallis, for libelants.

Ten Broeck & Van Orden, for claimant.

BROWN, J. The boat in question was running as an excursion boat. The coal was furnished upon 22 different days, and was evidently necessary for the prosecution of her voyages. Being furnished in the port of another state from that of her owner's residence, under the ordinary maritime law of this country, the coal was presumptively furnished upon the credit of the ship as well as of her owners; and the testimony corroborates this fact. The libelants acquired, therefore, presumptively, a maritime lien upon the vessel for the coal thus supplied. *The Neversink*, 5 Blatchf. 539; *The Lulu*, 10 Wall. 192; *The Eliza Jane*, 1 Spr. 152; *The New Champion*, 17 FED. REP. 816, and cases cited.

It is urged that as the mortgage was duly recorded, as required by section 4192 of the Revised Statutes, prior to the time when these

supplies were furnished, the mortgage was a notice to all persons; and the mortgagees contend that all ports of the country, as regards them, were home ports, and that no lien could be thereafter acquired against them which would take precedence of the mortgage. The section of the Revised Statutes in question gives constructive notice to all persons of the existence of the mortgage. That its purpose is, however, only to give such constructive notice, is apparent from its excepting persons who have actual notice thereof from the effect of its provisions. In providing, as this mortgage did, that the mortgagor might have the possession and use of the vessel for the purposes of navigation, without restriction, the mortgagee necessarily assented by implication to the creation of such maritime charges and liens on the vessel as by law arise incidentally in the course of the business and navigation to which the mortgagee assented; and maritime liens for supplies thus arising take precedence, therefore, of the prior mortgage. That rule was laid down in this district in the case of *The E. M. McChesney*, 8 Ben. 150, and the same rule has been elsewhere sustained. *The Granite State*, 1 Spr. 277; *The Henrich Hudson*, 7 L. R. (N. S.) 93. See, also, *The Lulu*, 10 Wall. 192, 193; *The May Queen*, 1 Spr. 588.

The libelant is entitled to a decree for $582.75, with costs.

THE MAGGIE ELLEN.[1]

(*District Court, E. D. New York.* December 3, 1883.)

SALVAGE—COMPENSATION—COSTS TO NEITHER PARTY.

A schooner grounded on Brigantine shoal, a dangerous shoal in the Atlantic ocean, in fair weather, with the wind light, the sea smooth, and the tide young flood. The bottom was smooth, she did not pound, nor leak, nor suffer any damage, nor set a distress signal. The value of the schooner was $4,000. A tug, which came by, offered to tow her off for $500 and her master offered to pay $200, but neither offer was accepted, and the tug towed her off the shoal to an anchorage three miles distant, being employed some three-quarters of an hour, on the understanding that underwriters should fix the amount of compensation. On their refusal to do so, this suit was brought. The owners of the tug claimed $1,000. *Held*, that there was no room to deny that this was a salvage service; that the service was worth $200, and the offer of that sum should have been accepted. Costs were not given the libelant, because the efforts of the owners of the schooner to agree on an amount before the suit were not met in a proper spirit, and there was some reason to suppose there was the intention to compel payment of more than was just by pressure of legal proceedings. Costs were not given the claimant, as no amount was tendered, and the ground was taken that the service was towage, not salvage.

In Admiralty.

Owen & Gray, for libelant.

Beebe & Wilcox, for claimant.

BENEDICT, J. This action is to recover salvage for services rendered in towing the schooner Maggie Ellen off the Brigantine shoal. Brigantine shoal is a dangerous shoal in the Atlantic ocean, just above Absecom. On the afternoon of April 23, 1882, between 5 and 6 o'clock P. M., the schooner Maggie Ellen, laden with ice and bound to the southward, grounded upon this shoal. The wind at the time was light from the north-west, and the weather fair. The sea was smooth and the tide was young flood. The vessel herself was sound and stanch. The bottom was smooth; she did not pound; made no water, and suffered no damage whatever by reason of the grounding. No signal of distress was set. As the wind and sea were, and continued to be until about midnight, there is no reason to doubt that the schooner would have got off the shoal by means of her windlass and kedge. She was within reach of assistance from a life-saving station, and a life-saving crew was on the way to her relief when the tug Argus, also bound to the south, came within hail and tendered her aid for a compensation of $500. The master of the schooner offered $200, and after the master of the schooner had, by sounding, shown the master of the tug that he could approach the schooner without danger, the tug took hold of the schooner, upon the understanding that the amount of her compensation should be left to the underwriters at Philadelphia. Upon this understanding the tug towed the schooner off the shoal, and took her to a place of anchorage some

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

three miles distant, being employed some three-quarters of an hour in performing the service. The underwriters refused to determine the amount, and, the parties being unable to agree, this suit is the result.

There is no room to deny that the service rendered was a salvage service. A vessel aground on Brigantine shoals, in the Atlantic ocean, is always in peril, but not necessarily in immediate peril. The service rendered by the tug was not a towage service. No tug could be expected to render a service of the character in question for ordinary towage compensation. The service was salvage, and the only question upon which there can be dispute is as to what will be a proper salvage compensation therefor. The difference between the parties is wide. One thousand dollars was demanded by the tug after the service had been performed. Two hundred dollars was offered by the schooner at the time of the service. On the trial $750 was the least sum suggested in behalf of the libelant; $100 the greatest suggested in behalf of the claimant. Upon considering all the circumstances, and considering that the value of the schooner does not exceed $4,000, I am of the opinion that the offer of $200, made by the master of the schooner at the time the service was rendered, was a liberal one, and should have been accepted. That sum is in my opinion the proper compensation to be awarded now. I give no costs to the libelant, because I consider that the endeavors of the owners of the schooner to agree upon an amount, made before suit brought, were not met in a proper spirit, and there is some reason to suppose that there was the intention to compel payment of a larger amount than was just by the pressure of legal proceedings. I cannot give the claimant his costs, for no tender of any amount whatever was made in the answer, nor was any sum paid into court. On the contrary, the ground was taken in the answer that the service rendered was towage, not salvage.

Let a decree be entered in favor of the libelants for the sum of $200, without costs.

THE PONCA

(*District Court, E. D. New York.* November 23, 1883.)

LIABILITY OF STEAMER FOR DAMAGE TO CANAL-BOAT BY STEAMER'S CAREENING. Where a canal-boat, employed in coaling a steamer, was, when nearly discharged, hauled by the steamer to a position where she lay wedged in between the steamer and other boats in the slip, and when the tide fell the steamer took bottom and careened over and crushed the canal-boat, which could not extricate herself, and the liability of the steamer to careen when the tide fell was known to those in charge of the steamer, *held*, that the obligation to remove the canal-boat from the dangerous position before the tide fell attached to those in charge of the steamer, and, that obligation not having been discharged, the steamer was liable for the damage that resulted.

In Admiralty.

E. D. McCarthy, for libelant.

Ullo & Davison, (*Chas. E. Le Barbier*,) for claimant.

BENEDICT, J. In this case the following facts appear: The canal-boat Orville Dean was employed in coaling the steam-ship Ponca. The latter vessel was at the time lying in a slip, and the canal-boat along-side. When the canal-boat was nearly discharged, she was hauled by the steamer to a position where she lay wedged in between the side of the steamer and other boats in the slip, and there she was left until the tide fell. When the tide fell, the steamer took the bottom and careened over towards and upon the canal-boat, whereby the canal-boat was crushed between the boat on the outside of her and the steamer. In the condition of the slip it was not possible for the canal-boat to extricate herself from the position where she had been placed by those in charge of the steamer. The liability of the steamer to careen over when the tide fell, was known to those in charge of the steamer. Upon these facts the steam-ship must be held responsible for the injury done to the canal-boat. When those in charge of the steamer, for their own convenience, hauled the canal-boat into a position where she was in danger of being injured by the careening of the steam-ship when the tide fell, and from which the canal-boat could not extricate herself, the obligation to remove her from that position before the tide fell attached to those in charge of the steam-ship. That obligation not having been discharged, the steam-ship is liable for the damages that resulted.

Let a decree be entered in favor of the libelants, with an order of reference to ascertain the amount.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

SCOBEL *v.* GILES.[1]

(*District Court, E. D. New York.* September 21, 1883.)

INTERROGATORIES — TIME FOR PROPOUNDING — ADMIRALTY RULES 23 AND 32 — RULES 99 AND 100 OF THE SOUTHERN DISTRICT OF NEW YORK.

In the eastern district of New York, interrogatories to a party are not permitted in admiralty unless propounded in accordance with the admiralty rules of the supreme court. Rules 99 and 100 of the southern district of New York have never been adopted by this court.

In Admiralty.

The libelant propounded certain interrogatories to be answered by the claimant. These interrogatories were not attached to the libel, and were not propounded until after the claimant had filed his answer.

H. D. Hotchkiss, for libelant.

Benedict, Taft & Benedict, for claimant.

BENEDICT, J. The time for propounding interrogatories on the part of a libelant is fixed by the twenty-third admiralty rule of the United States supreme court, according to which rule interrogatories are required to be put at the close or conclusion of the libel. See, also, rule 27. So, interrogatories propounded by the claimant are by the thirty-second rule required to be made at the close of the answer. The admiralty rules promulgated by the United States supreme court supersede any rule of a district court fixing a different time for propounding interrogatories; and for this reason the 99th and 100th rules of the district court of the southern district of New York, adopted many years prior to the promulgation of the admiralty rules by the United States supreme court, have never been adopted as rules of this court. In this court, interrogatories are not permitted unless propounded in accordance with the admiralty rules of the United States supreme court.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

BELL v. NOONAN and others.

(*Circuit Court, N. D. Iowa, C. D.* January Term, 1884.)

REMOVAL OF CAUSE—ACTION BY ASSIGNEE.

Though the assignee of a chose in action cannot sue originally in the federal courts unless his assignor could have done so, he can accomplish the same result by bringing his action in the state court and removing it thence to the federal court.

Motion to Remand.

Duncombe & Clarke and *Harrison & Jenswold,* for plaintiff.

Soper, Crawford & Carr and *Geo. E. Clark,* for defendants.

SHIRAS, J. On the twenty-seventh of December, 1882, the defendants M. F. Noonan and Patrick Nolan entered into a written contract with one W. H. Godair, whereby defendants agreed to deliver to the order of said Godair, on the second or third day of April 1883, 300 head of cattle, at Emmettsburg, Iowa. The cattle were not delivered and Godair sold and assigned the contract to James Bell, the present plaintiff, who was then and is now a citizen of the state of Illinois. Godair, the assignor, and the defendants were at the date of the contract, and are now, citizens of Iowa. Bell brought an action against the defendants in the district court of Palo Alto county, Iowa, to recover the damages alleged to have been caused by the failure to deliver the cattle according to the terms of the contract. Defendants filed an answer denying that there had been a breach of contract upon their part, and averring that Godair had failed to perform the conditions of the contract upon his part, and that thereby they were excused from performance upon their part. Thereupon plaintiff filed a petition for the removal of the case into this court, upon the ground that he was a citizen of Illinois and the defendants were citizens of Iowa, and that by reason of local prejudice he could not obtain a fair trial in the state court. The proper petition, affidavit, and bond conforming to the requirements of the act of 1867 were filed, and the state court ordered the case to be removed. The record having been filed in this court, the defendants move to remand the same to the state court, on the ground that the plaintiff is seeking to maintain an action upon a contract as an assignee thereof, and that as his assignor, Godair, could not himself have brought the action originally or by removal into the federal court, therefore his assignee could not do so, and in support of this position defendants cite the case of *Berger* v. *Co. Com'rs,* 2 McCrary 483; [S. C. 5 FED. REP. 23.] In that case the right of removal was asserted under the act of 1875, and his honor, the circuit judge, held that the provision found in the first section of the act, which declares that neither the circuit nor district court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might be prosecuted in such court to recover thereon, in case no assignment had been made, ex-

cept in cases of promissory notes negotiable by the law-merchant and bills of exchange," should be read in connection with the second section providing for removal of cases; and so, construing the same, the result was that a removal could not be had under that act in a case where a plaintiff was an assignee, unless his assignor might have brought suit in the federal court.

The removal in the present case was sought, not under the provisions of the act of 1875, but under the act of 1867, as embodied in subdivision 3 of section 639 of the Revised Statues. This subdivision was not repealed by the passage of the act of March 3, 1875. *Miller* v. *C., B. & Q. R. Co.* 3 McCrary, 460; [S. C. 17 FED. REP. 97.] It remains in full force; and the question now presented and to be decided is whether, under its provisions, an assignee of a contract who is a citizen of a state other than that of which the defendants are citizens, and who has brought an action upon the contract for a sum exceeding $500, in a state court, can remove the same into the federal court when it appears that plaintiff's assignor is and has been from the date of the contract a citizen of the same state with defendants.

In the case of *City of Lexington* v. *Butler*, 14 Wall. 282, the supreme court held that the act of 1867 was not controlled or restricted by the provision found in the eleventh section of the judiciary act, to the effect "that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit may have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." The court ruled that "suits may properly be removed from a state court into the circuit court, in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the circuit courts. Since the decision in the case of *Bushnell* v. *Kennedy*, 9 Wall. 387, all doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the judiciary act, has no application to cases removed into the circuit court from a state court; and it is quite clear that the same rule must be applied in the construction of the subsequent acts of congress extending that privilege to other suitors not embraced in twelfth section of the judiciary act. Such a privilege was extended by the twelfth section of the judiciary act only to an alien defendant and to a defendant, citizen of another state, when sued by a citizen of the state in which the suit was brought; but the privilege was much enlarged by subsequent acts, and the act in question extends it to a plaintiff as well as to a defendant," etc. The court held that under the act of 1867 the case was properly removable, even though plaintiffs therein should

be held to be the assignee of the Lexington and Big Sandy Railroad Company, the payee and original owner of the bonds sued on; the said railroad company and the defendant, the city of Lexington, being both corporations created under the laws of the state of Kentucky.

If then, as is held in that case, the restriction in the judiciary act, declaring that the circuit court shall not have cognizance of any suit on *a chose in action*, in favor of an assignee, unless the assignor could have maintained the action, is not applicable to the removal act of 1867, but, under its provisions, an assignee might remove a cause, although his assignor was a citizen of the same state as was the defendant, no good reason is perceived why the same rule should not apply to the present case. The first section of the act of 1875 is almost identical in point of language with the judiciary act, and, if the latter act did not control or restrict a removal under the act of 1867, I do not see how it can be well held that the act of 1875 has that effect.

Under the rule laid down in *City of Lexington* v. *Butler*, it follows that the case was properly removed, and the motion to remand must be overruled.

Since the foregoing opinion was written the decision of the supreme court in case of *Claflin* v. *Ins. Co.* has been announced, wherein it is held that the provisions of the first section of the act of 1875 does not limit or control the right of removal conferred by the second section of the act; and that an assignee of a *chose in action* might remove a cause from the state conrt, although he could not have originally sustained an action in the United States court. See *Claflin* v. *Ins. Co.* 3 Sup. Ct. Rep. 507.

FREIDLER *v.* CHOTARD and Husband.[1]

(Circuit Court, W. D. Louisiana. October, 1883

REMOVAL OF CAUSE—SEPARATE CONTROVERSY—INTERVENOR.

The plaintiff, claiming that by a contract with him the defendants became lessees of a plantation, of which he became owner, sued them for rent, and asserted his lessor's lien upon all effects found upon the premises. The parties all lived in the same state. A citizen of a different state intervened, claiming to be the owner of a part of the effects in question, and praying, as essential to his relief, that the contract between the plaintiff and the defendants be decreed to be a mere mortgage giving the plaintiff no rights of ownership. *Held*, that there was no separable controversy wholly between the intervenor, on one side, and the other parties upon the other, such as to give him the right to remove the cause into a federal court.

On Motion to Remand.

[1] Reported by Talbot Stillman, Esq., of the Monroe, La., bar.

BOARMAN, J. Isaac Freidler entered into a contract with Mrs. S. M. Chotard and husband, all citizens of Louisiana, in relation to the Minorica plantation, in Concordia parish, Louisiana. A statement of the demands in his petition will be sufficient, without reciting in detail the items of the agreement for considering plaintiff's motion to remand. Freidler, basing his title and ownership on the contract agreement between himself and Mrs. Chotard, sues her for $1,166 for one year's rent of the said plantation, and asks for recognition and enforcement of his lessor's lien on all the effects found on the premises. Issue by default was joined on his action against Mrs. Chotard, when W. R. Young, a citizen of Mississippi, intervened in the suit to assert his claim to the ownership of one-half of the stock, revenues, etc., on which Freidler prays for his lien, and to demand other rights to and uses of the plantation. In maintenance of his action he alleges that in pursuance of a contract entered into with Mrs. Chotard and husband, in June, A. D. 1882, subsequent to the date of the agreement between Freidler and Mrs. Chotard, he *became the owner* of and entitled to the rights and things claimed by him. Alleging that he fears collusion between Freidler and Mrs. Chotard to defraud him, his claim to said property and rights are set up against all parties. He avers that the agreement upon which Freidler bases his action is, in form and substance, only a common-law mortgage, and the property and rights claimed by him are in no way affected by Freidler's pretended claim to the ownership of the plantation, or by any liens or privileges in his favor. Young prays that Freidler's demand as to the ownership of plantation be rejected; that the contract be declared a common-law mortgage; that he have exclusive control of the plantation business; that his right to one-half of the stock, revenues, etc., of the plantation, for the period of 10 years, be recognized and made executory.

It may be that under the practice in Lousiana he has included, among his several demands, some issues upon which, as an intervenor, he could not in this suit be heard in the state court. But whatever view this court may entertain, should such questions of state practice be presented in a case on trial, the right to intervene "when one has an interest in the success of either of the parties to the suit, or an interest opposed to both, is clear enough. Code Pr. art. 390. Young's right to remove the suit is not adversely affected by the fact that he appears as an intervenor, and if he has presented such a controversy as is contemplated in the following section of Act 1875, the motion to remand should be denied: "When in any such suit mentioned in this section there shall be a controversy wholly between citizens of different states, and which can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested may remove said suit into the circuit court."

The intervenor claims that the pending suit, which he caused to be

removed, discloses several separable controversies which are wholly between himself and a citizen of another state, and which can be fully determined as between them independently of the other citizen of that state; that the issues he raises with Freidler can be determined without Mrs. Chotard being a necessary party, or that the issues he raises with Mrs. Chotard can be determined for or against himself, independently of and without the presence of Freidler. Without adopting the method for division, suggested in his brief, of the several demands presented in his petition, I think the following summary covers all the controversies or issues he presents:

(1) Shall the claim which he asserts to one-half of the stock, revenues, or on which the lessor's lien is prayed for, be allowed; if allowed shall it be free from the rights asserted by Freidler. (2) In order to maintain his claim to the effects, or free from Freidler's demand, he, denying Freidler's ownership, presents an issue as to the legal effect of the agreement between Freidler and Mrs. Chotard on his rights, and as to its effect between plaintiff and defendant in original suit. (3) Alleging his fear of collusion between Freidler and Mrs. Chotard to defraud him, he asserts his demands, and asks that they be recognized and made executory against all parties for 10 years, the period of his contract with Mrs. Chotard. Freidler put all of the intervenor's demands at issue by a general denial. So far no issue is joined between Young and Mrs. Chotard.

In this court Mrs. Chotard may or may not answer Young's petition. If she does not answer, and the court takes jurisdiction, he can put at issue and try, on default against her, all the issues involved in his petition. As the case now stands, are any of the controversies presented in the pleadings wholly between citizens of different states? Can any one of the controversies be fully determined as between Young and Freidler, or between him and Mrs. Chotard, without all three being necessary parties to the suit? Are not the claims or demands set up by Young so intimately blended, and inseparably connected, with the matters and issues asserted and denied by the parties to the original suit that no one of them can be taken up and tried without the judgment, whatever it may be, affecting, controlling, and binding all three of the litigants as to all the issues in the suit?

Before further discussing these questions it may be well to say that the right, under the law and constitution, to remove the *whole suit*, when there is such a controversy disclosed, even though in removing the whole suit the circuit court finds it necessary to take jurisdiction of and to decide issues which are solely between citizens of the same state, and which are entirely free from all entanglements with de-demands of a non-resident citizen, since the decision in *Barney* v. *Latham*, 103 U. S. 205, seems no longer an open question. In that case the United States supreme court seem to have considered, and to have reconciled, satisfactorily to themselves, this doctrine as

to the removal of the whole suit, containing issues, *some of which are solely and exclusively between citizens of the same state*, with the constitutional provision that the judicial power of the United States shall extend to "controversies between citizens of different states." At any rate, since that decision we are forbidden to question that, where a suit pending in the state court unites two separable controversies, one distinctly with a citizen of plaintiff's own state, and the other with a citizen of a different state, the cause may be removed.

In discussing the matter of separable issues, or in ascertaining whether such a separable controversy as is contemplated in the act of 1875 is presented by the intervenor, it should be kept in mind that Young asserts his ownership of the stock, etc., his right to the exclusive management of the plantation business, his right to enjoy one-half of the revenues thereof for 10 years, and his right to have all of his demands and claims made executory against all parties to the suit. This summary of his demands appears to me to forbid the idea that any court could allow or deny to him any of them without, at the same time, passing on controversies which, before his appearance in the suit, existed solely between the plaintiff and defendant, or on matters alleged and denied by and between citizens of the same state, and which are inseparably blended with all the items of the intervenor's demand, and to the allowance of which all the parties are necessary parties.

In the case of *Iowa Homestead Co.* v. *Des Moines Nav. & R. Co.* 8 FED. REP. 97, the complainant sued for a sum of money in a state court and claimed a special lien on certain lands. Litchfield, a citizen of New York, intervened in the suit to assert his ownership of the land, and to dispute the special lien, and caused the suit to be removed. Mr. Justice MILLER, on hearing the motion to remand, said, if complainant saw fit to dismiss his claim for the special lien on the land, the suit would be remanded. The complainant dismissed the claim to the special lien, but after its dismissal the court, having improvidently allowed Litchfield to file some other pleadings, had to pass upon a second motion to remand. The judges (MCCRARY and LOVE) of the Fifth circuit said, in considering the last motion to remand, that the first motion should have prevailed without any conditions whatever; that the issues presented by Litchfield did not warrant the removal; that the case was easily distinguished from the *Barney-Latham Case*.

In *Bailey* v. *New York Sav. Bank*, 2 FED. REP. 14, the plaintiff, a widow, sued the bank for $25,000, alleged to be a deposit made for her account by her deceased husband. The bank caused Lewis Bailey, executor of Bailey, deceased, a citizen of Connecticut, to be made a party, and the bank, while laying no claim to the money, refused to pay it over to any one except under an order of court. The state court allowed the executor to remove the suit on the ground, as the judge said, that the bank was a mere stockholder, and the real

controversy was between citizens of different states. On motion to remand, Justice BLATCHFORD, holding that the bank was not a mere stockholder, but a necessary party to any judgment that might be given in the case, since the suit discloses no "controversy wholly between citizens of different states, and which can be fully determined as between them, without the presence of a defendant citizen of the same state with plaintiff, actually interested in such controversy."

In the pending suit, before the appearance of Young, judgment could have been given in favor of either party without in any way binding or affecting Young's claims. His voluntary appearance makes the dual controversy, new parties, and separable issues; but he claims nothing that is not intimately blended and connected with the matters actually in controversy between plaintiff and defendant, citizens of the same state. Mrs. Chotard, default having been taken against her by Freidler, stands as denying all of the demands made by Freidler. So she will stand, as against Young's demand, should he take default against her. It is suggested in argument that she may not answer, or may admit Young's claim; but her action cannot in this way be anticipated. If she does not answer, Young cannot try his intervention without putting her in default, and then she will stand, as she is presumed now to stand, in court as having denied all of his claims. All three of the litigants have controversies together, and against one another. The several things claimed by Young form, more or less, the subject matter of a controversy between Freidler and Mrs. Chotard, and he could not obtain a judgment in any court allowing him any one of the rights or things claimed, without such judgment operating upon and binding plaintiff and defendant as to matters and things about which they are actually disputing.

Cause remanded.

TORPEDO CO. *v.* BOROUGH OF CLARENDON.

(*Circuit Court, W. D. Pennsylvania.* January 21, 1884.)

1. MUNICIPAL CORPORATION—REMEDY FOR DAMAGE CAUSED BY UNREASONABLE ORDINANCE—ACTION AT LAW.
   The ordinary remedy for an injury from the operation of an unlawful municipal ordinance is by an action at law, for complete redress in damages is generally thus attainable.
2. SAME—INJUNCTION REFUSED.
   A borough ordinance forbids any person to convey or have, etc., within the borough limits, any nitro-glycerine, (except enough to "shoot" any oil well within the borough, and this upon payment of a license fee,) under a penalty of not less than $50, nor more than $100, for each offense, upon conviction before the burgess or a justice of the peace. Plaintiff's works for the manufacture of nitro-glycerine are nine miles from the borough, and a magazine for its storage is one mile from the borough, on the opposite side. Plaintiff's employes conveying nitro-glycerine from its works to the magazine along public

highways, through the borough limits, were arrested and fined, but these judicial proceedings were removed into the proper county court, and are there pending. The plaintiff, alleging that the ordinance is unreasonable, unauthorized, and void, and injurious to its business, filed a bill in equity against the borough to restrain the enforcement thereof, etc. *Held*, that the case was not one for equitable relief, and, on this ground, a preliminary injunction refused.

In Equity. *Sur* motion for a preliminary injunction.

Brown & Stone, for complainant.

D. I. Ball, for defendant.

ACHESON, J. This is a suit by the Torpedo Company, a corporation of the state of Delaware doing business in the state of Pennsylvania, against the incorporated borough of Clarendon, in Warren county, in the latter state, to restrain the enforcement against the plaintiff of an ordinance of the borough, enacted April 24, 1882, which declares it to be unlawful for any person to "store, house, convey, carry, or have in his or her possession," within the borough limits, any nitro-glycerine, (except enough to "shoot" any oil well in the borough, on payment of a license fee of $10,) under a penalty of not less than $50, nor more than $100, for each offense, upon conviction before the burgess or a justice of the peace. The proper operation of oil wells, it seems, requires that torpedoes containing nitro-glycerine be exploded from time to time in the wells. The plaintiff has established works for the manufacture of nitro-glycerine in the county of Warren, nine miles from Clarendon, and on the opposite side of the borough there has been located a magazine of one of its customers for the storage of nitro-glycerine for the supply of the trade in the oil territory known as the Clarendon field, lying in and about the borough. The plaintiff alleges that to reach this magazine with supplies of nitro-glycerine it is necessary to traverse certain highways within the borough limits, but which do not pass through the thickly-settled portions of the town. To insure safety in transportation, the plaintiff has observed commendable care in providing wagons constructed specially for the purpose, with appliances well adapted to reduce the danger of explosion to the minimum, and it is alleged by the plaintiff that these precautions secure the public from all risk. The plaintiff began business after the passage of the ordinance, and the magazine was located so late as May or June, 1883. Employes of the plaintiff have been twice arrested and fines imposed for violations of the ordinance, but these judicial proceedings have been removed into the proper court of Warren county, and are there now depending. The plaintiff claiming that the regulation in question is unreasonable and oppressive,—abridging its legal right to use the public highways of the borough, and injuring its business,—and that the ordinance is without legislative warrant and void, prays the court for an injunction to restrain the borough from enforcing the same against the plaintiff, and from arresting its employes, or bringing or prosecuting any action, civil or criminal, against them for a violation thereof.

The affidavit in behalf of the defendant in opposition to the allowance of the present motion, sets forth facts in vindication of the ordinance as wise and reasonable, and controverts some of the material allegations of the bill. But were it clear that the ordinance is void, is this a case for equitable relief? Undoubtedly courts of equity often interdict the unlawful exercise by municipal corporations of their powers; and, possibly, cases of such peculiar hardship from the enforcement of a void ordinance in restraint of trade might arise, that a court of equity would feel moved to interpose, by injunction, even before its illegality had been established at law. But such cases would be exceptional. Dill. Mun. Corp. § 727; *Ewing* v. *City of St. Louis*, 5 Wall. 413; High, Inj. §§ 1242, 1244. The ordinary remedy for an injury from the operation of an unlawful municipal ordinance is by an action at law, for complete redress in damages is generally thus attainable.

The learned counsel for the plaintiff rely on *Butler's Appeal*, 73 Pa. St. 448. But it is not an authority, it seems to me, for the proposition that an injunction is a proper remedy for the injury of which the plaintiff complains. That was a case of a clearly illegal exercise by city councils of the taxing power. I have been referred to no precedent, nor have I been able to find any, where a court of equity in such a case as the present has granted the relief the plaintiff seeks. But in several analogous cases such redress has been denied, and the aggrieved party turned over to his legal remedies. *Burnett* v. *Craig*, 30 Ala. 135; *Gaertner* v. *City of Fond du Lac*, 34 Wis. 497; *Cohen* v. *Goldsboro*, 77 N. C. 2; *Brown* v. *Catlettsburg*, 11 Bush, 435. Here the plaintiff's legal remedies are, I think, ample. One of these has already been invoked; for by *certiorari* or appeal the proceedings against the plaintiff's employes for violation of the ordinance have been removed into the proper state court, and are there pending. It does not appear to me that the plaintiff is likely to sustain any injury which may not be fully and adequately compensated by an action for damages, should it be adjudged that the ordinance is invalid.

The motion for an injunction is denied.

WASHBURN & MOEN MANUF'G CO. *v.* WILSON.

(Circuit Court, S. D. New York. January 2, 1884.)

CONTRACT—CONSTRUCTION—DEPENDENT AND INDEPENDENT STIPULATION.

The Washburn & Moen Manufacturing Company granted Wilson an exclusive license to manufacture bale-ties under their patent, in New York city, for which he agreed to pay them certain royalties every month. He afterwards invented a splicing-machine, and made a written agreement with the company, by the terms of which he was to assign to them for $300 the patent for his machine when secured, and they were to grant him back a license to use the

machine, under certain conditions, while he was to continue paying the royalties. The patent was obtained, and the assignments were made according to agreement, but Wilson refused to pay the royalties. The manufacturing company thereupon brought suit to restain him from using the splicing-machine till the royalties were paid; but, *held*, that the license to use the machine was independent of the agreement to pay the royalties, which had to do only with the previous license to manufacture bale-ties.

In Equity.

W. B. Hornblower, for orator.

Edwin S. Babcock, for defendant.

WHEELER, J. The orators own reissued letters patent No. 7,388, dated November 7, 1876, and original letters patent No. 66,065, dated June 25, 1867, for wire bale-ties, and December 6, 1878, granted to the defendant an exclusive license for the city of New York and its neighborhood to make such ties of wire that had been before used for binding bales, for the term of one year, and agreed to license him for an additional year, for which he agreed to pay on the fifteenth day of each month a royalty of 10 cents for each 250 ties made the last previous month. The defendant invented a machine for splicing wire, made application for a patent, and on the twelfth day of June, 1879, while the application was pending, agreed with the orators that they should have the invention, when he got a patent, for $300, and grant him the right to use his machine in the United States except for uniting the ends of bale-ties in position around bales, and not to license any one else to make ties under their patents, nor engage in splicing wire themselves, within 25 miles of New York city, and that he should continue to pay the royalties on the former patents during their term on all ties he should make and not sell to the orators. His patent was granted and assigned to the orators, and a license back for his machine executed, according to the agreement, but he did not continue to pay the royalties according to the agreement, and they brought suit and recovered judgment for $728.71 arrears, with $313.15 costs. This suit is brought to restrain the defendant from using his machine without paying these royalties. These agreements were in writing, signed by the parties, and contained some stipulations other than those mentioned, not here material, but none that the license should cease on or be revocable for non-payment, and no express condition on the subject of the license.

It is claimed in behalf of the orators that the grant of the license by the orators, and the agreement to pay the royalties by the defendant, were so far dependent stipulations that the law would imply a condition that the benefits of one should not be enjoyed without a reciprocal performance of the other; or that such enjoyment without performance would be so unjust and inequitable that a court of equity should restrain the enjoyment until performance should be made or secured. This claim is not acquiesced in by the defendant, but is disputed. The court cannot make nor unmake, even in equity, the contracts of the parties; at most, it can only interpret and enforc

them. This is all that the orators claim; but they insist that these contracts should be so interpreted as to require performance by the defendant, if he is to enjoy the license. If the royalties were to be paid for the privileges of the license, so that one was the exact consideration for the other, there might be reason founded in some authorities for the orators' view. *Withers* v. *Reynolds*, 2 Barn. & Adol. 882; *Chanter* v. *Leese*, 5 Mees. & W. 698; *Brooks* v. *Stolley*, 3 McLean, 523. These royalties were stipulated for in the first contract before the subject of the license under consideration was in existence far enough to be mentioned or alluded to in it. The agreement to pay them was the consideration for the grant of the license under the patents which the orators then owned. The agreement to assign the patent for $300 appears to have been the substantial consideration for the license under that patent. The term of the license is the term of the patent. The right to the royalties expires with the term of the former patents. The defendant assigned his patent to the orators with the agreement that they should grant him back this license. In effect it was the same as if he had assigned all the rights secured by his patent, except those secured by the grant of the license, or had assigned the patent reserving those rights. Had the conveyance taken this form there would have been no grant of a license whatever which could have formed the consideration for the royalties, and no ground to claim that the machine of defendant should not be used unless the royalties should be paid. This is the substance of the arrangements made. The defendant never parted with the right to use his machine. By the instrument by which it was provided that he should assign his patented invention, it was provided that this right should be reassigned. He assigned the invention, and the right was reassigned. So this right was always his; he did not buy it, nor hire it, but created it under the law, and never agreed to pay anything for it, and cannot legally be compelled to pay anything as a condition for enjoying it.

Let there be a decree dismissing the bill, with costs.

FOGG *v.* FISK.

(*Circuit Court, S. D. New York.* January 25, 1884.)

1. PRELIMINARY EXAMINATIONS—PRACTICE IN STATE AND FEDERAL COURTS.
The examination of a party to a suit as a witness for the adverse party, pending in a state court under a provision of the Code of Procedure for that state, may be continued after the removal of such suit to the federal court, though such an examination would not be allowed under the practice of the federal court, had the action been originally brought there.

2. SAME — SURVIVAL OF PROCEEDINGS TAKEN IN STATE COURTS AFTER REMOVAL.

The removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court, and by section 4 of said act, it is provided that when any suit is removed from a state court to a circuit court of the United States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit has been removed.

At Law.

John R. Dos Passos, for plaintiff.

Miller, Peckham & Dixon, for defendant.

WALLACE, J. At the time this suit was removed from the state court by the defendant his examination as a witness was pending under an order of that court, directing him to appear and be examined before the trial as a witness at the instance of the plaintiff. By the Code of Civil Procedure of this state a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them, or either of them, and has the same effect as though the party were orally examined as a witness upon the trial. Section 883. The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application upon the ground that the examination of a party before the trial as a witness for the adverse party is not permitted by the practice of this court.

It is well settled in this circuit that section 914, Rev. St., for conforming the practice of the federal courts in suits at common law as near as may be to that of the state courts, does not apply to the taking of testimony, because the statutes of congress cover the whole subject; and these statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness. Rev. St. § 861; *Beardsley* v. *Littell*, 14 Blatchf. 102; *U. S.* v. *Pings*, 4 FED. REP. 714. If, therefore, this were an action originally brought in this court, the plaintiff should not be permitted to proceed with the examination of the defendant. But the removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court. Section 4 declares that when any suit is removed from a state court to a circuit court of the United States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. By force of this provision the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this court should be exercised to deprive him of the benefit of the order he has obtained and the proceed-

ing he has instituted. It lies with the defendant, therefore, to present some controling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested.

It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the supreme court at special term and at general term, and by the court of appeals; and that, although for a period of 18 months he was willing to submit his rights to the state courts, he invoked the jurisdiction of this court when there was no other resource left by which he could escape an examination. Certainly, there are no equities which should induce this court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the state courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, it can be as the declarations of a party; and it can also be used in other suits in the courts of this state between the same parties, or their privies, pursuant to section 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the state court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit.

The motion is granted.

ASHUELOT SAVINGS BANK *v.* FROST.

(Circuit Court, D. New Hampshire. 1884.)

CONVEYANCE IN LIEU OF ATTACHMENT HELD NOT IN FRAUD OF CREDITORS.

Where a bank levied an attachment upon lands owned by its treasurer who was under liabilities to it far exceeding in amount the value of the land, and in order to save the trouble of legal proceedings he made a deed of the land to the bank in lieu of the attachment, *held*, that creditors of his who afterwards attached the land could not avoid the conveyance to the bank.

At Law.

Batchelder & Faulkner, for plaintiff.

A. S. Waite, for defendant.

LOWELL, J. In this writ of entry the plaintiff corporation demands several parcels of land in the county of Cheshire and state of New

Hampshire, said to be worth about $10,000. The parties have waived trial by jury. The evidence is that Ellery Albee had been treasurer of the savings bank for many years, and in March, 1881, it was discovered that he had embezzled the money or property of the bank to an amount which was believed to be, and which has proved to be, not less than $80,000. March 16, 1881, he made to the bank a deed of the land in question in the usual form of an unconditional conveyance. The defendant was a creditor of Albee, and attached the lands after the deed had been made and recorded, and having obtained judgment caused them to be duly set off to him on the execution. The single question in this case is whether the deed to the bank was in fact a mortgage. It is agreed by counsel that the law of New Hampshire makes every deed which is given upon a secret condition voidable by the creditors of the grantor, however honest the transaction may be, and though the condition is merely a parol defeasance. *Coolidge* v. *Melvin*, 42 N. H. 510, and cases; *Winkley* v. *Hill*, 9 N. H. 31; *Ladd* v. *Wiggin*, 35 N. H. 421.

The grantor, Albee, testifies for the defendant by deposition: "I do not understand that there was any consideration, except that they were, as I understand, given as collateral security to secure my bondsmen." By "they" he means the deed; for, though there was but one, he had before testified that he did not remember how many there were. The deposition of this witness is not very satisfactory, because he remembers but little with any positiveness, and speaks of "impressions" chiefly. He further says that he did not know the amount of his indebtedness to the bank at the time, and that no valuation was agreed on at which the land was to be taken. On the other side, the evidence is that the bank had laid a first attachment on the land; that the amount of defalcation was approximately known, and far exceeded the value of the property; that Albee himself, knowing of the attachment, offered to give the deed to save the plaintiff bank the trouble and expense of legal proceedings; and that, accordingly, the deed was given and taken without any condition of any sort. If such was the transaction, the inference is that the deed was given, instead of the attachment, as a payment so far as it would go, for the debt. The plaintiff might be required to account in some form of action for the full value if Albee or his sureties should be ready to pay the remainder, but it would be as payment, and not as security, that the credit would be due.

I consider the plaintiff's case to be made out by a decided preponderance of the evidence. Verdict for the plaintiff.

TEXAS & ST. L. RY. CO., in Missouri and Arkansas, *v.* RUST and another.

(*Circuit Court, E. D. Arkansas.* October Term, 1883.)

1. CONTRACT—STIPULATED DAMAGES FOR FAILURE TO PERFORM.
   A provision in a contract to build a railroad bridge that, in case of non-completion of the bridge or providing a crossing for trains by a given date, the sum of $1,000 per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages.
2. SAME—DELAY—GOOD FAITH.
   In such case, if the contractors act in good faith, and the delay results from causes beyond their control, they will not be liable for damages in excess of the stipulated amount.
3. SAME—ASSUMING RISKS—EXCUSE.
   The fact that the contractors were retarded in the work by high water, sickness of hands, and sunken logs encountered in sinking piers, does not excuse them from performance of their contract. They assumed these risks when they executed the contract, without a provision exempting them from the consequences of such casualties.
4. SAME—CONSTRUCTION OF CONTRACT—PROVINCE OF COURT AND JURY.
   It is the duty of the court to determine the construction of a contract. But where it has relation to a trade, profession, or business of a technical character, and is expressed in terms of art, or in words having a technical or peculiar sense in such trade, profession, or business, resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate; and when such testimony is conflicting, the question of the meaning of such terms and words must be referred to the jury.
5. SAME—WAIVER—SILENCE.
   A waiver is not to be implied from the silence of one who is under no obligation to speak. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation.
6. SAME—ADDITIONAL WORK—EXTENDING TIME.
   If, after a contract is made for building a bridge by a given day, the owner of the bridge directs the contractor to make additions or changes, or do work on the bridge not covered by the contract, which will require longer time to complete the bridge, the time necessary to do such extra work must be added to the contract time allowed for the completion of the work.

At Law.

John McClure, H. K. & N. T. White, and *Phillips & Stewart,* for plaintiff.

U. M. & G. B. Rose and *M. L. Bell,* for defendants.

CALDWELL, J., (*charging jury.*) On the twenty-second day of April, 1882, the parties entered into a written contract for the construction, by the defendants for the plaintiff, of a railroad bridge across the Arkansas river, at the price of $305,000. Differences arose between them as to their relative rights, duties, and obligations under the contract, which resulted in the institution of this suit. The matters in controversy between them can best be brought to your attention by stating the defendant's claims first, which may be stated thus:

1. Contract price for bridge,	$305,000 00
2. For sinking piers, other than center pier, below 60 feet, at $200 per vertical foot, as per contract,	1,000 00
3. Extra for sinking center pier 10 feet below 60 feet,	15,000 00
4. Extra for draw protection,	21,530 00
5. Extra for iron stringers,	2,646 00
6. Extra for two shore abutments,	1,600 00
7. Extra for additional material for piers sunk below 60 feet,	1,900 00
8. Extra for trestle approaches,	911 70
	$349,587 70

Against this sum the defendants admit credits as follows:

1. For reduced height of piers,	$ 8,100 00
2. For material and labor to complete bridge after defendants quit work,	6,000 00
3. Payments on estimates,	267,959 79
	$282,059 79

This makes the balance claimed by the defendants as due to them from the plaintiff $67,527.91. The parties agree as to the amount paid defendants on estimates, *i. e.*, $267,959.79. The items in the defendants' accounts which the plaintiff disputes are, the charge for sinking center pier below 60 feet in excess of $200 per vertical foot; the whole of the charge for a draw protection; the whole of the charge for iron stringers for draw span; the whole of the charge for extra materials for piers sunk below 60 feet; and the charge for shore abutments is said to be excessive to the amount of $200.

The plaintiff's claims against the defendants may be stated thus:

1. Payments made on estimates,	$267,959 79
2. Weekly reduction in price of bridge for its non-completion, 39 weeks and 4 days, at $1,000 per week,	39,570 88
3. Claim for general damages for failure to complete bridge,	200,000 00
4. For money expended in completing bridge after defendants quit work,	15,075 61
5. Reduction in contract price of bridge on account of reduced height of piers,	8,100 00

The defendants dispute the plaintiff's claim for damages, including the $1,000 per week specified in the contract, on the ground that plaintiff waived the same; they admit their liability for what it cost the plaintiff to complete the bridge after they quit work upon it, but they say the amount charged therefor above $6,000 is excessive. The provisions of the contract, and the law applicable to the matters in controversy between the parties, will now be stated in their order. The contract contains this provision:

"In case of non-completion of the bridge upon November 1, 1882, or providing a crossing for trains by said date, then in such event the sum of $1,000 per week for the period of time such completion or provision for crossing of trains is delayed shall be deducted from said contract price; and in like manner, should the bridge be completed at an earlier date than November 1, 1882, then in such event the sum of $1,000 per week shall be added to

said contract price, for the period by which said fixed date of completion shall be anticipated."

It is a conceded fact in the case that the bridge was not completed so trains could cross on it until the fourth day of August, 1883, and that no other mode of crossing trains was provided by the defendants before that time; and the plaintiff claims that, under the clause of the contract I have quoted, it is entitled to a reduction of $1,000 per week in the contract price of the bridge, from the first of November 1882, to the fourth day of August, 1883, when the bridge was so far completed as to admit of the passage of trains over it. It is open to parties when they make a contract to agree on the amount to be paid or allowed by either to the other as compensation for a breach of it. Sometimes stipulations providing for the payment of a fixed sum for a breach of contract are termed penalties, and go for nothing for reasons not necessary to be stated here. But where the damages for the breach of the contract are uncertain in their nature, or difficult to be proved with any degree of accuracy, and the amount fixed by the contract is not grossly in excess of a probably just compensation, that sum will be taken as the true amount of the damages, and is called in legal parlance liquidated damages.

The difficulty of ascertaining, with any degree of certainty, the damages the plaintiff sustained, is made apparent by the testimony of the witnesses in the case, who estimated the damages from half a million of dollars down to a comparatively small sum. You will observe the contract does not provide for the payment of a large sum in gross for a failure to have the bridge completed on the day named, or for any mere technical breach of the contract. If it had done so a different question would be presented. The damages fixed by the contract do not accrue for failure to complete the bridge on a given day, but for "non-completion of the bridge, or of providing a crossing for trains by said date," which latter alternative could have been complied with by providing a boat to transfer trains; and upon failure to do either, the damages are not given in one gross sum the day the default accrues, but are graduated according to the length of time the breach continues, and are not excessive or unreasonable in amount. You are therefore instructed that the contract fixed the amount of the defendants' liability for non-completion of the bridge, or failure to provide a crossing for trains by the first of November, 1882, and afterwards. That amount is $1,000 per week from that date until a crossing for trains was provided. As the defendants seem to have acted in good faith, and the delay resulted from causes beyond their control, the plaintiff will not be permitted to show the damages were more, nor the defendants that they were less, than the stipulated amount. Nor does the fact, if it is a fact, that the defendants were unexpectedly retarded in the work on the bridge by high water, sickness of hands, and sunken logs, encountered in sinking the piers, excuse them from performance of their contract, or from any of its

obligations. Against the consequences of such casualties they might have guarded by a provision in the contract. Not having done so, it is not in the power of the court or jury to relieve them. *Dermott* v. *Jones*, 2 Wall. 1.

The learned counsel for the plaintiff has argued that this clause of the contract relates to the price to be paid for the bridge, which it is said is made to depend on the time of its completion, and that the $1,000 per week is a "deduction from the contract price" of the bridge, and not damages for its non-completion. In construing a contract every part of it must be taken into consideration. It is perfectly obvious from the face of the contract, as well as from the correspondence which preceded its execution, that $305,000 was deemed by both parties a fair and just price for the bridge, and that the time fixed for its completion was thought to be reasonable. In view of these facts it is unreasonable to suppose that the parties deliberately agreed that the more time and money it took to build the bridge, beyond what the contract contemplated, the less price the contractors should receive for it by the amount of $1,000 per week; and that over and above the loss of this sum, which might absorb the price of the bridge and more too, they should be liable for all damages sustained by non-completion of the bridge for the same period this $1,000 per week was deducted. The contract does not mean this. The $1,000 per week is damages, and it is none the less so because it is to be "deducted from the contract price."

Witnesses were examined, without objection from either side, on the question of damages. On the case as it stands such evidence is irrelevant, and is excluded from your consideration. You will therefore reject *in toto* the plaintiff's claim of $200,000 for general damages.

The provisions of the contract bearing on the question whether the defendants are entitled to compensation above $200 per vertical foot, for sinking the center pier below 60 feet, are the following:

"A center pier consisting of wrought-iron cylinders, sunk to a depth of sixty feet below low water into the compact material of the bed of the river, making a total height of 100 feet from base of pier to bridge seat, the center column being seven feet in diameter, and the six outside columns four feet in diameter. * * * Seven intermediate piers consisting each of two wrought-iron cylinders, seven feet in diameter, sunk and filled in manner provided for center pier. * * * If, during the progress of sinking of piers, it shall be decided to found any of them at a less depth than said sixty feet below low water, then in such event the sum of $200 per vertical foot of pier for said reduced height shall be deducted from contract price, and in like manner should it be decided to sink to a depth below sixty feet, and not below seventy feet, then in that event there shall be added to the contract price said sum of $200 per vertical foot of pier."

The defendants' contention is that the word "piers" in the last of these clauses, in the understanding and usage of engineers and bridge builders, does not include the center, or draw pier. The evi-

dence shows that the difference in the cost of sinking the center and any other pier is as three and a half or four to one. It is the duty of the court to determine the construction of a contract, and this duty it is usually able to perform without the aid of a jury or extrinsic evidence. But it not unfrequently occurs that contracts have relation to a trade, profession, or branch of business of a technical character, and are expressed in terms of art, or in words having a technical or peculiar sense in such trade or business, with which the court is not familiar. In such cases resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate, and when such evidence is conflicting, as it is in this case, the question of the meaning of such terms and words in the contract must be referred to the jury.

It is under the operation of this rule that it becomes proper for the court to refer to you for decision these questions: (1) Whether the word "pier," as used in that clause of the contract providing for the sinking of "piers" below 60 feet, at the option of the plaintiff, does or does not include the center or draw pier; (2) whether a contract to construct "a 355 feet rectangular wrought-iron truss-draw" requires the main stringers for such draw-span to be constructed of iron; and (3) whether the contract to built the "bridge complete" included a draw protection?

You have heard the testimony of the engineers and bridge builders who where called as experts, and of the parties who made the contract, and from this evidence you will determine these questions. If you find the word "pier" in the clause referred to did not include the center or draw pier, and that the sinking of that pier below 60 feet was not provided for in the contract, then you will allow the defendants the reasonable value of their labor and materials used in sinking the center pier below the depth of 60 feet; and you will make a like allowance for the draw protection and iron stringers for the draw span, if you find they were not included in the original contract. One having no knowledge of the science of engineering or bridge building would construe the word "piers" in the clause of the contract under consideration to include all the piers in the bridge; and you will so construe it, unless it is shown by a preponderance of evidence that among engineers and bridge builders it has in the connection in which it is here used a particular or technical meaning which limits and restricts it to the piers which support the fixed spans.

In relation to the questions whether the "draw protection" and the "iron stringers" for the draw span are called for by the contract, I call your attention to this clause of the contract: "Plans, diagrams, and detailed specifications embodying the above stipulations, which shall meet the approval of the chief engineer, will be promptly furnished upon acceptance hereof."

The plaintiff claims that "plans, diagrams, and detailed specifications" were furnished by defendants under this clause of the contract and submitted to and approved by plaintiff's chief engineer, and that the detailed specifications thus submitted contained this provision: "The draw protection to consist of two timber cribs, 24 feet by 30 feet, as shown on drawings, sunk to bed of river, filled with oak piles driven to a firm bearing; the cribs to be carried up to level of ordinary high water and filled with rip-rap stone;" and that the plan and diagram furnished conformed to this specification and showed a draw protection. And the same specifications contain this provision: "The trusses of the draw to be built entirely of wrought-iron, floor beams and main stringers of iron. * * *" If you find the specifications submitted to and approved by the plaintiff's chief engineer, under the contract, contained the clauses I have quoted, then it is quite clear the defendants themselves understood the contract to include the draw protection, and that the "main stringers" of the draw span were to be "of iron."

Under the clause of the contract which I have quoted the "plans, diagrams, and specifications," when submitted to and approved by the chief engineer, became a part of the contract, and whatever is included in them is included in the contract; and if you find the specifications submitted by the defendants under the contract to the plaintiff's engineer and approved by him contained the provisions I have quoted then you can make no extra allowance to defendants for the "draw protection" or for "main iron stringers" for the draw span.

The defendants say the plans and specifications in evidence are not those originally furnished under the contract, but a copy subsequently made in which the draw protection and iron stringers are called for in pursuance to an agreement to furnish them as extras, made after the first plans were delivered. This is denied by the plaintiff, and you will settle this in common with all other disputed facts.

I now come to the claim of the defendants that the sum of $1,000 per week stipulated for in the contract for non-completion of the bridge was waived by mutual consent of the parties. If one in possession of a right conferred either by law or contract, knowing his rights and all the attendant facts, does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon it, he is said to have waived it. No man is compelled to stand on a right which the law or his contract gives him. Parties have the same right to add to or vary a contract after it is made that they had to make it originally. The burden is on the party asserting a waiver or any modification or alteration of a contract to prove it. It is not necessary to show an express agreement for the waiver or modification; like any other fact, it may be proved by circumstances, such as the acts or language of the parties, which, of course,

includes their correspondence and any other facts which throw light on the question.

The right of the plaintiff under the contract to the $1,000 per week for the non-completion of the bridge is a valuable right of which it is not to be deprived without its consent, either expressed or implied. What inducement or consideration was there for the plaintiff to waive its right to all damages for non-completion of the bridge? It was the duty of the defendants, under the contract, to go forward and complete the bridge, and this was a continuing duty. They had no right to demand of the plaintiff a relinquishment of its right to damages as a condition of going forward with the work. The contract does not state when the $1,000 per week is to be deducted from the contract price, and the plaintiff was not bound to deduct it from the monthly estimates; and a failure, therefore, to make a claim for it, from month to month, is not sufficient evidence of a waiver. A waiver is not to be implied from the plaintiff's silence, because there was no obligation on the plaintiff to say anything on the subject. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation. You will remember that it is not the province of courts and juries to make contracts for parties, or to alter them after they are made, but to enforce them as the parties made them. You should not, therefore, let any supposed considerations of hardship influence you to find a waiver upon insufficient or unsatisfactory testimony. It may be that $1,000 a week was more damages than plaintiff actually sustained for some weeks after the first of November, 1882, but, on the other hand, it is obvious that that sum is greatly less than the damages that accrued weekly after the completion of the road, which occurred some weeks before the bridge was completed. But there may have been a partial or limited waiver of this right, or rather an extension of the original contract time for completing the bridge, in a mode to which I will now call your attention.

If the plaintiff directed the defendants to make additions or changes, or do work on the bridge not covered by the contract, and which would require longer time to complete the bridge, and this fact was known to both parties, then it must be implied that both parties consented to such an extension of time as was necessary or reasonable for making such additions or changes, but no more. *Manuf'g Co.* v. *U. S.* 17 Wall. 592. If such orders for additions or changes in the bridge were given by the plaintiff, and the defendants, with good faith and with reasonable diligence and adequate force and appliances, performed such extra work, then the time required to do the same must be added to the contract time allowed for completion of the bridge; as, for instance, if you find additions and changes were made at plaintiff's request, and that the time necessary to make them was, say one week, then the time at which the $1,000 per week was to commence to accrue under the contract would be postponed one week. You are

the judges of the facts, the weight of evidence, and the credibility of witnesses.

The jury found a verdict of $2,489.97 for the plaintiff, which neither party sought to disturb.

BRADLEY and wife *v.* HARTFORD STEAM-BOILER INSPECTION & INS. CO.[1]

(*Circuit Court, E. D. Pennsylvania.* December 22, 1883.)

1. NEGLIGENCE—EXPLOSION OF BOILER—LIABILITY OF PUBLIC INSPECTORS.
   A corporation authorized by statute to insure and also to inspect steam-boilers and stationary steam-engines, and issue certificates, stating the maximum working pressure, which certificates should be accepted by the chief inspector for the city of Philadelphia, is liable for damages resulting from a negligent inspection and false certificate.
2. SAME—BURDEN OF PROOF.
   Where a steam-boiler insured and inspected by such corporation exploded, killing a child of the plaintiffs, the burden of proof was upon the plaintiffs to show (1) that the certificate accorded to the boiler a greater capacity of resistance than it would safely bear, thus authorizing its use under a dangerous degree of pressure, and (2) that this was the result of negligent inspection.
3. SAME—EVIDENCE—ADMISSIBILITY OF TESTS UPON ANOTHER BOILER SIMILAR IN CONSTRUCTION TO THE BOILER IN QUESTION.
   Experimental tests, made after the accident, upon a boiler similar in construction to the one in question, are admissible in evidence for the purpose of showing that the defendant was not negligent in the inspection of the boiler which exploded.
4. SAME—INSURERS.
   The defendants were not insurers as respects the plaintiffs, and are not, therefore, responsible for the consequences of according to the boiler a higher degree of resisting power than it would safely bear, unless their doing this resulted from negligence.

Motion for a rule for a new trial. This was an action upon the case brought by William Bradley and wife, citizens of Pennsylvania, against The Hartford Steam Boiler Inspection & Insurance Company, a corporation of Connecticut, to recover damages for the death of plaintiffs' child, caused by the explosion of a boiler inspected and insured by the defendant. By an act of Pennsylvania, approved May 7, 1864, (Pamphlet Laws 1864, p. 880,) the mayor of Philadelphia is directed, by and with the advice of councils, to appoint inspectors of steam-boilers, and a penalty is imposed upon any using boilers without first obtaining a certificate from the inspectors that the same was found safe and stating its maximum working pressure. By an ordinance of Philadelphia, approved July 13, 1868, (West's Dig. 417,) the number and duties of the inspectors are set forth. By an act of Pennsylvania, approved July 7, 1869, (Pamphlet Laws 1869, p. 1279,)

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

the defendant was authorized to inspect steam-boilers and issue certificates in accordance with the above recited act and ordinance.

George H. Van Zandt and *Furman Sheppard*, for plaintiffs.

Frank Wolfe and *Benjamin Harris Brewster*, for defendant.

BUTLER, J., (*charging jury.*) By virtue of the statute, to which your attention has been called, authorizing the defendants to inspect steam-boilers in pursuance of the laws of this state, the defendants' acceptance of the authority thus conferred, and undertaking to inspect Gaffney & Nolan's boilers, at the corner of Martha and Collins streets, it became their duty to make this inspection in the manner indicated by the city ordinance read to you with the care skill which the importance of the duty demands, and to grant a certificate specifying the extent of pressure the boilers would safely bear. The plaintiffs allege that the certificate granted accorded to the boiler in question, a greater power of resistance than it would safely sustain; that this was the result of carelessness in the inspection, and that in consequence a greater strain was put upon the boiler than it would bear, whereby it was exploded, and the plaintiffs' son killed. If this allegation is sustained by the evidence, the plaintiffs are entitled to your verdict; and, in such case, should be awarded a sum equal to what you may find would have been the value of the child's services to his parents, during minority, if he had lived. Is the allegation sustained by the evidence? This inquiry presents two questions, and two only. (1) Did the certificate accord to the boiler a greater capacity of resistance than it would safely bear, thus authorizing its use under a dangerous degree of pressure? And if it did, then (2) was this the result of negligent inspection? The burden of proof respecting both questions is on the plaintiffs, who must show by satisfactory evidence—*First*, the incapacity of the boiler to sustain the pressure accorded; and, *second*, that the failure to discover this incapacity, and granting the certificate to use it at so high a rate, was the result of negligence.

Considering these questions in their order, you will first inquire whether the plaintiffs have shown that the boiler would not safely bear the certified pressure. They called before you several mechanical engineers as experts, some of whom testified from investigations made after the explosion, that, in their judgment, the boiler-head would not safely sustain the pressure, and gave you their reasons for this conclusion. Some of these witnesses, as the court understood them, did not unite fully in this judgment. This, as you observe, is the opinion simply of skilled and intelligent witnesses, who had no opportunity of examining and testing the head (the only part alleged to be defective) before the explosion. On the other hand, the defendants have called before you the manufacturers of the boiler, who testify not only that the boiler was constructed of good material, and in the best manner as respects workmanship, but also that they subjected it to the hydrostatic test, and thus actually ascertained that it

would safely bear a considerably higher degree of pressure than the certificate subsequently accorded it. The defendants' agents, who inspected the boiler and granted the certificate, testify that they also subjected it to this test, and ascertained it to be capable of bearing the pressure accorded, with safety. The engineer who was first placed in charge testifies that for the several weeks he ran the engine the boiler sustained this pressure with safety. Several witnesses have testified that, with a view of ascertaining what pressure such a head would bear, a short boiler, with a head precisely like this, was manufactured after the accident, and subjected to the hydrostatic test, under the supervision of the city inspector; and that it actually bore between four and five hundred pounds to the square inch. The defendants also called experts, who, from the appearance of the boiler, expressed the judgment that it would safely bear the pressure certified. Now, gentlemen, under the evidence (and if there is anything more bearing upon this question than I have referred to, you will remember and consider it,) can you say that the boiler in question would not safely bear the pressure accorded it? If you cannot, then your verdict must be for the defendants without going further. If you find it was not capable of bearing this pressure, then you will pass to the second question, to-wit, does it appear from the evidence that the defendants were negligent in not discovering this?

The defendants were not insurers, as respects the plaintiffs, and are not, therefore, responsible for the consequences of according to the boiler a higher degree of resisting power than it would safely bear, (if they did so,) unless their doing this resulted from negligence. As before stated, it was their duty to inspect and test the boiler, as has been explained to you. If the want or insufficiency of resisting capacity could be discovered by such inspection, they should have discovered it, and failure to do so, under such circumstances, would be negligence. They were not required, nor authorized, however, to cut or chip the iron, and thus ascertain its quality, but to examine the boiler and its workmanship carefully and intelligently, and see whatever could thus be seen, and to subject it to the prescribed hydrostatic test. If they did this, and certified according to their best judgment thus formed, they are not responsible, no matter what latent defects may have existed. Does the testimony warrant a conclusion that this duty was not properly performed? Can you say that the boiler was subject to any defect discoverable by such an inspection? As before stated, the only defect alleged was in the head. This was of cast iron, flat, with the flange turned inward. If such heads as you find this to have been were in common use, and thus approved by manufacturers and the trade, the defendants cannot be held guilty of negligence in failing to condemn it on this account. That such heads were in common use at the time, the testimony on both sides would seem to put beyond doubt. That other heads, of a different type, might be safer, or that experts differ in judgment on

this subject, is unimportant. The defendants cannot be found guilty of negligence in failing to condemn a head such as was in general use, and thus proved to be reasonably safe, or at least shown to be so esteemed.

The plaintiffs, however, contend, and have endeavored to prove, that this head, aside from its kind and material, was defective in manufacture, in that the man-hole plate, as they assert, was irregular or uneven on its surface, so that when bolted down upon the head, to make a close joint, it would strain the metal of the head, and in some other minor respects. While two, and possibly more, of the plaintiffs' experts testify to such defects of construction, others, and probably a large number of the plaintiffs' witnesses who had an equal opportunity of examining the head, testify either that they did not find these defects, or that they attach no importance to them. On the other hand, the defendants have exhibited the man-hole plate to you, and called witnesses, who, examining it in your presence, say it does not exhibit such uneven surface, and that it cannot have been altered in this respect since the accident.

To the court the exhibition of the plate, with this testimony, seems to be a complete and conclusive answer to the plaintiffs' allegation in this regard. You will say, however, whether it is so or not. Other experts called by the defendants, tell you that there were no defects in the boiler-head, such as the plaintiffs ascribe to it, nor any other that a careful and competent inspector could have discovered. The city inspector, Mr. Overn, called by the plaintiffs, as well as the defendants, tells you distinctly and emphatically, that no imperfection of any description could have been discovered in it before the explosion. He further tells you that he, as inspector, would certainly have passed it, and accorded the pressure certified; that the broken parts, examined by him after the accident, showed plainly that the explosion resulted from faultiness of the iron alone, which faultiness no previous inspection could have revealed. The defendants' agents, who inspected and tested the boiler, describe to you how they did it; testify that they were careful in all respects; that they could discover no defect; and that it safely bore the prescribed test. The court sees nothing to justify the suggestion that these inspectors were wanting either in experience or intelligence. Now, gentlemen, can you say that the want of resisting power in the boiler (if it existed) should have been discovered by inspection?

I have little more to say. Unless the evidence satisfies you that the boiler would not bear the pressure accorded to it, and also satisfies you that this incapacity to bear such pressure could have been discovered by proper inspection, your verdict must be for the defendants. I deem it my duty to say to you, that the plaintiffs' case, in my judgment, is weak, as respects both these points; so weak as hardly to justify a verdict in their favor. The question, however, is submitted to you, to be determined according to your judgment. In submitting

it I caution you against all suggestions of sympathy or prejudice. They have no proper place in a court of justice.

The point submitted by the defendants, to-wit: "That under all the evidence as presented, the verdict must be for the defendants," was reserved by the court.

Verdict for defendants.

The plaintiffs moved for a rule for a new trial, assigning for reasons that evidence was admitted concerning an experimental test of a different boiler than the one in question, but said to be constructed in a similar manner; that the court charged that the defendant was not guilty of negligence if the boiler in question was of a kind in common use and approved by manufacturers and the trade, and properly inspected and tested; and because the court declared that the plaintiff's case was so weak as hardly to justify a verdict in their favor.

Rule discharged.

Vide Rose v. *Stephens & Condit Transp. Co.* 11 FED. REP. 438.

VIETOR and others *v.* ARTHUR.

(*Circuit Court, S. D. New York.* February, 1884.)

CUSTOMS DUTIES — WOOLEN STOCKINGS — SPECIFIC STATUTE NOT REPEALED BY GENERAL.

The specific provisions of the act of July 14, 1862, § 13, fixing the duty upon "stocking, etc., made on frames," are not repealed, with respect to stockings made of either wool or worsted and cotton, by the general provisions of the act of March 2, 1867, § 2, regulating the duty upon "all manufactures of wool."

Motion for New Trial.

Stephen G. Clarke, for plaintiffs.

Elihu Root and *Samuel B. Clarke*, for defendant.

COXE, J. Prior to the Revised Statutes, the plaintiffs imported into this country stockings composed of either wool or worsted and cotton. They were made on frames and worn by men, women, and children. The collector assessed them under the second section of the act of March 2, 1867, as follows:

"On woolen cloths, woolen shawls, and *all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for*, fifty cents per pound, and, in addition thereto, thirty-five per cent. *ad valorem*. On flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and *all manufatures of every description composed wholly or in part of worsted*, the hair of the alpaca, goat, or other like animals, except such as

are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound," etc. 14 St. at Large, 559.

The importers insisted that they should have been classified under section 13 of the act of July 14, 1862, as follows:

"Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles *made on frames, of whatever material composed, worn by men, women* and children, and not otherwise provided for." 12 St. at Large, 556.

The supreme court, having the provisions of the Revised Statutes under consideration, as applicable to these identical importations, say, in *Vietor* v. *Arthur*, 104 U. S. 498:

"It is also well settled that when congress has designated an article by its specific name, and imposed a duty on it by such name, general terms in a later act, or other parts of the same act, although sufficiently broad to comprehend such article, are not applicable to it. * * * It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different enactments."

Here, then, is a general and long recognized rule of statutory construction applicable to the law as it existed both before and after the Revision, as applicable to the case at bar as to the case the supreme court were considering. Tested by it the position of the plaintiffs seems well taken. They imported "stockings made on frames worn by men, women, and children." It would be difficult to employ language more correctly describing the articles—the duty being imposed without reference to the material. But it is asserted that the general language of the act of 1867, viz., "manufactures of wool of every description" and "knit goods * * * composed wholly or in part of worsted" repealed the provisions quoted from the act of 1862. That it does not do this expressly is admitted, but it is argued that it operates as a repeal by implication.

The act of 1867 was, to use the language of defendant's brief, "intended to be a complete and exhaustive revision of the tariff so far as it related to wool and articles containing wool." It certainly was very comprehensive, specific, and minute in its classifications. That in such an act, where "buttons," "head-nets," and "hats of wool" were not forgotten, no mention should have been made of "stockings made on frames" or the acts which for many years imposed a duty upon them by that name, is indeed significant. Within the rule just quoted from the supreme court the specific description in the act of 1862 was not affected by the general description in the act of 1867. When the collector turned to the former act he found precisely what the law requires him to search for in the first instance—a particular description of the imported articles. There was no need to examine further. His duty was done.

The motion for a new trial is denied.

MIDDLETON PAPER CO. *v.* ROCK RIVER PAPER CO., Defendant, and another, Garnishee.

(*Circuit Court, W. D. Wisconsin.* January 26, 1884.)

1. FEDERAL COURT PRACTICE—PROCESSES—HOW ISSUED.
   All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court, or a circuit court, shall bear *teste* of the chief justice of the United States. Section 911, Rev. St.
2. SAME—GARNISHEE PROCEEDINGS—SUMMONS IN—HOW ISSUED.
   The summons in a garnishee proceeding is "process" within the meaning of the statute prescribing the manner in which processes shall issue from the federal courts, both the statutes and the decisions of the state courts regarding the garnishee proceeding as the commencement of a new suit against the defendant therein.
3. SAME—SUMMONS ISSUED BY THE ATTORNEY—AMENDMENT.
   A process which has been issued by the attorney when it should have been issued by the clerk is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons the court gets no jurisdiction of the case, and there is nothing to amend.

At Law.

Tenny & Bashford, for plaintiff.

Pease & Rugen, for defendant and garnishee.

BUNN, J. This action was brought by the plaintiff, a citizen of Ohio, against the defendant, the Rock River Paper Company, a citizen of Wisconsin, upon an acceptance made by said defendant in favor of the plaintiff. John Hackett, also a citizen of Wisconsin, was served with garnishee process, issued and signed by the plaintiff's attorneys, according to the forms of proceeding in such cases under the laws of Wisconsin. The defendant's attorneys, appearing for the garnishee for that special purpose, move the court to set aside the garnishee proceedings, on the ground that no sufficient process has been served upon the defendant. Section 911, Rev. St., provides that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court or a circuit court shall bear *teste* of the chief justice of the United States. And rule 20 of the rules for this district provides that all process shall be issued by the clerk under the seal of the court, and shall be signed by the clerk issuing the same, and shall be returnable at Madison or La Crosse, as directed by the party applying therefor. The garnishee summons in this case, served upon the defendant in the garnishee proceedings, is in the form prescribed by the law and practice in the state court, runs in the name of the state of Wisconsin, has no seal, and is issued and signed by the plaintiff's attorneys.

The question is whether in view of the foregoing provisions such a practice can obtain in this court; and it seems quite clear that it

cannot. It is true that section 914, Rev. St., provides that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. But it is evident that this provision must receive a reasonable construction in connection with the other provisions above referred to, requiring process to be issued by the clerk of this court under the seal thereof. Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit. But I believe it has uniformly been held, in view of the provisions of congress, that this cannot be done in the federal courts; and so it has been the uniform practice in this state, so far as our knowledge goes, that the summons, as well as writs of attachment and arrest, are issued by the clerk of this court under the seal of the court, run in the name of the president of the United States, and bear *teste* of the chief justice of the United States. In other respects they are in substance and form as prescribed by the laws of the state.

It is insisted, however, by plaintiff's attorneys, that a garnishee summon is not "process." I am unable to concur in this view. Both the statues and decisions of the state courts regard the garnishee proceedings as the commencement of a new suit against the defendant therein. Section 3766, Rev. St. Wis., provides: "The proceedings against a garnishee shall be deemed an action, by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions of law relating to proceedings in civil actions at issue, including examination of the parties, amendments, and relief from default, or proceedings taken, and appeals, and all provisions for enforcing judgments, shall be applicable thereto. The statute provides for the formation of an issue and trial, and a personal judgment against the garnishee defendant. He may also be punished for contempt for failing to answer when duly summoned. See, also, *Atchison* v. *Rasalip*, 3 Pin. 288; *Orton* v. *Noonan*, 27 Wis. 572; *Everdell* v. *S. & F. du L. R. Co.* 41 Wis. 395. Although the garnishee proceedings are ancillary and auxiliary to the suit against the original defendant, they are nevertheless properly regarded as constituting a separate action against the garnishee. And the summons served upon him is the "process" by which the court is to get jurisdiction of the action, if it gets it at all. It comes within any definition of process with which the court is acquainted. The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be "*process* within the meaning of the law of congress" and the rule of the court, which is to be issued

by the clerk of this court, under the seal of the court and *tested* in the name of the chief justice of the United States. And this makes the practice in this court consistent and uniform. There would be no consistency in requiring the summons, by which the action is begun, to be issued from the court and allow the garnishee summons to be issued by the attorney. It is no doubt the policy of the law to keep process under the immediate supervision and control of the court.

The plaintiff's counsel ask for leave, in case the practice is held to be irregular, to allow an amendment; and the law of amendments is ample for the purpose, if the defect be curable by amendment. But the difficulty is, there is nothing to amend by. If process, in some respects irregular in form or substance, had been issued, the court could amend it. For instance, if the clerk had issued the summons and failed to seal it, the court could order it sealed. But no process, regular or irregular, has been issued by the proper authority. Hence it is that the court gets no jurisdiction of the case, and there is nothing to amend by.

The motion must therefore be allowed, and the garnishee proceedings set aside.

See *Peaslee* v. *Haberstro*, 15 Blatchf. 472; *Dwight* v. *Merritt*, 4 FED. REP. 614; *Ins. Co.* v. *Hallock*, 6 Wall. 556; *Republic Ins. Co.* v. *Williams*, 3 Biss. 372; *Manville* v. *Battle M. S. Co.* 17 FED. REP. 126; Field, Fed. Pr. 176, 181, 427, note 1.

LUNG CHUNG, Adm'r, etc., *v.* NORTHERN PAC. RY. CO.

BUCHANAN *v.* SAME.

(*District Court D. Oregon.* February 8, 1884.)

1. RIGHT TO APPEAR SPECIALLY.
   A defendant in an action, upon whom a summons has been served illegally, may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon Code of Civil Procedure derogatory of such right.
2. ACTION IN NATIONAL COURTS.
   Subdivision 1 of section 54 of said Code, when applied to actions in the national courts, must be construed as if the word "county" read "district."
3. CORPORATION—SERVICE OF SUMMONS ON.
   In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant.
4. CAUSE OF ACTION—WHEN AND WHERE IT ARISES.
   A cause of action given by statute to an administrator to recover damages for the death of his intestate arises out of such death, and where it occurred; and not the appointment of the administrator or the place where it was made.

Action for Injury to the Person. Motion to set aside the service of a summons.

John H. Woodward, for Lung Chung.

O. P. Mason, for Buchanan.

Cyrus A. Dolph, for defendant.

DEADY, J. These actions are each brought to recover damages for an injury to the person, caused by the negligence and misconduct of the defendant. In Lung Chung's case it appears from the complaint that on June 21, 1883, Lung Ban was at work on the grade of defendant's railroad, in Montana, about 10 miles to the westward of Herron's Siding, when he was killed by the wrecking of a train on which he was being carried from the place where he was working to the camp of the contractors, On Chung Wa Company, under whom he was employed; and that on November 23, 1883, the county court of Multnomah county, Oregon, granted letters of administration upon the estate of the deceased to the plaintiff, who is a citizen of China. In Buchanan's case it appears that the plaintiff is a citizen of Nevada, and that on February 13, 1883, he was at work for the defendant as a carpenter, repairing bridges, on the line of its road in Washington territory, when, by the falling of timbers from a platform car, he had his arm and wrist broken, and was otherwise injured. In each case it appears that the defendant is a corporation formed under a law of the United States; and in Buchanan's case it also appears that its principal place of business is at New York; while in Lung Chung's case it is also alleged that the defendant was so organized for the purpose of constructing and operating a railway from Minnesota to Oregon and Washington territory; of all which, except the place of business, the court takes judicial notice. A summons was duly issued in each case, and from the return of the marshal thereon it appears that not being able to find the president, secretary, cashier, or managing agent of the defendant in this district, he served the summons on Homer D. Sanborn, "the purchasing agent" of the defendant herein. The defendant now moves to set aside the service of the summons in each case, having given the plaintiffs written notice of its appearance for that purpose; and by consent of parties the motions are heard together.

And, *first*, the counsel for the plaintiff in Buchanan's case insists that the defendant cannot appear for this purpose only—that it must either appear fully and without reserve or not at all, citing sections 61 and 520 of the Oregon Code of Civil Proc. By the first of these sections it is provided, in effect, that a voluntary appearance of the defendant shall, for the purpose of giving the court jurisdiction, be equivalent to a personal service of the summons;" while the latter declares that "a defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance; and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the un-

dertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property." Section 61 contemplates, of course, a full and unqualified appearance, and declares the effect of it on the jurisdiction of the court; but it has no bearing on the question whether a defendant has a right to make a qualified appearance for a special purpose, as to set aside an attachment or the service of a summons. So, an appearance under said section 520, by delivering a demurrer or answer to the complaint, is in the nature of things an unqualified appearance. There is only one other way for a defendant to appear, and that is by giving the plaintiff written notice thereof. And the question is, can that appearance be something short of a general appearance and for a particular purpose? There is nothing in the Code to the contrary. The statute says the defendant may appear by a written notice. This does not necessarily imply a full appearance or exclude a qualified one. If the defendant desires, in the language of the statute, to appear, not to the action, but in a "proceeding pertaining thereto," why may he not, and what is there in section 520, or the nature of the proceeding, to prevent it? The right to appear specially and move to set aside the service of a summons is one thing, and the allowance of the motion is another. When the summons or the service thereof is merely defective or wanting in some matter of form or method which does not affect the substantial rights of the defendant, the motion to set aside will be disallowed, or a counter motion allowed to amend. But where the service is unlawful, and cannot give the court jurisdiction of the defendant, it ought to be set aside or quashed, and, unless the party upon whom it is made is allowed to appear for that purpose, he must run the risk of having a judgment given against him for want of an answer, in a case where it may be there is no appeal, and, if there was, the illegality of the service is not apparent on the face of the record.

In *Lyman* v. *Milton*, 44 Cal. 635, and *Kent* v. *West*, 50 Cal. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and, in the other, to set aside the illegal service of a legal summons; and further, that the wrongful denial of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case.

To the same effect is the case of *Harkness* v. *Hyde*, 98 U. S. 476, in which it was held that the service of a summons from a district court in Idaho, upon a defendant while on an Indian reservation, from which the jurisdiction of the court was by law excluded, was unlawful, and that the defendant was entitled to appear specially, to have such illegal service set aside; and further that the error committed in denying the motion to set aside was not waived by the defendant's subsequent appearance and submission to a trial of the cause.

The cases under consideration are within the rulings made in these cases, and I see nothing in the Code to take them out of it. Nothing less than the express language of a statute or the necessary implication therefrom would be construed by any court of justice as forbidding or preventing a party to appear in an action for the purpose of having the service of a summons set aside, on the ground that it was illegally served upon him,—not in manner, but in substance,—and under such circumstances as not to give the court any jurisdiction of his person, or authority to proceed to judgment against him.

By the act of 1875 (18 St. 470) it is provided that no civil suit shall be brought before any circuit court against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," saving certain exceptions not now material. Whether the defendant is an "inhabitant" of this district, within the meaning of this act, need not now be considered. If it is such an inhabitant it cannot be brought before this court as a defendant in this action unless by the due service of a summons upon it; nor can it be "found" here for such purpose, only so far as it can be so served here. And in either case we must look to the local law prescribing the method of serving a summons on a corporation to ascertain what constitutes such service and the effect of it. The defendant, being a mere legal entity, cannot be directly served with process. From the nature of the case the service must be a substituted one. Generally, it is made upon some natural person for it. This person is usually designated by the local law, upon the theory that his relation to the corporation is such that notice to him will result in notice to it.

By section 54 of the Code of Civil Procedure, as amended in 1876, (Sess. Laws, 37,) it is provided that in case of an action against a private corporation the summons shall be served on "the president or other head of the corporation, secretary, cashier, or managing agent," or in case none of these officers "shall reside or have an office in the county where the cause of action arose, then on any clerk or agent of such corporation who may reside or be found in the county; or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." Allowing that the practice in this court, in this respect, must conform "as near as may be" to the directions of this section, as provided by section 914 of the Revised Statutes, still the word "county," as used therein, must in this court be understood to mean the "district" or territorial limit of the court's jurisdiction. The defendant, although an inhabitant of this district, cannot be brought before this court in a civil action, unless it is served with a summons in the mode prescribed in this section. If the action is transitory in its character, and service of the summons is made within the district on the president, secretary, cashier, or managing agent of the defendant, the

court acquires jurisdiction without reference to where the cause of action arose. But if neither of them can be so served, the action cannot be maintained in the district unless the cause of action arose therein. For the statute, in giving a plaintiff the right to serve a summons against a corporation upon any inferior agent or clerk thereof, where the superior ones cannot be found in the district, limits the same to cases where the cause of action arose in the district. Now, in each of these cases the cause of action arose without the district, and therefore the service of the summons thereon upon an agent of the corporation who does not appear to be its "managing" one, or its secretary, cashier, or president, is unauthorized and illegal. The illegality arises, not from a defect in form or method, but in substance, and is therefore incurable. In effect, the law does not, under these circumstances, permit the defendant to be brought before this court in civil action without its consent upon a cause of action that arose without the district.

The suggestion of counsel for the plaintiff, in Lung Chung's case, that the cause of action ought to be considered as having arisen within the district because the plaintiff's letters of administration were granted here, is ingenious, but not sound. On the contrary, the cause of action arose in Montana on the death of the deceased,—the law of that territory giving an action to his heirs or personal representatives for damages on that account. The plaintiff's right to sue on this cause of action may be said to have originated here, but the grant of administration to him did not create or originate the cause of action, though it gave him a certain control over it.

The motions are allowed, and the service set aside.

CHILD *v.* BOSTON & FAIRHAVEN IRON WORKS.

(*Circuit Court, D. Massachusetts.* January 25, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SECOND ACTION FOR DAMAGES FOR SAME ACT.
   A party who has elected to take judgment for his profits, which judgment has not been reversed, cannot prosecute a second action for other damages arising out of the same acts of infringement.
2. SAME—DAMAGES FOR A SINGLE WRONG.
   For a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all

At Law.

E. P. Brown and *C. E. Washburn*, for plaintiff.

Causten Browne, for defendant.

LOWELL, J. The parties have agreed that if, upon the facts submitted, the action can be further maintained, it shall stand for trial;

if not, a verdict shall be entered for the defendant. It is an action at law for infringement of two claims of a patent owned by the plaintiff, After it was begun the plaintiff filed his bill on the equity side of the court for precisely the same infringement, which consisted of making and selling certain printing presses, and Judge SHEPLEY, after a full hearing, entered an interlocutory decree for an injunction, and an account of the profits and damages. *Child* v. *Boston & Fairhaven Iron Works*, 1 Holmes, 303. The master reported that the plaintiff had not claimed damages as such, and that he was entitled to recover $5,640.26, as profits. No claim was made before the court or the master under the second claim of the patent, and it was not passed upon, though the bill was broad enough to include it. A final decree was entered for the sum found by the master, but it has not been satisfied. The suit in equity was begun after the statute of 1870 had given the owners of a patent the right to recover damages as well as profits, in equity; and, under the prayer for general relief, the plaintiff might have had his damages assessed, as the interlocutory decree itself provides. Both suits, therefore, were for precisely the same cause of action; and though the remedy in equity was more complete, it was a concurrent remedy with this action, and has now passed into judgment. If the plaintiff had found that his damages exceeded the defendant's profits, he might have had the larger sum assessed. *Birdsall* v. *Coolidge*, 93 U. S. 64.

The principle of law relied on by the defendant, applies to the damages for the second claim, as well as damages generally. It is that the same defendant shall not be twice vexed by the same plaintiff for a single wrong, any more than for a single contract. "Suppose," said the court, in *Farrington* v. *Payne*, 15 Johns. 432, 433, "a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" So far as I have been informed by the able arguments, or have discovered by my own examination, the authorities agree entirely, to this extent, at least, that for a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all. The doctrine has sometimes operated harshly for plaintiffs, whose damages proved to be greater than they were expected to be. Here, however, the infringement consisted in making and selling certain machines, identical in the two cases, and not for their continued use; and there is no possible element of prospective or uncertain damage. See *Bennett* v. *Hood*, 1 Allen, 47; *Trask* v. *Hartford & N. H. R. Co.* 2 Allen, 331; *Goodrich* v. *Yale*, 8 Allen, 454; *Fowle* v. *New Haven & N. Co.* 107 Mass. 352; *Folsom* v. *Clemence*, 119 Mass. 473; *McCaffrey* v. *Carter*, 125 Mass. 330; *Adm'r of Whitney* v. *Clarendon*, 18 Vt. 252; *Great Laxey Mining Co.* v. *Clague*, 4 App. Cas. 115.

In giving the opinion of the supreme court, that an unsatisfied

judgment against one wrong-doer does not bar an action against others who are jointly and severally liable, MILLER, J., is careful to distinguish the case from that of a second action against the same defendant. *Lovejoy* v. *Murray*, 3 Wall. 1, 16.

The plaintiff having elected to take judgment for his profits for the precise infringement which is the subject of this action, which judgment has not been reversed, he cannot now prosecute his action for other damages arising out of the same acts of infringement; and, in accordance with the stipulation, there must be a verdict for the defendant.

NICODEMUS and another *v.* FRAZIER.

(*Circuit Court, D. Maryland.* January 24, 1884.)

PATENTS FOR INVENTIONS—COMBINATION VOID FOR WANT OF PATENTABILITY.

Patent No. 241,405, granted December 27, 1881, to Nicodemus & Weeks, for improvement in apparatus for processing canned goods, *held* to be a combination of old elements, void for want of patentability.

In Equity.

Sebastian Brown, for complainants.

John H. Barnes, for defendant.

MORRIS, J. Bill of complaint for infringement of patent No. 241,405, granted to complainants December 27, 1881. Complainants' patent is for an improvement in an apparatus for processing canned goods. To enable the goods, after being put in hermetically-sealed cans, to be subjected to a higher degree of heat than 212 degrees Fahrenheit, the complainant provides a vessel, or kettle, with a steam-tight cover in which the cans may be placed, and the steam admitted until the temperature is raised to the required degree. The cans being subjected while in the steam-tight vessel to the pressure of the confined steam are not liable to be burst by the explosive pressure generated within them. The steam-tight processing vessel is substantially the same contrivance described and claimed in patent No. 149,256, granted to Andrew K. Shriver March 31, 1874. Shriver's contrivance is not claimed by him in his patent in combination with any boiler or steam generator, but simply as a steam-tight processing vessel, to be supplied with steam from any convenient steam generator.

The complainant in his patent claims this steam-tight vessel in combination with an ordinary tubular boiler, and it is described and shown as placed upon the boiler with the bottom extending downward a little distance into the boiler itself. The first claim is for the combination of the vessel and the boiler, the vessel mounted upon

the boiler and communicating with the steam drum. The second claim is for the combination of the vessel and boiler, with the vessel resting upon and partially within the boiler. The third claim is for the combination of the same elements in connection with a removable lid for the kettle, a clamp to fasten it, a gage cock and pipe, all of them well known appliances used in connection with boilers and vessels in which steam is confined. It is quite evident, I think, that there is nothing new in the processing kettle, and nothing new in the tubular boiler, and nothing of invention in the mechanical construction by which the complainants unite the two together. The only question then is, are the two when brought together a patentable combination? Do the two as combined by complainants contribute to a new mode of operation or produce any new and common result? I do not see how it can be so contended. The boiler, just as before, produces the steam, and just as before it is conveyed by a pipe into the processing vessel, and being there confined it acts upon the cans just as before, producing the same results by precisely the same operation.

The complainant claims that his contrivance has for its object to economize steam, to faciliate the removal of the cans, and to increase generally the efficiency of the apparatus. It may be that by placing the kettle upon and partly within the boiler he has accomplished these objects, but it seems to me that what he has done are mere details of construction, and do not approach invention. In *Atlantic Works* v. *Brady*, 107 U. S. 200, [S. C. 2 Sup. Ct. Rep. 225,] the supreme court has declared very plainly that it is not the design of the patent laws to grant a monopoly of the improvements and adaptations which in the progress of manufactures from time to time would occur as the demand for them arises to any skilled mechanic or operator. If, for the use of any class of persons engaged in putting up canned goods, it is more convenient and economical to have the steam processing kettle placed on and sunk partly into the boiler which generates the steam, instead of placed alongside of it, it was an arrangement the virtues of which could not perhaps be ascertained except by experiment, but I cannot see that it required invention to suggest it, or that when so arranged it is a patentable combination of the boiler and the kettle.

The complainant contends that this defense should not be considered by the court, because it is not set up by the respondent in his answer, but that the defense disclosed by the answer, and to support which the testimony by respondent was pertinent, was that the respondent and not the complainants was the real inventor of the patented combination, and that the complainants by fraud had procured the patent to be granted to them. Respondent in his answer "denies that the complainants were the first inventors of the invention patented to them as alleged, but that this respondent is the true, first,

and original inventor of the said device, or so much thereof as is patentable." The answer also contains this statement:

"*Fourth*, this respondent charges that said complainants are not the original and first inventors of the processing apparatus patented as aforesaid by them, but charges that the same was well known and publicly exhibited by said Frazier (the respondent) in Baltimore city, Maryland, 132 Thames street, before the date of complainants' alleged invention or discovery of the same, *which is but an aggregation of old and well-known devices, and producing no new and useful result*, and that the following persons of Baltimore city had knowledge of the existence of the said invention in said city, and will testify in behalf of respondent, to-wit, etc.:

"*Fifth*, and this respondent charges that the complainants, well knowing this respondent to be the true, just, and original inventor of said device, sought to deprive him of the just fruits of his invention, and did, surreptitiously and fraudulently, obtain from respondent a knowledge of said invention, and secretly, and without the knowledge or consent of this respondent, obtain a patent therefor by falsely and deceitfully representing themselves to be the first inventors thereof. And this respondent charges that as soon as he was advised of the issuing of said patent No. 251,456 to complainants he proceeded to the city of Washington and instituted at the United States patent-office proceedings in interference, and accordingly interference was declared, under which the questions of priority of invention will be adjudicated and determined."

The answer, it will be seen, claims that the respondent is entitled to a patent, and is striving to obtain a patent, for the very thing patented to the complainants; and although, in a parenthetical and indirect fashion, the respondent does intimate that the alleged invention is but an aggregation of old and well-known devices, producing no new results, the substantial defense in the answer, and attempted to be established by respondent's proof, is that the invention and the patent of right belong to him, and that the complainant stole it from him. Indeed, the copy of the Shriver patent was not put in evidence by respondent until the very last sittings for taking testimony, and more than a year after the first testimony was taken. I think, however, that this is a case in which the want of patentability is clear, and that, as ruled by the supreme court in *Slawson* v. *Grand Street R. Co.* 107 U. S. 652, [S. C. 2 Sup. Ct. Rep. 663,] the court may, *sua sponte*, without looking into the answer, dismiss the bill on that ground, and that it cannot be the duty of the court to render a money decree for the infringement of a void patent, even though that defense is not properly made by the respondent. In the case before the supreme court they held that a mere inspection of the Slawson patent showed it to be void on its face. It may be that such an inspection merely of complainant's patent would not show it to be void on its face; but reading it, as it is proper it should be read, with some knowledge of the state of the art, and particularly with a knowledge of the contrivances made known to the public by Shriver's patent nearly eight years prior to complainant's patent, it then becomes evident that there is nothing new in any of the elements of the combination, and,

indeed, it is not claimed in the patent that there is, and it is plain on the face of the patent that, as a combination of old elements, there is nothing patentable in the combination.

Bill dismissed, without costs.

McARTHUR v. BROOKLYN RAILWAY SUPPLY CO. and others.

(Circuit Court, S. D. New York. January 2, 1884.)

PATENTS—VALIDITY OF REISSUED LETTERS, No. 2,568.

Reissued letters patent No. 2,568, granted upon the surrender of original letters patent No. 59,733, for an improved broom, were properly reissued. The invention therein described is the same as that described in the original letters, and if the claim is enlarged the reissue was, nevertheless, proper in the absence of intervening rights.

In Equity.

Eugene N. Elliot, for orator.

H. D. Donnelly, for defendants.

WHEELER, J. The right to a decree in this cause depends upon the validity of reissued letters patent No. 2,598, dated May 14, 1867, granted to William H. Cory, assignee of Thomas Wright, upon the surrender of original letters patent No. 59,733, dated November 13, 1866, for an improved broom. The questions made are as to novelty; and the propriety of the reissue. The broom is for out-door work, and made by doubling small bundles of splints for the brush in the middle and inserting the ends through pairs of holes in a wooden head, astride the wood between the holes, by which and by a back of wood, with a groove for the loop in one or the other, they are held in place. Brushes made of looped bristles drawn through single holes and held in place by wires through the loops, and by grooved backs, and other similar devices, and patents for similar devices, had existed before, but no broom with a head like this had been known or used before. The original patent showed a double socket for a handle to be inserted on either side to secure even wear, and described only metallic splints, and the claim was for simply a wire broom made substantially in the manner set forth. The reissue describes metallic or other suitable splints, and the claim is for such splints inserted in bundles through apertures formed in pairs, in the base plate of the broom, by looping them as described, said apertures being connected by a groove or recess to accomodate the loop and the latter held to its place by a back or upper plate substantially as shown and described. The substitution of other suitable splints for wires would occur to any mechanic with skill for making the brooms, and required no invention. There is nothing described as invented in the reissue that was not in the orignal, and therefore the invention described in

the reissue is the same as that described in the original. The claim in the original covered the broom merely. If that would include the handle and sockets for it, or the sockets, the reissue is for less, for it does not include either. It is merely for the splints so inserted in the head and fastened, making a broom. If the claim is really enlarged, as the reissue was taken out so promptly, and the invention is the same, and no rights of others are shown to have intervened, the reissue would seem to be proper. *Hartshorn* v. *Eagle Shade Roller Co.* 18 FED. REP. 90. But as the head was new, and included in the claim of the original, that could not be taken without infringement by the use of equivalents for the wires of the original, and therefore the claim may not be really enlarged at all. In this view the orator seems to be entitled to the usual decree against infringement.

Let a decree for the orator be entered according to the prayer of the bill, with costs.

THE JAMES P. DONALDSON.

(District Court, E. D. Michigan. July 9, 1883.)

1. TOWAGE—CHOICE OF ROUTE—DISCRETION OF MASTER.
   Where the propriety of the general course to be taken by a tow from one port to another depends largely upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, the choice of a route is usually within the discretion of the master of the tug; and if he has exercised reasonable judgment and skill in his selection he will not be held in fault, though the court may be of opinion that the disaster which followed would not have occurred if he had taken another route.
2. SAME—REFUSAL TO CROSS LAKE—STORM.
   A like rule obtains with reference to the conduct of the master in refusing to cross the lake or turn back to the port of departure in face of a storm.
3. SAME—INTOXICATION OF MASTER.
   The intoxication of a master upon duty ought not to be inferred from slight circumstances equally consistent with a different theory, or from the equivocal testimony of one or two dissatisfied seamen, when flatly contradicted by the remainder of the crew.
4. SAME—ABANDONMENT OF TOW—GENERAL AVERAGE.
   The abandonment and ultimate loss of a tow of barges to save the tug from destruction, and the subsequent arrival of the tug in a port of safety, does not vest in the owners of the barges a claim against the tug for contribution in general average.

In Admiralty.

These were consolidated libels against the propeller James P. Donaldson, to recover for the abandonment and subsequent stranding and loss of the barges Eldorado and George W. Wesley, some three or four miles below Erie, Pennsylvania, upon the evening of November 20, 1880. The conceded facts were substantially as follows: That the barges in question, together with the barge Bay City, left Buffalo

in tow of the Donaldson about 9 P. M. of November 19th, bound for Bay City, Michigan. None of the tow were laden except the Bay City, which carried a small cargo of coal. There was a light breeze from the S. E., which changed about 3 in the morning to the southward and westward, and became somewhat fresher. It continued S. W. and S. S. W. during the entire day, with indications of veering still further to the westward, and by evening was blowing a gale from S. S. W. On leaving Buffalo, the propeller took a S. W. course, in order to obtain the advantage of smoother water off the S. shore, and kept substantially the same course until about dark, when the lights of Erie harbor were made, eight or ten miles distant. The progress of the tow during the whole day had been very slow, not exceeding two and one-half miles per hour, and for some time prior to the abandonment the propeller could do little more than to keep her tow headed to the sea. About 8 or 8:30 o'clock, the wind, which had been blowing hard from S. S. W. by S., suddenly veered into a N. W. or W. N. W. squall of great violence, accompanied by gusts of snow, striking the Donaldson on her starboard bow, and forcing her head around toward the shore so far that she was heading nearly S. ½ E. during its continuance. This squall lasted from six to ten minutes. During its continuance the Donaldson and her tow, with wheel hard-a-port, drifted helplessly before its fury, until, according to the theory of the propeller's crew, they had come within about three-quarters of a mile of the shore, when the squall ceased as suddenly as it had arisen, and the wind dropped back instantly to S. W. by S., and so continued for 20 or 30 minutes. About 9 o'clock a second squall struck the tow, even harder than the first. The propeller immediately put her wheel hard-a-port, but without effect. She continued to swing off before the gale, heading for the shore. When she had drifted to within about 600 feet of the reef which lines the shore at that point, seeing there was no escape except by flight, she gave the proper signal, cast off her line, abandoned the barges, and made for the entrance to Erie harbor, and there came to anchor. The barges drifted ashore and were lost.

The libelant charged the master with the following faults: (1) In failing to take the usual and proper course up the lake. (2) In not keeping far enough from the shore to handle his tow and to come round in case of a sudden squall or high wind from the west; and in leaving the deck to his mate without sufficient cause. It was also charged in this connection that the master was intoxicated during the afternoon and evening.

Moore & Canfield, for libelants.

H. H. Swan, for claimants.

BROWN, J. I will proceed to consider the several allegations of negligence charged against the master of the propeller.

1. In regard to the general course of the tow in leaving Buffalo. The usual and ordinary course up the lake from Buffalo to the mouth

of the Detroit river is W. by S. ¾ S., considerably to the northward of the course actually taken. This would carry the tow close to Long Point, and thence in a straight course to the narrow channel between Pointe Au Pelee and Pointe Au Pelee island. Had Captain Towle adopted this course, it is very probable that he could have taken shelter behind Long Point and weathered out the gale, as several other vessels did which left Buffalo about the same time. But the wind was from the S. E., the season was late, and the weather treacherous. By taking the course along the S. shore he could secure much smoother water, and would easily have been able to make the harbor of Erie, had not the wind kept canting to the westward and increasing in violence. There is some testimony tending to show that a S. E. wind at that season of the year frequently, but not invariably, changes to a gale from the S. W. or W.; but as the wind was light when the tow left Buffalo, I think it is demanding too much of the master to require him to forecast the weather for the following day. We have no right to expect in him greater weather wisdom than is found among the most experienced and scientific observers.

There is a great conflict of testimony as to the propriety of the course taken by the tow in leaving Buffalo. Some vessels which left on the same day took the northerly route and gained shelter behind Long Point. Others took the southerly route and made the harbor at Erie before the gale struck them. I think it is clearly one of those cases where the master might, in the exercise of sound judgment and reasonable discretion, have taken either course without being chargeable with negligence. His choice, of course, was largely dependent upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, and we are not inclined to review his judgment in that particular. The disaster which befel him undoubtedly tends to show that he made the wrong selection, but the propriety of his action must not be determined by the result. He can only be chargeable with negligence when he takes a course which good seamanship would deem unauthorized and reckless. "The owner of a vessel does not engage for the infallibility of the master, nor that he shall do in an emergency precisely what, after the event, others may think would have been the best." *The Hornet*, (*Lawrence* v. *Minturn*,) 17 How. 100; *The Star of Hope*, 9 Wall. 230; *The W. E. Gladwish*, 17 Blatchf. 77, 82, 83; *The Mohawk*, 7 Ben. 139. *The Clematis*, 1 Brown, Adm. 499.

Libelants also claim in this connection that the propeller could either have crossed the lake and taken refuge under Long Point, or could have come about and returned to Buffalo as the master saw the storm approaching. I do not think he was bound to do this. So long as he could make his way against the wind he was as likely to make the harbor of Erie in safety as he was to make Long Point; indeed, it would seem, with the wind blowing a gale from the S. W., there would

have been lack of good judgment in the master exposing himself to a beam wind and sea, by attempting to cross the lake. Whether he should attempt to turn about and make the harbor of Buffalo was also a question upon which he was at liberty to exercise his judgment. He deemed it a more prudent course to proceed directly to Erie, and I am by no means satisfied that he was not correct.

2. In not keeping further from the shore as the propeller approached Erie. It is charged in this connection that Capt. Towle was under the influence of liquor that afternoon, and left the deck at the time he was most needed, to a mate who had no knowledge of the shore at that point. There was no question made of Capt. Towle's general competency, and I can see nothing to criticise in his management of the steamer after he took command. The charge of intoxication rests upon his admission that he drank in a saloon on the day he left Buffalo; that he had sent on board a jug of whisky as a part of the sea-stores which he kept in his room, and that there was an empty whisky bottle found on the floor the morning after the accident. Webster, the steward, who found the empty bottle, testified that the captain's appearance that night indicated to him that he had been drinking; that his eyes were red, and he looked stupid. But he says he saw nothing otherwise to indicate that he had been drinking, and that this appearance might have been owing to his facing the storm. This is also corroborated by the testimony of one or two others of the crew, who confessed to having quarreled with Capt. Towle. It is denied, not only by Capt. Towle himself, who swears that he drank nothing that day, and that there had been no whisky in the bottle for three months, but by all the rest of the crew, who swear that they never saw or heard of his drinking too much while upon the propeller. It is pertinent in this connection to notice that the pleadings give no intimation that such an accusation was contemplated, nor was it suggested by the libelant in his testimony before the steam-boat inspectors at Port Huron, who inquired into the cause of the loss. Upon the whole, it does not seem to me that the offense has been proven. So grave a charge as this ought to be substantiated by something more than trifling incidents which are quite consistent with another theory, and the testimony of two or three disaffected men, contradicted, as it is, by nearly the entire crew.

The most serious question in the case is whether the propeller kept her tow as far away from the shore as she should have done under the circumstances. As I have already observed, I do not think the master was bound to contemplate the contingency of turning about and going to Buffalo, or of crossing the lake under a beam wind and seeking shelter at Long Point, when he was already so near to Erie, but he was bound to keep far enough from shore to escape the danger of running upon the reef at that point as the wind and sea then were. Capt. Towle's watch ended at noon, but as the weather was heavy he remained on deck until 5 o'clock, when he left

the propeller in charge of the mate, an experienced seaman, but not very familiar with the approach and entry to the harbor at Erie. Between 7 and 8 o'clock he came on deck again. The tow was then, as he claims, from a mile to a mile and a half from shore, with no indications of immediate peril. Libelants, however, claim that she had been allowed by the mate to drift to within a half a mile of the shore, and was nearer than was customary or safe for vessels in entering the harbor. There is a very considerable conflict of testimony upon this point. While I am disposed to give considerable weight to the testimony of Henry, the keeper of the light at the Beacon ranges; of Clark, who was in charge of the life saving-station; and of Pherrin, who lived about four miles from Erie and very close to the shore; at the same time it is entirely possible that their observations might have been made after the first squall had struck the tow and when she had undoubtedly gotten much to the southward of her proper course. The testimony of the crew of the propeller is substantially that she was kept upon the usual heading towards the Erie lights, and in the darkness and storm of that evening it must have been very difficult for those upon the tow to determine their distance from the shore. Libelant Slyfield admits he could not tell the distance. Upon the whole I do not think libelants have made out this branch of their case by a preponderance of testimony.

This includes all the charges of negligence which were urged upon the argument. In my opinion, the loss was occasioned by a peril of the sea. The disaster occurred during the prevalence of the worst storm of the season of 1880. All the ship-masters who were exposed to it united in pronouncing it a "living gale of wind," and one of the most sudden and violent within their memories. The report of the signal service filed characterized it as "a furious westerly gale; a thick, blinding snow storm." Such was its violence, at the very time the Donaldson was struggling off the shore, that the steamers which had taken refuge under Long Point were obliged to keep their engines working at full speed, and even then could not hold themselves up to their anchors, while at least one barge was lost there. In Erie harbor another powerful steam-barge, during the same squall, had to let go her barges, because she could not hold them. With such weather as this in sheltered roadsteads, it is easy to conceive the peril to which the Donaldson with her tow was exposed in making their way along the open lake, with furious squalls driving them directly upon a lee shore. While the conduct of the tow may not have been above a searching criticism, we think it quite apparent that it would have been useless to contend against the furious squalls from the N. W.; and that the propeller cannot be justly held in fault for abandoning her tow and seeking safety where she could find it. Indeed, it was not claimed but that the abandonment, when actually made, was not necessary to save the propeller.

3. But it is urged by libelants that even if the propeller be exoner-

ated from all charges of negligence in respect to the conduct of her tow upon that occasion, she is still liable for her proportion of the value of the lost barges, in general average,—that here was a common danger; a danger imminent and apparently inevitable, in which all participated; a voluntary jettison of the barges for the purpose of saving the propeller; or in other words, a transfer of the peril from the whole to a part of the tow; and that this attempt was successful; and therefore the propeller may be called upon for contribution. The proposition is a novel and interesting one. I know of no case in which it has even been discussed. Indeed, the very fact that no claim of this description has ever been made is worthy of suggestion as indicating the view generally taken by the profession. It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Barnard* v. *Adams*, 10 How. 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law-maritime as applied to the carriage of goods by sea. It is never applied to cases of a voluntary sacrifice of property upon land when made to preserve the property of others from a greater loss. For instance, if the house of A. be torn down, or is blown up in a conflagration, to save the houses of B., C., and D., A. has no right to contribution, be the evidence never so clear that the sacrifice was successful, and saved the property of B., C., and D. from destruction. Indeed, the cases have gone so far as to hold that the parties themselves who commit an act of depredation for the public safety are not liable in trespass. Says Judge DILLON, in his work upon Municipal Corporations, vol. 2, § 756:

"The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures in a city or compact town, to prevent the spreading of a destructive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains."

It was said, so long ago as the reign of Edward IV., that "by common law every man may come upon my land for the 'defense of the realm.'"

In the *Saltpetre Case*, 12 Coke, 13, it is said that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war, for the common safety, shall be plucked down,—and a thing for the commonwealth every man may do without being liable to an action."

In *Mouse's Case*, Id. 63, certain passengers upon a ferry-boat from Gravesend to London cast overboard a hogshead of wine and other

ponderous things to save the boat from being swamped in a violent tempest. It was held that as this was a case of necessity for the saving of the lives of the passengers, the defendant, being a passenger, was justified in casting the hogshead of the plaintiff out of the barge. See, also, *Governor, etc.*, v. *Meredith*, 4 Term R. 794; *Respublica* v. *Sparhawk*, 1 Dall. 357; *Taylor* v. *Plymouth*, 8 Metc. 462; *Mayor, etc.*, v. *Lord*, 17 Wend. 285; S. C. 18 Wend. 126. A like principle was applied in the Roman law, wherein it is said that if, by the force of the winds, a ship is driven against the cables of another, and the sailors cut these cables, no action will lie, if the ship cannot be extricated in any other way.

In the case of *The John Perkins*, 21 Law Rep. 87, Mr. Justice CURTIS decided a case which involved somewhat the same principle as the one under consideration. In this case one of the crew of a fishing schooner cut her cable in order to prevent a collision with another vessel and the destruction of both, and claimed a general average contribution for the loss of his cable and anchor. Judge CURTIS dismissed the libel, saying that, in his opinion, the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with authority to act in emergencies as the agent of all concerned, and which were relieved from a common peril by a voluntary sacrifice made of one of those subjects. The only opinion I have found to the contrary is that of Casaregis, an eminent civil law writer, who puts the case of the destruction of a vessel in port, lying near to another vessel which is on fire, to prevent the flames from spreading and being communicated to other vessels. He considers the compensation to the owner of the vessel thus destroyed as a proper subject of maritime contribution by the owners of the other vessels and cargoes which were saved from the impending peril. Disc. 46, No. 4563. I have found this opinion wholly irreconcilable with the opinion of Mr. Justice CURTIS above quoted.

From this review of authorities it is quite apparent that the doctrine of general average contribution arises from the peculiar relations existing between the ship and her cargo. Mr. Lowndes finds the underlying principle in the agency of the master to act for the owner of the cargo in cases of unforeseen danger. Lowndes, Av. 14–16. This would clearly have no application to the case of a vessel whose master remains in command of his own ship, and usually has no opportunity of conferring with the master of the tug in emergencies of this description. The master of the tug is in no sense the agent of the tow for any such purpose.

The difference between the relations of a ship to her cargo and those of a tug to its tow will not escape the observation of the most casual observer. Ordinarily, the master of the ship has but a single duty to perform, namely, the delivery of his cargo to the consignee; and for the time being, and for that purpose, the owner of the cargo

yields possession and abdicates his authority to the master. For the performance of this duty the master binds himself, his ship, and its owners by the most stringent obligations of the law. His undertaking is absolute that his ship is seaworthy; that he and his crew are competent and honest; that he will use due care in lading and unlading his cargo; that he will protect it from thieves; and will navigate his ship to her port of destination without unnecessary delay or deviation. Indeed, he is liable for every mishap to the cargo not attributable to the owner's fault, saving and excepting only the perils of the sea and the acts of public enemies. He cannot sell or hypothecate the cargo, except in case of urgent necessity, and not even then, without communication with the owner, if such communication be possible. Even if the vessel be wrecked, and his goods are cast upon the shore, neither he nor his crew are entitled to salvage for preserving them. Jones, Salv. 20.

On the other hand, if the cargo be once laden on board, the master has the right to carry it to its destination and detain it for payment of freight. Even if the voyage be temporarily interrupted or broken up, he has the right to tranship the cargo and forward it by another vessel. From the intimacy of their relations, from the common danger incident to their common adventure, and to prevent the master from sacrificing the cargo at the expense of the ship, there is attached the further anomalous feature that all sacrifices rendered necessary by the elements shall be borne mutually by the ship and cargo; whether the loss be occasioned by cutting away a mast or throwing overboard a bale of goods, it shall be borne by the owners of the ship and cargo in exact proportion to the value of their respective interests.

On the contrary, the obligations of the tug to her tow are discharged by the employment of reasonable care and skill. The master of the tug guaranties that she is seaworthy and properly equipped; that he will furnish the motive power and will use his best endeavors to take his tow to the place of destination in safety. He does not, however, take charge of the ship except so far as may be necessary to direct her course. In all other respects the master and crew of the tow have entire control of her movements, and may adopt such independent measures for her preservation and safety as their own judgment may dictate. He does not insure the ship against anything but the consequences of his own negligence, nor her cargo from the depredations of thieves or the barratry of the crew. If the performance of his contract be interrupted by any unforeseen or extraordinary peril not within the contemplation of the parties, such as the slipping or breaking of a line in a heavy sea, he is at liberty to treat the original contract at an end; and while he has no right to abandon his tow except to save his own vessel, he may recover salvage as if he were a stranger, if he has put his own vessel in peril to rescue her. *The Saratoga*, Lush. 318; *The Robert Dixon*, 4 Prob.

Div. 121; S. C. 5 Prob. Div. 54; *Roff* v. *Wass*, 2 Sawy. 389; *The J. C. Potter*, 3 Mar. Law Cas. 506.

As observed by Lord KINGSDOWN, in delivering the opinion of the privy council in the case of *The Minnehaha*, Lush. 335, 347:

"She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of this task, by sudden violence of the wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which are not within the scope of her original engagement, she is entitled to additional remuneration for the additional services if she be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

The rule is the same with respect to pilots. *The Eolus*, 1 Asp. Mar. Law Cas. 516, and note; *The Hope*, (*Hobart* v. *Drogan*,) 10 Pet. 108; *Akerblom* v. *Price*, 4 Asp. Mar. Law Cas. 441; *The Wave*, Blatchf. & H. 235.

It is not claimed that the distinctions here taken are decisive against the allowance of a general average contribution in cases like these. They do, however, show that the whole law upon this subject has arisen out of the anomalous relations between the ship and cargo—relations such as do not exist between a tug and tow. In my opinion, the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage.

A decree will be entered dismissing the libels, with costs.

WHITTENTON MANUF'G CO. v. MEMPHIS & OHIO RIVER PACKET CO. and others.

(*Circuit Court, W. D. Tennessee.* November 26, 1883.)

1. REMOVAL OF CAUSES—REPLEADING—CONSTITUTIONAL LAW—TRIAL BY JURY.
Where a suit at common law has been removed from a state court in which it has been conducted under the forms of procedure belonging to a court of equity, the constitution and laws of the United States require that there must be a repleading to conform to the practice of the federal court as a court of law.
2. SAME—REMOVAL ACTS CONSTRUED—EFFECT OF THE REMOVED PLEADINGS.
This repleading may require more than one suit, and on both sides of the docket, but this is unavoidable in a jurisdiction keeping up as persistently as the federal laws do the distinctions between law and equity; and the force and effect of the proceedings in the state court are preserved by moulding them to suit the requirements of the case in the process of distribution between the two jurisdictions.
3. SAME—UNIFORMITY IN THE FEDERAL PRACTICE.
It is only by this construction of the removal acts that the distinctions between law and equity jurisdiction can be observed in practice, and that uniformity secured which it is plainly their intention to enforce. There cannot be one practice for causes removed from the state courts and another for suits originally commenced in the federal court.
4. SAME—SECTION 639, REV. ST.—ACT OF MARCH 3, 1875—PARTIAL REPEAL.
The last clause of section 639, Rev. St., taken from the act of July 27, 1866, enacting that "the copies of the pleadings shall have the same force and effect *in every respect and for every purpose* as the original pleadings would have had by the laws and practice of such state if the cause had remained in the state court," has been repealed by the act of March 3, 1875.
5. SAME—PLEADING UNDER THE TENNESSEE CODE.
Although the Code of Tennessee does not permit an action to fail for any defect of form in pleading and allows a suit "upon the facts of the case," it does not authorize a suit at common law to be prosecuted in a court of law under the form of pleadings belonging to a court of equity.

Motion to Replead.

The plaintiff, under an act of the Tennessee legislature of March 23, 1877, *c.* 47, which enacts that the jurisdiction of all civil causes of action now triable in the circuit court, except for injury to person, property, or character, involving unliquidating damages, is hereby conferred upon the chancery court, which shall have and exercise concurrent jurisdiction thereof along with the circuit court, filed its bill in the chancery court of Shelby county to recover damages from the defendants for an alleged breach of contract by failure to deliver to the plaintiff in the same good order in which they were received for transportation about 1,000 bales of cotton. The bill, which is in the usual form of a bill in equity addressed to the chancellor, proceeds, in about 27 pages of manuscript, to relate in detail the purchase by plaintiff of the several lots of cotton; that these lots were, respectively, in the warehouse of the vendors, where they were selected, examined, sampled, etc., and found to be in good condition and shipping order; that, after the purchases, they were sent either to the Mammoth Cotton Compress Company or to the Union Cotton Com-

press Company to be compressed and prepared for shipment according to a contract between the plaintiff and said companies, at an agreed price; that after compression the bales were delivered to the defendant packet company for transportation to the plaintiff's mills in Massachusetts; that the defendant packet company executed bills of lading, which are set out by exhibits, etc.

The bill then states that the cotton was shipped to plaintiff's mills, and proceeds with particularity to state, on information and belief, the dates, names of the steamers of the packet company, the several lots, and the compress company from which received by the steamers, and other matters connected with the shipments; that the cotton reached plaintiff, but that "when so delivered the said cotton was not in good order and condition," describing the condition as received, etc.

The bill "charges," on information and belief, that "the cotton was carelessly and negligently exposed to the weather, without adequate protection or care by the said Mammoth and Union compress companies and the packet company, and that the damage and injury done to it were produced by, or the necessary result of, the negligence and want of care of said companies respectively, and while they so had custody," etc.

It then alleges that plaintiff notified the railroad company of its claim for damages, and subsequently notified the packet company and the compress companies, all refusing compensation, and avers that the whole damage done by the defendant companies amounts to $5,000, and that the three defendants are jointly and severally liable for the same.

The bill further states that the receipts taken by the plaintiff from the compress companies respectively were delivered to the packet company, and that the plaintiff believes they are now under the control of defendants, or one of them, and prays "they be required to produce the same for the purposes of this suit and to be used on the hearing," etc.

Another allegation of the bill is that, since the transactions mentioned, the two compress companies have become merged into a new compress company; that plaintiff had endeavored to procure information necessary to enable him to determine when, and how, and by whom the damages to the cotton was done, by addressing a letter to the company, etc., and that no response had been made, the letter being exhibited and filed as part of the bill.

The bill also charges that the Merchants' Compress & Storage Company, in the place and stead of the other two compress companies, is, with the packet company, justly indebted to the plaintiff, "by reason of the damage done to the cotton aforesaid, in the sum of $5,000 and interest."

The bill names the agent of defendant or its superintendent, and prays process to make the packet company and the compress company defendants; that they be required to answer; that the amount

of the damage be ascertained and fixed, and for the proper judgment or judgments and execution, and that, if necessary, attachment issue against the non-resident Ohio corporation,—the packet company,—and for general relief.

Subpœna issued, and was served, but no attachment. The compress and storage company appeared and demurred, assigning three grounds of demurrer, and the packet company also appeared and filed a separate demurrer on four grounds. Without disposing of these demurrers the plaintiff obtained leave to amend the bill, and by an amended bill, in about six additional pages of manuscript, states substantially that it is advised that the cotton was in the custody of the compress companies, as the agents of the packet company, from the time the bills of lading were signed until the same was delivered to the respective steamboats. The amended bill prays the same relief as the original bill.

After the amended bill was filed the plaintiff removed the case to this court, when the transcript was filed and docketed on the law side. The defendants moved that the plaintiff be required to replead according to the practice of the courts in suits at law.

H. C. Warinner and *Metcalf & Walker*, for the motion.

Randolph & McHenry, contra.

HAMMOND, J. In whatever form the subject has presented itself,—whether as a matter of jurisdiction, pleading, or practice, as to methods of relief, defenses, review, or what not,—the supreme and inferior federal courts have, with inexorable firmness, insisted upon preserving the *essential* distinctions between law and equity by administering them separately, as required by the constitution and laws of the United States. The cases are far too numerous for citation here, but will be gathered in a foot-note for consultation in support of this opinion. They commence with the organization of the courts, and are to be found in almost every volume of the reported decisions. It is a distinction that inheres in the system by virtue of constitutional commands, and it will be found upon close observation that the federal constitution has protected the right of trial by jury in a manner that imposes restrictions upon legislative power more effectual, perhaps, than those found in many of the state constitutions. It necessarily results from the requirement that, in all controversies of legal cognizance, there shall be preserved a right of trial by jury, and that no fact so tried shall be re-examined in any court otherwise than according to the rules of the common law, that the original trial shall be likewise according to those rules in all essential and substantial particulars. Merely taking the verdict of 12 men, no matter how, is not, in the sense of our federal constitution, a trial by jury; and it is impracticable, as well as impossible, to conduct the original trial according to rules unknown to the common law, and in subversion of them, and then, on re-examination by writ of error in an appellate jurisdiction, or, it may be, on motion for new trial, or otherwise, in

the tribunal of first instance, to obey this mandate of the constitution, and conduct those proceedings "according to the rules of the common law." Const. U. S. Amend. 7. The whole proceeding, from beginning to end, must be, *ex necessitate rei*, a common-law proceeding; not necessarily according to the precise forms of the common law,—reformation in procedure being open to legislation,—but always there must be a trial substantially according to the course of the common law.

Now, this consideration alone has convinced me, aside from all others, that when parties bring their "*suits at common law*" from a state court of equity, where, by state legislation, they have been permitted to conduct them under the forms of procedure known to those courts in ancient times, into this court, they must, in the nature of the case, by repleading, convert their "bills," exhibits, disclaimers, *pro confessos*, answers, cross-bills, pleas, replications, petitions, affidavits, *jurats*, and the like into declarations and pleas according to the forms for trials of suits at common law prevailing, not only in this court, but as well in the law courts of the state of Tennessee. Even in the state court of equity, from which this suit comes, when a jury is demanded, as it may be, the trial is not on the bill, answer, etc., but, by statute, the parties are required to make up their issues in a separate writing for the jury, which is, in effect, what we require them to do here by repleading. Manifestly, that method of sifting out the issues to be tried is not open to this court, and it can only be accomplished by repleading.

It matters not that this may result in two or more separate suits, with some at law and some in equity. This comes from state legislation allowing the parties to litigate their several controversies in one suit, a method forbidden to this court, which must administer law and equity separately. If the parties deem this an advantage they should remain in the state court where it can be done. Nor is it practicable to have a different rule for a suit which is removed when the "bill" only has been filed, from one which is brought here at some later stage. It would be a hybrid proceeding, producing confusion, if not disadvantage, to the defendant, to allow the plaintiff to use an elaborate and voluminous "bill" as the vehicle for his case and confine the defendant to the simple form of a plea at law.

Acting on these views some years ago, in the case of *Levy* v. *Amer. Cent. Ins. Co.*, (not reported,) it was ruled by this court that there must be, in such cases, a repleading when the suit is removed; and the practice has been so until challenged in this case. In that case, as in this, the state chancery court had acquired jurisdiction under the act of March 23, 1877, *c.* 47, giving the equity courts jurisdiction concurrently with courts of law of all civil causes not founded in tort. Acts 1877, p. 119. And, it may be remarked, that in addition to this source of jurisdiction over purely common-law suits, the state chancery courts have, for a very long time, under our attachment

laws, and also by the statutes regulating their practice, acquired jurisdiction over all manner of civil causes of legal cognizance; as, for example, by a failure of the parties to object to the jurisdiction by special plea or demurrer, an answer being deemed a waiver of all objections to jurisdiction. The statutory provisions made for a finding of facts by a jury in all equity cases is considered an answer to all constitutional objections to such legislation. Tenn. Code, 4309, 4321; *Jackson* v. *Nimmo*, 3 Lea, 597; *Scott* v. *Feucht*, 1 Memphis L. J. 40; *Saudek* v. *Turnpike Co.* 3 Tenn. Ch. 473; 1 Memphis L. J. 3.

It was, therefore, an important question whether or not, when any of these causes, of which the state equity court had such a vast and almost inexhaustible jurisdiction, are removed to this court and go to the law side of our docket, as all concede they must, they shall be submitted to the jury on the voluminous records and pleadings in use in our courts of equity, (for they are all conducted in that form in the state court, and in this form they necessarily come here,) or the parties be required to replead according to the forms of a court of law. As before remarked they are not required to be so submitted in the state courts, the difficulty being overcome by statutory provisions requiring the parties, under the supervision of the chancellor, to draw up in writing, "according to the forms of a court of law," the issues of fact to be submitted to the jury. Tenn. Code, 3156, 4468. This provision is not, of course, available in this court, and the same end is reached, and can be reached, only by pleading *de novo*.

In the case of *Levy* v. *Ins. Co.*, *supra*, there was a suit in the chancery court on a policy of fire insurance under the form of a bill in equity, which, in addition to a claim for the loss suffered, prayed, as in the case now under consideration, for a discovery, by the agent of the company, of certain papers in his possession, these being the plaintiff's invoices, and also for an injunction to prevent him from sending them away. The defendant company filed an answer, and, as it might under the state statute, but not under the federal practice, made that answer a cross-bill, alleging fraud by the plaintiff in the procurement of the policy, for which it prayed to have the document canceled. Tenn. Code, 4323. The case was then removed by the defendant company to this court under the act of congress of March 3, 1875, (18 St. 470.) The plaintiff moved to docket the case on the law side of the court, for leave to file a declaration as at law and for a rule on the defendant to plead thereto. The defendant, on the other hand, moved to docket the case on the equity side of the court. It was held that the plaintiff should declare on his policy of insurance, according to our practice in cases at law, and the defendant plead thereto, and that if the plaintiff should find section 792 of the Revised Statutes inadequate to compel a production of the invoices, and should need discovery thereof or should need the injunction he asked, it was manifest that, under our federal practice, he must resort to the equity side of the court for that relief in aid of his

suit at law; while the defendant must, since we have in this court no statute permitting an answer to be made a cross-bill, and certainly no power in a court of law to grant the relief it asked, likewise resort, if need there be, to the equity side of the court with an independent bill or a cross-bill, according to our practice, in any suit the plaintiff might file on that side, to restrain the plaintiff's suit on the policy until it could be canceled for the alleged fraud.

Clearly, this was the only possible solution of the complication in a jurisdiction keeping up the distinctions between law and equity so persistently as the federal courts are required to do; and nothing but the anomalous legislation of Tennessee, which had no effect in the federal court, could unite all these matters in one suit, however desirable such a practice might be. Yet there is no need of any new cost bonds, or new process in any of these several suits in which this conglomerate state court suit must be divided, but only a distribution of them, according to the congenital demands of our own practice; and, if any orders have been made, or rights acquired, in the state court, these are all preserved in the federal court by a like process of distribution; not by giving to the pleadings exactly the same force and effect in every respect which they had in the state court, for that is impossible, if the union of all the causes of action in one suit be insisted on here as one of the rights preserved, but, in all other respects, saving their force and effect in this process of distribution by treating the bonds, process, pleadings, and orders as if they had been made in suits originally commenced in the federal court and the same proceedings had been taken there, and now moulding them into one or more suits on either side of the jurisdiction, as the circumstances of the case may require. This is precisely what we are commanded to do by the removal acts, and what they mean by directing that the pleadings, process, and other proceedings shall have the same force and effect here as in the state court, which requirement of the statute has been so much relied on in argument to defeat this motion, as it was relied on in the former case.

It is now argued,—as it was in that case,—with great earnestness, that these removal cases are, by force of the statute, on a different footing from those originally brought here, and that although the act of congress by its terms requires that "the cause shall proceed in the same manner as if it had been brought there by original process," yet, by like positive command, "the copies of the pleadings shall have the same force and effect in every respect, and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court." Rev. St. § 639. It is a sufficient reply to this argument to say that nowhere is it manifest that congress intended to have one practice for original suits and another for removed suits, and the contrary intention of uniformity in all is apparent from the beginning of these removal acts to the present time. Moreover, there is no more ca-

pacity in our federal courts for mingling the separate jurisdiction of law and equity in causes removed than in those originally commenced, for it is a constitutional separation that must be preserved; and whatever may be the power of congress to preserve the substance and yet change the form of procedure, until some more specific machinery—like that already adverted to in the Tennessee state courts for submitting issues to a jury "according to the forms of a court of law" where there is such a commingled practice—is provided by congress, such a practice is impossible with us.

I have already pointed out a more reasonable interpretation of this language in the statute, but there is still another answer to the argument based upon it. It is to be observed that while a clause in section 3 of the act of March 3, 1875, enacts, as in section 639 of the the Revised Statutes, that the removal cause "shall proceed in the same manner as if it had been originally commenced in the said circuit court," and section 6 of the same act, "that the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suits had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said court as shall have been had therein in said state court prior to its removal," nowhere does that act contain the last above-quoted clause of section 639 of the Revised Statutes, providing that the copies of the pleadings in the state court shall, *in every respect and for every purpose*, have the same force and effect as in the state court. It is clearly repealed by the repealing clause in section 10 of the act of March 3, 1875, (18 St. 470–473.) This repealed clause of section 639 of the Revised Statutes had its origin in the act of July 27, 1866, from which it was carried into the Revision, (14 St. 306, 307.) The act of March 3, 1875, returns to the language of the judiciary act of September 24, 1789, somewhat amplified, as amended by the acts of July 27, 1866, and March 2, 1867, but with this clause of the act of 1866 omitted. Rev. St. § 639; 1 St. 79; 14 St. 306, 558; 18 St. 471. And a critical examination of the cases cited in the foot-notes will show that the act of 1875 in the sections already cited, taken in connection with its section 4, which provides for the continuing force and effect of all *process, attachments, injunctions*, etc., bonds, undertakings, securities, etc., and all orders and other proceedings prior to removal, has, with the utmost care, expressed the judicial result of the construction of all the acts preceding it, including the omitted or repealed clause of the act of 1866, which was misleading in its language, and therefore omitted.

This last act of 1875, construed by the decisions, has a very plain meaning in respect to the subject of procedure after removal; and this is, that while every right and substantial advantage the parties had in the state court prior to removal is preserved to them with scrupulous care, in giving them the benefit of that right, the federal court

proceeds, and in the present state of legislation by congress must proceed, according to its own methods of procedure and rules of practice, and not that of the state courts, unless they be substantially the same. The federal court does not stickle for any mere idle or technical form, but will use on either side of the jurisdiction the removed pleadings as they stand, if by them and through them it can, acting independently of state regulation governing the suit before its removal, preserve the essential distinctions between legal and equitable modes of trial and the substantial rights of the parties growing out of those distinctions.

These are in suits of legal cognizance *a trial by jury*, not necessarily according to the precise forms, but substantially *according to the course* of the common law, and, in suits cognizable in a court of equity, a trial according to the practice of those courts as prescribed by our rules of practice. If the state court pleadings can be held, whatever their form, to accomplish this purpose, no repleading can be necessary, otherwise there must be a reformation of the pleadings and a recast of the litigation to accomplish that result, and this depends upon the nature of the particular suit and the relief sought by it as well as the form in which it has been conducted in the state court.

It is apparent that, in cases like this, there must be, by this rule, a repleading in this court, as there must have been, if the case were to be tried by a jury in the state court, had it remained there. But it is insisted that under the practice conformity act of June 1, 1872, (17 St. 197; Rev. St. § 914,) this court is bound to the state practice; that the Code of Tennessee abolishes all forms of actions, and allows the plaintiff to sue on the facts of the case; and that inasmuch as this "bill in chancery" states the facts it may, under the state practice, be treated as a sufficient pleading in a court of law. I have never known a common-law suit prosecuted under the forms of a "bill in equity" in *a court of law* in Tennessee. Such a proceeding would be as much of an anomaly in those courts as in the court of king's bench 100 years ago, notwithstanding our reformed pleadings under the Code. There is, therefore, no state practice like that suggested, imposed upon this court by the practice conformity act of 1872. On the same principle as that contended for, any letter or series of letters "stating the facts" and claiming damages, or any memorandum, deposition, affidavit, memorial, article in a newspaper or magazine, or other "statement of the facts" might be filed and treated as a declaration in a court of law. I do not understand the law of Tennessee to be so. The Code abolishes all forms of action so far as to obliterate the technical distinctions between them, but still requires *pleadings* in courts of law to be in the form of *declarations* and *pleas*, and the form of petition and answer or bill and answer is not recognized in the statutes nor used in practice. The models prescribed are those of the common law, stripped of useless verbiage and those technical char-

acteristics which distinguish them as actions of *assumpsit* or *ase*, *trespass* or *trover*, and the like, but they are yet in form and substance *declarations* and *pleas* and constitute a compact and admirable system of pleading, which it is a pity the legislature has spoiled by giving parties the option to plead "*as at common law*," and it would be the more a pity to give a further option of pleading *as in equity*, which we are asked to do in this case. Act 1859–60, *c.* 33, Tenn. Code, § 2917*a*.

It is true that no action is allowed to fail because of any defect in form; and any form complying substantially with the Code requirements would be sustained however inartistic; but, after all, the Code requires that the pleadings shall state "only material facts, without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form," and "in all actions at law the cause of action shall be stated clearly, explicitly, and as briefly as possible." Tenn. Code, §§ 2751, 2881. This would seem to preclude the argumentative and inferential statements of this "bill in equity" and its "exhibits," proper enough in a court of chancery, but not at all like the forms prescribed by the Code for a *declaration* in suits at law with which substantial compliance is required. Id. §§ 2939, 2940. Another section enacts that "Any pleading possessing the following requisites shall be sufficient: (1) When it conveys a reasonable certainty of meaning; (2) when by a fair and natural construction it shows a substantial cause of action or defense." Id. 2884. This means, of course, any pleading substantially in the forms prescribed by the Code; and the very next section requires the court to require a more specific statement, if the pleading be defective in the first particular above mentioned. Id. 2885. I do not doubt that, taken altogether, the Code requires, in suits at law, a pleading in the form of a *declaration*, but saves to the party stating the facts of his case, in any form whatever, his right of action, subject to the power of the court to compel him to reform the pleadings, if not already in substantial compliance with the requirements of the Code. Nor do I doubt, on the other hand, that, if taken in time, an objection to an action at law brought in a state law court, under the form of a bill in equity, would be sustained and the party required, as here, to put his pleading in the form of a declaration at law. Id. 2746–2753, 2863–2879, 2880–2940; 3 Meig, Dig. (2d. Ed.) 2140, 2133–2151; *Cherry* v. *Hardin*, 4 Heisk. 199, 203; *Stover* v. *Allen*, 6 Heisk. 614.

The pleadings in a court of equity are so ill-adapted to present the issues to a jury that I doubt if congress itself could impose them on a federal court of law without giving the act "an unconstitutional operation dangerous to the trial by jury." *Phillips* v. *Preston*, 5 How. 278, 289. It certainly could not, without some such contrivance as we have in the state courts of equity in Tennesee for sifting out

the issues and presenting them in a more simple form, less embarrassing to the prosecution or defense of a case before a jury.

Motion granted.

1. Consult on the subject of the distinctions between law and equity in procedure generally in the courts of the United States the following cases: *Wiscart* v. *Dauchy*, 3 Dall. 321; *Robinson* v. *Campbell*, 3 Wheat. 212; *U. S.* v. *Howland*, 4 Wheat. 114; *Wayman* v. *Southard*, 10 Wheat. 1, 41; *Parsons* v. *Bedford*, 3 Pet. 433; *Beers* v. *Haughton*, 9 Pet. 329; *Livingston* v. *Story*, Id. 652; *Parish* v. *Ellis*, 16 Pet. 451; *Phillips* v. *Preston*, 5 How. 278; *Bennett* v. *Butterworth*, 11 How. 674; *Neves* v. *Scott*, 13 How. 268; *Pennsylvania* v. *Wheeling Bridge Co.* 13 How. 518; *Graham* v. *Bayne*, 18 How. 60; *Hipp* v. *Babin*, 19 How. 276; *McFaul* v. *Ramsey*, 20 How. 525; *Jones* v. *McMasters*, 8; Id. *Fenn* v. *Holme*, 21 How. 481; *Farni* v. *Tesson*, 1 Black, 314; *Noonan* v. *Lee*, 2 Black, 509; *Thompson* v. *Railroad Cos.* 6 Wall. 134; *Ins. Co.* v. *Weide*, 9 Wall. 677; *Walker* v. *Dreville*, 12 Wall. 440; *Ex parte McNeil*, 13 Wall. 236; *Tyler* v. *Magwire*, 17 Wall. 253; *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Nudd* v. *Burrows*, 91 U. S. 426; *Indianapolis, etc., R. Co.* v. *Horst*, 93 U. S. 299; *Newcomb* v. *Wood*, 97 U. S. 581; *Van Norden* v. *Morton*, 99 U. S. 378; *Smith* v. *Railroad Co.* Id. 398; *Ex parte Boyd*, 105 U. S. 647; *Mayer* v. *Foulkrod*, 4 Wash. C. C. 349; *Baker* v. *Biddle*, Bald. 394; *Gier* v. *Gregg*, 4 McLean, 202; *Gordon* v. *Hobart*, 2 Sumn. 401; *Byrd* v. *Badger*, 1 McAll. 443; *Loring* v. *Downer*, Id. 360; *Shuford* v. *Cain*, 1 Abb. (U. S.) 302; *Lamar* v. *Dana*, 10 Blatchf. 34; *Montejo* v. *Owen*, 14 Blatchf. 324; *Garden City Co.* v. *Smith*, 1 Dill. 305; *Weed Sewing-machine Co.* v. *Wicks*, 3 Dill. 261; *Hall* v. *Mining Co.* 1 Woods, 544; *Benjamin* v. *Cavaroc*, 2 Woods, 168; *Kimball* v. *Mobile Co.* 3 Woods, 555; *Butler* v. *Young*, 1 Flippin, 276; *Beardsley* v. *Littell*, 6 Cent. Law J. 270; *Sage* v. *Touszky*, Id. 7; *Stone Cutter Co.* v. *Sears*, 9 FED. REP. 8; *Benedict* v. *Williams*, 11 FED. REP. 547; *Werthein* v. *Continental Ry. & T. Co.* Id. 689; *U. S.* v. *Train*, 12 FED. REP. 852; *Steam Stone Cutter Co.* v. *Jones*, 13 FED. REP. 567.

2. Consult on the special subject of these distinctions in relation to matters of pleading and the removal of causes the following cases: *Gaines* v. *Relf*, 15 Pet. 9; *Minor* v. *Tillotson*, 2 How. 392; *Randon* v. *Toby*, 11 How. 493; *Green* v. *Custard*, 23 How. 484; *Gridley* v. *Westbrook*, Id. 503; *Partridge* v. *Ins. Co.* 15 Wall. 573; *The Abbottsford*, 98 U. S. 440; *Barrow* v. *Hunton*, 99 U. S. 80; *Hurt* v. *Hollingsworth*, 100 U. S. 100; *West* v. *Smith*, 101 U. S. 264; *Duncan* v. *Gegan*, Id. 810; *Jifkins* v. *Sweetzer*, 102 U. S. 177; *King* v. *Worthington*, 104 U. S. 44, 50; *Hewett* v. *Phelps*, 105 U. S. 393, 396; *Toucey* v. *Bowen*, 1 Biss. 81; *Akerly* v. *Vilas*, 3 Biss. 332; *Brownell* v. *Gordon*, 1 McAll. 207, 211; *Clarke* v. *Protection Ins. Co.* 1 Blatchf. 150; *Charter Oak Ins. Co.* v. *Star Ins. Co.* 6 Blatchf. 208; *Fisk* v. *Union Pac. R. Co.* 8 Blatchf. 299; *Dart* v. *McKinney*, 9 Blatchf. 359; *Merchants' Nat. Bank* v. *Wheeler*, 13 Blatchf. 218; S. C. 3 Cent. Law J. 13; *Bills* v. *Railroad Co.* 13 Blatchf. 227; *Oscanyan* v. *Winchester Arms Co.* 15 Blatchf. 79, 87; *La. Mothe Manuf'g Co.* v. *Tube Works*, Id. 435; *Stevens* v. *Richardson*. 20 Blatchf. 53; [S. C. 9 FED. REP. 191;] *Ins. Co.* v. *Stanchfield*, 1 Dill. 424; *Zinkeison* v. *Hufschmidt*, 1 Cent. Law J. 144; *Thorne* v. *Towanda Tanning Co.* 15 FED. REP. 289.

3. Consult, also, generally, the following text-books: Dill. Rem. Causes, (2d Ed.) 40, 42, 45, 46, 47; Bump, Fed. Proc. 180, 209, 237; Thatcher, Pr. C. C. 305–307, 309, 310; Spear, Fed. J. 473, 486, 521, 522, 747, 764.

LEO *v.* UNION PAC. RY. CO. and another.

(*Circuit Court, S. D. New York.* January 24, 1884.)

1. DEMURRER—INSUFFICIENCY OF COMPLAINT—CORPORATE POWERS, ETC.
   The bill of the plaintiff, a stockholder in the defendant corporation, brought to restrain the corporation from employing its assets in excess of its corporate powers, *held* insufficient on demurrer on the ground that the allegations and statements should be more specific to show good cause for the relief sought.
2. CORPORATIONS—IN WHAT CASE THE MAJORITY RULES.
   In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits.
3. SAME.
   Those who become members of a corporation consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond such powers depends upon the want of consent, if the consent is given the right ceases. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief.

In Equity.

George Zabriskie and *John E. Burrill*, for orator.

John F. Dillon, for defendants.

WHEELER, J. This cause has been before heard on a motion for a preliminary injunction. 17 FED REP. 273. It has now been heard on demurrer to the bill. The question then was whether the defendants should be restrained pending the litigation; it now is whether there is anything in the bill which they ought to answer. The bill is brought by a stockholder to restrain the corporation from employing its assets in excess of its corporate powers; the other defendant is joined as president of the corporation for discovery merely, and no bad faith is alleged or charged. The prayer is that the corporation and its officers and agents be restrained, and for further relief. Any relief for the orator here must be wholly preventive. He could not, and does not ask to, undo what has been done. The avails of it, if held by the corporation, can only be reached through dividends common to all stockholders; if by others, only by proceedings against those who have them.

According to the bill, which is now to be taken as true, the corporation is made up of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company. The Union Pacific Railroad Company, before the consolidation, having a definite line of road, exceeded its powers if what is now sought to be restrained is an excess, and in the same manner, by lending and advancing moneys to other railroad companies to be used in the construction, maintenance, and operation of their roads, and entered into obligations to furnish further amounts, and received in payment of moneys furnished from time to time stocks and bonds of such roads. Since the consolida-

tion the same course has been pursued; stocks and bonds to which the Union Pacific Railroad Company would have been entitled, have been received by the defendant, and it has lent and advanced its moneys and credit to the same and other organized railroad corporations for the purpose of, and of aiding in, the construction, maintenance, and operation of their roads. There is no description of the corporations so aided, except that the corporate names of some are stated without their source, whether from state or national authority, and some are stated to be unknown; nor of their lines of road except as branch and connecting roads. Nor is there any statement of the amount of such aid or of the payments therefor, except that it is stated as appearing from the report of the government auditor that the amount of stocks and bonds received from other roads was, by the Union Pacific Railroad Company, June 30, 1878, $5,229,327.84; June 30, 1879, $7,534,243.91; by the defendant, June 30, 1880, $15,338,453.94, and that the orator is informed and believes that the defendant now holds of such bonds $23,749,-230.40, and of such stocks $29,462,046.98. The orator has at different times been a stockholder to a large amount in the defendant company. He acquired his present stock, 100 shares, November 17, 1882; commenced to object to this course of the defendant the next day, and brought this suit December 22, 1882. In the amended bill now under consideration, it is alleged that at a general meeting of the stockholders, held March 9, 1883, at which the holders of 384,769 shares were present or represented, this course was unanimously approved of. Whether the orator was present at that meeting is not stated; neither is any effort by him with the stockholders, either separately or at any meeting, to induce them to change or desist from this course, set forth, or any attempt to stop it shown, except notifications and protests to the officers and agents of the company.

The orator could not, and does not claim to, have any right to relief on account of his former ownership of stock. Having parted with that and all rights belonging to it, he gained this as a new acquisition, and has such rights as appertain to him as the owner of it as he acquired it. There is no doubt, and no question is really made, but that a stockholder or partner in an enterprise has the right to prevent taking his interest into another and different enterprise without his consent. In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits. *Colman* v. *Eastern Cos. Ry. Co.* 10 Beav. 1; *Salomons* v. *Laing*, 12 Beav. 339; *Beman* v. *Rufford*, 4 Eng. Law & Eq. 106; *Stevens* v. *Rutland & B. R. Co.* 29 Vt. 545. This right to stop the majority at the bounds of corporate power rests upon the control which every one has over his own property. Those who become members of a corporation, consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond depends upon the want of consent, if

the consent is given the right must cease. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief. *Kent* v. *Jackson*, 14 Beav. 367; *Gregory* v. *Patchett*, 33 Beav. 595. The exercise of the rights of a stockholder to influence corporate action by vote and speech in corporate meetings, when opportunity was presented or could be had, would lie in the proper direction. Until such means should be exhausted or prevented, there would be no real oppression of the minority by the majority. *Hawes* v. *Oakland*, 104 U. S. 450. The transactions of which the orator complains, and the continuance of which he is seeking to prevent, have been going on in the Union Pacific Railroad Company since long before, and in the defendant company ever since, the organization of the defendant company. As he had been a stockholder before, and has derived his knowledge of what was being done from the auditor's reports, open to all stockholders at least, he must have known what had been and was being done in these respects when he purchased this stock and assumed his present *status* in the company. He does not allege that he was in anywise ignorant of these things. His vendor is not shown to have in all this time objected, and must be taken to have acquiesced. He purchased this stock knowing that the company was engaged in the enterprises he seeks to stop, and by taking it he consented to become a member of a corporation so engaged. Large outlays had been made, great liabilities had been incurred, and embarrassing complications would necessarily follow, stopping them in the midst. It would seem to be highly inequitable and unjust to allow such a small minority to step in and arbitrarily stop the great majority, acting in good faith, honestly even if mistakenly, and in strictness outside of their authority. If the company was about to undertake a new enterprise not involved with these which have been so long prosecuted, and outside of its corporate powers, such as building a new line of road or purchasing the stock of another line, so as to control it, and thereby extend its lines beyond its charter, the case might be very different.

It does not distinctly appear that the transactions in question are outside of the powers of the corporation. The Kansas Pacific Railway Company was a Kansas corporation, with powers amply sufficient, under the laws of that state, to do within that state all that is complained of as being done somewhere by the defendant. Comp. Laws Kan. § 4091. This corporation was consolidated with the others as it was, and as they were, and it is not easy to see any reason why the corporate powers of each were not carried into the consolidated company. *County of Scotland* v. *Thomas*, 94 U. S. 682. Not that the consolidated company has powers in all the states and territories where it exists co-extensive with those of the Kansas Pacific in Kansas, but it may have in Kansas all the powers which the Kansas Pacific had there. If it has, all these transactions may be, so far as

the bill shows, in that state, and within the powers authorized to be exercised there. The names of the corporations are given, but they are private corporations, although created for public purposes, and judicial notice cannot be taken of their location. Although the defendant is merely a railroad corporation, it must, from its nature and circumstances, have large implied powers, which are as well conferred as its express powers. *Nat. Bank* v. *Graham*, 100 U. S. 699. It is burdened with vast debts, which it was fully authorized to assume, falling due in such immense sums at a time that the ordinary revenues would be wholly inadequate to meet them. Large accumulations and investments must be made long beforehand, involving great financial transactions. Operations must be had wholly foreign to the management of the railroads themselves, and pertaining much more to the business of banking than that of a carrier. These operations, if entered into for the purpose of carrying on a banking business, would be wholly outside of the corporate power; but when done for the purpose of fulfilling the financial duties of the corporation, must be clearly within them. The purchase of the stocks and bonds of other railroads might be for this legitimate purpose as well as the purchase of government or other corporate securities. The orator has not shown that the purchases of stocks and bonds may not be of this proper class.

All these statements and allegations are in very general terms. Excess of chartered powers, in progress or intended, is in no particular pointed out. A decree according to the prayer of the bill would be scarcely, if any, more than a general injunction against going outside of the charters. Something more specific, and so specific that the court can see that it is unwarranted by the law of the existence of the corporation, and wrongful to the orator as a member of it, should be pointed out distinctly. The bill, as now considered, does not appear to be sufficient to require an answer.

The demurrer is sustained, and the bill adjudged insufficient.

BERRY and another, Assignee, etc., *v.* SAWYER and others.

(*Circuit Court, W. D. Pennsylvania.* September 14, 1882.)

1. EXPRESS AND CONSTRUCTIVE TRUSTS—PAROL AGREEMENT RESPECTING LAND.
   A parol agreement by which one of several joint purchasers of land takes the title in trust for the others, imposes upon the grantee an express trust which does not fall within the meaning of a statute of limitations fixing a time for the enforcement of constructive trusts.
2. LIMITATION—BANKRUPT ACT—ADVERSE INTEREST.
   The clause of the bankrupt act requiring all causes of action, "between an assignee in bankruptcy and a person claiming an adverse interest," to be prosecuted within two years, applies only when the interest has been actually adverse for two years; and the interest of a trustee, so long as he acknowledges the trust, is not adverse to that of his *cestui que trust*.

3. WITNESS—COMPETENCY—ACTION BY OR AGAINST EXECUTORS—PARTY TO THE RECORD.
   Section 858 of the Revised Statutes, making both parties in actions by or against executors, administrators, or guardians incompetent to testify as to certain transactions, does not disqualify a person interested in the controversy unless he is an actual party to the record.
4. EQUITY PLEADING — RESPONSIVE ALLEGATIONS — HOW FAR CONCLUSIVE EVIDENCE.
   The rule that responsive allegations in the answer to a bill in equity are conclusive evidence in favor of the respondent unless overcome by the testimony of two witnesses or their equivalent cannot be invoked when the answer is upon information and belief, or is discredited by circumstances.

In Equity.

Schoyer & McMurry, for complainants.

Malcolm Hay and *S. H. Geyer*, for respondents.

MCKENNAN, J. This bill is filed by the complainants, as assignees in bankruptcy of N. P. Sawyer, against Jane Frances Sawyer, in her own right, and as executrix of the will of John H. Sawyer, and also against C. B. Seeley and Ormsby Phillips, as voluntary assignees of said John H. Sawyer. It alleges that N. P. Sawyer confessed judgments to a large amount in favor of John H. Sawyer, which are entered of record in Allegheny county, a large portion of which judgments were merely a security for advances and responsibilities to be thereafter made and assumed by said John H. Sawyer for the benefit of N. P. Sawyer, but which he did not make or assume; and that certain valuable real estate, fully described in Exhibit C, was purchased jointly by John H. Sawyer, N. P. Sawyer, and B. C. Sawyer, the title of which, for convenience of sale, was vested in John H. Sawyer, who held said title in trust for himself and the said N. P. and B. C. Sawyer; and that the said John H. Sawyer, in his life-time, sold considerable portions of said real estate and received the purchase money, but rendered no account thereof. And, therefore, praying that an account be taken of the proceeds of all sales by said John H. Sawyer in his life-time; that any surplus due to said N. P. Sawyer after paying his true indebtedness to John H. Sawyer, be paid to the complainants; and that the undivided one-third of the said real estate remaining unsold be conveyed to the complainants.

The answers of Jane F. Sawyer and Ormsby Phillips, upon information and belief, deny that the judgments confessed by N. P. Sawyer to John H. Sawyer were given, as stated in the bill, for future advances and responsibilities, but aver that they were founded upon an actual indebtedness by N. P. to John H. Sawyer, at the time. And they also, upon information and belief, deny the fiduciary character of the conveyances to John H. Sawyer of the real estate described. And they also aver that an act of assembly of the commonwealth of Pennsylvania, approved April 22, 1856, entitled, "An act for the greater certainty of title, and more secure enjoyment of real estate," provides, *inter alia*, "that no right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to re-

alty, but within five years after such trust accrued, with the right of entry, unless such trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the said period;" and therefore aver that, as more than five years have elapsed since the alleged trust accrued, the complainants are not entitled to have it enforced.

It is clear that the Pennsylvania statute operates exclusively upon the class of trust which is within its terms. Resulting trusts alone are named, and hence they only are within its scope. They are such as are implied by operation of law, as where one buys land in the name of another, and pays the purchase money, the legal implication is that the grantee of the title holds it in trust for the person who paid the purchase money. They belong to a distinct class from express trusts, which never rest in implication, but are the product of an express declaration or agreement. That the latter may be created by parol—as is now well settled—does not change their technical character or classification. The trust alleged in the bill is an express one, and therefore the respondents are not entitled to the benefit of the statutory limitation.

The complainants were appointed assignees in bankruptcy of N. P. Sawyer on the twentieth of November, 1876; John H. Sawyer died in July, 1877; and this suit was brought in November, 1879. It is therefore insisted that more than two years elapsed after the complainants' right of action accrued, and that the suit is barred by section 5057 of the Revised Statutes, (section 2 of the bankrupt act.) That section fixes the period of two years from the time when the cause of action accrued for the bringing of suits, at law or in equity, "between an assignee in bankruptcy and a person claiming an adverse interest touching any property or right of property transferable or vested in such assignee." A similar provision was contained in the bankrupt act of 1841, and that was held not to apply to controversies touching real estate until after two years from the taking of adverse possession. *Banks* v. *Ogden*, 2 Wall. 58. And in *Bailey* v. *Glover*, 21 Wall. 346, the limitation in the act of 1867 is held to apply to all judicial contests where the interests are *adverse* and *have so existed for more than two years.* And so, again, in *Seymour* v. *Freer*, 8 Wall. 202, the court say: "When there is no disclaimer the statute has no application to an express trust, such as we have found to exist in this case." Here the court found a trust to have existed which is strikingly similar in its main feature to the trust set up in this case.

If the averments of the bill as to the original existence of a trust are sustained by competent and sufficient proof, the applicability of the limitation will then depend upon whether, and at what time, there was a disclaimer of the trust by the trustee or his representatives, or whether and when the interests of the parties became adverse. The respondents have not offered any evidence; and there is nothing in the record to show that John H. Sawyer, at any time during his

life, denied the trust, or that his assignees and personal representative assumed an attitude adverse to it until 1879, within a year before the institution of this suit. It is true that John H. Sawyer held the legal title and made sales and conveyances of parts of the trust property, and received the purchase money therefor. This was not, however, inconsistent with the trust, but was in entire harmony with, and in pursuance of, its alleged object and terms. More than this, it is in proof that N. P. Sawyer and B. C. Sawyer occupied parts of the trust property for some years during the life of John H. Sawyer without paying any rent to him, or any claim for it on his part. Under these circumstances, it is clear that an adverse relation touching the alleged trust did not exist for two years between N. P. Sawyer and John H. Sawyer or his representatives; and hence that the statutory limitation is ineffectually invoked.

The testimony of N. P. Sawyer has been taken and offered, and it is indispensible to the complainants. His competency as a witness is objected to by the respondents. Although he is not a party to this suit, yet we think he has such an interest in its result as would disqualify him, unless he is rendered competent by section 858 of the Revised Statutes. That section, in the most comprehensive terms, removes all disqualifications to testify by a party to an action, or by one interested in the issue tried; but it provides "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, *neither party* shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Before the passage of this act two classes of persons were incompetent to testify, viz., parties to the issue, and persons interested in but not parties to it. In the body of the section this disqualification is removed, without restriction, as to both classes. The proviso, however, restricts the testimony of a "*party*" to the issue so as to exclude transactions with, or statements by, a deceased testator, intestate, or guardian, but does not impose any such limitation upon the competency of a witness interested in but not a party to the issue. This is the literal import of the whole section, and, we think, accords with its spirit and reason. We must therefore overrule the objection to the deposition of N. P. Sawyer, and take the whole of it into consideration. That testimony is of great significance. It sustains every material allegation of the bill. It establishes the trust alleged, explains its origin and nature, and states fully and clearly its objects and terms, and the reason of them, and what was done in pursuance of it. And it is materially reinforced by the testimony of Wade Hampton and Andrew Lyons, both of whom testify to acts and declarations of John H. Sawyer, as well as of N. P. and B. C. Sawyer, in his presence, in confirmation of the existence of a trust. No reason is apparent to us why this testimony should not be believed; and

so accepting it, we are brought to the conclusion that the title to the real estate described in the bill and exhibits was vested in John H. Sawyer for the joint and equal benefit of himself, N. P. Sawyer, and B. C. Sawyer, and that the unsold remainder of this real estate is held by his successors, subject to this trust.

But it is urged by the respondents' counsel that even if the evidence in support of the bill is to be taken as true, it is not sufficient to entitle the complainants to a decree; and the familiar rule in equity is invoked that the responsive allegations in an answer are conclusive evidence in favor of the respondent, unless they are overcome by the testimony of two witnesses, or that of one and proof of circumstances equivalent to the testimony of a second witness. This is the general rule when the negative averments in the answer are positive and are founded upon the knowledge of the respondent. The reason of it is, as stated by Chief Justice MARSHALL in *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch, 160, that "the plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance." And he affirms that the weight to be given to the answer is affected by the same tests which are applicable to a deposition, as, for instance, whether the respondent speaks from belief or knowledge. Both are only evidence, and must be weighed in the same scales. This qualification of the weight to be given to an answer upon information and belief is also strongly stated in the note to Mr. Bispham's Adam's Equity, on page 693, on the authority of numerous American cases. And in the note to section 849*a*, Story, Eq. Pl. (9th Ed.) it is thus stated: "An answer upon oath is not evidence for the defendant, which must be overcome by two witnesses, * * * (5) when the answer itself shows, or it is apparent from the defendant's situation or condition, that though the answer is positive, he swears to matters of which he could not have personal knowledge." In the same note it is further said, upon several authorities, that, where an answer upon oath is discredited as to one point, its effect as evidence, as to other points, is impaired or destroyed, according to the circumstances of the case.

The alleged trust property consisted of two parcels, one known as the Hitchcock property, purchased in the latter part of 1865; the other as the O'Hara property, which was purchased not long after the Hitchcock. As to the Hitchcock property, the largest requirement of the rule is fully met by the proofs presented by the complainants. The testimony of three witnesses as to the declarations and acts of John H. Sawyer touching the negotiation for its purchase, the contract for it, and the sales of a large part of it, clearly impress upon his title the fiduciary character contended for by the complainants. The proof in relation to the O'Hara property

is somewhat less plenary. It consists chiefly of the testimony of N. P. Sawyer. But considering that his testimony as to the trust agreement is corroborated by the testimony of Wade Hampton and Andrew Lyons touching the Hitchcock property; that the negative averments of the answers do not rest upon the personal knowledge of the respondents; that the answers are materially discredited upon one point at least by the complainants' proofs; and that N. P. Sawyer was in the occupancy and enjoyment of the O'Hara property for nearly 10 years without payment of or claim for rent,—we are of opinion that the weight of the answers as evidence is greatly impaired, and that the balance of proof is in favor of the complainants.

Upon the whole case, we think the relief prayed for ought to be granted against the respondents, except Seeley, and a decree to that effect will accordingly be drawn.

ACHESON, J. I sat with Judge MCKENNAN at the hearing of this case, and have reached the same conclusions announced by him. I concur unreservedly in his opinion.

WEST PORTLAND HOMESTEAD ASS'N *v.* LAWNSDALE, Assignee.

(*District Court, D. Oregon.* February 21, 1884.)

1. CONVEYANCE—CONSIDERATION FOR.
   A conveyance under seal is *prima facie* evidence of a sufficient consideration, and a mere stranger to the land cannot question it.
2. CASE IN JUDGMENT.
   G. and C. were tenants in common of a tract of land which was surveyed and platted as Carter's addition to Portland, and then partitioned between the tenants in common by mutual conveyances, the one to C. containing a small park for the purpose of equalizing the partition, described therein as block 67, and afterwards changed said survey so as to materially diminish said park; and at the same time G. surveyed a tract of land adjoining the tract held in common, into lots and blocks, and together with his co-tenants platted the two tracts as one Carter's addition, and duly acknowledged and recorded the same, with a block numbered 67 in the G. tract, and the small park aforesaid, not numbered. *Held*, that the conveyance to C. of the park as block 67 did not affect the block 67 afterwards laid off in the G. tract, and that the assignee in bankruptcy of C. had no right, interest, or equity therein, and should be enjoined at the suit of G.'s grantee from selling the same as the property of C. and thereby casting a cloud on such grantee's title thereto.

Suit to Enjoin a Sale of Real Property.

C. P. Heald, for plaintiff.

George H. Durham and *George H. Williams*, for defendant.

DEADY, J. This case was before this court on a plea of the statute of limitations (section 5057, Rev. St.) to the original bill, filed on March 27, 1883, when the former was held good, (17 FED. REP. 205;) and also on a demurrer to an amended bill filed July 24, 1883, which

was overruled. Id. 614. The case has since been heard on such amended bill, the answer thereto, and the replication, exhibits and testimony, and the only question arising thereon is this: was the present block 67, in Carter's addition to Portland, conveyed to Charles M. Carter on September 6, 1871, by the partition deed to him of L. F. and Elizabeth Grover and others, of that date? If it was, this suit cannot be maintained, even if it was included in said deed by mistake, because the right to relief therefrom is barred by section 5057 of the Revised Statutes. But if it was not, then it is equally clear that the defendant, as the assignee in bankruptcy of said Carter, has no right or interest in the property, and may be restrained from selling it as such, and thereby casting a cloud on the title of the plaintiff thereto. This is a question of fact; and without discussing the evidence in detail it is sufficient to say that it is clear and convincing that this block 67 was not in existence—had not been laid off—when this deed was executed, and was not affected by it. Neither did the parties to this conveyance contemplate or understand that the title to this block was in any way involved in the partition of which it forms a part. For although the description in the conveyance—block 67, in Carter's addition to Portland—so far indicates this block as the property intended, as to make a *prima facie* case of identity, yet the plaintiff is entitled to show, and has shown beyond a doubt, that this is a mere coincidence, and that whatever property was intended to be conveyed by the description of block 67, in Carter's addition, it was not and could not be this block 67.

Whenever, for any cause outside of a deed, there arises a doubt in the application of the descriptive part thereof, evidence *dehors* the writing may be resorted to for the purpose of identifying the subject of the instrument and the understanding or intent in this respect of the parties thereto. And it matters not that it may not appear what property was intended to be conveyed by the description of block 67 in this deed, so long as it does not appear that it is the block in dispute. But there is very little room for doubt or controversy on the subject. When the parties had selected the blocks in the common tracts as laid out, up to and including 65, in the first survey, it was found that Mr. J. S. Smith and Charles M. Carter, had less in value, according to the agreed prices, than the other two; and so to equalize the partition, Smith took a small park and numbered it 66, while Carter took another one lying between Summit and East drives, and marked it 67, and the deeds to them were made out accordingly. The plat of this survey was photographed before this partition, and the original was burned in the great fire of 1872. The photographic copy is here, but without the numbers 66 and 67 on it. Soon after this survey and partition of the common tract, the ground, which was uneven and steep and covered with timber and brush, was burned over, and showed such irregularities of conformation as induced the parties to change the survey in some respects, whereby the park al-

lotted and conveyed to Carter, as block 67, was materially reduced in size, and on this account and from its situation regarded as almost worthless.

In platting the subsequent survey of the Grover tract the second survey of the common tract was included therein, and the whole acknowledged and recorded by all the parties thereto on November 4, 1871, as the plat of Carter's addition. In numbering the blocks on the Grover tract, the draughtsman, who was the same person in both cases, commenced at 66, the highest number on the original draught of the plat of the common tract being 65. Before the acknowledgment, however, attention was called to the fact that Smith had been allotted a park in that tract and received a conveyance of it from his co-tenants as block 66, and thereupon the block of that number on the Grover tract was numbered 66½, but the park allotted and conveyed to Carter as block 67 does not appear to have attracted the same attention, and the plat was acknowledged and recorded with only the one block numbered 67 on it—the one in the Grover tract. The probability is that, being comparatively worthless, it was overlooked. It was never listed for taxation; and Mr. Carter testifies that he owned the block adjoining it, and he preferred and so regarded it as public ground or street.

The theory of the defendant is that, although this park in the common tract was allotted and conveyed to Carter as block 67, yet when upon the resurvey this was nearly obliterated, that the parties—and particularly Grover and Carter—came to an understanding that there should be a block 67 laid off in the Grover part of the new Carter's addition, which should stand for and represent the block of that number and description in his deed of September 6th. But the parties to the transaction—Grover, Smith, and Carter—all testify positively that there never was any such agreement or understanding, or even any intention, that Carter should have block 67 in the Grover tract on any account or for any reason; and there is nothing in the case but surmise and conjecture to the contrary. About this time Carter wrote his name on the recorded plat of Carter's addition across all the blocks claimed by him therein, and this block 67 is not among them. If he then understood that it was his, why did he omit to mark it? The omission to do so, under the circumstances, is a deliberate admission that it was not his. He never listed it for taxation or paid any taxes on it. Lists of the property on which he paid taxes for several years after 1871, indorsed on the tax receipts, including sundry blocks in Carter's addition, are produced in court, and this block does not appear in any of them. Carter was one of the corporators of the plaintiff, his name appearing signed to the articles on July 27, 1875, and as such he took the conveyance of this block from the grantors of the plaintiff. This was another deliberate admission that the property was not his, but of the grantors of the plaintiff. And all these admissions were made long prior to the bankruptcy and the

rise of this controversy, and could not, so far as appears, have been made collectively or for any ulterior purpose whatever. And if this surmise or conjecture is even admitted to be a fact, it is not apparent how this verbal understanding between Grover and Carter could have the effect to convey any land of the former to the latter, let alone that of his wife's. Nor was there any reason in right or justice for such an understanding or agreement between the parties. If the partition of the common tract was thought to have resulted unequally as to Carter, by reason of the contraction of the park allotted to him as block 67, Mr. Grover was under no more obligation to make up the deficiency than his two co-tenants, who had received an equal share with himself. The assumption that he would voluntarily undertake to make this deficiency good, and apparently more than good, out of his own or his wife's property, is unreasonable and incredible.

Nor is there any ground on which the plaintiff and its grantors are estopped to assert their title to this block as against Carter's assignee in bankruptcy. In the first place, there is no reason to believe that any of Carter's creditors ever gave him credit on the strength of the ownership of this block. In those days it was an unoccupied, out-of-the-way piece of property and of comparatively small value,—a mere drop in the bucket compared with the value of his estate and the volume of his financial transactions. He never was in possession of it; never laid any claim to it, or exercised any acts of ownership over it. There was no intention to deceive any one by means of the transaction, which occurred seven years before the bankruptcy, nor did it involve any such gross culpable negligence on the part of the plaintiff's grantors as the law considers equivalent to such intention; and more than all this, if any creditor ever was led to believe, from the record of the deed of September 6th to him, that the bankrupt ever owned a block numbered 67, in a Carter's addition to Portland, he would also see that it did not purport to be such a block according to the recorded plat of said addition," and he might also see from the record thereof that such plat was made and acknowledged quite two months after the date of such deed; and thereby he would be informed, or have good reason to believe, that such block must be number 67 on some other and prior, but unrecorded, plat of some other attempted Carter's addition.

It is also claimed by counsel for the defendant that the plaintiff is not a purchaser for a valuable consideration, and therefore cannot maintain this suit. But how that can be material in this controversy between the plaintiff, who appears to have the legal title and a stranger to the property, who does not appear to have any right, interest, or even equity in the premises, is not apparent. But the claim is not even sustained by the evidence. The conveyance from Grover and wife to the plaintiff, on August 11, 1875, purports to have been made in "consideration of the sum of $30,000 to them paid. The

conveyance is under seal, and is *prima facie* evidence of the truth of this recital, or at least that it was executed for a valuable consideration. Code Civil Proc. § 743. And there is not a particle of evidence in the case to the contrary. The most that can be said is that it may be surmised from the evidence and the nature of the transaction that the formation of the plaintiff and the conveyance of this property to it was merely a means of putting it on the market, and that the only consideration which the grantors actually received from the conveyance was in the stock of the corporation. But admitting this to be a fact, the conveyance was nevertheless made upon a valuable consideration, the stock of the corporation standing for the property and having an equal value with it.

The plaintiff is clearly entitled to the relief, and there must be a decree for an injunction restraining the defendant, as prayed in the amended bill, and for the costs, and it is so ordered.

BRADLEY and others *v.* KROFT and another, Defendants, and WILLIAM J. COWEN, Garnishee Defendant.

(Circuit Court, W. D. Wisconsin. December Term, 1883.)

1. VOLUNTARY ASSIGNMENT — STATUTE OF WISCONSIN — PROOF OF CLAIM AFTER THE EXPIRATION OF THREE MONTHS.
   The statutes of Wisconsin require all creditors of one who has made a voluntary assignment to file their claims with the assignee within three months after his appointment, upon pain of being debarred from participation in any dividends made after the expiration of the three months, and before their claims are actually filed; *held*, that there is nothing in the statute which prevents a creditor, who has failed to file his claim within three months, from filing and proving it afterwards and taking the benefit of the law.
2. SAME—UNLAWFUL PREFERENCE.
   Accordingly, where a voluntary assignment of partnership property was made in trust for the payment of all partnership debts that should be proved "as provided by the statute," and afterwards in trust for the payment of individual debts, *held* that the assignment contained no unlawful preference, such as to debar from their rights the creditors of the partnership who did not file their claims within three months.
3. ACTION ON DEMAND NOT YET DUE—STATUTE OF WISCONSIN—PREREQUISITES —BOND.
   The statute of Wisconsin, allowing an action to be maintained on a demand not yet due upon the filing of a bond conditioned in three times the amount of the claim, must be strictly complied with. The bond is a prerequisite to the right of action, and if it is defective in the first instance the fault cannot be afterwards healed by the substitution of a regular bond.

Decision of Motion for Judgments against defendants on the answer, and against garnishee defendant.

Tenney & Bashford, for plaintiffs.

L. M. Vilas, for defendants and garnishee.

BUNN, J. This action is brought by David Bradley & Co., a corporation existing under the laws of Minnesota, and a citizen of Min-

nesota, against the defendants, who are citizens of Wisconsin, upon certain promissory notes not due; and an attachment accompanying the summons was issued against defendants' property, under the provisions of chapter 233 of the General Laws of Wisconsin for the year 1880, and garnishee proceedings commenced against William J. Cowen, who, it is claimed, has property in his hands belonging to the defendants, and liable for their debts. The garnishee answers, denying all liability, or that he has any property in his hands belonging to the defendants. He also sets up facts showing that previous to the commencement of this action on November 14, 1883, to-wit, on November 5, 1883, the defendants, who were partners doing business at Menomonee, in Dunn county, under the firm name of Kroft & Severson, made a general assignment of all their stock and effects to the garnishee defendant in trust and for the benefit of their creditors, under the insolvent laws of Wisconsin; and that the said garnishee holds the property which it is sought by the garnishee proceedings to reach, under such assignment. The plaintiff moves for judgment against the garnishee upon his answer, and attacks the validity of the assignment. The question is, whether the assignment is valid under the laws of Wisconsin? If it is, then the motion must be denied.

The principal objections urged against the assignment are: (1) That it contains a preference in favor of creditors, which the statute forbids; (2) that it is conditional and does not appropriate the property of the assignors absolutely to the payment of their debts. If the assignment is justly obnoxious to these objections, or to either of them, it cannot be maintained.

By chapter 349, Laws 1883, § 1, it is provided that "any and all assignments hereafter made for the benefit of creditors, which shall contain or give any preferences to one creditor over another creditor, except for the wages of laborers, servants, and employes earned within six months prior thereto, shall be void."

The assignment is somewhat voluminous, and, in order to a proper understanding and construction of it, it is necessary that all the provisions should be considered together. The substance of those material to the inquiry is as follows:

The assignment recites that whereas the said assignors are indebted to divers persons in divers sums, which, by reason of difficulties and misfortunes, they have become unable to pay, and they being desirous of providing for the payment thereof by an assignment of their property and effects for that purpose, not exempt from execution, in consideration of the premises, etc., they do assign, convey, and set over to the assignee all their real estate and personal property, whether held by them as partners or individuals, except such as is exempt from execution; to have and to hold the same in trust that the assignee shall take possession of the partnership property, and, with all convenient diligence, sell and convert the same into

money, at public or private sale, as may be deemed for the best interest of the creditors, collect all the debts, and, out of the proceeds of such sales and collections, make such payment or payments to the partnership creditors, *pro rata*, and without preference, except as to laborers and servants, as is provided by law, subject to the orders and directions of the circuit court of said county, or the judge thereof, as provided by law; and that if, after the payment of all costs, and all partnership debts in full, as have been proved against them as such partnership or firm, as provided in chapter 80 of the Revised Statutes of Wisconsin, and the several acts amendatory thereof, any portion of such proceeds remain in the hands of such assignee, he shall pay and discharge all the private and individual debts of the assignors, or either of them, whether due or to grow due, provided the respective amounts of the individual debts of each does not exceed his portion, being one-half thereof of the surplus that may remain, after paying all of the said partnership debts, and, if it should, then his interest in such surplus to be divided, *pro rata*, among his individual creditors in proportion to their respective demands, which shall have been proved and filed as required by said chapter 80, Rev. St., and amendatory acts. There is a like provision in regard to the separate property of the individual partners, assigning it (all that is not exempt) to the assignee, without preference, for the benefit of (1) the private and individual creditors that have proved their claims, and (2) when they are satisfied, then to their partnership creditors, share and share alike, who shall have proved their claims, as before provided. Then follows a provision that "if, after payment in full, as aforesaid, there should remain in the hands or possession of the assignee, in trust, any portion of the proceeds of said sale and collections of said partnership property, or of said individual property, or of both, he shall return, reassign, and deliver the same to the assignors, according to their several rights."

The foregoing is a condensed statement of the provisions bearing upon the question of a preference in favor of creditors, and also upon the question of whether the assignment is conditional or absolute, these objections both turning upon the same question of construction.

The question is as to the proper construction to be placed upon them, and whether the effect of the provisions, taken as a whole, is to prefer one creditor to another, or to make the assignment conditional instead of absolute for the benefit of creditors. There is no claim that the assignment, in terms, prefers any creditor or creditors by name, over others. But the plaintiffs' contention is that the assignment only provides for the payment of such creditors as shall prove their claims within three months from the time of publication of notice to them by the assignee; and that the creditors who do not file affidavits of their claims within that time can not be paid at all under the assignment, but the property, after that, is to be returned to the assignee. And if this be the proper meaning of the assign-

ment, I think the contention must be sustained. But after a careful consideration of all its provisions, and in the light of the statute, I must say this seems to me a rather straitened construction, and that I find no such meaning in the assignment. The intention to be gathered from the whole instrument would clearly seem to be to provide for the payment of all who are entitled to be paid under the statute, share and share alike, whether partnership or individual creditors, and equitably according to their respective rights, as against the partnership and individnal effects, and whether the claims are proved within three months or afterwards, under the statute, except as to such preference as the statute itself gives to those who prove their claims within three months. But to judge properly of the weight to be given the objection it will be necessary to refer to some provisions of the statute.

Section 1693, chapter 80, of the Revised Statutes, provides that "the circuit court, or the judge thereof, in vacation, shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter, and may make all necessary orders for the execution of the same."

Section 1698: "Within twelve days after the execution of the assignment the assignee shall give notice of the making thereof, and of his post-office address; and that every creditor of such assignor is required to file, within three months, with such assignee, or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence, and post-office address, the nature, consideration, and amount of his debt claimed by him, over and above all offsets." Then the statute provides for a publication of the notice, and mailing a copy to each creditor.

Section 1699, among other things, provides that the assignee, after the expiration of three months, shall file with the clerk of the court proof of the publication, and a list of the creditors served, and also a list of the creditors who have filed an affidavit of their claim.

Section 1700 provides that "every creditor of the assignee [assignor] who shall not file such an affidavit of his claim within the time limited, as aforesaid, shall not participate in any dividend made before his claim is filed. Debts to become due, as well as debts due may be proved," a rebate of interest being allowed, etc.

Section 1701 provides that the assignee shall, within six months after his appointment or within such further time as the circuit judge or court shall allow, file in the circuit court a report setting forth a full statement of the property received, together with the names and residences of the creditors, the dividends made, and a full account of the receipts and disbursements.

The plaintiff contends that there is no provision in the law for a creditor to prove his claim after three months has expired, although he may file it and be entitled to payment; and that the effect of the

assignment is to provide only for the payment of those creditors who file proof by affidavit of their claims within the three months. But if this be so it must be by inference only, because there is no such provision expressed in the assignment. There is an express provision that out of the proceeds of sales and collections the assignee shall make payment to the creditors, *pro rata*, and without preference, except as to laborers and servants, as the law provides, subject to the order and direction of the circuit court or the judge thereof.

It is true, as before seen, that the assignment provides that if after payment of all costs and all debts in full, as have been proved against the assignors, as provided by said chapter 80 and the several acts amendatory, that if anything remain, it shall be returned to them; but this is not equivalent to a provision that none shall be paid who do not file proof of claim within three months. On the contrary, it appears the provisions for payment in the assignment are as broad as the provisions of the statute, and that any one who is entitled to file or prove his claim within the law is also entitled to payment under the assignment. The clear inference from the statute is that no absolute limit is placed upon the time when claims must be filed or proved. There is an inducement held out to such as file them within three months. But, except that other creditors not so filing the affidavit within that time are barred from sharing in dividends made previous to the filing of their claims, their right to file and prove their claims after three months has expired is just as clear under the law as is that of the more diligent class.

It is said there is no provision in the law for proving claims, though there may be for filing them, after the expiration of the three months. But the general provision, that debts to become due, as well as debts due, may be "proved," applies just as well to those "filed" after three months as those "proved" before, by the filing of an affidavit. The inference is irresistible that a creditor may both file and prove his claim after the time limited, and the only penalty for not proving before is that they are not entitled to previous dividends. It is clearly contemplated by section 1701 that the settlement of an estate under the act may require six months, or even longer, in the distribution, and under the general control and supervision of the circuit court. And the provision, that "every creditor who should not file such affidavit of his claim within the time limited, shall not participate in any dividend made before his claim is filed," contains the clear implication that he is entitled by proving up his claim afterwards, to participate in dividends made subsequently. And if he is entitled under the law to prove his claim and participate in dividends, he is also so entitled by the clear and positive provisions of the assignment. It will have been observed that the circuit court has general control and supervision of the estate and proceedings under the assignment; and I see nothing in the provisions of the assignment at all inconsistent with

a full and fair distribution of all the property and effects of the assignors, according to law.

The conclusion I have reached is that the assignment is valid in law, and that the answer of the assignee, as garnishee, sets up a good defense. The motion for judgment will therefore be denied.

I am also of opinion that the answer of the defendants Kroft & Severson sets up a good plea in abatement, and that the motion for judgment against them must be denied.

The action is upon promissory notes not due at the time of the commencement of the action.

Chapter 233, Laws 1880, provides that "an action may be maintained, and a writ of attachment issued, on a demand not yet due, * * * and the same proceedings in the action shall be had, and the same affidavit shall be required, as in actions upon matured demands, except that the affidavit shall state that the debt is to become due: provided that the undertaking * * * shall be conditional in three times the amount demanded."

The action was commenced on November 14, 1883, by the issuing and service of a summons accompained by an attachment and undertaking, but the undertaking was not in three times the amount demanded. On November 17th a new undertaking was executed and served, such as the law required in such cases, but no new summons or attachment was issued, and no new service had. The amount of the debt demanded was $603.56. The original undertaking accompanying the summons or attachment was for $250. The undertaking executed on November 17th was for $2,000. It is claimed by plaintiffs that they had a right to give that new undertaking, and that the giving of it cured the defect and made the service of the summons and attachment good from that time. But I am unable to concur in this view. The proceeding is special, and I think all the conditions of the statute should be complied with in order to uphold it. It was so held by the supreme court of Wisconsin in *Gowan* v. *Hanson*, 55 Wis. 341, [S. C. 13 N. W. Rep. 238,] and I fully concur in the construction therein given to this statute. The court there say:

"To our minds it is perfectly clear that the statute only authorizes the commencement of an action on a debt not due, for the purpose of an attachment, on condition that the requisite affidavit is made, and the proper undertaking executed and delivered. The giving of an undertaking for three times the amount demanded is as essential to the right to maintain the action as the making of the affidavit. Both things are absolutely necessary and requisite, when the debt is not due, and the omission of either is fatal to the action. This is the plain meaning of the statute; any other construction would do violence to the language."

The execution and service of an undertaking after the suit was begun could not relate back so as either to give the plaintiff a cause of action, as upon a demand already due, or to bring him within the provisions of the law for maintaining an action upon a contract *not*

due when the suit was commenced. This is the real difficulty with the plaintiff's case. It is not that there is a mere irregularity that may be cured by amendment or by a general appearance. The summons and attachment proceedings were regular in form, but the plaintiff had no cause of action, although he held the defendants' contract not due, and of which there had been no breach. A cause of action arises on a contract not from the date, but from the time of the breach. By common and universal law no action can be maintained until the contract is broken. By the laws of Wisconsin an action may be maintained so soon as the contract is delivered, and before any breach, but only upon certain precedent conditions, which were not observed in this case.

The action when begun was liable to the plea in abatement, which was afterwards put in, that the debt was not due, and the service of the new undertaking was not the commencement of another suit, and could not debar the defendant from his plea. The plaintiff, if he wished to avail himself of this extraordinary statute, should have begun his suit anew, and complied in all respects with its conditions. Nor was the defect waived by a general appearance. The case is in no way likened to that of a merely irregular or defective service, where the party defendant, in order to take advantage of the irregularity, must appear specially and move to vacate, and where a general appearance will be a waiver. Here the summons, attachment, and service are perfectly regular in form, and the affidavit for the attachment gives no clue to the fact that the debt is not due, but, on the contrary, states that it is due upon express contract. The real difficulty is that the plaintiff has begun his action prematurely; in other words, that he had no cause of action at the time of the commencement of the suit.

The course taken by the defendant was the proper course—to appear in the action and set up the facts by plea in abatement. I think his plea a good one, and the motion for judgment thereon is denied.

BANK OF THE METROPOLIS *v.* FIRST NAT. BANK OF JERSEY CITY.

(*Circuit Court, S. D. New York.* February 8, 1884.)

1. NEGOTIABLE PAPER—QUALIFIED INDORSEMENT—NOTICE.
   An indorsement upon negotiable paper "For collection; pay to the order of A. B.," is notice to all purchasers that the indorser is entitled to the proceeds.
2. MONEY HAD AND RECEIVED—PRIORITY.
   An action for money had and received lies against anyone who has money in his hands which he is not entitled to hold as against the plaintiff; and want of priority between the parties is no obstacle to the action.

At Law.

Francis Schell, for plaintiff.

Marsh, Wilson & Wallis, for defendant.

WALLACE, J. The plaintiff sues to recover the amount of certain checks of which it was the holder and owner, and which came to the defendant's hands and were collected by its sub-agent under the following circumstances: The plaintiff sent the checks to the Mechanics' National Bank of Newark, for collection, with the qualified indorsement, "For collection; pay to the order of O. L. Baldwin, cashier," Baldwin being the cashier of that bank. The Mechanics' National Bank of Newark sent the checks for collection to the defendant, pursuant to an existing arrangement between them by which each sent to the other commercial paper for collection, it being understood that the proceeds were not to be specifically returned, but were to be credited to the sending bank by the receiving bank, and enter into the general account between them, consisting of such collections and other items of account, and offset any indebtedness of the sending bank to the receiving bank. After the defendant received the checks in question, the Mechanics' National Bank of Newark became insolvent, and suspended payment, being indebted to the defendant under the state of the accounts between them in a considerable sum.

Upon these facts it is clear that the relations between the defendant and the Newark bank in respect to paper received by the former from the latter for collection were those of debtor and creditor, and not merely of agent and principal, (Morse, Banks, 52;) and the defendant, having received the paper with the right to appropriate its proceeds upon general account as a credit to offset or apply upon any indebtedness existing or to accrue from the Newark bank growing out of the transactions between the two banks, was a holder for value. Since the decision in *Swift* v. *Tyson*, 16 Pet. 1, it has been the recognized doctrine of the federal courts that one who acquires negotiable paper in payment or as security for a pre-existing indebtedness is a holder for value, (*Nat. Bank of the Republic* v. *Brooklyn City, etc., R. Co.* 14 Blatchf. 242; affirmed, 102 U. S. 14;) and if the defendant had been justified in assuming that such paper was the property of the Newark bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper. *Bank of Metropolis* v. *New England Bank*, 1 How. 234. But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of GIBSON, C. J., "a negotiable bill or note is a courier without luggage; a memorandum to control it, though indorsed upon it, would be incorporated with it, and destroy it." *Overton* v. *Tyler*, 3 Pa. St. 348. The indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in *Cecil Bank* v. *Bank of Maryland*, 22 Md.

148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First Nat. Bank* v. *Reno Co. Bank*, 3 FED. REP. 257, paper was indorsed, "Pay to the order of Hetherington & Co., on account of First National Bank, Chicago," and it was held to be such a restrictive indorsement, as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are *Sweeny* v. *Eastor*, 1 Wall. 166; *White* v. *Nat. Bank*, 102 U. S. 658; *Lee* v. *Chillicothe Bank*, 1 Bond, 389; *Blaine* v. *Bourne*, 11 R. I. 119; *Claflin* v. *Wilson*, 51 Iowa, 15. The defendant could not acquire any better title to the checks or their proceeds than belonged to the Newark bank, except by a purchase for value, and without notice of any infirmity in the title of the latter. As the indorsement of the checks was notice of the limited title of the Newark bank, the defendant simply succeeded to the rights of that bank.

It is insisted for the defendant that there was no privity between the plaintiff and the defendant respecting the transaction, because the defendant was not employed by the plaintiff, but was the agent only of the Newark bank; and it is argued that if the defendant is answerable to the plaintiff, so would be every other party through whose hands the paper might pass in the process of being collected. In answer to this it is sufficient to say that the defendant is sued, not as an agent of plaintiff, nor upon any contract liability, but upon the promise which is implied by law whenever a defendant has in his hands money of the plaintiff which he is not entitled to retain as against the plaintiff. It has long been well settled that want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. See note *a*, Appendix, 1 Cranch, 367, where the authorities are collated.

As against the plaintiff, the defendant had no right to retain the proceeds of the checks as security or payment for any balance due to it from the Mechanics' National Bank of Newark, after a demand by the plaintiff. The plaintiff is therefore entitled to judgment.

WILSON and others *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884.)

1. MISTAKE IN STATUTE—INTERPRETATION—LEGISLATIVE INTENT.
An act of congress, approved August 7, 1882, purports by its title to correct an error in section 2504 of the Revised Statutes; but in the body of the act the clause to be corrected is quoted as a part of "schedule M of section 25." Section 25 contains no schedule M, and bears upon an entirely different subject, and the language quoted is found in schedule M of section 2504. *Held*, that the act corrects section 2504.
2. STATUTE—TITLE.
The title of an act may be resorted to by the court for the purpose of elucidating what is obscure in the provisionary part.
3. CUSTOMS DUTIES—WOOLEN KNIT GOODS.
Certain woolen knit goods *held* dutiable under schedule L, and not under schedule M, as corrected by the act of August 7, 1882.

At Law.

Storck & Schumann, for plaintiffs.

Gen. Jos. B. Leake, for defendants.

BLODGETT, J. This suit is brought to recover duties paid by the plaintiffs, under protest, to the defendant, as collector of customs of the port of Chicago, upon certain woolen knit goods, shirts, and drawers imported by plaintiffs in September, 1882. The goods in question were charged with duty at the rate of 40 cents per pound, and 35 per cent. *ad valorem*, under the twelfth paragraph of class 3, schedule L, § 2504, which reads as follows:

"Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarn, and all manufactures of every description, composed wholly or in part of worsted, the hair of the Alpaca goat, or other like animal, except such as are composed of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding fifty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem*."

The only question in this case is whether the act of congress, approved August 7, 1882, entitled "An act to correct an error in section 2504 of the Revised Statutes of the United States," is applicable to and amends schedule M of said section 2504? By its title this act purports to amend section 2504, but the body of the first paragraph of the act reads as follows:

"The paragraph beginning with the words, 'clothing, ready-made, and wearing apparel,' under schedule M of section twenty-five of the Revised Statutes of the United States, be and the same is hereby amended by the insertion of the word 'wool' before the word 'silk' in two places where it was omitted in the revision of the said statute, so that the same shall read as follows:"

Then follows the paragraph as it would read when amended.

By the letter of the body of this act, it is an amendment of section 25 of the Revised Statutes. The subject-matter of section 25 is the time of holding the election for representatives and delegates to congress in the states and territories; while the subject-matter of this amendment is the rate of custom duties to be levied on certain kinds of imported goods. It is apparent from the reading that there is a mistake in the body of the act as to the section of the Revised Statutes it was intended to amend, it being clear that it was not the purpose of congress to amend section 25. The incorporation of this new matter into section 25 would not only be incongruous to the purpose of the original section, but it would be practically impossible to fit or adjust the new matter to the provisions of section 25, because there is no schedule M in section 25. The question is, can the court apply this act and make it operative, notwithstanding this obvious mistake? It is the duty of the court to so construe any act of congress, if possible, as to effectuate the intention of the legislature in enacting it, when that intention can be ascertained from the act itself. Now, it is clear from the body of the act that congress did not intend to amend section 25, and it is equally clear that the intention was to amend some section of the Revised Statutes regulating duties to be paid on imported goods, and an examination of the sections of the Revised Statutes regulating the duties on imported goods shows that section 2504 not only has reference to the duties on imported goods, but it contains a series of schedules identified by letters of the alphabet, among which is "schedule M," and as far as I have been able to find by such brief examination as my time would permit, this is the only section in the entire Revised Statutes which contains a "schedule M." We find also in this schedule a paragraph beginning with the words, "Clothing, ready-made, and wearing apparel," and corresponding in every particular with the paragraph which the act in question purports to amend by the insertion of the word "wool" before the word "silk" in two places. In other words, insert the word "wool" in two places before the word "silk" in the paragraph of schedule M, § 2504, and you make a new paragraph, which reads exactly as the act provides this paragraph in schedule M of section 25 shall read when amended.

But we are not left to the body and subject-matter of this act of 1882 alone to determine the intention of congress in enacting it. The title of the act is, "An act to correct an error in section *twenty-five hundred and four* of the Revised Statutes of the United States." It is urged, however, by counsel for complainant that the title is no part of the act. The use which may be made of the title in construing an act of congress is, I think, well settled by a line of uniform decisions in the supreme court. In *U. S.* v. *Fisher*, 2 Cranch, 358, that court, speaking by Chief Justice MARSHALL, said:

"On the influence which the title ought to have in construing the enacting clauses much has been said, and yet it is not easy to discover the point of

difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of a statute; and neither denies that, taken with other parts, it may assist in removing ambiguity. Where the intent is plain there is nothing left to construction. When the mind labors to discover the design of the legislator it seizes everything from which aid can be derived, and, in such case, the title claims a degree of notice, and will have its due share of consideration."

So the same learned judge said in *U. S.* v. *Palmer*, 3 Wheat. 610:

"The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislator."

And in *Hadden* v. *Collector*, 5 Wall. 107, Mr. Justice FIELD, speaking for the court, said:

"The title of an act furnished little aid in the construction of its provisions. Originally, in the English courts, the title was held to be no part of the act. 'No more,' says Lord HOLT, 'than the title of a book is part of a book.' It was generally framed by the clerk of the house of parliament where the act originated and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these are doubtful that resort may be had to the title, and even then it has little weight."

These authorities seem to fully sustain the right of the court to look at the title for the purpose of ascertaining the intent of congress, when the intent is doubtful or obscure from the body of the act. While, from the body of this act, read in connection with section 25, it is very clear that it was not the intent of congress to amend that section, yet it may be said to be doubtful from the body of the act itself what section it was intended to amend; but reading the body of the act and the title together, there can be no question what section the act is applicable to. I am therefore of opinion that the act of August 7, 1882, is an operative law, and was intended to amend and does amend schedule M of section 2504, so as to throw the goods in question into the twelfth paragraph of the third class of schedule L.

On argument, reference was made to the proceeding of the senate at the time the act in question passed for the purpose of showing that the omission of the words "hundred and four" from the first paragraph of the body of the act was not a mistake, but that attention was called to the omission. The debate on the bill as reported in the Congressional Record shows that on the last day of the session the bill came up for action in the senate, having passed the house, and some senators who would seem to have wished to defeat the bill insisted on amending it by inserting the words "hundred and four," so that it would read section 2504, but the friends of the bill believing that the effect of an amendment at that stage of the session would be to defeat the measure, insisted that an amendment was not necessary; that it was sufficiently apparent what part of the Revised Statute was to be affected by the proposed act; and that the executive officers and the courts would properly construe and apply it. This

citation of the debate in the senate only proves that the senators—that is, the majority who passed the bill—did not deem it ambiguous or incapable of application.

The issue is found for the defendant.

VERMONT FARM MACHINE CO. and others *v.* MARBLE, Com'r, etc.

(*Circuit Court, D. Vermont.* January 28, 1884.)

PATENT—PREVIOUS DESCRIPTION.

An inventor is not barred from obtaining a patent because his invention has been described, though not claimed, in a prior patent to the same inventor.

In Equity.

William E. Simonds and *Kittredge Haskins*, for orators.

WHEELER, J. The orators, on the thirtieth of March, 1880, filed an application for a patent for improvements in milk-setting apparatus, consisting, as finally amended, of nine claims, the last five of which have been allowed; the first four have been refused, because described, although not claimed, in a prior patent to the same inventors, No. 207,738, dated September 3, 1878. Prior public use to bar the patent is denied on oath by the applicants, and is not shown. The refusal rests solely, apparently, on the prior description, and *Campbell* v. *James*, 104 U. S. 356. What is said in that case, taken at large, would seem to show that a patent could not be granted for an invention described in a former patent to the same inventor. What was so spoken of there had been not only described but patented in the former patent. What was said is to be understood by reference to what it was spoken of. That part of that case relied upon in this rejection is where it is said:

"It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he might get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should prove an interference declared." Page 382.

The latter part of this extract relates to the same subject as the former part. It expressly refers to patented inventions by others; and serves to show that patented inventions by the same inventor were intended where inventions embraced or discovered in his prior patent were referred to. The statute does not make prior description in a patent a bar, but being patented. Sections 4886, 4887, 4920. The court appears to have merely referred to the plain effect of these statute provisions. In *Battin* v. *Taggert*, 17 How. 74, it appears to have been expressly adjudged upon the same statute provisions as are in

force now, that an inventor might have a patent for an invention described in a prior patent to himself. The same seems to have been decided in *Graham* v. *McCormick*, 11 FED. REP. 859, on full argument and much consideration. According to the terms of the statutes the orators seem to be entitled to the patent for these claims. There does not appear to be any settled construction to control otherwise.

Let there be a decree for the applicant adjudging that he is entitled to receive a patent for the invention covered by these first four claims of his application.

REAY, EX'X *v.* RAYNOR and others.

(*Circuit Court, S. D. New York.* January 23, 1884.)

PATENTS FOR INVENTIONS.

Amended bill to cover reissue of patent allowed, though the patent alleged to be infringed by the first bill had expired before the amended bill was filed. Reissued letters patent No. 2,529, granted March 26, 1867, for improvements in envelope machines, *held* to have been infringed by the defendants as to the first, second, and tenth claims, and an injunction and accounting ordered.

In Equity.

Arthur v. Briesen, for oratrix.

Stephen D. Law and *John Van Santvoord*, for defendants.

WHEELER, J. The testator of the oratrix was the owner of reissued letters patent No. 2,529, granted March 26, 1867, upon the surrender of original letters patent No. 39,702, granted to him August 25, 1863, for improvements in envelope machines, which would expire August 25, 1880. The bill was brought June 12, 1880, upon the original patent, without referring to the reissue, to restrain the use of machines alleged to be infringements, and for an account. No motion was made for a preliminary injunction. An answer was filed setting forth the reissue August 16, 1880; the oratrix moved to amend the bill, and September 22, 1880, it was by stipulation amended to cover the reissue in place of the original. The defendants now move, on the authority of *Root* v. *Railway*, 105 U. S. 189, that the bill be dismissed for want of jurisdiction in equity, because the patent had expired before the amended bill was filed, upon which only the oratrix could have any equitable relief. *Dowell* v. *Mitchell*, 105 U. S. 430. The infringement is solely by the use of machines made before the bill was brought and continued ever since, and would be covered by the general allegation of infringement made in both the original and amended bills, if filed during the term of the patent, but the continued use after the expiration of the term would not be so covered by that general allegation in a bill filed after the expiration; special

allegations setting forth that the machines were infringements when made would be necessary. *Root* v. *Railway, supra; Amer. Diamond Rock Boring Co.* v. *Rutland Marble Co.* 2 FED. REP. 355. It is urged for the oratrix that the amended bill is to be considered for this purpose as if the original had been as it is amended, when filed, and for the defendants that it is to be considered as if it had been filed as an original bill when it was filed. The oratrix had the reissue when she brought her original bill, and must have intended to bring her bill upon the patent which she had, and not upon one which she did not have. Under these circumstances it would have been competent for the court to allow the amendment. That which could be done by the court without consent could well be done by the parties by consent. When done, it made the bill as it should have been at first, and, in effect, as if it had been so at first. Such amendement only was necessary as would make the bill what it should have been to be good when brought, not what would have been necessary to make it what it would have to be to be good at some other time. If the oratrix has shown a case for any equitable relief, she is, upon all the decided cases, entitled to have the bill retained for that, and such cognate relief as is necessary to do complete justice. *Dowell* v. *Mitchell, supra.*

The defendants set up that the reissue is too broad for the original. The original showed and described two arms, extending from a table in the interior of a machine under which the envelope blank is made to pass on its way to a creasing box in the rear,—one on each side of the box,—to or nearly to a line with the rear side of the box. No use for these arms was stated. In the reissue these arms are described as applied in such position that they extend parallel to the edges of the creasing box with their lower edges level with, or rather below, the top edge of the box so as to bear down on the ends of the blanks and hold them in position on the box to be creased, and as secured to the table or any other fixed part of the machine. No other reference to the table in connection with them is made. No claim was made in the original in respect to them. They are the subject of the new fourth claim. The original showed these arms only as extensions from the table. Their height in respect to the creasing box was not shown with accuracy otherwise than by reference to the table. As no function was ascribed to them their position could not be inferred from what they were to do. When they were described as in a certain position, with reference to the creasing box instead of the table, and as attachable to some other part of the machine when they would not be extensions of the table, and an office was ascribed to them, an invention different from that in the original was shown. This claim was too broad to be added at any time, and therefore void. *Gill* v. *Wells*, 22 Wall. 1; *Russell* v. *Dodge*, 93 U. S. 460. Besides, the reissue was taken out more than three years after the original, and would seem to be for that reason unreasonable and invalid. *Miller*

v. *Bridgeport Brass Co.* 104 U. S. 350. That this claim is invalid does not necessarily render the other claims of the original, reproduced in the reissue, invalid. *Schillinger* v. *Greenway Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244;] *Gage* v. *Herring*, 107 U. S. 640; [S. C. 2 Sup. Ct. Rep. 820.] In the first claim in both, what is called a slide in the original is called a carrier in the reissue. The description of it or of its operation is not changed. The claim is in substance the same in both. Only the first, second, fifth, seventh, tenth, and twelfth claims, besides the fourth claim of the reissue, are said to be infringed. The fifth claim is merely for feeding the blanks under the table which supports the gum-box, instead of over it. The machinery described, some of which is the subject of other claims, does feed the blanks under that table. The claim is merely for that function or mode of operation of that machinery. As such, this function or mode of operation does not seem to be patentable apart from the machinery. *McKay* v. *Jackman*, 20 Blatchf. 466; 12 FED. REP. 615. Want of novelty of the other claims is alleged, and infringement of them is denied.

Envelope machines were in use before this invention. This inventor was entitled to and claimed a patent only for his improvements. Slides or platforms to hold envelope blanks, lifters, or pickers, to receive gum on their faces and take it to the proper place on the blank, and, by its adhesiveness, to lift them so they could be taken by carriers or conveyors, carriers or conveyors to take them to a creasing box, creasing boxes to crease them, and folding apparatus to fold them, were all then known. The seventh claim is for a balance weight connected with this form of conveyor; and the twelfth, for ribs on the face of the plunger which works in the creasing-box, and presses the envelopes after they are folded. The defendants are not found to make use of either of these devices, or what is the equivalent of either, in the working of this invention.

In this invention the lifters or pickers, after receiving gum on their faces, fall by their own weight upon a pack of blanks on a movable slide, which receives the pack and carries it to and holds it in the proper place, and lift the upper blank until it is disengaged by the table supporting the gum box, and taken by the conveyor under the table and steadied by it to the creasing box. This combination of the movable slide and falling lifters and arrangement of the table and conveyor form the subjects of the first and second claims. Also, a cam and roller, connected with the plunger, bring its face to a pressure upon the envelope to stick its folds firmly after it has been folded. This cam and roller, in combination with the plunger, are the subjects of the tenth claim. Careful and repeated examinations of the machines and patents put in evidence to show anticipations and want of novelty have failed to discover such combinations and arrangements as those covered by these three claims. The falling lifters, the arrangement of the table over the conveyor to steady the blank, and the combina-

tion of the cam and roller with the plunger, appear to be new with this invention. These claims, therefore, appear to be valid. The defendants' machines have the movable slide to carry the pile of blanks to the proper position under the pickers, the falling pickers, and the conveyor arranged under the table supporting the gum-box; they also have the cam and roller pressing the support of the envelope against the plunger, instead of the plunger against it, to press it. The support is the equivalent of the plunger for this purpose. Therefore, the defendants are found to infringe these three claims by the use of the machines made during the life of the patent in violation of the rights of the inventor; and it appears that they would continue the use if not restrained.

It is claimed that the inventor so conducted himself, by seeing machines similar to those of the defendants made without claiming that they infringed his patent, that neither he nor the oratrix, as his personal representative, could have any equitable right to restrain their use. It does not appear, however, that he led the defendants into any expenditure or course of conduct by his silence when he ought to have spoken which they would not have made or followed if he had spoken. The fact of the patent was open to them, as well as known to him. They could respect it, or take the risk of having what they did turn out to be an infringement. They chose the latter course, and he does not appear to have been responsible for their choice. The oratrix appears to be entitled to an injunction to restrain the use of so much of these machines as were infringements when they were made. *Crossley* v. *Derby Gas-light Co.* Webst. Pat. Cas. 119; 4 Law Jour. (N. S.) Ch. pt. 1, p. 25; *American, etc., Co.* v. *Sheldon*, 18 Blatchf. 50; [S. C. 1 FED. REP. 870;] Curt. Pat. § 436. The right to an account for past infringement follows.

Let there be a decree that the first, second, and tenth claims of the patent are valid and have been infringed, and for an injunction against the use of such parts of machines as were made in violation of those claims, and for an account, with costs.

REAY *v.* BERLIN & JONES ENVELOPE CO.

(Circuit Court, S. D. New York. January 23, 1884.)

PATENT FOR INVENTION.

Reay v. *Raynor*, *ante*, 308, followed.

In Equity.

Arthur v. Briesen, for oratrix.

S. D. Law, for defendant.

WHEELER, J. This suit is brought upon the same patent, in the same manner, and involving the same questions as to its mainte-

nance, as that of *Reay* v. *Raynor*, *ante*, 308. The cause is upheld for the same reasons, and the patent is sustained to the same extent, upon the same grounds, as in that case. Only the second, fourth and fifth claims are said to be infringed here. Of these only the second is held to be valid. The defendant appears to infringe this claim. Their machine has the arrangement of the table over the conveyor so that the blanks are held even and in place by the table while being carried by the conveyor to the creasing box, as described in that claim.

Let a decree be entered for the oratrix accordingly.

BELL and others *v.* UNITED STATES STAMPING Co.

(*Circuit Court, S. D. New York.* January 24, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.
   It is no answer to an action for infringement of a patent, that all the parts of the patent were known before, if they were not known in that connection and arrangement.
2. SAME.
   Letters patent No. 140,619, dated July 8, 1873, granted to John B. Firth, for an improvement in cake-pans, and now owned by the plaintiff, *held*, to be infringed by letters patent No. 255,045, dated March 14, 1882, and granted to Joseph Smith for a patty-pan.

In Equity.

George H. Fletcher, for orators.

J. L. N. Hunt and *C. R. Ingersoll*, for defendant.

WHEELER, J. This suit is upon letters patent No. 140,619, dated July 8, 1873, granted to John B. Firth, for an improvement in cake-pans, and now owned by the orators. The defenses are, want of novelty in the invention, want of invention in the patent, and non-infringement. The patent is for a cluster of cake-pans united to a plate having an aperture for each pan by a double-seam joint formed from the rim of the cup turned outward and the edge of the plate about the aperture turned upward, on the upper side of the plate. The defendants make and sell similar clusters, but the double-seamd joint is formed of the rim of the pan turned outward and then inward, and of the edge of the plate turned downward on the underside of the plate, according to letters patent 255,045, dated March 14, 1882, and granted to Joseph Smith, for a patty-pan. The principal things of this sort preceding Firth's patent were clusters of cups fastened to frames, pans riveted through the bottom to a plate, pans put through apertures in a plate with their rims turned out flat and riveted to the plate; pits in steam-tables and in the bottoms of wash-boilers, fastened by double-seamed and soldered joints; and double-seam joints in use generally among wares of these kinds. This patented

invention is not of the pans, or the plates, or the seams, but of the whole manufacture. The nearest previous approach to it in kind was the cluster with the rims riveted to the plate; and the nearest in principle was the bottom of the wash-boiler. Such a bottom, with two or four pits, as the evidence shows were made, would be awkward to use for, and hardly suggestive of, these small cake-pans. The rivets in the riveted cluster might be the equivalent of the double-seam joint, as a mere mode of fastening pieces of sheet-metal together in some places, for some purposes; but it would not be the equivalent in this place for this purpose. An even and smooth union was required; the riveted joint was rough and uneven; the double-seam joint there was nearly all that was desirable in these respects; and although not a new thing it was new in this place, and more than mere mechanical skill was requisite to the construction and arrangement of the necessary parts for successfully putting it there. It is no answer to the patent that all the parts were known before, if they were not known in that connection and arrangement before. *Smith* v. *Goodyear Co.* 93 U. S. 486; *Wallace* v. *Noyes*, 13 FED. REP. 172.

The defendant insists that, if the patent is valid, as there were double-seam joints, and cake-pans, and clusters of cake-pans fastened in a plate before, it can only cover Firth's precise mode of uniting the cake-pans in a cluster to the plate by the double-seam joint. *Ry. Co.* v. *Sayles*, 97 U. S. 554. This is doubtless true; and the defendant would not be liable if his mode was left to the orators who own the patent. His mode is the use of the double-seam joint there. The defendant has not left that but has taken it. His mode of using it has been changed, and perhaps improved upon, and that improvement has been patented, and perhaps properly patented, but that gives no right to what was before patented.

Let there be a decree for the orators for an injunction, and an account, with costs.

MUNSON *v.* MAYOR, ETC., OF NEW YORK.

(*Circuit Court S. D. New York.* 1884.)

PATENTS FOR INVENTIONS — SUSPENSION OF INJUNCTION — PUBLIC INTEREST — INCONSISTENT CONTENTIONS.

After a final decree establishing an exclusive right to the use of a patent and awarding an injunction to protect it, the injunctions will not be suspended while the decree stands unreversed, unless some extraordinary cause outside of the interests of the parties is shown. Public necessity may be a cause for such suspension; but the defendant, after insisting that the invention is of no use and benefit, and thus defeating the orator's claim for substantial damages on account of infringement, will not be heard to allege that it is of such public importance as to warrant a court in suspending the injunction.

In Equity.

Royal S. Crane, for orator.

Frederic H. Betts, for defendant.

WHEELER, J. This cause has now been heard on a motion to suspend the injunction heretofore granted, during the pendency of an appeal from the final decree awarding to the orator a merely nominal sum for profits and damages, and a small balance of costs of the suit. After a decree on final hearing, establishing an exclusive right, and awarding an injunction to protect the right, the injunction is not suspended unless some extraordinary cause is shown to exist outside the rights of the parties established by the decree. *Potter* v. *Mack*, 3 Fisher, Pat. Cas. 428; *Brown* v. *Deere*, 6 FED. REP. 487. This patent is for a register to preserve for safety, and convenience of reference, paid bonds and coupons. The defendant used the patented register for this purpose as any corporation, partnership, or individual issuing and redeeming coupon bonds would. The use by the defendant is not public any more than such use would be, nor any more than any business transaction of the city is. The city is a public municipal corporation, and a large part of the public have a pecuniary interest in its financial transactions of all kinds, and this is all the interest of the public in this question. It does not affect the convenience, enjoyment, or business of the individuals composing the public, at all. It touches only the convenience of the officers whose duty it is to preserve the bonds and coupons safely, and refer to them when necessary. On the accounting it was insisted on behalf of the defendant that this convenience was of no value or benefit, and with such success that a decree has been entered to that effect. It does not now seem to be equitable and just, in view of that result, to allow that a deprivation of that convenience is too grievous to be borne. The orator, as the case now stands, is entitled to the exclusive use of his patented invention. If the injunction should be suspended during the appeal, and the decree be affirmed, the orator would be left to another accounting, either in a new suit or under some order in this one, which, if it should follow the former result, would be much worse than fruitless. The appeal really involves nothing, so far, but the costs of suit. There seems to be no reason why the orator's right to his monoply should not be protected in the usual modes; in fact, it does not appear that they can be fully protected but by this injunction; the motion cannot therefore justly be sustained.

Motion denied.

DRYFOOS *v.* WIESE.[1]

(Circuit Court, S. D. New York. January 24, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CLAIMS IN REISSUES NOT FOUND IN THE ORIGINAL.
   A claim of a second reissue of letters patent *held* invalid as going beyond the invention shown in the original. But where a new claim contained in a first reissue was brought forward into the second, it being valid in the first reissue, *held*, not avoided by the invalid claim of the second reissue.
2. SAME.
   Complaint for infringement of reissued letters patent No. 9,097, granted February 24, 1880, to August Beck, assignor to the orator, for an improvement in quilting-machines, dismissed.

In Equity.

Edmond Wetmore, for plaintiff.

Gilbert M. Plympton, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,097, granted February 24, 1880, to August Beck, assignor, to the orator, for an improvement in quilting-machines. The original was No. 190,184, dated May 1, 1877. It was reissued in No. 8,063, dated January 29, 1878, and surrendered for the reissue in suit. The improvement was, and is stated in the original and reissues to be, for improvements on the quilting-machine shown in letters patent No. 159,884, dated February 16, 1875, granted to the same inventor. That machine was for quilting by gangs of needles in zigzag parallel lines, and was fed by cylindrical rolls having an intermittent rotary motion, which would move the cloth while the needles were out of it, and could be arranged to feed in straight lines, direct or oblique. The original of the patent in suit showed different mechanism for actuating the feed-rolls, so that the length of stitch could be varied at pleasure, and conical rolls having an intermittent motion to feed the conical bodies of skirts and skirt borders in a circular direction, when the needles were out of the cloth, as well as cylindrical rolls for straight goods, and other improvements upon other parts of the machine; and had claims for the feed mechanism, and improvements upon the other parts of the machine, but none of the conical feed-rolls. The first reissue further described the conical feed-rolls as made of such taper as to conform to the shape of the skirt or border to be quilted, and claimed the combination of the series of needles with the conical feed-rolls acting intermittently, in place of one of the other claims. The reissue in suit still further describes the conical feed-rolls as the embodiment of a feed device which extends substantially throughout the width of the conical strip of goods, and as it departs from the shorter curved edge and approaches the longer curved edge is adapted to have a proportionately increased range of feed-movement, so that it will feed the conical strip of goods in the requisite curved path evenly and without any injurious strain or drag, and further claims

[1] Affirmed See 8 Sup. Ct. Rep. 354.

the combination with the gang of sewing mechanism, and the cloth plate which supports the goods under them, of a feed device operating intermittingly in the intervals between the formation of the stitches, which extends and operates substantially across the conical strip of goods, and which, as it departs from the shorter curved edge and approaches the longer curved edge of the goods, is adapted to have a proportionately increased range of feed-movement. The defendant is engaged in using a quilting-machine for quilting conical goods having a gang of needles, and short cylindrical feed-rollers at each edge of the goods which they feed in a circular direction by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while in it; and also one with a four-motion feed, which is capable of feeding in a circular direction by lengthening the feed at the longest edge of the goods; but is not shown to have been so used or intended to be so used. The validity of the reissue, and infringement of it, if valid, are denied.

Beck well appears to have meritoriously invented effective means for giving circular direction to the feed of quilting-machines, having gangs of needles for quilting several parallel seams. He set forth these means in the specifications and drawings of his original patent, and seems to have been well entitled to then have a patent for them, and for the combination of the mechanism with the gang of needles. But he does not appear to have been entitled to a patent for merely giving such direction to such feed-motion apart from the mechanism, nor to the process of operation of his mechanism for giving such direction. *McKay* v. *Jackman*, 20 Blatchf. 466; 12 FED. REP. 615. Neither could he claim the combination of mechanism not then known, or its processes with the needles. He invented his own mechanism, and the combination of that with the co-operating parts of the machine, and nothing more; and seems to have been entitled to a patent for those and no more. The first reissue was within a few months of the original, and before others appear to have done anything in that region of invention, and seems to have been well enough. *Meyer* v. *Goodyear Manuf'g Co.* 11 FED. REP. 891; *Hartshorn* v. *Eagle Shade-Roller Co.* 18 FED. REP. 90. The second reissue was more than two years after the original, but, whether too long after or not, was, in effect, for the combination of the gang of needles and cloth plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other. This was clearly beyond the invention shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way. This claim of the reissue is therefore wholly invalid. *Wing* v. *Anthony*, 106 U. S. 142; [S. C. 1 Sup. Ct. Rep. 93;] *James* v. *Campbell*, 104 U. S. 356. The new claim of the first reissue brought forward into the second, being valid in the first, is not avoided by the invalid claim of the second. *Schillinger* v. *Greenway Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244;]

Gage v. *Herring*, 107 U. S. 640; [S. C. 2 Sup. Ct. Rep. 820.] The orator appears therefore to be entitled to a monopoly of the conical rollers in that combination. It is argued that the defendant's machines invade that monopoly. Those machines have not conical rollers, nor are they claimed to have any of his other mechanism. It is said that there is no invention in dividing the conical rollers into parts, and that the parts are the equivalent of the whole. This is not what the defendant does. The orator's machine gives the circular direction by mechanism that accomplishes that result in one way, the defendants by different mechanism that accomplishes it in a different way. That claim, therefore, is not infringed.

Let there be a decree dismissing the bill of complaint, with costs.

ADAMS and others *v.* HOWARD and another.

(*Circuit Court, S. D. New York.* February 6, 1884.)

1. LETTERS PATENT—BASKET LANTERN.
   The validity of letters patent granted to John H. Irwin in 1865, for an improved basket lantern, sustained.
2. RIGHT TO PART OF THE RELIEF SOUGHT WHEN THE REST CANNOT BE GIVEN.
   The expiration of a patent, pending a suit for its infringement, will defeat a prayer for an injunction, but not for an accounting, though the bill contains both.
3. COSTS—WHERE BOTH PARTIES HAVE A DECREE.
   When two distinct causes of action are united, and one party prevails in each, costs will be allowed to neither.

In Equity.

Betts, Atterbury & Betts, for complainants.

Jas. A. Whitney, for defendants.

WALLACE, J. Infringement is alleged of two letters patent for improvements in lanterns, granted to John H. Irwin, one May 2, 1865, and the other October, 24, 1865, both of which have been assigned to the complainants. The second patent only is infringed upon the construction of the claims of the first patent adopted and expressed at the hearing of the cause, which limits it to a lantern having two horizontal guards connected by a hinge or catch, whereby the lantern may be opened at or near the middle of the globe. Infringement of the second patent is not contested. The claim is to be construed as one for a loose globe lantern, in which the globe is protected by a basket of guards, and is held in place by the top of the lantern when the lantern is closed, the basket being hinged at its upper horizontal guard to the top of the lantern, and opened by a spring catch opposite the hinge. The special utility of the device over the lantern of the first patent consists in the protection of the loose globe against

accident, in case the catch is accidentally unlocked, as when unlocked the basket will prevent the globe from falling out.

It is insisted that there is no patentable novelty in the improvement, but, as was suggested at the hearing of the cause, assuming that Irwin's first patent was granted before the lantern of the second patent was invented, it is believed that the change made in the last lantern was not such an obvious one as to negative the exercise of invention. As the lantern of Irwin's first patent approximates to that of the second far more closely than any other preceding device, it is unnecessary to examine further into the prior state of the art. The difference between the lantern of the second patent and that of the first consists only in a new location of the hinge and spring catch, and the employment of a horizontal guard to form the upper rim of the basket for the purposes of this new location. This change of location seems to have been a very simple thing after it was made. But simple as it may have been, it remedied a grave defect in the lantern of the first patent; and the advantages which it introduced were immediately recognized by the public. Others who were actively experimenting in the same field of improvement failed to discover how readily this change could be made and what advantages would result by its being made.

The defense that the patent is anticipated by the lantern described in the prior application for a patent by Anthony M. Duburn is not tenable, because there is no evidence, except his application for a patent, that he ever invented such a lantern. It was conceded by his solicitors upon the application that the model accompanying his application would not answer for use as a lantern, although it was sufficient to illustrate the construction of the device; and the examiner in charge condemned the model as inoperative. As there is no evidence in the case to show that such a lantern as was described in the application and illustrated by the model was ever actually constructed by Duburn, sufficient does not appear to defeat the novelty of Irwin's invention.

It will not be profitable to consider in detail the numerous objections urged by the defendant to the complainant's title to the patent. The conclusion reached is that the complainant Adams is vested with the title to the patent which was acquired by the Chicago Manufacturing Company, October 6, 1866, together with the right of action of that company to recover for infringements since that date. This title is, of course, subject to the license which had been granted by that company to Archer and others to make and use the invention in this state and elsewhere. The complainant Dietz has acquired an undivided third interest in this license by the transfer of Pancoast of March 24, 1881. No objection having been taken by demurrer or the answer to the non-joinder of the other two owners of this license, such non-joinder can not now be insisted on to defeat a decree. If these parties are within the jurisdiction of the court, which does not

appear, a decree can be made without affecting their rights, and which will completely adjust the rights of all the parties to the suits as between themselves. In this view the recovery by Dietz must be limited to one-third of the damages and profits, by reason of the making, and using of the invention, accruing since March 24, 1881. The case does not disclose such laches on the part of the owners of the patent as should defeat an accounting. While infringements by various parties and for considerable periods have been shown to have taken place during the life of the patent, the circumstances fail to establish acquiescence in the instances where the infringement was known to the owners of the patent.

No doubt is entertained of the propriety of decreeing an accounting, although the patent has expired since the commencement of the suit, and although for that reason there should not be an injunction. The jurisdiction of a court of equity having been legitimately invoked by the complainant, he will not be sent away without redress, merely because all the redress to which he was originally entitled cannot now be awarded to him. Under such circumstances, the court will retain the cause in order to completely determine the controversy. *Gottfried* v. *Moerelin*, 14 FED. REP. 170.

Inasmuch as the complainants have united two distinct causes of action in their bill, and upon their allegation that the defendants' lanterns infringed both the letters patent, have compelled the defendants to litigate both, and as to one of these causes of action the defendants have prevailed, neither party should recover costs as against the other. *Strickland* v. *Strickland*, 3 Beav. 242; *Crippen* v. *Heermance*, 9 Paige, 211; *Elfelt* v. *Steinhart*, 11 FED. REP. 896, 899.

A decree is ordered for complainants in conformity with this opinion.

SCHALSCHA *v.* SUTRO and others.

(*Circuit Court, S. D. New York.* February 6, 1884.)

LETTERS PATENT—PERFORATED CIGAR.

Letters patent No. 186,628, for a cigar with a hole in the end, cover only cigars manufactured by the machine described in the specifications. It is no infringement to punch a hole in the cigar with a pencil.

In Equity.

Edmonds & Jerome, for complainant.

Hamilton Cole, for defendants.

WALLACE, J. The claim of the patent to Schalscha (No. 186,628, granted January 3, 1877) is "a cigar constructed as described, with a longitudinal opening, H, in its drawing end, and the end of the wrapper, A, secured permanently within the aperture, as and for the pur-

pose set forth." Read with the description, however, the claim must be limited to one for the cigar when made by the machine described in detail by the patentee as employed by him for the purpose, or a substantially similar machine. No mode of making such a cigar is disclosed in the specification except by means of the machine described. The machine is described with particularity, and the mode of operating it; and among the advantages enumerated as the result of the invention are those which could only result from the employment of the particular machine. There is no evidence that the defendants' cigars were made by a machine; on the contrary, the proof is that the hole in the tip was punched by a pencil.

The bill is dismissed.

MUNSON and another *v.* HALL.

(Circuit Court, S. D. New York. February 6, 1884.)

PATENTS—IMPROVED PAPER BOX.

The distinctive characteristic of letters patent No. 124,319, for an improved paper box, consists in the closed corners; and a box of which the end can be turned down is not an infringement.

In Equity.

Munson & Philipp, for complainants.

James A. Hudson and *Frederic H. Betts*, for defendant.

WALLACE, J. The complainants letters patent (No. 124,319, granted to Beecher and Swift, assignors, March 5, 1872) describe an improved paper box of the class which are provided with tubular sliding covers, and commonly used for containing matches, etc. The box is made from a blank sheet of paper cut and creased so as to form a bottom, two side flaps, two end flaps provided with projecting end pieces, and two corner pieces which may be used or discarded at pleasure. The side flaps are turned up to form the sides, and the end flaps are turned up to form the ends, after which the corner pieces are folded around the side flaps, and the projecting end pieces are turned down into the top of the box. The specification states that "after thus folding the several parts together they are united by pasting the overlapping corner pieces to the side flaps, the whole forming a strong and durable box." The inventors point out two objections to the boxes previously in use, and which are obviated by their improvement. One of these is insufficient strength and rigidity owing to the absence of the corner pieces. The other is the liability of the contents to escape if one end of the box should accidentally project slightly from the tubular cover.

There are two claims: (1) The combination with a paper box

adapted to a tubular cover of the projecting end pieces arranged substantially as and for the purposes described; (2) a paper box constructed substantially as described, with overlapping corner pieces, and with overlapping end pieces partially covering the end of the box. Infringement is alleged of the first claim only. The defendants use a blank cut and creased like complainants' blank, except without any corner pieces, which they fold into box form with sides and ends and projecting end pieces, and thus make a receptacle to hold cigarettes which is not pasted at the corners, but in which the whole end can be opened without removing the receptacle from the tubular cover. It is a loose receptacle adapted to expose the whole end while the body remains within the tubular cover. The complainants' patent is for a different thing. It is for a box in which the parts are united at the ends and sides. If made without the corner pieces it is "joined together at the corners to form the sides and ends of the box," as the pre-existing boxes are described in the specification to have been made, but has the projecting end pieces to prevent escape of the contents by accidental exposure. If made with the corner pieces it has the additional strength and rigidity which they confer upon it. No wider scope can be given to the claims in view of their terms, the descriptive position of the specifications, and the specific improvements over the existing boxes which were contemplated by the inventors.

The bill is dismissed.

MATTHEWS v. IRON CLAD MANUF'G CO.

(Circuit Court, S. D. New York. February 8, 1884.)

PATENTS FOR INVENTIONS—EVIDENCE—JUDGMENT—STRANGERS TO THE SUIT.

A decree obtained by the plaintiff in an action to recover for the infringement of his patent cannot be introduced in an action against a stranger to the former suit for the purpose of proving acquiesence in the plaintiff's use of the patent.

In Equity.

Briesen & Steele, for complainant.

Betts, Atterbury & Betts, for defendant.

WALLACE, J. The defendant moves to expunge from the proofs certain decrees introduced by the complainant, obtained in actions in which he was complainant, adjudicating the validity of the patent upon which the present suit is brought. These decrees were obtained in suits against infringers to which the present defendant was not a party, or privy. The evidence was introduced against the defendant's objection, and is now insisted on as tending to show acquiescence in the rights of the plaintiff under his patent. If it were necessary for the complainant to show that he had asserted his rights

under the patent, before the present suit, doubtless the records would be evidence that he had brought suits and prosecuted them to final judgment. They are not competent, however, as admissions of third persons, because the defendant cannot be prejudiced by such admissions. The effect of such decrees is considered by Mr. Justice NELSON in *Buck* v. *Hermance*, 1 Blatchf. 322, where he held that, although admissible upon motions for a provisional injunction in which the ordinary rules of evidence do not obtain, they are proceedings *inter alios*, and therefore not competent on a trial upon the merits.

The motion is granted.

TIME TELEGRAPH CO. *v.* HIMMER and others.

(*Circuit Court, S. D. New York.* January 30, 1884.)

PATENTS—ESTOPPEL.

The inventor of a certain mechanism assigned the improvement to his employers, by whom it was patented. While in the same employ he ordered a mechanism to be made which he represented as a modification of the patented invention. After leaving the service of his employers he manufactured machinery identical with what he had previously ordered to be made. *Held*, that he, and those in privity with him, were estopped to deny that the mechanism in question was covered by the patent.

In Equity.

B. S. Clark, for complainant.

Roscoe Conkling and *E. N. Dickerson, Jr.*, of counsel.

Turner, Lee & McClure, for Himmer and Carey.

B. F. Lee, of counsel.

WALLACE, J. The peculiar facts of this case authorize the granting of a preliminary injunction as to some of the defendants, although the complainant's patent is of recent date, and has never been adjudicated. The defendant Himmer was the inventor and assignor to the complainant of the improvement in electric clocks, described and claimed in the letters patent of the complainant. While he was in the employ of the complainant as its superintendent he ordered certain clock mechanism to be made, which was identical in parts and arrangements with that now sought to be enjoined, respresenting it to be one of the modifications of the invention secured by the patent. Special tools and dies were obtained to construct this mechanism, and the complainant's officers, assuming that the complainant was protected by the patent, have embodied this mechanism in their clocks, and introduced them to the public. After Himmer left the complainant's employ he induced the manufacturers who were then making this clock mechanism for the complainant, to supply him with the various parts sufficient to make a number of complete

clocks. These have been put together by him, (or his wife, in whose name the clock-making business is carried on,) and through the agency of the defendant Carey, who seems to have been cognizant of all the facts, and to be the principal prompter of the transaction, are now being introduced to the public in competition with the complainant's clocks. Upon these facts Himmer is estopped, for the purposes of a motion like this, from contesting the validity of the patent, or denying that the clock mechanism he employs is covered by the claims of the patent. He cannot be heard to assert either of these defenses after inducing the complainant to acquire the patent and engage in making and selling clocks under it, such as he now undertakes to make and vend. Carey occupies no better position than Himmer does. He is Himmer's *alter ego* in the scheme of pirating the complainant's rights. His general denial of community of interest with Himmer goes for nothing, in view of the facts and circumstances which are set forth in the complainant's affidavits, and which are sufficient to call upon him for a full and explicit disclosure of his relations with Himmer, in order to exonerate himself.

No case is made for an injunction against the defendants other than Himmer and Carey. As to Himmer and Carey, an injunction is granted; as to the other defendants, the motion is denied.

GIBBS *v.* HOEFNER and others.

(Circuit Court, N. D. New York. February 1, 1884.)

1. PATENTS—UTILITY.
   A patent will not be declared void for inutility if it possesses any utility whatsoever, even the slightest.
2. SAME—LICENSE TO USE NOT ASSIGNABLE.
   A license to use a patented process at the licensee's place of business, and to associate others with him in such use, is not assignable.

In Equity.

James S. Gibbs, complainant in person.

Adelbert Moot, for defendant.

COXE, J. The complainant, who is owner of a three-fourths interest in letters patent issued for an improvement in the manufacture of soap, seeks to recover the gains and profits which have accrued to the defendant Hoefner by reason of his alleged infringement. The other defendants are the owners of the remaining one-fourth interest and were impleaded because they declined to join with the complainant. No personal claim is made against them. The patent expired April 25, 1882. Two defenses are interposed upon the merits. The defendant insists—*First*, that the patent is void for want of utility; *second*, that he has not infringed.

1. Was the invention useful within the meaning of the statute? In order to answer the question in favor of the defendant it must be determined that it possessed no utility whatever. If it was useful in any degree, no matter how infinitesimal, the court would not be justified in declaring the patent void. *Lowell* v. *Lewis*, 1 Mason, 183, 186; *Earle* v. *Sawyer*, 4 Mason, 1, 6; *Seymour* v. *Osborne*, 11 Wall. 516, 549; *Wilbur* v. *Beecher*, 2 Blatchf. 132, 137; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94; *Bell* v. *Daniels*, 1 Fisher, 375; *Shaw* v. *Lead Co.* 11 FED. REP. 711; *Wheeler* v. *Reaper Co.* 10 Blatchf. 189; *Vance* v. *Campbell*, 1 Fisher, 485; Sim. Pat. 92, 93; Walk. Pat. 52, 53.

Tested by this rule it cannot be said that the patent was void for want of utility.

In addition to the presumption arising from the patent itself, there is evidence that the patented process worked with greater rapidity and produced a larger quantity of soap from the same amount of material than the methods formerly used. One of the witnesses testified that by the new process the work of three days could be accomplished in one, and the principal witness for the defense admits that the yield is slightly more than by "the open-kettle process." If the court were required to determine on this proof which of the two methods referred to is the better, it is not improbable that it would have to conclude that the weight of evidence is decidedly in favor of the older process. But such is not the question.

If the defendant is right in his contention that no merchantable article could be manufactured by the use of the patented process, he will have little difficulty in convincing the master that the award of damages to the complainant should be characterized by unusual frugality. To quote from Walk. Pat., *supra:*

"Patents are never held to be void for want of utility, merely because the things covered by them perform their functions but poorly. In such cases no harm results to the public from the exclusive right, because few will use the invention, and because those who do use it without permission, will seldom or never be obliged to pay for that use, anything beyond the small benefit they may really have realized therefrom."

2. Did the defendant infringe? It is admitted that for several months the patented machine was used in defendant's factory, but he insists that he had the right to use it by reason of his contract with M. B. Sherwood, Jr., and Sherwood's contract with the complainant. On the ninth of June, 1873, the complainant granted to Sherwood a license, known as a "shop right," to operate the patented process at Buffalo, and at all times to associate with him such party or parties as he might desire. In June, 1878, Sherwood, by a written instrument, agreed to deliver to the defendant a bill of sale of all the patented machinery, etc., used in making soap, and give him the right to use it in Erie county so far as he had the power to do so. The consideration was the sum of $800, which the defendant agreed to pay as follows: $100 on the execution of the instrument, $100 in 30

days thereafter, $200 when the profits amounted to that sum, and the remaining $400 when half the profits reached that amount. It is unfortunate that at this time the defendant did not obtain a license from the complainant; he was doubtless misled as to his rights and supposed he was purchasing not only the apparatus but the right to operate it. The court, however, must construe the contract according to its true legal import. Sherwood could, of course, convey no more than he himself possessed. What he possessed was a "shop right" for Buffalo, a mere personal license. It was not assignable and gave him no right to authorize others to use the process, except in the manner expressly stipulated. *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Troy Fact.* v. *Corning*, 14 How. 193; *Searls* v. *Bouton*, 12 FED. REP. 140. After the agreement was executed the machine and fixtures were owned by the defendant. They were operated in his place of business. Sherwood had no title to them; he was not a partner of the defendant or associated in business with him in any legal sense. His only interest was to see that the defendant paid him the $800 pursuant to the terms of the contract. Upon this proof I am constrained to hold that the defendant has infringed.

The other defenses of a technical character have been carefully examined but it is thought that none of them are well founded.

It follows that there must be a decree for the complainant with a reference to a master.

REED and another *v.* HOLLIDAY.

(*Circuit Court, W. D. Pennsylvania.* January 31, 1884.)

1. COPYRIGHT—ACT OF CONGRESS.
   The act of congress secures to the proprietor of a copyright the "sole liberty" of printing, etc., and vending the copyrighted book, and this is inconsistent with a right in any other person to print and vend material and valuable portions of said work taken *verbatim* therefrom.
2. SAME—INFRINGEMENT—TEXT-BOOKS—KEY FOR USE OF TEACHERS.
   A key, purporting to be for the use of teachers, to copyrighted text-books which contain an original method by which instruction in the English language is made interesting and effective by the use of sentences formed into diagrams under certain rules and principles of analysis, in which key are transcribed from the original works, diagrams, and also all the lesson-sentences arranged in diagrams according to said rules, is an infringement of the copyright.
3. SAME—INJUNCTION—WHAT MUST BE SHOWN.
   Upon an application for an injunction to restrain infringement, it is not necessary to show that the piratical work is a substitute for the original.
4. SAME—INTENTION.
   Intention is a matter of no moment if infringement otherwise appears.
5. SAME—INJUNCTION—WHEN GRANTED.
   If a plaintiff shows infringement of his copyright the court will grant an injunction without proof of actual damage.

In Equity. *Sur* motion for preliminary injunction.

W. F. McCook for complainants.

Wm. Blakely for defendant.

ACHESON, J. The plaintiffs are the proprietors of the copyright—secured to them according to the provisions of the act of congress—of two text-books, for the use of schools, of which they are the joint authors and compilers, entitled "Graded Lessons in English" and "Higher Lessons in English," which contain an original method by which instruction in the English language is made interesting and effective by the use of sentences formed into diagrams under certain rules and principles of analysis within the easy comprehension of pupils. The general method employed is the arrangement of a single sentence in each lesson in the form of a diagram, and it is required of the pupils that a number of other sentences contained in each lesson shall be written out by them in the form of diagrams in accordance with the laws of the English language as laid down, explained, and amplified in said works. It is shown that these text-books have been favorably received and extensively used by practical educators in different parts of the country, and that the sales thereof have been large and remunerative to the plaintiffs. The defendant has published, exposed to sale, and sold, and continues so to do, a work called "A Teacher's Manual to accompany Reed & Kellogg's English Lessons, as prepared by Robert P. Holliday." This work purports to be a key to the plaintiffs' text-books, for the use of teachers and private students. It is a volume of 236 pages, (including preface, remarks, and index,) of which 188 pages consist of sentences formed into diagrams. Forty of these diagrams, forming a distinguishing feature and characteristic of the plaintiffs' said works, are exact copies therefrom, and the remainder are made up by transcribing from the plaintiffs' works literally, and in the order in which they there appear, the lesson-sentences composed or selected by the plaintiffs, and arranging these sentences in diagrams upon the principles and under the rules laid down by the plaintiffs in their above-named works.

The defendant shows that teaching grammar with the aid of diagrams did not originate with the plaintiffs, and that the system appears in works anterior to theirs; for example, in "Burtt's Practical English Grammar" and "Clark's Practical Grammar." This is not controverted. All that the plaintiffs claim is that the particular method set forth and explained in their works is original. But the defendant has not contented himself with copying the plaintiff's diagrams merely. He has appropriated bodily the lesson-sentences composed or compiled by them, and which constitute substantial parts of their works. True, the defendant has not copied the whole, and perhaps not the larger portion, of either of the works of the plaintiffs. He has, however, incorporated in his book material portions of each, and this constitutes infringement, (*Folsom* v. *Marsh*,

2 Story, 100; *Greene* v. *Bishop*, 1 Cliff. 186,) unless the defendant can justify himself upon some principle consistent with the entirety of ownership which the author has in his copyright. This the defendant attempts to do. He alleges that his book is not intended to supersede the plaintiffs' work, or to infringe their copyright; that it is a mere key to accompany the plaintiffs' text-books, and to be used in connection therewith; and that in fact it does not supersede them. Intention, however, is a matter of no moment if infringement otherwise appears. *Roworth* v. *Wilkes*, 1 Camp. 98; *McLean* v. *Fleming*, 96 U. S. 245. Nor is it necessary to show, upon an application for an injunction to restrain infringement, that the violation of the copyright is so extensive that the piratical work is a substitute for the original work. *Bohn* v. *Bogue*, 10 Jur. 420. The act of congress secures to the proprietor of the copyright the "sole liberty" of printing, etc., and vending the copyrighted book, and this certainly is inconsistent with a right in any other person to print and vend material and valuable proportions of such work taken *verbatim* therefrom. What difference, then, does it make that the defendant's work takes the form of a *key* to the plaintiffs' text-books? By what right may he thus appropriate the fruits of the plaintiffs' talents, labors, and industry? Granted that the defendant has produced a serviceable key to aid the instructor. This no more entitles him to take to himself, and publish the literary matter covered by the plaintiffs' copyright, than does the fact that a second inventor has made an improvement on a patented machine give him the right to use such machine during the life of the first patent.

The defendant, in opposition to the present motion, asserts, further, that the plaintiffs sustain no damages by reason of the sale of his work, but, on the contrary, are benefited thereby, as the key promotes the sale of the original works. The opinion of at least one witness coincides with this theory. But the plaintiffs entertain a very different view of the effect of the sale of the key, and they allege that it will prove highly detrimental to them in this, that the fact that a full key to all the work to be done by the pupils using these text-books is on public sale, and within reach of the pupils, will impair the popularity, usefulness, and sale of said works. I confess that this strikes me as a consequence very likely to follow the general sale of the defendant's book. But, at any rate, the defendant has no right to subject the plaintiffs to such risk. Moreover, if a plaintiff shows infringement of his copyright, the court will grant an injunction without proof of actual damage. *Tinsley* v. *Lacy*, 32 L. J. Ch. 536. The motion for a preliminary injunction must prevail.

Let a decree therefor be drawn.

The St. Lawrence.

(*District Court, W. D. Pennsylvania.* January 23, 1884.)

1. Wharves—Right to Moor Vessels.
   The right of mooring vessels at public wharves is as much to be protected as that of navigation itself, but it is to be exercised with due regard to the rights of passing vessels, and any unnecessary encroachment upon the channel-way which greatly imperils passing craft is without justification.
2. Same—Position of Steam-Boat.
   A steam-boat lying at a wharf-boat at the public landing of Pittsburgh, threw her stern out in the way of a descending coal-tow, when she might have lain broadside to the wharf-boat, and thus afforded a sufficient passage-way for the tow-boat and tow. A collision occurring, *held*, that the steam-boat was answerable to the owner of a coal-boat thereby lost.
3. Same—Collision with Tow.
   In case of a collision between a descending coal-tow and a vessel wrongfully obstructing the channel-way, the previous fault of another vessel, in striking and throwing out of shape the coal-tow, is not to be imputed to the tow-boat, if the latter were free from blame.
4. Same—Mutual Fault—Damages Recoverable from Either Vessel.
   An innocent party who sustains loss by reason of the concurrent negligence of two vessels may pursue and recover the entire damages from either wrong-doer.

In Admiralty.

Knox & Reed, for libelants.

Barton & Son, for respondents.

Acheson, J. The St. Lawrence, a steamer plying in the Pittsburgh and Cincinnati trade, early on the morning of March 31, 1883, came into the port of Pittsburgh, landing at the Phillips wharf-boat, which lies at the public wharf, her usual place for receiving and discharging cargo and passengers. This wharf-boat is at the north shore of the Monongahela river, 840 feet below the Smithfield Street bridge. The head of the St. Lawrence was to the wharf-boat, and she lay quartering out in the river, her stern projecting into the coal-boat channel. A barge at the lower end and two tow-boats immediately above the wharf-boat prevented the St. Lawrence, upon her arrival, from getting broadside against the wharf-boat. Andrew Hazlett, the mate of the St. Lawrence, testifies, however, that these tow-boats moved away between 8 and 9 o'clock that morning. The Monongahela river was rapidly rising to a coal-boat stage, when the St. Lawrence came into port, and by 7 o'clock had reached a stage of 9 feet, and by 10 o'clock that morning had reached 11 feet. The rise was altogether out of the Monongahela river, and hence the current was exceedingly rapid. Descending coal-tows customarily used the span between the first and second old piers of the Smithfield Street bridge, and at that particular time it was the only open span, the others being then closed by piles and trestle-work, the bridge being in process of reconstruction. The "Robinson fleet" of coal-boats, etc., consisting of upwards of 40 pieces, lay in the river moored to the

third pier of the bridge, and extending down past the St. Lawrence, or nearly so. This fleet, which had been there for some time, greatly narrowed the passage-way for descending tows. The St. Lawrence still further contracted this passage-way, and her projecting position reduced the space between her and the fleet to 200 feet or less. From the Smithfield Street bridge down to a point below the Phillips wharf-boat, the natural direction of the current is in towards the north shore, and this tendency, on the occasion in question, was rather increased by the obstruction at the bridge already mentioned and the Robinson fleet. It is shown that on a Monongahela rise, the proper method for a tow-boat with a coal-tow, to run this part of the river, is by flanking; *i. e.*, setting the tow-boat quartering with her head down stream and in towards the north shore, then backing against the cross current and floating downward. This of course requires more space than does steering or running head on.

Under all the evidence, I find without hesitation that the St. Lawrence, in the quartering position in which she lay, occupied and was an obstruction to a considerable portion of the working channel used by tow-boats having coal-tows in charge, and which in the then condition of affairs it was necessary for them to use, and that her position was one of great peril both to herself and descending tows. This is substantiated not only by the general testimony but by what actually occurred in the space of a very few hours. Hazlett, the mate, states that the St. Lawrence was struck by the tow-boats Sam Robinson and the Tide, (he thinks,) and it is in proof that she was also struck by the tow-boat Blackmore, and all this before the disaster out of which this suit grew. Between 9 and 10 o'clock that morning James T. Fawcett went to the St. Lawrence and warned her master, Capt. List, that she was lying right in the channel, endangering both herself and descending coal-tows; and immediately after the Blackmore struck her (which it would seem was about half an hour before the disaster under investigation) J. Sharp McDonald gave Capt. List a like warning and advised him to take his boat altogether away from that place.

In anticipation of a coal-boat rise the libelants had employed the tow-boat Abe Hays to take certain coal-boats belonging to them from the Tenth Street bridge down to the foot of Brunot's island, there to be made up in a tow for Louisville. During the forenoon of March 31st, the Abe Hays took in charge one of these coal-boats and proceeded with it down stream. When she had reached a point some 200 feet above the Smithfield Street bridge, the tow-boat Acorn struck her, but doing her no serious damage, and not injuring the coal-boat. The effect of the stroke was to put the Abe Hays somewhat out of shape to run the bridge, but her pilot states she had recovered herself when she passed under the bridge; and I think the evidence favors the conclusion that she was kept in proper position and rightly handled below the bridge, and throughout was free from fault. Never-

theless the head of her coal-boat struck the wheel, or immediately forward of the wheel, of the St. Lawrence, passing under her guard. The effect of the collision was to so injure the coal-boat that it sank in a few minutes, and, with its cargo of coal, became a total loss. Immediately after this collision the St. Lawrence changed her position, moving up broadside against the wharf-boat. I am well satisfied from the proofs that had she taken this position sooner, the Abe Hays and her tow would have passed down safely and this loss have been avoided.

The collision occurred about 11 o'clock A. M. Now, it clearly appears that at an earlier hour the tow-boats which lay above the wharf-boat had moved away, and there was nothing to prevent the St. Lawrence from taking, before the catastrophe, the position she took afterwards. Indeed, between the time the Blackmore struck her and the approach of the Abe Hays she might have made this change in her position. That she did not sooner do so—especially in view of the collisions which had already occurred, and the warnings given her master—was entirely inexcusable.

Experienced river men testify that, under the peculiar circumstances then existing, ordinary prudence required the St. Lawrence to avoid, or go away from the Phillips wharf-boat altogether, and take a position at the city wharf, lower down, which the evidence indicates was available to her. Coal-boat rises, as is well known, are often of short duration, and the river must be "taken at the flood" by outgoing coal-tows. There is therefore great force in the argument urged by the libelants' counsel, that it was the duty of the St. Lawrence to yield the whole space between the wharf-boat and the Robinson fleet—none too large for the requirements of the occasion—to descending tows, (*The Exchange*, 10 Blatchf. 168,) but it is not necessary to decide whether or not such was her duty.

The culpability which makes the St. Lawrence justly answerable to the libelants' for the loss of their property, consisted in her unnecessarily encroaching upon the ordinary coal-boat channel by throwing her stern out in the way of descending tows, when she might have lain broadside to the wharf-boat, and thus afforded the Abe Hays a sufficient passage-way.

Undoubtedly the mooring of vessels at public wharves is a well recognized right, as much to be protected by the law as that of navigation itself. But it is to be exercised with due regard to the rights of passing vessels. An unnecessary encroachment upon the channel-way, which greatly imperils passing craft, is without justification. It may have been more convenient to the St. Lawrence to receive and discharge her cargo with her bow to the wharf-boat, but this is a poor excuse for putting in needless jeopardy descending tows.

It is, however, asserted that the Abe Hays had not sufficient power to control and manage her tow, in the then stage of the river and

strong current, and that it was negligence to employ her for the service she undertook. But this defense, I think, is not made out. This employment was her ordinary business, and while she was less powerful than some other tow-boats, she was reasonably fit for the work. On this occasion she had in charge but a single coal-boat, which she had sufficient power to manage had the channel-way which she had a right to use been unobstructed. It is quite true that after she had passed the Smithfield Street bridge, (where her pilot first discovered the projecting position of the St. Lawrence,) she had not power to back up stream, and thus avoid the danger. But tow-boats with coal-tows descending the Monongahela and Ohio rivers are not expected, and ordinarily have not the ability, to back up stream, or even to hold their tows against a strong current. *Fawcett* v. *The L. W. Morgan*, 6 FED. REP. 200. The coal is taken out on freshets, the tow-boat guiding the tow.

It is further claimed on the part of the defense that the Abe Hays, having gone up the river at about 8 o'clock on the morning of March 31st, in sight of the place where the St. Lawrence lay, was chargeable with notice of her position, and therefore was in fault in coming down at all. But the Abe Hays went up without any tow, and the St. Lawrence was not in her way. Her master and pilot state that they do not remember to have observed the St. Lawrence; but if they did, they may well have supposed that she had just come into port or was about to leave. At any rate, they were not bound to assume that she would continue to lie in her then position for several hours, and after coal-tows had commenced coming down.

Again, it is insisted that the disaster was brought about by the previous collision between the Acorn and Abe Hayes. The evidence, however, leads me to a different conclusion. Moreover, in that matter the Acorn was exclusively to blame. Therefore, if her stroke did put the Abe Hays out of shape and thus contributed to the misfortune, her fault is not to be imputed to the innocent vessel.

But did it appear that the Abe Hays was guilty of contributory negligence, what then? The libelants were not her owners nor answerable for her misconduct. Now, it is a recognized principle of law that an innocent party who sustains a loss by reason of the concurrent negligence of two vessels may pursue and recover the entire damage from either wrong-doer. *The Atlas*, 93 U. S. 302; *The Franconia*, 16 FED. REP. 149. And herein is to be found the answer to the suggestion (if true) that the Robinson fleet wrongfully narrowed the coal-boat channel.

The evidence shows the value per bushel of the coal to be as stated in the libel, and as to quality there seems to be no controversy.

Let a decree be drawn in favor of the libelants for the amount of their claim, with interest from March 31, 1883, and costs.

The Frank C. Barker, Her Tackle, etc.

(District Court, D. New Jersey. February 2, 1884.)

1. Seamen—Desertion—Discharge.
   In consequence of a disagreement between the master of a vessel and his seamen about the amount of wages due them, the mariners were ordered to go to work or go on shore. They agreed to go ashore if he would give them orders for their wages, stating that they would regard themselves in that case as discharged. The master gave them the orders, and the sailors left the vessel. *Held*, that they were discharged, and were not to be looked on as deserters.
2. Entire Contract—Discharge—Recovery of Wages Earned.
   Upon the wrongful discharge of a workman engaged under an entire contract, he is entitled to recover his wages during actual service.
3. Statutory Remedy not Exclusive.
   The remedy afforded seamen by sections 4546 and 4547 of the Revised Statutes is not exclusive, and the usual process *in rem* against the vessel is still open to them.

In Admiralty. Libel *in rem* for wages.

Bedle, Muirheid & McGee, for libelants.

E. A. Ransom, for respondents.

Nixon, J. A careful reading of the voluminous testimony in this case shows that the unfortunate misunderstanding between the owners and the crew, leading to the present controversies, has arisen from the double-faced dealing of the master, Raynor. It must be borne in mind that seamen of this class are generally ignorant; and are often imposed on, and that such imposition makes them suspicious. The libelants were hired at $25 a month and a bonus of three cents for every 1,000 fish caught during the season. There seems to have been no very definite arrangement when their wages were to be payable. The owners testify what their understanding was, and what instructions they gave to the master in regard to the hiring of the crew. But there is no evidence that any hint was given to the libelants that the payment of three cents per thousand on the fish taken was contingent on their remaining to the end of the season, or that no payment was to be made on account until the season ended, or that the men would be expected to have deducted from their wages all that was expended for grub above three dollars a week. On the contrary, I think it is a fair inference, from the testimony, that the libelants thought at the time of their hiring that their wages would be paid monthly, and the bonus, or fish-money, as it was earned, and as they desired to have it.

It appears that some of the crew had been employed in the same business the previous year by the same master and no suggestion was then made that they would receive nothing on account of the bonus until the end of the season's work, or that they would be charged anything on account of their grub, whatever the cost of providing it might be. But after the season's work was fully under way news came to the ears of the libelants that these new terms were to be im-

posed. In the controversy over it which followed, the master seems to have taken sides with the men, when with them, and with the owners when away from the crew. About the first of July some of the libelants went to the master for payment on account of the bonus, or fish money, earned, as they had done the year before. It was agreed that they would estimate the number caught to that date at 500,000. But when the owners were applied to they refused to pay anything, stating for the first time that all earnings would be withheld till the close of the season. This was followed shortly afterwards with the other claim in regard to the expenses for the grub. They at once demanded, both of the master and of the owners, that these questions, and especially the latter, charging them for any part of their board should be definitely settled. The owners and master were wrong in attempting to incorporate new terms into the contract for hiring without the consent of the libelants, and the latter were right in insisting upon an amicable adjustment of the differences, or upon a separation.

The libelants were peremptorily told to go to work or to go ashore. They agreed to the latter if they were paid off in full to date. Elliott says that, when he was ordered to go ashore, he replied that he would go if the captain would give him an order for his money. Upon receiving his order the other men asked for theirs, also, and they were given. Pages 74, 75. The master assented to the payment, and gave them orders upon the owners to that effect. The orders were taken to the owners, who, on a subsequent day, handed to the captain, for them, checks for the month's wages then due, but not including their earnings for the number of fish caught. The libelants found that the checks were drawn to their order, and in full for all claims. They declined to use them, and filed libels forthwith for the wages and fish money due to the date of the master's orders. The proctor of the respondents claims that this was a desertion, and the libelants, that it was a discharge. Were the libelants discharged? This question is often determined affirmatively by circumstances, in the absence of direct proof. *Granon* v. *Hartshorne*, Blatchf. & H. 458; *The David Faust*, 1 Ben. 187. The proof is clear that the libelants considered themselves discharged by the act of the master. While they were parleying in regard to being charged for the expenses of their grub, exceeding three dollars a week, and properly insisting that the question should be settled without further delay, and when the master ordered them to go to work or go ashore, they agreed to the latter, provided he would give them an order upon the owners for what was due to them, and at the same time stated that they should look upon such an order as a discharge. With express knowledge as to how the libelants regarded the proceeding, he gave them the order for the wages due, with which they went to the owners for payment. I must hold the giving of such an order, under the circumstances, as a discharge of the libelants.

This view of the case renders it unimportant to determine whether the men were shipped for the season or from month to month, and whether the bonus was payable at the end of the season or by the month. If they were discharged by the master they should receive what they had earned up to the date of the discharge, whether due under the original contract or not. But it may be conceded that I am in error in regard to the discharge of the libelants, and still they are entitled to a decree. The respondents testify to the instructions which they gave to the master in regard to hiring the crew. But the master was examined, and he does not pretend to have carried them out in his negotiations with the men. Not one of them was told that the bonus was to be withheld until the end of the season, or that any deductions would be made from their wages for board if the expense exceeded three dollars per week. On the contrary, the testimony of Elliott is uncontradicted that during the previous years he had been in their employ, and that the wages were paid monthly, and the bonus as it was earned and whenever it was asked for. On page 29 of his evidence he states that when the hiring took place he said to the master: "I suppose we get the monthly pay the same we did last year, every month?" "Yes," said he. "And the bonus when we want it?" says I; says he, "Yes." While I am not disposed to wholly justify the conduct of the men, great allowance should be made for them under the provocation of an attempt to impose upon them new and unexpected obstacles to receiving their hard-earned wages. The proctor of the respondents at the hearing claimed that three of the libels should be dismissed because they were filed within 10 days after the alleged discharge of the libelants. He contended that the remedy afforded by sections 4546 and 4547 of the Revised Statutes was exclusive, and that the provision therein made for an application to a judge, commissioner, or justice of the peace, must be observed in all cases except where the vessel was about to go out of the jurisdiction of the court. But this is not the construction which the courts have ordinarily given to these sections. It is held that the remedy is cumulative and not exclusive, and that, notwithstanding these provisions, the courts of admiralty remain open to seamen for the usual process *in rem* against the vessel whenever they prefer to pursue that course. *Murray* v. *Ferryboat*, 2 FED. REP. 88; *The William Jarvis*, Spr. Dec. 485; *The M. W. Wright*, 1 Brown, Adm. 290; *The Waverly*, 7 Biss. 465.

Let a decree be entered for the libelants, and a reference, unless the parties can agree from the testimony already taken upon the amount of wages due.

THE SALLY.[1]

(*District Court, E. D. Pennsylvania.* December 24, 1883.)

ADMIRALTY—COLLISION BETWEEN FLOATING BARGE AND SAILING VESSEL—DUTY ON MEETING IN NARROW STREAM.

Where a barge, floating with the tide up a narrow creek, had her bow stuck in rubbish near the bank and her stern swung across the creek by the tide, and a collision with a sloop under sail coming down the creek might have been avoided by the man on the barge reversing his pole so as to turn the stern completely around, *held*, the barge was in fault in holding her stern against the tide and thereby making a collision inevitable.

In Admiralty. Hearing on libel, answer and proofs.

Libel by the owners of the canal barge Henry S. Pence, against the sloop Sally. The libelants claimed that on July 18, 1883, while the barge Henry S. Pence was floating up the Woodbury creek, and had proceeded about half a mile from its mouth, she was struck upon the starboard side by the sloop Sally, although the sloop had ample time and sufficient water to go astern of the barge. The respondent contended that as the sloop, proceeding down the creek, rounded a curve, the barge was seen about 100 yards distant, directly across the creek, floating up with the tide; that the barge was insufficiently and negligently manned by only one man, who was using a pole on her starboard side near the stern, and paid no attention to the approach of the sloop, although several men upon the shore called out to him. The sloop at once starboarded her wheel, and tried to go under the barge's stern expecting that the barge would allow her stern to drift up, but the man on the barge held her stern with the pole, making a collision inevitable.

John A. Toomey, for libelant.

Edward F. Pugh, for respondent.

BUTLER, J. The libel must be dismissed. Whether the barge was sufficiently manned, and, if not, whether this had anything to do with the result, need not be considered. Her position in the creek, barring the channel, was improper and inexcusable. Her bow appears to have been interfered with by rubbish at the side of the stream, and her stern swung around, under the influence of the tide. I do not think the wind had anything to do with it. Whether it had or not does not seem, however, material. Her stern would have gone completely around if her master had not prevented it. Desiring to right his boat, he held her stern against the tide with his pole. This was proper at the time he commenced it, and doubtless would soon have relieved the bow and turned it up stream. His mistake, however, was in continuing it after the sloop came into view. Had he reversed his pole and added his strength to the force of the tide, he would have opened the channel before the sloop reached him. As it was his duty

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

to do this, the sloop was justified in supposing he would, and going forward. Seeing that he still held his boat across the stream he was cautioned to let her stern go, and every proper effort made to arrest the sloop's headway. He persisted, however, in his folly, and was struck. That the accident occurred in this way, and from this cause, seems very clear from the evidence on both sides. Directly after, the master of the barge repeatedly admitted his fault, and exonerated the sloop.

A decree must be entered dismissing the libel, with costs.

THE ASHLAND.[1]

(Circuit Court, E. D. Louisiana. December, 1883.)

1. PRACTICE—APPEAL—REMITTITUR.
   Where a judgment was rendered by the district court against claimants for an appealable amount, and thereafter proctor for libelants offered to enter a *remittitur* of so much of the judgment as to reduce it below the appealable amount, and the district court refused to allow the *remittitur*, *held*, that it was within the discretion of the district judge to allow or refuse to allow the *remittitur* to be entered.
   Ins. Co. v. *Nichols*, 3 Sup. Ct. Rep. 120, followed.

2. SAME.
   A *remittitur* comes too late when offered to be entered after an appeal has been allowed.

On Motion to Dismiss Appeal in Admiralty.

R. King Cutler, for libelants.

A. G. Brice, *Joseph P. Hornor*, and *F. W. Baker*, for claimant.

PARDEE, J. It appears from the transcript that on June 7, 1883, the judgment was rendered in the district court for $51. On the same day a motion for appeal was made and allowed. June 9th a bond was given and accepted. June 11th the decree was signed by the district judge, and on the same day a *remittitur* of one dollar "was filed, but not entered on the minutes, nor allowed by the court." The motion to dismiss must be overruled and refused because (1) the *remittitur* was not allowed by the court. *Alabama Gold Life Ins. Co.* v. *Nichols*, 3 Sup. Ct. Rep. 120. (2) It came too late after an appeal was allowed and perfected.

Order accordingly.

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

DOTY and another *v.* JEWETT and others.

Circuit Court, N. D. New York. February 16, 1884.)

1. JURISDICTION OF CIRCUIT COURTS—REVIEW OF PROCEEDINGS IN DISTRICT COURT —WAIVER OF JURY.
   The circuit courts of the United States have no jurisdiction to review any question raised by a bill of exceptions in an action at law in a district court, where the facts have been found without the aid of a jury, since there is no warrant in the statutes for the waiver of a jury in the district courts.
2. SAME—APPEAL—BILL IN EQUITY—ACTION AT LAW—WRIT OF ERROR.
   Proceedings in equity in the district courts can be reviewed in the circuit courts only upon appeal, and not upon writ of error. If a writ of error is taken, the court of review can only treat the case as an action at law.
3. SAME—LIMITED BY STATUTE.
   The circuit court has no jurisdiction to revise judgments of the district court in any other way than the statutes prescribe; and no agreement of the parties can give it such authority.

At Law.

Thomas Corlett, for plaintiffs in error.

Ruger, Jenney, Marshall & Brooks, for defendants in error.

BLATCHFORD, Justice. This is an action brought in the district court of the United States for the Northern district of New York, by the plaintiffs in error against the defendants in error. The first pleadings of the plaintiffs calls itself a complaint and is sworn to as a complaint. It sets forth the copartnership of Albert Jewett and William Johnson, as Jewett & Johnson; an indebtedness of the firm to the Phœnix Mills, a corporation, of $6,208.51, for goods sold and moneys advanced; the adjudication of the corporation as a bankrupt; the appointment of the plaintiffs and said Johnson as its assignees; an assignment to them; the death of Johnson; the insolvency of Jewett; the want of copartnership assets of Jewett & Johnson to pay any part of said debt; the absence of any other remedy for the plaintiffs to collect the debt, except against the estate of Johnson; the granting of letters of administration on his estate to the defendants Angeline C. Johnson and Stephen B. Johnson; the non-payment of any of the debt; and its existence as a debt against the estate of Johnson, enforceable by the plaintiffs. The prayer is for judgment against Jewett, surviving partner, and against the other defendants as administratrix and administrator, for $6,208.51, with interest. Jewett put in a separate answer containing three distinct defenses, to which the plaintiff put in a replication, which treated the answer as consisting of three pleas, and itself contained two separate pleadings, each of which concluded to the country. The other defendants put in a separate answer containing five separate defenses, to which the plaintiffs put in a replication, which treated the answer as consisting of five pleas, and itself contained five separate pleadings, each of which concluded to the country. Each of the replications speaks of the plaintiffs' initial pleading as a "declaration."

The case is before this court on a writ of error. The record shows that the action was tried by consent, in the district court, before that court held by the district judge, without a jury; that a jury was duly waived by the parties; that the judge heard evidence, both parties appearing; that he made certain decisions to which the plaintiffs excepted; and that he dismissed the complaint on the ground of a bar by a statute of limitations. A bill of exceptions was signed, and a judgment was entered dismissing the complaint on the merits, and awarding costs to the defendants. The plaintiffs brought a writ of error. No other questions are sought to be reviewed, except those arising on the bill of exceptions. It was held by this court, in *Town of Lyons* v. *Lyons Nat. Bank*, 19 Blatchf. C. C. 279,[1] that no question arising on a bill of exceptions could be considered by this court on a writ of error to the district court, in an action at law, where the facts were found by the district court without a jury. The question was there fully examined, and the following authorities were cited and reviewed: *Guild* v. *Frontin*, 18 How. 135; *Suydam* v. *Williamson*, 20 How. 432; *Kelsey* v. *Forsyth*, 21 How. 85; *Campbell* v. *Boyreau*, Id. 223; *U. S.* v. *15 Hogsheads*, 5 Blatchf. C. C. 106; *Blair* v. *Allen*, 3 Dill. 101; *Wear* v. *Mayer*, 2 McCrary, 172; [S. C. 6 FED. REP. 658.] It was held that the question is one of the power and authority of the court, and is not such a question of practice, or such a form or mode of proceeding, as is embraced in section 914 of the Revised Statutes, which adopts for the circuit and district courts of the United States, in suits at law, the practice of the state courts; and that there is nothing in section 914 which extends or affects the power of this court, as it before existed, on a writ of error to the district court. The want of power consists in this: that section 566 of the Revised Statutes requires that issues of fact, in actions at law in the district courts, shall be tried by a jury, and there is no statutory provision for the waiver of a trial by jury in such actions, and no special statutory power conferred on this court to consider any question raised by a bill of exceptions in such an action not tried by a jury.

It is urged for the plaintiffs in error that in regard to the representatives of Johnson the suit is in the nature of a suit in equity, as the complaint alleges the insolvency of Jewett. The answer to this is that the plaintiffs, by their pleadings, have treated the action throughout as a suit at law. By section 4979 of the Revised Statutes jurisdiction is given to the district courts of suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property or rights of the bankrupt transferable to or vested in the assignee. Under the rulings of the supreme court in *Jenkins* v. *International Bank*, 106 U. S. 571, [S. C. 2 Sup. Ct. Rep. 1,] the present suit is either a suit at law or a suit in equity, within the provisions of section 4979. If

[1] S. C. 8 FED. REP. 369.

a suit in equity, it would be commenced by bill, and the proceedings would be in conformity to the rules of equity practice established by the supreme court, as required by general order No. 33 in bankruptcy. This has not been done. The plaintiffs, in their replication, call their own first pleading a declaration, and the defendants' pleading pleas, and their replication consists of five pleadings, each of which concludes thus: "and this the said plaintiffs pray may be inquired of by the country," etc. Moreover, they waived a trial by jury, and they made a bill of exceptions, and they sued out a writ of error, all badges of a suit at law, and not of a suit in equity. By section 4980 of the Revised Statutes it is provided that "appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the districts courts may be allowed in cases at law arising under or authorized by this title." The fact of the taking of a writ of error establishes that this is a case at law, so far as this court is concerned. If it were a case in equity, a review by this court would have to be by appeal, in order to give this court jurisdiction.

It is urged that the trial by the court took place as it would have done in an equity suit; and that, as the case is one reviewable in one or the other of the two modes, the objection to the mode may be waived by the other side, and such waiver has taken place in this case. Some authorities under the state practice in New York are referred to. But the question is one of jurisdiction. The agreement of parties cannot authorize this court to revise a judgment of the district court in any other mode of proceeding than that which the law prescribes, nor can the laws or practice of a state, in regard to the proceedings of its own courts, authorize this court or the district court to depart from the modes of proceeding and rules prescribed by the acts of congress. *Kelsey* v. *Forsyth*, 21 How. 85, 88; *Merrill* v. *Petty*, 16 Wall. 338, 347; *U. S.* v. *Emholt*, 105 U. S. 414, 416.

As the district court had jurisdiction of the subject-matter and of the parties, and as there is no error in the record, and as nothing found in the bill of exceptions can be considered, the judgment must be presumed to be right, and must be affirmed, with costs. *Campbell* v. *Boyreau*, 21 How. 223, 227; *Town of Lyons* v. *Lyons Nat. Bank*, 19 Blatchf. C. C. 279, 289; [S. C. 8 FED. REP. 369.]

MARTIN *v.* BALDWIN and others.

(Circuit Court, D. California. February 4, 1884.)

JURISDICTION OF FEDERAL COURT—PENDENCY OF CAUSE IN STATE COURT.

Pending a suit in a state court for the partition of land, a court of the United States having concurrent jurisdiction may refuse to entertain a suit between the same parties or their successors by purchase, *pendente lite*, when the issues and interests involved in the two cases are the same.

The facts are stated in the opinion.

W. S. Woods, for complainant.

Latiner & Morrow, for defendants.

SAWYER, J., *(orally.)* This is a suit for partition of a ranch, Camilo Martin bringing the suit against Baldwin and Garvey for partition, alleging that he owns a certain portion, and that Baldwin and Garvey own the remaining portions. The plea sets up that W. and F. W. Temple commenced suit in the district court for the district of Los Angeles county, against Baldwin, one of the defendants in this suit, and several other defendants named, being the other owners at the time, for a partition of this same ranch; that said suit is still pending in the superior court for the county of Los Angeles; that it embraces the identical object and subject-matter involved in this suit; that since the commencement of that suit, the plaintiff in this proceeding, Camilo Martin, has purchased the interest of the Temples, and now owns the same interest that the Temples did; that Garvey has purchased the interest of some of the other defendants in the suit; and that Camilo Martin, the complainant in this suit, and Baldwin have also purchased the remaining interest of the other defendants in the suit, so that now Martin, Garvey, and Baldwin are owners of the entire ranch; that though there are other parties to the former suit for partition, yet the parties to the present suit have succeeded to their interests, *pendente lite*, and are now the only parties in interest; that the same interests are now involved, the parties to this suit having purchased in subsequently to the bringing of the former suit and the filing of notice *lis pendens*, and are, therefore, in privity with those other parties; that this suit involves precisely the same questions that the former suit does; and that the judgment or the decree in the former suit would be binding upon all the world. Section 1908 of the Code of Civil Procedure says:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * (2) In other cases, the judgment or order is, in respect to the matter directly adjudged conclusive between the parties and their successors in interest by title, subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title, and in the same capacity."

Precisely the same relief is to be had in one suit as in the other, and the judgment in the first suit would be binding upon all the par-

ties. It is true that these are different jurisdictions, that is to say, one is the jurisdiction of the United States and the other of the state court, and in ordinary cases the pending of the suit in one of these tribunals would not abate a suit pending in another. But these suits are for partition of the same land, and the two courts might reach a different result and there be no error in either proceeding upon which the judgment could be reversed. The parties would find themselves in a very embarrassing position if the judgments should be different in the different courts and both of them be valid. The jurisdiction of the two courts is concurrent. The proceeding is in the nature of a proceeding *in rem.* Where two courts have concurrent jurisdiction in a proceeding *in rem,* and one court obtains possession of the *res,* ordinarily it would be entitled to proceed to judgment without interference from the other court. Certainly, one court would not be entitled to take the *res* out of the possession of another court of concurrent jurisdiction, which, in the exercise of its lawful authority, has obtained the actual, physical possession of the thing in suit. It seems to me that the same principle should apply to a suit for partition. The action is local, and the courts, having concurrent jurisdiction, must necessarily exercise the same territorial jurisdiction, although the courts may be courts of different sovereignties. The proceeding being in the nature of a proceeding *in rem,* the court first obtaining legal possession or control of the *res* ought, by comity at least, if not otherwise, to be permitted to proceed to an adjudication without interference by the other court. As a matter of sound legal discretion and comity, I think the court is authorized to abate the suit in this court on the ground of the pending of the other suit in the state court, even if the party pleading the matter of abatement is not entitled to have it abated as a matter of strict legal right. The complainant cannot complain, for he purchased pending the former suit, and the notice of *lis pendens,* filed in pursuance of the statute, informed him of the condition of the lands. He purchased into a lawsuit in regard to lands already in the legal control of another court. This court, at the commencement of that suit, had no jurisdiction whatever of the case,—the parties being then all citizens of California,—and complainant took his interest *cum onere.*

Let the plea be sustained.

BRUCE and others *v.* MANCHESTER & K. R. R. and others.

(Circuit Court, D. New Hampshire. February 14, 1884.)

1. COURTS OF CONCURRENT JURISDICTION — JURISDICTION ACTUALLY ACQUIRED.
Of two courts having concurrent jurisdiction of any matter, the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it involving substantially the same interests.
2. SAME—FORECLOSURE OF MORTGAGE ON RAILROAD.
Accordingly, where the supreme court of New Hampshire decreed the foreclosure of a deed of trust and mortgage of a railroad, and the property was actually sold, *held*, that the circuit court of the United States could not entertain a bill to enforce the operation of the road by trustees for the benefit of its stockholders, although the bill was filed before the sale, and the sale when made was declared to be subject to the result of the suit in the circuit court.
3. RECEIVER—POSSESSION OF THE COURT.
The possession of a receiver is the possession of the court appointing him, and cannot be divested by a court of co-ordinate jurisdiction.
4. EVIDENCE—ADMISSIBILITY—RECORDS.
The admissibility of copies of a record in evidence does not render the record itself inadmissible.

In Equity.

F. A. Brooks, for complainants.

S. N. Bell, Briggs & Hull, Wm. E. Chandler, and *Wm. L. Foster*, for defendants.

CLARK, J. The Manchester & Keene Railroad was incorporated by the legislature of New Hampshire, July 16, 1864. On the twenty-ninth of May, 1878, it issued its bonds to the amount of $500,000, bearing date July 1, 1876, and payable July 1, 1896, with 6 per cent. interest, semi-annually. To secure the payment and interest of these bonds, it mortgaged its road and franchises, and all the property connected therewith, to Cornelius V. Dearborn, J. Wilson White, and Farnum F. Lane, trustees. By this mortgage it was stipulated that if said railroad failed for a period of six months to pay the interest of said bonds, upon a request of a majority of the holders, the trustees might declare the principal of the bonds to be payable forthwith, and make demand therefor, and for arrears of interest, and upon failure of payment of the same, within 10 days after demand, might sell the railroad, property, and franchise by public auction, and make due conveyance of the same. The railroad made default in the payment of its interest, and on the twenty-ninth day of April, 1880, Samuel W. Hale, Henry Colony, John Y. Scruton, and William P. Frye filed a bill of complaint in equity in the supreme court of New Hampshire against the Nashua & Lowell Railroad, the Manchester & Keene Railroad, and Dearborn, White, and Lane, trustees. The bill alleged that the complainants were bondholders of the Manchester & Keene road, and, among other things, that by reason of the want of care and proper management of the directors and trustees, the interest of said bonds had become overdue, and been unpaid for more than two years, though demanded, and the road itself was unused, neglected, and rapidly go-

ing to ruin. It prayed, among other things, that a receiver might be appointed for the protection and preservation of the road; that two of the trustees, Dearborn and White, might be removed, and others appointed in their places; and that a foreclosure of the mortgage might be made. Of this bill of complaint the supreme court of New Hampshire took immediate cognizance, and appointed a receiver to take possession of the road. On the eighteenth day of August, thereafter, it removed two of its trustees, Dearborn and White, and appointed James A. Weston, George A. Ramsdell, and John Kimball in their places, and that of Lane, who had resigned, and they afterwards became parties to the bill. The bill was then amended so as to allow other bondholders to come in and constitute the same a proceeding of all the bondholders who should desire to become parties thereto; and they did so come in, among others the Nashua & Lowell Railroad, which had been made party defendant in the bill. At the September trial term of the court, 1880, a hearing was had upon the bill, and the pleadings connected therewith, and certain questions of law were reserved and transferred to the full bench of the supreme court. These questions were heard at the March term, 1881, decided, and the case remanded for a decree in accordance therewith; and at the May trial term next following, a default and breach of the condition was adjudged to have taken place, and a decree entered that a foreclosure be made by a sale at auction of the road, its franchise and property, and that notice be given by publication for the presentation by the bondholders of their bonds before August 5, 1881.

At the September term, (September 2, 1881,) an order was made allowing the bondholders to hold a meeting for the choice of trustees, if they desired; and that if no such meeting was held within 10 days, the trustees which had been appointed by the court should proceed to foreclose the mortgage by a sale according to the decree of the court at the preceding May term. No such meeting of the bondholders was held, and on the twentieth day of September, 1881, in accordance with the order of the court, the trustees advertised said road, its franchises and property, for sale at public auction, Wednesday October 26th, at 12 o'clock noon, at which time the property was sold subject to the result in this suit. November 21st the trustees made report of the sale to the court, and the sale was ratified and approved. On the twenty-fourth of October, 1881, two days before the sale of the road under the order of the court was to take place, and with full knowledge of the proceedings in the supreme court of New Hampshire, either by themselves or their attorney, the complainants in this case filed their bill against all the parties complainant in the New Hampshire court; and Charles H. Campbell, who was advertised as auctioneer to sell the road, alleging that they were bondholders of said road; that the road was in default of the payment of its interest, and the condition of the mortgage broken; and asking this court to order an account to be taken of what is due

and owing to all the holders of said bond secured by the mortgage of May 29, 1878, and now payable; and that said Manchester & Keene Railroad may be ordered to pay and satisfy the same at some short day, to be fixed by the court, together with the costs of suit, and in default thereof that the said Lane, White, and Dearborn, as trustees under said mortgage, or that such other persons, if any there be, who may or shall have succeeded to the office of trustees under said deed of trust, in pursuance of the terms of said deed, in the place and stead of said Lane, White, and Dearborn, by lawful right may be required by order of this court to take possession of said Manchester & Keene Railroad, and of all the property embraced in said mortgage, and either operate the same personally, and take the earnings thereof, or else to lease said railroad to be operated by others, at a rental, for the benefit of said bondholders, as is provided in and by said deed of trust, and that the said Hale and Colony and Frye and Scruton and Campbell, and any other person or persons who may become the pretended purchasers of said railroad at such pretended sale, may be restrained from resisting the said Lane, White, and Dearborn in discharge of their duties under said mortgage pursuant to the order of this court.

To this bill of complaint the Manchester & Keene Railroad has made answer, setting forth the proceedings of the supreme court of New Hampshire, its orders and decrees in relation thereto, the sale of the road, and the foreclosure of the mortgage. Other parties defendant have made answer, but as no relief is claimed against them, those answers are not material to the decision of this case. The Boston & Lowell Railroad have withdrawn as complainants, and the remaining complainants make no denial or question of the jurisdiction of the supreme court of New Hampshire in the premises. The question then comes distinctly, whether, upon the bill and answer as thus stated, this court should grant the relief prayed for, and the answer must be that it should not. The subject-matter of the two suits—the one in the New Hamphire supreme court and the one in this court—is substantially the same: the Manchester & Keene Railroad, and its default in the payment of the interest on its bonds secured by the mortgage of May 29, 1878, and the relief of its bondholders. The relief asked was somewhat different, but the subject-matter the same. Over this matter the two courts have concurrent jurisdiction, and the rule has been established, by a long line of almost unbroken decisions, that in all cases of concurrent jurisdiction the court which first has possession of the subject-matter must decide it. Chief Justice MARSHALL thus announced the rule in *Smith* v. *McIver*, 9 Wheat. 532, and it has been followed in many cases since. *Mallett* v. *Dexter*, 1 Curt. 178; *The Robert Fulton*, 1 Paine, 621; *Ex parte Robinson*, 6 McLean, 355; *Board of F. Missions* v. *McMasters*, 4 Amer. Law Rev. 526; *Ex parte Sifford*, 5 Amer. Law Rev. 659; *Parsons* v. *Lyman*, 5 Blatchf. C. C. 170; *U. S.* v. *Wells*, 20 Amer.

Law Rev. 424; *Crane* v. *McCoy*, 1 Bond. 422; *Blake* v. *Railroad*, 6 N. B. R. 331; *Levi* v. *Life Ins. Co.* 1 FED. REP. 206; *Hamilton* v. *Chouteau*, 6 FED. REP. 339; *Ins. Co.* v. *University of Chicago*, Id. 443; *Walker* v. *Flint*, 7 FED. REP. 435; *Wire Co.* v. *Wheeler*, 11 FED. REP. 206; *Ins. Co.* v. *Railroad*, 13 FED. REP. 857; *The J. W. French*, Id. 916; *Stout* v. *Lye*, 103 U. S. 66.

The jurisdiction of the supreme court of New Hampshire first attached, and it had the right to proceed to the final determination of the cause, to the exclusion of this court upon the same subject-matter.

In *Peck* v. *Jenness*, 7 How. 612, Mr. Justice GRIER, delivering the opinion of the court, says: "It is a doctrine too long established to require a citation of authorities, that when a court has jurisdiction it has a right to decide every question which occurs in the cause, whether its decisions be correct or otherwise; its judgment, till reversed, is regarded as binding on every other court; and that where the jurisdiction of a court, and the right of the plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." "This rule," says the court, "is founded not only in comity, but in necessity. If one could adjudge and the other reverse, the contest might go on until parties tired, justice was delayed, and the courts were in contempt."

Again, when the bill of complaint was filed in this case, the Manchester & Keene road was in the hands of a receiver appointed by the supreme court of New Hampshire. The possession of that receiver was the possession of that court, and this court could not divest or disturb that possession, as it must do if it granted the relief prayed for. *Taylor* v. *Carryl*, 20 How. 583; *Hagan* v. *Lucas*, 10 Pet. 100; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Walker* v. *Flint*, 7 FED. REP. 435.

It is contended by the complainants that the sale of the road by the trustees under the order of the court of New Hampshire was made subject to the result in this suit, and therefore the relief prayed for should be granted; but that contention cannot be assented to. The decree of the court of New Hampshire was absolute, and without condition, that a foreclosure of the mortgage should be made by a sale of the road. That decree this court cannot reverse or set aside, as it practically must do if it now grants the relief prayed for by the complainants. The court of New Hampshire ordered the trustees to sell the road; this court is asked to order the trustees to run or lease the road for the benefit of the complainants. The one is inconsistent with the other. The sale of the road was operative to foreclose the mortgage, and transfer the road to the purchaser, divested of that incumbrance; and if so, this court cannot treat the mortgage as still subsisting, and take the road out of the possession of the purchaser or of its present owner.

An objection was made at the hearing that the original records of the court of New Hampshire, produced by the clerk, were not com-

petent evidence; that copies should have been produced. This objection the court overruled. Copies of record are admitted from necessity, because the originals cannot be produced. The originals are the best evidence, and the admission of copies does not exclude the originals when they can be produced. In *Cate* v. *Nutter*, 24 N. H. 108, it was held that where a copy of a record is admissible in evidence, the record itself is equally admissible. So, in *Jones* v. *French*, 22 N. H. 64. The papers admitted as evidence were not an extended record; none had been made, but various orders and decrees of the court, and in such case, in proceedings in equity, the original papers and docket entries will be deemed the record. *U. S. Bank* v. *Benning*, 4 Cranch, C. C. 81.

On consideration the ruling of the court was correct, and the bill in this case should be dismissed.

BARTLETT and others *v.* HIS IMPERIAL MAJESTY THE SULTAN OF TURKEY and others.

(*Circuit Court, S. D. New York.* February 25, 1884.)

PRACTICE—SERVICE OF PROCESS ON ATTORNEY—SUIT FOR INJUNCTION.

In a suit to enjoin the prosecution of an action at law, if the defendant cannot be found in the district, process may be served upon his attorneys in the legal action.

In Equity.

Goodrich, Deady & Platt, for plaintiffs.

Tracy, Olmstead & Tracy, for American National Bank, for the purposes of this motion only.

WALLACE, J. The theory of this bill is that the complainants, as warehousemen, having been sued by the defendants severally in actions at law, to recover the possession of personal property in the custody of complainants as such warehousemen, are entitled to compel the defendants to interplead and relieve complainants from the burden of the several litigations at law. As part of the relief prayed for, the complainants seek to enjoin the defendants from their proceedings at law. For reasons which it is not now necessary to state, it may be doubtful whether the complainants can maintain their bill. The question now is, however, not whether the bill is good upon demurrer, but whether the complainants are entitled to secure the appearance of the defendants who cannot be served with process, because they cannot be found within the district by service of process upon the attorneys for the defendants in the suits at law in this district. This has long been recognized as good practice when the suit

in equity is brought to enjoin proceedings at law. As the subpœna has already been served upon the defendants' attorneys, an order authorizing such service will be granted upon presenting a sufficient affidavit.

WALLAMET IRON BRIDGE CO. v. HATCH and another.

(Circuit Court, D. Oregon. March 3, 1884.)

1. BILL OF REVIEW.
   An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject of the litigation, it ought to be allowed.
2. SAME—HEARING.
   On the hearing of a bill of review the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence.
3. THE WALLAMET RIVER A NAVIGABLE WATER OF THE UNITED STATES.
   The Wallamet river, though wholly within the state of Oregon, by means of its connection with the Columbia river, forms a highway for interstate and foreign commerce, and is therefore a navigable river of the United States, and subject, as such, to the control of congress.
4. NAVIGABLE WATERS IN OREGON ARE COMMON HIGHWAYS.
   The act of February 14, 1859, (11 St. 383,) admitting Oregon into the Union, which declares that the navigable waters therein shall be "common highways and forever free" to the citizens of the United States, is not a compact made with or condition imposed upon the state in consideration of its admission into the Union, but is, so far, an absolute and valid regulation, made by congress in pursuance of its power over the navigable waters of the United States, as a means of interstate and foreign commerce, which it might as well have enacted before or after as at the time of such admission.
5. OBSTRUCTION TO "COMMON HIGHWAY."
   Congress, by the act of 1859, having declared the Wallamet river "a common highway," the state cannot authorize any one to build a bridge across the same, which, under the circumstances of the case, will needlessly impede or obstruct the navigation thereof.
6. JURISDICTION OF THE UNITED STATES CIRCUIT COURT.
   The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless and therefore unlawful obstruction thereto arises under a law of the United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same.
7. THE ORDINANCE OF 1787.
   Semble, that the clause in the fourth article of the compact in the ordinance of 1787, concerning the navigable waters of the Northwest territory, was not abrogated or superseded by the formation of states therein and their admission into the Union.

Bill of Review.

George H. Williams and *Rufus Mallory*, for plaintiff.

Walter W. Thayer and *John M. Gearin*, for defendants.

DEADY, J. This is a bill of review, filed May 27, 1883, and brought to reverse the final decree given in this court on October 22, 1881, in a suit between the parties hereto, commenced by the de-

[1]Reversed. See 8 Sup. Ct. Rep. 811.

fendants herein, on January 3, 1881, to obtain an injunction restraining the plaintiff herein from further constructing a bridge across the Wallamet river, at the foot of Morrison street, in Portland, upon the ground that such a bridge as said plaintiff was then engaged in building was an unnecessary and unlawful hindrance and obstruction to the navigation of said river,—particularly with seagoing vessels,—because of the insufficient character and improper position of the piers and the lack of width in the draw; that said bridge would be a public nuisance, injurious, and damaging to the rights and interests of defendants herein, as the owners and lessees of valuable wharf property in Portland, a short distance above the site of said bridge, and contrary to the act of congress of February 14, 1859, (11 St. 383,) which provides "that all the navigable waters of said state [Oregon] shall be common highways." An application was made to the district judge on the bill, and affidavits, and counter-affidavits for a provisional injunction, and after a hearing, in which the corporation maintained its right to build the bridge in question, under and by authority of an act of the legislature of Oregon, of October 18, 1878, authorizing the Portland Bridge Company, a corporation formed under the laws of Oregon, or its assigns, to build a bridge, "for all purposes of travel and commerce," across the Wallamet river, between Portland and East Portland, "at such point or location on the banks of said river" as it might select, "on or above Morrison street, of said city of Portland:" "provided that there shall be placed and maintained in said bridge a good and sufficient draw of not less than 100 feet in the clear, in width, of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge."

On March 28, 1881, an order was made continuing the application for an injunction until the April term, and until the circuit judge should be present; and restraining the corporation in the mean time as prayed for in the bill. *Hatch* v. *Wallamet I. B. Co.* 7 Sawy. 127; [S. C. 6 FED. REP. 326.] On April 11, 1881, the corporation put in its answer to the bill, alleging that it was a corporation duly formed under the laws of Oregon, and the assignee of the Portland Bridge Company aforesaid; and admitted that it was building the bridge, as alleged, under authority of the act of the legislature aforesaid, except that the draw was 105 feet in the clear, instead of 100, and that the piers were sufficient and at right angles with the current; and denied the same was or would be any hindrance or obstruction to the navigation of the river, or any injury to the defendants herein. At the April term the application for a provisional injunction was further heard upon the bill, answer, and further affidavits and counter affidavits, before the circuit and district judge, the counsel for the plaintiff herein then conceding that the law of the case had been correctly

ruled on the former hearing before the district judge, (*Hatch* v. *Wallamet, I. B. Co., supra,*) and that the only question in the case for the consideration of the court was whether, under the circumstances, the proposed bridge was an unreasonable use of this common highway; and on April 17th an order was made allowing the provisional injunction restraining the corporation, as prayed for in the bill. *Hatch* v. *Wallamet I. B. Co.* 7 Sawy. 141; [S. C. 6 FED. REP. 781.] Subsequently, the cause was put at issue by the filing of a replication to the answer, and testimony taken by both parties, and at the October term it was finally heard before the circuit judge, who, on October 22, 1881, gave a decree therein for the defendants herein, perpetually enjoining the corporation as prayed for in the bill, and also requiring it to remove the material already placed in the river in the construction of the piers. From this decree an appeal was allowed to the plaintiff herein on October 22, 1883.

An application was made for leave to file the bill of review, without first performing the decree requiring plaintiff therein to remove the unfinished piers from the river. The application was based upon a petition or allegation in the bill, stating the grounds thereof. Upon notice to the adverse party it was heard and allowed upon the ground that the performance of the decree, in this respect, would involve large expense and the destruction, so far, of the subject of the litigation, so that if the decree is reversed for error, the plaintiff herein will, nevertheless, suffer an irremediable loss, as in the case of the cancellation of a bond in obedience to a decree. Story Eq. Pl. § 406; *Davis* v. *Speiden,* 104 U. S. 83. But I think the better method of making the application is by a separate petition for that purpose, against which the adverse party may show cause and the matter be fully heard and determined thereon. The right to file the bill may depend upon a question of fact not determined or affected by the proceedings or decree in the case, as the pecuniary ability of the party to pay a given sum of money, and therefore the application should be made in such manner as will best enable the parties to be fully heard in the premises. The rule requiring the performance of the decree is said to be "administrative" rather than "jurisdictional," and therefore a bill filed without such performance or leave would give the court jurisdiction to review the decree; and if the adverse party did not move to strike it from the files, he would be held to have waived the objection. *Davis* v. *Speiden, supra,* 85.

The defendants herein demur to the bill, for that there are no errors in the record, nor any sufficient matter alleged in the same, to require a reversal of the decree. The bill contains an assignment of errors, 11 in number, most of which are predicated upon the reasons given in the opinion of the court allowing the provisional injunction, rather than the decree itself, and all but one are simply variations of the allegation that the court erred in deciding that the act of congress of February 14, 1859, was in any degree a limitation or re-

straint upon the power of the state to obstruct or authorize the obstruction of the navigation of the river, by the construction of a bridge of any character across the same. The exception is the assignment No. 4, which alleges that the court erred in deciding as a matter of fact that the bridge in question is or will be a nuisance and serious impediment to the navigation of the river. This is a proceeding to review the former determination of this case and obtain a reversal of the decree then given therein for errors of law apparent on the face of the record,—the pleadings, proceedings, and decree,—without reference to the evidence in the case. Story, Eq. Pl. § 407; *Shelton* v. *Vankleeck*, 106 U. S. 532; [S. C. 1 Sup. Ct. Rep. 491.] No question is made but that the allegations of the original bill are sufficient to authorize the decree; and the law presumes that the evidence was sufficient to sustain it. It follows, then, that for the purpose of this proceeding it must be considered settled that this bridge, as and where it was being built, is and would be, as a matter of fact, a serious and unnecessary impediment and obstruction to the navigation of the river, by reason of which the defendants herein suffered and would suffer, as riparian proprietors, special damage. But whether such obstruction is also unlawful is the question, and the only one, properly arising on this bill of review. The assignment of errors in law, as has been stated, are in effect that the act of 1859 has no application to the case; that congress has made no provision on the subject of the navigation of the river; and that therefore the whole question of the lawfulness of the proposed structure arises under the state law, and is without the jurisdiction of this court.

The argument of counsel for the corporation, in support of this conclusion, is, in substance and effect:

(1) The Wallamet river is wholly within the state of Oregon, and therefore not within the power of congress to regulate or conserve its use as a vehicle, or means of interstate or foreign commerce. Now, this proposition has no countenance or support in either reason or authority. In fact, and for all the purposes of commerce, the Wallamet river is a part of the Columbia, of which it is an important affluent or branch. Together they form, or help to form, a continuous highway between Oregon and the other Pacific states and territories and foreign countries; therefore, in contemplation of the constitutional grant of power to congress over the subject of commerce between these states and countries, and for the purpose of regulating the same, it is the property of the nation—a navigable water of the United States. The authorities from *Gibbons* v. *Ogden*, 9 Wheat. 1, to *Miller* v. *City of New York*, 3 Sup. Ct. Rep. 234—a period of 60 years—are uniform and unqualified on this point.

In *Gilman* v. *Philadelphia*, 3 Wall. 724, Mr. Justice SWAYNE says:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than

those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against occurrence of the evil, and for the punishment of the offenders."

In *The Daniel Ball*, 10 Wall. 557, it was held that Grand river, a comparatively insignificant water lying wholly within the state of Michigan, but emptying into the lake of that name, and only navigable 40 miles from its mouth to Grand Rapids, for a boat of 123 tons burden, is a navigable water of the United States, and subject to its control as a highway of commerce, interstate and foreign, on account of its junction with Lake Michigan, of which it forms a part. In delivering the opinion of the court, Mr. Justice FIELD said (page 563) the common-law test of the navigability of a river—the ebb and flow of the tide therein—does not apply to the rivers of this country:

"Those rivers must be regarded as public, navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In *Escanaba Co.* v. *Chicago*, 107 U. S. 678, [2 Sup. Ct. Rep. 185,] it was held that the Chicago river, lying wholly within the city of Chicago, and a little local stream, compared with the Wallamet, is a navigable water of the United States, because it leads into Lake Michigan; and in *Miller* v. *City of New York, supra*, the same rule was applied to the East river, a water wholly within the state of New York, but connecting the Hudson and the sound, and therefore a highway of interstate and foreign commerce. Mr. Justice FIELD delivered the opinion of the court in both these cases, and referred to and relied on the above citation from the opinion of the court in the case of *The Daniel Bell.* See, also, *Hatch* v. *Wallamet I. B. Co., supra.*

(2) That if congress has the power to regulate the navigation of the Wallamet river, as a navigable water of the United States, it cannot do so by a special act, as the statute of 1850, applicable alone to the waters of Oregon, but only by a general law, which shall operate uniformly upon all such waters in the United States. And this proposition is also without a shadow of foundation in either reason or authority. It is rather late in the day to question the right of congress to exercise its authority over the navigable waters of the United States, specially,—from time to time and place to place,—as

it may consider the exigencies of commerce to require. Congress has been making appropriations from time to time, for years, to maintain and improve the navigation of the Wallamet river, but on this theory of its power all such acts are void and usurpations of power, unless a like provision was made at the same time for every other navigable water of the United States. In the last 15 or 20 years congress has legislated largely on the subject of bridges over the Ohio, Mississippi, and Missouri rivers, prescribing when, where, and how they may or may not be built, (*Hatch* v. *Wallamet I. B. Co.*, *supra*;) and although important interests have been unfavorably affected by such legislation, it was never before suggested that it was invalid for want of such uniformity. It has also legislated specially upon the subject of a bridge over the East river in New York; and although the legality of this structure has since been contested from the circuit to the supreme court of the United States, (*Miller* v. *City of New York*, *supra*,) no one appears to have ever questioned the legality of the act of congress authorizing its erection and prescribing its character and location, on this or any other ground.

The vice of the argument in support of each of these propositions is the assumption that the navigable waters within a state are exclusively the waters of such state, and therefore congress has no power over them; or, if it may legislate concerning them in the interest of commerce, it can only do so by such general legislation as shall limit or affect the power of each state in the premises equally, so as to preserve, as it is said, its "equal footing in the Union with the other states." But, as we have seen, this theory of the matter is founded upon a total misapprehension of the relation of the national and state governments to the subject and to one another. For the purposes of commerce, and the exercise of the power of congress over that subject, every navigable water in the Union which of itself, or by means of its connections, forms a continuous highway for interstate or foreign commerce, is primarily the navigable water of the United States, over which it has the same power for the purposes of such commerce as if it was wholly in a territory or the District of Columbia. When and how far congress will exercise this power is a question for its determination in each case, looking to the public convenience and general welfare. In the exercise of this, as in the case of other congressional powers, no such thing as uniformity of action is desirable or attainable; and it is also to be considered that what is lawful may not always be expedient.

(3) That congress has no power, in the admission of a state into the Union, to impose, by compact or otherwise, any limitation or restriction on its powers or rights as a state, under the constitution; and therefore the act of 1859, admitting Oregon into the Union, so far as it attempts to restrict its power over the navigable waters within its limits, is void and of no effect. But admitting the premises, the conclusion does not follow. Although the grant of power to

congress to admit new states into this Union (U. S. Const. art. 4, § 3) is unqualified, yet it is well established by the supreme court that congress cannot admit a state upon any other than an equal footing with the other states therein, and therefore cannot, as a consideration of such admission, make any valid compact or enactment which shall deny to such state within its limits the municipal powers common to the others. *Pollard* v. *Hagan*, 3 How. 233; *Permoli* v. *New Orleans*, Id. 609; *Strader* v. *Graham*, 10 How. 92. The act of 1859, admitting Oregon into the Union, contains (section 4) four propositions to the people of Oregon concerning the public lands therein, which, in consideration of a valuable grant of public land, they accepted by an act of the legislature of June 3, 1859. Or. Laws, 101. But the admission of the state was not conditioned upon the acceptance of these propositions, and in fact preceded it. Nor did the state, in accepting it, undertake to relinquish any power or right that belonged to it, as a state of the Union, unless it is the right to tax "non-resident proprietors" higher than "residents." Therefore, this portion of the act is valid, without reference to such acceptance, as a congressional enactment respecting the disposition of the public lands in Oregon. U. S. Const. art. 4, § 3; *Pollard* v *Hagan*, 3 How. 224.

But the clause in section 2 of the act of 1859, declaring the navigable waters in Oregon to be "common highways," is no part of these propositions, and does not even purport to derive its force or vitality from this or any compact, but solely from the fact that it is an act of congress, duly passed by it in pursuance of its power to regulate commerce. The admission of the state and the enactment of the regulation are simply coincident in point of time. The one was admitted unconditionally and the other enacted absolutely; and the regulation might have been enacted on the day before or the day after the admission, or at any time since as well as then. But even if it had been made a condition of the admission of the state into the Union that the people thereof should consent to this regulation, it would nevertheless be valid, as an act of congress, because that body had the power to pass it without their consent. Their consent would add nothing to its force or validity. In the leading case on this subject of *Pollard* v. *Hagan*, *supra*, the court say (page 229) of the following declaration contained in the compact entered into between the United States and Alabama, upon the admission of the latter into the Union, "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and the United States, without any tax, duty, impost, or toll therefor, imposed by the said state," (3 St. 492,) that it was nothing more than a regulation of commerce, and, as such, a valid and binding act of congress, without reference to the supposed compact or the consent of the people of Alabama.

(4) That the provision in section 2 of the act of 1859—"all the navigable waters of said state [Oregon] shall be common highways

and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor"—was not intended, and should not be construed as a restriction or limitation on the power of the state to impede and obstruct the navigation of the Wallamet river at its pleasure, but only on its power to impose a toll upon any citizen of the United States on account of such navigation. This clause had its origin in the fourth of the articles of compact of the ordinance of 1787, for the government of the Northwest territory, in which it was provided that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor;" and has been applied to the states admitted to the Union since the formation of the constitution, and formed out of territory other than that included in the ordinance, it being generally supposed, until a comparatively late day, that these articles of compact, and particularly the clause in question, continued in force in the states formed out of such territory, except so far as altered by "common consent." *Strader* v. *Graham*, 10 How. 97, McLean and Caton, JJ.; *Palmer* v. *Com'rs Cuyahoga Co.* 3 McLean, 226; *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, 209. It is admitted that the provision does prohibit this state from imposing any tax or toll on any citizen of the United States on account of the navigation of the river. But the authority of the national government to restrain the state in this particular is no clearer than it is to prevent the state from authorizing or causing obstructions to the navigation of the river that may as effectually deprive the citizen of the United States of its use as a highway as any tax or toll could.

Counsel for the plaintiff herein contend that the words "common highways forever free," taken in connection with the rest of the sentence, show that the paramount purpose of this legislation "was to prevent any discrimination between the citizens of the United States," in the imposition of tolls on account of the navigation of the river. But there is no ground for this construction, for plainly the clause does not rest with the prohibition of discrimination in the imposition of such tolls, but goes further, and prohibits them altogether, as well in the case of the citizens of the state as of the United States. But the clause contains two distinct provisions—the one an absolute prohibition against the imposition of tolls for the navigation of the river, and the other a declaration that the river shall remain a "common highway" for the use of all the citizens of the United States. The two things are separate and distinct, and one is not to be considered the mere adjunct or amplification of the other, because it is found in the same sentence. The maxim, *noscitur a sociis*, does not apply. And if either provision can be considered as subordinate to the other, it is

the one against tolls. A highway is a public way upon which all persons have a right to pass; and a public river is such a way, since it is open to all the king's subjects. Rap. & Law, Law Dict., "Highway;" 2 Smith, Lead. Cas. 175.

A declaration or act of the congress of the United States that a navigable water thereof shall be a "common highway," imports, *ex vi termini*, that such water shall not be closed up or obstructed by dams, booms, bridges, or otherwise, so as to materially impede or hinder the navigation of the same. And being a highway, no toll can be charged for travel thereon, except by consent of the sovereign power which declared and made it such,—the congress of the United States,—and they have been forbidden it to be done. The plain purport and effect of the statute is this: (1) The Wallamet river is declared and made a "common highway" for the use of all the citizens of the United States; and (2) it shall be a "free" highway, upon which no toll, tax, or impost shall be charged. Being a "common" highway, it is open to all citizens; and being also "free," it is open to them without toll or tax. From these premises, the conclusion follows that any obstruction to the navigation of this river, which materially impairs its use as a "common highway," is contrary to the act of congress, and therefore illegal, whether authorized by the legislature of the state or not. It also follows that a case involving the question whether any bridge or other structure is such an obstruction, is a case arising under a law of the United States, and therefore within the jurisdiction of this court. Act of 1875, (18 St. 470.) The court then had jurisdiction to hear and decide the question whether this bridge is or would be such an obstruction to the use of this highway as is forbidden by the act of congress. Whether it properly decided the question or not is a matter depending upon the circumstances of the case as disclosed by the evidence, and cannot be considered in this proceeding. The way to determine that is by an appeal from the final decree in the original case to the supreme court, where the whole question can be considered on its merits. And in this connection it should be remembered that the court did not decide that the act of 1859 prohibited the erection of *any* bridge across the Wallamet. It prohibits, of course, the erection of a low, solid bridge, for that would be an impassable barrier—a complete closing of the highway. And it is equally certain that it does not prohibit the erection of a high, suspension bridge under which vessels navigating the river might pass without hinderance or delay. Neither does it prohibit a low bridge, properly constructed with a good and sufficient draw, through which vessels may pass without unnecessary danger or delay—the commerce, size, and condition of the river, as well as the state of the art of such bridge building being taken into consideration. It is well known that all highways, whether of land or water, are subject to be crossed by other highways. The commerce of the country cannot be conducted on parallel lines. But where and in what manner such crossing shall

be made or allowed depends largely upon the particular circumstances of each case. *Hatch* v. *Wallamet I. B. Co., supra.*

But the court found upon the evidence that, all the circumstances considered, the draw of the proposed bridge was altogether inadequate; that it ought to be at least 150 feet wide on either side of the pivot pier, as provided in the act of congress of June 23, 1874, (18 St. 281,) authorizing the Oregon & California Railway Company to bridge the river at this place; and therefore it was a material as well as needless obstruction to the navigation of the river, causing danger and delay to the passage of vessels thereon. Neither did the court hold that such a bridge was even authorized by the act of the legislature of October 18, 1878. That act requires not only that the bridge shall have a draw of not less than 100 feet in width, but that it shall be "so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of said vessels through said bridge.

Upon this point the conclusion of the court was that the legislalature did not intend to declare that a draw of only 100 feet in width is sufficient, or to authorize the construction of a bridge otherwise than with a draw sufficient for the easy and safe passage of vessels, whether that must be one or two hundred feet in width, but that if it did, the act was invalid, because contrary to the act of congress, which on this point is the supreme law of the land. *Hatch* v. *Wallamet I. B. Co., supra.*

And in this connection the court is reminded by counsel for the plaintiff herein "that it is a delicate duty for a court to declare an act of the legislature invalid." Of course, the court will not do so unless the conflict between it and the act of congress is plain. And for this reason the act of the legislature is to be construed, if it reasonably can, so as to prevent such conflict, and make it harmonize with supreme law. But really it is well to remember, in a case like this, that the interested parties who prepare and procure the passage of an act granting themselves some special privilege or franchise like this are more responsible for it than the members of the legislature. The average member, having no special interest in the matter, and knowing little, if anything, about it, but seeing that the act contains a plain provision that the bridge shall be built with a good and sufficient draw anyhow, with that understanding gives his consent to its passage; and I think it ought to be so construed by the court. Considered in this, its true light, the act is only a license to the corporation named therein, or its assigns, to build a draw-bridge at this point, subject to the act of congress of 1859; or, in other words, so as not needlessly to impede or obstruct the navigation of the river, considered as a "common highway." Beyond this the legislature could not go, and it is not to be presumed that it so intended.

The decision in *Escanaba Co.* v. *Chicago, supra*, so much relied on by the plaintiff herein, is not in conflict with these views. In a legal

point of view, the case is not new, though it contains some wholesome suggestions upon the application of the law to the facts and circumstances of that case, which are peculiar and altogether different from this. A small bayou, called a river, with a current less than a mile an hour, not a mile in length below its two branches, not exceeding two miles in length each, not naturally over 150 feet in width, and lying in the heart of a great city, was deepened and widened so as to serve as a canal or convenient water-way, whereon to move the lake boats from the harbor in the lake outside, into which it drained, to the docks and warehouses along its banks. Over it there are a number of drawbridges, erected by public authority, on which pass daily great numbers of people, particularly in going to and returning from their business and employment in the morning and evening. Amer. Cyclo. Chicago. The city, by the authority of the state, and with a view of preventing the inconvenience resulting from the unregulated and conflicting use of the bridges and the water-way, passed an ordinance requiring the draws to be closed for the benefit of the land travel for one hour in the morning and evening, and limiting the period during which a draw might be kept open for the passage of vessels to 10 minutes at any one time. The suit did not involve the right to build the bridges, nor the sufficiency of the draws. The right of the city on both these points was taken for granted, and the only question made and decided was whether, under the circumstances, this was a reasonable regulation, one that did not needlessly obstruct the use of the water-way, and the court, if I may be allowed to say so, very properly and wisely held that it was. The case was brought in the circuit court of the United States upon the assumption that the provision of the fourth article of compact of the ordinance of 1787, whereby the navigable waters of the Northwest territory were declared "common highways" was still in force in Illinois, and therefore the reasonableness of the city ordinance, when judged by this United States law, was a federal question, and the national courts had jurisdiction of the case, and the decision was actually made upon this hypothesis. But the learned justice who delivered the opinion of the court went further, and said that by the admission of Illinois into the Union "on an equal footing with the original states in all respects whatever," the ordinance ceased to have any effect within her limits, and therefore there was no law of the United States regulating the use of the navigable waters of the United States within the state of Illinois, and therefore the latter was the judge of what was reasonable in the premises.

The cases cited in support of this latter conclusion are *Pollard* v. *Hagan*, 3 How. 212; *Permoli* v. *New Orleans*, Id. 589; and *Strader* v. *Graham*, 10 How. 82. By the first one, as we have seen, it was simply held that congress cannot, by any compact or condition made with or laid upon a state on her admission into the Union, restrain or limit her municipal power as such state, but that, if the subject of

the compact or condition is within the power of congress to enact or regulate, without the consent of the state,—as to declare that the navigable waters therein shall be "common highways,"—it is good as a law. In *Permoli's Case* the court only held that so much of the articles of compact as secured religious freedom to the inhabitants of the territory of Orleans—the same having been specially extended there by congress—ceased to have any force or effect therein upon the admission of the territory into the Union as the state of Louisiana, because the subject of religious freedom in a state was beyond the power of congress, and exclusively within that of the state. In *Strader's Case* it was decided on a writ of error to the supreme court of Kentucky that the condition of a negro held as a slave in that state, and who had been allowed to visit Ohio, but afterwards returned, was, after such return and in said state, a question arising solely under the laws of Kentucky, and therefore not within the jurisdiction of the supreme court. But, in delivering the opinion of the court, Mr. Chief Justice TANEY, referring to some sort of claim that had been made in the argument that the provision in the articles of compact of the ordinance of 1787, prohibiting slavery in the Northwest territory, of which Ohio was a part, had some bearing on the question of the *status* of the negro, denied that it could have any effect outside of such territory; and then took occasion further to say that the ordinance was no longer in force, even in Ohio, where it had been superseded by the organization and admission of the territory into the Union as a state, and added that it had been so decided in the cases of *Permoli* v. *New Orleans* and *Pollard* v. *Hagan*, *supra*. But this statement, though true generally, and in the light in which the chief justice was considering the articles—that is, so far as they trenched upon the municipal power of the state, or were inconsistent with its control over its domestic affairs,—was not otherwise accurate or correct. And for this reason both Justices MCLEAN and CATRON, while assenting to the decision that the ordinance had no application to the case, in any view of the matter, and that the court had no jurisdiction to review the judgment of the Kentucky court, protested against this *dictum* of the chief justice, the latter putting his dissent especially on the navigation clause of the fourth article of the compact, and saying:

"For thirty years, the state courts within the territory ceded by Virginia have held this part of the fourth article to be in force and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative of the rights of others, in a case where the fourth article is nowise involved, and when our opinion might be disregarded by the state courts as *obiter* and a *dictum* uncalled for."

And as we have seen, the only question decided in *Permoli's Case* was that the clause in the compact securing religious freedom to the inhabitants of the territory was necessarily superseded upon its admission into the Union as a state, while it is admitted that the principle

of this ruling would include all similar provisions in the compact. In *Pollard* v. *Hagan*, while it was held that a state could not be hampered or bound, in its admission into the Union, with conditions or compacts that would limit or restrain its municipal power and right, as compared with the other states therein, it was distinctly decided that the clause in the ordinance, as applied to Alabama by the act of congress of March 2, 1819, (3 St. 489,) authorizing the people of that territory to form a constitution, declaring the navigable waters of the future state "common highways," was not such a condition, but a valid law which congress had the power to enact, whether the waters were within a state or territory.

I, therefore, respectfully submit that the clause in the fourth article of the compact in the ordinance of 1787, relating to the navigable waters in the Northwest territory, having been enacted by congress, (1 St. 50,) was a valid commercial regulation as to the navigable waters in said territory or the states afterwards formed therein until repealed by it, and therefore it is still in force in Illinois. But be this as it may, the decision does not touch the question of the validity or force and effect of the act of 1859. For on what possible ground can it be claimed that the admission of Oregon into the Union set aside or superseded an otherwise valid clause in the very act of admission, declaring the navigable waters of the future state "common highways?"

This case, having been heard before the circuit judge, and the decree under review having been made by him, I thought I ought not to decide the matter without consulting him. Accordingly, I submitted this opinion to Judge SAWYER, with copies of the briefs of counsel, and he has authorized me to say that he concurs in it.

There being, then, no error in the original decree, as it appears to this court, the demurrer to the bill of review must be sustained, and the bill dismissed, and it is so ordered.

DUNDEE MORTGAGE, TRUST INVESTMENT CO. *v.* SCHOOL-DIST. NO. 1, MULTNOMAH CO., and others.

(*Circuit Court, D. Oregon.* March 6, 1884.)

1. MULTIPLICITY OF SUITS.
   Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits.
2. STATE STATUTE INVOLVING FEDERAL QUESTION.
   In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court.
3. IMPAIRING THE OBLIGATION OF A CONTRACT.
   At the date of the execution of a note and mortgage, the law of the state required the mortgaged premises to be assessed at their full cash value for taxa-

tion, and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation; *held* that the latter act did not impair the obligation of the contract between the creditor and the debtor.

4. STATE POWER OF TAXATION.
The state has power, so long as it does not trench upon the constitution of the United States, to tax all persons, property, and business within its jurisdiction or reach; and whether any person, property, or business is so within its jurisdiction is not a federal question, and must be determined by the state for itself.

5. UNIFORM AND EQUAL TAXATION.
An act of the legislature, providing for the taxation of mortgages as land, which, in effect, exempts all such mortgages from such taxation upon land in more than one county, violates section 1 of article 9 of the constitution of the state, which requires that taxation shall be uniform, and imposed according to its value, upon "all property" not specially exempted therefrom, and is therefore void and of no effect; and, *semble*, that such act is also a "special" one for "the assessment and collection of taxes," and therefore in violation of subdivision 10 of section 23 of article 4 of the constitution of the state.

6. DUE PROCESS OF LAW.
The enforcement by the state of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States.

Suit to Enjoin the Collection of a Tax.

William H. Effinger, Charles B. Bellinger, and *W. D. Fenton*, for plaintiff.

William B. Gilbert, H. Hurley, and *Walter W. Thayer*, for defendants.

DEADY, J. This is an application for a provisional injunction on the bill filed herein, on December 31, 1883, to restrain the defendants hereinafter named, and others, from selling and disposing of sundry notes and mortgages belonging to the plaintiff, for the non-payment of taxes levied thereon, in the district and counties where the mortgaged premises are situate, under the provisions and by the authority of the act of the legislature of Oregon, entitled "An act to define the terms 'land' and 'real property' for the purposes of taxation, and to provide when the same shall be assessed and taxed," etc., approved October 26, 1882. The defendants—the school district No. 1, and George C. Sears, the sheriff of Multnomah county—were duly served with a subpœna to answer, and an order to show cause why the provisional injunction should not issue; and the defendant E. B. Collard, the sheriff of Yamhill county, appeared and showed cause against the application, without service. None of the other defendants were served with the subpœna or order, or appeared.

From the bill it may be gathered that the plaintiff is a foreign corporation, duly incorporated under the laws of Great Britain, with its "principal office at the burg of Dundee, Scotland." That for some years it has been and now is carrying on in this state, and by the permission thereof, the business of loaning money upon promissory notes secured by mortgage or real property therein, and payable in a certain period of years, with lawful interest, at Dundee,—each of such notes containing, in addition to the ordinary promise to pay, these

words: "This note is given on an actual loan secured by a mortgage, by the terms and conditions of which this note is to be governed." That the money thus loaned is obtained from residents of Great Britain "on bonds or mortgage debentures" that entitle the holders thereof to be paid out of the assets of the plaintiff, including these notes and mortgages. That the plaintiff, as the successor and assignee of sundry similar corporations heretofore organized in Dundee, and engaged in the like business in Oregon, is the "owner and holder" of certain notes and mortgages made and executed to said corporations for money loaned in Oregon, and is also the "owner and holder" of certain other notes and mortgages made and executed to itself for money loaned therein, amounting in the aggregate to two and a half millions of dollars; upon all of which said "bond and debenture holders" have a lien for the money advanced by them to the plaintiff and its said assignors. That the said loans were all made before October 26, 1882, except one in Marion county for the sum of $19,000, and that they will become due and payable at periods varying from one to five years hence. That the notes and mortgages aforesaid were made and executed within this state, and afterwards transmitted to the "home office, Dundee," where they are kept until the borrower desires to pay the same, when they are returned here for that purpose. That the defendants, the school districts No. 1 and No. 18, and the several counties of which the other defendants are the sheriffs, respectively, have assessed said notes and mortgages, under the act of 1882, aforesaid, for taxation, within the respective districts and counties, so far as the mortgaged premises are therein situate—said district No. 1 having assessed the same within its limits at $165,510, and levied a tax thereon of $827.55; the county of Multnomah at $209,600, and levied a tax thereon of $3,269.76; and the county of Yamhill at $———, and levied a tax thereon of $834.46. And said defendants have demanded payment of the same, and are about "to coerce the payment" thereof, by the sale of the notes and mortgages so assessed. And that said assessment and levy are unlawful, because the act under which they were made, and the defendants are proceeding, is void and of no effect, for the reason that it is contrary to the constitution of the United States, and the state; and that such debts and mortgages are beyond the jurisdiction of the state.

From the affidavit of the defendant George C. Sears, filed at the hearing, it appears that "several" of the notes and mortgages assigned to the plaintiff and assessed for taxation in school-district No. 1 and the county of Multnomah "were made to William Reid, manager," and payable in the state of Oregon; that the corporations of whose notes and mortgages the plaintiff has become the owner by assignment, as aforesaid, during all the time they did business in Oregon had a managing agent residing herein, and duly appointed under the laws of Oregon, concerning foreign corporations doing business here, (Or. Laws, p. 617, §§ 7, 8;) and the plaintiff, during

the period it has done business here, has had a like agent in the state, whose business, in either case, it was and is to receive applications for loans and make the same; that in the course of such business such agents have retained in this state all money received on said loans, whether of principal or interest, and reloaned the same herein; and that a "large proportion" of the mortgages, upon which the collection of the tax is by this suit sought to be enjoined, were made to secure loans of money so received and reloaned within this state.

The act of 1882 provides that a mortgage, "whereby land or real property, situate in no more than one county of this state, is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property," (section 1,) and "shall be assessed and taxed to the owner of such security and debt in the county, city, or district in which the land or real property affected by such security is situated;" and "the taxes so assessed and levied on such security and debt shall be a lien thereon, and the debt, together with the security, may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes." Section 2. The owner of such mortgage, "for the purpose of assessment and taxation" shall "be deemed to be the person to whom the security was given in the first instance," unless the contrary appears on the record thereof; and "all assignments and transfers of a debt" so secured shall, for the purposes aforesaid, "be null and void," unless the same "is made in writing upon the margin of the record of the security;" and all mortgages "hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void." Section 3. For the purposes aforesaid, no payment on any debt so secured shall hereafter be considered by the assessor unless indorsed "on the margin of the record of such security;" and "the assessor shall assess such debt and security for the full amount of such debt that appears from the record of such security to be owing," unless in his judgment the property by which such debt is secured is not worth that amount, in which case he shall assess the same "at their real cash value." Section 4. A debt so secured on "property situated in no more than one county in this state, shall, for the purposes of taxation," be considered "as indebtedness within this state," and the person owing the same may deduct the amount from his assessment as such indebtedness." Section 8. No "writing which is the evidence of a debt," wholly or partly so assessed, "shall be taxed for any purpose in this state," but such debt and "the instrument by which it is secured, shall, for the purpose of assessment and taxation," be deemed real property, and "together be assessed and taxed" as therein provided. Section 10.

Sections 5, 6, and 7 of the act relate to the duties of the county clerk in furnishing the assessor with a statement of the unsatisfied mortgages on record in his office, and recording the assignments of such mortgages and of all payments thereon.

The real purpose and intent of this act is not far to seek or hard to find. And, *first*, it is not, as suggested in the brief of counsel for the defendants, to tax the mortgagee's interest in the land to the mortgagee and the remainder to the mortgagor. But the purpose is to tax the "debt" of the mortgagee and "the instrument by which it is secured," and by deducting the amount thereof from the value of the land so far exempt it from taxation. In other words, it is a scheme to tax the debt of the mortgagee, and so far exempt the land of the mortgagor; and not only this, but to tax the debt, not at the residence of the creditor, but the debtor, in the county or district where the mortgaged premises are situate. The debt and mortgage are not the land, and not even a legislative act can make them so; but they are to be deemed and considered such, as a matter of convenience, for the purpose of assessment and taxation, and the collection of the tax.

For many years prior to this act the law was such that a debt was taxed, or supposed to be, at the residence of the creditor, and the debtor was allowed to deduct the amount thereof from his assessment, provided the debt was owing in the state. The result was that the par value of the domestic indebtedness of the country, being deducted from the value of the land, as appraised for taxation, about one-third of its cash value, the value of lands left subject to taxation was very much reduced. In the rural districts, where the principal property is land, and borrowers are more numerous than lenders, the assessment rolls grew very light. The value of the land in a county, as appraised for taxation, was largely swallowed up in its indebtedness, while this was principally owned without its limits, and if it paid taxes at all, did not do so in the county where it was owing and secured, and had taken the place of the land. As an illustration, take the case of a farmer in Linn county. He owns a farm worth, in cash, $10,000. He borrows from some person or corporation in Portland $5,000, and gives a mortgage upon his farm to secure the payment of the same. The county assessor, chosen by himself and neighbors for that special purpose, estimates the cash value of the farm, for the purpose of taxation, at not exceeding $5,000, and, it may be, at only $3,000. From this false valuation the farmer is allowed to deduct his indebtedness at its par value, and thereby escapes taxation. But the county gets no revenue from $10,000 worth of land situate within its limits. Getting in debt becomes a recognized mode of escaping taxation. To correct this evil the legislature, instead of retracing the steps which led to it, by taking measures to secure obedience to the law requiring each "parcel of land" to be appraised for the purpose of taxation at its "full cash value,"

(Or. Laws, 754, § 29,) and to prevent the deduction of any indebtedness from such valuation, concluded, in its wisdom, to go further in the doubtful direction it was already traveling. And to this end it passed this act to secure the taxation of the indebtedness deducted from the valuation of the land in the county where the land lies, so far, at least, as it was secured thereby. And, to make this right of deduction uniform, it also allows the debtor to deduct his indebtedness from the valuation of his land, if secured thereon, without reference to the residence of the creditor, by declaring that such a debt shall be deemed an "indebtedness within this state," and therefore taxable in place of the land, and in the county where the land is situate.

Counsel for the plaintiff contends that this assessment and taxation of its notes and mortgages are illegal and void for the following reasons: (1) The act of 1882, under which it is made, impairs the obligation of the contract between the plaintiff and its debtors, by which the latter were bound to pay the taxes on the land covered by the mortgage; (2) the debts and mortgages of the plaintiff are in fact and in contemplation of law existing and owned without the limits of the state, as its residence is Dundee, and therefore beyond the jurisdiction of the state either to assess, tax, or sell; (3) this assessment and taxation are contrary to the constitution of the state of Oregon, which declares (article 9, § 1) that the "legislative assembly shall provide by law for *uniform* and *equal* rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of *all property*, both real and personal, excepting such only for municipal, etc., purposes as may be specially exempted by law," and therefore void, because the act under which it is made arbitrarily and unjustly discriminates between debts and mortgages on land in no more than one county, and those on land on more than one county, and therefore does not provide for a "uniform" assessment of debts secured by mortgage or for "a just valuation for taxation of *all property*," but the contrary; and (4) that the act of 1882 being void, the collection of the tax levied under it would so far deprive the plaintiff of its property without due process of law, contrary to the constitution of the United States. Fourteenth amendment, § 1.

The jurisdiction of the court on the ground of the diverse citizenship of the parties is admitted, and its power to grant the relief sought, on the ground of preventing a multiplicity of suits and irremediable injury, is tacitly conceded. In this respect the case falls within the rule laid down by this court in *Coulson* v. *City of Portland*, 1 Deady, 494. See, also, Pom. Eq. Jur. §§ 243–275. The validity of the act is questioned in the bill upon other grounds than these, as that it unlawfully discriminates between secured and unsecured debts evidenced by promissory notes, and that it was not passed in conformity with the requirements of article 4, § 19, of the constitution

of the state, concerning the reading of bills during their passage through the legislature. But they were not pressed on the argument.

In *Mumford* v. *Sewall*, (Daily *Oregonian*, May 25, 1883,) the supreme court of the state held that the act was duly passed, and that the legislature has the power to authorize and require the taxation of mortgages on real property in Oregon, irrespective of the residence of the owner of the debt thereby secured, and that the act in no way impairs the obligation of the contract between the parties thereto: but whether the state has power to tax such a debt when payable to a non-resident was not decided. The national courts are not bound by the judgment of a state court, sustaining the validity of a state statute, so far as a federal question is involved therein. *Louisville & N. R. Co.* v. *Palmes*, 3 Sup. Ct. Rep. 193, and cases there cited. Therefore, the question of whether the act of 1882 impairs the obligation of the contract between the plaintiff and the maker of any of these notes and mortgages, is an open one in this court.

It does not distinctly appear from the bill how the alleged obligation of the mortgagor to pay the taxes on the mortgaged premises arose. The first impression is that he directly contracted with the mortgagee to do so, but as no such contract is set out, in either words or substance, the inference is that none was made, and that the alleged liability of the mortgagor to pay such taxes was simply owing to the fact that, by the law as it stood when the loan was made, the land was taxed as the property of the mortgagor, and the mortgage was exempt. But, in any case, the act taxing the debt and mortgage of the plaintiff and exempting a corresponding value in the land from taxation does not impair the obligation of the contract. The state is no party to this contract; and its power of imposing and collecting taxes upon persons, property, and business within its jurisdiction cannot be affected or restrained by it. True, the laws in force when the mortgage is made, defining what constitutes a valid mortgage and prescribing the remedy for its enforcement, are to be regarded as part of the contract; and any essential change in these, is so far invalid as impairing the obligation of the contract. But a law imposing taxes upon the subject of the contract or the property affected by it, or exempting either therefrom, is no part of such contract; and is so far within the power of the state to alter or repeal from time to time as the public good or convenience may require.

It may be admitted that any provision in the mortgage itself or in a contemporary statute, providing who, as between the parties thereto, shall pay the taxes imposed by the state on the mortgaged premises, or the debt or mortgage itself in lieu thereof or otherwise, is beyond the power of the state to alter or modify to the prejudice of either party. To do so would impair the obligation of the contract. But when and to what extent taxes shall be levied is a question for the state to decide. Parties interested in property liable to taxation may contract, as between themselves, on whom the burden of such

taxation shall ultimately fall, but they cannot by such means limit or control the power of the state in placing or apportioning this burden in the first instance, nor in enforcing its payment or collection accordingly.

The liability of the mortgagor to pay taxes on the mortgaged premises at the time of the execution of the mortgage was primarily to the state. It arose out of a law of the state, and not the contract with the plaintiff; and might thereafter be modified or discharged by the authority of the same, without any reference to the agreement or wishes of the parties. As a means of protecting himself against the delinquency of the mortgagor in this respect, the statute in force since 1854 (Or. Laws, p. 770, § 105) expressly provides that the mortgagee may pay any delinquent tax on the mortgaged premises, and add the amount to his mortgage, and enforce the collection of the same as a part thereof. But whether this provision, or an express agreement to the same effect, should be construed to include taxes levied under a subsequent statute on the debt or mortgage itself, or both of them, in place of the land, or so much of its value as being within the equity of the statute or contract, is a judicial question between the parties to the mortgage, and one over which the state has no legislative control. And if it should be determined in the negative it would only add another to the many instances in which statutes and contracts made in contemplation of future events have not been found broad or full enough to comprehend and provide for all the changes and contingencies that may occur in the course of time in human affairs. But it is to be understood that the contract by which the parties to a loan or mortgage may provide between themselves, for the payment of taxes imposed thereon or thereabout, is otherwise lawful when made. Neither is it material in this connection that the holders of the mortgage debentures issued by the plaintiff in Scotland, and upon which it obtained the money loaned on these notes and mortgages, may be inconvenienced or even injured by the enforcement of this tax in the mode prescribed, or that such notes may thereby lose their negotiability. The act is not responsible for the inconveniencies which may result from disobedience to it. The restriction placed upon the negotiability of the notes by the act is only for the purpose of taxation, and can be of no inconvenience to any one except in a case of delinquency, and then the blame must rest on the delinquent. Nor is it material, if true, that the plaintiff may not be able to pay these debenture holders the rate of interest on their money that it expected or agreed to, because of the imposition of this tax. If the power of the state to levy taxes was in any way limited or restrained by the fact that its exercise might hinder or prevent any one from performing his contract with another, it would be useless. If A. rents a mill of B., and afterwards becomes unable to pay the rent on account of a tax which the state imposes on his business, it cannot be admitted for a moment that the act imposing this

otherwise valid tax is void, on the ground that it impairs the obligation of its contract to pay the rent. It may have impaired his ability or means of performing his contract, and so might a fire or flood, but the obligation to perform the contract would be untouched in either case.

But I suspect the truth about this complaint is that, after the payment of this tax in addition to the interest due the debenture holders, the profits accruing to the plaintiff are just so much diminished; but that may happen to any one who loans money in a country where mortgages are taxable or liable to become so. Whether these notes and mortgages are within the jurisdiction of the state, for the purpose of taxation, is a question in this case, but not, as I understand, a federal one. There is no provision in the constitution or laws of the United States that can be invoked to prevent the state from taxing any property on the ground that it is not within its jurisdiction. The power of a state to levy and collect taxes is not directly limited or restrained by the national constitution, except in the case of duties on "imports and exports" and "tonnage." U. S. Const. art. 1, § 10. In a few other cases it is so restrained, incidentally and by implication, as that the obligation of a contract shall not thereby be impaired, or that the powers of the national government, or the agencies by which they are exercised, shall not be hindered or interfered with. *Railroad Tax Case*, 8 Sawy. 250; [S. C. 13 FED. REP. 722.] All other limitations upon this sovereign power must be found either in the constitution of the state or the wisdom and justice of the legislature and people. So long as a state does not intrench on the constitution of the United States, it may tax anything within its reach,—anything it can lay its hands on, and subject to its power. *Kirtland* v. *Hotchkiss*, 100 U. S. 498. It follows that this court, in deciding this question of the taxability of these subjects by the state, will be governed by the decisions of the supreme court of the state. In *Oppleton* v. *Yamhill Co.* 8 Or. 341, it was held that notes and mortgages are personal property, and, as such, subject to assessment and taxation. In *Mumford* v. *Sewall*, *supra*, as we have seen, the court held that a mortgage upon real property in this state is taxable by the state without reference to the domicile of the owner, or the *situs* of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision.

A mortgage upon real property in this state, whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the state and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the

instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial. But the right to tax the mortgage may not give the state any direct power over the debt, when the same is actually held without the limits of the state. But indirectly it does. A sale of the mortgage, although it would not carry with it the debt, would separate them, and leave the latter without any security. A purchaser of the mortgaged premises from the mortgagor, who has or may purchase the mortgage when sold for taxes, would thus unite in himself the interest of both mortgagor and mortgagee, and hold the property discharged from the debt.

But counsel for the defendants claim that these debts are actually within the jurisdiction of the state for the purposes of taxation, on the ground that the plaintiff and its assignors in the transaction of their business here, out of which these notes and mortgages arose, maintained an agent in the state under the foreign corporation act. Or. Laws, p. 617, §§ 7, 8. As to any of the foreign corporations required by that act to appoint an agent to represent it within the state, before doing business here, it is clear to my mind that, as to such business, and for the purposes of taxation, it is a domestic corporation, having a residence within the state. But in the case of *Oregon & Wash. T. & I. Co.* v. *Rathbun*, 5 Sawy. 32, this court held that a foreign corporation engaged in loaning its own money in this state was not within the purview of the act, as limited by its title, and therefore not required to appoint such agent before doing business here. But admitting that the plaintiff was not required, while doing business in Oregon, to appoint and keep an agent here under the foreign corporation act, nevertheless it appears to be a fact that the business out of which these notes and mortgages arose was done here through an agent, resident in Oregon. The money of the plaintiff was sent here to be loaned by this agent upon applications made and accepted here. And although the notes were made payable to the plaintiff in Dundee, and with the mortgages sent there for safe keeping, they are and have been returned here for payment, and the money received on them reloaned here. It is altogether probable that the otherwise useless ceremony of making these notes payable in Dundee, and sending them there for custody until their maturity, and then returning them here for payment and collection, is a mere shift to avoid taxation thereon in Oregon. In fact, it appears that the money was loaned in Oregon and the notes made here, with the understanding between the parties that, whatever their tenor, they should be paid and payable here. If the plaintiff was actually engaged in loaning money in Dundee, and a resident of Oregon should go or send there and procure a loan from it and give his note therefor, the case would be a different one, although the note was secured by a mortgage on real property in Oregon. But it is plain to be seen that that is not this case, and that the plaintiff could never have done this volume of

business here in that way. Therefore, availing itself of the comity of the state, it comes here, in the person of its authorized agent, with its money, loans and reloans it, and is, so far, I think, a resident here for the purposes of taxation.

The maxim so much relied on by the plaintiffs—that personal property follows the person of the owner—is but a legal fiction, invented for useful purposes, and must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the *situs* of such property. In cases of attachment and for purposes of taxation it is constantly disregarded, as the following cases will show: *Catlin* v. *Hull*, 21 Vt. 158; *People* v. *Com'rs of Taxes*, 23 N. Y. 225; *People* v. *Home Ins. Co.* 29 Cal. 533; *Green* v. *Van Buskirk*, 7 Wall. 150. And the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, cited and also much relied on by counsel for the plaintiff, only *decides* that a state law which comes between the foreign lender and the local borrower, and compels the latter to pay a portion of the interest due the former on his debt, as taxes to the state, is void because it impairs the obligation of the contract between the parties. And this same ruling could as well have been made on this ground if the parties had both been citizens of the state seeking to impose the tax. The case was before the court on a writ of error to the judgment of the supreme court of the state of Pennsylvania, and this was the only federal question in the case, and therefore the only one determined by it. But on the question of uniformity I confess I am unable to find any ground on which this act can be harmonized with the constitution of the state and upheld as a valid law. It is expressly confined to mortgages on land in only one county, and thereby admits what was conceded on the argument, and what the court may judicially know, that there are mortgages in this state on land in more than one county. Section 1 of article 9 of the constitution of the state, already referred to, not only requires the legislative assembly to "provide by law for *uniform* and *equal* rate of assessment and taxation," but also to "prescribe such regulations"—make such laws—"as shall secure a just valuation for taxation of *all property, both real and personal*, excepting such only for municipal, educational, etc., purposes as may be specially excepted by law." And section 32 of article 1 declares that all taxation shall be *equal* and *uniform*."

The rule on this subject prescribed by the constitution is mandatory, and the legislature in exercising the power of taxation must conform its action thereto. But the constitution must have a reasonable and practical construction in this respect. It does not require that a law on this subject shall have mathematical precision or secure in practice absolute equality and uniformity. But it must at least appear to have been enacted with a view to uniformity, and must contain provisions reasonably calculated to secure that end in practice. But when an act not only fails to secure uniform taxation,

but upon its face appears to have been passed with a contrary intent, there can be no question of its invalidity. For instance, no one would claim that an act taxing mortgages in all the counties of the state, excepting Yamhill, or one taxing mortgages in all the counties of the state except those in the Wallamet valley, was intended or calculated to produce "uniform" taxation, or to secure "a just valuation for taxation" of "all property" not exempt therefrom by the constitution.

Now, there is no difference in principle between such an act and the one under consideration, and very little in the circumstances. The latter taxes mortgages on land in no more than one county and exempts those on land in more than one county. The mortgage taxed and the mortgage not taxed, and the property affected by them, are in all essentials the same. The only difference between them is the purely adventitious and immaterial one, that in the one case the land is all in one county, and in the other is in two or more, as in the case of the railway mortgages. Without admitting that there can be any classification of mortgages for taxation, under the constitution of the state, so as to produce a difference in the burden imposed on them or the cost or convenience of discharging it, there is no ground to say that this discrimination between one and two county mortgages is the result of a *bona fide* or other attempt to so classify mortgages for the purpose of taxation. Classification for the purpose of state taxation cannot be arbitrarily made, as by mere reference to the county in which the property is situated. For such purpose a mortgage upon an acre of land in Polk county is not distinguishable from one on an acre of land in Benton county; and a law providing for the assessment and taxation of one and not the other is wanting in the uniformity required by the constitution, and therefore void. This conclusion cannot be made plainer by argument. If the injunctions of the constitution in this respect mean anything, they certainly prohibit this kind of unequal and discriminating legislation on the subject of taxation.

This being a suit between a foreign corporation and citizens of this state, the court has jurisdiction of the controversy on account of the citizenship of the parties, whether a federal question is involved in the controversy or not. The defendants are intending and attempting to sell and dispose of the notes and mortgages of the plaintiff respectively assessed by them for the non-payment of an illegal tax; and this being repeated from year to year until the maturity and payment of the notes, the plaintiff may be compelled to maintain a corresponding number of actions at law to recover the amounts so collected, to prevent and avoid which an injunction will be allowed. Pom. Eq. Jur. §§ 243–275. But the act under which the defendants are proceeding to dispose of the plaintiff's property for taxes, being void, such disposition constitutes a violation of section 1 of the fourteenth amendment to the constitution of the United States, which for-

bids a state "to deprive any person of life, liberty, or property without due process of law," and therefore this court has jurisdiction of the case, as one arising under said constitution, without reference to the citizenship of the parties thereto. If the defendants, acting for and in the name of the state, are allowed to take the plaintiff's property for taxes assessed under a void law, the state would thereby deprive the plaintiff of such property "without due process of law, contrary to the constitution of the United States. *Railroad Tax Case*, 8 Sawy. 251, 287; [S. C. 13 FED. REP. 722.]

The constitution of the state (article 4, § 23, sub. 10) also prohibits the passage of "special or local law * * * for the assessment and collection of taxes for state, county, township or road purposes." In *Manning* v. *Klippel*, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of 14 out of the 23 counties of the state was a "local" law for the assessment and collection of taxes for county purposes, and therefore within this prohibition and void. The terms "special" and "local" are not always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the *genus* while the former is confined to the species. In *Holland's Case*, 4 Coke, 76*a*, cited in Smith, Comm. § 798, it is said, by way of illustration: "Spirituality is *genus*; bishopric, deanery, etc., are *species;*" and the author adds: "Hence, acts which concern the whole spirituality in general are general acts. * * * A statute concerning leases made by bishops is a special act, because it concerns the bishops only, who are but a species of the spirituality. * * *"

An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the *genus*. But an act providing for the assessment of all mortgages for sums exceeding $500, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood lands, plow lands, or river lands is special; and, in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the *genus*, mortgages, but only the species, one-county mortgages. Without imputing to the legislature that passed this act any other purpose in making this discrimination between one and two county mortgages, than a desire to avoid the supposed inconvenience of applying it to the latter, it is well to remember that special legislation in the imposition of taxes is sure, if unrestrained, to run into partiality, oppression, and injustice. To prevent this evil this inhibition against special legislation was placed in the constitution. It is not material to the decision of this application nor the case, except as to the loan in Marion county, to ascertain how far, if at all, this act is prospectively valid. It forbids any more two-county mortgages being made, but it cannot, nor does not, attempt to annihilate

or strike out of existence those made before its passage. Admitting that the legislature cannot discriminate between mortgages on the ground of the locality of the property affected by them, it follows that so long as there are any two-county mortgages in existence in the state, an act taxing only one-county mortgages is open to the objection of want of uniformity. In reaching this conclusion concerning the validity of this act, I have not been unmindful of the responsibility of declaring an act of the legislature void. But, as was said by this court under similar circumstances, (*Oregon & Wash. T. & I. Co.* v. *Rathbun*, 5 Sawy. 38,) "In a plain case like this, it is as much the duty of the court to declare the act of the legislature invalid as to reform or set aside a contract for mistake or fraud. In so doing, it but upholds and obeys the supreme law,—the constitution,—to which both courts and legislatures are bound to conform their conduct."

Let the injunction issue as prayed for; the plaintiff first giving a bond with sufficient surety, to be approved by the master of this court, in a sum equal to the tax in question and 20 per centum thereon, conditioned that the plaintiff will pay all damages which the defendants or either of them may sustain by reason of such injunction, if the same shall be held wrongful, to be ascertained by a reference or otherwise, as this court may direct.

Due process of law, *County of Santa Clara* v. *Southern Pac. R. Co.* 18 FED. REP. 385, and note, 449; *Railroad Tax Cases*, 13 FED. REP. 722, and note, 783; obligation of contract, *Sawyer* v. *Parish of Concordia*, 12 FED. REP. 754, and note, 761; state power of taxation and equality and uniformity, *Railroad Tax Cases*, 13 FED. REP. 722, and note, 785; *In re Watson*, 15 FED. REP. 511, and note, 514; *State of Indiana* v. *Pullman Palace Car Co.* 16 FED. REP. 193, and note, 201; *County of Santa Clara* v. *Southern Pac. R. Co.* 18 FED. REP. 385, and note, 445; restraining collection of tax, *Second Nat. Bank* v. *Caldwell*, 13 FED. REP. 429, and note, 434; taxation of national bank shares, *Second Nat. Bank* v. *Caldwell*, 13 FED. REP. 429, and note, 433; *Exchange Nat. Bank* v. *Miller*, *infra*, and note.—[ED.

EXCHANGE NATIONAL BANK *v.* MILLER, County Treasurer, etc.

(*Circuit Court, S. D. Ohio, W. D.* February 7, 1884.)

1. TAXATION—NATIONAL BANK SHARES—INEQUALITIES IN VALUATION.
   Inequalities in the valuation of property for taxation, under the constitution and laws of a state requiring that all property shall be taxed upon its value by a uniform rule, afford no ground for relief, unless it be made to appear that such inequalities result not merely from error in judgment on the part of the assessing officer, but it must appear also that there was an intentional discrimination. The same rule applies to the valuation of shares in national banks

[1] Reported by J. C. Harper, Esq., of the Cincinnati bar.

for taxation, where it appears that they were actually assessed at a greater rate than other moneyed capital in the hands of individual tax-payers of the state. Intentional discrimination may be established by proof of inequalities so gross as to lead the court to the conclusion that they were designed. But the facts do not warrant such conclusion in this case.

2. CORPORATIONS—SHARES ARE PROPERTY DISTINCT FROM THE PROPERTY OF THE CORPORATION.
Shares in the capital stock of corporations in Ohio are not necessarily to be treated or regarded as portions of the capital of the corporation. They are property of the shareholders, distinct and separate from the property of the corporation itself.

3. TAXATION OF NATIONAL BANK SHARES—TRUE MONEY VALUE.
Under the constitution and laws of this state, and also under the law of congress authorizing taxation on shares in national banks, they may be taxed at their true money value.

4. SAME—UNITED STATES BONDS AND OTHER NON-TAXABLE SECURITIES NOT DEDUCTED.
A statutory rule fixing such value, which does not permit a deduction therefrom for the amount of United States bonds or other non-taxable securities held by the bank, is not in conflict with the constitution of Ohio, nor with the law of congress authorizing taxation on such shares.

5. SAME—OHIO—SUCH NON-TAXABLE SECURITIES DEDUCTED FROM RETURNS OF INDIVIDUAL BANKERS, BUT NOT FROM THOSE OF NATIONAL BANKS.
The elimination from the returns made by unincorporated banks and individual bankers to the assessing officers, within the state of Ohio, of all United States bonds and other non-taxable securities held or owned by such bank or banker, is not a deduction nor a discrimination in favor of such bank or banker and against the holder and owner of shares in national banks, although such shares are valued for taxation without such deduction for the non-taxable securities held and owned by the bank.

6. SAME—"OTHER MONEYED CAPITAL" MEANS TAXABLE MONEYED CAPITAL.
"Other moneyed capital," in section 5219, Rev. St., refers to other *taxable* moneyed capital, and the valuation of shares in national banks for taxation is not, within the meaning of that section, at a greater rate than the assessment of other moneyed capital, unless such other moneyed capital be subject or liable to taxation.

In Chancery.

Perry & Jenney, Stallo, Kittredge & Wilby, and *Harrison & Olds,* for complainant.

Foraker & Black and *O. J. Cosgrove,* Co. Sol., for defendant.

Before BAXTER and SAGE, JJ.

SAGE, J. The tax from which the complainant prays to be relieved was assessed on the duplicate of 1882, under the following sections of the Revised Statutes of Ohio:

"Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

"Sec. 2766. Upon receiving such report, the auditor shall fix the total value of the shares of such bank according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate; and when the bank is located in any city of the first or second class, he shall thereupon

make out and transmit to the city board of equalization, otherwise to the county board of equalization, a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor."

The complainant contests the validity of the tax on the general ground that its shares are assessed at a higher rate than other moneyed capital in the hands of individual citizens, specifying (1) that the shares are valued too high, compared with other property on the tax duplicate; and (2) that the assets of the complainant consist, in part, of United States bonds, not subject to taxation, but included in the valuation made by the auditor and placed on the duplicate.

In support of the first objection the complainant has introduced testimony relating to a meeting of decennial assessors from all parts of the state, held at Columbus in 1880, preparatory to the appraising of real estate, at which meeting, according to the testimony of two witnesses, the conclusion or general understanding was that real estate should be assessed at two-thirds to three-fourths of its value, and that by that rate the assessment would represent the true cash value in money, taking into consideration "that real estate is almost always sold on long terms, and the losses occurring thereby." A third witness testifies that he was present, but that to the best of his recollection no rate was fully agreed upon. One witness states that the meeting was quite large, but how many assessors attended, or how many localities were represented, does not appear, nor does it appear that assessors were guided in their valuations by the action of the meeting, in opposition to their own judgment of the money value of the property by them appraised. There is testimony also that the object of the meeting was to make the assessments of real estate uniform. And whether two-thirds to three-fourths of what is spoken of by witnesses as the value of real estate sold upon pay-payments—part in cash and part on time—would be what is spoken of as its true cash value in money, does not appear. There is testimony tending to show great inequalities in the valuation for taxation of real and personal property, including shares in national banks, but in no instance does a witness testify that any assessor has been governed in making an assessment by any other rule than his judgment of the true money value of the property assessed.

It is contended for the complainant that this testimony brings the case within the rule of *Pelton* v. *Nat. Bank*, 101 U. S. 143, and *Cummings* v. *Nat. Bank*, 101 U. S. 153. That is not our view. In *Pelton* v. *Nat. Bank* it was held that the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its full value, while shares of national banks were assessed at their full value, was a violation of the act of congress which prescribes the rule by which they were to be taxed by the state. In that case the court found that the valuation of national bank shares was intentionally higher than the valuation of other personal property, and

that this discrimination was neither an accident or a mistake, but a principle deliberately adopted in the valuation of all shares in national banks, and applied without exception, and therefore the decree below in favor of the complainant was affirmed. In *Cummings* v. *Nat. Bank*, the supreme court found that the assessors of real property, the assessors of personal property, and the auditor of Lucas county, Ohio, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one-third, and money or invested capital at six-tenths, of its actual value, and that the assessments on shares of incorporated banks, as returned by the state board of equalization for taxation to the auditor of Lucas county, were fully equal to their selling price and to their true value in money, and the decree enjoining the collection of the excessive tax was affirmed.

No such state of facts is shown in the case now before this court. It is true, as shown by the testimony, that, although the shares of the complainant were valued for taxation at but 86.7+ per cent. of their true value in money, they were valued higher than other personal property, but the error or inequality is not shown to arise otherwise than from a mistake in judgment on the part of the assessing officials. It would, perhaps, be more exact to say that the judgment of the assessors, in their official valuation, differs from the judgment of witnesses in their unofficial valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which affect salable values are various and often complicated. Much depends upon who is the owner or vendor, as well as upon who is the purchaser. The shrinkage in the value of estates result in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the state has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, excepting in cases of intentional discrimination.

We are of opinion that the rule laid down in *Nat. Bank* v. *Kimball*, 103 U. S. 732, applies here. There it was held that no case for relief is made by averring that the assessments are unequal and partial, and that some other property is rated for taxable purposes at less than one-half of its cash value, unless it is further averred

that the officers appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate. It has been held, and, we think, correctly, that inequalities in valuation may be so great as to authorize the court to conclude that they are the result of intention, but we do not think that the testimony warrants such conclusion in this case.

To the same effect as *Nat. Bank* v. *Kimball* is *Wagoner* v. *Loomis*, 37 Ohio St. 571, where it was decided that inequalities in valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers making such valuations, and that a petition for such injunction, which shows that the plaintiff's property was valued at only 80 per cent. of its true value in money, while other property in the county was valued at only 40 per cent. of its value, and avers that such valuations were unequal, unjust, and illegal, is insufficient.

2. Is the assessment invalid for the reason that the assets of the complainant consisted in part of United States bonds, not subject to taxation, but included in the valuation made by the auditor, and placed on the duplicate? The legislature, in providing for the taxation of shares in national banks, is subject to two classes of restrictions: *First*, those imposed by congress, and contained in section 5219, Rev. St.; and, *second*, those imposed by the constitution of the state of Ohio. If the act under which the assessment was made exceeds any of these restrictions it is invalid, at least to the extent of the excess. The valuation of shares in national banks, under sections 2765 and 2766, Rev. St. Ohio, quoted above, is fixed by deducting from the resources of the bank, its liabilities, and also the value of the real estate, included in the statement of resources, as the same stands on the duplicate. These are the only deductions.

It is urged on behalf of the complainant, that, by the constitution and statutes of Ohio, taxation is limited to tangible property, subject to ownership, and capable of definite money valuations, and that corporate franchises are not recognized as subjects of taxation. To these propositions, as stated, we agree, and, in our opinion, they are recognized by the legislature of Ohio in providing, by the law already referred to, for the taxation of shares in national banks. Nothing is taken into account, in the valuation of the shares for taxation, but the tangible property of the bank. From the sum of its resources is deducted the sum of its liabilities, and the assessed value of its real estate. The remainder is divided by the total number of shares, and the quotient is the amount which the law fixes as the taxable value of each share.

It is also urged that the taxable property of corporations in Ohio is taxed on valuation, like the property of individuals, and not otherwise, and that shares in any corporation are considered and treated as

"portions" of the taxable property of the corporation, and not otherwise, and are not required to be listed by the owner when the property of the corporation is listed. The constitution of Ohio declares that the property of corporations shall be subject to taxation the same as the property of individuals, (art. 13, § 4,) and the law (Rev. St. Ohio, § 2746) exempts from taxation the shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. If the taxation of the property of the corporation be regarded as indirect taxation of the shares, it is, perhaps, true that the shares are considered and treated as "portions" of the taxable property of the corporation, but the direct and proper view is that the property of the corporation, in the case stated, is taxed, and the shares are exempt. In cases where the property of the corporation is not taxed we do not agree that the shares are considered and treated as "portions" of the taxable property of the corporation.

By section 2736 of the Revised Statutes of Ohio each person listing property is required to include in his statement all investments in bonds, stocks, joint-stock companies, etc., in his possession. Section 2737 provides that such statement shall truly and distinctly set forth the amount of all moneys invested in bonds, stocks, joint-stock companies, etc., and section 2739 provides that investments in bonds, stocks, and joint-stock companies shall be valued at the true value thereof in money. These sections prescribe the standard for the valuation of shares for taxation. It is their true value in money, and not the proportion which they bear to the taxable property of the corporation. If the property of the corporation is taxed, the shares are exempt. But congress does not authorize the property of national banks, excepting their real estate, to be taxed, and it cannot be taxed without authority from congress. It does permit the taxation of shares as the property of their owners or holders. And one of the points decided by the supreme court of Ohio, in *Frazer* v. *Siebern*, 16 Ohio St. 614, is that shares in national banks liable to taxation in the state of Ohio "are to be understood as the individual property or choses of the stockholders, as contradistinguished from aliquot parts of the capital and property of the bank, and as such may be taxed at their full value, without deduction for the franchise, or for real estate otherwise taxed, or for untaxable bonds owned by the bank." We do not see how language could be more explicit.

In *Bradley* v. *Bauder*, 36 Ohio St. 28, the question was whether a person residing in Ohio and owning shares of stock in a foreign corporation was required to list the same for taxation, notwithstanding the capital of the corporation was taxed in the state where the corporation was located. The argument was that capital of the corporation was invested in property taxed in the name of the corporation; that the shares only represented proportions of that property; and, therefore, that taxing the shares was, by another mode, taxing the property of the corporation. But Judge BOYNTON, pronouncing the opinion,

said: "This argument, however plausible, has never met with favor from the courts," and the legality of the tax upon the shares, as property, distinct and separate from the property of the corporation, and therefore not "portions" of the same—was affirmed.

In *Wagoner* v. *Loomis, supra,* Judge McIlvaine intimates, on page 580, that the officers of the law violated their sworn duty in placing the national bank shares of the plaintiff in error on the duplicate at their par value, "instead of their true value in money, (as the constitution requires,) which was 125 per cent. of their par value."

In each of these cases there is a clear recognition that the shares are entirely distinct, as taxable property, from the property of the corporation, and in *Frazer* v. *Siebern,* and in *Wagoner* v. *Loomis,* that intangible constituents of value—as the franchise—may be included in fixing the true money value of the shares for taxation. But by the law under which the shares of the complainant were valued for taxation everything intangible is excluded. The aggregate tax value of all the shares is equal to the net value of the capital of the bank, less the assessed value of its real estate. The non-taxable bonds owned by the bank are not excluded. How that affects the validity of the assessment is a question which we shall now consider.

Congress authorizes taxation upon the shares in national banks by the states within which they are located, under two restrictions: *First,* "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals within such state;" and, *second,* "that the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere. The real estate of the bank is also taxable as other real estate. Rev. St. § 5219. By section 2759, Rev. St. Ohio, the county auditor is required to allow to every individual banker, and to every unincorporated bank, in addition to the credits allowed in the valuation for taxation of national bank shares, "the average amount of United States government, and other securities that are exempt from taxation," held by such banker or unincorporated bank. Wherefore, it is argued that the taxation upon the national bank shares is in violation of the first restriction imposed by congress, in that it is "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens." No complete definition of other "moneyed capital" has been given. It must, however, be held to mean other taxable moneyed capital. Otherwise, the law of congress, permitting taxation of the shares, would defeat itself, for they could not be taxed at a greater rate than individual investments in United States bonds, which are exempt. Unincorporated banks and individual bankers can be taxed only upon their property. The statement they are required to make and return to the auditor shall, the law says, set forth not only their taxable property, but also United States bonds and other non-taxable securities held by them. The auditor is required

to deduct from the statement so made and returned that which the state has no power to tax. The statute creates no exemption. It lays hold upon every item of property which it can reach, and taxes every item which it can tax, allowing only the credits allowed to other individual tax-payers. The auditor, accordingly, in fixing the amount for taxation, deducts from the statement, which the law compels the unincorporated bank and the individual banker to make, the securities which the state could not tax if it would. If it were material to inquire why the law requires that non-taxable securities shall be included in the return, the answer might be suggested by sections 139 and 1522 of the Revised Statutes of Ohio, relating to the statistical duties of the secretary of state and of assessors. Every tax-payer is required, at the time of listing his property, to make to the assessor a verified statement, which shall include, among other things, "the amount of United States bonds owned, the amount of legal tender notes or money exempt from taxation, and the amount of state bonds or certificates." As the unincorporated bank and the individual banker make their returns to the auditor, it is provided that those returns shall contain the items which the assessor, in the discharge of his statistical duties, is required to take from every individual tax-payer.

Unless the taxation on the shares in national banks is indirectly a tax on the property of the bank, there is no discrimination in favor of the individual banker and the unincorporated bank. But in *Van Allen* v. *The Assessors*, 3 Wall. 573, the supreme court of the United States decided that "the tax on the shares is not a tax on the capital of the bank." They state, as familiar law, that "the corporation is the legal owner of all the property of the bank, real and personal," and that the interest of the shareholder is "a distinct, independent interest or property, held by the shareholder like any other property that may belong to him," and that "it is this interest which the act of congress has left subject to taxation by the states." Chief Justice CHASE, for himself, and Associate Justices WAYNE and SWAYNE, in a dissenting opinion, argued with great power that taxation on shares in national banks, without reference to the amount of their capital invested in bonds of the United States, was "actual, though indirect, taxation of the bonds," but the holding by the majority of the court was affirmed in *People* v. *Com'rs*, 4 Wall. 244, and has since remained as settled law, so that the dissenting opinion of the chief justice only strengthens the authority of *Van Allen* v. *The Assessors*. In *People* v. *Com'rs*, the only question before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative. Mr. Justice NELSON, who pronounced the opinion of the court, said that "the meaning and intent of the law-makers was that the rate of the taxation of the shares should be the same, or not greater, than upon the moneyed

capital of the individual citizen which is subject or liable to taxation. Eliminating from the return made by the unincorporated bank or individual banker, every item of property and of moneyed capital exempt from taxation, is not deducting, nor is it discriminating in favor of such bank or banker and against the holder or owner of shares in a national bank. What is such discrimination is clearly shown in *People* v. *Weaver*, 100 U. S. 539. That case was taken to the supreme court of the United States from the court of appeals of New York. Mr. Justice MILLER, delivering the opinion, said:

"It cannot be disputed,—it is not disputed here,—nor is it denied in the opinion of the state court, that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation; while he whose money is invested in shares of bank stocks can make no such deduction. Nor, inasmuch as nearly all the banks in that state, and in all others, are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot."

In accordance with this view, the judgment of the state court was reversed. It was within the power of the legislature of New York to allow or to disallow a deduction from the listed value of the property of the tax-payer equal to the amount of his indebtedness; and to allow it to one and to refuse it to another was, by intentional discrimination, to make the taxation unequal. But in the case of an unincorporated bank, or of an individual banker in Ohio, the state levies its taxes upon every dollar's worth of property which it has power to tax, at the same rate and by the same method as in the taxation on national bank shares, leaving untouched only the property which it has not power to tax.

It is claimed that upon a proper application of the decision in *Frazer* v. *Siebern*, *supra*, the assessment must be held illegal. We do not so think. The act of congress then in force, authorizing taxation upon shares in national banks, contained the following restriction not to be found in the present law: "That the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located." The state of Ohio imposed no tax upon shares in the state banks, which were then in existence. On the contrary, by the fifty-ninth section of the act of 1861, then in force, they were expressly exempted. But the state banks themselves were taxed upon their capital, subject to a deduction for the value of their real estate, and of their non-taxable bonds of the United States, while the tax on shares in national banks was upon their nominal or par value without any deduction for real estate, which was taxed separately against the banks as real estate, and

without deduction for United States bonds owned by the banks. The court, recognizing that the equivalent taxation necessary to justify a tax upon shares in national banks might be either upon the shares in the state banks and assessed against the shareholders, or upon the capital of the bank and assessed against the bank itself, provided only that it be equivalent, held that "the tax against the owners of shares in the national banks must not exceed that imposed, in some form, upon the state banks or their stockholders." And, finding that the tax upon the shares in the national banks was in excess of that assessed against the state banks, the court enjoined the collection of the excess.

As we have already found that the limitation in the present act of congress is, in effect, that the taxation on the shares shall not be at a greater rate than is assessed upon other taxable moneyed capital, it follows that the failure to levy a tax against a citizen of the state, whether a banker, a manufacturer, a merchant, or a capitalist, upon property or investments which the state has no power to tax, does not make out a case of discrimination against the owner or holder of shares in a national bank.

Our conclusion is that the bill must be dismissed, and it is so ordered.

POWER OF STATES TO TAX. National banks, as such, being instrumentalities of the government, are not liable to taxation by the states.[1] Such banks derive their authority to do business in the states by virtue of a United States statute, which is supreme law.[2] Their franchise is not liable to state taxation, nor can the state authorize its municipalities to exact from them license taxes for doing business within their limits.[3] A city cannot tax the business of a bank which might be the fiscal agent of the federal government, although it may tax its property and the shares of its stockholders.[4] Congress may permit states to tax national banks,[5] and its shares held by individuals,[6] and this although its capital may be invested in bonds or other securities of the United States;[7] but the permission of congress is a prerequisite to such authority.[8] A state can impose only such a tax on national banking corporations as is authorized by the act of congress creating them, and that act only authorizes

1 McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S. 9 Wheat. 738; Bank of Commerce v. New York, 2 Black, 620; Bank Tax Cases, 2 Wall. 200; Pittsburg v. Nat. Bank, 55 Pa. St. 45; Collins v. Chicago, 4 Biss. 472.

2 Carthage v. First Nat. Bank of Carthage, 71 Mo. 509; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 459; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Nat. Bank, 19 Wall. 490; Hepburn v School Directors, 23 Wall. 480; Second Nat. Bank v. Caldwell, 13 Fed. Rep. 429.

3 Carthage v. First Nat. Bank of Carthage, 71 Mo. 509; Nat. Bank v. Mayor, etc., 8 Heisk. 514.

4 Johnston v. Macon, 62 Ga. 650; Macon v. First Nat. Bank, 59 Ga. 648; Macon v. Macon Sav. Bank, 60 Ga. 133.

5 Van Allen v. Assessors, 3 Wall. 573; 33 N. Y. 161; Frazer v. Seibern, 16 Ohio St. 614; Mintzer v. Montgomery Co. 54 Pa. St. 139; Austin v. Boston, 96 Mass. 359; City of Utica v. Churchill, 43 Barb. 550; People v. Com'rs, 4 Wall. 244; Nat. Bank v. Com. 9 Wall. 353; First Nat. Bank v. Douglas Co. 3 Dill. 298, 330; Wright v. Stiltz, 27 Ind. 338; Hubbard v. Sup'rs, 23 Iowa, 130.

6 Nat. Bank v. Com'rs, 9 Wall. 353; People v. Bradley, 39 Ill. 130; St. Louis Nat. Bank v. Papin, 4 Dill. 29; Goddard v. Bulow, 1 Nott & McC. 45; Stetson v. Bangor, 56 Me. 274; State v. Haight, 31 N. J. 399; State v. Hart, Id. 434.

7 People v. Com'rs, 4 Wall. 259; Wright v. Stiltz, 27 Ind. 238; St. Louis B. & S. Ass'n v. Lightner, 47 Mo. 393. Contra, Whitney v. Madison, 23 Ind. 331.

8 People v. Weaver, 100 U. S. 543; McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S. 9 Wheat. 738; Weston v. Charleston, 2 Pet. 449; People v. Assessors, 44 Barb. 148.

a tax on the shares in such banks, and not on its capital stock.[1] States have the power to tax national banks only at a rate, in the manner, and on the particular conditions authorized by congress;[2] and the requirements of the act must be obeyed in good faith, and the state tax must be construed in connection with the act.[3] The permission given by the national banking act to tax national banks, removes any implied exemption that might otherwise exist.[4]

REAL ESTATE. The state may tax the real estate and the shares of national banks.[5] Under the Revised Statutes the state is left free to exercise the power of taxation over national banks, assessing the same upon the real property of the bank, or upon the shares of its capital stock, at the election of the state, in accordance with the requirements of the state constitution and laws, and only in conformity with the rules applicable to citizens and corporations of the state.[6] Real estate is taxable by state authority, and the separate shares of its capital stock, as the personal property of the holders of such shares, may be taxed by the state or its municipal corporations, so long as the tax is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.[7] Real estate owned by a national bank should be assessed as realty in the township where it is situated, and not as a part of the capital stock of the bank.[8] The banking office and lot lawfully owned and occupied as its place of business by a national bank is not liable to assessment and taxation as real estate *eo nomine* against the bank.[9]

CAPITAL NOT TAXABLE. The capital of a national bank is not taxable by the state.[10] Capital stock as such cannot be assessed. The only way stock can be reached is by assessment of the different shares of stockholders,[11] and an assessment on the shares in gross against the bank is not authorized and is illegal.[12] A bank is not liable to taxation on its capital under a statute which requires owners of property to return it for taxation. It does not own the shares held by individuals,[13] but it is the owner of all the property of the corporation, real and personal;[14] but it is not liable for either state or municipal taxes on the shares of stock not owned by it, but owned by individual stockholders.[15] If the shares of a national bank, when in the hands of a receiver, have any value, they are taxable in the hands of the holders or owners; but the property held by the receiver is exempt to the same extent that it was before his appointment.[16] Such property cannot be subjected to sale for the payment of the demand of a creditor against the claim for the property by a receiver of the bank subsequently appointed.[17] The taxation by a state of the capital stock

[1] Carthage v. First Nat. Bank, 71 Mo. 509; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 459; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Nat. Bank, 19 Wall. 490; Hepburn v. School Directors, 23 Wall. 480.

[2] Sumter Co. v. Nat. Bank, 62 Ala. 464; Nat. Commercial Bank v. Mobile, Id. 284.

[3] First Nat. Bank v. St. Joseph, 46 Mich. 526; S. C. 9 N. W. Rep. 838.

[4] Union Nat. Bank v. Chicago, 3 Biss. 82.

[5] Nat. Commercial Bank v. Mobile, 62 Ala. 284; Salt Lake City Bank v. Golding, 2 Utah, 1; Sumter Co. v. Gainesville Bank, 62 Ala. 464; First Nat. Bank v. Douglas Co. 3 Dill. 330.

[6] Nat. Commercial Bank v. Mobile, 62 Ala. 284.

[7] Loftin v. Citizens' Nat. Bank, 85 Ind. 341.

[8] Rice Co. Com'rs v. Citizens' Nat Bank, 23 Minn. 281.

[9] Second Nat. Bank v. Caldwell, 13 Fed. Rep. 430; Lackawanna Co. v. First Nat. Bank, 94 Pa. St. 221; People v. Com'rs of Taxes, 80 N. Y. 573; and cases.

[10] Nat. Commercial Bank v. Mobile, 62 Ala. 295; People v. Com'rs, 4 Wall. 244; Bradley v. People, Id. 459; Salt Lake City Bank v. Golding, 2 Utah, 1; Sumter Co. v. Gainesville Bank, 62 Ala. 464; First Nat. Bank v. Douglas Co. 3 Dill. 330.

[11] Collins v. Chicago, 4 Biss. 472.

[12] Nat. Commercial Bank v. Mobile, 62 Ala. 284.

[13] Waco Bank v. Rogers, 51 Tex. 606; North Ward Bank v. Newark, 40 N. J. Law, 558; Waite v. Dowley, 94 U. S. 527; Sumter Co. v. Gainesville Bank, 62 Ala. 468; Van Allen v. Assessors, 3 Wall. 584.

[14] Van Allen v. Assessors, 3 Wall. 584; Sumter Co. v. Gainesville Bank, 62 Ala. 468.

[15] Waco Bank v. Rogers, 51 Tex. 606.

[16] Rosenblatt v. Johnston, 104 U. S. 463.

[17] Woodward v. Ellsworth, 4 Colo. 583; Nat. Bank v. Colby, 21 Wall. 609.

of a national bank invested in United States securities will be restrained,[1] but injunction will not lie to restrain the collection of a tax illegally assessed by the municipal authorities upon the shares of a national bank in gross, instead of against the individual shareholders, though such municipal corporation be insolvent, as there are ample remedies at law.[2]

SHARES OF STOCK SUBJECT TO TAXATION. Shares of national bank stock are subject to taxation by the state[3] against the shareholders.[4] They may be taxed at the place where the bank is situated.[5] They are exceptions to the rule that personal property follows the owner, for they are by law made taxable at the *situs* of the bank.[6] The state in which the national bank is situated has the exclusive right to derive revenue from the shares of such bank, no matter where the shareholders may be domiciled.[7] A state may authorize the assessment in the city or town within the same state where the owner resides,[8] the stockholder having the right to be assessed at his domicile within the state in which the bank is located.[9] The mode by which the tax shall be assessed and collected, and the place where it shall be laid on resident stockholders, is left to the discretion of the legislature of the state in which the bank is located.[10] Under the general state statutes the stock belonging to an inhabitant of a school-district in a town other than that in which the bank is situated, cannot be taxed for the purpose of defraying the expense of building a school-house in the district.[11] Where the legislature declared that the tax on the shares of non-resident stockholders shall be assessed against and paid by the bank, if this were in fact unjust to the resident stockholders the remedy for the injustice would be with the legislature.[12] The fact that a national bank in one state keeps a clerk in another state authorized to receive deposits, does not render the bank taxable to the latter state.[13] States may tax dividends declared to holders of national bank stock;[14] but the consent of the comptroller of the treasury being necessary for an increase of shares of the stock, new shares issued under a vote of the corporation are not assessable until the certificate of the comptroller of his approval shall be issued.[15]

RATE. The only restrictions imposed by the act of congress on the power of the states to tax national bank shares is that it shall not be at a greater rate than is assessed on "other moneyed capital" in the hands of individual citizens of the state, and that shares owned by non-residents shall be taxed in the city or town where the bank is located.[16] "Other moneyed capital" means money capital invested otherwise than in national banks.[17] This restriction only requires that the amount of tax imposed and the system of assessment applied to shares of the stock shall be substantially the same as are

1 First Nat. Bank v. Douglas Co. 3 Dill. 298.

2 Nat. Commercial Bank v. Mobile, 62 Ala. 284.

3 Howell v. Cassopolis, 35 Mich. 471; Kyle v. Fayetteville, 75 N. C. 445; Buie v. Fayetteville, 79 N. C. 267; North Ward Nat. Bank v. Newark, 39 N. J. Law, 380; Nat. Bank v. Com. 9 Wall. 353; Lionberger v. Rouse, Id. 468; Austin v. Boston, 14 Allen, 359.

4 Sumter Co v. Gainesville Bank, 62 Ala. 464.

5 First Nat. Bank v. Smith, 65 Ill. 44; Baker v. First Nat. Bank, 67 Ill. 297.

6 Tappan v. Merch. Nat. Bank, 19 Wall. 490; Baker v. First Nat. Bank, 67 Ill. 297; Prov. Inst. v. Boston, 101 Mass. 575; McLaughlin v. Chadwell, 7 Heisk. 389. See 15 St. at Large, 34.

7 Sumter Co. v. Nat. Bank of Gainesville, 62 Ala. 469; Nat. Bank v. Com'rs. 9 Wall. 355.

8 Austin v. Boston, 14 Allen, 359.

9 North Ward Nat. Bank v. Newark, 40 N. J. Law. 558; North Ward Nat. Bank v. Newark, 39 N. J. Law, 380; Howell v. Cassopolis, 35 Mich. 471; Kyle v. Fayetteville, 75 N. C. 445; Buie v. Same, 79 N. C. 267.

10 North Ward Nat. Bank v. Newark, 39 N. J. Law, 380.

11 Little v. Little, 131 Mass. 367.

12 North Ward Nat. Bank v. Newark, 40 N. J. Law, 562; State v. Branin, 38 N. J. Law, 494.

13 Nat. State Bank v. Pierce, 18 Alb. Law J. 16.

14 State v. Collector, 2 Bailey, 654.

15 Charleston v. People's Nat. Bank, 5 S. C. 103.

16 Lionberger v. Rouse, 9 Wall. 475; Pollard v. State, 65 Ala. 628; Miller v. Heilbron, 58 Cal. 133; North Ward Nat. Bank v. Newark, 39 N. J. Law, 380; Ruggles v. Fond du Lac, 53 Wis. 439.

17 Miller v. Heilbron, 58 Cal. 133; People v. Weaver, 100 U. S. 543.

imposed and applied to other moneyed capital.[1] Where different rates of taxation are imposed upon different classes of moneyed capital the rate of taxation on national bank shares should not exceed the rate imposed on shares in state banks.[2] In the taxation of national bank shares it must appear that the assessors acted under some agreement or rule which necessarily tended to tax such shares at a greater rate than is assessed on other moneyed capital, to render the assessment void.[3] If the amount assessed on them is governed by the same percentage on the valuation as that applied to other moneyed capital, the act of congress is satisfied.[4] Any system of assessment of taxes which exacts from the owner of the shares a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, taxes them at a greater rate within the meaning of the act of congress.[5]

VALUATION. The actual and not the par value is the standard of taxation of national bank shares,[6] and such valuation is not affected by the fact that a portion of the capital of the bank is invested in United States bonds;[7] and the surplus fund which a national bank is required to reserve from its net profits is not excluded in the valuation of its shares for taxation.[8] Under certain limitations, the shares of the national banks are taxable, with exclusive reference to their value, and without regard to the nature of the property held by the bank as a corporation.[9] They may be lawfully included in the valuation of the personal property of the owners thereof in assessing state taxes.[10] The provision of the act of congress has reference to the entire process of assessment, and includes the valuation of the shares, as well as the rate of percentage charged thereon.[11] Shares in national banks may be valued *above* their par value.[12] The actual value of the stock diminished by the proportionate value of the real estate owned by the bank, furnishes the proper sum upon which to assess the tax.[13] The state cannot evade the restriction contained in the act of congress, by requiring the value of the property to be added to the value of the shares.[14] Where the value of the real estate held by the bank was not deducted, the shares are subjected to double taxation, and the tax was invalid.[15]

REDUCTION FROM VALUATION. Where other moneyed corporation was taxed, but a reduction to the whole amount of the owner's indebtedness was to be made before assessment, and no such deduction was allowed to the holders of national bank stock, the tax upon such shares is invalid.[16] Under a statute making taxable all credits in excess of the debts of the person taxed, it is not necessarily in conflict with the act of congress providing that national bank stock shall not be taxed at a greater rate than other moneyed capital, even though the latter are taxed for their full value, without deduct-

1 Pollard v. State, 65 Ala. 628.

2 City Nat. Bank v. Paducah, 2 Flippin, 61.

3 First Nat. Bank v. Farwell, 7 Fed. Rep. 518; S. C. 10 Biss. 270.

4 Pelton v. Nat. Bank, 101 U. S. 145; People v. Weaver, 100 U. S. 539.

5 Pollard v. State, 65 Ala. 632; Pelton v. Nat. Bank, 101 U. S. 145.

6 People v. Com'rs, 94 U. S. 415; S. C. 67 N. Y. 516; Van Allen v. Assessors, 3 Wall. 573; People v. Com'rs of Taxes, 8 Hun, 556.

7 Id.

8 Stafford Nat. Bank v. Dover, 58 N. H. 316; First Nat. Bank v. Peterborough, 56 N. H. 38; Nat. Bank v. Com'rs, 9 Wall, 353; People v. Com'rs, 67 N. Y. 516; S. C. 94 U. S. 415

9 Evansville Nat. Bank v. Britton, 105 U. S. 325; Van Allen v. Assessors, 3 Wall. 573.

10 Van Allen v. Assessors, 3 Wall. 573; People v. Com'rs, 4 Wall. 244; Nat. Bank v. Com. 9 Wall. 353; Tappan v. Merch. Nat. Bank, 19 Wall. 491; People v. Com'rs, 94 U. S. 415; Waite v. Dowley, 94 U. S. 527; Adams v. Nashville, 95 U. S. 19; McIver v. Robinson, 53 Ala. 456; Nat. Commercial Bank v. Mobile, 62 Ala. 295.

11 People v. Weaver, 100 U. S. 539.

12 Pelton v. Nat. Bank, 101 U. S. 143.

13 People v. Weaver, 100 U. S. 539; Sup'rs of Albany v. Stanley, 105 U. S. 305; S. C. 12 Fed. Rep. 87. See People v. Dolan, 36 N. Y. 59; Nat. Alb Exch. Bank v. Hills, 5 Fed. Rep. 251.

14 Pelton v. Nat. Bank, 101 U. S. 143.

15 Nat. Bank v. Kimball, 103 U. S. 732.

16 City Nat. Bank v. Paducah, 2 Flippin, 61.

ing indebtedness.[1] The provisions which authorize the tax-payer to deduct his indebtedness from the amount of money loaned and solvent credits, taxing only the excess, and exempts from taxation of the capital stock of incorporated companies created under any law of the state such portion thereof as may be invested in property, and taxed otherwise as property, and limits municipal taxation upon such corporations, in their operation upon moneyed capital discriminate unfavorably against shareholders in national banks, and are to that extent violative of the act of congress.[2] Shareholders are not entitled to any allowance for such of the capital and surplus of the bank as may be invested in government bonds;[3] as a state statute taxing bank stock must levy the tax on the shares of stockholders, as distinguished from the capital of the bank invested in federal securities.[4] Congress may subject the shares of national bank stock to state taxation, notwithstanding the capital is invested in national securities.[5] The shares of stock are property, separate and distinct from the property of the corporation which they represent.[6]

DEDUCTION OF INDEBTEDNESS. Any statute is in conflict with the restrictive clause of the act of congress in so far as it does not permit a stockholder to deduct the amount of his just indebtedness from the assessed value of his stock, while the owners of all other taxable personal property may deduct debts from the value of their property.[7] When the shareholder has no debts to deduct, the law provides a mode of assessment for him which is not in conflict with the act of congress; the law in that case can be held valid,[8] and he cannot recover back the tax paid pursuant thereto. If he has debts, the assessment excluding them from computation is voidable, but the assessing officers act within their authority until they are duly notified that he is entitled to deduction of such debts,[9] and notice of debts must be given to the assessor.[10] If the assessing officer proceeds after such notice and acts in violation of the act of congress, the tax-payer may take the requisite steps to secure the deduction, and when secured the residue of the state statute remains valid.[11] Where, under the statute, the stockholder has presented to the proper board of assessors his affidavit showing that his personal property subject to taxation, including such shares, after deducting therefrom his just debts, is of no value, and they refuse, on his demand, to reduce his assessment of the shares, an injunction should be awarded to restrain the collection of the tax.[12] In the absence of evidence that the debt claimed for deduction was not a just one and enforceable against the party taxed, he is entitled to have it deducted, and this, although the transaction creating the debt was a "device to escape assessment and taxation;" so held, in a case where the debt was created in the purchase of non-taxable securities.[13] Where the assess-

[1] First Nat. Bank v. St. Joseph, 46 Mich. 526; S. C. 9 N. W. Rep. 838.

[2] Pollard v. State, 65 Ala. 628.

[3] First Nat. Bank v. Farwell, 7 Fed. Rep. 518.

[4] Nat. Bank v. Com'rs, 9 Wall. 353.

[5] McCulloch v. Maryland, 4 Wheat. 316; Weston v. Charleston, 2 Pet. 449; Collector v. Day, 11 Wall. 123; Ward v. Maryland, 12 Wall. 427; Van Allen v. Assessors, 3 Wall. 593.

[6] Kirtland v. Hotchkiss, 42 Conn. 438; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 459; Nat. Bank v. Com'rs, 9 Wall. 353.

[7] Sup'rs of Albany v. Stanley, 105 U. S. 305; Hills v. Nat. Exch. Bank, Id. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96; Railroad Tax Cases, 13 Fed. Rep. 737; People v. Weaver, 100 U. S. 539, reversing 7 C.; Williams v. Weaver, 75 N. Y. 30; and see Cummings v. Nat. Bank, 101 U. S. 153; Ruggles v. Fond du Lac, 10 N. W. Rep. 566.

[8] Sup'rs of Albany v. Stanley, 12 Fed. Rep. 90; Austin v. Boston, 14 Allen, 357, to the same effect; People v. Bull, 46 N. Y. 57; Gordon v. Cornes, 47 N. Y. 608; Village of Middleton, Ex parte, 82 N. Y. 196.

[9] Sup'rs of Albany v. Stanley, 105 U. S. 305; Hills v. Nat. Exch. Bank, Id. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

[10] Sup'rs of Albany v. Stanley, 105 U. S. 305; S. C. 12 Fed. Rep. 1.

[11] Sup'rs of Albany v. Stanley, 105 U. S. 305; Hills v. Nat. Exch. Bank, 105 U. S. 319; Evansville Bank v. Britton, 105 U. S. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

[12] Hills v. Nat. Exch. Bank, 105 U. S. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

[13] People v. Ryan, 88 N. Y. 142.

ment is not void, but only voidable, it must stand good for the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.[1]

EQUALITY AND UNIFORMITY. The restrictions on the power of the state to tax national bank shares is intended to secure equality of valuation in their assessment, as well as equality in the rate of the tax after the assessment has been made.[2] The rule that they should not be assessed higher than other moneyed capital is not violated by taxing them without deduction of mortgages, judgments, and other securities for money loaned, although some capital is subject to such exemption from taxation for other than state purposes;[3] so exempting from taxation money invested in state bonds, or city bonds, is not an unfriendly discrimination.[4] The act of congress is not infringed by a state law which provides that all personal property, including money and all debts owing by solvent debtors, and shares in national and state banks, and other corporations, shall be assessed at their true value and taxed at an equal rate, even if it also provides that certain classes of property, including shares in certain classes of corporations, shall be exempt from taxation.[5] The discrimination must be "with moneyed capital in the hands of individual citizens;" a discrimination between shareholders in corporations, other than banks, is not within the prohibition.[6] The rule or principle of unequal valuation of different classes of property, adopted by local boards of assessors, is in conflict with the constitution and works injustice to owners of bank shares;[7] so to tax the shares in a national bank at their full value, while other property is assessed at 30 or 40 per cent. of its value, is unjust and unlawful, and the bank may maintain an action to restrain the collection of such tax;[8] the court will not restrain the collection where the shares are taxable and no excessive valuation is complained of, although the officers arrived at correct result by an erroneous method.[9] Although for purposes of taxation the statutes provide for the valuation of all moneyed capital, including shares of national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while the shares are assessed at their true value, is a violation of the act of congress, which prescribes the rule by which they shall be taxed by state authority;[10] and the statute which establishes a mode of assessments by which shares are valued higher in proportion to their real value than other moneyed capital, is in conflict, although no greater percentage is levied than on that of other moneyed capital.[11] In such case, on the payment or the tender of the sum which such shares ought to pay, under the rule established by that act, a court of equity will enjoin the state authorities from collecting the remainder;[12] but where they are taxed at the same rate as other property, and the valuation of these shares is at half their actual value, while that of some other property is at less than half its value, a discrimination is not thereby shown.[13] The validity of a municipal tax on the shares of a national bank is not impaired by the fact that the money paid for such stock may have been taxed for municipal purposes to the same person.[14]

DISCRIMINATION. A state law is not violative of the act of congress merely on the ground that it allowed a "partial exemption" of a certain kind of moneyed capital, which was designed to prevent a double burden of taxation,

1 Hills v. Nat. Exch. Bank, 12 Fed. Rep. 95.
2 Albany City Nat. Bank v. Maher, 6 Fed Rep. 417.
3 Gorgas' Appeal, 79 Pa. St. 149.
4 Pollard v. State, 65 Ala. 628; Adams v. Nashville, 95 U. S. 19.
5 Stratton v. Collins, 43 N. J. Law, 563.
6 First Nat. Bank v. Waters, 7 Fed. Rep. 152.
7 Cummings v. Nat. Bank, 101 U. S. 153.
8 Id.
9 St. Louis Nat. Bank v. Papin, 4 Dill. 29.
10 Second Nat. Bank v. Caldwell, 13 Fed. Rep. 432; Hepburn v. School-dist. 23 Wall. 480.
11 People v. Com'rs, 69 N. Y. 91; S. C. 8 Hun, 536.
12 St. Louis Nat. Bank v. Papin, 4 Dill. 29.
13 City Nat. Bank v. Paducah, 2 Flippin, 61.
14 Richmond City v. Scott, 48 Ind. 568.

both of property and debts secured by it.[1] The fact that two banks by their charters are specially taxed, will not preclude taxation of the shares in the national banks by general law; neither are the shares to be excluded from taxation because some other classes of moneyed capital are exempted from taxation by a law of limited application.[2] A tax may be levied by an incorporated city on the shares of stock of a national bank at the same rate as on real and personal property within the city, although there is still in existence branches of the state bank, the shares of which are not subject to municipal taxation.[3] Where there is no discrimination against such shares and in favor of other moneyed capital in the hands of individual citizens of the state, such taxation is valid.[4] The act of congress of June 3, 1864, was not intended to curtail the power of the state on the subject of taxation, or to prohibit exemptions of particular kinds of property, but to protect corporations formed under its authority from unfriendly discrimination by the state in the exercise of their taxing powers.[5] It was the intention of congress to prevent the state, by hostile legislation, from discriminating against national banks, and to place all bank shares, state and national, on a common level.[6] The system of assessment of bank shares, owing to the fact that the shares of different banks are differently rated, must necessarily be imperfect.[7] The law does not require absolute accuracy where the shareholders have the same rights as other individuals taxed for moneyed capital; they should look to the statutes of the state for relief.[8] It is not sufficient, to invalidate the taxation, to show that in the case of a single state bank, the shares of which are subject to a like taxation, that the assessors, either by mistake or intention, have shown favor.[9]

ENFORCEMENT OF PAYMENT. Payment of the tax imposed on bank shares may be enforced.[10] The tax imposed pursuant to statute becomes a lien upon the shares taxed, and such lien continues till the tax is paid.[11] It may be made the duty of every national bank to pay for its stockholders the tax legally assessed against their respective shares, whether the stockholders reside in the state or not.[12] The state statute relating to the collection of taxes upon bank shares does not apply to shares belonging to the estates of deceased persons.[13] A bank may be compelled to disclose the amount of deposits due each depositor, and a state law to that effect is enforceable.[14] Where the statute requires or permits the bank to pay the tax for the shareholder, as trustee it is the proper complainant seeking relief against illegal exaction.[15] A statute requiring the cashier to return to the clerk of each town in the state where shareholders reside, a list of shareholders resident therein, and the amount paid out on each share, is valid.[16]

SUIT TO ENJOIN COLLECTION. A shareholder who has made affidavit and demand for deduction of debts owed by him from the valuation of his shares, as required by law, may bring suit to enjoin the collection of such tax.[17] And

1 Pollard v. State, 65 Ala. 633; Hepburn v. School Directors, 23 Wall 480.

2 Lemley v. Com'rs, 85 N. C. 382; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Merch. Nat. Bank, 19 Wall. 490; Providence Ins. Co. v. Boston, 101 Mass. 595.

3 Richmond City v. Scott, 48 Ind. 568.

4 Lemley v. Com'rs, 85 N. C. 379.

5 Adams v. Nashville, 95 U. S. 19; People v. Com'rs, 4 Wall. 244; Hepburn v. School Directors, 23 Wall. 480.

6 Stanley v. Board of Sup'rs, 15 Fed. Rep. 483.

7 Id.

8 Id.

9 Id.

10 First Nat. Bank v. Douglas Co. 3 Dill. 299.

11 Simmons v. Aldrich, 41 Wis. 241; Van Slyke v. State, 23 Wis. 655; Bagnall v. State, 25 Wis. 112.

12 Nat. Commercial Bank v. Mobile, 62 Ala. 295; Nat. Bank v. Com'rs, 9 Wall 353; Tappan v. Merch. Nat. Bank, 19 Wall. 491; Waite v. Dowley, 94 U. S. 527; Adams v. Nashville, 95 U. S. 19; McIvers v. Robinson, 53 Ala. 456.

13 Revere v. Boston, 123 Mass. 375.

14 First Nat. Bank v. Hughes, 24 Alb. Law J. 74.

15 Nat. Bank v. Cummings, 101 U. S. 153; First Nat. Bank v. St. Joseph, 46 Mich. 526.

16 Waite v. Dowley, 94 U. S. 527.

17 Hills v. Nat. Alb. Exch. Bank. 12 Fed. Rep. 93.

where it is shown that the affidavit and demand would have been unavailing, they may show, in an action by the bank brought on their behalf, the deductions to which they were entitled.[1] A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on the shares by state authorities,[2] and on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owned by the stockholders,[3] although payable in the first instance by such shareholder, if a multiplicity of suits can be thereby avoided, or injury to its credit or business is anticipated.[4] Where the statute requires or permits the bank to pay the tax for the shareholder, as trustee, the bank is the proper complainant seeking relief against illegal exaction.[5] A bill to restrain the collection of the state tax must show a statute discriminating against them, or that they are rated higher in proportion to actual valuation than other moneyed corporations.[6]—[ED.

[1] Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; S. C. 12 Fed. Rep. 93; Evansville Nat. Bank v. Britton, 105 U. S. 322. See Sup'rs of Albany v. Stanley, 12 Fed. Rep. 82.

[2] Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; S. C. 12 Fed. Rep. 93; Evansville Nat. Bank v. Britton, 105 U. S. 322.

[3] Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 249; Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; S. C. 12 Fed. Rep. 93; Cummings v. Nat. Bank, 101 U. S. 153; Pelton v. Nat. Bank, 101 U. S. 143; Evansville Nat. Bank v. Britton, 105 U. S. 322.

[4] City Nat. Bank v. Paducah, 2 Flippin, 61. See Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 248; reversed, 12 Fed. Rep. 93.

[5] Nat. Bank v. Cummings, 101 U. S. 153, affirmed; Evansville Nat. Bank v. Britton, 105 U. S. 322; S. C. 12 Fed. Rep. 93; First Nat. Bank v. St. Joseph, 46 Mich. 526.

[6] German Nat. Bank v. Kimball, 103 U. S. 732; Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 93.

MEMPHIS & L. R. R. Co., as reorganized, *v.* DOW.[1]

(*Circuit Court, S. D. New York.* February 11, 1884.)

1. ULTRA VIRES—RETENTION OF BENEFITS.
   A corporation cannot retain property acquired under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transactions.
2. CORPORATIONS—POWER TO CONTRACT WITH STOCKHOLDERS.
   A corporation is not precluded from contracting with its bondholders because they own all the stock.
3. SAME—MORTGAGE OF CORPORATE FRANCHISE.
   A corporation lawfully purchasing its franchise has implied authority to mortgage it for the purchase money.
4. SAME—CASE STATED.
   A railroad corporation organized in Arkansas issued bonds secured by trust mortgage of its franchises and other property; the mortgage was foreclosed, and a scheme of reorganization adopted, in pursuance of which the company conveyed all its property to the trustees, and the bondholders formed a new corporation, to which the franchises and other property of the old one were conveyed by the trustees. The new corporation, thus composed entirely of the original bondholders, issued its bonds to those bondholders, secured by mortgage of its franchises and other property; and the new bonds were received in lieu of the old. Afterwards portions of the stock passed into other hands. *Held*, that the bonds constituted a valid obligation, notwithstanding the stockholders of the contracting corporation were the contractees, and notwitstanding a provision in the constitution of Arkansas forbidding private corporations to issue stock or bonds except for value actually received.

[1] See 7 Sup. Ct. Rep. 482, and 20 Fed. Rep. 260, 768.

In Equity.

Dillon & Swayne, for plaintiff.

Platt & Bowers, for defendant.

WALLACE, J. The complainant's bill is filed against the trustees and holders of the mortgage bonds of the complainant for $2,600,000, and the mortgage upon its corporate franchises and property for securing the same, executed May 2, 1877, seeking to annul the bonds and mortgage, upon the ground that they were issued and executed by the complainant without corporate power in that behalf.

A brief statement of the facts relating to the creation of the mortgage bonds, their origin, consideration, and purpose, will serve to present the legal questions involved. The complainant, created under a special act of the legislature of Arkansas, is a reorganized corporation which has succeeded to the property and franchises of a former corporation of the same name under the foreclosure of a mortgage of that corporation, and a conveyance under the decree of foreclosure. By the terms of that mortgage, and by the provisions of the decree of foreclosure in conformity therewith, it was provided that if the trustees named in the mortgage should be requested so to do by a majority of the holders of the bonds secured thereby they might purchase the property, and, in that case, no bondholder should have any claim to the premises or the proceeds thereof, except for his *pro rata* share, as represented in a new corporation or company to be formed, by a majority in interest of said bondholders, for the use and benefit of the holders of the mortgage bonds. The trustees purchased at the sale, and thereupon the bondholders proceeded to organize the present corporation. There was due to the holders of the old mortgage bonds $2,600,000 of principal, and $1,300,000 of unpaid interest, and the scheme of reorganization contemplated the acceptance by the bondholders of the new mortgage bonds in place of their old ones, and of the capital stock in place of their accrued and unpaid interest. Accordingly, by the terms of the reorganization agreement, the capital stock of the new corporation was fixed at $1,300,000, divided into 13,000 shares of $100 each, and was declared to be full paid; and by the same agreement the trustees who had purchased at the foreclosure sale were directed to transfer the property and franchises purchased by them to the new corporation, upon the condition, among others, that the new corporation should execute and deliver to said trustees the new mortgage bonds for $2,600,000, now sought to be set aside. Thereupon—the new corporation having agreed to accept a conveyance of the property and franchises of the old corporation, pursuant to the terms of the reorganization agreement—the trustees conveyed the same to the new corporation, the deed of conveyance reciting the conditions upon which, as trustees, for the owners of the outstanding mortgage bonds, they were authorized to make such conveyance, and further reciting the acceptance of such conditions by the new corporation. The corporation accepted this conveyance and took

possession under it. Every certificate of shares of stock issued by it contains a recital that the holder takes his stock subject to the mortgage bonds in question. The new mortgage bonds were issued and delivered to the trustees for the holders of the outstanding mortgage bonds, and were distributed by the trustees, *pro rata*, to the holders of those bonds. The capital stock was also apportioned among the holders of these bonds, *pro rata*, and certificates were delivered for the shares to which each bondholder was entitled.

After the reorganized corporation had operated the railroad for several years, and early in the year 1880, the majority of the stock was acquired by Messrs. Margrand, Gould, and Sage, in the interest of the St. Louis, Iron Mountain & Southern Railway Company. The object seems to have been to acquire control of the corporation and subordinate its management to the interests of the Iron Mountain company. The parties who thus acquired control now control the corporation, and, speaking through it, insist that the mortgage bonds, which were the consideration of the transfer of the property to the corporation, are void, and should be set aside. The case, then, is this: The complainant is a corporation which was brought into life by a body of creditors of a pre-existing corporation, who had succeeded to all the property thereof, and who proposed to convey such property to the complainant upon receiving, among other considerations, the mortgage bonds in suit. The complainant assented to this proposition, accepted a conveyance of the property, and executed its mortgage bonds. It asserts now that although it had power to acquire the property it had no lawful power to pay for it in the terms and manner promised. Its contention is founded upon a section of the charter or act of incorporation by which alone it is claimed its power to create a mortgage is conferred, and upon a provision of the constitution of Arkansas which limits the power of corporations of that state in issuing bonds. The section of the charter relied on is section 9, which is as follows:

"The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with any thing necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works."

The constitutional provision is contained in article 12, and declares:

"No private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void."

As the bonds and stock issued by this corporation were issued for property actually received, viz., the said railroad and all the corporate property, it is not obvious how this constitutional provision has any application to the present controversy. It is assumed in the argument of counsel for the complainant, and reiterated several times,

that the complainant received no consideration for the mortgage bonds. Upon what theory this is claimed or can be maintained is not apparent, and, indeed, is incomprehensible. The original corporation had been divested of its property by the foreclosure sale. The newly-organized corporation accepted a reconveyance upon condition of executing the new mortgage bonds to the vendors. Whether the complainant is a new corporation, or whether it is the old corporation, need not be considered, because in either view the mortgage bonds were the consideration of the conveyance.

The proposition which is advanced, that the vendors and the vendees were the same persons, and therefore there could be no contract or sale, is not even technically correct. One of the parties was the corporation; the bondholders, by their trustees, were the other parties. True, the stockholders of the corporation were also the bondholders, but the circumstance that all the stockholders of a corporation are at the same time the several owners of property, which the corporation wishes to buy, does not destroy the power of the parties to contract together. Suppose there were two corporations, each composed of the same stockholders, can it be seriously contended that one corporation could not make a contract with the other? A corporation may contract with its directors; why not with its stockholders? If the complainant ever acquired the property it was by a purchase; if it could purchase, the bondholders could sell, and the mortgage was the consideration of the purchase and sale.

The primary questions, then, are—*First*, whether, upon the purchase of property, the corporation could mortgage what it acquired to secure the purchase money; and, *second*, whether section 9 of the charter has any application to such a transaction. It is to be observed that the complainant does not question its own power to acquire the property conveyed to it. It cannot do this while it holds on to the property and seeks to remove the lien of the mortgage. If it could legitimately purchase, why could it not, like an individual purchaser, mortgage to secure the price? A corporation, in order to attain its legitimate objects, may deal precisely as can an individual who seeks to accomplish the same ends, unless it is prohibited by law to incur obligations as a borrower of money. "Corporations having the power to borrow money may mortgage their property as security. Although it was at one time a question whether express legislative consent was not required in order to authorize a mortgage of any corporate property, as, for example, in *Steiner's Appeal*, 27 Pa. St. 313, yet the rule now is that a general right to borrow money implies the power to mortgage all corporate property except franchises, unless restrained by express prohibition in the act of incorporation, or by some general statute." Green's Brice's Ultra Vires, (2d Ed.) 223, 224.

In the late case of *Philadelphia & R. R. Co.* v. *Stickler*, 21 Amer.

Law Reg. 713, the supreme court of Pennsylvania considered the question, and PAXON, J., delivering the opinion of the court, said:

"So far as the mere borrowing of money is concerned it is not necessary to look into the charter of the company for a grant of express powers. It exists by necessary implication. * * * The reason is plain. Such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect."

In *Platt* v. *Union Pac. R. Co.* 99 U. S. 48–56, Mr. Justice STRONG, speaking for the court, says:

"Railroad corporations are not usually empowered to hold lands other than those needed for roadways and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads the authority must include the ordinary incidents of ownership—*the right to sell or to mortgage.*"

The right of mortgaging follows as a necessary incident to the right of managing the business of a corporation, according to the usual methods of business men. The right of a corporation to mortgage its franchises, or the property which is essential to enable it to perform its functions, is generally denied by the authorities. But does the reason upon which this denial rests have any application to a case like the present? The foundation of the doctrine is that such a mortgage tends to defeat the purposes for which the corporation was chartered, and the implied undertaking of those who obtain the charter, to construct and maintain the public work, and exercise the franchises for the public benefit. Some judicial opinion is found to the effect that there is no good reason for denying the right to make such a mortgage without legislative consent, because the transfer of the franchise to new hands through a foreclosure is, in fact, a change no greater than may take place within the original corporation, and the public interests are as safe in such new hands as they were in those of the original corporators. *Shepley* v. *Atlantic & St. L. R. R. Co.* 55 Me. 395–407; *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 59 Me. 9–23; *Miller* v. *Rutland & W. R. Co.* 36 Vt. 452–492. Here the mortgage was executed to enable the corporation to resume the exercise of its charter powers, and fulfill the purposes for which it was originally created. No precedent has been found denying to a corporation the power to execute a mortgage of everything it acquires by a purchase, when the mortgage is a condition of making the purchase; and there seems to be no reason, in a case like the present, for denying the power when the purchase of the mortgagor includes the franchise and the whole property of the corporation.

Section 9 of the charter is not a restriction upon the implied power of the corporation to incur such obligations as are necessary to enable it to carry on its business. It is a provision which would seem to be intended to enlarge rather than to restrict the power of the cor-

poration in this regard. Its purpose is to authorize an increase of capital to an extent commensurate with the necessities of the corporation in any of the modes usually adopted by corporations for raising money—a provision which was necessary in view of section 4 of the charter, which limited the amount of increase. As a corporation has no implied authority to alter the amount of its capital stock when the charter has definitely prescribed the limit, this permission was necessary. The purchase of property by the corporation for cash or on credit is not an increase of its capital.

There is another ground, however, upon which the decision of the case may rest more satisfactorily. Assuming that the complainant transcended its charter powers in creating the mortgage bonds in question, it cannot be permitted to retain the benefits of its purchase, and at the same time repudiate its liability for the purchase price. The rule is thus stated by a recent commentator:

"The law founded on public policy requires that a contract made by a corporation in excess of its chartered powers be voidable by either party while a rescission can be effected without injustice. But after a contract of this character has been performed by either of the parties the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform on his side." Morawetz, Corp. § 100.

It is to be observed that in the present case there is no express statutory or charter prohibition upon the corporation to purchase the property or mortgage it for the purchase money. At most, its acts were *ultra vires*, because outside the restricted permission of the charter. It is not necessary, therefore, to consider the distinction made by some of the adjudications between the two classes of cases. *Hitchcock* v. *Galveston*, 96 U. S. 341. The decided weight of modern authority favors the conclusion that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits. The question has frequently been considered in cases where a corporation, suing to recover upon a contract which has been performed on its side, is met with the defense that the contract was *ultra vires*, or prohibited by the organic law of the corporation. *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Oil Creek & A. R. Co.* v. *Penn. Transp. Co.* 83 Pa. St. 160; *Bly* v. *Second Nat. Bank*, 79 Pa. St. 453; *Gold Mining Co.* v. *Nat. Bank*, 96 U. S. 640; *Nat. Bank* v. *Matthews*, 98 U. S. 621. The latter case is a forcible illustration of the rule generally adopted. There a national banking association was proceeding to enforce a deed of trust given to secure a loan on real estate made by the association in contravention of section 5136, Rev. St., prohibiting by implication such an association from loaning on real estate, and the maker of the trust deed sought to enjoin the proceeding upon that ground. The court, speaking through Mr. Justice SWAYNE, cite with approval Sedg. St. & Const. Law, 73, in which the author states that the party who has had the benefit of the agreement will not be permitted to question its validity when the ques-

tion is one of power conferred by a charter. Another class of cases is where the corporation itself attempts to set up its own want of power, in order to defeat an agreement or transaction which is an executed one as to the other party, and from which the corporation has derived all that it was entitled to. Such cases were *Parish* v. *Wheeler*, 22 N. Y. 494; *Bissell* v. *M. S. & N. I. R. Co.* Id. 258; *Hays* v. *Galion Gas Co.* 29 Ohio St. 330–340; *Attleborough Bank* v. *Rogers*, 125 Mass. 339; *McCluer* v. *Manchester R. Co.* 13 Gray, 124; *Bradley* v. *Ballard*, 55 Ill. 418; *Rutland & B. R. Co.* v. *Proctor*, 29 Vt. 93. In the first of these cases the court say:

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail.

The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligations to its creditors without offering to return the property it acquired by its unauthorized contract with them. The fundamental maxim is that he who seeks equity must do equity. Every stockholder of the corporation when he acquired his stock took it with notice explicitly embodied in his certificate that his interest as a stockholder was subordinate to the rights of the holders of the mortgage bonds. It is now contended that if there is any obligation on the part of the corporation to pay for the property it purchased, it is not to pay what it agreed to, but to pay a less consideration, because the property was not worth the price agreed to be paid. The court will not compel the bondholders to enter upon any such inquiry. They are entitled to set their own value on their own property. When the complainant offers to reconvey the property in consideration of which it created its mortgage bonds it will have taken the first step towards reaching a position which may entitle it to be heard. It may be said, in conclusion, that there would be no difficulty, on well recognized principles, in protecting the bondholders against the destruction of their claims upon the theory of a vendor's lien for the purchase money. The taking of a mortgage by their trustees, so far from evidencing an intention to waive the lien, is conclusive evidence to the contrary

The bill is dismissed, with costs.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY *v.* GUENTHER, Trustee, etc.

(*Circuit Court, E. D. Tennessee.* February 18, 1884.)

1. AUTHORITY OF TAX COLLECTOR.
   A tax collector has no authority to compromise a claim against a tax-payer.
2. TAXATION—UNCONSTITUTIONAL ASSESSMENT—ESTOPPEL.
   In Tennessee, when taxes have been assessed and collected under an unconstitutional statute, the municipality receiving them is not estopped by such receipt from disputing the correctness of the valuation and making a reassessment.
3. SAME—ASSESSMENT BY COLLECTOR—RAILROAD PROPERTY.
   The statute of Tennessee empowering collectors of taxes to assess property which, by mistake, has escaped assessment in regular course, applies to the property of railroads as well as to that of private individuals.
4. SAME—UNEQUAL VALUATIONS—VALIDITY OF ASSESSMENT.
   An exaggerated valuation intentionally put upon a particular class of property renders unconstitutional a tax imposed in accordance therewith; but the tax-payer may be required to pay the amount justly due, without the formality of a new assessment.
5. VALUE OF RAILROAD PROPERTY.
   The value of railroad property is to be determined largely by reference to present and prospective profits, and not by the cost of construction alone.

In Equity.

C. D. McGuffy and *Thornburgh & Andrews*, for complainants.

James Sevier and *Luckey & Yoe*, for respondent.

KEY, J. Complainants own a railroad extending from Cincinnati, Ohio, to Chattanooga, Tennessee. This line of road passes through Roane county, Tennessee, for the distance of 15 miles and a half. An act of the legislature of Tennessee, passed March 24, 1875, p. 100, provides for a board of railroad tax assessors, who are to assess the taxable value of the railroad property of the state, and how the same is to be apportioned to the different counties through which these roads run. Under this statute the complainants were assessed for and on behalf of the county of Roane the sum of $1,235.17 for the year 1881, which assessments were paid. At the September term, 1881, of the supreme court of Tennessee, it was decided that the mode of assessment provided by the act of 1875 was unconstitutional. *Chattanooga* v. *Railroad Co.* 7 Lea, 561. On February 15, 1882, the respondent issued a citation or notice to complainants reciting that the assessments under the act of 1875 were unconstitutional, and that the taxes paid for the years 1880 and 1881 were paid upon an undervaluation, and notifying complainants to appear for the purpose of making a proper assessment. Complainants did not appear, and respondent proceeded to make new assessments, according to which the taxes due the state and Roane county for the year 1880 amounted to $5,504.79, and for the year 1881, $5,566.68. Complainants appealed from this assessment to the chairman of the county court of

Roane county, who reduced the assessment somewhat, but not very considerably.

The bill in this case is filed to enjoin the collection of the taxes under the last assessment upon several grounds. It is insisted that the payment of the taxes assessed originally by the board of commissioners was a settlement and compromise in respect to these taxes, because respondent insisted upon their payment, and complainants objected to the validity of at least a portion of the tax. It appears from the receipts executed for the taxes that complainants paid them under protest. As the law provides that taxes illegally assessed may be recovered back by the tax-payer, if paid under protest, these transactions, upon their face, could hardly be regarded as a compromise. But this aside, the respondent, as the trustee and tax collector of Roane county, had no authority to compromise with complainants in this respect. He was bound to collect taxes as assessed. It is further insisted that as the agents of the state had assessed taxes against complainants under the forms and terms of the law of the legislature, and the county of Roane had recognized its action by collecting and appropriating the taxes under the assessments, the county of Roane is estopped from denying the validity of the first valuation, and in consequence the assessments in controversy are void. There is much force in this position, and I am not sure but I might concur in this view of the case if the question were an open one. But we are considering laws,—statutes of the state of Tennessee,—and this court is bound by the decisions of the supreme court of the state in regard to the construction of the statutes thereof, provided no federal or constitutional right is invaded. The supreme court of Tennessee, in the decision already referred to, (*Chattanooga* v. *Railroad Co.* 7 Lea, 563,) says:

"We may assume in this case that if the position of the plaintiff is correct, that the assessment by the board of assessors for railroads is unconstitutional as to the property owned by the company in the city of Chattanooga, then there has been no assessment at all, and the property may well be assessed for taxation, and the railroad company be compelled to pay the taxes thus assessed."

In that case, as in the one under consideration, the railroad company had paid the taxes for the years 1877, 1878, and 1879, and tendered the sum due for 1880, according to the assessment and valuation made by the state railroad assessors, as provided for by the acts of the legislature of 1875 and 1877, and the court held that the tax as assessed by the board of tax assessors for railroads was unconstitutional,—was void for that reason; so that, according to the paragraph already quoted, "there had been no assessment at all, and the property may be well assessed for taxation, and the railroad company be compelled to pay the taxes thus assessed." The whole scope of this decision is opposed to the idea of the estoppel claimed by complainants.

Complainants say that the assessments for taxes made in 1882 for the taxes of 1880 and 1881 are void for the want of authority in the respondent or the county court to make them. The general tax law of April 7, 1881, p. 251, contains a provision that if it should come to the knowledge of the chairman, or judge or clerk of the county court, the county trustee, sheriff, or tax collector of any county, that any person, company, firm, or corporation had not been assessed as contemplated by the act, or had been assessed on an inadequate amount, it should be the duty of such officer to cite such person, company, firm, or corporation, or their agent or attorney, to appear before him, so that an assessment may be made, and such officer was authorized to make the proper assessment. A similar provision is found in the act of 1873, p. 175. The act of March 12, 1879, p. 93, says "that all collectors of taxes are hereby made assessors to assess all property which, by mistake of law or facts, has not been assessed; and it is hereby made the duty of such collectors in all cases whereby property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same and proceed to collect the taxes. It is insisted that railroad property was not in the contemplation of the legislature when these acts were passed, and is not embraced in them. That railroads were taxed under other acts, and assessed through different agencies and instrumentalities from those assessing other property, is true. It has not been shown that any special provisions of law have been made for railroads which might have escaped taxation, and the terms of the acts of 1873, 1879, and 1881 are sufficiently general to embrace railroads in their scope and phraseology. When we add to these considerations the authority of the case of *Chattanooga* v. *Railroad Co.*, *supra*, we conclude that the tax collector was clothed with authority in the premises. The subsequent action of the county court did not invalidate the assessment, for the chairman thereof might have assessed the property as well as the tax collector for the year 1881, and the tax collector and chairman might consult with the members of the county court, or with other persons, as to the valuation of the property. No formalities or methods are prescribed by which he is to be governed in arriving at his conclusions in regard to such assessments as he may make.

It is said by complainants that the taxes for the year 1880 cannot be collected because the respondent was not installed into office until September of that year; that the taxes for that year were assessed in June, according to the terms of the law; and the case of *Otis* v. *Boyd*, 8 Lea, 679, is relied upon as authority for this position. That case does decide that the tax collector cannot assess and collect taxes upon property which has not been assessed for any year previous to the current year in which he entered upon his office. But it seems to me that the reasoning in that case does not sustain the position of complainants. Under the terms of the law, the tax assessor has no power to assess except in cases in which there has been no as-

sessment, or in which there has been an inadequate one. He is compelled to wait until after the regular assessors have made their reports and returns before he can ascertain whether property has been omitted, or inadequately taxed. If he may wait a week, he may a month, or six months, or more, so that he act thereon during his term. The nature of his duties in this respect leads to this conclusion from the necessity of the case. It may be said, in regard to most of the grounds assumed by complainants in opposition to the payment of these taxes, that it is not denied that the property of complainant is subject to a tax for the benefit of and on behalf of Roane county, and that it is the duty of complainants to pay such tax. It is the invalidity of the tax from the method of its assessment which is relied upon. In such cases all doubts are resolved in favor of the tax. The defense must make its right to resist the collection of the tax clear and manifest before it can have relief.

Complainants insist, however, that though all the foregoing reasons for their relief fail, yet the taxes assessed against them violate the constitution of the state of Tennessee in this: That the tax against complainants is unjust and unequal, and railroad property is valued at a higher rate than property of other character; that this inequality is produced because railroad property, as a class or species, is valued for taxation at a higher rate according to its value than other kinds or species of property in Roane county; that this higher valuation is made and arrived at by establishing a different basis of valuation for railroad property from that used in valuing other kinds of property, and that it is done intentionally, and for the purpose of discriminating against railroads. Mere inequalities in taxation will not vitiate a tax if they be accidental and unintentional. These must occur under any system of assessment, and especially under that in force in this state, in which every civil district and ward has its own assessor. There will of necessity be many instances in which property will be assessed at more than its value, and more, perhaps, in which it will be assessed at less than its value. These errors and discrepancies will not vitiate the tax; they are inevitable. But a different result follows should a standard of valuation be used for one species of property which is different from that used for another, if the end reached necessarily is the taxation of the one species higher than the other. The constitution of Tennessee establishes that "all property shall be taxed according to its value; that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." Article 2, § 28. With something of iteration the principle is emphasized that taxation shall be equal and uniform. If unjust discrimination and difference is made, the tax so imposed may be restrained and its collection pre-

vented. *Pelton* v. *Nat. Bank*, 101 U. S. 143; *Cummings* v. *Nat. Bank*, Id. 153; *Chattanooga* v. *Railroad Co. supra.*

The record in the case under consideration does not show very clearly what particular method of valuation was followed in assessing the value of railroad property, or that of other property, but it does appear that real estate was, as a rule, taxed upon a valuation less than its real value. The respondent in his deposition says, at a rate less by 10 per centum than its real value. But from the other proof in the cause, and from what a court may judicially know of the history of tax assessments in this region of the country, we think that lands in Roane county were taxed at a valuation on the average of one-fourth below their real value. It is quite apparent that the property of complainants was assessed at a valuation much above its real value. It does not distinctly appear what rule was adopted in the valuation of lands, but it is clear that it was not intended to assess them at their real value, but below it; nor were they assessed, as a rule, according to their cost. It is equally clear that it was intended to assess railroad property at its full value, and that in doing so there was fixed upon it an exaggerated and unreasonable valuation. This difference was not accidental. It follows from this intentional inequality that the complainants are entitled to relief, but how far and to what extent is a question of interest. Shall the entire tax be declared illegal and void because of the illegality of the assessment, or shall only the collection of so much of it as may be in excess of a reasonable and proper tax be restrained? As already stated, all presumptions and intendments should be in favor of the tax, in cases of doubt. If the entire tax were declared void, it is probable that under the ruling of the supreme court of the state in the case of *Otis* v. *Boyd*, 8 Lea, 679, valid assessments could not now be made for the taxes of the years 1880 and 1881. The supreme court of the United States, in the case of *Cummings* v. *Nat. Bank*, 101 U. S. 153, held that the tax in that case was unconstitutional because the rule of equality in taxation had been disregarded, and that the appropriate mode of relief in such cases is, upon payment of the amount of tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess. The same doctrine is again asserted in *Nat. Bank* v. *Kimball*, 103 U. S. 733, and in *Sup'rs* v. *Stanley*, 105 U. S. 305. I conclude, therefore, that so much of the tax as is reasonable and just should be paid by the complainants, and the excess enjoined.

Then, what is a reasonable valuation of complainants' property as compared with that fixed upon other property for taxation? For this litigation should be so conducted that such taxes as are proper may be paid at the earliest moment practicable, and the case should now be finally determined if the record is in such a state of completeness as to allow it. The value of a railroad, especially a new one, is a problem of no easy solution. It is quite evident that the respondent assessed the value of that part of this railroad in Roane county

mainly from the cost of its construction. In his answer he says that "he believes that the *cost* and *value* of the road lying and situate in Roane county was and is above the average of said road. There are several tunnels and bridges in said county, and *cost*, as he is informed, about as follows: Emory river bridge, $100,000; White's Creek bridge, $20,000; Kegan's tunnel, $250,000," etc. To make the cost of a thing, especially a railroad, the measure of its value, or even a chief constituent thereof, is most fallacious. A railroad that costs $20,000 per mile is worth as much as one that costs $50,000 per mile, if its business and net earnings be as great or greater. Indeed, it is more valuable, in one sense, as it makes a better return on the investment. The expenses of keeping a road in repair which runs through hills and mountains, and over rivers, are greater, because it requires greater labor to keep its tunnels, bridges, and roadbed in repair, than it does in case of a road over a level country. There must be a greater number of watchmen at the bridges, tunnels, curves, and cuts and fills. The grades are heavier and running expenses more. Sometimes, indeed often, property may cost much and be worth very little, or cost little and be of great worth. Its cost may be looked to as an element entering into its value, but not as its sole or even chief element. The earnings of a railroad, present and prospective, must form a most important ingredient in the estimation of its value. What amount of business has it done, is it doing, and what is it likely to do? What through freights, local freights, etc., does it carry and will it carry? Many things must be considered in arriving at its value. There are 15½ miles of this road in Roane county. One of the engineers under whose supervision it was constructed shows that the cost of this part of the road was about $40-000 per mile. It has been assessed at that rate for the year 1880, and at $44,000 for the year 1881. The officers of the road, who predicate their estimate of value solely upon the net earnings of the road for these two years as compared with its cost, fix the value of the same part of the road at about $16,000 per mile for 1880, and nearly $20,000 for 1881. We know, as an historical fact, that railroads in this section of the country have never proved a profitable investment to those whose capital built them, even in the localities most favorable for their construction and business. We know that this road runs, for a great part of its way, through a mountainous and rugged country, and was built at a heavy outlay. The country through which it runs is, much of it, wild and undeveloped, and what business may grow up along its line is problematical. Taking all the known and proven facts into consideration, I am of the opinion that about 50 per cent. of the original cost would be a fair valuation for 1880, and that about $2,000 per mile should be added to it for 1881. I direct, therefore, that a valuation of $20,000 per mile be assessed for 1880, and $22,000 per mile for 1881. I think this will be a fair and full assessment upon this property as compared with the rate at

which other property is valued for taxation by the county, and is more likely to be above than below the real value. It is manifest that the rolling stock and other personal property which were assessed for taxes against complainants did not belong to complainants, but to their lessees, and therefore complainants should not be taxed on its account.

The next question raised by complainants is that the act of the general assembly of Tennessee of 1879, p. 282, authorized a county tax of not exceeding 30 cents on the hundred dollars, but that the county court of Roane county, after levying a tax of 30 cents, levied a special tax of 10 cents additional. It is insisted that this special tax of 10 cents is void. This tax was levied, it is said, to repair county buildings. Complainants' position is sustained by the case of *Railroad* v. *Franklin Co.* 5 Lea, 711, and *Railroad* v. *Marion Co.* 7 Lea, 664. Special authority must be shown to have been conferred by law on the county court to levy this special tax before it could legally impose it. The repair of the county buildings is an ordinary county purpose, and the limit of taxation for such purposes was 30 cents. A school tax of 25 cents on the hundred dollars was levied for 1880. The foregoing case of *Railroad* v. *Franklin Co.* decided that a tax of 20 cents on the hundred dollars was the limit of the school tax which the legislature authorized counties to impose for the year 1880. Therefore, to the extent of five cents upon the hundred dollars, the school tax levied by the county of Roane was illegal. The collection of the special tax aforesaid, and of the excess of the school tax herein mentioned, will be enjoined as against complainants. The sums paid by complainants as taxes for the years 1880 and 1881 will be credited on the amounts due from them for the respective years, as ascertained and declared by the decree in this case as herein directed. Interest will be charged upon the balance due from complainants from the date of the filing of the bill in this cause. The costs of the cause will be paid by respondent. No account need be taken, as the amounts due under the decree can be readily arrived at by a simple calculation.

PHILADELPHIA & R. R. CO. *v.* POLLOCK.[1]

(*Circuit Court, E. D. Pennsylvania.* February 11, 1884.)

INTERNAL REVENUE—SECTION 19, ACT OF FEBRUARY 8, 1875, (18 ST. 311,)—NOTES USED FOR CIRCULATION—PROMISSORY NOTES—WAGES CERTIFICATES.

The nineteenth section of the act of Feburary 8, 1875, (18 St. 311,) providing that "every association, other than national bank associations, and every corporation, * * * shall pay a tax of ten per centum on the amount of their own notes *used for circulation* and paid out by them," does not apply to certifi-

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

cates of indebtedness, bearing interest and payable to bearer on a certain day therein named, issued in denominations of five and ten dollars each, and paid out by a railroad company to its employes for wages, and providing that they would be received by the company at or before maturity for any debts due the company. These notes or certificates, having been issued only to the employes of the company on account of wages, and when paid by the company having been canceled and not reissued, were not "used for circulation," and that they were used afterwards by those to whom they were issued to discharge their debts to others or to purchase subsistence for themselves, does not affect the character imposed upon them by the company.

Hearing on Bill, Answer, and Proofs.

This was a bill to enjoin Pollock, collector of internal revenue, and his deputy from proceeding to enforce payment of a tax levied under the nineteenth section of the act of congress of February 8, 1875, (18 St. 311,) providing "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a *tax* of *ten per centum* on the amount of their own notes *used for circulation* and paid out by them." From the pleading and evidence it appeared that the Philadelphia & Reading Railroad Company issued to its employes for wages in the years 1878 and 1879 certain instruments, in the following form:

"THE PHILADELPHIA & READING RAILROAD COMPANY.

"*No.* ——. *Wages Certificate.*

"PHILADELPHIA, December —, 1878.

"The Philadelphia & Reading Railroad Company promises to pay to the bearer hereof the sum of ——— dollars, on the ——— day of ———, 1879, with interest from date, without defalcation, for value received. This note is issued for wages due by the Philadelphia & Reading Railroad Company, and will be received either before or at its maturity for the amounts due thereon in payment of freight and toll bills of the Philadelphia & Reading Railroad Company, for coal bills of the Philadelphia & Reading Coal & Iron Company, or any other debts due to either of the said companies.

"F. B. GOWEN, President.

"S BRADFORD, Treasurer."

These certificates were printed on tinted paper, embellished with a vignette, and were somewhat narrower and longer in size than national bank notes. For convenience they were made in denominations of five and ten dollars each, and were issued to an amount of about $4,800,000. They were paid only to the employes of the company for wages, and when returned to the company, before maturity, in payment of freights or tolls, and when paid by the company at maturity, were canceled and not reissued. There was evidence that in many cases these notes had been used, by the persons to whom they had been issued, in payment for goods purchased from store-keepers and dealers, and that wholesale dealers had received them in payment of accounts due by such store-keepers, and that they had been largely dealt in by stock brokers. There was also evidence that they had never been treated as circulation in the localities in which

they were thus used, and that they could not be mistaken for bank notes.

James E. Gowen, for complainants.

The certificates are simply interest-bearing promissory notes, payable at a certain time, issued for existing debts, and were never intended or used as "circulation." The extent of the issue is of no importance. The denominations used were to facilitate the payment of thousands of officers and employes, whose salaries were largely in arrear. They were issued only to employes for actual debts, and when returned to the company before or after maturity were canceled and not reissued. Had the purpose been to use them as circulation they would have been reissued, and in such case a tax could have been claimed only on the average monthly amount in circulation. They were dealt in by brokers and others as any other security, and their credit was fixed by their quotable value at the stock exchange. They resemble warrants issued by municipalities. The distinction between notes issued in payment of existing debts and notes issued for circulation has always been recognized. *Craig* v. *Missouri*, 4 Pet. 410; *Atty. Gen.* v. *Ins. Co.* 9 Paige, Ch. 470; *Dively* v. *City of Cedar Falls*, 27 Iowa, 227; *Mullarky* v. *Town of Cedar Falls*, 19 Iowa, 24. Obligations which circulate as money are payable on demand. 14 Abb. Pr. 275; Morse, Banks, 458. The question, however, is concluded by *U. S.* v. *Wilson*, 106 U. S. 620, [S. C. 2 Sup. Ct. Rep. 85,] which was a much stronger case for the government than the present. The committee on ways and means of the house of representatives, and the committee on finance of the senate, at Washington, have both reported that these certificates are not taxable as circulation under the act of 1875.

I. K. Valentine, U. S. Dist. Atty., for respondents.

These notes are within the prohibition of the act. *Thomas* v. *Richmond*, 12 Wall. 353. The name given these notes by the company is not essential. Their nature is to be determined by the instruments themselves, their character and purpose. The agreement to receive them for debts due the company is calculated to facilitate their circulation. In fact they did circulate. It is no answer to say they were not reissued; Bank of England notes are not reissued. These are in all respects current notes used for circulation, and taxable as such. Webst. Dict. "Note;" Morse, Banks, 438; *Craig* v. *Missouri*, 4 Pet. 410; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257. The law is so settled in Pennsylvania. *Hazleton Coal Co.* v. *Megargel*, 4 Barr, 324. Also in New York. *Ins. Co.* v. *Cadwell*, 3 Wend. 302; *Leavitt* v. *Yates*, 4 Edw. Ch. 134. *U. S.* v. *Wilson*, *supra*, arose under a different act, and in that case the notes had been issued by the receiver under a decree of a court and were sold by the company.

McKennan, J. We are of opinion that this case is ruled by *U. S.* v. *Wilson*, 106 U. S. 620, [2 Sup. Ct. Rep. 85.] In that case it was sought to subject to taxation certificates of indebtedness issued

by a railroad company, and by a receiver appointed to take charge of it, as notes or obligations, within the meaning of section 3408 of the Revised Statutes, "calculated, or intended to circulate, or to be used as money," and the court held that they were not "circulation" and so not taxable. The tax claimed in this case was imposed under the nineteenth section of the act of congress of February 8, 1875, which provides "that every person, firm, association other than national bank associations, and every corporation, state bank, or state banking association shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them." The notes issued by the complainants here were in the form of promises to pay to bearer a round sum at a future day, with interest, and were upon their face stated to be for wages due by the Philadelphia & Reading Railroad Company, and were receivable before or at maturity in payment of freight and toll bills of the Philadelphia & Reading Railroad Company and for coal bills of the Philadelphia & Reading Coal & Iron Company, or any other debts due to either of said companies. These notes were only issued to the employes of the railroad company on account of wages due them, and when paid by the company were canceled and not reissued. They were not, therefore, "used for circulation" by the company, but only as evidences of the company's indebtedness to its employes for wages. That they were used afterwards by those to whom they were issued to discharge their debts to others, or to purchase subsistence for themselves, is, in our judgment, indecisive in determining the character of these instruments, because that is to be imposed upon them by the company by *using them as circulation*, and paying them out as such. This, as already stated, was not done. What is there, then, to put them in the category of "circulation?" This is claimed to result from the form in which they were issued. But this is fully answered by the supreme court in *U. S.* v. *Wilson*. In every essential particular the certificates issued there and those in question here are remarkably alike. The former were certificates of indebtedness, good for round sums, payable to bearer at a future day, with interest, and one-fourth of their face value was receivable before maturity for freight and debts due the company, and were paid out again at their face value, with interest. Under these circumstances the supreme court held that it was not satisfied that these certificates "were calculated or intended to circulate or be used as money." Now, in view of this decision, we cannot hold that certificates of similar form, used by the railroad company, not for circulation, but as evidence of wages due to its employes, are within the scope and meaning of the act of congress, and so subject to the tax imposed by it.

The first prayer of the bill must therefore be granted.

BUTLER, J., concurred.

MUSKEGON NAT. BANK v. NORTHWESTERN MUT. LIFE INS. CO.[1]

(*Circuit Court, S. D. New York.* February 9, 1884.)

NEW TRIAL—VERDICT AGAINST EVIDENCE.

A verdict will not be set aside merely because the court is of the opinion that a contrary verdict should have been rendered, unless it is clearly and palpably against evidence.

Motion for New Trial.

John E. Parsons, for plaintiff.

Edward Salmon, for defendant.

SHIPMAN, J. This is a motion by the defendant for a new trial of an action upon a policy of life insurance, upon the ground that the verdict for the plaintiff was against the weight of the evidence. The defendant relied upon alleged false representations in the application in regard to the insured's habits of temperance and upon a breach of his promissory warranty against intemperance. I am not dissatisfied with the finding of the jury in regard to the alleged false representations in the application. When the application was made, the insured had been confessedly of temperate habits for over nine months, and had thus shown himself capable of self-control. I differ from the jury in regard to his habits after the policy was issued, because I am of opinion from the evidence that his habit of "spreeing," or indulging in occasional debauches, became more confirmed, frequent, and certain until his bondage to intemperance was established; and that the excessive use of liquor impaired his health and shortened his life. The uncontradicted facts that in April, 1881, while he was recovering from a spree, he employed a colored attendant for a fortnight to accompany him everywhere and guard him against the use of liquor, and that, notwithstanding, he occasionally became drunk, are strong proof to my mind that he had reached a point where he was conscious that he was powerless to withstand his periodical thirst for liquor. But, in the intervals between his sprees, it is plain that he was active, prompt, and energetic, and that he did not have the appearance of an intemperate man, and, from the fact that there was no indication of liquor about his person, I think that he did not drink during these intervals. The jury found that the insured was not "habitually intemperate, or so far intemperate as to impair health," apparently from the fact that his excessive use of liquor was occasional, and that he was abstinent during the periods which intervened between his attacks of intemperance. I can see that there was enough evidence in favor of the health and apparent temperance of Comstock, when he was engaged in business, to induce an honest belief that he had not yielded to intemperate habits, and that, therefore, the accounts which were given by persons who had seen him when he was intoxicated were exaggerated. The testimony of Messrs. Barrow, Par-

[1] Affirmed. See 7 Sup. Ct. Rep. 1221.

sons, Haines, and Goodsell shows that in their occasional or frequent interviews with Comstock in the business part of the city, and during business hours, they did not perceive that he ever drank liquor, and, I think, it is true that if he had drank without interruption his appearance and breath would have shown it. So that, while I think that the verdict should have been for the defendant, I cannot say that it was so much against the weight of evidence as to demand or justify the granting a new trial.

The jury gave more importance to the testimony for the plaintiff than I thought it deserved. While it was true, it did not seem to me to be convincing. It apparently seemed to the jury to be weighty, but new trials for verdicts against evidence should not be granted merely because the court thinks that a mistake was made. The mistake should be clear and palpable.

The motion is denied.

LAPP and others *v.* VAN NORMAN and another.

(*Circuit Court, D. Minnesota.* February 15, 1884.)

1. VOLUNTARY ASSIGNMENT—POSSESSION OF ASSIGNEE—ATTACHMENT.
   Property in the possession of an assignee under a voluntary assignment, purporting to be made by the debtor in pursuance of the statute of Minnesota, approved March, 1881, is not *in custodia legis*, so as to exempt it from seizure by a writ of attachment issued out of the circuit court of the United States.
2. SAME—MOTION TO DISSOLVE ATTACHMENT AND TURN OVER PROPERTY TO ASSIGNEE.
   A motion to dissolve an attachment and order the property to be turned over to the assignee by the marshal, denied upon the facts stated in the opinion.

The defendants made an assignment to one Bennett, in pursuance of the provisions of section 1 of the insolvency law of the state of Minnesota, approved March 7, 1881. While the debtor's property in store was in the possession of a deputy sheriff of Hennepin county, Minnesota, the United States marshal attempted to take the same by virtue of a writ of attachment issued out of the United States circuit court for this district. The deputy sheriff, after this attempted levy, on demand of the assignee, surrendered the possession of the property to him, which was immediately taken by the marshal, and the assignee ejected from the building. A motion is made by the assignee to intervene in this suit, and to dissolve the writ of attachment issued out of this court.

Merrick & Merrick, for Bennett, assignee.

O'Brien & Wilson, contra.

NELSON, J. It is not necessary to decide on this motion whether the assignment is fraudulent on its face. True, the assignors have expressly reserved an interest to themselves, and authorized the assignee to pay over to them any surplus that may remain, to the ex-

clusion of those creditors who do not file a release and participate in the assets of the estates. It is doubtful whether such a provision is in harmony with the law, but in the view taken by the court this question will not be considered. The affidavits introduced by the assignee at the hearing show that the sheriff of Hennepin county was in possession of and legally controlled the store and stock, when a demand was made by virtue of the assignment and the possession of the property surrendered by the deputy. The United States marshal of this district had attempted to make a levy after the sheriff had taken possession, but he could not rightfully interfere with that officer, and there was no voluntary surrender to him of the property seized. It also fairly appears by the affidavits of Bennett, the assignee, A. B. Van Norman, Peterson, deputy sheriff, and A. N. Merrick, that after the sheriff or his deputy had surrendered the possession on demand of the assignee and released the property, the United States marshal immediately took the same by virtue of a writ of attachment issued out of the circuit court of the United States for the district of Minnesota. It is by virtue of this seizure that the marshal holds the property. On this statement of the facts I shall not decide on this motion who has the better title and right to the possession of the property taken.

Mather v. *Nesbit*, 13 FED REP. 872, has no application to the facts here. The writ of attachment properly issued in this suit against the debtor, and if the marshal has seized the property which belonged to Bennett, he is certainly liable in an action of trespass for the damages thereby sustained.

It is claimed that the property in the possession of the assignee is *in custodia legis* and not subject to seizure by writ of attachment. I do not agree to this. The statute of Minnesota, March, 1881, did not validate all assignments purporting to be made in pursuance thereof, and forbid a judicial investigation; and while I concede that an attachment would not hold the property to satisfy a judgment against the defendants unless the assignment is fraudulent and void against the plaintiffs, yet under the law the property in the possession of the assignee is not *in custodia legis* so as to exempt it from seizure. This instrument is the source of title in the assignee, and its execution is the voluntary act of the debtors, and not a proceeding instituted by law against them. The object of section 1, as said by the court in Rhode Island, where a similar section is contained in the insolvent law of that state,—"is to take advantage of the displeasure which a debtor naturally feels when his property is attached, or to hold out an inducement to him to make an assignment." 12 R. I. 460. The defendants have joined issue in the action brought by the plaintiffs, and if the assignee desires to defend he can become a party thereto.

The motion to dissolve the attachment, however, is denied and it is so ordered.

OELBERMAN and others *v.* MERRITT.[1]

(Circuit Court, S. D. New York. February, 1884.)

CUSTOMS DUTIES—APPRAISER NOT ALLOWED TO IMPEACH HIS OWN VALUATION.

A merchant appraiser appointed under section 2930 of the Revised Statutes is a *quasi* judicial officer, and will not be permitted to testify to his own neglect of duty. To permit the awards of the important tribunal, which congress has established to appraise imported merchandise, to be overthrown on the assertion of one of its members made years afterwards, is clearly against public policy. It is putting a premium upon incompetency, inaccuracy, and fraud.

Motion for a New Trial.

D. H. Chamberlain and *Eugene H. Lewis*, for plaintiffs.

Elihu Root, U. S. Atty., and *Samuel B. Clarke*, Asst. U. S. Atty., for defendant.

Before SHIPMAN and COXE, JJ.

COXE, J. On the twenty-ninth day of June, 1879, the plaintiffs imported from Germany 34 cases of silk and cotton velvet, in two invoices, containing 10 and 24 cases respectively. The collector designated two cases from the former and three from the latter invoice, and they were sent to the public store for examination. The appraiser advanced the entered value more than 10 per cent. The plaintiffs, thereupon, gave notice of dissatisfaction under section 2930 of the Revised Statutes. The collector selected a merchant appraiser to be associated with one of the general appraisers for the purpose of instituting a re-examination of the merchandise as provided by law. Before entering upon his duties the merchant appraiser took the following oath:

"I, the undersigned, appointed by the collector of the district of New York to appraise a lot of silk and cotton velvets * * * do hereby solemnly swear, diligently and faithfully to examine and inspect said lot of silk and cotton velvets, and truly to report, to the best of my knowledge and belief, the actual market value, or wholesale price thereof, at the period of the exportation of the same to the United States in the principal markets of the country from which the same was exported into the United States, in conformity with the provisions of the several acts of congress providing for and regulating the appraisement of imported merchandise, so help me God."

Subsequently he made two reports, in which, after having stated that he had examined the velvets with the general appraiser, he certified that the actual market value or wholesale price of the goods was correctly stated in the itemized schedules which followed. The aggregate of his advance over the entered value was 9½ per cent. The general appraiser also made reports advancing the goods 17 3-10 per cent. There being a disagreement, the collector adopted the latter valuation and levied the additional duty and penalty as required by law. The plaintiffs insist that the reappraisal was invalid because the merchant appraiser did not diligently and faithfully inspect the

[1] Reversed. See 8 Sup. Ct. Rep. 151.

goods. The cause was tried at the February Circuit, 1883, and resulted in a verdict for the plaintiffs. The defendant now moves for a new trial. Upon the trial, a former decision by Judge SHIPMAN was relied upon as supporting the proposition that an appraiser might be called to impeach his own award. Although in that case—*Passavant* v. *The Collector*—the merchant appraiser was permitted to testify, the court did not have before it, or attempt to decide the question now presented for consideration. That question is: Was the merchant appraiser a competent witness to prove his own neglect of duty?

It is true that the counsel for the defendant might have made their objections more definite. We are, however, of the opinion that the exceptions to the admission of evidence and to the refusal of the court to direct a verdict fairly entitle them to present this question here. *Randall* v. *B. & O. R. Co.* 3 Sup. Ct. Rep. 322; *Gordon* v. *Butler*, 105 U. S. 553.

Stripped of all disguise the effort, on the part of the plaintiffs, was to induce the merchant appraiser to testify that he had not done what the law required him to do. In this they were partially successful, if they had not been, no question, upon any theory, could have been presented to the jury. In other words the only evidence of which to predicate illegality in the appraisement came from the lips of a man who took an oath that he would act legally, and subsequently certified over his own signature that he had done so. Should this evidence have been received? Appraisers occupy the position of *quasi* judicial officers, they have been aptly described as "legislative referees." *Tappan* v. *U. S.* 2 Mason, 406; *Harris* v. *Robinson*, 4 How. 336. The merchant appraiser is presumed to be, and in fact is, the special representative of the importer, and quite naturally, as was demonstrated by the evidence in this case, is somewhat biased against the government. The examination which he is required to make may take place when he is entirely alone, its extent is largely in his discretion. What he says of it and its sufficiency no one can contradict. The government, if he is permitted to testify, is left remediless and wholly at his mercy.

Thus may the solemn and definitive conclusion of the tribunal to which congress has assigned the duty of placing a value upon imported merchandise, be attacked in a collateral proceeding and swept away by the testimony of a negligent, forgetful or dishonest appraiser. The result, too, is infinitely more disastrous than in ordinary actions where verdicts and decisions are set aside and new trials ordered. No better illustration could be furnished than the verdict in this case. The evidence was overwhelming and hardly disputed that the goods were undervalued. The merchant appraiser admitted this, the inference to be drawn from this testimony is, that, being compelled to advance the value, his sole anxiety was to relieve the importer from the penalty; hence his valuation at 9½ per cent. advance. Notwithstanding this, the government loses the penalty not

only, but also the duty, which upon the proof was clearly due. Manifestly the rules of evidence should not be relaxed to produce a result so inequitable. To permit the awards of this important legislative tribunal to be overthrown upon the assertion of one of its members, made years afterwards is, we think, clearly against public policy. To hold otherwise, would be, in effect, to allow the witness to deny his oath and stultify himself by an impeachment of his own finding,—to contradict a record by speculative and fallible testimony, in short it would set a premium upon incompetency, inaccuracy and fraud. We do not intend to intimate that the evidence in the case at bar establishes more than forgetfulness, or perhaps, carelessness on the part of the merchant appraiser. The mischief is in establishing a rule under which ample opportunity is given for a complete reversal of the aphorism—"Corruption wins not more than honesty."

We have been referred to no case and are quite confident none can be found where this precise question has been decided. The weight of authority upon analogous questions, however, having reference to jurors, referees, arbitrators, and commissioners sustains the position here taken. Every objection to them applies with equal or greater force to an appraiser. What are the arguments against the admissibility of this testimony? It permits, it is said, a solemn record to be attacked by parol evidence, and that too in a collateral proceeding, it permits a witness whose memory is clouded and confused by a thousand intervening events to dispute the rectitude of a finding made when all was fresh and clear before him. It promotes litigation. It encourages bribery, trickery and fraud. These are some of the reasons; and which one of them does not apply to an appraiser? If a judicial officer or a juror may not testify to misbehavior on his part; if appraisers or commissioners under state laws cannot be heard to say that they did not sufficiently view or examine the land alleged to be damaged, if an arbitrator cannot impeach his own award, we fail to find any reason, founded upon authority, why the evidence here should stand.

As the conclusion reached upon this branch of the case necessitates a new trial it will not be necessary to consider the other propositions argued. It may be said, however, in view of all the testimony, and particularly that of the government appraiser, refreshed as it was by stenographic notes taken at the time, showing the nature of the examination and the part taken by the merchant appraiser, that the verdict should be set aside as against the weight of evidence; it being established by a great preponderance of testimony that every requirement of law was carefully obeyed

New trial ordered.

SHIPMAN, J., concurs

ELGIN WATCH CO. *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884.)

CUSTOMS DUTIES—WATCH ENAMEL.

The substance known as "watch enamel" is dutiable under schedule M of section 2504, as "watch material," at 25 per cent. *ad valorem*, and not under schedule B of the same section, at 40 per cent., as "manufactures of glass, or of which glass shall be a component material." Schedule B was intented to cover only manufactured articles of glass, and not the crude material.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. The plaintiff, about November 22, 1882, imported an article which was charged by the inspector of customs a duty of 40 per cent. *ad valorem* under the last paragraph of schedule B, § 2504, as "manufactures of glass, or of which glass shall be a component material." The plaintiff paid the duty so imposed under protest, and brings this suit to recover the excess of such duties, contending that the article in question is dutiable as "watch material," under the last paragraph but one of schedule M, § 2504, at 25 per cent. *ad valorem*. The proof in the case shows that the article in question is known to the trade as "watch enamel," and used only, so far as is disclosed by the evidence, for enameling the faces or dials of watches. The proof also shows that the composition of this commodity is a secret; that the component parts of it are not known in this country; that it is used by being pulverized and made into a paste which is spread upon the copper disk which forms the base of the watch dial, and then baked and polished, so as to bring it to a proper surface; and the proof fails to show that it is practically applied to any other use than for enameling watch dials, although it is suggested that it is adapted to use as an enamel for clock faces, and perhaps might be used for scale columns in thermometers and similar instruments, and for other purposes where a white enamel surface is desirable. I come, therefore, to the conclusion that the article in question was imported by the plaintiff solely for use as enamel for watches, and that this is the only purpose for which it is at present imported by importers and used in this country, and the only use known for it to the trade. The appearance of the article would seem to indicate that it is a vitreous material; at least the fracture would indicate that, and it may have in its composition some of the material out of which glass is made; but it seems very palpable to me that it is not *a manufacture of glass:* it is not even crude or raw glass, and I therefore conclude that it comes clearly within the description of "watch material." It is therefore, in my estimation, "watch material," and not a manufacture of glass. It is plain, I think, that the last paragraph of schedule B,

"manufactures of glass, or of which glass is a component material," was intended to designate some manufactured article of glass, in form for use as such, and not crude or raw glass. It must be an article which was fitted and adapted at the time it was imported for some purpose or use, and did not require further manipulation in order to make it dutiable as a manufacture of glass.

Issue is found for the plaintiff.

CHICAGO TIRE & SPRING WORKS CO. *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884.)

CUSTOMS DUTIES—TIRE BLOOMS—STEEL PARTLY MANUFACTURED.

Held, that certain steel-tire blooms which had gone through several stages in the process of manufacture, were dutiable at 45 per cent. as "articles of steel partially manufactured," and could not be classified as "steel not otherwise provided for," the duty upon which is only 30 per cent.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. This is a suit to recover duties claimed by the plaintiffs to have been illegally charged upon certain steel-tire blooms imported by plaintiff. The inspector of customs classed these blooms under the paragraph of schedule E, § 2504, which reads as follows:

"All manufacturers of steel, or of which steel shall be a component part, not otherwise provided for, forty-five per cent. *ad valorem*. But all articles of steel *partially* manufactured, or of which steel shall be a component, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured."

The plaintiffs insist that they should have been classed under another paragraph of schedule E, as "steel in any form, not otherwise provided for, thirty per cent. *ad valorem*." Payment of the duties demanded was made by plaintiff and appeal taken to the secretary of the treasury, who affirmed the action of the customs officer here. The proof shows that the steel-tire blooms in question are produced by first casting a flat round ingot of steel somewhat in the shape of a cheese, or grindstone with no hole through the center. It is then reheated and hammered so as to reduce its thickness, thereby compacting its grain or fiber; a hole is swaged through its center and it is then hammered on the horn or beak of an anvil, thereby expanding its circumferance and forming a grain or fiber in the circumferential direction, and when intended for locomotive tires the rudiments of a flange are formed or swaged also upon the outer periphery of the circle. In this form these blooms are ready for rolling, and are im-

ported at this stage of development. On arriving in this country they are reheated and placed in the rolling-machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving wheels or car wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe. It seems quite plain to me that when imported these blooms had passed through an important stage in the progress of manufacture into steel tires. They were something more than ingots of steel or plain steel blooms or bars. In the first place, the ingots were cast in a peculiar shape, and the work which had been expended on them to bring them from the ingot stage to tire blooms is shown, by the proof, to have been equal to $10 or $15 per ton, and it was all work for the specific purpose of making them into steel tires and nothing else. The particular use to which they were to be applied was indicated from the first by the shape in which these steel ingots were cast; the work done not only fitted them for this specific use but it unfitted them, in a degree, for any other use, and hence I conclude that these steel-tire blooms were articles of steel partially manufactured. To use these blooms for any other purpose, it would undoubtedly have been necessary to undo much of the work which had been done upon them. I am therefore of opinion that the duty in this case was rightfully charged.

The case of *Downing* v. *Robertson*, unreported, in the Southern district of New York, referred to by complainant's attorney on the trial, involved the duties on plain steel blooms where the ingot had been brought into the shape of planks or slabs by hammering or rolling and from which railroad bars or bar steel could readily be rolled, and at the stage where they could be and were readily adaptable to any other use for which steel was needed. This case, therefore, does not seem to me at all in point for the purpose of settling the question in these cases.

The issue must be found in this case for the defendant.

WILSON and others *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884

CUSTOMS DUTIES—TAFFETA GLOVES.

Taffeta gloves containing over 50 per cent. in value of silk and over 25 per cent. of cotton are subject to a duty of 50 per cent. *ad valorem* under the ninth paragraph of schedule 4.

At Law.

Storck & Schumann, for plaintiffs.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. This is a suit to recover back duties paid by plaintiffs under protest, on three lots of "Taffeta" gloves, imported by the plaintiffs in March and September, 1882, the amount of duties which plaintiffs claim was paid in excess of what was rightly chargeable, being $129.30 in this particular case. The goods in question were classed by the inspectors as composed of silk and cotton, "silk, chief component of value," and charged with an *ad valorem* duty of 60 per cent., under the seventh paragraph of schedule H, section 2504. The plaintiffs, by the protest, claim that these goods contain 25 per cent. or over in value of cotton, and are only dutiable at 50 per cent. *ad valorem*, under the last clause of schedule H, and the proviso of section 1 of the act of February 8, 1875, "amendatory of the customs and revenue law." By that act it is provided "that from and after the date of the passage of this act, in lieu of the duties heretofore imposed on the importations of the goods, wares, and merchandise hereinafter specified, the following rates of duties shall be exacted, namely: * * * On all goods, wares, and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws, or of their commercial designation, sixty per centum *ad valorem:* provided that this act shall not apply to goods, wares, or merchandise which have, as a component material thereof, twenty-five per centum, or over, in value, of cotton, flax, wool, or worsted."

The proof in this case shows without dispute that the gloves in this case are composed of silk and cotton, and contain over 25 per cent. of their value in cotton, but silk is the chief component of value; that is, they contain over 50 per cent. in value of silk. The duty upon them is therefore not specifically fixed by the act of February 8, 1875, as the proviso in this act takes them out of the 60 per cent. class, and the only question is, under what law are they dutiable? Plaintiffs claim them to be dutiable under the ninth paragraph of schedule H, while they were charged with duty under the seventh paragraph of schedule H. The paragraphs in schedule H, upon which the questions arise, read as follows:

"(7) Silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, *gloves*, suspenders, watch chains, webbing, braid, fringes, galloons, tassels, cords, and trimmings, and ready-made clothing, of silk, or of which silk is the component material of chief value, sixty per cent. *ad valorem*."

"(9) Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum *ad valorem*."

Since the passage of the act of February 8, 1875, several opinions construing it have been given by the attorney general and secretary of the treasury. These opinions are reported in 15 Op. Atty. Gen. 51, and Decisions of Treasury Department for 1875, page 344, and

Decisions of the Treasury Department for 1876, page 133; and I infer that under the construction of the law given by these rulings the practice of the customs officers has been to charge a duty of 60 per cent. *ad valorem* on this class of goods, on the ground that they are specifically dutiable as "silk gloves, under the seventh paragraph of schedule H. It seems to me, however, that there is at least room for a doubt whether any articles except ready-made clothing, composed partly of silk and partly of cotton, and where silk is the chief component of value, come within the meaning of the seventh paragraph. It reads, "silk vestings, etc." until we reach the words, "and ready-made clothing of silk," and then proceeds, "or of which silk is a component material of chief value." And I think the fair grammatical construction of the sentence limits the application of the words, "or of which silk is a component material of chief value," to "ready-made clothing," and that it was intended that the articles previously mentioned in the paragraph, such as "silk vestings," "gloves," etc., should be wholly of silk in order to subject them to the 60 per cent. *ad valorem* duty.

But whether I am right or not as to the true reading of this seventh paragraph, I think we must certainly assume that congress, by this proviso to the first section of the act of 1875, intended that goods composed of silk and cotton, but which contained 25 per cent. or over of cotton, shall not be dutiable at 60 per cent., else the exception by the proviso means nothing. Why exclude them from the clause of the act immediately preceding this proviso, which makes certain classes of goods dutiable at 60 per cent., and yet by construction put them back into this seventh paragraph, in schedule H, which charges them with 60 per cent. *ad valorem* duty. It is the duty of the court to give effect to all the parts of the law, if it can be consistently done; and, inasmuch as congress did not say by this proviso that these goods containing 25 per cent. or over of cotton should come in free of duty, we must assume that they were still subject to some duty; and the natural clause under which they fall, as they are to pay less than 60 per cent. *ad valorem*, is the last clause of schedule H, which makes them dutiable as "manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, 50 per cent. *ad valorem*." They certainly respond to this definition, and I therefore conclude that they are dutiable under this ninth clause of schedule H.

This view seems to me to harmonize the legislation, and give effect to all the parts of the act of February 8, 1875, making it consistent with itself and the previous legislation of congress on the subject.

The issue in this case, and the cases that were tried with it, will be found for the plaintiff.

FAIRBANKS and others *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884.)

CUSTOMS DUTIES—STEARINE.

Stearine is not to be classed as "tallow," but as a "manufacture of tallow," and as such is subject to a duty of 25 per cent.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. In February, 1882, the plaintiffs imported two invoices of merchandise, entered as "tallow" and dutiable under schedule M of section 2504 of the Revised Statutes. The article so entered as "tallow" was classed by the inspector as "a manufacture of tallow" under section 2516, and charged a duty at the rate of 20 per cent. *ad valorem*. The plaintiffs paid, under protest, the duty so charged and bring this suit to recover the difference between the amount paid at the rate of 20 per cent. *ad valorem* and what would have been the amount of the duty on this commodity had it been classed as tallow and charged with duty at the rate of 1 per cent. per pound, as provided in schedule M, § 2504. The only question in the case is one of fact, whether the article imported was tallow or a manufacture of tallow, and the preponderance of proof, I think, shows quite satisfactorily that this imported article was stearine, and that stearine is one of the products resulting from the manufacture of tallow. It is a hard substance or residuum, left after extracting or pressing the oil from the tallow, and the proof fully satisfies me that this is stearine—that it had passed through the process of pressing, and was, at the time of its importation, a manufacture of tallow, and not tallow in its natural condition. The plaintiffs' counsel also contends that this article is entitled to come in under the free list provided for in section 2505, as "grease for use as soap stock only;" but there are, as it seems to me, two complete answers to this proposition: *First*, that the protest claimed that the article was "tallow" and dutiable at 1 per cent. per pound, and he is confined to the case made by his protest, under section 2931. *Second*, there is no proof that this article is "grease for soap stock only." The court perhaps might, from common knowledge, say any fatty substance can be used in some way for the manufacture of soap, but I cannot say, and certainly the proof does not aid me in saying, that this stearine is only used for the manufacture of soaps.

There will be a finding, therefore, for the defendant.

LEAHY *v.* SPAULDING, Collector.

(*Circuit Court, N. D. Illinois.* January 22, 1884.)

CUSTOMS DUTIES—SILK AND COTTON SHAWLS.

Certain shawls worth 15 shillings and 6 pence, containing one shilling and six pence worth of silk, and the rest cotton, *held*, subject to a duty of 35 per cent. only, as "shawls, cotton chief value," instead of 60 per cent., as "wearing apparel, silk chief value."

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. The only question in this case is whether certain shawls imported by the plaintiff and which were classed as "wearing apparel, silk chief value," and charged with duty at the rate of 60 per cent. *ad valorem*, were improperly so classed and should have been classed as "shawls, cotton chief value," and charged with duty at 35 per cent. *ad valorem*. The proof shows, without dispute, that much the larger component in value of these shawls is cotton. According to the proof the value of these shawls was 15 shillings and 6 pence each, while, if all cotton, they would have only cost 14 shillings each, thus showing that they contained only a very small proportion of silk, and that their value was not increased over 1 shilling and 6 pence by the silk they contain.

The issues will be found for the plaintiff.

KIRK and another *v.* ELKINS MANUF'G & GAS CO.[1]

(*Circuit Court, E. D. Pennsylvania.* February 13, 1884.)

PATENT FOR INVENTION—INFRINGEMENT.

Patent No. 201,536, for improvement in bronze alloys, not infringed by defendant's metal or alloy, known as "Ajax Metal," in which copper, tin, and arsenic occur in proportions different from the proportions specified in complainant's patent.

Hearing on Bill, Answer, and Proofs.

This was a bill to restrain an infringement of patent No. 201,536, dated March 19, 1878, for improvement in bronze alloys, issued to Edward C. Kirk.

H. T. Fenton, for complainants.

John G. Johnson, for respondents.

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

McKENNAN, J. The compound described and claimed in the patent consists of copper, tin, and arsenic, in the proportion of 75 to 90 parts of copper, 10 to 25 parts of tin, and one-fifth of 1 per cent. to 10 per cent. of arsenic to be added to the copper and tin when the latter are at the melting point in the crucible. The patentee was not the first to produce an alloy of copper and tin. The specification shows that castings of these metallic constituents were made before the date of the patent; and, indeed, the patent of Randall, for a metal alloy of copper, tin, and arsenic, is expressly referred to. The patentable novelty of the described alloy consists, then, in the proportions in which the copper and tin are compounded and in the addition thereto, in the process of melting, of the prescribed quantity of arsenic, for the purpose of deoxidizing the metallic oxides always found in ordinary alloys of copper and tin. The only evidence of infringement is furnished by analyses of borings from several samples of Ajax metal manufactured by the respondents. These show it to be composed of copper, tin, zinc, lead, and arsenic; copper within the range of proportion stated in the patent, tin and arsenic generally below the minimum proportion stated in the patent, and lead and zinc in varying proportions, as high as 8 per cent. What differential effect upon the character and properties of the compound results from the reduced proportions of tin and arsenic and the addition of lead and zinc we are uninformed by the evidence; but it is clear that so far as the constituents of the two compounds are concerned they are not the same. But the respondents deny that they have added arsenic to the other metallic components of their alloy, and allege that whatever portion of arsenic it may be found to contain was only in combination with the copper, which they used in its natural state. This is fully sustained by the testimony of their superintendent, who was alone cognizant of the ingredients of their compound. He says he desired to get rid of all the arsenic he possibly could, and hence that no arsenic was artificially introduced; that he used only the copper of commerce, which always contains more or less arsenic; and that he began the use of this in the manufacture of Ajax metal in 1874, and has continued to use it since without material change in proportions.

Considering, therefore, that the alloys manufactured by the complainants and the respondents, respectively, are not constituently the same, and that the respondents have not used arsenic except as it may have been found in combination with commercial copper, and that their use of this began in 1874, we cannot adjudge them to be infringers, and the bill must therefore be dismissed, with costs.

GOLD & STOCK TEL. CO. *v.* PEARCE and others.

(Circuit Court, S. D. New York. February 20, 1884.)

PRELIMINARY INJUNCTION—WHEN TO BE GRANTED.

A preliminary injunction will not be granted while another to the same effect is in force in a different suit.

In Equity.

Edward N. Dickerson, Jr., for orator.

Roscoe Conkling and *Samuel A. Duncan,* for defendants.

WHEELER, J. This cause has been heard on the motion of the orator for a preliminary injunction to restrain infringement of the second claim of the orator's patent. In a prior suit in this court, so lately brought by the orator against these same defendants that the time for an answer and taking of testimony has not yet expired, a preliminary injunction restraining the defendants from infringing this second and the third claims of the patent has, on motion of the orator, been granted, and is still in force. The time for pleading in bar the pendency of the first suit has not arrived. In an affidavit by an expert, filed by the orator on this motion, it is stated that he is familiar with the patent, and made an affidavit on the former motion, and that the apparatus claimed to be an infringement on this motion "is in all material respects, so far as the second claim is concerned, the same apparatus as that enjoined in the previous motion." The defendants object to this mode of procedure by a new bill, and cite *Wheeler* v. *McCormick,* 8 Blatchf. 267. The orator insists that it is proper to file successive bills for successive infringements, and cited *Higby* v. *Columbia Rubber Co.* 18 FED. REP. 601. It is also urged in support of the orator's position that the prior suit could not be maintained on an infringement subsequent to the filing of that bill only; while this may be, and that that may fail and this succeed. That is one ground stated by WOODRUFF, C. J., for maintaining the second suit in *Wheeler* v. *McCormick,* although the principal ground was that the prior suit was in another district and circuit. That reason does not obtain here, however, as this case now stands, for it is adjudged in the prior suit, and that adjudication still stands insisted upon by the orator, that there was an infringement prior to the filing of the former bill sufficient to uphold it to an accounting and final decree. That the accounting in that case would extend to the time of taking, and cover the infringement now aimed at, is not at all questioned. That distinguishes this case from what was said by LOWELL, J., in *Higby* v. *Columbia Rubber Co.* There the account had been closed, and although the former injunction was in force a new bill would be necessary to full relief for the new infringement. It is also urged that as a proceeding for contempt would be a harsher remedy than a motion for a new injunction, the injunction might be granted on a case on which the

defendants might not be adjudged guilty of contempt of the former one, and especially where the proof would consist of *ex parte* affidavits. But the processes of courts of equity are so flexible and capable of being tempered to the justice and necessities of every case, at all its stages and in all its phases, that the difference between the forms does not seem to be important. As these cases are now situated the modes of proof on proceedings for contempt of the former injunction would or might be precisely the same as upon this motion. The question whether the device sought now to be restrained infringes the second claim is precisely the same as that whether it violates the former injunction. If it is not willful it need not be visited with punishment as such. As the case is presented the question to be decided is precisely the same as that before decided between the same parties, the adjudication of which is in force and covers all that is asked for here. If it were necessary, or more fair, or more desirable, to make the former injunction more specific by being directed at some device which the orators claim to be an infringement and the defendants that it is not, that end can be reached by motion in the pending cause as well as by a new bill. Multiplicity of suits should be avoided when practicable, and this multiplicity may well be avoided here.

Under the circumstances of this case this motion is denied, but without prejudice to any motion or proceeding in the original cause.

GREEN *v.* BARNEY.

(*Circuit Court, D. Massachusetts.* February 28, 1884.)

PATENT—LACHES—PENDING LITIGATION.

When the validity of a patent is in litigation, the patentee may, without being guilty of laches, wait until a decision is rendered before bringing suit against infringers.

In Equity.

Allen Webster, for complainant.

B. F. Thurston, for defendant.

LOWELL, J. This suit is brought upon the much-litigated reissued patent, as both counsel have called it, granted to the plaintiff for driven wells, May 9, 1871, No. 4,372. The validity of the patent is not denied. The sum in dispute being small, it is made a question whether the plaintiff should not be remitted to his action at law. The evidence tends to show a technical right to an injunction, and a claim for some profits; and I do not conceive that I have a right, under these circumstances, to dismiss the suit, though, as to the costs, I will hear the parties. The usual license fee for a well for domestic uses is $10, and for one for supplying water for steam-en-

gines, $125. The complainant understood the defendant to say, in an interview which they had before suit was brought, that he had paid the complainant's agent the usual fee of $10 for one domestic well, and had afterwards moved it, as the defendant called it,—that is, had taken up the pipes, and put them down in another place,—which, according to the meaning of a license, as the plaintiff interprets it, requires a second royalty to be paid. The fact is not proved. There was a domestic well which was abandoned in 1873 and a new one driven, but the evidence does not explain when, or by whom, the first well was driven, or whether it had been licensed. The defendant had recently bought the place in 1873, and there is an intimation that the well was already there at that time. He paid the royalty in 1876 for the only domestic well which he now uses, or has used, since 1873; and in the absence of proof to the contrary, the presumption is that he paid all that the agent asked him to pay. Certain it is that he did not move the well after he paid the royalty, but before. In the same year (1873) the defendant made a driven well in the celler of his workshop, to supply his boiler, and used it for seven months, when he discontinued the use of it, which he has never resumed. It does not appear that he has destroyed it, or taken up the pipes. There is no reason to suppose that he will ever use it again; for the water injured his boiler, and he laid pipes to the adjacent river, which furnishes a purer and better supply. In this state of facts, the plaintiff understood the defendant to be ready and to offer to pay $10 for the double use of the domestic well; and he charged him with the usual royalty of $125 for the "well used for engine," and says that he refused to accept anything unless the whole was settled. How near the parties came to an agreement is not proved, nor whether the defendant offered to pay anything for the seven months' use of the larger well. It is plain, however, that the charge of $125, which is the price of a perpetual license, was excessive, unless it could be shown (which seems highly improbable) that the defendant's profits for the seven months were equal to that sum.

As to the point of laches, so ably argued by the defendant's counsel. This suit was brought in 1879, and the complainant's patent having been and being still severely litigated, he could not be bound to proceed against all supposed infringers, until at least the first decree in his favor, which was made by Judge BENEDICT in 1876, (*Colgate* v. *Gold & Stock Tel. Co.* 4 Ban. & A. 415;) and between that date and 1879 he had, I do not doubt, a great deal of information to obtain as to the facts of the numerous infringements.

I shall make an interlocutory decree for the plaintiff; but neither refer the case to a master, nor settle the costs, until the parties have had further opportunity to adjust their differences without more expense.

BRAINARD *v.* EVENING POST ASS'N.

(*Circuit Court, D. Connecticut.* February 14, 1884.)

PATENT—PREVIOUS STATE OF THE ART—COPY—DISTRIBUTOR.

Letters patent No. 149,092, for an improved galley-holder, designed to facilitate the orderly assortment of compositors' copy, are invalid for want of patentable novelty in the invention.

In Equity.

Chas. Rollin Brainard, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity for relief against the alleged infringement of letters patent to Charles Rollin Brainard, No. 149,092, dated March 31, 1874, for an improvement in compositors' copy distributors. The plaintiff is the owner of the patent.

The invention is described in the specification as follows:

"My invention * * * consists in a galley-holder provided with a series of compartments and pins or hooks, correspondingly lettered or numbered, as hereinafter more fully set forth, the object being to keep the copy properly assorted, thus greatly facilitating and reducing the expense of proof-reading. * * * It is well known to all practical printers and proof-readers that, as the compositors empty their matter into the different galleys on the stand, the copy is usually deposited into a common receptacle, without regard to the nature of the article or the order of setting. From this receptacle the proof-reader is obliged to hunt up or select the copy corresponding with his proof, frequently causing much confusion and delay when time is very important, especially when the 'takes' are small. In the drawing it is an ordinary galley-stand, or holder, provided with compartments or slips, lettered in regular order from A to M. Disposed in the upper part of the stand are a series of pins or hooks or copy-holders, lettered to correspond with the compartments. * * * When the compositor goes to the 'bank' or 'dump' to empty matter, instead of depositing his copy in a drawer, it is impaled on the pin or hook in the stand corresponding with the slip in which the galley is located. * * *"

The claim is for "the copy-distributer described, consisting of the galley-holder, N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified." The important question in the case is that of patentability. To determine this question, a knowledge of the exact relation which the invention bore to the previous state of the art is necessary. The case of *Brainard* v. *Pulsifer,* 7 FED. REP. 349, was tried before Judge LOWELL upon the patent and a "short stipulation as to the state of the art and the thing which the defendants use." So much of the stipulation as related to the history of the art is as follows:

"It is further stipulated and agreed that, prior to the grant of the complainant's, patent, it was customary to conduct the business of sorting copy in daily newspaper printing offices substantially as follows: 'The copy was

cut in suitable lengths, called, technically, 'takes,' and distributed in order to the compositors in the office. When a compositor had set up his 'take' he deposited the type set up by him on a galley upon the galley-bank, and deposited the copy from which he had set up the type in a drawer, or box, or upon a table or shelf, or other receptacle, for the proof-reader.' "

When proofs were submitted to the proof-reader for correction he was also furnished with the "copy," procured from the receptacle on or in which it had been placed.

Upon this state of facts Judge LOWELL sustained the patent, and it seems to me that there was no reason for a different conclusion.

But it is now clearly shown that the New York *Sun* office, in 1868, and thereafter, and before the date of the patented invention, used the following system: There was placed over the dumping galley a series of lettered hooks, which were lettered to correspond with the letters which, by the custom of the office, were uniformly placed upon the different classes of matter to be put in type. The "takes" or small pieces of copy were marked with their appropriate letter and were numbered in numerical order and were given to the compositors, each of whom placed his matter, when in type, upon a galley in the galley-bank, and marked it with a tag to correspond with the letter and number on his copy, and placed his copy on the hook which contained the appropriate letter. Sometimes, instead of the tags, the galleys were chalked with a letter to indicate where the copy containing the letters was placed.

In the Waterbury *American* office, for the greater part of the time between 1868 and 1872, there was a system of lettered hooks and spindles over the galley-bank, the letters or words indicating the character of the copy to be placed on each hook. Copy was placed upon the respective hooks, was taken therefrom by the compositors, and when set in type was returned to the spindle and the type was placed upon the galleys, which, though not designated, were "understood, as a rule of the office, to correspond respectively with the copy hooks and holders."

It thus appears, especially by the testimony from the *Sun* office, that separate hooks for the reception of copy, correspondingly lettered with the letters placed upon the copy, and designated upon the type when placed in the galley, were used, and thus the delay from having to search through a large pile of copy for the needed slip was avoided.

The improvement of the patentee consisted in having lettered hooks to correspond with lettered galleys. When the art had arrived at lettering a series of hooks to correspond with the letters systematically placed upon the copy, and marked upon the type when placed in the galley, there does not seem to me to have been any invention in permanently lettering the galley to correspond with the lettering upon the hooks. The only advance upon the simple system of the comparatively small Waterbury *American* office was the en-

largement of the system so as to adapt it to the needs of a much larger newspaper, by the use of a greater number of lettered hooks, and the lettering of the galleys instead of their being designated by rule of the office and in the memory of the compositor.

The description of the invention which was given by the patentee upon his cross examination is as follows:

"When the compositor has emptied his type on the galley, he is instructed by my invention, 149,092, to deposit his copy on a receptacle corresponding to the galley where his matter is, or corresponding to the take-mark on his copy and thereby keep the copy for that galley or article distinct and separate from all other copy or matter, for the more immediate convenience of the proof-reader, and without the labor usually entailed on a copy-sorter."

The invention thus described was substantially used in the *Sun* office, and the patented improvement was a convenient modification of, but not a substantial advance upon, the *Sun's* system.

Believing that the invention was not patentable, I have not examined the question of infringement.

The bill is dismissed.

CAHN *v.* WONG TOWN ON.

(*Circuit Court, D. California.* February 4, 1884.)

PATENTS—COMBINATION OF SEPARATE DEVICES—SUBCOMBINATION.

The fact that a device, comprising several patentable elements, has been patented as a whole, will not prevent the patentee from afterwards securing a patent for a combination of any number of the elements less than the whole, provided he appplies for it before the lesser combination has been two years in public use.

In Equity.

M. A. Wheaton, for complainant.

J. L. Boone, contra.

SAWYER, J., (*orally.*) This action is upon a patent. The patent consists of lapping over two pieces of leather in making the seam of a boot or any other work of the kind, running a line of rivets along, and then a line of stitching on each side of the line of rivets, so as to make a compact, tight seam. The plea sets up that the patentee in this case, on a prior occasion, procured a patent, and that this other and prior patent is for the same thing, with the addition of a piece of India rubber inserted between the two pieces of leather. The strip of India rubber having been inserted, a line of rivets is run along with two lines of stitching, one on each side of the line of rivets, in the same manner as in the second patent. The defendant claims that the second patent is not a new invention; that it is merely a combination of a part of the elements of the first patent, or of the prior invention, and therefore that the second patent is void, as not covering

a new invention. I think, probably, that would be the case if the patentee were a different inventor—if the patentee in the prior patent had been a different person from the patentee in the second, I am inclined to think so. But the prior patentee is the same man, and doubtless if he had made the invention at the time he obtained his first patent, he might have got a patent for the subcombination, omitting one element—the slip of India rubber. And it does not appear in the plea that this second invention has been in public use or on sale for more than two years, whereby it would be abandoned to the public. The inventor failed, therefore, if he is the inventor of both at the same time, to obtain a patent for all he was entitled to. If he was the inventor at that time, he was entitled to patent the second or subcombination of elements, omitting the inserted strip of India rubber, as well as the first combining all the elements. He might, perhaps, have got a reissue covering both, if his invention of the subcombination is sufficiently indicated in the specification of the first patent; but he has chosen to obtain an independent patent for the subcombination. If he invented it at the same time with the other he might undoubtedly have obtained a patent in the first instance. I think if it was patentable with the additional element of the India rubber, the subcombination, without the addition of the India rubber, invented at the same time, would be patentable. Justice FIELD says, in the *Giant Powder Case*,[1] that this is the proper mode of proceeding when there is another invention for which an independent patent might have been obtained, but has been omitted. If he was the inventor of both he was entitled to patent both, the subcombination without the strip of India rubber, as well as the entire combination of the lapping of the leather and the intervention of a piece of India rubber to make the seam tighter, and better still in combination with the line of rivets and line of stitching on each side of it. He being the first person to invent both, I think it was patentable as to both. He doubtless did invent the subcombination as well as the entire combination at the same time. He embraced the subcombination in the last patent without the additional element intervening; and it does not appear that it was on sale for two years before the application for the last patent. I think the plea, then, should be overruled. And it so ordered

[1] 4 FED. REP. 720; 5 FED. REP. 197

GLOUCESTER ISINGLASS & GLUE CO. *v.* BROOKS and others.

Circuit Court D. Massachusetts. February 13, 1884.)

1. PATENTS—EXTRACTION OF GELATINE FROM FISH-SKINS.
Letters patent No. 167,123, for a process of extracting gelatine from fish-skins, sustained against letters No. 177,764, granted to another person for a like process, and the latter held to be an infringement.
2. SAME—DECISIONS OF THE PATENT-OFFICE.
The decisions of the commissioner of patents, though entitled to great weight upon questions of priority, are not conclusive.

In Equity.

Browne, Holmes & Browne, for complainant.

James E. Maynodier, for defendant.

NELSON, J. The original of the plaintiff's patent was granted to John S. Rogers, August 24, 1875, No. 167,123, for a new and useful process of extracting gelatine or ichthyocolla from salted fish-skins. It was reissued June 1, 1880, No. 9,226, and again reissued July 13, 1880, No. 9,296. The invention has proved of great value commercially, and it has certainly the merit of patentability. It is also new, unless it was anticipated by Isaac Stanwood, to whom a patent was granted for the same process, May 23, 1876, No. 177,764, and reissued May 17, 1881, No. 9,715. The specifications and claims of both the original and reissued patents of Rogers are the same in substance, the difference between them in phraseology being slight and immamaterial. In the second reissue he states the process to be this:

"My invention is to utilize such salted skins of fish; and in carrying it out the first portion of it is to desalt the skins, such portion of the process causing the removal of the scales from the skins, it being accomplished by soaking the skins in cool water, and agitating them therein sufficiently to extract the salt from them. The water should be changed repeatedly until the salt may have been separated from the skins, after which they are to be put into fresh water, which should be gradually heated to a boiling temperature, and kept so for three hours, more or less, until the gelatine may have been sufficiently extracted from the skins by the water so heated. Next, the superfluous matter or matters should be removed from the gelatinous solution now procured, and it (the gelatinous solution) should be strained or filtered in order to obtain it in a purified state. Finally, the liquid is to be suitably evaporated by introducing the solution into pans or moulds, or upon slabs, and exposing to the atmosphere until it may be sufficiently condensed for use, whether as an article of food or as a glue for mechanical purposes."

His claim is:

"The process, substantially as described, of obtaining gelatine from salted fish-skins, it consisting in desalting and boiling them, separating from the gelatinous solution so obtained the superfluous matter or matters, and reducing it (the solution) by evaporation to the necessary consistency for use, as set forth."

The evidence shows that in the years 1872 and 1873 an extensive business was carried on in Gloucester, in the preparation of what is

termed dessicated or boneless salt fish. The process of the manufacture consisted in stripping off the skins and removing the bones from the salted fish, and then cutting the flesh into suitable pieces and packing it in boxes for the market. One result was the accumulation of great quantities of the skins, then thought to be of no value for any purpose, which the fish dealers found considerable difficulty in getting rid of. In November, 1873, Rogers first conceived the idea of utilizing this waste substance as material for the manufacture of gelatine or glue, and began his experiments at Gloucester. In the following autumn he had so far succeeded as to be able to place upon the market samples of liquid glue extracted from salted fish-skins. On February 27, 1875, he filed his application for a patent. Stanwood, who was a manufacturer of glue from fish sounds, in Gloucester, begun his experiments in the autumn of 1872, or the following winter, and by soaking and boiling the skins, and then drying the solution, succeeded in obtaining a liquid glue in small quantities. But the glue proving to be of inferior quality, and his customers finding fault with it, he abandoned his attempts and did not resume them until 1876, after Rogers had obtained his patent. The evidence is conflicting on this point, but upon the whole it is satisfactorily proved that everything done by Stanwood prior to the Rogers patent was merely experimental, and that his experiments, such as they were, did not reach the perfected process of Rogers. Experienced as he was in the manufacture of fish glue, he must have appreciated the importance of a new method by which this waste material could be made available as glue stock in his business. The presumption is very strong that if he had actually succeeded in discovering such a method, he would have made more use of the discovery than he is shown to have done.

When Stanwood applied for his reissue patent an interference was declared between his application and Rogers' original patent. The interference was contested by the parties, and the decision of the patent office was in favor of Stanwood. The defendants rely in their answer upon this decision as a final adjudication settling the question of priority in favor of the Stanwood patent. But it is well settled that the decisions of the commissioner of patents though entitled to great weight on questions of priority, are not final, even between those who have been fully heard in the interference. *Union Paper Bag Mach. Co.* v. *Crane*, 1 Holmes, 429; *Whipple* v. *Miner*, 23 O. G. 2236; [S. C. 15 FED. REP. 117.]

The process used by the defendants in the manufacture of glue is identical with that of the Rogers patent, and infringes it.

Decree for complainants.

RAYER & LINCOLN SEAMING-MACHINE CO. *v.* AMERICAN PRINTING CO.

(Circuit Court, D. Massachusetts. February 18, 1884.)

PATENTS—REISSUE—SEWING-MACHINE.

The third claim of original letters patent No. 108,827 was for the combination of an annular plate with the stitching and feeding mechanism of a sewing-machine, for the purpose of guiding the fabric. The first and third claims of the reissue, No. 9,176, were for a wheel to feed as well as guide the fabric. *Held*, that the reissue, being more than a mere reproduction of the original patent, was invalid as against intervening rights.

In Equity.

T. W. Clarke, for complainant.

J. L. S. Roberts, for defendant.

Before LOWELL and NELSON, JJ.

NELSON, J. The plaintiff sues for the infringement of reissue patent No. 9,176, granted to Rayer & Lincoln, assignors by mesne assignments to the plaintiff, April 27, 1880. The original patent, No. 108,827, was dated November 1, 1870. In the original patent the invention is described as "a new and improved sewing-machine attachment." In the specification, the invention is said to consist in certain improvements by which sewing-machines may be adapted to sew the ends of pieces of goods of the same width, one pair after another continuously, and to stitch all kinds of goods where long, continuous seams are required. The invention is described with reference to any sewing-machine of suitable construction and size. D is an annular plate supported in a vertical position by rollers hung in a frame, and so set that its upper edge is behind the presser-foot and needle-bar of the sewing-machine. In front of the plate there is affixed to the frame a shield, covering all but the upper part of the plate. A toothed ring is secured to the back of the plate, and meshes into the teeth of a gear-wheel mounted on an arbor, which derives motion from the driving-shaft of the sewing-machine. Upon the edge of the plate are hung a series of hooks or points, which can be shifted to conform to the width of the fabric. The pieces to be sewed together are hung upon the hooks, and rest upon a shoulder projecting from the plate, and upon the upper edge of the shield. A winged wheel working in front serves to throw the sewed fabric off the hooks. When in operation, the plate is designed to move correspondingly with the feed of the sewing-machine. As the plate revolves with the action of the sewing-machine, the pieces are carried along to and past the sewing devices, and when sewed are thrown off as they arrive at the winged wheel, the process being capable of continuous repetition indefinitely.

The third claim of the original patent is thus stated:

"(3) The combination with stitching and feeding mechanism, substantially such as described, of a continuously revolving annular fabric-guide, D, as and for the purpose set forth."

In the reissue patent the invention is called "an improvement in sewing-machines." In the specification it is described with reference to a Wilcox & Gibbs sewing-machine having the usual rotable hook-shaft and needle-bar, with needle attached. In describing its advantages the inventors state:

"In sewing-machines containing the usual intermittingly rotated wheel-feed, variations in speed affect, through momentum, the length of stitch, and the power required to run such a feed, and wear of machinery, and the cost of mechanism, are all greater than in this, our plan, wherein the feed is continuous, which always insures an equal length of stitch, and a substantially uniform expenditure of power. With an annular feeding-plate, as described, provided with points or hooks to penetrate and hold the fabric as it is moved along under the needle, we have combined the well-known Wilcox & Gibbs class of machine, the hook or looper of which, as is well-known, rotates continuously in one direction, and may be run at the highest speed."

The first and third claims, to which alone the controversy relates, are as follows:

"(1) The within-described apparatus for sewing together the ends of pieces of fabric for factory use, it consisting essentially of the stitch-forming mechanism shown and described, the rotable annular feeding-wheel provided with hooks to penetrate, carry, and present the fabric positively to the action of the said stitch-forming mechanism, and means to operate the said feeding-wheel continuously as described.

"(3) The combination, with stitching mechanism substantially such as described, of the continuously revolving annular baster plate or wheel to feed the fabric, and mechanism to continuously revolve the baster-wheel, substantially as described."

The position of the plaintiff is that the third claim of the original patent is substantially reproduced in the first and third claims of the reissue. It is obvious, from the description given in the original specification, that the thing patented was a device to be attached to a sewing-machine having a feeding mechanism of its own, and was designed to carry along the pieces of cloth to be stitched together by a movement to correspond with the movement of the feeding mechanism of the sewing-machine. It is called "a sewing-machine attachment," and its object was to serve as a guide and support to the pieces of cloth as they were carried along by the sewing-machine. It is apparent that the first and third claims of the reissue, taken in connection with the specification, cover a combination different from this. The combination, with the stitching and feeding mechanism of a sewing-machine, of the annular plate, D, to guide the fabric as it is carried along by the feeding mechanism of the sewing-machine, which was in substance the original claim, has been expanded into a combination with the stitching mechanism alone of a sewing-machine, of a feeding-wheel to feed as well as to guide the fabric, working independently of, and in substitution for, the feeding mechanism of the sewing-machine. A new function has been added to the plate, D. It is no longer a mere attachment to a complete sewing-machine, and a guide and support to the cloth as it is moved along in the ma-

chine. It has become itself a feeding apparatus for a sewing-machine,—a thing quite different from the original invention. Under the rule established by the recent decisions of the supreme court, the plaintiff's reissue patent was taken out too late, and must be held to be invalid.

Bill dismissed, with costs.

THE MANHASSET.

(District Court, E. D. Virginia. February 24, 1884.)

1. ADMIRALTY PRACTICE—LIBEL—AMENDMENT.
   In a case in admiralty where the *res* is the same, and the tort and the contract for which damages are claimed are the same, and where the original libel sets out matter enough by which to amend, a libel may be amended as to parties by changing the character in which the libelant sues, and dismissing as to the parties who have no right to sue.
2. SAME—ACTION FOR DEATH CAUSED BY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
   Where, in a libel for damages for the killing of a husband and father, the ferry steamer inflicting the injury was in fault, but the deceased had violated rules of the managers, forbidding passengers to step over guard-chains and passing off to the wharf before the boat was drawn up and made fast at the landing, in doing which deceased received fatal injuries, but in doing so only did what men and boys habitually and constantly did on the ferry, without restraint or remonstrance from the management, *held*, that this was not such contributory negligence on the part of deceased as to exonerate the claimants from responsibility in damages, the managers of the ferry having, by neglecting to enforce their rules, held out to passengers that there was no practical danger in violating them, and thereby put the deceased off his guard as to the danger attending the practice, which was habitually permitted.

In Admiralty, in a Libel for Damages.

After the decision rendered in this case on the question of jurisdiction, on the fifth of January, 1884, (18 FED. REP. 918,) the libelant moved for leave to dismiss the original libel as to herself, as administratrix of William H. Black, and to file an amended libel in her individual character as widow of Black, and in her character as guardian of the two minor children of the deceased. This motion was granted, on the ground that the *res* was the same, the *tort* and contract on which the claim for damages was leased was the same, and that the original libel contained all the facts as to parties that were necessary to amend by.

William H. Black, whose widow, Frances Black, brings this libel, was a colored man, 64 years old, who had irregular employment at $2.50 a day in the carpenter-shop of the United States navy-yard, at Gosport, opposite Norfolk, and lived on the Norfolk side of Elizabeth river, some distance westward of Norfolk, where he had a farm of about 120 acres of land. Returning from the navy-yard, after fail-

ing to get work, on the morning of March 18, 1881, the weather being somewhat rainy, Black got upon the ferry-boat Manhasset to cross over to Norfolk. He was engaged in earnest conversation, on the passage, with George Mason, a colored deck-hand, on the subject of politics. The weight of testimony is that Black, on the approach of the boat to the Norfolk landing, had got outside the chains which are stretched as a guard in front of the gangways to prevent the egress of passengers and teams until the boat can be secured. It was also stated in evidence that he was, while standing beyond the chains, before the boat had touched the landing, still conversing with Mason, the deck-hand, who also had stepped beyond the chains. The weight of evidence is that the chains were all still up when Black was at the front edge of the boat, conversing and ready to step off. When the boat had got within 18 inches of the float, or dock, to which it was to be fastened, Mason stepped off to hook the boat's chain to a windlass, and to draw the boat up fast to the landing. As Mason stepped off for this purpose, Black also stepped off; in doing which, Black's foot slipped, and he fell forward, with his body partly upon the float. Mason and another man seized hold of Black as he fell, but were unable to draw him upon the float before the other foot was caught and crushed by the boat, which was coming slowly with a side motion to the float. Medical aid was immediately brought to Black, but his injury terminated fatally on the morning of the twenty-fifth of March, just one week after the accident happened.

At that time three chains were used as guards, in front of this boat, to prevent the premature egress of passengers and teams. One small chain stretched across the gangway of the white passengers, on the right-hand side of the boat, one end of which was fastened to the side of the boat, and the other hooked to a post on the left of that gangway. A large chain stretched across the team gangway, in the middle of the boat. A small chain, quite long, stretched across the colored people's gangway on the left of the boat, and also across the team gangway in the middle, to the post on the right of the team gangway, and hooked to the same post on which the small chain across the white people's gangway was hooked. This long chain was fastened to the left side of the boat. The weight of evidence, as before said, is that all of these chains were still up, and none of them had been lowered, when Black was standing in front of them, conversing with Mason, and ready to step off to the float. It was not Mason's duty to let down the chains at the time of the landing of the boat; and he did not do so on the occasion of this accident. It was the duty of the white deck-hand, Montague, to let the chains down; and Montague swears, I think with truth, that he had not let them down before the accident happened to Black. Mason's place of duty, on this occasion, was on the left side of the boat, forward of the colored people's gangway. Montague's place of duty was on the right

side of the team gangway at the post to which one end of each of the three chains that have been described was hooked.

It is proved that it was the habit of men and apprentice boys to pass off the boat before it had reached and had been made fast to the dock, and that not unfrequently the chains were lowered by passengers before the deck-hands in charge were at liberty to do so, under the rules and regulations prescribed to them by the managers of the ferry. It is not shown that the authorities of the ferry did more than give very proper orders for the safety of passengers, in respect to keeping the gangways closed. It is not shown that they did anything effectual towards preventing the premature egress of passengers during those critical moments while the boat is approaching the dock, or took any practically effective measures for preventing the habitual violation of their wise rules and regulations in this respect. On the occasion on which Black received his injury several other persons are proved to have passed over the chains and stepped to the float before the boat had landed and been made fast. It is proved that the principal ferries of the north have adopted, and have been using for several years, a patented set of gates, called "the Frazee Patent Safety Gates," designed for preventing passengers from incurring the hazard of injury by passing from ferry-boats before they have been made fast.

W. H. & J. J. Burroughs, for libelant.

J. F. Crocker and *Sharp & Hughes*, for claimant.

HUGHES, J. I think the foregoing statement of the facts of this case embodies all that is material to its decision. There is no doubt that the managers of the ferry-boats made good and wise rules for securing the safe transportation of passengers. These rules forbade all persons to leave their boats until the guard-chains before the several gangways were lowered; and rigidly forbade the deck-hands from lowering the chains before the boats were drawn close to the dock and made fast. That part of the evidence reflects the highest credit upon the management. The residue of the evidence, however, is less satisfactory. It shows that men and apprentice boys habitually violated the rules of the ferry. It shows that this class of passengers frequently themselves let down the chains which stretched in front of the passenger gangways, without waiting for the deck-hands to do so; and that they did this frequently, and when not doing it, habitually got over the chains and leaped off the boats before they were drawn up and made fast to the dock. It shows that this was all done without check or hinderance from the management of the ferries. Now it it is but little short of mockery to say that rules, the best and wisest conceivable for the safety of human life are made by common carriers, and at the same time to admit that they allow these rules to be continually and habitually violated. The impatience of passengers to precipitate themselves pell-mell off of ferry-boats is a matter of constant observation; and the managers of well-regulated ferries else-

where, in view of this notorious and apparently uncontrollable propensity, acknowledge their obligation to provide against the dangers attending it by adopting contrivances which physically prevent this unreasoning press of passengers for egress, and effectually insure against the dangers incurred. I will not say that the ferry-boats which ply across Norfolk harbor are under legal obligation (as one or two other classes of common carriers are) to provide the latest and most approved contrivances that have been invented, for insuring the safety of their passengers; but I am bound to say that it is their duty to do more than adopt wise, cautionary rules for the purpose,—it is their duty to take effectual measures for enforcing, from all passengers, a certain and absolute obedience to those rules.

The obligations of the carriers of passengers on this subject are laid down by the courts in very stringent terms. Federal courts take the law from the supreme court of the United States; and that tribunal, in a late case, (*Penn. Co.* v. *Roy*, 102 U. S. 455, 456,) reviewing previous cases, declared that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy requires that they shall be held to the greatest possible care and diligence; that the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents; that although a carrier does not warrant the safety of passengers at all events, yet his undertaking and liability as to passengers go to the extent that he or his agents shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely; and that he is responsible for all injuries received by passengers, which might have been avoided by the exercise on his part of extraordinary vigilance, aided by the highest skill.

These propositions may be regarded as the settled and accepted law of the subject in this country, and they are the law of this case. The obligations of the authorities who controlled the Manhasset are determined by them, and they show that there was fault on the part of this ferry-boat; and therefore, if the accident which happened to Black, a grown and sane man, had happened to a child or other person unpossessed of ordinary discretion, the liability of the Manhasset would have been indisputable. But Black was a man of responsible age and discretion; and the law, tender as it is of the safety of passengers on steam vehicles, yet lays down the counter-principle that every man is bound, no matter in what he may be engaged, to use ordinary care for his own protection, and no man is bound to use more; so that if a man of discretion is negligent in taking care of himself, and *contributes* by that negligence to bring upon himself the accident by which he suffers, he, in general, relieves the carrier from the obligation of compensating him in damages.

The application of these counter doctrines of the rigid responsibility of carriers to passengers, and of the *contributory negligence* of the person injured, is one of the most difficult tasks that devolve upon

courts, and is especially difficult in the present case. The question here is, whether Black, by stepping over the guard-chains of the ferry-boat and then attempting to leap from the boat to the float before she was made fast, "contributed" to the accident to such a degree as, under all the circumstances of the occasion, to exonerate the boat from responsibility. That the boat was in *fault* has already been stated; that Black was more or less reckless in his conduct is equally true; and the question of law is whether his conduct was of such a character as to relieve the boat of *responsibility* for the accident in damages. Now, if Black had not been a customary passenger on that ferry, or if, of those who habitually made that passage, he was the only person, or one of a few persons, who took the hazard of passing the chains and leaping the chasm before the boat was made fast, then the case would be free from much of its difficulty. It would resemble in principle the case of *Railroad Co.* v. *Jones*, 95 U. S. 439. But Black had passed the ferry often enough to know what its authorities habitually allowed in respect to this matter. He was familiar with the fact that passengers habitually overstepped the chains and strided the chasm without hinderance or rebuke from them. The managers thus gave out to the public, as if it was their opinion, that the practice was practically safe and unattended with danger. Printed rules there may have been; chains were in fact stretched formally before the eyes of passengers; but passengers were seen and notoriously known to disregard them by the half dozen or dozen on every trip. The question, therefore, resolves itself into this: was Black not thrown off his guard? Was it not held out to him habitually by the managers, that, practically, there was no danger? Was anything presented to arrest his attention and to warn him of the fate which overtook him? I think the evidence in the case leaves room for but one answer to this, the crucial question of this case.

The case turns upon this question, because it is a principle of the law of contributory negligence that a carrier is not necessarily excused because the injured person knew that *some* danger existed through the carrier's neglect, and voluntarily incurred the danger. *Clayards* v. *Dethick*, 12 Q. B. 439. Where, for instance, a traveler crossed a bridge which he knew to be *somewhat* unsafe, but which its managers had not closed, nor warned the people not to pass, and the traveler's horse fell through and was killed, it was held that he was not in fault, and damages were recovered. *Humphreys* v. *Armstrong Co.* 56 Pa. St. 204. So it was held that the plaintiff might recover where a passenger train was moving very slowly by, but did not stop at a depot where it should have stopped, and a passenger was injured by leaping off, notwithstanding the usual warning that passengers must not get off the train while in motion, the slow gait of the train seeming to invite the passenger to get off. *Filer* v. *N. Y. Cent. R. Co.* 49 N. Y. 47. These cases sufficiently illustrate the principle of the law of contributory negligence, that though the

passenger must do what a prudent person should do to avoid accident in any particular circumstance, in which he may stand; yet if he has reason to infer from the conduct and policy of the carrier that no practical danger would attend an act, though there might be some risk, and if he is thereby thrown off his guard respecting it, the carrier is liable.

I do not feel called upon to review the myriad of cases on this subject which fill the reports of the courts, or to dwell upon the confusing and confounding niceties of distinction which are drawn by the text-writers in digesting these cases. Suffice it to say that I am of opinion, though it has been arrived at with diffidence and some doubt, that the Manhasset is liable in this action.

I will now allude to a question of jurisdiction which was raised at bar, to the effect that the *tort* in this case was not maritime, and not within the cognizance of admiralty; inasmuch as Black, when he fell upon the float, just as he received the injury to his foot, was, as a matter of fact, on land, and not on the boat; it being certain that if he had already got upon the float, and was standing upon it, the *tort* would not have been maritime. See *The Plymouth*, 3 Wall. 20, and *The Mary Stewart*, 5 Hughes, 312.[1] This view of the case is defeated by the consideration that the *tort* was inflicted by the boat while Black was in the act of leaving her, and before he had completed the act of landing. But even if this were not so, it is only with respect to *torts* that maritime locality is essential to the admiralty jurisdiction. In respect to *contracts* the rule does not hold; if the contract is maritime in its character, the locality where it is made is immaterial. In this case there was not only the *tort* of inflicting an injury resulting in death, but a *contract* to carry the passenger and to land him safely at Norfolk. The damages he received will be of the double character of a satisfaction for the breach of contract and for the *tort*. But I insist that it was the boat which inflicted the injury, and that the injury was inflicted upon a part of the body of the deceased man which had not yet landed, and which was injured by reason of its being still on the water. I know that this distinction would seem over-nicely drawn, but questions of law very often depend upon nice distinctions, and when they do it is necessary to draw them.

Assuming, on the whole case, that the libelant is entitled to recover damages, the final question is what these should be. The amount depends upon the question, how much of his earnings could the deceased have bestowed upon the libelants as their sustenance if he had lived? He owned a farm; and that, of course, is still left to them. Beyond this the evidence gives us but little to build an estimate upon. His precarious employment and wages at the navy-yard afford no certain basis for a calculation. Driven to conjecture, my

[1] S. C. 10 FED. REP. 137.

estimate must be very moderate; the more moderate, as this man had entered the period of old age, and could not, in the course of nature, be supposed to have continued long to spare from his own support a surplus for the sustenance of those dependent on him. It is the custom and the duty of the young to support the aged when they have entered the period of old age. At the age of 64 the tables of vitality show that Black's expectation of life was seven years and a half. If we assume that he could during this period of old age have spared an average of $75 a year to the use of the libelants, then we should arrive at an award of $562.50 as the damages to be allowed in this case. I will give a decree for that amount, and for the costs of this suit.

BAKER SALVAGE CO. *v.* THE EXCELSIOR.

(*District Court, E. D. Virginia.* February 20, 1884.)

SALVAGE SERVICE—AWARD.

A large passenger and freight steamer, worth $150,000, having a cargo worth $10,000, was run into by a tug, which stove a hole in her hull, some six by eight feet in size, causing her to fill with water, and she was beached on Hampton bar, in Hampton Roads. Salvors were telegraphed for, to Norfolk, who came with wrecking steamers, schooner, steam-tugs, pumps, and diving and wrecking apparatus. A diver went down, and, with plank and canvass, battened the hole. Pumps were then set to work, which emptied the hull of the water. The cargo was all got off without loss or damage. The steamer was floated, and towed 12 miles into port at Norfolk. All further injury to the steamer or her machinery was prevented. It was in December, and a severe storm from the eastward could have wrecked the steamer. None occurred, and the work of the salvors was accomplished within 48 hours. *Held*, that the service was a salvage service, and that the reward should bear some relation to the value of the property saved. Six thousand dollars decreed.

In Admiralty. Libel for salvage.

The passenger and freight steamer Excelsior, belonging to the Potomac Steam-boat Company, claimants in this suit,—Theodore E. Baldwin, master,—left her wharf in Norfolk at 5 P. M. on the fourth of December, 1882, on her regular trip to Washington City. She was valued at $150,000. She had a cargo worth $10,000, and the usual number of passengers, and her regular crew, on board. After passing Sewell's point, and in making for the wharf at Fortress Monroe, she came in collision with the United States naval tug Fortune, which drove a hole into her hull, on the starboard bow, some eight by ten feet in dimensions. Capt. Baldwin immediately made for Hampton bar, and at about 6:15 P. M. beached her about midway of that bar, about four miles from Sewell's point, a mile from the Soldiers' Home, and a mile and a half from Old Point Comfort wharf. She went upon, and lay nearly at right angles with, the bar; her bow in six feet, and her stern in ten or eleven feet, water. She had filled

with water, and laid easily on the bottom. The sea came over the main deck, aft, at high tide; but did not cover the deck amid-ships or forward. Her cargo was amid-ships, and was not reached by the water. She was in a place on the bar, and in a position on the bottom, that rendered her reasonably safe from further injury, except in the event of rough weather from the eastward. In consequence of the width of her guards, which spread out from about three feet at the ends of the steamer to ten or twelve feet at the wheel-houses, the waves of a rough sea would beat under the guards, and endanger the deck and the joiner work, and cabins above it, by lifting and breaking them up, and carrying them away, thereby bringing the cargo and the lives of those on board in peril.

It may be stated here that a board of naval officers, appointed afterwards for the purpose of inquiring into the collision, found that the Fortune was in fault; and the United States government has since compensated the claimants in damages from the accident to the amount of $18,350.86. From this computation of damages the amount due the libelants for salvage in this case was reserved, (to be determined by this court,) as also a bill of $470.70, rendered by the libelants, for services rendered the Excelsior during and after the salvage service was rendered. The board of naval officers, which has been mentioned, found that the direct damage to the Excelsior, done by the Fortune, was $11,795.

After beaching his vessel, Capt. Baldwin went off to Old Point Comfort, and from thence sent the following telegrams to the Baker Wrecking Company, Norfolk:

"FORT MONROE, VA., Dec. 4, 1882.

"Send assistance, with steam-pumps, to Excelsior, on Hampton bar. Get here by low water. BALDWIN."

This telegram reached the telegraph office in Norfolk at 8 P. M. on that night. Capt. Stoddard answered it from Berkeley,[1] but the answer is not in the evidence. Capt. Baldwin's second telegram was as follows:

"DEC. 4, 1882.

"Delay guarantied.

"Bring on steamer Resolute a diver, with appliances.

"T. E. BALDWIN."

This telegram reached the telegraph office at Norfolk at 9:15 P. M. Capt. Stoddard, superintendent of the Baker Salvage Company, left Berkeley shortly after 10 that night, on the wrecking steamer Resolute, with the wrecking schooner Scud in tow, with a diver and diving apparatus, with a portable steam-pump and appliances, and with other wrecking apparatus on board. Not knowing the position

[1] The east and south branches of Elizabeth river meet, and form Norfolk harbor; Norfolk being on the north, Portsmouth on the south, and Berkeley in the fork of the two rivers.

on the bar where the Excelsior was, Capt. Stoddard went directly to Old Point wharf, reaching there at midnight, and finding it high tide at that point. Aiming to reach the Excelsior at low tide, as requested by Capt. Baldwin, Capt. Stoddard remained at the wharf until the approach of morning, and then left for the Excelsior, which he reached at daybreak. On meeting Capt. Baldwin, conversation immediately occurred between the two as to the terms on which Capt. Stoddard was to proceed with the work for which he had been summoned. Capt. Baldwin's statement, reduced after the conversation to writing, but never shown to Capt. Stoddard, was as follows:

"It was agreed that there was to be no salvage. The said Baker Salvage Company agreed to raise and float the steamer Excelsior and tow her to Norfolk, Va.; the work to be done as quickly as possible, the bills to be rendered, and, in the event of the said Baker Salvage Company and the Potomac Steam-boat Company not agreeing as to the amount charged for services rendered, then the question was to be settled by arbitration."

Capt. Stoddard, while positively denying any stipulation that there should be "no salvage," substantially admits that there was an understanding as to arbitration in the event of a disputed bill for services. The Excelsior lay about midway of Hampton bar, on its south side, about fifty to a hundred yards from the channel. As before said, she was full of water and submerged to her main deck, the water at high tide rising over the main deck aft. The hole that had been driven into her by the Fortune extended from her hurricane deck far down under the water. Most of her cargo was amid-ships, free from the water. Capt. Stoddard put the wrecking schooner Scud along-side, with a view to taking off the cargo. The diving apparatus was put on board the steamer, and the diver sent down to make examination into the extent of the wound which the steamer had received. Meanwhile Capt. Stoddard went back with the Resolute to Old Point wharf, where he employed a number of laborers to aid in handling the cargo, and procured a quantity of plank lumber with which to batten up the hole in the hull of the Excelsior. Returning with these laborers and this lumber to the steamer, the cargo was put in course of being transferred on the Scud to Old Point wharf, and the diver and his gang employed themselves in battening the hole in the hull. The removal of the cargo was successfully effected without any loss or damage by the latter part of the afternoon of the 5th; the officers and crew of the Excelsior rendering assistance in the work, and the two wrecking vessels making two or three trips each to the wharf. The diver and his assistants could not complete their task that day, and had to suspend work at nightfall till morning. At night a breeze set in from the eastward, producing a rather rough sea, and creating apprehensions in the minds of the officers of the two steamers. At Capt. Baldwin's request, the Resolute was put on the starboard (windward) side of the Excelsior and made fast to her, with fenders placed to prevent injury to the guards and sides of the

vessels. While the sea continued rough, it was a laborious task to keep these fenders in place, and to replace such of them as would be crushed between the two steamers. This task and that of keeping the vessels lashed together, subjected the seamen engaged to more or less danger of limb and life. The Resolute also was in more danger, lashed to the sunken steamer, in the event of a storm, than if she had been at anchor out in the harbor. The object of having the Resolute close at hand was to be in readiness to save life in the event of a storm. Fortunately, however, instead of the breeze increasing on the night of the 5th, it ceased about 1 o'clock, and the weather continued good from that time until the enterprise was finally completed.

The portable steam-pump of the Baker Company had been set up on the Excelsior in the afternoon of the 5th. On the next morning the diver and his gang resumed their work, and were assisted in putting canvass over the planking by the action of the portable pump, which had been made ready for use the afternoon before. The stationary pump on the Resolute was, on that morning, put in connection with the operations on the Excelsior in such manner as to be ready to render effectual assistance. About 12 M. on the 6th the driver completed his task of stopping the hole in the hull with plank, and covering it with canvass, and both pumps were set to work at their full capacity. The wrecking steam-tug Olive Baker had been before that time ordered to the assistance of Capt. Stoddard, and had a tow-line attached to the Excelsior. By about 2 P. M. the pumps had done their work so effectually that the steamer went afloat in tow of the Olive Baker. She was soon afterwards got under way, and, with the further assistance of the wrecking steamer Victoria J. Peed, belonging to the Baker Company, and their tug Olive Branch, was towed to her wharf at Norfolk; the pumps being worked during the voyage by the Resolute. The latter steamer lay by her at her wharf at Norfolk, on the night of the 6th, doing such pumping as occasion required. During the voyage from Hampton bar to Norfolk there was, of course, no other covering upon the hole in the Excelsior's hull but of inch pine plank, overlaid with canvass, which was liable to be punctured by encounter with logs or other hard substances in the channel. This danger rendered it necessary to provide every precaution against such an accident, by which she might be sunk to the bottom of the channel. During the period of this service the libelants' tug Nettie was employed in errands between Berkeley and Old Point, under the direction of Capt. Stoddard. Before the Excelsior left Norfolk to go to Baltimore for repairs, certain necessary work was put upon and done for her by the libelants, to the value of $470.70, as assessed by the board of naval officers before mentioned. These are the subjects of a second libel. The libelants are a corporation chartered expressly as a wrecking and salvage company, and expensively and elaborately equipped with wrecking steamers, tugs, lifeboats, steam-pumps, donkey-engines, heavy and light anchors, chains,

cables, falls, diving apparatus, and skilled wreckers and divers, and are capable of rendering prompt and effectual salvage service, at short notice, on the Atlantic and Gulf coasts, and in the West Indies.

Ellis & Kerr, for libelants.

White & Garrett, for claimants.

Edmund Waddill, U. S. Atty., and *Sharp & Hughes*, for the United States.

HUGHES, J. Obviously, the service rendered by these libelants to the Excelsior was a meritorious salvage service. They were telegraphed for as salvors. They left Norfolk and went to the Excelsior for the purpose of rendering salvage service. If their agent, Capt. Stoddard, had assented to the protestation of Capt. Baldwin that this was not to be a salvage service, he would not have altered the fact, or destroyed the rights of his employes as salvors, or changed the character of the service already entered upon. It is not the policy of the law maritime, when a vessel is in peril and has invoked the services of salvors, and these have gone to her for the purpose of rendering salvage assistance, to listen to stories of sharp bargains, driven at the instant, in the endeavor to change the character and lower the grade of the service about to be rendered. The law of the subject is laid down by the United States supreme court in the case of *The Camanche*, 8 Wall. 477, in which the answer alleged that the services were rendered under an agreement for a fixed sum, and were therefore not salvage services. The court said: "An agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment." In the present case there was no fixed sum agreed upon, and, of course, none tendered. There was an agreement that the compensation should be left to arbitration, in the event of a future disagreement as to the amount to be paid. As to such agreements, the supreme court of the United States, in *The Camanche Case*, said that "nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage." This, therefore, was a salvage service, and it is an attribute of such a service that it entitles the salvor not merely to the ordinary compensation for work and labor performed, materials furnished, and money laid out and expended,—which are allowed and are computed at the usual rates commanded in the market by such services,—but to a *reward* in addition, given on the principle of encouraging daring and enterprising men to be in readiness, and to be prompt and adventurous, in giving aid to ships in distress, and rescuing lives and property in peril of the sea. The reward is gauged according to the peril in which the persons or property rescued may be; and if the thing saved be property, according, in some degree, to its value.

In one respect this was a highly meritorious salvage service; for all the cargo was saved, without any loss or damage whatever, and the ship herself was saved without damage of any sort to her beyond what she had received in the collision which sunk her. This being indisputably so, the only further point of inquiry is as to the danger in which the Excelsior and her cargo were, from which they were taken by the salvors; and as to the hazard encountered by the salvors, and their vessels and material, in the course of the service which they rendered. That a large and expensively furnished bay and river steamer, with first-class boilers, engines, and machinery in her hold, lying full of water on the bottom, at a place where a heavy sea could easily effect her destruction, was in very great *possible* danger, is quite clear. This danger of possible *destruction* on a December night, though not certain, was imminent, and depended entirely on the caprice of the winds. The danger of greater or less *injury* to her machinery, her hull, her joiner-work, and cabins, and her decks, from lying in the water submerged, with a hole in her sides of 50 superficial feet, was certain and absolute. She could not be removed from the position in which she was until the hole in her hull was closed, and made water-tight. This needed to be speedily and effectually done; it needed the services of one who was not only an experienced diver, but a workman of skill; and of the greater skill from the work having to be done under water. Not only was such a diver with such experience absolutely requisite, but after he had accomplished his task, and to some extent while it was in progress, steam-pumps of exceptional size, power, and efficiency were necessary to empty the ship of the water with which she was full, and to empty it expeditiously, without mishap or delay. And, after the vessel was thus—by the work of the diver and of the pumps—made ready to be floated, it was of the highest importance that towing appliances and vessels should be in readiness to take the ship promptly into port, thoroughly guarded from the peradventure of accident to her frail and weakened hull at every step. All this was accomplished in a thoroughly skillful and successful manner by the salvors.

The complainants have not shown that there were other skilled persons, with ample outfit of divers, steamers, and wrecking vessels and apparatus, at hand, by whose instrumentality this ship and her cargo could have been rescued from the danger they were in, speedily enough to have prevented the irreparable damages that would have resulted from her lying long in the water. That fact could not have been proved; and this court has had such an iteration of evidence in such a large number of cases to the same effect, that it is now at liberty to assume, until the contrary is shown, that the Baker Salvage Company is the only fully equipped wrecking company available at all times for the most arduous and difficult salvage work, that is to be found anywhere south of the Delaware capes on the Atlantic seaboard. I think the danger of *injury* which the Excelsior was in

was very great; and she was certainly in danger of possible *destruction* from a rough sea, if one had set in, which, by thumping up under her very wide guards, might have lifted and ripped up her main deck, and broken up and wrecked all that was above it. Possible danger, which chanced not to have actually occurred, to a vessel in danger, may always be considered as interpreting the spirit with which the salvors worked, and illustrating the merit of their conduct; but is seldom made, of itself, the ground of materially increasing their reward. As to the danger in which the Resolute and her crew were during the rough part of the night of the fifth of December, I do not think it was actually great. That there was ground for apprehending danger is proved by Capt. Baldwin having requested that the Resolute should lie close along-side of him; and that the Resolute was by Capt. Stoddard willingly subjected to the risk of taking that position, shows that the salvors were ready and prompt to encounter the risks incident to salvage service. On the whole, I think this was a meritorious salvage service, deserving high commendation for the spirit, skill, and success with which it was rendered; but not of high grade when considered with reference to the risks and dangers incident to it; yet of sufficient merit in both respects to justify a graduation of the reward in some degree by the value of the property saved.

Except for the stress laid by claimants' counsel upon the matter, it would hardly be worth while to indicate the marked distinction between this case and the case of the same steamer Excelsior, when, in December, 1881, she was by accident run on Hampton bar, not far from where she was beached by Capt. Baldwin. For the first case see 5 Hughes, 416. There is in fact no similarity between the two cases, except that the vessel was the same and the bar on which she was grounded the same. In the former case, the Excelsior was merely aground, though so fast aground, by reason of her bottom being exceptionally broad and flat, that she could not be pulled off by tugs, and resort had to be made to wrecking anchors and cables. It is true that the services of a wrecker were called for, and the apparatus of wreckers employed. By the use of these means, and by taking advantage of the tides, which were waited for, the steamer was floated, and then proceeded on her voyage. She had been merely delayed. I believe none of her cargo was removed. On the authority of abundant precedent, I held that the case was one of salvage, but of salvage of a very low grade. It was more than a case of tugging and towing. It was a case for the use of wrecking anchors and cables, and for wrecking services. On this ground alone, I allowed, in addition to compensation by the rule of *quantum meruit*, a reward of $350. It was not a case for the reward to be made to bear any relation to the value of the property saved, which then was $180,000.

In contrasting the present case with that, it is unnecessary to advert further than already done to the circumstances under which the

present libelants found the Excelsior in Hampton roads,—sunk to her main deck on the bottom; full of water; with a hole in her hull, graphically described by one of the witnesses as "big enough for a street car to pass through;" with $10,000 worth of cargo on board nearly reached by water, on the main deck; with this deck and all above it liable to be lifted off and broken up by a heavy sea from the eastward; and with injuries inflicted by collision upon her hull to an extent then painfully and apprehensively unknown, but since discovered to be more than $10,000 could repair. The only elements of safety in the condition of the Excelsior were that she was squarely bottomed on one of the bars which skirt Hampton roads, and that she was within 12 miles of Norfolk, on the border of one of the safest anchorages and most capacious roadsteads for shipping in the world. The success with which she was saved, with all her cargo, was due to two causes, viz.: *First*, to the accident that no heavy wind or sea arose during the 42 December hours when she lay on the bottom; and, *second*, to the consummate skill with which the salvors performed their work. Though the former accident, that of good weather, may go to the diminution of the salvage reward, the latter should not. It is the characteristic of these salvors that, whenever success is possible, they perform their work with such facility and perfect success as to produce the impression on those who are benefited that their labors have not been difficult enough to deserve a liberal compensation. Such an objection is faulty both in its logic and justice, and I cannot accede to it.

As to what claimants' counsel say of "harbor service," Hampton roads is rather an inland sea than a harbor. It is an anchorage and roadstead, into which sea-going vessels put for safety by hundreds, without a thought of going into port. It is surrounded by headlands, flats, and bars, and there are but two wharves on its entire boundary, and these run out far from land in reaching the channel.

The services rendered by the libelants to the Excelsior in this case were of the same character, though not as tedious, laborious, or difficult, as those which were rendered within the harbor of San Francisco in the case of *The Camanche*, 8 Wall. 448, where the award was one-third of the value of the property saved, where only a part of the property at risk was saved, and where the service was what counsel calls "harbor service." The work there was divers' work, and that of powerful lifting machinery. It was done in the harbor, and in perfect safety, except as to the accidents ordinarily incident to diving and the handling of machinery. Yet in that case, where there was no sea danger, nor much danger of any sort, the award was, as before stated, one-third of the value of that portion of the sunken property which was saved—$25,000 for $75,000.

The case of *The Blackwall*, 10 Wall. 1, was also a notable case of harbor service, in which for a half-hour's work with city fire-engines on board of a harbor tug, a fire on a ship was put out, and $10,000 awarded for saving property worth $100,000.

Salvage services are rewarded in proportion to the danger attending them, to the peril from which the property was rescued, and to the energy, promptitude, skill, and success with which the salvage is affected. When of the requisite grade in these respects, the amount awarded is fixed with some reference to the values saved. In this case I will give a decree for 3½ per cent. of those values, or $5,600. In the second libel filed I will give a decree for the amount claimed, or $470.70.

The libelants claimed in argument 10 per cent. of the value of the property recovered, or $16,000; but as a compromise, to avoid the necessity of suing, reduced the amount of the bill presented to $10,000. I do not, in view of all the circumstances of the case, feel justified in awarding a larger amount than $6,000, as above stated.

BLOWERS *v.* ONE WIRE ROPE CABLE.

(*District Court, S. D. New York.* January 18, 1884.)

1. SHIPPING—FREIGHT, LIEN FOR.
   A barge has presumptively a lien for her freight upon the goods laden on board, which is not waived by any provisions of the contract of hire not absolutely incompatible with the enforcement of the lien at the time of delivery.
2. SAME—CONTRACT TO TAKE ON BOARD WIRE CABLE.
   A contract to take on board wire cable in New York to be laid in the Erie canal, freight, the hire of the barge, at a *per diem* rate, to be paid as soon as the cable is laid, is not incompatible with such a lien, and with proceedings to enforce it at once in default of payment as agreed.
3. SAME—PRIVATE ARRANGEMENT BETWEEN MANUFACTURER AND OWNER.
   Where wire cable was laden on board a barge by the manufacturer, pursuant to an agreement between the shipper and the owner of the barge, of which the manufacturer was chargeable with knowledge, *held*, that the barge had a lien upon the cable for her freight pursuant to the contract, and that such lien was not affected by the private arrangement between the manufacturer and shipper, not known to the libelant, that the cable should be paid for on delivery, nor by the fact that the manufacturers, upon completing the lading of the cable, kept the shore end fast upon their premises, so as not to permit the departure of the barge with the cable abroad. *Held, also*, that the cable, as between the manufacturers and the libelant, must be regarded as laden on account of the libelant's contract, and as the goods of the shipper, and that the manufacturers were estopped from denying this, as respects the libelant, although, as between the manufacturers and the shipper, the title may not have passed.
4. SAME—LIEN ARISES, WHEN.
   A maritime lien for freight arises from the time the goods are laden on board.
5. SAME—LIEN AS AGAINST MANUFACTURER.
   As the barge under her contract with the shipper would, as against him, be entitled to a lien on the goods during the time the vessel was detained by reason of his not fulfilling his contract with the libelant, *held*, that the lien existed to the same extent as against the manufacturers, who, for their own benefit, had held the vessel fast by the shore end of of the cable until they removed the cable under the stipulation given in this suit.

The libel in this case was filed by the owner of the barge E. M. Greenman, to recover freight under an agreement for the transportation of some 15 miles of wire rope cable from the city of New York, to be laid in the Erie canal. The charter was executed on September 10, 1880, between the New York Steam Cable Company and the libelant, whereby the latter agreed "to furnish the canal-boat E. M. Greenman, of Buffalo, for the purpose of taking on board and laying in the Erie canal a quantity of cable of the parties of the second part, the boat to be maintained in good condition and sufficiently manned, at $5 per day from the time of commencing to load until reaching the Erie canal at West Troy, after which $6.50 per day, until fully unloaded;" and the cable company thereby agreed "to pay the sum above mentioned upon performance of the agreement." At the time the charter was signed the cable company had agreed with the Wire Rope Manufacturing Company, by verbal contract, for the manufacture at its factory, near the wharf at One Hundred and Fiftieth street, Harlem, of the cable in question, to be delivered along-side the wharf, on board of a boat to be sent by the cable company, as the cable was manufactured; and upon delivery to be paid for by the cable company, one-half in cash and the other half in stock of that company. The manufacturing company also agreed, as part of the contract, to pay to the cable company one-half of the expense of the boat during the time it lay at the wharf taking the cable aboard.

The president of the cable company, after this agreement, procured the libelant's boat to be sent to the wharf under the above charter, where it arrived on the thirteenth of September, 1880. The cable was manufactured and put on board by the manufacturing company, at the rate of about a mile a day, and the lading completed on the third of October, 1880. The cable lay in a single coil extending the whole length of the barge, fore and aft, but running ashore into the manufacturing company's factory and there connected with the machinery, but was not cut off or let loose so that the barge could depart. The manufacturers thereupon demanded pay for the cable according to the terms of the contract with the cable company, but not obtaining the cash payment agreed on, continued to hold the shore end of the cable fastened to their premises. Numerous interviews took place between the agents of the two companies and the libelant, having reference to the payment of their respective demands. The cable company, during the three or four months following, paid the libelant, as his boat lay at the wharf, some 10 payments, amounting altogether to not quite $200, and the agent of the manufacturing company, at the request of the president of the cable company, paid the libelant the sum of $52.50, on account of its one-half part of the expenses of the boat while lying at the wharf and receiving the cable on board, pursuant to the agreement between the two companies. The cable company became insolvent, and went into the hands of a receiver, who declined to interfere in the matter.

In the spring and summer of 1881, the barge remaining all the time at the wharf, and the shore end of the cable still fastened in the manufactory, the libelant or his attorney, in several interviews and letters, required payment of the amount due the boat under the agreement, and that she be released by the removal of the cable, and threatened to remove it himself if this was not done. The vice president and superintendent of the manufacturing company always objected to this, and throughout this long period encouraged the libelant in the expectation that all difficulties would be settled through the action of the cable company or its president, Mr. Foote, and frequently forbade removal of the wire from the barge. On the nineteenth of July, 1881, the present libel was filed against the cable for the libelant's claim. The manufacturing company appeared as claimants, and thereupon removed it from the barge, and, in their defense to the action, claimed that under the charter no lien attached; and, *second*, that there was no such delivery of the cable on board as subjected it to any claim of the libelant.

J. A. Hyland, for libelant.

Scudder & Carter and *Geo. A. Black*, for respondents.

BROWN, J. It is claimed that no lien could attach under the charter in this case, because the provision that the freight was not to be due until the vessel had performed her contract, that is, until the cable had been laid in the Erie canal, shows that no lien on the cable was contemplated, and that none could have been enforced by action if the freight or hire of the barge had not been paid according to contract as soon as the cable had been laid. It is undoubtedly true that where the express stipulations as to payment of freight are incompatible with a claim upon the cargo, the lien will be deemed waived. *Ruggles* v. *Bucknor*, 1 Paine, 363; *Raymond* v. *Tyson*, 17 How. 53, 61. But in this case payment was due upon performance as in the ordinary cases of the transportation of goods on freight; nor do I perceive anything in the fact that the cable was laid in the canal incompatible with the right of the libelant immediately to proceed to libel the cable, as it lay, by a suit *in rem*, and to attach and seize it through the marshal, as in other cases, if the charterer had failed to pay the contract price upon the delivery being complete. I understand, the law, as generally administered, to be that the lien of the vessel upon the goods, and of the goods upon the vessel, attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *The Bird of Paradise*, 5 Wall. 545, 562, 563; *Bulkley* v. *Naumkeag, etc., Co.* 24 How. 386, 393; *The Yankee Blade*, 19 How. 82; 1 Pars. Shipp. & Adm. 174, and notes; *The Hermitage*, 4 Blatchf. 474; *The Eddy*, 5 Wall. 481, 494. This objection, therefore, cannot be sustained.

The situation of the barge, with 15 miles of cable on board, but made fast at the shore end upon the manufacturer's premises, is doubtless a peculiar one. The manufacturing company did not in-

tend to make a complete delivery in favor of the cable company, except on receipt of the cash payment agreed on, and it is claimed that they were, therefore, in possession of the cable while it was on the barge through the control they exercised over it by holding fast to the shore end. The manufacturers, however, are clearly chargeable with notice of the relations of the libelant to the cable company. In loading the cable on board they could not have supposed that the barge belonged to the cable company. They knew that it came under some contract with the libelant, by which he was to have pay for the use of it, for they agreed to pay one-half of the expenses of the vessel while she was receiving the wire, and they subsequently made a payment on this account. So far as the libelant was concerned, therefore, they must be held to be chargeable with knowledge of the contract between him and the cable company, and that in the ordinary course of business the libelant would have a lien for the hire of the boat upon all cable put aboard. They must be held, therefore, to have laden the cable on board the libelant's boat pursuant to his contract with the cable company. The libelant, in receiving it on board, received it in execution of his contract with the cable company, and the manufacturers in putting it aboard did so on account of the cable company, at least so far as respects the libelant's rights. The libelant had no knowledge of the terms of the contract between the two companies, and there were no circumstances putting him upon inquiry. He had no right to refuse to receive the wire on board when tendered by the manufacturers; on the contrary, he was bound to receive the cable on board, precisely as he did accept it; and in thus accepting it and permitting it to be laden on board, he received it evidently under, and in part execution of, the contract of affreightment; and the manufacturers are clearly chargeable with notice of these facts. It is clear, therefore, as it seems to me, that the libelant could not be bound to receive the wire on board under his contract without at the same time acquiring that lien on the cable which by the maritime law attaches to goods from the moment they are laden on board. Had the manufacturers desired to put the cable on board under such qualifications and restrictions as would prevent the ordinary lien of the vessel from attaching, they were bound to give the libelant express notice of this intention and condition on loading; and the libelant might in that case have lawfully refused to receive the cable on board under such qualifications. As the manufacturers did not do this they must be held, as respects the libelant, to be estopped from denying that they loaded the goods on board the barge as the goods of the cable company, and to have voluntarily subjected the cable to the lien of the vessel thereon, without regard to their own private relations to the cable company as respects their right to payment on delivery. *Faith* v. *East Ind. Co.* 4 Barn. & Ald. 630. The same principle of estoppel as regards the lien of material-men upon vessels or their equipment, without regard to the actual title, has been applied in the

case of *The May Queen*, 1 Spr. 588; *The St. Jago de Cuba*, 9 Wheat. 409, 418; and *The Sarah Starr*, 1 Spr. 453.

As respects the cable company, it is manifest that the delivery of the cable was not complete, and was not intended by the manufacturers to be complete, until they should obtain the cash payment agreed upon; but this, so far as the libelant was concerned, was a secret arrangement between the two companies, of which the libelant had no knowledge; and the intention of the manufacturers to hold on to the shore end of the cable, instead of cutting it loose, when the whole amount was put on board, was in no way communicated to the libelant until the cable had all been loaded. The manufacturers being then unable to obtain their pay, refused to cut the shore end of the cable so as to allow the vessel to depart and perform her contract, and in their endeavor by subsequent negotiations with the cable company and the receiver to procure their pay, they kept the vessel in that condition, and would neither remove the cable nor suffer it to depart.

The manufacturers, it is true, were not, as respects the cable company, bound to deliver the cable or suffer the vessel to depart without being paid according to their contract. The cable company in omitting to pay for the cable as their contract provided, so as to permit the departure of the vessel, in effect obstructed and prevented the further performance by the vessel of her contract after the cable had been taken aboard, though the vessel was ready to proceed and complete her contract. The vessel is entitled, therefore, to compensation according to the contract price prior to reaching West Troy. The manufacturers have no equity to contest this, for the reason that, having put the wire on board with substantial knowledge or notice of the libelant's rights, they could not afterwards, upon failure to get their pay as expected, rightfully keep the vessel tied to the wharf for their own benefit, in the hope of speedy payment for the cable put on board.

By the charter the libelant was to have five dollars a day for the vessel until she arrived at Troy. She has been prevented from the full performance of her contract, after having taken the cable aboard, through the default of the charterer; and, by this default, with the concurrent acts of the claimants, the vessel was detained until the cable was removed from on board, under the bond given by the claimants on August 23, 1881, after this libel was filed, in all 343 days, making $1,715. The increased price of the barge after reaching the Erie canal is presumably on account of the increased expense subsequently attaching. The time during which she was detained at the wharf was far more than sufficient for the laying of the cable, so that full compensation for her contract will be given by an allowance of the stipulated price of five dollars per day for the time during which she had the cable on board, amounting to $1,715, from which, deducting $240.50 already paid, a balance remains due of $1,474.50. Where a lien on the cargo for freight exists, it extends also as against the

freighter, by the maritime law, though otherwise at common law, to demurrage and damages for the unreasonable detention of the vessel, though not expressly agreed upon. *The Hermitage*, 4 Blatchf. 474; *The Hyperion's Cargo*, 2 Low. 93; *Sprague* v. *West*, Abb. Adm. 548. But in the present case, compensation for the vessel, while lying at the wharf with the cable on board, is not in the nature of damage for detention, but is a part of the express contract of the charter to pay for the vessel at the rate of five dollars per day until arrival at Troy.

The libelant is therefore entitled to a decree for $1,474.50, with interest from August 23, 1881, with costs.

THE ROCKAWAY, etc.

THE SURVIVOR, etc.

(*District Court, S. D. New York.* January 15, 1884

1. COLLISION—ANCHORED VESSEL—PRESUMPTION.
   Where a steamer in motion collides with a vessel properly anchored, the presumption of fault is upon the former.
2. SAME—RINGING BELL—SNOW.
   There being no positive rule nor settled usage for a vessel at anchor to ring a bell in thick snow, *held*, such vessel is not in fault for not ringing a bell during a thick squall of snow of a few minutes' duration only.
3. SAME—CASE STATED.
   Where the ferry-boat R., running from Hunter's Point to Seventh street, New York, her usual course being near where the bark S. was anchored off Nineteenth street, was overtaken after leaving Hunter's Point by a sudden squall of thick snow, and on passing Twenty-third street was embarrassed by one of the ferry-boats of the Twenty-third street line crossing her bows, compelling her to stop and back, and while so doing, and being headed well towards the New York shore, she drifted down with a strong tide and ran afoul of the S. at anchor, the position of the latter being previously well known to the R., *held*, that the ferry-boat was in fault for not keeping further away from the known situation of the S.; *held also*, that under the circumstances it was not probable that the ringing of a bell would have been of any service to the R. in avoiding the collision, and that the R. accordingly was alone answerable.

In Admiralty.

Shipman, Barlow, Larocque & Choate, for ferry company.

Jas. K. Hill, Wing & Shoudy, for the Survivor.

BROWN, J. These cross-libels were filed to recover damages arising out of a collision, which took place in the East river, off Eighteenth street, a little after 7 o'clock in the evening of Sunday, December 26, 1880, between the brigantine Survivor and the ferry-boat Rockaway. The brig was a new vessel of 193 tons register, belonging at Windsor, Nova Scotia. She arrived at New York, loaded with potatoes, on the afternoon previous, by way of Long Island sound and the East river, and, after being taken through Hell Gate by the pilot in charge, was

left by him on the usual anchorage ground, known as the Poor House flats off Nineteenth street, about 450 yards from the New York shore. The brig Louisa Coipel was anchored just above and a little nearer the shore. The place of anchorage was at first disputed, but is fixed with approximate accuracy by the pilot who anchored the Louisa Coipel, who states that she was anchored when he got in range of the west ship-house, at the navy-yard, as it opened along the line of the New York shore. This fixes the position of the brigantine at about 450 yards from the New York shore.

On Sunday, the day of the collision, the wind was strong from the north-east, with occasional spits of snow. At about 5 P.M. both vessels threw out a second anchor, apprehending a stormy night, and paid out 20 additional fathoms of chain. This would have brought the brigantine between Eighteenth and Nineteenth streets. The Rockaway, with her companion-boat, the Long Beach, was running from the ferry at the foot of Seventh street, New York, to Hunter's Point. Off Tenth street there is a reef of rocks near the middle of the river. The usual course of the ferry-boats is to run between this reef and the New York shore until off Seventeenth street, and then make somewhat across the river for Hunter's Point. When the weather is thick the boats go near the docks as far as Seventeenth street and then steer by compass across for Hunter's Point, and return in the same manner. At Seventeenth street the New York shore makes a sudden and deep bend to the westward, forming a sort of bay with the flats above referred to. The harbor regulations forbid vessels to anchor within 300 yards of the shore. While the Survivor was thus at anchor, the tide being strong ebb, the Rockaway, on one of her trips down the river from Hunter's Point, ran afoul of the brigantine, causing damage to both vessels. The ferry-boat at the time was headed more or less for the New York shore; was under slow headway through the water, and drifting down with the strong ebb-tide. As she did so, the jib-boom of the Survivor ran through the second window from the front of the forward cabin of the Rockaway, on her port-side, and that side of the ferry-boat was carried away as far back as the wheel-house. The boats became entangled; the Rockaway swung round with her head up river and upon the east or starboard-side of the Survivor, and was fast afoul from half an hour to an hour, when she was finally extricated through the aid of the Long Beach, which was approaching and very near at the time of the collision.

The witnesses on behalf of the ferry-boat testify that when the Rockaway left her slip at Hunter's Point the lights at Thirtieth street could be seen, but that a few moments afterwards, when she got out into the river, a thick squall of snow set in, which hid the lights on both shores, as well as the lights of the vessels at anchor, so that no light could be seen except at a very short distance; and that this snow squall and this condition of the weather continued until the collision. The pilot testifies that as he approached the crossing of

the Twenty-third street ferry from New York to Greenpoint, he blew signal whistles for this ferry, and received in reply two whistles from the ferry-boat Martha, of that line, which he recognized, indicating that she would cross his bow; that he immediately reversed his engine; that the Martha passed his bow very near to him; that he could only see her white light when she was close to him; that after she had passed, and while he was still drifting and backing, he ran afoul of the Survivor in the manner before described, not being able to see her anchor light, which was set in her fore-stay, until close upon her. This testimony in regard to the state of the weather is substantiated by three other pilots, namely, the pilot of the Long Beach, and the pilots of the Martha and Greenpoint, of the Twenty-third street line. They all testify that on this trip lights could not be seen any considerable distance, so as to be of service in avoiding vessels, and that they sounded their fog-whistle, as customary in thick weather. The witnesses on behalf of the Survivor, including some who were disinterested, state in general terms that the weather was not thick; that there was no snow to obstruct lights; that the lights on both shores were visible, and the lights of vessels visible at a good distance off. Such a conflict of evidence in regard to the weather is extremely embarrassing. But, upon a careful consideration of the testimony, and notwithstanding the able argument of counsel on the part of the company, I am not satisfied that the ferry-boat has absolved herself from the sole responsibility for this collision.

1. The brig was at anchor in a proper place, where she had a right to be, and with her light properly set. The pilot of the ferry-boat knew her precise position, and was bound to keep out of her way. The burden of proof in such cases is upon the vessel under way to show by a clear preponderance of proof that the collision occurred without fault on her part, or through some fault of the other vessel. *The Batavier*, 2 Wm. Rob. 407; *The John Adams*, 1 Cliff. 404, 413; *The City of New York*, 8 Blatchf. 194.

2. Even if the weather were as thick as the witnesses on the part of the Rockaway state, the latter must, nevertheless, be held in fault, because her pilot well knew where the Survivor lay at anchor, and was bound to give her a good offing, there being nothing in the way of his doing so. Moreover, a statute of this state requires steam-boats navigating the East river to keep in the middle of it; and this statute was held by NELSON, J., in the case of *The E. C. Scranton*, 3 Blatchf. 50, to be binding upon the Williamsburgh ferry-boats. The Rockaway in deviating from this rule did so at her own peril. The course of the Rockaway on this trip, by compass, as stated by the pilot, shows that no effort was made to keep in the middle of the river or to go much to the eastward of the Survivor. As respects her duty to keep away, the case is very similar to the case of *The D. S. Gregory*, 6 Blatchf. 528, in which NELSON, J., says:

"It was the duty of the D. S. Gregory [in a thick fog] to take every reasonable precaution in her power to avoid the Talisman. In this, I think, she failed. She knew that the Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position down to the time of the collision, and the ferry-boat was passing her every trip she was making, the ferry-boat is chargeable with notice of her position, and should have been so navigated as to avoid her."

That case presented more difficulties from the surrounding shipping than the present, and, nevertheless, the ferry-boat alone was held liable.

3. It is urged that the Survivor was in fault in not ringing a bell when the weather was so thick with snow that lights could not be seen. There was not then, and is not now, any express rule or regulation in force in this country requiring a vessel at anchor to ring a bell in snowy weather. The rule provides for cases of fog only. The new international rules of navigation provide for snow as in cases of fog; but these rules have not yet been adopted by congress. There was no proof of any usage or custom of the port for vessels at anchor to ring a bell in snowy weather. See *The Bay State*, 1 Abb. Adm. 235, 241, note.

Without considering what may be the obligations of a vessel in this respect when anchored in the region where ferry-boats are in the known habit of passing, I have come to the conclusion that under the peculiar circumstances of this case there is not such satisfactory evidence or preponderance of proof on the part of the ferry-boat in regard to the condition of the weather for such a length of time as would justify me in holding the Survivor chargeable with negligence in not ringing a bell. The case is not one of the omission of a reasonable precaution to avoid the danger of a particular collision after that danger has become visible. The fault charged is that the Survivor did not commence to ring a bell when the weather, as is alleged, became thick, as a general measure of precaution, to enable ferry-boats and any other vessels to keep away from her. But the time during which this thick snow could have existed was extremely short; certainly not more than five or six minutes. No bells were rung anywhere else, either upon other vessels, or upon the ferry slips, which are in the habit of using bells in thick weather to guide boats coming in. Some suspicion necessarily attaches also to the claim that so thick weather should come on so suddenly, continue until the collision, and disappear a minute or two afterwards; and the proof to sustain it ought to be clear and satisfactory. Although four pilots of ferry-boats do testify to this, there are numerous circumstances in connection with the other direct evidence, which, contrary to my first impressions, have led me to hesitate, and at length to conclude, after much review, that the weather was not so thick for any such appreciable time as could constitute negligence in the brig for not ringing a bell. There must be some reasonable period allowed for observation, directions, and the execution of orders for such signals. A vessel at anchor, and

in a proper place, is not, I think, to be charged with extreme vigilance or watchfulness against collision with other vessels, nor held to be always prepared for the instantaneous sounding of a bell. Less vigilance is required of a vessel at anchor. *The Lady Franklin*, 2 Low. 220. The general absence of such ringing of bells as would be looked for if the weather was very thick is entitled to considerable weight, I think, as evidence that whatever thickness of weather existed was for so brief a period as not to have given occasion for bells to be rung, in the exercise of ordinary prudence. In the several years that have elapsed since the collision it is not impossible, also, that the thickness of the weather may have become somewhat exaggerated in the recollection of the witnesses on the part of the ferry-boat; and some important differences in their testimony and other circumstances of proved mistake have on the whole satisfied me that, as the main fault was very clearly on the part of the ferry-boat, there is not sufficiently satisfactory evidence of negligence to make the Survivor also legally responsible for the collision. If, moreover, the weather was as thick as alleged, it is not evident, and scarcely appears probable, that, considering the heading, the backing, and the drifting of the Rockaway after the embarrassment caused her by the Martha's crossing her bows, she would have received aid from a bell if rung from the Survivor. Her pilot had not lost his bearings; he knew the position of the Survivor and Louisa Coipel, and must have known his own position very approximately from the Martha's course. He does not claim to have been misled by the absence of the bell, and I doubt that the bell, if rung, would have made any difference in the result. *McCready* v. *Goldsmith*, 18 How. 89, 92.

In the case of Slocomb a reference may be taken to compute the damages to the Survivor, if the parties do not agree, and the cross-libel must be dismissed, with costs.

THE ECHO, etc.

(*District Court, S. D. New York.* January 21, 1884.

1. COLLISION—NEGLIGENCE—BURDEN OF PROOF—CUSTOM.
   Where a boat properly moored receives damage from another colliding with her, the latter is presumptively liable for the damages, and the burden of proof is upon her to clear herself from fault.
2. SAME—LINE ACROSS CHANNEL.
   The temporary use of a line or warp stretched across a narrow stream in the mooring and handling of vessels is not necessarily unlawful.
3. SAME—CUSTOM.
   Where a tug-boat coming down Newtown creek discovered such a line ahead of her, and upon backing to avoid it, ran into the libelant's boat, *held*, that the burden of proof was upon the tug-boat to show that the line was used improperly, or that any proper signals were omitted; *held, also*, that in view of the

local usage the tug-boat should have been more cautious in her approach, and kept further away from the libelant's boat, and was therefore chargeable with the damage.

Collision.

Beebe, Wilcox & Hobbs, for libelant.

Edwin G. Davis, for claimant.

BROWN, J. On December 21, 1880, the libelant's canal-boat Van Vleet, laden with coal, was lying at the Long Island railroad dock, in Newtown creek, a short distance above the bridge, moored outside of two other canal-boats. At dusk, about 5 P. M. of that day, the weather being clear, the steam-tug Echo was coming down the creek on a course which would carry her about 25 feet outside of the Van Vleet. When she had come within about 30 feet of the stern of the Van Vleet her pilot saw a line stretched across the creek a short distance below the canal-boat, running from a schooner on one side to the opposite shore, and ranging about 10 or 12 feet above the water. The pilot immediately stopped and reversed his propeller to avoid running into the line. In doing so, the Echo not being entirely manageable in backing, swung her bows towards the canal boat and inflicted a blow, causing some damage, for which this libel was filed. The owner of the Echo subsequently agreed to pay for certain repairs, but the terms of the agreement being afterwards a subject of dispute, no settlement was effected.

The canal-boat being moored at a proper place, and no fault chargeable against her, she is presumptively entitled to the damages inflicted by another boat colliding with her. *New York, etc.*, v. *Rumball*, 21 How. 385; *The Bridgeport*, 7 Blatchf. 361; *Pierce* v. *Lang*, 1 Low. 65; *The Lincoln*, Id. 46; *The John Adams*, 1 Cliff. 404, 413; *The City of New York*, 8 Blatchf. 194; *The Rockaway*, *ante*, 449. On the part of the Echo, it is urged that she ought not to be held liable, on the ground that the stretching of a line across the creek, a thoroughfare for vessels, was the real wrong which caused the collision; that there was no previous notice given of the existence of the line, available to the Echo; that it was seen as soon as it could be perceived; and that there was no subsequent fault in the handling of the tug. If the evidence sustained this view a different question might be presented; but it is a familiar fact, and it was proved on the trial, that the use of lines stretched across the creek was a usual and customary thing for the purpose of handling and moving vessels of a considerable size which go above the bridge, and that the temporary use of such lines is necessary for that purpose, in that narrow channel-way. 1 Pars. Shipp. & Adm. 547. It cannot be assumed, therefore, that this line was wrongfully across the stream at the moment when the pilot of the Echo discovered it, and no evidence was given showing the omission of any customary signals. The burden of proof to show that the line was wrongfully there was upon the Echo. Nothing was proved, however, beyond the bare fact of the

line being there, and, under the custom proved, that is not presumptively unlawful. The custom of stretching lines across the stream for this purpose imposes the duty upon tugs navigating that part of the creek to observe carefully, and to regulate their speed and distance from other craft with reference to such a contingency. There was plenty of room for the tug to have gone further from the canal-boat. The pilot of the Echo had not been accustomed to navigate in Newtown creek, and the accident in question, doubtless, arose from his want of familiarity with the usage of stretching lines across the creek. This does not exempt the Echo from responsibility, and the defense in this respect cannot be sustained. Nor upon the evidence of the pilot himself can I sustain the claim that the blow was a light one, or such only as may rightfully occur in the ordinary rubbing of boats passing along-side each other. *The Chas. R. Stone*, 9 Ben. 182. It was plainly a considerable blow, and did not arise in the course of the ordinary, usual, and prudent handling of such boats.

I see no reason in this case to doubt the fairness of the bill presented for the repairs, detention, and expenses of the vessel. These are proved to amount to $97, which, with interest to this date, makes $115, for which the libelant is entitled to a decree, with costs.

THE SWAN.

(*District Court, S. D. New York.* February 1, 1884.)

1. SHIPPING—OBSTRUCTION TO NAVIGATION—ROPE ACROSS CHANNEL—DAMAGE—PROXIMATE CAUSE.

   A rope stretched across the archway of a bridge and over the principal channel of a navigable river, and remaining 24 hours, is an unlawful obstruction of navigation.

2. SAME—WHEN JUSTIFIABLE.

   Wherever such rope or warp may be used, it is justifiable only for a temporary purpose, those who use it making provision for loosening it to allow vessels to pass, and giving timely notice of its existence.

3. SAME—CASE STATED.

   Where a rope was stretched across the west archway of High bridge, for the purpose of keeping a canal-boat a few feet distant from the abutment of the bridge where there were sunken spiles, and the boat might have been breasted off equally well by the use of planks upon the wharf, and the passenger steamer S., after landing within 150 feet of the abutment, proceeded with the flood-tide through the main channel, no notice being given of the rope which was under the water in the middle, and visible only where the ends came from beneath the surface, and those on the boat being unable to loosen it at once, and in the strong tide it being dangerous for the S. to remain in contact with the rope, *held*, that the use of the line in this case was unnecessary and was an unlawful obstruction; that the cutting of the rope by those on the steamer was lawful; and that the steamer was not liable for any damage subsequently sustained by the canal-boat. *Held, also*, upon the facts, that the damage to the canal-boat from settling upon the spiles arose after a considerable interval, during which the boat might have been breasted off from the spiles; that the cutting of the line was not the proximate cause of the injury; and that on these grounds also the libel should be dismissed.

This action was brought to recover damages for injuries to the canal-boat C. B. Simon, on the fifteenth day of July, 1881, on the west side of the Harlem river, at High bridge, caused through a line by which she was fastened having been cut by those in charge of the steam-launch Swan. The Simon had arrived at High bridge the day previous, loaded with coal, and moored on the west side of the river, along-side of the bulk-head which extends northerly from the westerly abutment along the shore, and which is on a line flush with the inner side of the abutment. The canal-boat lay with her bows to the northward and her stern projected part way through the western archway of the bridge. Beneath the water and near the bottom were the remains of a crib extending around the abutment two or three feet from its base, the outer margin of which consists of spiles which had been cut off a foot or two above the bottom. To prevent boats moored along the bulk-head and the abutment from settling down upon these spiles at low water, they were usually fended off so as to be outside of the line of these sunken spiles. This was sometimes done by means of planking passing from the wharf to the boat, and sometimes by a line run from the end of the boat at the abutment and stretched across the western archway and fastened to a spike driven into the second abutment of the bridge not far from the surface of the water at high tide. The stern of the Simon was kept off by a line fastened in the manner last described. The Swan was a small steamer plying in the summer season between Harlem bridge and High bridge for the carriage of passengers. Her usual landing place at High bridge, upon the west side, was at a float, known as Riley's float, upon the western edge of the channel directly below, and about 150 feet southerly from the western abutment of the bridge. Her usual landing on the east shore was about the same distance above the bridge. The principal channel is under the western arch of the bridge, which is of about 70 feet span. The middle arch, though usually having about six feet of water at low tide, was much less used for passage. Around the second abutment there were loose stones extending some distance to the southward which interfered somewhat with the approach to the middle arch, and rendered a cross-ways approach to it dangerous; and under the eastern arch the water was too shoal for navigation. The ordinary course of the Swan upon her trips, both in going and coming, was through the western arch, not only by reason of the deeper water there, but especially, also, because upon the flood tide, after landing at Riley's float, the Swan could not in the short space between that and the bridge get far enough out into the river to make the middle passage without danger of running upon the rocks by the second abutment, except at great inconvenience and by special appliances which she did have aboard for first shoving her bows or her stern out into the river. After making her landing at Riley's float, upon her first trip on the fifteenth of July, the Swan proceeded in the manner usual at flood tide through the western arch-

way, and when close to it observed for the first time the line stretched across it, which in the middle was beneath the water and was visible only where the two ends came out above the surface. Shouts were given from the Swan to loosen the line, and some effort was made by the wife of the libelant on board of the boat to unfasten it there, but it was so secured that it could not be readily loosened, and the Swan having run afoul of it, and the captain apprehending danger both to the boat and passengers in the strong flood tide, after a few minutes ordered it cut, which was done. The canal-boat afterwards got upon the sunken spiles, which in the ebb tide made holes in her bottom, causing the injury for which this libel was filed.

J. A. Hyland, for libelant.

Edwin G. Davis, for claimant.

BROWN, J. There can be no doubt that the archway across which the line was stretched was the principal channel for navigation in the Harlem river, under High bridge. The landing at Riley's float has been in use for many years. The course from that landing, through the middle archway, upon a flood tide, would be attended by such obvious inconvenience and dangers as cannot rightfully be imposed upon persons entitled to navigate the river in the ordinary course of navigation. The line stretched across the western archway was, therefore, in my judgment, plainly an unreasonable obstruction to the navigation of the river, which could only be lawfully put there very temporarily, or at seasons when the channel was not in use for ordinary navigation. While such lines or warps may doubtless be used temporarily for mooring and handling vessels in rivers or harbors, they cannot be lawfully continued so as to form a permanent obstruction to navigation. Those who make use of them must be prepared to give seasonable notice of them to approaching vessels to avoid danger, and make seasonable provision for their passage.

In *Potter* v. *Pettis*, 2 R. I. 487, the court say:

"The plaintiffs had a right to extend their warp across the entire channel of the river, if there were no vessels passing, but on the approach of another vessel it was their duty to take notice of such approach, and to lower their warp so as to give ample space in the ordinary traveled part of the channel for her to pass, and to give timely notice of the space so left."

In *McCord* v. *The Tiber*, 6 Biss. 410, the court say:

"The respondent had no right to obstruct the channel with a line across it in that manner. * * * If it was for the safety of the boat to make a line fast to the shore, or to use a line attached to the shore as a necessary assistance in getting off the bar, she should have taken care to get it out of the way of all passing vessels, either by dropping it, so that they could pass over it safely, or by casting off one end. The obstruction not being removed so as to let this raft pass over or under it in safety, was manifestly illegal."

See 1 Pars. Adm. 547; *The Vancouver*, 2 Sawy. 381.

In this case no attempt was made to give seasonable notice to the Swan of the existence of this line across the archway before she left Riley's float, or afterwards, until she was close upon it. Such a

line was not easily distinguishable, and the pilot of the Swan is not, so far as I can see, chargeable with any negligence in not perceiving it in time to avoid it. Those on the Simon could not loosen the line, though requested to do so. The Swan could not safely remain any length of time in contact with the line, and the only alternative was to cut it, as was done, which, under such circumstances, as I must hold, the captain had a legal right to do. There was no actual necessity for the use of this line by the Simon at all. The boat might have been breasted off by the use of planks, and that, as the laborer Dunn stated, has been latterly the more usual method. The line had been thus used by the Simon for 24 hours, forming a plainly illegal obstruction of the channel.

While, therefore, upon the ground above stated, I should be constrained to hold that any loss occasioned by the line's being cut was through the libelant's own fault, and not through any legal fault in the Swan, upon the other facts of the case, also, the weight of evidence seems to show that the damage to the boat was not the proximate result of cutting the line. It was high water that day at Governor's Island at about 10 minutes before 12, and it could not have been high water at High bridge until between 2 and 3. The libel states that the line was cut at about 11 o'clock, and the libelant so testified. The answer does not state the hour, but says that the flood tide was then about three-quarters full, which would place the time between 11 and 12. These statements in the pleadings, with other direct evidence in accord with them, should be held controlling, notwithstanding some contrary evidence which was given on the part of the libelant. While the tide, therefore, was rising rapidly, it was impossible that the injuries complained of could have arisen immediately after the line was cut. The discharge of coal continued until 3 o'clock, and until nearly that time the tide was rising; after that it fell, and the settling of the boat upon the spiles with the falling tide must have taken place at or after that time. During the interval there was abundant time for the libelant to take all necessary means to shove his boat off and out of the way of the sunken spiles. The libelant himself says the effort to get the boat off was *soon* after the line was cut,—from five to fifteen minutes afterwards. But the libel is so full of gross errors in its statement of facts as to detract much from the credit to be given to the libelant's case, and I cannot accept as true the statement of some of the libelant's witnesses, that when the line was cut the boat immediately got upon the spiles and could not be removed.

On both grounds, therefore, the libel should be dismissed, with costs.

THE OLUF.[1]

(Circuit Court, E. D. Louisiana. December, 1883.)

1. CHARTER-PARTY—DEMURRAGE.
The words "providing for demurrage for every day, day by day," in a charter-party, are to be construed as running days, and not working days, and all days are to be counted, including rainy days, Sundays, and other holidays. *Lindsay* v. *Cusimano*, 12 FED. REP. 503, 504, followed.

2. SAME.
The words "weather permitting," in the charter-party in this case, apply to the time to be taken for unloading, and not to the time of the detention of the vessel by the default of consignees.

Admiralty Appeal.

E. H. Farrar, for libelants.

W. S. Benedict, for respondents.

PARDEE, J. Libel for demurrage under charter-party, containing this clause on the subject:

"It is agreed that the lay days for loading and discharging shall be as follows, (if not sooner dispatched:) commencing from the time the vessel is ready to receive or discharge cargo; cargo to be delivered to the vessel in quantity of not less than 15,000 feet per day, and to discharge as fast as the vessel can deliver to company's lighters, weather permitting. And that for each and every day's detention, by default of said party of the second part, or agent, twenty-five dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent."

The evidence shows that the cargo could have been discharged in 10 working days had ordinary dispatch been used. And this was expressly agreed to by the agent of consignees. It is also shown and agreed that the lay days commenced September 26th, and expired October 27th, from which time the bark was detained by default of the respondents. The only question remaining is whether, under the contract, demurrage was to be paid for running days or only for working days. It seems to me that the contract is perfectly plain: "And that for each and every day's detention, * * * twenty-five dollars per day, day by day, shall be paid." The vessel should have been discharged October 27th.

As this court had occasion to say in another case:

"All delays after that date were the result of the negligence of the respondent, and whether it 'rained or shined,' was Sunday or weekday, he should pay demurrage for every day thereafter, until the ship was discharged." *Lindsay* v. *Cusimano*, 12 FED. REP. 504.

It seems that after the expiration of the lay days, and while demurrage was running, the storms were so violent at intervals that the bark was compelled to go to sea for safety, and this no less than six times; and one time the bark was kept outside some 10 days. It

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

does not appear that much of the time the bark was outside for safety could or would have been utilized for discharging; but the respondents urge that these days should, at least, be deducted from the delay for which demurrage is allowed. This claim, though plausible at first glance, cannot be allowed under the contract. The words "weather permitting" apply to the time to be taken for unloading, and not to the detention of the bark by the default of consignees. If the bark had been discharged with dispatch when the stormy season came on, she could have sailed for smoother seas and safer ports. The risks and losses she was compelled to meet to secure her safety will be hardly compensated by the allowance she will get as demurrage during that stormy season.

A decree will be entered in favor of libelant for $2,650, being demurrage for 106 days at $25 per day, with interest from December 24, 1881, with credit of $550 deposit, with interest from November 24, 1882, and for costs of both courts.

THE CITY OF LINCOLN.

(Circuit Court, E. D. Louisiana. December, 1883.)

1. APPEAL—BOND—PARTIES.
   Where the appeal was taken and bond given before the decree below was made final by the signature of the judge, and where all parties against whom the decree below was rendered have not appealed nor severed, and where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, and the judgment below in his favor was only for $40, not sufficient to give jurisdiction to this court, the appeal will be dismissed.
2. SAME—AMENDMENT OF PROCESS.
   On appeal from district to circuit court defective process cannot be cured by amendment.

On Motion to Dismiss Appeal in Admiralty.

Richard De Gray, for libelants and appellees.

Emmet D. Craig, for claimants and appellants.

PARDEE, J. The appeal bond in this case is irregular and defective, (1) because the appeal was taken and bond given before the decree below was made final by the signature of the judge; (2) because all parties against whom the decree below was rendered have not appealed, nor have they severed; (3) because the motion and order for appeal were not taken against any of the numerous libelants by name; (4) because no bond was given in favor of any other libelant and appellee than Daniel Kelly, and the judgment below in his favor was only $40, not an amount sufficient to give appellate jurisdiction.

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

It may be said that the first three grounds are not sufficient to enable the court to say that there is no appeal. There may be no rule of the district court (although the custom is invariable) requiring decrees to be signed by the judge; but see Betts, Adm. 98. The steam-ship company may be the only real party interested in the decree below, to be determined by examining the record. No motion for appeal may be necessary where notice is given and a proper bond given.

The fourth and last ground, however, is too serious to be explained away. I take it that the bond in the case is the real and only appeal process which in this case, at least, brings the case to this court. The decree below was in favor of some 20 odd libelants by names, for various sums. The appeal bond is in favor of Daniel Kelly and intervening libelants, without naming any one. The rule is well settled that such appeal process is defective. It must name all the persons which the appeal is intended to bring before the court; otherwise there can be no decree for or against them. See *Smith* v. *Clark*, 12 How. 21; *Deneale* v. *Stump* 8 Pet. 526; *Holliday* v. *Batson*, 4 How. 645.

Suggestion has been made that the court can grant leave for appellant to amend, but I do not know of any authority for the court to make such order where the effect would be to bring new parties before the court. There is no sufficient bond in this case to bring the parties here for the court to act upon them for any purpose.

The appeal will be dismissed.

THE CITY OF BATON ROUGE.[1]

(*Circuit Court, E. D. Louisiana.* December, 1883.)

JURISDICTION—ADMIRALTY.

An unexecuted contract of affreightment gives no lien in admiralty.

The Pacific, 1 Blatchf. 569, distinguished

Admiralty Appeal.

Henry C. Miller and *Walter S. Finney*, for libelant.

Charles B. Singleton and *Richard H. Browne*, for claimants.

PARDEE, J. Libel *in rem* to recover damages for the breach of a contract made between libelant and the master of the steam-boat City of Baton Rouge, to convey certain molasses from libelant's plantation, in the parish of Iberville, to St. Louis, "it being agreed that said molasses would be taken on board for conveyance to St. Louis on or about January 25, 1883, the said steam-boat being on her down

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

trip from St. Louis when said contract was made, and it being intended by said contract that said molasses would be taken on board said steam-boat on her return and up trip to St. Louis." The breach alleged is "but neither on said appointed day nor at any time did the said master call for, take on board, or convey said molasses as he had agreed to, but in all respects he failed to keep and carry into effect said contract." The case has been heard on an exception to the jurisdiction, and the question is whether an unexecuted contract of affreightment gives a lien. This question is well settled in the negative. *The Freeman* v. *Buckingham*, 18 How. 188; *Vandewater* v. *Mills*, 19 How. 82; and see *The Lady Franklin*, 8 Wall. 329; *The Keokuk*, 9 Wall. 517; *The Prince Leopold*, 9 FED. REP. 333.

The learned proctor who brings the libel in this case relies entirely, to maintain the jurisdiction, on *The Pacific*, 1 Blatchf. 569. In regard to that case, it should be noticed that the maritime contract for passage had been so far entered upon that the passage money had been paid, and one demand of the libel was for the return of the money. It is very probable that in just such a case jurisdiction would be maintained now. In our case no freight has been paid, no goods delivered, nor the maritime contract in any sense entered upon by the ship. The whole case is that the master contracted for the ship that on the return trip the molasses should be shipped. There is no case that I am aware of that gives a maritime lien for entire breach of such a contract.

The exception will be maintained, and the libel dismissed, with costs in both courts.

THE IMOGENE M. TERRY.

(*District Court, D. New Jersey.* February 2, 1884)

1. ADMIRALTY—MARITIME LIEN—CAPTAIN OF VESSEL.
The rule of law that the captain of a vessel has no lien upon it for his wages is not applicable to a person who, though calling himself captain, neither contracts directly with the owners, nor has charge of freights and moneys, but is, except in name, an ordinary seaman.

2. SAME—PLEADINGS—AMENDMENTS.
It is in the discretion of a court of admiralty to allow amendments in the pleadings even with respect to matters of substance, by a party who shows merits.

In Admiralty. Libel *in rem.*

Bedle, Muirheid & McGee, for libelants.

E. A. Ransom, for respondent.

NIXON, J. In the above libel the libelant, with some self-complacency, describes himself as master of the sloop Imogene M. Terry. But courts of admiralty deal with things, and not with words. If the proofs show that he is in fact an ordinary seaman, under the control of the master, his calling himself the captain ought not to hinder him from invoking the seaman's remedy for the collection of his wages. It is well settled in the admiralty that the captain has no libel *in rem* upon the vessel for his wages. *The Orleans* v. *Phœbus*, 11 Pet. 175. Two reasons are ordinarily assigned for this: (1) Because the freights of the ship pass through his hands, on which he has a lien for payment; (2) because his contract for hire is with the owners, and he is supposed to bargain with reference to their personal responsibility, and not with an intention to look elsewhere for satisfaction. *The Grand Turk*, 1 Paine, 73. The evidence shows that both these reasons failed in the present case. *Cessante ratione legis, cessat ipsa lex.* The libelant was not hired by the owners, but by the master of the Frank C. Barker. He earned no freights, and no money passed through his hands from the earnings of the vessel. When the crew of the Barker was made up by Capt. Raynor, he was employed with other fishermen, and at the same rate of compensation, to-wit, $25 per month, and three cents for every thousand fish caught. To carry on the fishing operations, some of the men were placed on board the Barker to aid in taking the fish, and others on two tenders, by which the fish were transported from the vessel to the respondent's manufactory on the shore. The libelant had charge of the tender Imogene M. Terry, but was as much subject to the orders and the control of Capt. Raynor as if he had remained on board the Barker. The same attempt was made to charge him with the cost of his grub, over three dollars per week, that was sought to be imposed on the other men. There was also a refusal to pay anything to him on account of the bonus for fish caught, although the fact that Capt. Raynor went with a num-

ber of the crew to the owners on July 1st to receive payment on account of the dues for fish then taken, and the additional fact that he suggested that the number should be estimated, for convenience, at 500,000, show quite clearly that he did not understand when the men were hired that they would be expected to wait until the end of the season before any payment on account should be made.

The proctor of the libelant, at the hearing, asked leave to amend the libel, in order to have the allegations harmonize with the proofs. In admiralty practice there is not much limit to the discretion of the court in this respect. In section 483 of Benedict's American Admiralty, it is said that "on proper cause shown omissions and deficiencies in pleadings may be supplied, and errors and mistakes in practice, in matters of substance as well as in form, may be corrected at any stage of the proceedings, for the furtherance of justice. Where merits clearly appear on the records, it is the settled practice in admiralty not to dismiss the libel, but to allow the party to assert his rights in a new allegation. The whole subject rests entirely with the discretion of the court, as well in relation to the relief to be granted as to the terms on which it shall be granted. Amendments may be made on application to the court at any time, as well after as before decree, and at any time before the final decree new counts or articles may be added, and new and supplemental allegations may be filed."

The libel may be amended as proposed, and a decree entered in favor of the libelant. If necessary, a reference will be ordered to ascertain the amount of monthly wages and bonus due to the libelant to the date of the order given by the captain upon the owners for the payment of the sum due.

POLLOK and others *v.* LOUCHHEIM and others.

(*Circuit Court, N. D. Illinois.* November 21, 1883.)

JURISDICTION OF CIRCUIT COURT—RIGHT OF REMOVAL—SEPARATE CONTROVERSY.

One of several attaching creditors joined the others as defendants in a suit to set aside certain judgments obtained against the debtor by confession. *Held*, that they were necessary parties to the controversy between the plaintiff and his debtor; and that, as they were citizens of the same state with the debtor, the cause could not be removed to the United States court.

In Equity.

Flower, Remy & Gregory, for complainants.

Mr. Shehan and *L. Schissler*, for defendants.

DRUMMOND, J. On the twenty-seventh day of September last Louchheim was a merchant, engaged in business in Galena, in this state, and about that time three several judgments were rendered by confession in the circuit court of Jo Daviess county against him, in favor of different parties, amounting altogether to a little more than $15,000, upon which executions issued and were levied by the sheriff upon a stock of goods in his possession. Shortly after this had taken place various creditors of Louchheim, including these plaintiffs, sued out attachments from the same court, which were also levied upon the same property by the sheriff, and thereupon the plaintiffs filed a bill in the same court against Louchheim, the sheriff, and the various creditors who had sued out the attachments. The bill alleged an indebtedness to them on the part of Louchheim, for which their attachment had issued, and declared that the judgments confessed by Louchheim were in whole or in part fraudulent as against the plaintiffs, and asked that a receiver should be appointed and the property sold, and the proceeds distributed in accordance with the equities of the parties. The plaintiffs in the bill were and are citizens of Wisconsin, the defendants are all citizens of Illinois except two, who are alleged to be citizens of New York. The bill was filed on the sixteenth of October, and an injunction issued in conformity with a prayer to that effect contained in the bill. On the twenty-fifth of October last the plaintiffs made application, under the act of 1875, for the removal of the case from the circuit court of Jo Daviess county to this court, which application, it is admitted, was refused by the court, and the plaintiffs now ask leave of this court to file a transcript and docket the case, on the ground that it was properly removable from the state court.

The principal objection made to this application is that the attaching creditors, who have been made defendants, are only nominal defendants, but are really plaintiffs, when they come to be arranged according to the principle laid down by the supreme court in *The Removal Cases*, 100 U. S. 457, on opposite sides of what is the real controversy in this case, without regard to the position they occupy in

the pleading as plaintiffs or defendants; and it is insisted that when so arranged the interests of the attaching creditors and of the plaintiffs in this bill are identical, and that, as some of them are citizens of the same state as the plaintiffs in the suits, upon which judgments by confession were entered, but who are defendants to this bill, consequently this court has no jurisdiction of the case. It is manifest, if this court takes jurisdiction of the suit, all the attachment suits brought by the various parties against Louchheim must necessarily come into this court for adjudication if the purpose of the bill is to be accomplished. The bill is not filed simply to remove the obstacles in the way of the prosecution of the attachment suits and the collection of judgments, which may be obtained therein, caused by the other judgments heretofore mentioned, rendered upon confession, but to take possession and dispose of all the property covered by the various executions and attachments already referred to. It is important, therefore, to ascertain whether this position of the defendants is well taken. The only allegation in the pleadings bearing upon this part of the case, and which is contained in the bill, is "that as to whether the respective sums for which said attachments issued are actually owing by the said Abram J. Louchheim to the above-mentioned firms, or as to whether the same, or any part thereof is now past due, your orators have no information, and make them defendants hereto for the purpose of determining such facts and of ascertaining whether or not they have liens prior to or equal with the lien of the attachment issued in favor of your orator, and for the purpose of determining and settling in this suit their respective rights and interests;" and in the prayer for relief, the bill requests "that the attachment creditors hereinbefore named, and each of them, be required to establish and show what, if anything, is due to them upon their claims against the said Abram J. Louchheim, and the nature and extent of their respective liens, if any they have." It is manifest, therefore, that in order to accomplish the object of the bill it was indispensable that the attachment creditors should be made parties; and the real question is whether, as the record now stands, they are really plaintiffs or defendants. It may be assumed from the allegations of the bill, if the judgments entered by confession are held to be valid, there will be little or nothing left for the attaching creditors, including the plaintiffs to this bill. It is not stated that the bill is filed as well for the benefit of the plaintiffs named therein as of the other attaching creditors, nor is it stated that any application was made to the latter to join these plaintiffs in the prosecution of the present bill; and so far as it now appears, if the plaintiffs shall prove the allegations of their bill and get rid in whole or in part of the judgments entered by confession, the result would operate for the benefit of the attaching creditors as well as of the plaintiffs to the bill, unless some special equity should be obtained by the plaintiffs, from the fact that they alone of the creditors have proceeded in chan-

cery for the purpose of removing the claims made under the judgments rendered by confession. It will be observed that the bill does not really make any controversy between these plaintiffs and the attaching creditors. It does not deny that the debts on which the attachments were issued were *bona fide* and properly enforceable at law. The bill simply alleges that the plaintiffs had no information as to whether the debts are owing or past due, and states that they are made parties for the purpose of ascertaining these facts; neither does it allege any priority of lien on the part of the plaintiffs over the attaching creditors, but says one of the objects of making them parties is to ascertain whether their liens are prior or equal to that of the plaintiffs. I think the case would have appeared much stronger in favor of the jurisdiction of this court if it had been stated that application had been made to these attaching creditors and they had declined to take part in these equitable proceedings instituted by the plaintiffs. It may be that they will insist, as for aught that I can see they may have the right to do, that they shall be made parties with the plaintiffs in the prosecution of this bill in equity, sharing with them in the labor and expense of the litigation. They would then be co-plaintiffs, and some of them would be citizens of Illinois, and therefore, citizens of the same state as some of the defendants.

As has been already stated, the allegations of the bill seem to require the settlement of any controversies which may exist between the attaching creditors and Louchheim. It desires the court to determine the amount of the debts, whether due, and the nature of the lien against the property. The substantial result of this is to decide all controversies between the attaching creditors and the principal debtor. There are here, therefore, nine suits at law between plaintiffs, all of whom, except the plaintiffs in this bill, are citizens of Illinois, against a defendant who is also a citizen of Illinois. The plaintiffs in this bill allege that they do not know what are the facts as to these claims; but the parties to those attachment suits do know, and have the right to insist, that they should be ascertained, if controverted, by a jury, because they are suits at law; and can the plaintiffs in this case deprive them of that right by filing this bill? As the case now stands, therefore, I cannot say that it clearly appears that the right of removal exists, but as the litigation has only just commenced, and this cause is not ready for trial, it may be that before the plaintiffs shall have lost the right to remove the case its *status* may change so as to present the question in a different phase.

On the record *now* there seems to be no substantial controversy between the plaintiffs and the attaching creditors, and for aught that appears the latter may have been made parties simply for the purpose of giving jurisdiction to this court, as it seems clear that if the plaintiffs shall obtain a decree upon their bill it will inure as well to the benefit of the attaching creditors as to the plaintiffs.

It should be stated that the frame of the bill and the question of

removal are to be applied to the first clause of the second section of the act of 1875, and not to the second clause, where there is a controversy existing between some of the parties, citizens of different states, which can be fully determined, as between them, irrespective of other parties and other controversies in the case.

FLAGLER ENGRAVING MACHINE CO. *v.* FLAGLER and others. (Two Cases.)

(*Circuit Court, D. Massachusetts.* February 21, 1884.

1. JOINT STOCK COMPANY—FRAUD OF DIRECTORS—BY WHOM SUIT TO BE BROUGHT. Where the organizers of a joint stock company put in as a part of the capital stock certain patent rights, and by fraudulent puffing induced others to purchase the stock at factitious rates, *held*, that whether the purchasers could set aside the sales or not, they were not entitled to gain control of the company and pursue their remedy against the fraudulent directors in the corporate name.
2. MASTER'S FINDING AFFIRMED.

In Equity.

Ball, Storey & Tower, for complainant.

N. B. Bryant and *J. M. Baker*, for defendants.

LOWELL, J. These suits in equity come up upon the report of Mr. Merwin, as special master. Both are brought by the Flagler Engraving Machine Company, a corporation established under the laws of Connecticut, but having its business in Boston, against the same defendants. In the second, and more important, case, the company complain that the defendants, Flagler, Bartlett, and Chaffee, in January, 1880, conspired together to form, and did form, the plaintiff corporation, with a capital of $300,000, divided into 3,000 shares of the par value of $100 each, and put into the company as its capital stock certain rights and interests under letters patent of the United States, numbered 174,715, and 191,821, of inconsiderable value, very much less than $300,000; that of the 3,000 shares, Flagler received 1,425, and each of the other defendants 663; that the defendants were duly elected directors of the company, and that Flagler was elected president, Bartlett secretary, and Chaffee treasurer; that afterwards the defendants voted to authorize Flagler, as president, to convey to A. S. Sullivan, of New York, as trustee for a corporation called the New York & London Metal, Wood & Stone Working Company, all the patent rights and interests of the complainants, and that they were conveyed accordingly, so that the complainants cannot tender the respondents a reconveyance of those rights and interests; that the complainants are not bound by the fraudulent acts of the defendants, and are unwilling to accept the patent rights in payment for the shares of capital stock issued to the

defendants, and demand the par value of the shares in money, less the value, if any, of the patent rights.

The case has been argued upon several issues besides that raised by the bill, which is that the defendants are bound to pay the par value of their shares in money. The facts, as found by the master, are that Flagler owned an exclusive license for the United States to use the inventions of one Atchison, described in the patents referred to, for working on metals. He likewise owned foreign patents for the same inventions in Great Britain, Canada, France, Germany, Italy, and Belgium, and the right to obtain patents in all other foreign countries. One Benyon, of Boston, and a corporation in Chicago, owned, respectively, the exclusive rights for the United States to use the invention in working wood and stone. The value of the right for wood working is estimated, by the person best informed upon the subject, at about $20,000; the right to work upon metals and upon stone are of some value, but the master cannot estimate the former, and the evidence gives none of the latter; but they are, probably, together, of less value than $20,000. In January, 1880, Flagler gave the other defendants to understand that the machine would do much more important and complicated work than it could really perform. He showed them a watch which he said was engraved by the machine, but which was, in truth, made by hand. The machine would only do frost work, or "matting," which was, comparatively speaking, of little value to the trade. One firm had paid a royalty of about $275 a year to the inventor, Atchison, for three years, for the use of one machine, but the fashion had changed, and they had not renewed their contract after 1878. The master finds that the defendants Bartlett and Chaffee were deceived by Flagler, and honestly believed that the patent right might be made to earn a fair income on $300,000. The three defendants organized a corporation under the laws of Connecticut, and put the patent rights in as the capital. They gave 250 shares to the company itself, as "treasury stock," and kept the remainder, as alleged in the bill. The master finds that the law of Connecticut, at that time, permitted property to be used as the capital of a corporation. The defendants, acting for the company, employed a broker to sell the treasury stock, and published advertisements in which the value of the patent was set forth in the most glowing terms; and some positively false and fraudulent statements were made in these advertisements, with the assent of all the defendants. By these means a great demand for the shares was created, and they were all sold in a few days. It is plain, I think, and I do not understand it to be questioned, that every person concerned understood that the patent was the capital, and that the nominal value of $300,000 was merely arbitrary. Indeed, the advertisements represent it as much too small a valuation. No one says that he understood $300,000 had been paid for the property. The sales were made upon the representations of what the machine would accomplish, and of

the demand for machines by jewelers and others; and the prices at which the shares were taken varied from $100 to $300, and even more, in which the nominal capital of the company was simply the point of departure. The money received for these 250 shares was put into the treasury of the company. The defendants, as directors of the company, passed a vote in February, while the sales of treasury stock were going on, to sell 300 shares more, and pay the proceeds to Flagler for his rights in foreign countries. About 195 shares were sold, and from this source the defendants received the only money which came to them at any time. These shares were contributed by the defendants, and the proceeds were divided among them in proportion to their several holdings of shares. The money passed through the hands of the treasurer of the company. The defendants gave the shares to the company and took back the proceeds at the same time, but left with the company, or subject to its order, the patents and patent rights for foreign countries. The occasion for passing a vote to authorize the sales of shares appears to have been that there was some agreement not to sell shares without the consent of the company. The defendants then gave the company the foreign interests in exchange for a permission to sell some of their own shares.

From this statement of facts it appears that certain persons were probably induced to buy stock by false and fraudulent representations; and for this wrong I do not doubt that there is a remedy. But I cannot see how the company itself can work out the remedy. There was no contract that the defendants should pay for their shares in money, and no such contract can be set up by estoppel, because no one ever supposed that they had made any such; nor is it true, nor did any one suppose, that they warranted the property to be worth its nominal estimated value. The actual fraud was not in fixing the capital stock at a certain sum, but in puffing the property afterwards; and the persons who suffered were those who were induced to buy shares in the market. The shares were not subscribed for at par, but bought. The purchasers, some or all of them, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they cannot, by obtaining control of the company, set up an artificial case and recover through the company what is really their own loss, from which the company itself was enriched. This is the view which the master takes of the case, and I concur in it.

In the other suit, the company assuming that it was legally organized and is to continue its corporate existence, asks an account from the defendants, its former officers, of the money paid into the treasury for the 250 shares of "treasury stock." The master finds that this sum was $32,130. The plaintiffs insist that it was a larger sum; but I cannot find that the master has made a mistake in this respect. When the present managers obtained control of the com-

pany, the money turned over to them was between $5,000 and $6,000. The remainder had been paid out. The principal items of payment are connected with the New York company. The defendants, encouraged by their extraordinary success in selling shares in Boston, determined to set up a company in New York, and, in addition to the patent rights which they already owned, to procure a transfer to the New York company of the right to use the patented invention in working wood and stone, which were owned by other persons. The several parties were to take the stock in the New York company in certain proportions. A company was organized under the law of Connecticut, and established in New York, and rooms were fitted up there in which the machine was exhibited in its operation upon wood and stone. Few buyers of stock were found, and the enterprise has not proved successful. The plaintiff company advanced to the New York company the money necessary to fit up the rooms and do the other things supposed to be necessary for the successful launching of the new corporation. The master finds that this is a debt against the New York company, and that the loan was justifiable. This decision I understand to rest upon the assumption, which is necessary in this case, that the plaintiff corporation is not to be dissolved, but has an existence as a company engaged in dealing with certain patent rights. From this point of view, the master considers that the company had reason to expect a return and repayment of the money expended in aid of the New York company. I affirm this finding. I note that all, or nearly all, the shareholders appear to have known of this enterprise, and that no one objected to it.

I disallow, as against the treasurer, Mr. Chaffee, and the defendant Flagler, a sum negligently paid by the former to the latter, for machines already once paid for, $750. I disallow one-half of the charges for advertising, because a considerable part of the sales were for the benefit of the defendants, as I have shown. I disallow one-half of the $500 paid to Mandell, because I think so much of it was paid for a certificate of value which was exaggerated, and only the other half for work done. In other respects, the report of the master is confirmed.

HAZARD, Commissioner, *v.* DURANT and others.

SAME *v.* SAME.

(*Circuit Court, D. Massachusetts.* February 15, 1884.)

1. EQUITY PLEADING—RELEVANCY OF AVERMENTS.

A stockholder of the Credit Mobilier brought suit in behalf of himself and others against Thomas C. Durant and others, trustees, to enforce the trust, and set forth in his bill a decree formerly rendered in a different court declaring

certain shares nominally held by Durant to be in fact the property of the stockholders of the Credit Mobilier and appointing the plaintiff in the present case receiver of all moneys due from Durant to the stockholders. *Held*, that the averment of the plaintiff's appointment as receiver was relevant as tending to show the disposition to be made in the final decree of the moneys for which the defendants may be held accountable.

2. SURVIVAL OF LIABILITY FOR BREACH OF TRUST—JOINDER OF DEFENDANTS.
The personal representatives of a deceased trustee are liable to the extent of their assets for breaches of trust committed in his life-time; and in case of a joint breach of trust the representatives of a deceased trustee may be joined with the survivors as defendants.

3. ABSENCE OF PARTIES BEYOND THE JURISDICTION OF THE COURT—WHEN RELIEF WILL BE GRANTED.
When effectual relief can be given against the parties actually appearing, the courts of the United States will not dismiss a bill because of the absence of other parties whose appearance would be required if they were within the jurisdiction of the court.

4. SAME—JOINT BREACH OF TRUST.
Such relief can be given against one of several trustees jointly implicated in a breach of trust, since their liability is several as well as joint.

5. POWERS OF RECEIVER LIMITED TO THE JURISDICTION WHERE APPOINTED.
A receiver appointed in one jurisdiction to take charge of a fund cannot sue in another in his own name, though expressly authorized by the decree to maintain actions in his own name.

In Equity.

Elias Merwin, for complainant.

S. Bartlett and *R. D. Smith*, for defendants.

Before LOWELL and NELSON, JJ.

NELSON, J. These suits, arising out of the same transactions, and between the same parties, may conveniently be considered together. In the first case, the plaintiff brings his bill "as he is commissioner under the decree of the supreme court of Rhode Island, in a suit in equity pending in said court, wherein the said Rowland Hazard and others are complainants and Thomas C. Durant and others are defendants," and "in behalf of himself and all others who were stockholders in the Credit Mobilier of America, on the fifteenth day of July, 1867."

The allegations of the bill, filed December 7, 1882, are in substance as follows: On the sixteenth of August, 1867, a contract was made between the Union Pacific Railroad Company and Oakes Ames, whereby Ames undertook to build and equip certain portions of the railroad and telegraph lines of the company, in which agreement were set forth the terms upon which the building and equipment were to be undertaken, the extent and character of the work to be done, and the times and amounts of payment to be made by the company for its performance. On the fifteenth of October, 1867, an agreement in writing was made between Oakes Ames, party of the first part, Thomas C. Durant and six other persons, named as trustees, parties of the second part, and the Credit Mobilier of America, party of the third part, by which the construction contract between Ames and the Union Pacific Railroad Company was assigned to the trustees, parties of the second part, upon the trusts and conditions that the trustees should

perform all the terms and conditions of the construction contract which were to have been performed by Ames, and that the avails and proceeds of the contract, after certain deductions for expenses, should be held by the trustees for the use and benefit of the several persons owning and holding shares in the capital stock of the Credit Mobilier of America, and for the use and benefit of the assignees of such holders who might comply with the provisions of the agreement. On the third of July, 1868, the first agreement was so far changed and modified by a new agreement executed by all the parties, that the trusts in favor of the stockholders and the assignees of stockholders were transferred to and vested in the persons specified in the instrument, who constituted all the stockholders of the Credit Mobilier. The plaintiff, at the date of the trust agreement, was and has since continued to be, a stockholder in the Credit Mobilier, and has complied with all the provisions of the agreement. The bill also sets forth the proceedings and decree in the Rhode Island suit, as is more fully stated later on. The bill alleges that in the execution of the trusts thus created, money and securities to a large amount came into the hands of the original trustees, or their successors, a portion of which has been divided among the stockholders, but the residue, alleged to amount to many millions of dollars, the trustees have failed and refused to account for and distribute; and, also, that the trustees have been guilty of willful negligence and misconduct in the management of the trusts. The prayer of the bill is for an account and for other relief.

In the second suit, the plaintiff proceeds alone in his capacity as commissioner appointed in the Rhode Island suit. The bill sets forth the construction contract between Oakes Ames and the Pacific Railroad Company, the agreement by which it was assigned to the trustees for the benefit of the Credit Mobilier stockholders, the later modifying agreement, the acceptance of the trusts by the trustees, the receipt by them of money and securities to a large amount for which they are accountable under the trust agreement, and their refusal to account. The bill further states that in August, 1868, Isaac P. Hazard and others, as stockholders in the Credit Mobilier and beneficiaries under the trust agreement, brought a suit in equity against the trustees and others in the supreme court of the state of Rhode Island; that process was issued and served upon Durant, Oliver Ames, John Duff, and some of the other defendants, who were found within the jurisdiction, and that they appeared in the suit; and, upon the decease of Ames and Duff, their executors were made parties, and duly cited to appear; that on the twenty-second of the same month an injunction was issued in the suit enjoining Durant from receiving or disposing of any dividends then declared or which should be thereafter declared, on 5,658 shares of the capital stock of the Credit Mobilier standing in his name; and that on the same day the injunction was served on Durant, Ames, and Duff, and the other

trustees; that the trustees, in violation of the injunction and conspiring with Durant to deprive the stockholders of the benefit of the injunction and of the dividends and profits on the shares, in January, 1869, and again in February, 1870, transferred and delivered to Durant certain shares and income bonds of the Union Pacific Railroad Company, being dividends on the 5,658 shares of Credit Mobilier stock; that by the final decree entered in the cause December 2, 1882, against Durant alone, it was adjudged and decreed, in accordance with the allegations of the bill, that the 5,658 shares standing in the name of Durant, as nominal owner, in fact belonged to the stockholders of the Credit Mobilier, and should inure to their benefit; and that Durant should, within 30 days from that date, transfer and deliver the shares and all dividends received by him thereon to the plaintiff and one Henry Martin, or either of them, as special commissioners, for the benefit of the Credit Mobilier stockholders; and that the commissioners should jointly and severally have power to take measures forthwith, by suit in their own name or otherwise, to enforce the transfer and delivery of the shares and dividends; and that Durant was accountable for and should pay for the benefit of the complainants in the suit, and the other beneficiaries under the trust agreement, the sum of $16,071,659.97, within 90 days from the date of the decree. The bill further averred that Durant had disposed of the dividends and was insolvent. The prayer of the bill was for an account of all the profits received by the trustees under the trust agreement, and of the dividends paid over to Durant, and for such orders and decrees as should be necessary to carry into effect the Rhode Island decree. The defendants in each case are three of the original trustees, the executors of others who have deceased, three persons substituted in the place of deceased trustees, and the Credit Mobilier of America, alleged to be a corporation created under the laws of the state of Pennsylvania. In each case the plaintiff prays for process against those of the defendants who are citizens of this state, and that those residing out of the state may be cited to appear. Those residing out of the state were not served with process, and did not appear. The executors of Oliver Ames, an original trustee, who died in 1877, the executors of John Duff, who died in 1881, appointed in March, 1868, in place of an original trustee, Frederick L. Ames and F. Gordon Dexter, appointed in place of deceased trustees, the only defendants who were citizens of Massachusetts, appeared and filed demurrers, upon which the cases were heard.

An objection is taken in the first suit that the plaintiff's bill is brought in two capacities—one as commissioner under the Rhode Island decree, and the other in his individual capacity in behalf of himself and the other stockholders. But we think the bill is susceptible of a different construction. That the plaintiff can sue as a stockholder in behalf of all cannot admit of question. By the decree in

the Rhode Island suit, which upon its face seems to be valid as between Durant and the other stockholders, it has been finally determined that the 5,658 shares standing in Durant's name as nominal owner, and all dividends accruing thereon, in fact belong to the other stockholders. It was therefore proper that this should be made to appear to the court, so that in the distribution of the avails of this suit the proportion pertaining to the shares should not be paid over to Durant as owner, but should either go to the plaintiff, as commissioner or receiver appointed to receive them by a court of competent jurisdiction, or in some other form, to be settled in the final decree, should inure for the benefit of the stockholders. Considered in this view, the averments of the bill relative to the plaintiff's appointment as commissioner are pertinent and material.

Another objection is that the executors of the deceased trustees are not accountable for breaches of the trust committed by their testators in their life-time. But that the executors are liable in such cases to the extent of the assets in their hands, is clear upon all the authorities. In Hill, Trust. 520, the rule is stated to be this:

"The executor or administrator of a deceased trustee is liable to the extent of the assets for a breach of trust committed by the testator or intestate in his life-time; and this liability may be enforced by suit. And when there are several co-trustees, who have been all implicated in a breach of trust, the representatives of those dying first will be liable to the same extent jointly with the surviving trustees, or their representatives if dead."

In 2 Perry, Trusts, § 877, the rule is thus expressed:

"The representatives of a deceased co-trustee are liable to the extent of assets received by them, for a breach of trust committed in his life-time, and they may all be joined that their relative rights may be ascertained in the suit."

There is nothing in the bill to show that the securities alleged to have come into the hands of the trustees cannot be transferred by the defendants before the court. Whether if this were otherwise it would afford an excuse to the defendants for not accounting for the securities, is not a question which it is necessary now to consider.

Another ground of demurrer in the first suit, assigned *ore tenus* at the argument, is that the suit cannot be maintained, or a decree of the character sought be made against the defendants who have appeared, until all the other existing trustees shall also have appeared and submitted to the jurisdiction. Section 737 of the Revised Statutes—a re-enactment of the first section of the act of February 28, 1839 (5 St. 321)—is as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and the non-joinder

of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

The effect of this statute and of the forty-seventh equity rule, made to regulate the practice of the court under it, has received the construction of the supreme court. The rule now well settled by the decisions is this: When there are parties who cannot be subjected to the jurisdiction of the court, whose interest in the subject-matter of the suit and in the relief sought are so bound up with the other parties that their presence is an absolute necessity, without which the court cannot proceed and make an effectual decree, the suit will not be maintained; but when an effectual decree can be made between the parties actually before the court, it will entertain the suit and proceed to administer such relief as may be in its power, although there may be absent parties, whose presence the court would require, if within its jurisdiction. *Shields* v. *Barron*, 17 How. 130; *Barney* v. *Baltimore City*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423; *Goodman* v. *Niblack*, 102 U. S. 556; Story, Eq. Pl. §§ 78, 79.

Taking the narrative of the bill to be true, as we are bound to do by the demurrer, the trustees, acting jointly, have received many millions of dollars in money and securities, the property of the stockholders, which they still retain, and refuse to account for under the trust agreement; and they have also been jointly guilty of gross negligence and misconduct in the management of the trusts, from which the stockholders have suffered loss. Can the co-trustees relieve themselves from all liability in such a case by simply taking up their residences in different states? We think not. By the familiar rules of the law, the liability of co-trustees, who have joined in a breach of the trust, is several as well as joint. If they are jointly implicated in the breach, they may be properly joined by the *cestui que trust* in a suit to enforce their liability, and he may have a decree against them jointly; but he may take out execution against any one of them separately, as each is liable for the whole amount. If any one of them is compelled to pay the whole, he may have contribution from the others who are implicated with him. Undoubtedly difficulties may arise in adjusting the equities between the co-trustees, where all of them are not before the court, but the inconvenience springs from their own wrongful acts, and should be suffered by them, and not by the *cestui que trust*. *Palmer* v. *Stevens*, 100 Mass. 461; Hill, Trust. 520; 2 Perry, Trusts, § 848.

We therefore hold, upon the case stated in the bill in the first suit, that this court can render an effectual decree against the defendants who have appeared, and has jurisdiction to entertain the suit against them in the absence of the other trustees, who cannot be served with process.

In the second suit, the plaintiff sues alone in his capacity as commissioner. He does not now ask to maintain the bill for any other purpose than to compel the trustees to account for the dividends on

the 5,658 shares paid to Durant after the service of the injunction. His position is that the dividends were charged in the hands of the trustees with a trust in favor of the stockholders, who where the equitable owners of the shares; and, as the trustees paid them to Durant, with notice of the equitable title, and with the purpose of preventing them from coming to the stockholders, they should be held accountable for them to him as the person officially authorized by the Rhode Island court to collect and receive them. Whether, under such circumstances, a suit for the dividends by the stockholders could be sustained against the trustees, it is not necessary to inquire. The plaintiff has no interest in them derived by assignment from the stockholders, and no transfer of the shares has ever been made to him by Durant. His claim rests solely upon his appointment as commissioner. Although called a commissioner in the decree, it is evident that his powers and duties are solely those of a receiver, and he must be treated in that capacity alone.

It was decided in the case of *Booth* v. *Clark*, 17 How. 322, a decision binding in this court, that a receiver appointed by a court of chancery, being a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment, cannot, in his own name, maintain a suit in another jurisdiction to recover the fund, even when expressly authorized by the decree appointing him to bring suits in his own name. This of itself is a fatal objection to the second suit, and makes it unnecessary for us to consider the other objections which have been made to the bill.

In the first suit the demurrers are overruled, and in the second the demurrers are sustained.

DAVIS *v.* DUNCAN, Receiver, and another.[1]

(Circuit Court, S. D. Mississippi. 1884.)

1. RECEIVER—LIABILITY FOR TORTS OF EMPLOYES.
   A receiver is not personally liable for the torts of his employes; it is only when he commits the wrong himself that he is personally liable.
2. SAME—ACTION—PROCEEDING IN REM.
   Proceedings against a receiver for the torts of his employes, is in the nature of a proceeding *in rem*, and renders the property held by him as receiver liable in compensation for such injuries.
3. SAME—RAILROAD COMPANY.
   A railroad company is not liable for injuries inflicted by a receiver or his servants while its property was in the possession of a receiver, and when it was out of the possession of the property and had no control over it.
4. SAME—DISCHARGE OF RECEIVER—DISPOSITION OF FUNDS.
   After entering an order discharging a receiver, and directing him to turn over the property in his hands to the defendant corporation, and which or-

[1] Reported by B. B. Boone, Esq., of the Mobile, Alabama, bar.

der was complied with by the receiver, the court cannot, after the adjournment of the term at which the order was made and entered of record, in any way alter, change, modify, or expand the decree discharging the receiver, and again obtain jurisdiction over the property and funds which it had by its decree ordered the receiver to turn over to the corporation.

5. SAME—PRESIDENT OF CORPORATION ACTING AS RECEIVER.
The fact that the receiver was also the president of the corporation can make no difference. It is the corporation that holds the property and not the president; he is only the official agent of the corporation.

6. SAME—CLAIMS FOR PERSONAL INJURIES—PAYMENT.
If the decree discharging the receiver, and under which the property was turned over to the railway company, had provided that it should be subject to the satisfaction of all claims, whether for personal injuries committed by the employes of the receiver or for other claims, arising while the property was under his control, and whether the receiver was discharged or not, the court, as a court of equity, would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction of the cause to that extent.

7. SAME—DEFENSE OF RECEIVER—HOW PLEADED.
Although permission has been granted by a court to sue its receiver, the right of the receiver to set up any defense he may have is reserved; and this can be done by plea, answer, or demurrer.

Demurrer to Bill.

L. T. Bradshaw and *L. Brame*, for complainant.

E. L. Russell, *B. B. Boone*, and *Frank Johnson*, for defendants.

HILL, J. The question for decision in this cause arises upon defendants' demurrer to complainant's bill. The bill in substance states and charges that defendant Duncan, in a suit in equity pending in this court, was duly appointed a receiver of the Mobile and Ohio railroad, and the property belonging to said company; that, acting as such, he was, on the nineteenth day of January, 1883, engaged by his agents, servants, and employes as a common carrier of passengers for hire over said road; that complainant was a passenger on one of the trains, having paid his fare to the town of West Point, on said road; that the night was dark when the train arrived at that place, and there were no lights to enable passengers to see in getting off the train; that while attempting to get off the train, without any signal, the train made a sudden start, which caused a jerk, by which he was suddenly thrown against the platform, and his thigh bone was broken, and other injuries were inflicted upon his person, and from which he has suffered much pain of body and mind, and has been at great expense in being cured of these injuries, some of which he fears may attend him through life; and that in consequence of these injuries he has been unable to attend to his business affairs, and has thereby been ruined in fortune, and has suffered damage to the sum of $15,000 by reason of the negligent and wrongful acts of the conductor, engineer, and employes of said Duncan, and for which he claims damages in the said sum of $15,000. The bill further charges that on the tenth day of February, 1883, in the matter of said receivership, a decree was made and entered in this court, approving and confirming all the accounts and dealings of said Duncan, and accepting his resignation and discharging him as receiver, upon condition

that he should produce and file, in this court, the acquittance and receipt of said Mobile & Ohio Railroad Company in full settlement, as set forth in said decree, but that he has not done so, as complainant is informed and believes, and charges that said resignation has not been accepted and said receiver discharged. That said Duncan, in applying for his discharge, led the court to believe that all matters, except pending suits, by and against him as receiver, had been settled, and that therefore it was unnecessary to continue said receivership except for the purposes of pending suits or actions, and that said Duncan must be held chargeable with knowledge of his, complainant's said injuries, and his right to compensation out of the property and assets in his hands as such receiver, and that he did not bring notice of the same to the court when said order of discharge was made, and that complainant had no notice of the proposed surrender of said receivership, and never did have notice of said proceedings until shortly before the filing of this bill, on the twenty-eighth of December, 1883, and insists that he ought not to be affected by the same. The bill further alleges that said Duncan was the president of said Mobile & Ohio Railroad Company, and one of its directors, at the time of the injuries, and at the time of the surrender of said railroad and its property, and still is; that a large portion of the railroad and property so surrendered is in the state of Mississippi, and in the possession of said Duncan; and that the rights of no third parties have intervened.

These are all the charges in the bill that need be stated to an understanding of the questions presented by the demurrer. It is agreed that in considering the demurrer the decree discharging the receiver, as entered, may be considered by the court, as if set forth in the bill. The proceedings in this court were in aid of and ancillary to the proceeding in the circuit court of the United States for the Southern district of Alabama, where the main suit was instituted and terminated; consequently, this court adopted as its decree the decrees of that court, so far as they related to settling the rights of the parties to the suit and the discharge of the receiver, settling only by its own independent decrees the rights and liabilities growing out of the receivership between the receiver and third parties within the jurisdiction of this court. The decree of the said circuit court for the Southern district of Alabama was made on the twenty-fourth day of January, 1883, and recited that said Duncan, as receiver, had fully accounted with the court for all his acts as such receiver, and was ready to surrender all the property in his hands as such, and which the railroad company was ready and willing to receive. Whereupon the court "ordered, adjudged, and decreed that said William Butler Duncan do, with all convenient speed, deliver all the property in his possession as receiver, under the former order of this court, in the states of Alabama, Mississippi, Tennessee, and Kentucky to the said Mobile & Ohio Railroad Company, to be by said corporation managed and op-

erated as authorized by its charter, and upon the filing in this court by said Duncan of the acquittance and receipt of said railroad company, as directed by the former order of this court, the resignation of said receivership by said Duncan is hereby accepted, and he and his sureties forever discharged from all liability as said receiver, except that all pending actions and suits by or against said receiver shall be carried on and prosecuted to conclusion the same as if the said Duncan continued the receiver of this court in this cause." This decree was received and adopted and entered by this court as ancillary to and in aid of the proceedings in said cause in that court on the tenth day of February, 1883.

The bill admits that the property in the hands of the receiver has been turned over to the railroad company, and that the acquittance and receipt was filed in that court before the filing of the bill in this cause, but that the acquittance and receipt has not been filed in this court. It is not denied that the bill sets forth a *prima facie* claim for damages, unless the right to recover the same has been lost by the surrender of the trust property and assets by the receiver, and his discharge before the commencement of these proceedings. The turning over of the property and filing the acquittance and receipt, in the court at Mobile, was under the decree of that court a complete discharge of the receiver, except as to pending suits by and against Duncan as receiver. This court only entertained jurisdiction of the case in aid of and ancillary to the procedings in Mobile, and only for the purpose of settling controversies between the receiver and third parties, growing out of the receivership. The filing of the acquittance and receipt of the railroad company in this court was unnecessary and unimportant, and the want of which did not, in my opinion, continue the liability of the receiver or render the property and assets turned over by him liable for any of the acts or wrongs committed by him, or his agents or employees.

As to all pending suits, in whatever form, by or against Duncan as receiver, in either the circuit court of the United States, in Alabama, or in this court, the receivership and the right to prosecute such suits to a conclusion was reserved, and any decree or judgment against the receiver became a charge against the property and assets so turned over, in the same manner that it would have been had the order of discharge never been made in either court. In other words, the railroad company took the property *cum onere* as to these claims. A receiver, as such upon principle and authority, is not personally liable for the torts of his employes. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver, for the wrongs of his employes, is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries. *Meara's Adm'r* v. *Holbrook*, 20 Ohio St. 137; *Klein* v. *Jewett*, 11 C. E. Green, 474; *Jordan* v. *Wells*, 3

Woods, 527; *Kennedy* v. *Indianapolis & C. R. Co.* 11 Cent. Law J. 89. The railroad company is not liable for the injuries complained of in the bill, for the reason that they were committed while it was out of possession of the property, and had no control over it. This conclusion is sustained by principle and authority. *Ohio, etc., R. Co.* v. *Davis*, 23 Ind. 560; *Bell* v. *Indianapolis, etc., R. Co.* 53 Ind. 57; *Metz* v. *Buffalo, etc., R. Co.* 58 N. Y. 61; *Rogers* v. *Mobile & O. R. Co.* 17 Cent. Law J. 290; *Meara's Adm'r* v. *Holbrook, supra.* There is no allegation in the bill that Duncan had any agency in bringing about the injuries complained of, or knew anything in relation thereto when either the decree of the court at Mobile, or of this court, discharging him as receiver, was made, and it is to be presumed that he did not have personal knowledge of the occurrence, or that any claim was intended to be made for damages therefor. I take it for granted that it was supposed there were no claims for damages against the receiver, or, rather, against the property or funds in his hands, which had not been put in suit, or a reservation would have been made holding the funds and property liable, as was done in favor of those in suit. I am satisfied that such was the case, or cases like the present one would have been provided for by the decree of this court in discharging the receiver, as was done in the case of *Mississippi Cent. R. Co.*

It is very much to be regretted that this provision was not made, as it may work a serious wrong to the complainant; but the question is, can this court, after the adjournment of the term at which the order was made, in any way alter, change, modify, suspend, or expand the decree discharging the receiver, and again obtain jurisdiction of the property and funds which it had by its decree ordered the receiver to turn over to the corporation, and which it is admitted was done. I am not aware of any rule by which this can be done. I do not believe that the fact that Duncan is the president of the corporation can make any difference. It is the corporation that holds the property, and not Duncan; he is only the official agent of the company. The corporation took the property free from any liens or claims growing out of the receivership, except those reserved and provided for by the decree under which the surrender was made to the company, and under which it is now held. Had the decree under which the property was turned over provided that it should be subject to the satisfaction of all claims, whether for personal injuries or otherwise, committed by the employes of the receiver while the property was under his control, whether the receiver was discharged or not, this court, as a court of equity, would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction to that extent.

The only authority referred to by complainant's counsel in support of the proposition that the discharge of the receiver does not operate as a discharge of the property held by him for torts committed before the discharge, is the case of *Miller* v. *Loeb*, 64 Barb. 454, re-

ferred to by High, Rec. §§ 268, 848. When that case is examined it will be found not to apply to the case at bar. The rule stated in that case is that the discharge of a receiver by order of the court is no bar to an action against him by third persons claiming property of which he has taken possession; when it is alleged that the receiver has sold such property after notice of the owner's claim thereto, the court will permit the owner to bring an action against the receiver, notwithstanding he has been discharged, especially where the claimant had no notice of the receiver's application for discharge. This was a case in which the receiver had possession of the property of another, and, with knowledge of his claim, sold the property.

In the present case the property in the hands of the receiver, and which he turned over to the company in obedience to the order of the court, never was the property of the complainant, and could only be reached by the establishment of the claim for damages in such way as the court might direct, and obtaining the order of the court that the same should be paid by the receiver out of the trust property in his hands. This was not done, and the property is now beyond the jurisdiction of this court.

It is insisted by complainant's counsel that a receiver occupies the position of an executor of an estate, and that the courts have holden that the discharge of an executor does not relieve him from liability from suit when the discharge is granted. In that case the judgment is against the executor in his fiduciary capacity, but must be satisfied out of any of the funds belonging to the estate in his hands, if any he has; if not, may be satisfied out of such property or means as may have passed into the possession of the devisee or legatee, and upon which the creditor had a lien created by law for the payment of his demand, the devisee or legatee having taken the property *cum onere*. In the case at bar this relation and liability does not exist as above stated. The only authority to which I have been referred or have been able to find analogous to the present case is the case of *Farmers' Loan & Trust Co.* v. *Central R. R. of Iowa*, 7 FED. REP. 537; in which Judge LOVE, in the circuit court of the United States for Iowa, in a very learned and exhaustive opinion, holds that no action can be maintained against the receiver of a railroad after such officer has been discharged and the property transfered to a purchaser under an order of the court in a foreclosure proceeding; and such purchaser takes the property subject to all claims against the receiver, when the court has reserved the jurisdiction upon final decree to enforce, as a lien upon the property, all liabilities incurred by such receiver. This opinion was concurred in by Judge MCCRARY, the circuit judge. This ruling does not conflict with the positions stated.

It is contended by complainants' counsel that to deny the relief prayed for is to acknowledge a right and deny a remedy, which it is insisted is contrary to legal rules. Rights are often defeated for the want of applying the proper remedy within the proper time, and under

which hardships are sometimes suffered; but complainant may not be altogether remediless. The employe or employes who caused the injuries, if the receiver or the property once in his hands was liable, are also liable, as having been the direct and wrongful cause of the injuries. The fruits of a suit against them, it is true, may be very uncertain.

It is insisted by complainant's counsel that the court, or one of its judges, having given leave to file the bill against the receiver, should not now dismiss it, but will permit the cause to proceed to final decree, as though the receivership remained. In all such cases the leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer. *Jordan* v. *Wells*, *supra*.

After a careful consideration of all the questions involved, I am unable to come to any other conclusion than the one that the bill does not present a case authorizing the court to grant the relief prayed for in the bill. While at the same time I regret that the final decree did not provide for this and all other claims against the receiver, or the property and funds which were in his hands, and to which it would have been liable had proceedings been pending when the final decree was entered.

The result is that the demurrer must be sustained and the bill dismissed.

DESMOND *v.* CITY OF JEFFERSON.

(*Circuit Court, W. D. Texas.* January 18, 1883.)

1. MUNICIPAL CORPORATION—AUTHORITY TO ISSUE BONDS.
   Authority conferred upon a municipal corporation to purchase property for its uses implies the power to issue negotiable bonds for that purpose.
2. SAME—POWERS CONFERRED BY CHARTER.
   The charter of a city empowers it to organize a fire department and regulate the same, and to adopt such other measures as should "conduce to the interest and welfare of said city." *Held*, that the city was authorized to purchase a fire engine, and to issue its negotiable bonds therefor.
3. SAME—MUNICIPAL BONDS—VALIDITY PRESUMED.
   Municipal bonds which recite the ordinance under which they were issued will be presumed to be valid without the production in evidence of the ordinance itself.

At Law.

Thomas P. Young, for plaintiff.

Chas. A. Culberson and *H. McKay*, for defendant.

TURNER, J. This suit was filed in this court January 18, 1883. The plaintiff seeks to recover upon quite a number of bonds, with coupons attached, issued by the proper authority, viz., the mayor,

and attested by the recorder, and dated the third day of September, 1870. Of these bonds there were 54 for the sum of $100, and one for the sum of $50. These bonds were substantially as follows:

"STATE OF TEXAS, CITY OF JEFFERSON.

"*No.* —. *Fire Engine Bonds.* $100

"Authorized by an ordinance of the city of Jefferson. On the first day of July, 1880, the city of Jefferson, Marion county, Texas, will pay to the bearer of this bond one hundred dollars, with interest from date at the rate of ten per cent. per annum, payable annually at the office of the treasurer of the city of Jefferson. This debt is authorized by an ordinance of the city of Jefferson, passed on the eighteenth day of April, 1870, and entitled an ordinance to provide for the issuance of bonds for the purchase of a *steam fire engine.*

"In witness whereof, the mayor of the city of Jefferson, in pursuance of said ordinance, hath hereunto set his hand and affixed the seal of the city of Jefferson this, the (3d) third day of September, 1870.

[Signed] "A. G. MALLOY,
"Mayor of the City of Jefferson.

"Attest: J. C. LANE, Recorder."

To each of these bonds coupons were attached for the interest, as the same accrued by the terms of the bond, and they were as follows:

"The city of Jefferson will pay to the bearer ten dollars for 12 months' interest, due June, 1880, on bond No. (say) 54, for $100.

[Signed] "A. G. MALLOY, Mayor."

Process issued and was served upon John Penman, the officer stating in his return that said Penman was the acting mayor of the city of Jefferson, Texas,—service made January 18, 1883. On the fourteenth day of February, 1883, this court then being in session, the said Penman filed a motion under oath to quash the service on the ground that he was not the mayor. The motion to quash was signed by counsel, and stated that the defendant appeared for the purpose of the motion only. On the same day, however, counsel for the defense filed in court special exceptions to the petition, and also filed answer to the merits. These pleadings, by way of caption, state that in case the motion to quash is not sustained, then they rely upon the exceptions and answer to the merits. At that term of the court the entry upon the minutes shows that the cause was continued by consent of the parties, and no action had upon the motion to quash until the present time. I am of opinion that if this motion could ever have been available it is too late at this time to press that question. I find answer to the merits filed—action taken with the concurrence of the defendant's counsel, who are attorneys of this court. The motion to quash, therefore, is denied, as I find here in the case an appearance which binds defendant, whether properly served or not.

It is admitted that these bonds were used in the purchase of a fire engine for the city, and that if the city had authority to issue these

bonds and coupons, that, upon the merits of the case, the plaintiff has a right to recover, and that there are no equities existing against the bonds and coupons. It is, however, contended that the plaintiff has not made out his case because he has not produced in evidence the ordinance referred to in the bonds themselves. These bonds recite upon their face that they were issued in pursuance of an ordinance passed by the city of Jefferson, dated April 18, 1870, entitled "An ordinance to provide for the issuance of bonds for the purchase of a *steam fire engine*." It is believed to be well settled that, if the power to issue these bonds existed in the corporation, the holder will be protected, and when, as in this case, the authority appears on the face of the instrument, the courts will presume that the authority was rightfully exercised.

This brings me to the consideration of the main question, viz., whether the authority in fact did exist in the corporation to issue these bonds, with the interest coupons attached, which are in the nature of commercial paper. It may be remarked that in this case none of the evils which flow from the exercise of this power are present, as the bonds were disposed of for the very purpose mentioned in the bonds themselves. The engine was procured for and used by one of the organized fire companies of the city. Did the power to issue these bonds exist? The charter of the city of Jefferson was passed September 11, 1866. It confers upon the city the usual powers, such as contracting and being contracted with. * * * It gives power "to organize a fire department, and to regulate the same, and to pass such other laws as may be deemed necessary for the prevention and extinguishment of fires," etc. If there were no other grant of power, it would seem to me that it must be held from this that the right to purchase the engine was clearly granted, if not by specific grant, by necessary implication. The department could not be rendered effective without it. But this is not all the power vested in the city by its charter. After enumerating the above and numerous other powers, it provides it may "do such other acts and pass such other ordinances, not inconsistent with the constitution and laws of this state or of the United States, as may conduce to the interest and welfare of said city." This is a very large and, in the light of experience with reference to other municipal corporations, we might say, a dangerous grant of power. Can any one doubt that under this authority the city of Jefferson had the right to issue these bonds? She was made the sole judge as to what would conduce to the interest and welfare of the city, and the exercise of this power was in direct furtherance of the specific grant in the charter to "organize a fire department, and to regulate the same, and to pass such other laws as may be deemed necessary for the prevention and extinguishment of fires." To my mind this power was ample.

There is no case to be found where, if the power is given by specific grant or by necessary implication, the courts have held that this

character of paper is not obligatory upon the municipality. Counsel in this case are forced to admit that the right to purchase this engine was given it, if not by specific grant, by necessary implication, it being a necessary and legitimate thing with which to carry out the object of the charter. But they say, while that is true, no right existed to issue commercial paper, and that to that extent the act was *ultra vires*. As I understand the authorities they are not sustained in this view of the law. We must bear in mind that these bonds were not issued for the purpose of borrowing money, but for the purpose of purchasing a steam fire engine, and were so used in fact. Mr. Dillon, however, says (see 1 Dill. Mun. Corp. 199, 200) few adjudications favor the idea that it makes any difference whether for the one purpose or the other. That corporations may exercise the following powers cannot be disputed: (1) Those granted by express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation. See 1 Dill. Mun. Corp. 173.

I am referred by counsel to the case of *Police Jury* v. *Britton*, 15 Wall. 566. In that case the bonds were declared to have been issued without authority. The police jury did not have any right to issue them; among other reasons, that the right to issue bonds at all was coupled with conditions not complied with; and again, that the police jury were authorized to issue bonds to the extent of $200,000, which power had been exhausted before those bonds were issued. And by an examination of that case it will be seen (see page 572) that it is conceded it is not necessary in *all* cases that express authority to issue such security is necessary, and concedes that the power to purchase property for a market-house confers the right to issue bonds of this character. This is upon the well-settled doctrine that where these securities are issued to purchase property for the use of the corporation, the same being necessary to carry out the object and purpose of the act of incorporation, they are valid and binding, and may properly be issued as in this instance, viz., with the qualities of commercial paper. It will be seen, therefore, from a careful examination of that case that the doctrine therein announced, when applied to the facts in this case, sustains the views of plaintiff in this case.

I am next referred to the case of *Chisholm* v. *City of Montgomery*, 2 Woods, 592. In this case the bonds were issued by the city to aid in the construction of plank-roads—works of internal improvement. The judge held (1) that there was no authority found in the charter for the issuance of these bonds; and I will add that the building of plank-roads was foreign to the purposes for which the charter was granted. The learned judge held them void, and there can be no doubt of the correctness of the determination. But it is said that the case of *The Mayor* v. *Ray*, 19 Wall. 468, is authority against the validity of these bonds. Let us see. In that case Mr. Justice BRADLEY delivered the opinion of the court. The case was reversed because

the court below refused to let the mayor show that the holder purchased after maturity, and that the bonds were tainted with fraud. It is true in delivering this opinion Mr. Justice BRADLEY declares that without *express authority* a municipal corporation cannot lawfully exercise the right to issue this class of paper. On examination of the case, however, it will be seen that upon the question involved here, in part, and as to the reasoning of Judge BRADLEY upon the question, Justices HUNT, CLIFFORD, SWAYNE, and STRONG took occasion to dissent, declaring that the doctrine announced by Mr. Justice BRADLEY as to the point in question is not the law as settled by repeated decisions of that court.

One other point is made, and that is that as the act of incorporation provided that bonds for certain purposes might issue, viz., for building jails, erecting wharfs, building free bridge, aiding the improvement of the navigation between the city of Jefferson and Shreveport, Louisiana, or in the construction of railroads to or from Jefferson, as matter of law, for all other expenditures, certificates of indebtedness, not in the shape of commercial paper, could alone issue.

Section 10 of the act of incorporation confers the general powers, and confers all the powers, as I think, to purchase the engine, and to make the ordinance under which it was purchased, and which authorized the issuance and makes binding these bonds. It is section 12 that grants authority to issue bonds for the purposes mentioned in that section. Some of the purposes, it must be admitted, do not pertain to the exercise of the ordinary or legitimate business of city government; and such authority was necessary; and the doctrine of *exclusio unis*, etc., does not obtain, in my judgment, to the extent of destroying the power to purchase the engine under the ordinance passed in pursuance of the extended authority to pass any law or ordinance that the city should deem advisable not in conflict with the laws of the United States or of this state. There can be no doubt of one thing—that the merits of this case are with the plaintiff. The city has had and retains value received. The defense has pleaded the statute of limitations to such of the coupons as were past due four years before the institution of this suit, and to this extent the defense is sustained. And it seems to me that there is another view of this case that must be fatal to the defense. It is this: the defendant has and still holds for its use the engine purchased with these identical bonds, makes no complaint with reference to its not being all that could be desired, and I think must be held estopped from denying plaintiff's right to recover.

Judgment for plaintiff for the amount due upon the bonds sued upon, and upon such of the interest coupons as were not barred at the date of filing this suit, together with costs of suit.

ALLISON, EX'X, etc., *v.* CHAPMAN.

(Circuit Court, D. New Jersey. January 20, 1884.)

ACTION UPON JUDGMENT OBTAINED BY FRAUD IN ANOTHER STATE.

In an action of debt in one state upon a judgment obtained in another, a plea that the judgment was obtained by fraud is no defense. To avail himself of such a defense, the judgment debtor must invoke the aid of the court upon its equity side.

In Debt.

J. Henry Stone, for plaintiff.

A. Q. Keasbey, for defendant.

NIXON, J. This is an action of debt upon a judgment obtained in the circuit court of the United States for the district of West Virginia. The first plea is that the alleged judgment was obtained by fraud and covin. The plaintiff moves to strike out the same. The question is whether such a plea is allowed as a common-law defense to an action brought upon a judgment from another state. There is undoubtedly a conflict of authority and much confusion existing on the subject, arising partly from the failure of courts to observe the precise nature and character of such judgments, and partly from the legislation of some of the states, allowing equitable pleas in suits at law. The courts of civilized nations generally make distinction between foreign and domestic judgments, holding a record of the former to be only *prima facie* evidence, and a record of the latter conclusive evidence. The provision of the constitution of the United States, (article 4, § 1,) that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that the congress may prescribe the manner in which they shall be proved, and the effect thereof, places the judgment of the different states upon a peculiar footing. They are neither foreign nor domestic judgments, although partaking more of the qualities of the latter than the former.

The attention of the supreme court was early called to the effect which the above-stated provisions of the constitution of the United States, supplemented by the act of congress of May 26, 1790, (1 St. at Large, 122,) had upon judgments obtained in other states. It was claimed in *Mills* v. *Duryee*, 7 Cranch, 481, that they should be treated as foreign judgments, and that *nil debet* was a good plea in a suit upon such a judgment. But the court denied the validity of the plea, alleging that it rendered the above clause of the constitution unimportant and illusory; that the record of the judgment duly authenticated was conclusive upon the parties; and that *nul tiel record* was the only proper plea. The counsel for the defendant in his brief justified his plea by the authority of the case of *Bank of Australasia* v. *Nias*, 16 Q. B. 717, where it was held that a plea that the judgment on which the suit was brought was obtained by fraud, would be good;

but he did not advert to the reason why it was good. The reason is disclosed by Lord Chancellor SELBORNE, in *Ochsenbein* v. *Papalier*, L. R. 8 Ch. App. Cas. 695, which was an application for an injunction to stay a suit at law upon judgment to which the defendant had put in the plea of fraud. He refused to interfere upon the ground that the court at law had jurisdiction, the parliament having passed statutes permitting such equitable defenses to be pleaded in suits at law. The obvious inference from the opinion is that, in the absence of such legislation, the plea would not be allowed.

This subject is fully discussed in 2 Amer. Lead. Cas. 658, and the conclusion is reached that the allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state. To sustain the position he quotes (1) *Benton* v. *Bergot*, 10 Serg. & R. 240, where the supreme court of Pennsylvania held, on demurrer, that in a suit on a judgment in the court of another state the plea of fraud in obtaining it was bad; (2) *Granger* v. *Clark*, 22 Me. 128, where the controversy was over a domestic judgment, and where the court said that even if fraudulently obtained, it must be considered conclusive between the parties until reversed; (3) *Christmas* v. *Russell*, 5 Wall. 290. The supreme court in this case, speaking of judgments of sister states, say: "They certainly are not foreign judgments, under the constitution and laws of congress, in any proper sense, because they 'shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence' they were taken; nor were they domestic judgments in every sense because they are not the proper foundation of final process except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant, but in *all other respects* they have the same faith and credit as domestic judgments." And in regard to domestic judgments the court add, that, under the rules of the common law, if rendered in a court of competent jurisdiction, they can only be called in question by writ of error, petition for new trial, or by bill in chancery. Third persons *only* (quoting 2 Saund. 1 Pl. & Ev. pt. 1, p. 63,) can set up the defense of fraud or collusion, and not the parties to the record, whose only relief is in equity, except in the case of a judgment obtained on *cognovit* or a warrant of attorney. This last case I think governs the present motion. The plea must be stricken out.

If the defendant wishes to impeach the judgment for fraud or covin in obtaining it, he must invoke the aid of the court upon the equity side, whose peculiar province it is to grant relief in cases of this sort. See *Glover* v. *Hedges*, Saxt. 119; *Power's Ex'rs* v. *Butler's Adm'r*, 3 Green, Ch. 465; *Moore* v. *Gamble*, 1 Stockt. 246; *Tomkins* v. *Tomkins*, 3 Stockt. 512.

AULTMAN and others *v.* THOMPSON.

(*Circuit Court, D. Minnesota.* February 25, 1884.)

NEW TRIAL.

New trial ordered, unless defendant should consent to a judgment against him for a certain sum.

Motion for a New Trial.

S. L. Pierce, for plaintiffs.

Rogers & Rogers and *Daniel Rohrer*, for defendant.

NELSON, J. On the trial of this case the court decided that the defendant could offer proof tending to show that the harvester and binder and mower sold to Valentine were worthless, or failed to perform work in accordance with the conditions of their sale. Such proof was offered, by depositions, of the character of the harvester and binder, but not in reference to the mower. When the plaintiff's counsel was asked if he had any evidence to meet the proof offered by defendant, he answered "No," and the court said it would be unprofitable to keep the jury, as plaintiff could not recover on the guaranty of the obligations given by Valentine for this implement. It was stated that plaintiffs were entitled to judgment on the notes given for the mower, and guarantied by defendant, amounting to $98.75 and interest, as no evidence had been offered of its failure to fulfill the terms of sale, and the court said it would dismiss the case, and, on a motion for a new trial or reinstatement, could protect the plaintiffs if they were entitled to recover this amount. The motion for a new trial has been submitted with briefs from all the counsel, and on a review of the case I think the plaintiff should recover upon the three notes guarantied for the sum of $93.70, and interest at 10 per cent. from February 15, 1879, amounting in all to the sum of $140.90. If the defendant will not consent that a judgment for this amount may be entered against him a new trial must be granted.

The defendant is given 20 days from this day, February 25, 1884, to determine; and in case his counsel do not indicate within the time his consent to judgment, by filing a request with the clerk of the court, an order for a new trial will then be entered.

In re LEONG YICK DEW.

(*Circuit Court, D. California.* February 25, 1884.)

CHINESE IMMIGRATION — RESTRICTION ACT — CERTIFICATE OF PREVIOUS RESIDENCE — WHEN EXCLUSIVE EVIDENCE.

The act of May 6, 1882, restricting Chinese immigration permits all laborers who were in this country at any time before the expiration of 90 days after the passage of the act, and who shall produce the certificate provided for by the

act, to go and come at pleasure, and no evidence of previous residence, except the prescribed certificate, can be received from those laborers who quitted the country since the certificates were obtainable; but those who went away before the act was passed, or before certificates were to be had, must be allowed (as was held in the *Case of Chin A On*, 18 FED. REP. 506) to prove their previous residence by any competent evidence.

Application for a Writ of *Habeas Corpus*. The opinion states the facts.

T. D. Riordan, for petitioner.

S. G. Hilborn, U. S. Atty., for the Government.

Before SAWYER, HOFFMAN, and SABIN, JJ.

SAWYER, J. The petitioner, a Chinese laborer, who was residing in the United States on the seventeenth day of November, 1880, left San Francisco for China, by steamer, on June 16, 1882, without obtaining the certificate provided for in section 4 of the act of congress of May 6, 1882, commonly called the restriction act. He has now returned and he seeks to land without such certificate, upon other proof of his residence in the United States at the date of the conclusion of the late treaty with China than the certificate provided in said section 4 of the restriction act. The question is whether he is entitled to land upon other satisfactory proof of former residence, without having obtained and produced such certificate. The treaty with China authorized the government of the United States to "regulate, limit, or suspend" the coming of "Chinese laborers" to, or residence in, the United States. But it provided that "the limitation or suspension *shall be reasonable*, and shall apply *only to Chinese who may go to the United States as laborers, other classes not being included in the limitation.*" And it was further expressly provided that "legislation taken in regard to *Chinese laborers will be of such character only as is necessary to enforce the regulation, limitation, or suspension*" of immigration. It is still further provided that "*Chinese laborers* who are *now in the United States* [at the date of the treaty, November 17, 1880] *shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions* which are accorded to the citizens and subjects of the most favored nation." This treaty having been ratified by the contracting parties, congress, on May 6, 1882, passed "An act to execute certain treaty stipulations relating to Chinese," commonly called the restriction act, under which the questions at issue now arise. As it is not stated in the act when it should go into operation, we have no doubt that it took effect immediately upon its approval by the president.

Section 1 of the act provides—

"That from and after the expiration of ninety days next after the passage of this act * * * the coming of *Chinese laborers* to the United States be and the same is hereby suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come, after the expiration of said ninety days, to remain in the United States."

Section 2 provides—

"That the master of any vessel who shall knowingly bring within the United States on such vessel or land, or *permit to be landed*, any Chinese laborer from any foreign port or place shall be deemed guilty of a misdemeanor, and shall be punished by fine of not more than five hundred dollars for *each and every such Chinese laborer* so brought," etc.

It will be observed that the language of the provisions of these two sections is broad, comprehensive, and sweeping, and that it in express terms prohibits "any" and "each and every" Chinese laborer from coming, or being brought into, or landed, or permitted to be landed in the United States or having come to remain, and, standing alone, would exclude each and every Chinese laborer, whether he had been in the country before or not. It would be difficult to express that idea more explicitly. But section 3 puts a limitation upon the comprehensive language of the two preceding sections, and makes an exception in the following terms:

"The two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days after the passage of this act, *and who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned.*"

Thus the exceptions are not Chinese laborers who were merely in the United States on the day mentioned, but Chinese laborers who were not only in the United States on that day, but who, in addition, "shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, *the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned.*"

Such is the plain language of the act defining the exceptions; and we are not authorized to enlarge the exceptions thus plainly defined by any latitudinarian or unwarranted construction. We cannot take half of the definition of the exception and reject the other half. We must take it as we find it, and that requires the certificate *as evidence of* residence as *well as the residence.* It seems clear to us that congress, with reference to Chinese laborers leaving the country, and having an opportunity to obtain the requisite certificate, intended to prescribe the evidence upon which they should be permitted to re-enter the United States, and that the evidence prescribed is a limitation upon, and forms a part of, the definition of the exceptions intended to be made to the comprehensive language of the preceding section of the act. And that evidence is the certificate to be furnished to the laborers departing from the county by the collector, or his deputy, of the port whence he takes his departure, provided for in the next section, being section 4 of the act. This, we think, is the only evidence of prior residence and a right to return of a departing laborer contemplated by the act of congress. The sweeping language of sections

1 and 2 quoted, it will be seen, are not permissive in form, but expressly prohibitory, aud excludes, in unmistakable terms, each and every Chinese laborer, and but for the exceptions, also explicitly defined in the next section, none of that class could be admitted. None but those coming within the plain meaning of the language of the exception can be taken out of the excluding provisions. There is no other provision in the act to indicate a different policy, or that congress did not intend to make the required certificate the only evidence of a right to return, as to all those Chinese laborers, who, having a right to the certificate and the ability to obtain it, depart from the country without obtaining it. On the contrary, the only other sections affording any inference or light on this point are section 5, pointing out the mode in which the same class of persons desiring to depart *by land* shall procure similar certificates; and section 12, which provides "that *no Chinese person* shall be permitted to enter the United States by land without producing to the officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel." This provision is, positively, prohibitory also, and not permissive; and it particularly and expressly forbids an entry without the particular evidence prescribed by this act. There could scarcely have been intended one rule of evidence for those entering by land and another for those landed from vessels. We think, then, that the certificate provided for is the only evidence of the right to re-enter the United States, or having re-entered, to remain, of a Chinese laborer who has departed from the United States, having the opportunity afforded by the act to obtain the certificate required, whether he comes by land or by sea.

We do not wish to be understood as questioning the construction adopted by the district court, in the *Case of Chin A On*, 18 FED. REP. 506, in regard to those Chinese laborers who were living in the United States at the date of the conclusion of the treaty, November 17, 1880, or subsequently, and who left the United States prior to May 6, 1882, the date of the passage of the restriction act. On the contrary, we are fully satisfied of the propriety of the construction given in that case. Congress could not possibly have intended to require that class of Chinese laborers to procure the required certificate where it was a physical impossibility for them to obtain it; and it would be absurd, under the circumstances, to hold that congress intended to, arbitrarily, exclude that class in direct violation of the express terms of the treaty protecting them. Congress had declined to enact any such legislation as is contained in the restriction act while the Burlingame treaty was in force, for the reason that it would be an act of bad faith on the part of the United States towards China, and a direct violation of the solemn stipulation of the treaty between the two governments. The United States went to the trouble, expense, and delay of sending a special mission, composed of three distinguished gentlemen, to China, for the express purpose of procuring

a modification of the Burlingame treaty, in order to enable the United States to adopt the legislation now in question without committing an act of bad faith towards China, and without violating the treaty stipulations between the two nations. A treaty was made with the modifications sought, which was ratified by, and apparently satisfactory to, both nations. And the modified treaty, in express and the most explicit terms, protected the class in question in their right to remain in the United States, or "to go and come of their own free will and accord," and also provided that they "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

It is expressly stipulated in the supplementary treaty that the "legislation taken in regard to Chinese laborers will be of such character *only as is necessary* to enforce the regulation, limitation, or suspension of immigration," and that "the limitation or suspension shall be reasonable." Conceding the legislation requiring Chinese laborers departing from the United States after the passage of the act in question, and having an opportunity to do so, to procure and produce the required certificate to be "necessary" and "reasonable," still such a requirement as to those who departed after the date of the treaty, and before the passage of the act, or before it was practicable or possible to obtain the certificate, could neither be necessary nor reasonable. If congress, then, intended by this act to make this provision requiring the prescribed certificates applicable to those Chinese laborers who were in the United States at the date of the treaty, and who left before the passage of the act of May 6, 1882,—before it was possible to obtain the certificate,—then it was the deliberate intention of congress to act in bad faith towards the government of China, and to violate the solemn obligations of the very treaty it had taken so great pains to obtain, in order to enable it to honorably legislate at all upon the subject. Why take all this trouble to negotiate a treaty if it was intended at last to flatly disregard it, and legislate in direct violation of its most solemn and vital stipulations? Congress might, with just as much propriety, have ignored and disregarded the Burlingame as the supplemental treaty. There would be just as much propriety in wholly repudiating the treaty as to repudiate it in this vital part, which the Chinese government took care to have inserted. It would be to the last degree absurd, under the circumstances, to suppose for a moment that congress intended to make the provisions of sections 3 and 4, relating to certificates, applicable to the class of Chinese laborers referred to. We cannot attribute to congress a deliberate intention to commit any such act of bad faith without provisions manifesting such a purpose far more explicit than any found in the act.

Again, the same section which requires the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to re-enter the United States.

The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other. They are reciprocal, and must go together. The obligation to produce the certificate presupposes the practicability, or, at least, the possibility, of procuring it, in order that it may be produced. The two provisions go together, and form but one legal conception. The obligation to produce and the right and ability to obtain it are *dependent*, and *not independent*, conditions. One is the counterpart of the other, and it is not to be supposed that congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or if intended, it must be void. The law requires nothing impossible—*Lex non cogit ad impossibilia*, (Bouv. Law Dict. "Maxims;" Broom, Max. 242;) and *Lex non intendit aliquid impossibile*, (Bouv. Law Dict.) —the law intends not anything impossible—are among the most venerable maxims of the law. In a statute, "No text imposing obligations is understood to demand impossible things." Sedg. St. Law, 191. "Provisions in acts of parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act." Dwarris' St. 582. The rule is to construe words "in their ordinary sense, unless it would lead to *absurdity or manifest injustice;* and if it should so vary them as to avoid that which certainly could not have been the intention of the legislature, we must put a reasonable construction upon the words." Id. 587. See *Donaldson* v. *Wood*, 22 Wend. 399; *Lake Shore Ry. Co.* v. *Roach*, 80 N. Y. 339. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression, or an absurd consequence.* It will always, therefore, be presumed that the *legislature intended exceptions to its language which would avoid results of this character.* The reason of the law in such cases should prevail over the letter." *U. S.* v. *Kirby*, 7 Wall. 486. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum." *Henderson* v. *Mayor of New York*, 92 U. S. 268. See, also, *Lessee of Brewer* v. *Blougher*, 14 Pet. 198; *U. S.* v. *Freeman*, 3 How. 564. So, in the case of the class of Chinese laborers now under consideration, to require them to produce a certificate as the *only* evidence of their right to land, when it was impossible or impracticable to procure it, would be, in effect, to absolutely and un-

conditionally exclude them. Yet it is manifestly the policy, intent, and reason of the law to carry out in good faith the stipulations of the treaty that they "shall be *allowed to go and come of their own free will and accord,*" and "*be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*"

We are therefore fully satisfied that those Chinese laborers who were in the United States on November 17, 1880, and left before the passage of the restriction act, and those also who came into the United States and departed therefrom between that date and May 6, 1882, and even afterwards, before the collector was prepared to issue the certificates provided for in section 4 of the restriction act, "in such form as the secretary of the treasury shall prescribe," are entitled to re-enter the United States upon satisfactory evidence other than the certificates provided for in said section 4.

The secretary of the treasury *first* issued his circular, notifying the various collectors of the ports of the United States of the passage and terms of the restriction act, and indicating the form of certificate to be used,—*which form, under the act, is to be prescribed by him alone,*—on May 19, 1882, and that circular was received at the port of San Francisco on May 26th, in time for the outgoing steamer for China, which sailed on June 6th. The secretary, however, did not send out his blanks, or authorize any to be printed by the collector, or furnish full instructions in time to arrive before August 4th, the date at which the right of Chinese laborers to enter the United States expired. They were in fact received at this port on August 8, 1882. The Chinese consul, on consultation with the officer in charge of the collector's office, had blank certificates printed, at his own expense, upon the same sheet with a certificate or passport issued by himself, which were issued by the collectors to outgoing Chinese laborers, and which, by direction of the secretary of the treasury, through telegraphic correspondence, were marked "Temporary." The first of these certificates was dated June 6th. From that time till August 8th these temporary certificates were issued, at first on the same sheet with the other issued by the Chinese consul, and afterwards separately. These certificates have been recognized by the collector when presented by returning Chinese laborers. Up to the date of the circular of the secretary of the treasury, received at San Francisco May 26th, the secretary had not prescribed the form of the certificate, and clearly the collector's office at San Francisco was not in a condition to execute the law according to its terms in time for any Chinese laborers departing prior to the sailing of the steamer which left on June 6th. We therefore hold that those Chinese laborers who departed from San Francisco prior to June 6th could not reasonably procure the prescribed certificate, and they must be admitted, on their return, on other satisfactory evidence of their having been in the United States between November 17, 1880, and

the date of their departure. On and after June 6th the collector was prepared to carry out the law according to its real intent, and all Chinese laborers departing from the port of San Francisco on and since that date, having had an opportunity to procure the required certificate, will be required to produce it.

UNITED STATES v. CHESMAN.[1]

(Circuit Court, E. D. Missouri. March 30, 1881.)

INDICTMENT FOR MAILING AN OBSCENE AND INDECENT PUBLICATION.

An illustrated pamphlet, purporting to be a work on the subject of the treatment of spermatorhœa and impotency, and consisting partially of extracts from standard books upon medicine and surgery, but of an indecent and obscene character, and intended for general circulation, *held* to come within the provisions of section 3893 of the Revised Statutes.

Indictment for depositing in the mail a publication of an obscene and indecent character. The indictment describes the publication as "a pamphlet entitled 'Prof. Harris' New Discovery for the Radical Cure of Spermatorhœa and Impotency, with the Anatomy and Physiology of the Generative Organs, Illustrated; and the Science of a Radical Cure.' By his 'new departure' in the treatment of those troubles, viz., local absorption at the seat of the disease,"—which said publication is so indecent that the same would be offensive to the court here, and improper to be placed on the records thereof.

William H. Bliss, for the United States.

Dyer, Lee & Ellis, for defendant.

MCCRARY, J. In this case, by agreement, counsel have submitted to the court the question whether the publications complained of come within the provisions of section 3893 of the Revised Statutes, which prohibits the mailing in any post-office of any publication of an obscene or indecent character. We have considered this question after a full oral argument by counsel, and we are clearly of the opinion that the publications referred to in the indictment and information do fall within the provisions of this section of the statute. They are clearly both obscene and indecent, and, in our opinion, within the meaning of the statute. It is not necessary, perhaps, to say more, but I may remark that it has been insisted by counsel for the defendant, with great earnestness, that the publications in question are, in their character, medical, and that the matters complained of are, to a large extent, extracts from standard medical works. It may be, and probably is, true that much of the offensive matter is taken from books upon medicine and surgery, which would be proper

[1]Reported by Benj. F. Rex, Esq., of the St. Louis bar.

enough for the general use of members and students of the profession. There are many things contained in the standard works upon these subjects which, if printed in pamphlet form and spread broadcast among the community, being sent through the mail to persons of all classes, including boys and girls, would be highly indecent and obscene. I am not prepared to say, and it is not necessary now to decide, whether these medical books could be sent through the mails without a violation of the statute. The publications before us are not medical. It is manifest from an examination of them that they are intended to be circulated generally among the people. We decide at present nothing more than they come within the provisions of the statute, and that when deposited in the post-office, directed to any actual person, the law is violated, without regard to the character of the person to whom they are directed. This, perhaps, may be shown by way of mitigation or aggravation of the offense, but not in justification.

See, generally, *U. S.* v. *Kaltmeyer*, 16 FED. REP. 760, and *Bates* v. *U. S.* 10 FED. REP. 92, and note.

TOWER *v.* BEMIS & CALL HARDWARE & TOOL CO. and others.

(Circuit Court, D. Massachusetts. February 28, 1884.)

1. PATENTS—WHAT IS PATENTABLE—MERE AGGREGATION.
   The mere combination in a convenient form of several devices, having no common purpose, is not patentable.
2. SAME—IMPROVED MONKEY-WRENCH.
   Patent No. 56,166, for an improvement in monkey-wrenches, cannot be held to cover every wrench in which the cam is solidly attached to the jaw, since similar arrangements were in use before the letters issued.

In Equity.

D. Hall Rice, for complainant.

John L. S. Roberts, for defendants.

LOWELL, J. The plaintiff owns patent No. 56,166, issued to Byron Boardman, July 10, 1866; and it is admitted that the invention was made in October, 1865. The patent is for an "improved tool," or, as the specification says, "an improved combination tool;" and "the [one] object of this invention is to combine a pipe-wrench with a monkey-wrench, in such manner that two of the jaws of the latter shall serve as griping-jaws for firmly holding rods or pipes of varying diameters, which it may be desirable to turn." A second and third purpose are to combine a screw-driver with the handle of a wrench in certain convenient modes. Of the five claims, only two have been mentioned in this suit, and only one is said to be infringed; claim "1, as an improvement in monkey-wrenches, the combination of the cam, *n*, with

the movable or fixed jaw-head of a monkey-wrench, so as to form thereof a pipe-wrench, substantially as described."

One Park had obtained a patent in 1865, No. 48,027, for a tool which described and claimed "a combined hammer, claw, monkey-wrench, socket-wrench, and screw-driver." Boardman's tool is confessedly and intentionally an improvement upon Park's tool. In the latter, the jaws of a monkey-wrench were placed on one side of the common handle, and a hammer and claw on the other side. Boardman put into the claw of Park's hammer a serrated piece of steel, called "the cam, *n*," which had a rocking motion, and he made a notch in the hammer opposite the cam, and in this way the claw and hammer formed a pipe-wrench, as well as a claw and hammer. Two monkey-wrenches and two pipe-wrenches had been put upon a single handle before October, 1865, but no tool had been made with a monkey-wrench on one side and a pipe-wrench on the other of the same handle. A monkey-wrench has its jaws always parallel and preferably smooth, so as to work to the best advantage upon parallel-sided nuts. A pipe-wrench should have a notch or curve in one of its jaws, to embrace the pipe or rod; a serrated surface in the other, to take better hold; and this part should have a rocking motion, so that the grip of the wrench can be loosed by merely reversing the handle.

The plaintiff contends that Boardman's pipe-wrench, considered by itself, was the first which had the cam so placed that the strain would come upon a solid jaw. The old form of this kind of tool, of which the defendants made about one hundred dozen a year, for six or seven years before 1866, was that patented by Bartholemew & Merrick, in 1849, No. 6,002. In this tool, which was an improvement upon one patented by Merrick in 1848, the upper jaw was curved or notched, to embrace the rod or pipe, and the lower jaw was serrated and had a rocking motion by being pivoted at its lower end, immediately above the nut, which actuates the movable jaw. The cam was solid with the jaw, but the plaintiff insists that too great strain came upon the pivot. There is no evidence in the record that the Bartholemew & Merrick wrench ever broke at the pivot, and the Exhibit 1, which represents it, appears to be strong; but the wrenches in litigation here are still stronger.

Amos Call, a member of the defendant corporation, obtained a patent in 1866, No. 57,621, for an improved pipe-wrench, which, in structure, is the Bartholemew & Merrick tool, with the addition that the rocking jaw is loosely confined by two collars. The invention was made later than Boardman's. The special advantages of this tool are not explained, but it is obvious that the collars prevent the rocking-jaw from rocking too far, and if there was danger of its breaking at the pivot, it overcomes this difficulty by bringing the strain, after the rocking has gone far enough, upon the collars, and through the collars upon the handle of the tool. Since this wrench was invented

the defendants have sold it instead of the other form. This tool is admitted not to infringe the patent in suit. The defendants likewise make and sell a tool which unites upon a single handle the jaws of a monkey-wrench on one side, and the jaws of the Call pipe-wrench on the other. The question is whether this tool infringes the first claim of the patent.

The primary examiner rejected Boardman's application, saying:

"The tool, as described and shown, is an aggregation of four distinct tools, answering to four different purposes, some widely dissimilar, and others analogous, but in no particular does any one of these tools add any value to either of the others, or co-operate therein to effect a common purpose, and hence no combinable relationship exists between them. That the aggregation of these several tools in the manner shown results in a convenient article, is not questioned, and, as an article of manufacture, the tool so resulting may possess patentable novelty," etc.

The examiners in chief reversed this decision.

Since 1866 the supreme court have decided that there is no patentable combination, properly so-called, in an aggregation of devices which have no common purpose or effect, concurrent or successive. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310; *Packing Co. Cases*, 105 U. S. 566. Applying the rule of those cases to the facts of this, they decide that a broad claim cannot be sustained for merely putting together two old tools for convenience of manipulation in their several and wholly distinct uses; but that the patent must be limited to some patentable improvement, either in the method of combining the tools, or in one or more of the tools themselves. No invention is claimed which relates to the mode of combination; but the pipe-wrench itself is said to be an improvement on all which preceded it.

The cam, *n*, is specifically claimed in the second claim thus:

"The manner herein described of securing the pipe-wrench cam within a recess, so that this cam will be firmly sustained by the solid metal surrounding it, during the operation of turning a cylindrical object, and allowed to play loosely when released, substantially as described."

It is not contended that the second claim is infringed, and if it claims the cam, *n*, as broadly as the invention will permit, the first claim is not infringed, which is for the combination of the cam, *n*, with one of the jaw-heads of a monkey-wrench. The defendant's cam, or rocking serrated jaw, is like the old jaw of the Bartholemew & Merrick wrench, and not at all, in appearance, at least, like a cam rocking in a recess. It has solidity, to be sure, but this is not obtained by affixing it any more firmly to the jaw than it was in Bartholemew & Merrick's, where it was a part of the jaw itself, but in putting a collar round that jaw, which prevents its rocking so far as to bring a dangerous strain upon the pivot.

There were several kinds of cams in use in pipe-wrenches before 1866, one of which is in the wrench patented to Phillips in 1859, No. 23,857. In this wrench the serrated cam had a sliding motion

upon the solid lower jaw of a pipe-wrench. The plaintiff's expert says that this wrench must have been of no practical value, because the sliding cam has not the rocking or toggle motion necessary to release the pipe readily from the grip of the jaws when the handle is reversed. This criticism is undoubtedly sound in assuming that a rocking motion is preferable to a sliding one. It was, however, demonstrated at the hearing that Phillips' tool will work to some considerable extent. Whether it was a commercial success, I do not know. There is no evidence about it, excepting that it was patented and was made. Considering the existence of the tools which I have mentioned, and of many others having several different sorts of cams, I am of opinion that the plaintiff cannot claim every cam which is solidly attached to the jaw, or jaw-head, and, specifically, that he cannot claim the cam which the defendant uses, which is the Bartholemew & Merrick rocking jaw, made more convenient and secure by two collars which play upon the handle. It was not a known substitute for cam, *n*, because the collars were new.

It follows that the pipe-wrench of the defendants is different from that of the plaintiff; and since the broad claim of aggregating any pipe-wrench with any monkey-wrench upon a single handle cannot be sustained, I do not see, as I have already said, that a wider meaning can be given to cam, *n*, in the first claim, than if the patent was for the pipe-wrench alone. There is therefore no infringement.

Bill dismissed, with costs.

PENTLARGE *v.* KIRBY. (Three Cases.)

PENTLARGE, for Himself, and the United States, *v.* KIRBY BUNG MANUF'G CO. (Three Cases.)

(*District Court, S. D. New York.* January 31, 1884.)

1. PATENTS—FALSE STAMPING—REV. ST. §§ 4901, 732—PENALTY.
   Section 4901, Rev. St., imposing a penalty for false marking upon articles the word "patented" with intent to deceive the public, as a penal statute, is to be strictly construed. It makes penal only the act of stamping. Taking the stamped articles into another district with the intent to sell them is neither prohibited nor made penal, and cannot be construed, as in cases of larceny, as a repetition or continuance of the act of stamping in the district to which the articles are removed.
2. SAME—STATUTE CREATING NEW OFFENSE—CONSTRUCTION.
   Where a statute creates a new offense and at the same time prescribes a particular and limited remedy, all different or other remedies than those prescribed are to be deemed excluded.
3. SAME—RECOVERY OF PENALTY—ACTION, WHERE BROUGHT.
   As section 4901 declares that the penalty is "to be recovered by suit in any district of the United States within whose jurisdiction such offense may have been committed," *held* that no suit for such penalty can be maintained except

in the district where the act of stamping was committed, and that the general provision of section 732, that suits for penalties and forfeitures may be brought wherever the defendant may be found, does not apply to suits under section 4901.

4. SAME—COMPLAINT—DEMURRER.

In a suit to recover 10 penalties of $100 each for falsely stamping certain wooden vent bungs with the words "Pat. Nov. 28, 1882," the complaint charged that the articles were so stamped in Cincinnati with intent to bring them to New York for sale; that they were so brought and exposed for sale; and that the defendant continued and thereby repeated and renewed said false stamping, etc. *Held*, on demurrer, that the suit could not be maintained in this district, but only in the district where the articles were actually stamped.

Demurrer to Complaint.

Brodhead, King & Voorhees, for plaintiffs.

Edward Fitch, for defendant.

BROWN, J. These six actions were brought to recover 10 penalties of $100 in each of the six suits, under section 4901 of the Revised Statutes, for falsely stamping upon certain unpatented wooden vent bungs the words "Pat. Nov. 28, 1882," with intent to deceive the public. The section above referred to imposes upon every person "who in any manner marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, a penalty of $100 for each article so stamped; one-half of said penalty to the use of the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed." In the original complaint it did not appear clearly where the act of stamping was done, and on motion of the defendant, the plaintiff was required to make the complaint more definite and certain in that particular. The amended complaint, accordingly, states as follows:

"That the aboved-named defendant, at Cincinnati, in the state of Ohio, or other place without the state of New York, or without the Southern district thereof, on or about the fifteenth day of September, 1883, falsely stamped and procured to be stamped upon and affixed to ten certain unpatented articles hereinafter described the words 'Pat. Nov. 28, 1882;' and thereupon said defendant brought, and caused to be brought, said ten unpatented articles to the city of New York, within this district, and then and there, with intent to deceive the public, continued and thereby repeated and renewed said false stamps, and thereby falsely stamped said articles at said city, all for the purpose of exposing said articles, and putting the same upon the market at said city, and inducing the public at said city to understand and believe the said articles were patented, whereas they were unpatented articles."

To the amended complaint in each of the six actions the defendant has demurred for want of jurisdiction, and that no cause of action is stated.

The statements in the complaint above quoted, to the effect that the defendant, at the city of New York, "continued and *thereby* repeated and renewed said false stamps, and *thereby* falsely stamped said articles at said city," etc., are plainly not averments of any real act of

stamping or affixing the marks referred to, within this district, but only a statement of such legal effect as the plaintiff claims to result from the previous act of stamping the articles at Cincinnati, or other place without the state of New York, with the intention of bringing them here for sale so stamped. The only act of stamping averred is plainly at Cincinnati, or other place without this district. The question to be determined, therefore, is, whether when the stamping is done without the district, with the intent to bring the stamped articles within this district and there sell them in fraud of the public, and such articles are accordingly brought here and offered for sale, any offense is committed under section 4901, for which a penalty can be recovered in this district.

The statute in question, though a public statute and designed to prevent impositions upon the community, is, nevertheless, a highly penal one. The articles stamped may be of comparatively little value; yet a penalty of $100 is fixed for the stamping of each. In these suits $6,000 are claimed as penalties. One half of any recovery in such suits may go to whomsoever it may please to sue, though the plaintiff have no special interest in the subject, and may not have sustained any actual injury. It is an action *qui tam* for the use of the informed and the government. Such penal statutes are always construed strictly; that is, they are not to be extended to acts which do not clearly come within the plain meaning and ordinary acceptation of the words used. The offense, being created by statute, does not extend, and cannot in such cases be construed by the courts as extending, beyond the fair meaning of the language employed in designating the offense. *Ferrett* v. *Atwill*, 1 Blatchf. 151, 156.

The offense under the third subdivision of section 4901 is clearly the act of marking upon or affixing to any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public. The intent to deceive must accompany the act; but the act which is made penal is affixing the mark or stamp, and nothing else. The acts in this case, with the accompanying unlawful intent, were wholly completed at Cincinnati, or other place without this district. The statuatory offense being therefore complete before the articles were brought into this district, the prescribed penalties could clearly have been recovered under the last clause of the statute within the district where it was thus committed.

The plaintiff, while admitting that the defendant was liable to suit within the district where the articles were in fact stamped, contends that, because the articles are brought within this district and offered for sale here pursuant to the original intention, the plaintiff may also sue for the penalties here—*First*, because the offense, as it is claimed, is a continuous one, and is in effect repeated and continued within the district where the articles are brought; and, *second*, because by section 732 of the Revised Statutes it is provided that "all pecuniary

penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found."

1. I cannot sustain the contention that any offense under section 4901 is "committed," or "repeated," within this district, in consequence of the articles being brought here, and exposed for sale in pursuance of the original intention. The statute has not made penal the act of offering such falsely stamped articles for sale, or the act of bringing them from one district to another with such intention. Had the articles been thus stamped in Canada with the intention of bringing them here for sale, and had they then been brought here, and put on the market, no offense would have been committed under this statute, because the prohibited act would have been done without our jurisdiction, and the acts of bringing the articles into the country, and offering them for sale already falsely stamped, cannot possibly be brought within the prohibitory language of the statute. Had it been the object of congress to make penal the exposure of such articles for sale, it must be presumed that appropriate words to indicate that intention would have been used. Under the rule of construction above referred to, the language of the statute cannot be thus extended merely because the statute may be easily evaded, or because the same mischief may be done by means of other acts not prohibited, and which cannot possibly be brought within the fair meaning of the statuatory terms. The language of MARSHALL, C. J., in the case of *U. S.* v. *Wiltberger*, 5 Wheat. 96, is specially applicable here: "The case," he says, "must be a strong one indeed which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. *Ferrett* v. *Atwill*, 1 Blatchf. 151–156. See, also, *The Saratoga*, 9 FED. REP. 322–325; *U. S.* v. *Temple*, 105 U. S. 97; *U. S.* v. *Graham*, 3 Sup. Ct. Rep. 583; *Ruggles* v. *State*, 2 Sup. Ct. Rep. 832–838; *French* v. *Foley*, 11 FED. REP. 801–804, and cases there cited.

The analogy afforded by indictments for larceny, which may be brought in any county wherein the thief is found with the goods, is not applicable here. The reason of that rule is that the legal owner's right to his goods is not changed by the theft; every moment of the thief's possession of the goods is a continuation of the original trespass, theft, or felony, amounting to a new asportation and abstraction. 1 Russ. Cr. 173. In its nature it is a continuous felonious appropriation of another man's property. But the crime of burglary, which includes the felonious entry of the particular *locus in quo*,

as an ingredient in that offense, must, at common law, be prosecuted in the county where the entry was committed; so, in the case of robbery, it is only by statute that an indictment can be brought in another county. 1 Hale, P. C. 536; *Haskins* v. *People*, 16 N. Y. 344, where the authorities are reviewed. In the present case, the offense is purely a statutory one, and consists solely in affixing certain marks or stamps with intent to deceive the public. The offense may be complete and the penalty incurred, though the articles are, in fact, never offered for sale or known to the public. The intent to deceive is doubtless continuous where the articles are offered to the public; but it is not that intent which is made penal, but the act of stamping when accompanied by that intent. Here that act was completed, and the "offense," therefore, wholly "committed" without this district. There was no act of marking or stamping within this district. No act prohibited by the statute was committed here. Bringing the falsely-stamped articles here, though in pursuance of the original intention, cannot, by any stretch of language, become an act of marking within this district, and hence the "offense" was not "committed" here.

2. There are, doubtless, strong grounds for permitting such actions to be brought, under the provisions of section 732 above quoted, in districts other than that where the offense was committed, if that can be allowed consistently with the established rules of statutory construction. For if after falsely stamping such unpatented articles the offender, on immediately leaving the district, cannot be prosecuted elsewhere, it will plainly be very easy in many cases to evade the statute altogether. If, on the other hand, the defendant is liable to be sued for such penalties under section 732 in any one of all the districts in the country where he may at any time happen to be found, great embarrassments in such suits might often arise. Controversies under this section, so far as they have come under my own observation, have sprung mostly out of *bona fide* differences in regard to the character of the articles, whether embraced within certain patents or not, and controversies as to the date of the patentee's rights. The requirement, also, of the statute, making the intention to deceive the public material, may demand examination of numerous witnesses at the place where the acts were done; and these various considerations might constitute possibly a sufficient reason for limiting the prosecution of offenses so highly penal to the district where they were in fact committed.

The language of section 4901 is not, in its reading, merely permissive. It seems to be mandatory in form—"to be recovered by suit in any district court of the United States within whose jurisdiction such offenses may have been committed." The enactment of the offense, of the penalty, of the persons who may sue, the mode of suit, and in what district the prosecution is to be brought, are all connected as parts of one single enactment. In such cases, where the

offense is new, and the remedy prescribed, the general rule has long been that the remedy must be sought in the precise mode and subject to the precise limitations provided by the act which creates the offense. The rule is founded upon the presumed intent of the legislative authority in connecting the new offense with the particular remedy prescribed to exclude all other remedies.

In *Millar* v. *Taylor*, 4 Burr. 2305, 2323, WILLES, J., says:

"If the offense, and consequently the right, which arises from the prohibition be *new*, no remedy or *mode of prosecution* can be pursued, except what is directed by the act. * * * If the act has prescribed the remedy for the party grieved, and the mode of prosecution, all other remedies and modes are excluded. * * * If the same act which *creates* the right, *limits the time* within which prosecutions for violations of it shall be commenced, that limitation cannot be dispensed with."

In *Donaldson* v. *Beckett*, 2 Brown C. P. 129, it was held in such cases that there can be no remedy, except on the foundation of the statute and on the terms and conditions prescribed thereby.

In the case of *Dudley* v. *Mayhew*, 3 N. Y. 9, STRONG, J., says, (page 15:)

"It is very clear that, when a party is confined to a statutory remedy, he must take it as it is conferred, and that *where the enforcing tribunal is specified the designation forms a part of the remedy, and all others are excluded.* The rule is inapplicable, of course, where property or a right is conferred and no remedy for its invasion is specified; then the party may sustain his right to protect his property in the usual manner."

See, also, *Almy* v. *Harris*, 5 Johns. 175; *McKeon* v. *Caherty*, 3 Wend. 494; *Renwick* v. *Morris*, 7 Hill, 575; *People* v. *Hazard*, 4 Hill, 207; *People* v. *Hall*, 80 N. Y. 117.

Again, section 732 of the Revised Statutes is taken *verbatim* from the act of February 28, 1839, § 3, (5 St. at Large, 322.) It is a general act applicable to a multitude of penalties and forfeitures, concerning which there is no other provision in regard to the place where the suit may be brought.

Section 4901 is taken from the act of July 8, 1870, § 39, (16 St. at Large, 203.) This act was passed long after the general act of 1839, providing for the recovery of penalties and forfeitures in any district where the offender might be found. The offense created by section 39 of the act of 1870 was new, and that section specifies definitely how and where such penalty is to be recovered. Under the rule above stated, the particular specification of the district wherein the remedy is to be pursued must be interpreted as a limitation, confining the plaintiff to the district where the offense is committed. Unless that were the intention of the clause in question, no reason appears for its insertion at all, since under the general act of 1839, then in force, suit might have been brought, if nothing had been said about it, wherever the offender might be found. No reason appears for applying a general statutory provision in extension of the remedy particularly designated by the act creating a new offense, which

would not apply equally in favor of such an extension by means of the ordinary common-law remedies; and yet it is well settled that the latter are excluded under the rule of construction above referred to, and the same rule must, therefore, be held to exclude the application of section 732 to suits brought under section 4901.

Other sections of the act of July, 1870, furnish further support to the construction here given. Sections 79 and 82 of that act provide for the recovery of damages in "any court of competent jurisdiction." Section 94 provides for the recovery of the penalty in any district court where the delinquents "may reside or be found." Section 98 provides for the recovery of a penalty of $100, by action precisely similar to the present, in cases of copyright, "in any court of competent jurisdiction;" and the same provision is made, as respects damages and penalties, by sections 99, 100, 101, and 102. In view of all these other sections of the same statute, permitting the suits for those penalties to be brought "wherever the defendant may be found," the exceptional language of section 39, providing that the suit for that penalty is to be brought "in the district where such offense may have been committed," warrants the inference of a particular intent to limit prosecutions under that section to the district where the offense was in fact committed. If, under this construction, the statute may, in some cases, be easily evaded, that must be set down to the explicit and peculiar limitation of the statute itself. It is for congress to apply the remedy, if any is needed, and not for the courts to attempt it, through a departure from the well-settled rules applicable to the construction of penal statutes and the remedies presented thereby.

The demurrers are sustained, and judgments thereon ordered for the defendant, with costs.

WINNE, Suing for Himself, as well as for the United States, *v.* SNOW.

(*District Court, S. D. New York.* February 11, 1884.)

1. PATENTS—FALSE MARKS—REV. ST. § 4901—DEMURRER—ACTION QUI TAM.
   An action brought by an informer for his own benefit and that of the United States, under section 4901, Rev. St., for falsely stamping the word "patented" on an unpatented article, is an action *qui tam*, in which the plaintiff may properly describe himself as bringing the action for the benefit of himself and of the United States. In such cases the United States is not regarded as a party to the action, and a demurrer for misjoinder of parties will not be sustained.
2. SAME—JURISDICTION.
   Such an action may be brought in the district where the offense is committed; and the jurisdiction of the court does not depend on the residence of the parties.
3. SAME—PARTIES.
   Such an action may be brought, under the statute, as well by a person suffering no special injury, as by one who is specially damaged by the defendant's illegal acts. Averments of special damage in the complaint are, therefore, immaterial

and irrelevant; but though they may be stricken out on motion, they are not a ground of demurrer under the New York Code of Procedure.

4. SAME—AVERMENTS—EVIDENCE.
In such an action it is not necessary to aver or prove that the articles falsely stamped were capable of being patented; if not patentable, and if the acts alleged were incapable of deceiving the public, that is matter of defense.

Demurrer to Complaint.

W. E. Ward, for plaintiff.

Charles M. Stafford, for defendant.

BROWN, J. The complaint charges that on or about the nineteenth day of May, 1883, the defendant, within this district, did mark or stamp upon 500 basket-cover fastenings, which were unpatented, the words and figures, "Patented May 30th, July 25, 1871," importing that they had been patented at those dates, with the intent and purpose of deceiving the public. The complaint further states that the plaintiff is the patentee of a useful improvement in basket-cover fastenings, and is engaged in business in manufacturing and selling such articles for the public; that the defendant's acts were for the purpose of injuring the plaintiff in his business; that defendant forbade the public the use of plaintiff's improvement, and threatened to prosecute the persons who should use and sell it; that the plaintiff's basket-cover fastening was better and cheaper than the defendant's and that the plaintiff had been greatly injured in his business by the defendant's wrongful acts, to the amount of $50,000; that all of these acts of the defendant were contrary to section 4901, Rev. St., whereby, by virtue of said statute, an action had accrued to the plaintiff to demand of the defendant a penalty of $100 for each of said basket covers so falsely stamped, amounting to $50,000, for which he demanded judgment for himself and the United States. The defendant demurs —*First*, for the improper joinder of parties plaintiff; *second*, misjoinder of causes of action,—one for penalty, the other for damages to the plaintiff's business; *third*, that the court has no jurisdiction; *fourth*, that the facts stated are not sufficient to constiute a cause of action.

1. The suit is a *qui tam* action to recover a penalty under section 4901, one-half of which is to go to the plaintiff, and the other half to the United States. The plaintiff, in stating that he sues "for himself as well as the United States," states only a legal fact apparent on the face of the statute, and in a form long recognized as proper. In such cases the United States is not regarded as a party to the action; the form of the title indicates only that it is a *qui tam* action, prosecuted by an informer, to recover a statutory penalty; and the objection of misjoinder is not well taken. *Cloud* v. *Hewitt*, 3 Cranch, C. C. 199; *Ferrett* v. *Atwill*, 1 Blatchf. 151; *Cole* v. *Smith*, 4 Johns. 193; *Oliphant* v. *Salem Flouring Mills*, 5 Sawy. 128.

2. The matter set up as special damage to the plaintiff is unnecessary and irrelevant. Any informer is entitled to the same recovery that any other person who was specially injured by the defendant's

wrongful acts would be. *Pentlarge* v. *Kirby, ante,* 501. This special matter, however, is plainly not stated in this complaint, as a separate cause of action, and no relief is prayed for in reference to it. As irrelevant matter, it might be stricken out on motion under the New York Code of Procedure, which regulates the practice here in common-law actions; but it cannot be objected to by demurrer.

3. In actions based upon this statute, the citizenship of the parties is immaterial; the action must be brought in the district where the offense is committed. *Pentlarge* v. *Kirby, supra.*

4. It is urged that the complaint does not state facts sufficient to constitute a cause of action, because it does not allege that the articles stamped were capable of being patented; and the case of *U. S.* v. *Morris,* 2 Bond, 24; 3 Fisher, Pat. Cas. 72, is cited in support of this view. If it appeared from the complaint itself that the articles were of such a nature that the public could not possibly be deceived by the mark "patent" put upon the articles, it might be that the complaint should be held insufficient; because the intent to deceive the public is a necessary ingredient in the offense. Beyond that, however, I cannot go; and in cases like the present, where there is nothing to indicate that the articles may not be patentable, and the public misled by the false and deceptive stamping alleged, I see no reason for shielding persons who seek to impose upon the public, from the penalties imposed upon them by the plain language of the law; or for requiring the plaintiff to allege, or to prove, more than the statute requires. Any defense of the kind referred to, in so far as it bears on the intent to deceive, is open to the defendant. This subject was fully considered by DEADY, J., in the case of *Oliphant* v. *Salem Flouring Mills, supra,* and I fully concur with the result which he reached, holding it unnecessary to allege or prove that the article stamped was patentable. See *Walker* v. *Hawkhurst,* 5 Blatchf. 494.

The demurrer should, therefore, be overruled; with liberty to the defendant to answer within 20 days, on payment of the costs of the demurrer.

GIANT POWDER CO. *v.* SAFETY NITRO POWDER CO.

(*Circuit Court, D. California.* February 18, 1884.)

1. PATENTS—REISSUE—WHEN ONLY PARTIALLY INOPERATIVE.
   Whenever a patent is so far inoperative that it fails to secure all that the patentee was, by his specifications, entitled to claim, it is inoperative within the meaning of the statute, and the patentee is entitled to a reissue.
2. SAME — DECISION OF PATENT-OFFICE CONCLUSIVE UPON COLLATERAL QUESTIONS.
   The decision of the commissioner of patents is conclusive upon all questions relating to the manner in which a patent was obtained, and the courts can only consider what appears upon the face of the patent.

3. SAME—REISSUE IN LANGUAGE OF ORIGINAL.
One who, under honest misapprehension, surrenders a valid patent, and takes a reissue which proves to be void, is entitled to a reissue of the first patent in the identical language originally used.

4. EQUITY PLEADING—PLEA—AMENDMENT—MULTIFARIOUS ISSUES—DELAY.
A plea in equity must be confined to a single issue, unless special leave is obtained to plead double; and an amendment of a plea so as to raise a multitude of issues will not generally be allowed, especially after long delay. The defendant must answer over.

Motion for Leave to File an Amended Plea.

Hall McAllister and *George Harding*, for complainant.

M. A. Wheaton, for respondent.

Before SAWYER and SABIN, JJ.

SAWYER, J., (*orally.*) In the case of *Giant Powder Co.* v. *Safety Nitro Co.*, a motion for leave to file an amended plea, setting up several distinct defenses, has been argued in connection with the argument as to the sufficiency of the plea already filed. The Giant Powder Company was the owner of original patent, No. 78,317. This patent was surrendered and reissued as patent No. 5,619. Afterwards, for the purpose of correcting a clerical error, patent No. 5,619 was surrendered and reissued as patent No. 5,799. A suit upon this last patent was decided by Mr. Justice FIELD in this court, in which it was held that the reissue was broader in its scope than the original invention as described in the original patent No. 78,317, being for a combination of nitro-glycerine with some non-explosive absorbent material, while the reissue embraced explosive as well as inexplosive absorbents, and Mr. Justice FIELD held that in that particular the reissue was broader than the originally-patented invention, and for that reason void. *Giant Powder Co.* v. *Cal. Vigorit P. Co.* 6 Sawy. 509; [S. C. 4 FED. REP. 721.] In consequence of this decision, patent No. 5,799 was surrendered and reissued again in patent No. 10,267, and in patent No. 10,267 both the specification and the claim are identical with those of the original patent No. 78,317, which had before been surrendered and reissued in the patents before mentioned.

These facts are set up in the plea, and it is claimed that patent No. 10,267 is void, it being identical with the original surrendered patent No. 78,317. That patent was surrendered as being inoperative; and as a reissue can only be had where the patent is inoperative, it is claimed that the original patent must have been held to be wholly inoperative. I think counsel are mistaken in that proposition. A patent may be inoperative, in my judgment, when it is inoperative in part. I do not think it must be absolutely inoperative in its entirety. If it is inoperative so far as not to cover all that the party is entitled to claim, and what he is entitled to claim appears in the specifications, it being inoperative to that extent, I think it would be inoperative within the meaning of the provisions of the statute, and entitle the party to a reissue, covering his entire invention. It does not necessarily follow that patent No. 78,317 was wholly in-

operative, or void, or useless. I am not aware that it has ever been held by any court to be utterly invalid in all its parts. It was not even claimed at the argument that the patent, as originally issued, was inoperative, in fact, as to the combination of nitro-glycerine with inexplosive absorbents.

The question of fraud in procuring the reissue, in my opinion, does not arise on this plea, because the question as to whether a mistake has been innocently made in not covering by the patent all that the party was entitled to cover—the question whether there is a fraud in the surrender and application for a reissue—is one of fact, for the officers of the patent-office alone to decide, and their determination is conclusive in a collateral proceeding. This court can only examine and pass upon what appears upon the face of the patent, and see whether there is anything to indicate its invalidity, or render it void upon its face. All questions of fact behind the patent are to be examined, heard, and conclusively determined by the commissioner of patents. This principle has been affirmed over and over again by the supreme court.

I do not think the fact that the patent was reissued in the identical terms of the original patent No. 78,317 renders it void. The specifications of the patent last surrendered were amended by omitting the objectionable parts. Patents are constantly reissued for portions of the specifications and claims in the identical language of the original patent. Each claim in its nature substantially and in effect covers a distinct and separate invention, and is an independent patent in substance and effect. It might be the subject of an independent patent; and if in any reissue, so far as the patents are identical, those claims are valid in the reissued patent having another or additional valid claim, or a modified claim, or some other change in the specification, I do not perceive why they would not be valid in a patent limited to them alone. If they can all stand together, I do not see why a reissued patent, covering the identical claims by themselves, may not stand and be valid. Patents may be reissued in divisions. It is not necessary that all claims in the reissue should be included in one patent. They are often issued in divisions, and I suppose that a patent might be reissued in divisions in the identical language as to some of the claims, the changes being included in another and separate division or patent; that is to say, all claims, or inventions, which are fully covered and operative, may be reissued by themselves in one division in the identical language of the original surrendered patent, and all other claims, on amendments to the the specifications, and covering the invention shown by the amended specifications, in another division or patent. I do not see why a part of the original claims may not be reissued in one division in identically the same language as in the original patent, and the rest in another. If this can be done without affecting the validity of the reissues, and a party finds that he has made a mistake and surrendered

a valid patent and obtained a void reissue, I do not perceive why he may not fall back upon his old patent and have it reissued on a newly-amended specification embracing that portion which is valid. If parts which are identical are valid in connection with other parts in a reissue, I do not perceive why they should not be valid in a reissue containing no additional matter.

In this particular class of cases it is quite extensively claimed by the bar, I think, that the supreme and some of the circuit courts have made something of a departure in some of their late decisions upon reissues, including the reissue in question. Mr. Justice FIELD held patent No. 5,799 to be void, while several of the circuit judges at the east held it to be valid, and the supreme court has recently repeatedly affirmed the principle of the decision of Mr. Justice FIELD on the circuit. Where courts make a mistake, it may, very properly, be conceded that a patentee may well make an honest mistake himself. On the argument of the plea, my attention was called for the first time to the case of *Gage* v. *Herring*, 107 U. S. 646, [S. C. 2 Sup. Ct. Rep. 824,] in which I think the principle involved in the plea is distinctly determined. The court says:

"*The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent.* Under the provisions of the patent act, whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original or first inventor or discoverer, his patent is valid for all that which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the patent-office a disclaimer, in writing, of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before a disclaimer he cannot recover costs. Rev. St. §§ 4917, 4922; *O'Reilly* v. *Morse*, 15 How. 62, 120, 121; *Vance* v. *Campbell*, 1 Black, 823. *A reissued patent is within the letter and the spirit of these provisions.*"

If a reissued patent is within the letter and spirit of these provisions, as stated, and "the invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent," it is not apparent to my comprehension why a second reissue, embracing the valid claim alone of the original patent, would not be valid. I cannot, therefore, say that the patent (No. 10,267) is void by reason of anything asserted in the plea upon the grounds set forth. The plea must therefore be overruled.

With reference to the filing of the proposed so-called amended plea, I think it is not within the reasonable discretion of the court to allow it to be filed at this late day. In view of the circumstances of this case, as they appeared before this court in the various stages of the proceedings, I think it would be an abuse of its discretion to allow the plea to be filed, if it were otherwise a proper plea. In fact, the proposed amended plea sets up all the defenses that can be made to

a patent, and it would involve the trial of the whole case, with the exception of the single question of infringement. The object of a plea, where there is some certain, single issue, requiring but little evidence that will dispose of the whole case if sustained, is to try that issue without putting the parties to the expense of the trial of the case at large; and pleas are limited to a single defense or issue unless, by permission of the court, the defendants are allowed to plead double. If the court allows this so-called amended plea to be filed, it would allow parties to try all the issues in the case with the exception of the one issue as to infringement, and it would be necessary to try the whole case on the merits by piecemeal. Besides, it comes too late. After this plea was originally filed it was stipulated that it stand for an answer so far as it was available as a defense. An answer and replications were filed, and the parties commenced taking testimony. In the course of taking the testimony the solicitor for the defendant ascertained the importance of having the case decided on his plea, provided it was good, and thought that he was at a disadvantage in his then position, as on the question of infringement he would be obliged to disclose the secrets of his composition. He therefore moved, upon affidavits, to be relieved from the stipulation, taking the plea for an answer. He claimed, among other things, to have misunderstood the practice of the court. After argument, the court, thinking that there might be something in the plea, as this exact point had never been decided, so far as it was aware, and, if good, it would save the expense of a trial, relieved the party from the stipulation, and allowed the plea to be set down for argument. It was supposed that the exact question had never been presented before, and when the argument was made upon the stipulation the court had not seen the case of *Gage* v. *Herring*, *supra*, which, it is thought, decides the principle. I thought that there was, perhaps, something in the plea. At all events, I thought that it was worthy of being carefully considered, for if the plea is good, and the patent absolutely void upon its face, I saw no occasion for putting the parties to the great expense of going to a trial of all the issues in the case. I therefore set aside the stipulation, and allow the defendant to withdraw its answer in the case, and set the plea down for a hearing. It was set down for a hearing, and continued from time to time, until finally it came up for argument, counsel from Philadelphia coming out to argue the case on the validity of the plea. When the plea was called for argument, it was found that there had been a change of solicitors, and an application was made by the substituted attorney at the moment for leave to file the proposed so-called amended plea, which presents all the issues in the case with the exception of the one issue of infringement. I think, under the circumstances, that it would be improper, and it would be an abuse of discretion to allow this so-called amended plea to be filed at this late day.

Leave to file the proposed amended plea is therefore denied.

NATIONAL CAR-BRAKE SHOE CO. *v.* TERRE HAUTE CAR & MANUF'G CO. and others.

(*Circuit Court, D. Indiana.* January 30, 1884.)

1. PATENTS FOR INVENTIONS—PARTIES IN ACTION AT LAW FOR INFRINGEMENT.
   In an action at law for infringement of a patent, all parties who participate in the infringement are liable, although some are simply acting as officers of a corporation; all parties who participate in a tort or trespass are liable, and a man cannot retreat behind a corporation and escape liability for infringements in which he actively participates.
2. SAME—CONSTRUCTION OF PATENT.
   It is for the court, as a matter of law, to construe a patent, and for the jury, as a question of fact, to determine whether it has been infringed, and the amount of damages that should be allowed.
3. SAME—BURDEN OF PROOF—DAMAGES.
   In an infringement suit, the burden is on the plaintiff to show the amount of damages he has suffered; and if he furnishes reasonably satisfactory evidence on that subject, he is entitled to substantial damages, otherwise to nominal damages.
4. SAME—EVIDENCE OF DAMAGE—LICENSE.
   On the question of damages, it is competent for a patentee to prove the prices at which licenses were granted under the patent while it was in force; but in order to be competent evidence of value, the prices agreed upon must be prices fixed with regard to the future, when there is no liability between the parties, and the parties not being subject to suits are presumed to act voluntarily, and therefore to make up their minds deliberately as to what would be a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use.
5. SAME—PAYMENTS MADE IN SETTLEMENT.
   It is not competent for a patentee to prove the prices paid for infringements already perpetrated; such settlements are not at all admissible on the subject of value.
6. SAME—AMOUNT OF DAMAGES.
   The value of an invention for which an infringer is liable is the value at the time of the infringement. A man who has got a patent owns it as property, and if anybody sees fit to infringe it he is bound to pay for its fair value; and the fact that there is something else just as good or better does not entirely destroy its value, but may affect it.
7. SAME—CONFUSION OF GOODS.
   The doctrine of a confusion of goods has no application to a suit for infringement of a patent, especially where there is only a confusion of book-keeping and not a confusion of the articles themselves, the articles being incapable of mixture.
8. SAME—CONCEALMENT—PRODUCTION OF BOOKS.
   If a party shows an unwillingness to let the truth out, and keeps back facts and the means of getting at facts, in his power, then the jury is warranted in drawing the strongest possible inferences against him, which may be drawn from the evidence actually given in favor of the other party. But if he comes forward with his books, furnishes all the evidence in his power, and is fairly candid in the matter, no inferences should be drawn against him, except such as are fairly drawn from the evidence adduced.
9. SAME—RECORD OF PATENT—NOTICE.
   Every one is bound to take notice of the existence of a patent, and of the rights of parties under it; like the record of a deed to real estate, the record of a patent at Washington is notice thereof to all the world.

Action for Damages for Infringement.

Banning & Banning, for plaintiff.

Claypool & Ketcham, for defendants.

WOODS, J., (*charging jury.*) This is an action by the plaintiff against the defendants claiming damages for the alleged infringement of a patent granted to James Bing, October 6, 1863, for an improvement in car-brake shoes. The burden of proof is upon the plaintiff to show the facts, so far as they are material, alleged in the complaint,—that it had a patent; that the defendants infringed it; and the amount of damages that it has suffered by reason of the infringement. The defendants are three—the car company and two individuals who are shown to be officers of the company. The action is in the form of a suit in trespass on the case, and consequently if all the defendants have participated in the infringement they are all liable, though the individuals were acting simply as officers of the company in doing it. All parties who take part in a tort or trespass are liable. A man cannot retreat behind a corporation, and escape liability for a tort in which he actively participates. So there is no question, probably, in the case but that all the defendants are liable, if any. There is no dispute that the plaintiff has a patent. The patent itself has been put in evidence, and is conclusive of the fact that the patent-office issued it to Bing, under whom the plaintiff claims. It is for the court to tell you what the claim of the party is in his patent, and what he acquired by the patent. It is for you, as a question of fact, to determine whether the defendants have, by anything that they have made, infringed the patent of the plaintiff.

The plaintiff in his patent makes two claims. The first is for the two parts of the brake, the shoe and the sole, adjusted together in a particular way described, for the purpose of producing a rotary motion. To this claim the rotary motion is essential, and any implement which does not produce the rotary motion is not an infringement of that claim of the patent. But there being two claims in the patent, an implement may infringe one and not the other; and if the defendants have manufactured an article which infringes either claim, the plaintiff is entitled to recover in the action for that infringement; and if it infringes both claims, of course the plaintiff is entitled to recover. I instruct you, on the authority of Judge DRUMMOND, who is my official superior in this circuit, as well as upon my own judgment of the law of the case, and of the proper interpretation of the patent, that the second claim does not embrace the idea of rotary motion, and may be violated by an implement which is not designed to produce, and does not in fact produce, the rotary motion. The second claim is simply for a combination of the two parts of the brake already mentioned,—the shoe and sole,—and of the clevis and bolt made in the substantial form described in the patent; but it is not necessary, as I have said, that it shall be so made as to produce rotary motion. It is simply for the combination of these parts, in substantially the way they are described, without reference to rotary mo-

tion, for the accomplishment of whatever benefits will result from the combination of the parts in that way. If the benefit be the ease in taking apart and putting together, or taking out old pieces and putting in new, or any other benefit that results from that combination, whether described in the letters patent or not, the inventor has the right to the benefits of the combination that he has thus produced. As already stated, it is for you to determine, as a question of fact, whether the implement manufactured by the defendants, which I believe is conceded to be in the form of this red model which I take in my hands, designated "J. S.," does infringe the patent of the plaintiff in respect to either claim,—the combination for rotary motion, and the general combination of the four parts, without reference to rotary motion. Now, it is argued by one side that this piece resting squarely down upon the shoe, and not pushed forward by this toe, will not produce rotary motion, and therefore does not violate this patent in respect to the claim for rotary motion. On the other hand, it is argued that this will produce rotary motion on the principle the plaintiff contends for. I leave that to you as a question of fact. If this implement, constructed in this way, will produce the rotary motion to some extent,—it may not be to the full extent of a model constructed in the form of the patent,—it is a violation of the first claim of the patent. If it will not produce rotary motion at all, then it is not a violation of that claim.

The next question is whether this model is substantially a combination of the same parts as are included in the second claim of Bing's patent. In order that there be an infringement, it is not necessary that the parts be exactly alike. If they are substantially the same in construction, and produce substantially the same result in substantially the same manner, it is an infringement. It takes more than a mere difference in form to escape an infringement. If a man has procured a patent—a combination patent—consisting of certain parts, one of which, for instance, is a clevis like that, coming down in two arms upon the outside of the ears of the brake head, the question in this case is whether the substitution of a single strap like this escapes that patent. If this strap was a thing already known to mechanics as something that, in this connection, would produce substantially the same result as the clevis, in the same connection,—a mere substitution of one thing that is equivalent to the other,—it then must be treated as an infringement. The defendants do not escape if this is substantially the same, and was a thing known to mechanics already, and substituted merely to produce substantially the same result as the clevis; and if not involving any invention, it is a mere mechanical equivalent. Such a change does not enable a party to escape liability for infringement. The question is for you. Counsel have argued it before you and I shall not enlarge upon it. It is for you to say whether there is a substantial change in anything more than mere form from that to this. If there is no substantial

change, no change except in form, then this should be treated as an infringement of the plaintiff's second claim.

Considerable has been said in argument, and some evidence adduced, in reference to decisions made by Judge DRUMMOND, of this circuit, that a certain brake-shoe used by the Illinois Central and the Lake Shore railroads, which are claimed to be substantially identical, even in form, with this model, are an infringement of the plaintiff's patent. I say to you that such decisions have been made; but they were decisions in particular cases, made, of course, with reference to the evidence adduced in those cases; and while they are entitled to weight upon your minds, they are not absolutely conclusive upon you. I leave it to you, as the law leaves it, a question of fact whether this is an infringement of that; that is, whether the brake-shoe represented by this model is an infringement of the Bing patent. You should hold that it is, unless there is some departure more than in mere form; that is, unless the result accomplished by this is by a substantially different contrivance, operating in a substantially different way from the Bing brake-shoe. If you find that the implement made by the defendants, of which this is conceded to be a model, is an infringement of the plaintiff's patent, then will arise the question, which counsel have more earnestly argued before you, and which is for you, perhaps, the more important question in the case—what damages shall be awarded? The burden of proof is upon the plaintiff to show the amount of damages that he has suffered, and to furnish the jury reasonably satisfactory evidence to enable them to reach a conclusion on that subject; and, if the plaintiff has furnished you that proof, it is your duty to award him substantial damages. If there has been an infringement, he is entitled to nominal damages anyway; but if the evidence shows that the patent is of real value, then he is entitled to substantial damages, according to the proof. As a general proposition, the weight that testimony shall have is a question for the jury; but the court may lay down general principles which will enable the jury to understand how the testimony should be weighed. I instruct you that it is competent for a patentee, in order to enable the jury to measure his damages, to prove contract prices at which licenses had been granted under the patent while it was in force, but that it is not competent for him to prove the prices paid for infringements; that is to say, payments made in settlement of infringements already perpetrated. In order to be competent evidence of value, the prices agreed upon must have been fixed with regard to future use, when, there being no liability between the parties, they are presumed, on both sides, to have acted voluntarily, and therefore to have made up their minds deliberately as to what was a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use. But settlements for past transactions, where the parties are

liable to suit if they do not pay, I instruct you, are not admissible as evidence for the plaintiff upon the subject of value.

Now, there is in evidence the deposition of Mr. Shaw, and counsel have discussed before you the weight that it should have. They dispute whether Mr. Shaw, in this deposition, has spoken about payments made for past use, or a price agreed upon for future use, or payments partly for past and partly for future uses. I leave that to you. The testimony is before you, and it is for you to say what it means, and what effect you will give it in this respect.

Other evidence has been introduced as to the value of the patented brake-shoe as compared with others, and some question is made of what the comparison should be. The plaintiff's counsel insists that no comparison shall be made with any implement that had not been in use, or been invented,—if it was a patented implement,—before the patent sued upon was issued. I am not able to agree fully with that position. The action being for damages, (not profits,) I suppose the defendants are liable—if they are liable for anything—for the value of the invention at the time they appropriated it. A patent issued on a particular day for a particular contrivance, might, with reference to the business of the community, and the uses to which it could be put, be worth a given sum on that day and at that time. If it was the only contrivance that could be used to accomplish the purpose for which it was adapted, it would of course constitute a monopoly, and would command the market for whatever price should be fixed upon it. If shortly after it was invented and put into use some new contrivance, entirely different, and not infringing it in any respect, but useful for accomplishing the same purpose, should be invented and brought into use, it is evident that competition would arise, and the first patent, instead of then being the sole occupant of the field, would have to meet the competition of the new, and might not be worth so much as when it was first produced. I think the jury have the right—and I so instruct you—to look to the facts as they existed at the time of the infringement. If the patent was useful when invented, and was an improvement of actual value over what then existed, the fact that something else was invented afterwards that was better than it, would not take away its entire value, so that the one who should prefer to use it or manufacture it could say, "I shall pay nothing for that because I might have taken something better." A man who has a patent owns it as property, and if anybody sees fit to infringe he is bound to pay for its fair value; and the fact that there may be something else just as good as that or better does not destroy its value, but it may affect your judgment of what the actual value is. The fact that this company chose to make this implement, with the combined parts,—that is, if you find those combined parts are an infringement of this patent,—is conclusive upon the company that they regarded it as a valuable instrument, thus combined, and its actual value in use, under the circumstances existing at the

time, the value of that combination, which constitutes the patent, should be awarded to the plaintiff in damages; but the existence of these other implements, patented or unpatented, is a matter that you have a right to consider in arriving at what your judgment of its actual value shall be. Of course, if the rival implements are patented, the existence of them could have no effect, or but little effect, upon the value of the invention in suit, except as they furnished competition in the market. If there existed some contrivance that was not patented at all, or that was free to everybody, which subserved substantially the same purpose, that might still further in your minds depreciate the value of this; but the mere fact that such a thing did exist would not destroy entirely, and could only be treated as modifying, the value of this at the time. In this connection I will refer to a point to which counsel have called my attention. It is claimed by plaintiff's counsel that the burden of proof is on the defendants to show that those implements which were brought forward are free if they want to claim the benefits of them as free implements. If they are patented, then of course the parties resorting to them would have to pay royalty for their use, and if they chose to go to this instead, they should pay royalty on this, the fair royalty, whatever it is. But counsel for defendants have asked me to say to you, that if, during the examination of the witnesses, it was conceded by the counsel for the plaintiff that any one of these implements was not patented, you have a right to accept that concession and treat it as proof of the fact that that particular one was not patented; and they claim that the one which has been called or designated as the reversible sole was admitted by counsel for the plaintiff not to be covered by any patent,—not to have been patented,—and therefore you are entitled to treat that as an unpatented implement; and so far as the existence of that in the market could have affected the fair value of this, you should consider it as a free instrument. I instruct you that a concession made by counsel may be treated by the jury as a fact against the party whose counsel made the concession.

There is one other point that I will instruct you about. In his opening statement the plaintiff's counsel claimed to you that if he made proof that these defendants constructed a brake which was a violation of his client's patent, and showed that they had constructed a certain number of brakes altogether, the burden of proof would then fall upon the defendants to show just how many were constructed after the form of the Bing patent; and that unless they offered that proof you should find that all made by them were constructed in that way, on the principle of the confusion of goods; that is, that a party who mixes his goods with another man's, so that they cannot be separated, is liable to lose his own goods with those that he commingles with them. That rule does not apply in this case, for the manifest reason that whenever you go and look at a car you can tell what brake is on it. If there is any confusion, it is confusion in the book-keep-

ing, and not of the goods. The brakes could not be mixed; one brake is always separable from another; and the burden is upon the plaintiff to show how many articles were made in infringement of its patent; and the plaintiff is entitled to recover for the infringement of only such number as upon the evidence you are satisfied were made by the defendants. It is only in a case of this kind,—and I do not mean to intimate that there is any cause for invoking the rule here; I leave that solely to you, as you are the judges of questions of fact. If a party shows an unwillingness to let the truth out, and keeps back facts, and the means of getting at facts in his power, then the jury is warranted in drawing the strongest possible inferences which may be drawn from the evidence actually given in favor of the other party; but further than this, there is no doctrine that can have any applicability in this case, and I do not say that this doctrine is applicable; I do not say to you that the defendants have manifested any disposition to keep back any facts in their power. If, when they made these implements, they actually knew they were violating somebody else's patent, and purposely omitted keeping any record of how many violations were perpetrated, then you would be entitled to draw the strongest inferences against them, if there were any evidence of that fact. But if they have brought forward their books, and furnished all the evidence in their power, and have been fairly candid in the matter, as much so as men may reasonably be expected to be when their interests are heavily at stake, you would not be justified in drawing any inferences, other than such as may fairly be drawn from the evidence adduced. In reference to this subject of knowledge of the patent, I say to you that every one is bound to take notice of the existence of a patent, and the rights of parties under it, and is held responsible to pay for every infringement that he actually perpetrates, just as if he did know it. It is like the record of a deed; the record of patents at Washington is notice to every one, just as your title deeds on the records of the proper county are notice to all the world of your title. But, while a man is held to have this constructive knowledge, he may be in actual ignorance of the fact; and so if these defendants were actually ignorant of the existence of this patent at the time they made the implements which are claimed to be an infringement, they should not be deemed subject to criticism or reproof because they have come here with their books in such shape that they cannot tell from their books what infringements they did commit. It is only when a man consciously does wrong, and so does it as to conceal the facts, that he is subject to such criticism and to this harsh rule of evidence.

DUNCAN *v.* SHAW and others.

(*District Court, S. D. New York.* February 7, 1884.)

1. SHIPPING—SEAMAN'S WAGES—ADVANCE NOTE—DISCHARGE AFTER NEGOTIATION—INDORSEE—REV. ST. § 4534.

Where an advance note is given upon the shipment of a seaman for a voyage, and it is transferred to a *bona fide* indorsee, under section 4534, the latter may recover of the owners of the vessel the amount thereof, notwithstanding the seaman's discharge by the master before sailing, and notwithstanding that the note contained the proviso that the seaman "be duly earning his wages." By giving the advance security, the master under the statute incurs the risk, as respects a *bona fide* indorsee, of the seaman's discharge before the vessel sails.

2. SAME—CASE STATED.

Where the shipping commissioner, at the request of the master, gave such an advance security to the seaman shipped by him, with the consent of the master, the master having full opportunity previously for ascertaining the fitness of the seaman, and the master subsequently discharged the seamen by reason of drunkenness on the evening preceding the sailing of the ship, and the latter act not being sufficient ground of discharge by the maratine law, *held*, that the master was not entitled as against the indorsee of the security to allege the general unfitness of the seaman of which he had previously means of knowledge; that the security was valid, and could be enforced by the indorsee; and that the shipping commissioner being obliged to pay it, could, therefore, recover the amount in an action against the owners. *Held, also*, that the shipping commissioner, having defended in a former action against him on the note, without notice to the present defendants, was not entitled to recover against them the costs of the former suit.

In Admiralty.

Benedict, Taft & Benedict, for libelant.

Alexander & Ash, for respondents.

BROWN, J. This libel was brought to recover for moneys paid by the libelant upon an advance note of $60, dated December 26, 1877, and given for two months' advance wages to the cook of the ship S. Hignett. The libelant was then, and is now, United States shipping commissioner at this port. His deputy, at the request of the captain of the ship, procured a cook for the ship, who signed the shipping articles; and the deputy at the same time, as requested by the captain, signed the advance note in the following form:

"*Seaman's Advance Note.*

"NEW YORK, December 26, 1877.

"Three days after the final departure of the ship Sarah Hignett from New York, for Calcutta, I promise to pay Joseph Harley, or his order, sixty (60) dollars, provided he is then duly earning his wages.

"$60. FRED C. DUNCAN, Dep'y U. S. Ship'g Com'r."

The cook had been employed upon the ship for two weeks previous, with the understanding on the part of the captain that he would be shipped for the voyage. On the morning of the day that the ship sailed, the captain, being dissatisfied through evidence of the cook's drunkenness, determined not to allow him to proceed on the voyage, called upon the shipping commissioner, discharged the cook, and pro-

cured another in his stead. The steward had previously indorsed and transferred the note to one Weinhold, acknowledged receipt of $60 thereon, and directed payment of the note to him or bearer. Weinhold, shortly after the vessel sailed, commenced suit upon this note against the commissioner and deputy commissioner in one of the city courts, and recovered judgment thereon, with costs. This judgment was paid by the libelant, who thereupon sues the owners of the ship, as for money paid at their request. Though the judgment was in form recovered against the deputy alone, as the deputy in fact acted on behalf of the shipping commissioner, and the latter has adopted his acts in that respect and paid the judgment, he is entitled to sue for reimbursement.

I have no doubt, upon the evidence, that the steward was, on the whole, an unfit person for the voyage. During the two weeks before the day of sailing, the master had, however, abundant opportunity to observe the steward's general unfitness. He knew that this steward was to be shipped by the shipping commissioner, and the latter acted at the master's request in procuring the shipping articles to be signed by the cook and in giving the advance note. The captain and owners became bound, therefore, by that engagement, and by the advance security given on account of it, in pursuance of sections 4532, 4534, Rev. St.; they could not allege previous unfitness as a defense against that obligation. By the section last named, it is provided that "if the seaman sails in the vessel from the port of departure mentioned in the security, and is then duly earning his wages, *or is previously discharged with consent of the master*, but not otherwise, the person discounting the security may, ten days after the departure of the vessel from the port of departure mentioned in the security, *sue for and recover the amount promised in the security*, with costs, either from the owner or any agent who has drawn or authorized the drawing of the security." By this section, it will be perceived, a recovery upon a note may be had not only if the seaman be duly earning his wages, but also in case he has been previously discharged with the consent of the master. The necessary effect of this provision is that a master who gives, or causes to be given, an advance security, for a seaman's wages, thereby incurs in favor of an indorsee all the risk of the seaman's discharge within a period of 10 days. It is not necessary to determine whether the liability would still exist where the discharge was for some gross misconduct on the seaman's part, such as, by the maritime law, would clearly be good ground for immediate discharge; since in this case the only act alleged after the seaman was shipped was a single drunken spree on the evening before the ship sailed, which alone is not a sufficient ground for such a discharge.

The note in this case contained the condition, "provided he [the seaman] is then duly earning his wages." As the seaman at that time was not earning his wages, had the right of recovery upon the note rested merely upon the ordinary rules of law, plainly no recovery

could have been had, because the condition was not complied with. But it is clear that upon such a note the right of recovery is not to be determined by ordinary legal rules; since the statute is explicit, that the person discounting the security may recover the amount promised by the security, with costs, if the seaman has been previously discharged with the consent of the master. The seaman in this case clearly was so discharged, without sufficient new cause arising after he was shipped; and the person who discounted the security had, therefore, a statutory right to recover the amount mentioned in it, not by force of the terms of the note, but by force of the statute. The libelant, when sued, did not give notice to the respondents. This, however, is immaterial, since the judgment itself is regarded as immaterial, here. Being liable to an indorsee, under the statute for the amount mentioned in the security, as an agent for the owners, who had authorized the drawing of the security, the libelant might have paid it without suit; and upon such payment he would have become entitled to reimbursement from the respondents as principals, without reference to any judgment.

The libelant is, therefore, entitled to recover the sum of $60, with interest, from the time of payment, together with costs in this court. Not having given notice of the suit in the city court to the respondents, he is not entitled to recover of the latter the costs in that court.

GOVE *v.* JUDSON and another.

(*District Court, S. D. New York.* February 8, 1884.)

SHIPPING—SEAMEN—SHIPPING ARTICLES—DISCHARGE—EXTRA WAGES—SECTION 4582.

An American seaman discharged from an American vessel in a foreign port, because the captain "has no funds to pay and could sail no further," will be deemed discharged with his own consent within the meaning and equity of section 4582, which was designed to furnish the seaman, in such cases, with means of return to his own country; and no consul being found in the foreign port nor extra wages paid there, as required, the seaman may maintain an action in admiralty on his return, against the owners, for his two months' extra pay.

In Admiralty.

J. A. Hyland, for libelant.

E. Seymour, for Sturges, one of the respondents.

BROWN, J. The libelant, an American seaman, in May, 1879, shipped on board the American bark Rocket, then lying at Newcastle, Australia, as first mate, for a voyage to the port of Saigow, Cochin China; thence to such ports as the master might direct, and thence to the United States. The libelant sailed from Newcastle, acting as first mate, and the bark arrived at Saigow in September of the same year. The crew then wanted to be discharged on the ground

of too much pumping, and on the tenth of September all were discharged by the captain, including the libelant; the vessel being then unseaworthy, and the captain stating that "there were no funds to pay with, and that she could sail no further." The libelant at the time demanded extra pay, and to go before the consul, but was told by the captain that there was no consul there; and the libelant, upon inquiry, was unable to find any consul; and only wages up to the time of discharge were paid by the master. As the claim for extra wages is not founded on the shipping articles, the formal defects in their certification and acknowledgment are immaterial. *Dustin* v. *Marray*, 5 Ben. 10. Under section 4582, if a seaman be discharged in a foreign port, with his own consent, three months' pay is required to be paid to the consul, two-thirds of which, by section 4584, are payable to the seaman on engaging his return to the United States. It has been repeatedly held, in this and other courts, that upon such a discharge, if the payment is not made to the consul, the seaman may by suit recover the sum to which he is entitled. *The Hermon*, 1 Low. 515; *Wells* v. *Meldrun*, Blatchf. & H. 344; *The Blohm*, 1 Ben. 228; *The Caroline E. Kelly*, 2 Abb. (U. S.) 160; *Coffin* v. *Weld*, 2 Low. 81. In the case of *Hoffman* v. *Yarrington*, 1 Low. 168, it was held that, under the provisions of the act of August 18, 1856, (Rev. St. § 4583,) extra wages will not be required where the vessel has been condemned as unfit for service from sea-damage arising during the voyage. In the present case there is no evidence that the vessel had been condemned as unfit for service.

It is objected that the evidence shows that the discharge of the libelant was not "with his own consent." What the libelant testifies on that subject is, "My discharge there was not my voluntary act, it was compulsory; by compulsion, I mean the captain told me there was no funds to pay, and could sail no further; I requested the captain to find a consul," etc. This evidence does not show that the libelant's discharge was not, under the circumstance which he explains, "with his own consent," within the meaning of the statute. His discharge was evidently "with his own consent," although that consent was constrained and rendered necessary under the circumstances, and, in that sense, compulsory, because the captain had no funds to pay, and could sail no further; and such duress will not deprive him of his right to extra pay. *Bates* v. *Seabury*, 1 Spr. 433.

The discharge not being within the exception of section 4583, the libelant's claim is evidently within the equity of the statute and its intention to provide American seamen with the means of return to this country; and he is therefore, I think, entitled to a decree for two months' pay, amounting to $80, with interest from the time of filing the libel, September 7, 1881, making $91.60, with costs.

RAY *v.* ONE BLOCK OF MARBLE.

(*District Court, S. D. New York.* January 26, 1884.)

DEMURRAGE—BILL OF LADING—READINESS TO DISCHARGE.

Where the bill of lading for a block of marble weighing seven tons provided that it should be disharged by the receiver within six hours after written notice of the master's readiness to deliver it, or pay demurrage, £15 per day, *held*, that the ship was bound to afford reasonable and customary facilities for the discharge; and the receiver being prepared to move the vessel some 250 feet to the usual place of discharge at his own expense, as was usual, and the mate, in the absence of the captain, having repeatedly refused to permit the vessel to be thus moved, partly for the reason that she had not her anchors aboard, *held*, that she was not in readiness to deliver within the meaning of the bill of lading, and could not recover during the time of such refusal.

Action for Demurrage.

A. J. Heath, for libelant.

W. W. Goodrich, for claimant.

BROWN, J. This action was brought to recover demurrage for delay in the discharge of a block of marble weighing about seven tons. The bill of lading contained the following clause:

"The marble to be discharged in New York, at the expense and risk of the receiver, six hours after written notice being given by the master that he is ready to deliver the same, or to pay demurrage at the rate of fifteen pounds sterling per running day."

To discharge her general cargo the vessel went to Coe's stores and lay along-side a bulkhead, at right angles with the line of the pier, near the end of which a permanent derrick was erected, and which was the usual and chief place in this city for the discharge of blocks of marble. The vessel was only about 250 feet distant from this derrick. The consignee was notified of readiness to discharge by a postal-card, mailed to him on a Friday forenoon, and which was received at his office at about 5 P. M. This was too late to be a valid notice for that day. The consignee had previously engaged Mr, Smith, the proprietor of the marble yard and derrick close by, to unlode the marble as soon as the vessel was ready. Mr. Smith had previously, on Friday, sent his son to the vessel to arrange to have her hauled to the derrick, 250 feet further along the bulkhead and pier, in order to discharge the marble. The captain was absent from the vessel, and the mate declined to say anything on the subject in his absence. It was a usual and customary thing for vessels discharging other cargo near by, and also having marble aboard, to discharge the marble at this slip, and to be hauled along-side the derrick by Mr. Smith's men for the purpose of quick discharge; and vessels waiting to discharge marble were usually hauled along-side the derrick in turn by Mr. Smith's men. On Saturday morning the consignee again went to the vessel with Mr. Smith, or his son, and again requested permission to move the vessel to the derrick, and offered sufficient men to move her

at once. The captain was again absent, and the mate declined to do anything. They remained there till near noon, and the captain not appearing, they went away. The day was very stormy, and no removal of the block of marble could safely have been made by the use of shears. On Monday morning, the vessel being in readiness to proceed to Hunter's Point to load, procured a tug for that purpose, and in passing out of the slip stopped a short time at the derrick, where the block was speedily discharged by Mr. Smith, and the vessel then proceeded on her way. She now claims three days' demurrage.

Upon the facts stated the claim of demurrage seems to me destitute of any equity. Had the vessel got her spare anchor and chains aboard on Friday or Saturday and been then really ready to move, there is no reason to suppose any refusal would have been made to the request to suffer her to be hauled along-side the derrick for the purpose of discharging the marble. The request was a reasonable one, and I am satisfied the moving of the ship would have been attended by no difficulty or danger. The condition of the bill of lading, requiring removal of the marble within the short time of six hours after the vessel was ready to discharge, imposed on the captain at least the duty of permitting her to be hauled in the usual manner and at the consignee's expense to a place where the discharge could be made expeditiously. Upon an agreement for discharge in so short a time, it must be implied that the ship would accede to any reasonable and customary facility for discharging. This was twice proposed to the vessel and twice refused, the captain not being present to answer, though it was business hours and he was long waited for. The mate's answer, that the vessel was not ready to move on account of the spare anchor and chains which were still on shore, shows that the vessel was not in fact "ready to discharge" the marble within the meaning of the bill of lading, because she was not ready to be moved the short distance of 250 feet, which the consignee had the reasonable and customary right to have her moved at his own expense. On Monday she had got her anchors aboard and was then ready, and she then proceeded to the derrick and discharged the block with no substantial detention. I think it is clear that she did not in fact sustain any detention through any acts of the consignee; and the libel should be dismissed, with costs.

THE VADERLAND, etc.

(*District Court, S. D. New York.* December 29, 1883.)

ADMIRALTY PRACTICE—NEW TRIAL—APPEAL.

After a hearing in an admiralty cause in this court, and a decision rendered upon complicated questions of law and fact, the cause should not be re-opened and a new trial had for the introduction of further evidence in this court, where there does not appear to have been any mistake or misapprehension in regard to the evidence taken and the facts proved; such relief should be sought upon appeal to the circuit, where the additional facts may be proved as a matter of right.

In Admiralty.

Rodman & Adams and *R. D. Benedict*, for Wolff & Co.

Edward S. Hubbe and *John E. Parsons*, for steam-ship company.

BROWN, J. Upon the motion for a rehearing in the above case, (18 FED. REP. 733,) it does not appear to the court upon the evidence taken that any error was committed in holding the white damage to be within the exception of the bill of lading under the term "rust," in the absence of any evidence of the restriction of the meaning of that word by commercial usage to the rust of iron. If the court is in error in that respect, an appeal to the circuit court is the appropriate remedy. So far as the supposed error of the court rests upon the alleged commercial use of the word "rust" in a restricted sense, if such restricted use can be proved through further evidence, that error can also be corrected on appeal by the introduction of the appropriate testimony to prove the fact; and relief must be sought in that manner, and not by a rehearing, or by an opening of the cause for further evidence on a new trial in this court. The court, being unable from the testimony to find satisfactorily what was the actual cause of the white damage, or by whose fault it arose, was bound to examine and consider the terms of the bill of lading. The failure of counsel on both sides to aid the court by any consideration of the meaning of the word "rust," did not relieve the court from this duty. If any actual misapprehension or mistake in regard to the facts proved had appeared to have been committed, the court would gladly seek to correct it; but that does not appear.

According to the settled practice, therefore, the relief desired should be sought upon an appeal to the circuit court; and as such appeal would, doubtless, be taken by one side or the other, in any event, the final disposition of the cause will in fact be expedited by following the usual practice; and the motion for a rehearing should be denied.

THE ELVINE.

(District Court, S. D. New York. February 11, 1884.)

SHIPPING—SEAMEN—SHIPPING ARTICLES—EVIDENCE.

Though shipping articles may be attacked by the seamen, and shown by parol to be incorrect, fraudulent, or void; yet, in case of dispute as to the amount of wages agreed on, the shipping articles will control, the seaman being competent to bind himself thereby, unless the articles are shown to be invalid by a reasonable and satisfactory preponderance of evidence.

In Admiralty.

Beebe & Wilcox, for libelant.

Jas. K. Hill and *Wing & Shoudy*, for claimants.

BROWN, J. I have no doubt that the shipping articles of July 31, 1883, were signed by the libelant; the handwriting is admitted by the libelant to be like his, and a comparison with other signatures of his leaves, I think, no question on that point. These articles fix the rate of wages at $40 per month. Shipping articles are required to be signed under section 4520; and though their correctness may be attacked, and though they may be shown by parol to be incorrect, fraudulent, or void, (*The Cypress*, Blatchf. & H. 83; *Page* v. *Sheffield*, 2 Curt. 377, 381,) unless this be satisfactorily established, the seaman will be held bound by the terms prescribed in them. *The Atlantic*, Abb. Adm. 451; *Slocum* v. *Swift*, 2 Low. 212; *Willard* v. *Dorr*, 3 Mason, 161, 169. The intention of the master to pay but $40 per month is clear, not only from his own testimony, but from that of other witnesses. The testimony of the libelant and of other witnesses who corroborate him, that he declined to ship for less than $45 per month, produces no little embarrassment in the testimony; and in such a case the original articles, as they stand, must control. There is no such clear and satisfactory proof of either fraud or mistake as would justify the court in disregarding them.

The evidence as to the articles signed at Fernandina is equally conflicting. It is unfortunate that the original document is not produced by one of the parties. The certified copy could not furnish any information by inspection as to whether the original articles had been altered from $45 to $40 per month. The certified copy of the articles is made competent evidence by section 4575, and the burden therefore seems to be upon the libelant to prove that it is incorrect. The original articles, however, signed in New York, and bearing no marks of alteration, give the libelant's wages as $40 only; and these articles were designed to cover the whole period of the libelant's services. On the whole, I think this original must be held to be controlling, and that the libelant should be entitled to a decree at the rate of $40 per month only.

THE GARDEN CITY, etc.

(District Court, S. D. New York. January 31, 1884.)

1. COLLISION—RIVER AND HARBOR NAVIGATION—RIGHT OF WAY.
   A steamer meeting another in the fifth situation, and bound to keep out of her way,—if able to do so through stopping and backing,—has no right to go to the left and attempt to cross the bows of the other when there is not sufficient time or space to pass in that manner without a collision, unless the other vessel either stops or changes its course; the latter has the right of way, and the right to proceed on her course without obstruction.
2. SAME—SIGNALS—TIMELY NOTICE.
   In river and harbor navigation, although for good reason a vessel may, under the inspectors' rules, signal that she will go to the left, instead of the right, these rules require early notice of such intention, and such a notice is not early or timely when it would compel the other vessel to stop in order to avoid a collision, unless in a situation where the former vessel has no other alternative.
3. SAME—INSPECTORS' RULES.
   Under the inspectors' rules the vessel signaled is bound to give an answer promptly, either of assent or dissent.
4. SAME—MUTUAL FAULT.
   Where the ferry-boats G. C. and R. were approaching each other in the East river in the fifth situation, and the latter being on the former's starboard hand, and the G. C., instead of stopping and backing, as she might have done, signaled with two whistles, and at the same time starboarded her helm so as to cross the R.'s bows, and the latter made no answering signal, and the G. C., after going about a length under a starboard wheel, again signaled with two whistles, to which there was no response, and she then stopped and backed until the collision, which happened shortly after, and the evidence being contradictory as to the other details of the maneuvering of the two vessels, *held*, that both were in fault; the G. C., for undertaking to pass to the left and cross the R.'s bows without assenting signals, and the latter for not answering as required, and thereby preventing the embarrassment and confusion of the G. C., which in this case plainly contributed to the collision.
5. SAME—EXCUSE—DEPARTURE FROM RULES.
   Though the G. C. ran in connection with railroad trains, and the avoidance of unnecessary stops was desirable, and though the usual course of the R. at this point was to swing to port, *held*, that these facts, though a sufficiently good reason for the signal of two whistles, given by the G. C., regarded merely as a proposition or request to pass to the left, were not a justification for any departure from the rules of navigation, without assenting signals from the R. in reply.

In Admiralty.

Benjamin D. Silliman, for libelant.

Shipman, Barlow, Larocque & Choate, for claimant.

BROWN, J. This action was brought to recover damages for a collision between two ferry-boats—the Republic and the Garden City—about 4:30 o'clock, in the afternoon of August 17, 1878, off Catharine street, in the East river. The day was fair, the wind light, the tide three-quarter ebb. The Republic belonged to the Catherine-street ferry, and was proceeding across the river towards Main street, Brooklyn. The Garden City was coming down the river from Hunter's Point, with the tide, to her slip at James street. At the time of collision the Garden City was heading nearly down the river, but a little

toward the Brooklyn shore; the Republic was going nearly across the river, but heading a little downward. The starboard bow of the Garden City, which was much the larger boat, struck the port bow of the Republic, and her guards ran over the deck of the latter, inflicting some injury. The blow was comparatively a light one, as both boats were nearly stopped.

According to the account given by the pilot of the Republic, as he was about clearing his slip on the New York shore he was obliged to stop to allow the steam-boat Superior to go up the river just in front of him. As she passed him he saw the ferry-boat Alaska about 600 feet up river, off Market street, coming nearly directly down river, but heading a little to the westward, and estimated to be about 300 feet off the New York shore, and the Garden City, as the pilot estimated, about six or seven lengths—that is, about 900 feet—astern of the Alaska, and nearly in her wake, but about half a breadth further out in the river. He testified that as the Superior passed him he gave one whistle, intended for both the Alaska and the Garden City, which, the pilot says, was replied to with one whistle by both; that he then went ahead; that the Alaska slowed and stopped, passing astern of him; that the Garden City, instead of stopping or slowing, sheered out into the river when about five or six lengths off—*i. e.*, about 700 feet—and blew two whistles; that he then stopped his own engines, but did not blow any whistle in reply to this signal of the Garden City; that then the Garden City stopped her engines; that he then started ahead, and blew one whistle simultaneously, being then about a length from the Garden City, and that the latter thereupon started ahead, blowing two whistles; that he then stopped and backed until the collision; that he was obliged to go ahead in order to get out of the way of the Alaska; that there was not room to swing round up river and go between the Alaska and the Garden City; and that the collision was about 300 feet off the New York shore, or at least not more than one-quarter across the river.

The pilot of the Garden City testifies that he was about 100 feet further out in the river than the Alaska, and considerably astern of her; that he heard the signal of one whistle from the Republic and the Alaska's reply of one whistle; that he did not understand that signal to be intended for him, and gave no whistle in answer to it, and that he did not blow one whistle at all; that when about off pier 37 or 38, and some 500 or 600 feet distant from the Republic, and five or six seconds after her one whistle, he gave her a signal of two whistles and immediately starboarded his helm, to which the Republic made no reply; that four or five seconds afterwards, and after passing about another length, and when off pier 37, he blew two whistles again, and at the same time stopped and backed, and kept backing with his helm to starboard till the collision; that the Republic did not, after she had signaled the Alaska, make a stop, as alleged, and then go ahead a certain time with one whistle; that he himself

did not, as alleged, go ahead after stopping and backing; that the Republic did not whistle at all after her first whistle to the Alaska; that under his own reversed engine he got seven or eight turns backwards, and would probably have been entirely stopped by another turn; that when he blew his second two whistles and stopped and backed off pier 37, the Alaska was about half a length out and away from the slip, and about 300 feet from him, and that the Republic was also about 300 feet from him, and nearer the New York shore, heading a little up river; that the usual course of the Catharine-street ferry-boats at that time of tide was to come out from the slip under a starboard helm and go up the river, swinging within a space of about 300 feet.

The other witnesses called upon each side, though differing in some details, generally corroborate the account given by the respective pilots, as above stated, the greater number of experienced nautical men being undoubtedly on the side of the libelants. The pilot of the Alaska states that the Garden City was about 400 feet astern of him when the Republic's one whistle was given, and about 50 to 75 feet further out in the river; that the Republic passed from 200 to 300 feet ahead of the Alaska; that she could not have swung round so as to go, as the Superior did, between the Alaska and the Garden City; and that the latter might have avoided the collision by slowing and backing, as the Alaska did.

Without considering more minutely the differences in the accounts given by the respective parties, nor relying much on the various estimates of distance given, it seems to me clear that the chief responsibility for this collision must rest with the Garden City, and that there are several distinct faults with which she is chargeable.

1. There were no such obstructions as to prevent the application of the ordinary rules for the navigation of the East river. The Garden City in coming down had the Republic upon her own starboard hand; the latter was seen in sufficient time for the Garden City to avoid her, and, by the statutory rule, the Garden City was therefore bound to keep out of the way, leaving the Republic free to keep her course. The evidence, as it seems to me, leaves no doubt that had she slowed and backed, as the Alaska ahead of her did, there would have been no difficulty. The two vessels being in the fifth situation, the ordinary course required of the Garden City by the inspectors' rules was to pass to the right; that is, astern of the Republic. There was no controlling reason compelling her to adopt the exceptional course of going to the left and attempting to cross the bows of the Republic. This departure from the ordinary rule was clearly the primary cause of the collision; and where such departures are not called for by any controlling necessity, and are adopted upon the mere option of the vessel bound to keep out of the way, they ought to be held to be at the peril of the vessel adopting them, un-

less it appears that, notwithstanding such departure, the collision was brought about solely by the fault of the other vessel. *The Chesapeake*, 5 Blatchf. 411; *The St. John*, 7 Blatchf. 220. That cannot be held to be the case here, notwithstanding the fault of the Republic in not answering the signal of two whistles, because I am satisfied that had the Republic kept her course without stopping, as she was entitled to do, whatever be considered her course, whether straight across the river as then headed, or swinging up the river as customary, the collision could not have been avoided, and that the only way of avoiding it, after the Garden City's two whistles and starboard helm, was by the Republic's stopping and backing, which the Garden City had no right to impose upon her.

2. While the inspectors' rules recognize (page 38) circumstances in river and harbor navigation in which "for good reason the pilot may find it necessary to deviate from the rule requiring him to go to the right," they also require that in such a case he shall give "*early notice* of such intention by two blasts of the steam-whistle." Except in some exigency of navigation which did not exist here, no notice can be considered early or timely, on the part of a vessel which is bound to keep out of the way, that would require the other vessel to stop in order to prevent a collision, for if this were allowed, then the vessel bound to keep out of the way would, in effect, reverse the obligation of the statute, which provides that she shall keep out of the way and that the other shall keep her course. The former, in effect, would be dictating to the latter, and compelling the latter to stop and give way contrary to the statute, which declares that the former is the vessel which shall keep out of the way of the latter. The notice then must be so timely as not to require the other boat to stop. There may plainly be special circumstances in river navigation where this rule would not apply, as where a boat is coming down with the tide and another is coming out of a slip too near to be avoided by going astern of her; and so in various other circumstances which might be instanced. The rule referred to applies only to ordinary navigation where there is no obstruction and nothing to prevent the vessel bound to keep out of the way from doing so, and giving time by signals as to her proposed course. The signal of two whistles given by the Garden City I must hold, was not in this case such early and timely signal as is required by the inspectors' rules, because, in the situation of these two ferry-boats at that time, I regard it as impossible for the Garden City to have avoided the collision by going to the left unless the Republic stopped and backed. As the Garden City could not require this of the Republic, so long as she could herself keep out of the way of the Republic by slowing and going to the right and allowing the Republic to keep on in her course as she had a right to do, it follows that under these circumstances her signal was too late, and that the time had already passed when the Garden City might lawfully go to the left, of her own option, inde-

pendent of any assent of the Republic, and that the Garden City was in fault for attempting to do so.

3. Again, there being no necessity for the Garden City to go to the left, and the signal of two whistles being given too late as the exercise of a positive right to cross the bows of the Republic, since that would have compelled the Republic to give way, that signal was lawful at the time it was given only as a proposition or request to the Republic to be allowed to pass to the left by the latter's aid and consent. The pilot of the Garden City had no right, therefore, to starboard his helm immediately on giving the signal, as the evidence shows that he did, before receiving an assenting response from the Republic. This was in effect dictating the course of the other vessel and depriving her of the right of way to which she had the superior right, under penalty of collision if she failed to yield. Until the Republic assented to this exceptional course, as proposed by the signal of two whistles, the Garden City had no right to act upon it. Her doing so manifestly contributed to the collision, and, upon this ground, as well as the others, she must, therefore, be held responsible. *The Johnson*, 9 Wall. 146, 155; *The Milwaukee*, 1 Brown, Adm. 313, 325; *The Delaware*, 6 FED. REP. 198; *The Franconia*, 3 FED. REP. 397, 401, 403; *The Hudson*, 14 FED. REP. 489.

While the primary responsibility for this collision rests upon the Garden City, for the reasons above stated, the Republic seems to me as plainly chargeable with violation of the inspectors' rule, which required her to "answer promptly" the signal of two whistles given by the Garden City proposing her exceptional course. These rules, enacted in conformity with section 4412 of the Revised Statutes, are of binding obligation. The supervising inspectors were authorized to frame these rules in consequence of more particular provisions, and more exact information being required by pilots in regard to each other's movements in rivers and crowded harbors than the ordinary rules of navigation afford. Nowhere is the need of these rules more urgent and an observance of them more essential than in navigation about this port. In the case of *The B. B. Saunders*, 19 FED. REP. 118, I have recently held it a fault to maneuver in accordance with a signal before answering it. The Republic in this case did not answer either of the two signals of the Garden City. Having disobeyed this rule, to avoid being charged with responsibility, the burden of proof is upon the Republic to show that her failure to reply could not possibly have affected the result. *The Pennsylvania*, 19 Wall. 125, 137. The libelant's counsel urges that this did not affect the result because the boats were already so near to each other that a collision was then inevitable. This contention seems to me not sustained by the evidence; and it is also attended by considerable improbability. The evidence shows that there were two signals given by the Garden City of two whistles each, besides several toots indicating danger. The pilot of the Garden City testifies that he had given no previous signal of one whistle to the Republic; so that, ac-

cording to his testimony, his first two whistles were the first signal given by him to the Republic. Now, it is certainly highly improbable that a pilot of any experience or sense of responsibility, such as the pilot of the Garden City certainly was, would give a signal proposing to cross the bow of a ferry-boat for the first time when he was so near to her that a collision was inevitable; and the improbability is still greater if he had previously agreed to go to the right by a signal of one whistle. The testimony of the pilot of the Republic, moreover, is to the effect that the Garden City stopped at some time after her first two whistles, whereupon he started his own engine ahead, and that he might, as he thinks, have thus cleared the Garden City, if the latter had not again started ahead under two whistles. The engineer of the Republic testifies that under this, her last, headway she made about six revolutions. This must have carried her forward some considerable distance. The two vessels were approaching each other nearly at right angles, and as they collided at the bows, and both boats were then almost stopped, a very little less forward motion on the part of the Republic would clearly have prevented the collision. These considerations, as it seems to me, prove conclusively that when the two whistles of the Garden City were first given, the situation and heading of the boats could not have been such as to involve any necessity of a collision. The situation was not *in extremis*, as in the case of *The Chesapeake, supra.*

Nor can it be said that the failure of the Republic to answer the first two whistles of the Garden City did not result in contributing to the collision, because she at once stopped her engines, assuming it to be true that she did so; for there is no question that her failure to respond led the Garden City, after going about a length, to repeat her signal, and at the same time to stop and reverse her engines. Even this signal was not responded to; for the Republic, according to her own story, then went ahead, and, in doing so, as stated above, collided gently with the Garden City. Had the Republic intended to keep on at all after the Garden City's first two whistles were given, considering that this would, as I find, and as the libelant's witnesses testify, have involved danger of collision, she should have replied to that signal promptly with one whistle, showing her dissent; and, in that case, the pilot of the Garden City would have known of the dissent and that he must reverse at once, as he did afterwards, instead of waiting for a reply until he had gone a length ahead, when his signals were repeated, and when he did commence to back. This difference of time in backing was of itself sufficient to have prevented the collision, and was the direct result of the Republic's failure to respond with one whistle if she did not intend to accede to the course proposed by the Garden City. If, on the other hand, the Republic did intend to assent to the signal of two whistles, and to give way to the Garden City, as it would seem that she did intend, from the fact of her stopping, if the account given by her pilot be correct, then she was equally bound to reply "promptly," so as to permit the Garden

City to go ahead confidently and without stopping. Had such assenting response been given and the Garden City allowed to continue going ahead, instead of backing, the Republic stopping meantime, as her pilot says she was then stopped, the collision could not have happened. I have much doubt, however, as to this part of the account given by the pilot of the Republic. The story of the pilot of the Garden City seems the more natural and probable. This part of the case shows evident embarrassment and confusion, occasioned by the failure to respond to the signals, as required; and such failure has been repeatedly held to be a fault. *The Clifton*, 14 FED. REP. 586; *The Grand Republic*, 16 FED. REP. 424, 427; *The Beaman*, 18 FED. REP. 334; *The B. B. Saunders, supra.*

The Garden City ran in connection with railroad trains, and it was a natural and lawful purpose to make good time and as few stops in navigation as possible. Her pilot had a right, also, to take into consideration the usual practice of ferry-boats to swing to the northward on coming out of their slip at that time of the tide. While neither of these considerations, nor both combined, could furnish any justification for any disobedience or neglect of any rule of navigation, general or local, nor authorize the Garden City to cross the bows of the Republic without the consent of the latter, unless she could do so without compelling the Republic to stop, they did furnish good and sufficient reasons for proposing to pass to the left, which her pilot evidently supposed would accommodate both, and required the Republic to answer promptly under the inspectors' rules.

Nor can I find any justification for the Republic's going ahead in the manner stated by her pilot, if his account in that particular be correct, after he had once stopped, on hearing the Garden City's first two whistles. For the Republic must then have been to the westward of the Garden City's course; under her six revolutions ahead the Republic must have made a considerable distance to the eastward, so that whether the Garden City went ahead or backed, it was the last movement ahead by the Republic which immediately contributed to the collision, and it could not have happened without that. The Garden City was, doubtless, already in fault, for the reasons I have stated above; and her fault was apparent, at least, to the pilot of the Republic; but this did not dispense with the use of all reasonable means and nautical skill on the part of the Republic to avoid a collision, notwithstanding the existing faults of the Garden City; and the danger of collision was then so evident that both alike were bound to keep away from each other. *The C. C. Vanderbilt*, 1 Abb. Adm. 331, 364; *The Vim*, 12 FED. REP. 906, 914, and cases cited.

For these reasons the Republic must also be held in fault, and the damages to her, less the damages to the Garden City must be apportioned between the two. The libelants are entitled to a decree accordingly, with costs, with an order of reference to ascertain the amount, if the parties do not agree.

ASTSRUP *v.* LEWY and others.

LEWY and others *v.* THE EXCELLENZEN SIBBERN, etc.

(*District Court, S. D. New York.* February 7, 1884.)

1. SHIPPING—IMPROPER STOWAGE—DAMAGE TO CARGO.
   Where in a short but violent gale the bottom of a bark gave way in the middle from four to five inches, through overloading with iron rails amidships, causing a bad leak, whereby a cargo of rags was damaged, *held*, that the negligence of the vessel in improper stowage was the proximate cause of the leak, for which the ship was responsible, and that the consequent damage was not through perils of the seas, within the exception of the bill of lading.
2. SAME—MASTER'S AUTHORITY TO SELL—NOTICE.
   The master has no authority to sell damaged cargo in a foreign port without notice to the owner or shipper, when there is abundant time and means for communication with him.
3. SAME—CASE STATED—BILL OF LADING—QUALITY UNKNOWN.
   Where the bark E. S., laden with rags and railroad iron, in a voyage from Libau to New York, sprung a leak in a gale in the North sea through overloading amidships, whereby some of the rags were wet; and being obliged to put in at Cowes for repairs, the cargo was all unloaded, and a considerable portion of the rags was found to be hot, steaming, and rotten, and not capable of being put into condition to be brought to New York; and communication being practicable with the shipper at Libau by mail within three days, and by telegraph daily; and that portion of the cargo not capable of being brought to New York having been sold after repeated surveys, and under the advice of the consul, after notice sent by him to the shipper at Libau without answer or direction received in reply, and the sale being fairly made, *held*, that the sale was justifiable, but that the vessel was responsible for all loss occasioned by the leak through overloading amidships. *Held, also*, that under the terms of the bill of lading, "quality unknown," the vessel might show bad condition of the rags when shipped; that the steaming condition of the rags on the morning following the gale was an indication that part were probably shipped in bad condition; and there being no direct evidence of their condition when shipped; *held*, that that question should be submitted for further evidence before the commissioner in connection with proof of damage occasioned by the ship's leak.
4. EVIDENCE—COMMISSION—ANSWER TO GENERAL INTERROGATORY.
   Upon commission to examine the consul at Cowes as a witness in behalf of the bark, the consul, in reply to the last general interrogatory, whether he knew anything further to the advantage of the ship, having replied that he and his firm communicated with the shipper at Libau before the sale and received no answer or direction; the subject being nowhere else alluded to in the pleadings, interrogatories, or testimony, and the commission having been returned and filed a year before the trial, *held*, that the answer should stand, and that it was sufficient *prima facie* evidence of proper communication with the shipper in the absence of any countervailing evidence, and that the motion to suppress that answer or for leave to cross-examine by further interrogatories should have been made before trial.

The above libel *in personam* was brought to recover the sum of $1,566.62 freight for 941 bales and 66 bags of rags shipped on the bark Excellenzen Sibbern, at Libau, April 22, 1880, to be delivered in New York. The libel *in rem* was brought to recover damages for the non-delivery of 524 bales and 28 bags, part of the above shipment, valued at $15,000. The rags not delivered were sold by the master at Cowes, at which port he had been obliged to put in, in distress. The cargo was there unloaded for the purpose of repairing

the ship, and a portion of the rags being found so damaged by wet, heat, and rottenness that, despite all efforts to improve their condition, they were deemed unfit to be reshipped, they were condemned on survey and sold, so far as salable, and other portions thrown away as worthless. For the vessel, it was contended that the injuries to the bark were caused solely by the severe weather which she encountered in the North sea; that the rags were in a wet and unfit condition when shipped, which in part caused their damaged condition at Cowes; and that the sale of the damaged portion was necessary; was effected in the best manner; and was made after notice sent to the shipper, (the bill of lading being to order,) to which, however, no answer was received. On behalf of the shipper, it was contended that the rags were all shipped in good condition; that the damage to the vessel, and her consequent leaking, and the injury to the rags, arose from the unseaworthiness of the vessel, through the improper stowage of the iron, too great weight being placed between the main and the after hatch, which caused the bottom of the vessel to give way and her keel to drop from three to five inches; also, that no proper communication to the shipper was proved, and that the sale of the rags at Cowes was unauthorized.

The Excellenzen Sibbern was a Swedish vessel, 359 tons register, about 500 tons burden, built in 1874, and rated in 1877 in the French Veritas as A 1; length, 130 feet; beam, 27 feet; depth, 14 feet; and single decked. Her cargo on this voyage consisted of 1,362 old iron T rails, weighing about 251 tons, and 186½ tons of rags; in all 437 tons weight. Both were shipped by H. Seelig, at Libau, to be delivered in New York to order. The vessel commenced loading on February 26th; 400 rails were put in the bottom of the ship; then rags; then above the rags, in a sort of trunk-way running fore and aft along the middle of the vessel, the remaining 963 iron rails; and then rags on top. The rags were stowed by a regular stevedore; the rails by a common laborer. The bark, according to the testimony of the master, was in perfect condition on leaving Libau, having had a new set of sails and new rigging. She sailed for New York on April 9th, touched at Copenhagen, and left the Elsinore roads on the evening of the 14th. On the afternoon of the 21st she encountered a heavy gale in the North sea, which abated on the evening of the 22d. On the morning of the 23d the vessel was found leaking heavily, and, on removing the hatches, it was discovered that the bottom of the vessel had given way in the middle, so that five of the stanchions running from the keel to the deck-beams were from two to five inches short. The mate testified that the bark sprang aleak on the night of the 21st or 22d; that they "could hardly keep it up with the pumps; it kept us pumping all the time;" that after the storm "we got down in the hold and could see that the bottom was sunk four inches, from the fore part of the main-hatch to the after-hatch; she was all the way along a little, a very little, from the fore-mast to the mizzen-mast; all the keys were

broken, and all the stanchions from the main-hatch to the after-hatch;" that "she had given way a little in the water-ways and seams;" the distance she had sunk down "when it was heavy seas was between four and five inches; she jumped up and down; the bottom was keeping jumping up and down on her;" and that after arrival at Cowes the bottom was still sunk some three inches or three and a half inches, and made at anchor about two or three inches of water per hour. On the 23d, when the hatches were opened, the bales of rags were in a heated and steaming condition. On discharging the cargo at Cowes, a few days after, some of the bales were so hot as to burn the hands in handling them. On the 28th the master, having instructions from the owners of the ship, ordered the requisite survey. In the report of April 29th it is stated that the vessel "had gone down very much in her center between the fore-part of the main-hatch and the fore-part of the after-hatch. In this part of the ship the hold stanchions were torn away from the beams and had sunk about two inches; the main-mast and the beams appeared to have gone down about two inches," and the main-mast and pumps the same. In the report of the survey of the cargo, May 11th, 524 bales and 28 bags of rags were reported in a very wet and damaged state; many of them so greatly heated as to be actually smouldering; they were directed to be kept separate and in the open air as long as practicable, with the view of partly drying them. Ten other bales, slightly wet, were directed to be opened, dried, and repacked. Upon a further survey directed by the consul, the surveyors, on the twelfth of June, reported that on previous surveys, particularly on the third of June, the bales and bags above referred to had been found extremely wet and damaged, a large number of them greatly heated, and many in a rotten and partially decomposed condition; that, where practicable, the bales were opened and exposed to the air with the view of improving their condition, and that no perceptible improvement was effected; and that, believing that they could not reach New York without becoming entirely worthless, they had on the third of June condemned the whole of said bales and bags as quite unfit for shipment and had recommended their sale at auction; and that on the eleventh of June they had again re-examined the rags with a rag merchant, and that they adhered to their previous conclusion, in which the merchant concurred. About May 25th notice of the intended sale of the rags for June 15th was given by advertisements put in the *Shipping Gazette* and in the local and London newspapers; hand-bills were also extensively posted. The sale was conducted by an auctioneer accustomed to the sale of all kinds of damaged cargoes, who testifies that the sale was attended by at least 150 persons, many of whom bid for the various lots; that the competition was brisk; and that he considered the sale satisfactory for goods in such a damaged condition, many of the bales being quite rotten, and "having to be packed in bags before they could be weighed."

The consul, who was examined upon commission, in answer to the general interrogatory if he knew of any other thing of benefit to the vessel or her owners, said:

"My firm, as agents, and the captain personally, communicated with the shipper of the cargo at Libau on the arrival of the ship at Cowes, and afterwards; but the shipper made no reply to such communication nor gave any directions; the parties claiming to be the owners of the rags were not communicated with, because neither their names nor addresses were known."

The repairs of the vessel being completed, she left Cowes June 25th and arrived at New York on the thirteenth of August. A portion of the rags delivered in New York, it is claimed, were in a damaged condition. The bill of lading of the rags contained the following clause: "Quality, weight, and marks unknown; the rags loaded under and over iron."

Sidney Chubb and *Chas. M. DaCosta*, for the shippers.

Hill, Wing & Shoudy, for the Sibbern and owners.

BROWN, J. Upon the evidence in this case it must be held that the sinking of the keel and bottom of the bark prior to her arrival at Cowes was an unusual and extraordinary occurrence. Cumming, a stevedore, one of the experts in behalf of the vessel, testified that with heavy cargoes on the ship's bottom, it was not unusual that there should be a sinking of from one to three inches, but that he never knew of a case of a sinking of five inches; and that, in his judgment, 150 tons, with possibly 20 additional, would have been a suitable weight over a space of from 40 to 60 feet along the center of the vessel, and that the sinking of the bottom, to which he refers, might or might not cause the ship to leak, according to circumstances. The mate says that her bottom dropped from four to five inches at sea, and from three to three and a half when lying still at Cowes. Karbek, the carpenter, testified that "the ship gave way; she sank in the middle four inches." Other witnesses make it from three to four inches. Although the bark met with a severe gale, which came on during the afternoon of April 21st, it was scarcely more than of 24 hours' duration, since the protest expressly states that it abated on the evening of the 23d. The sea is spoken of as running very high, and some water swept the deck; but, it must be noted, that nothing was carried away, nor a spar lost; and it seems to me that the testimony of the experts on behalf of the shippers, and their judgment, considering the circumstances above mentioned, are entitled to the greater weight, and that there was nothing so extraordinary in the weather encountered on the twenty-first and twenty-second of April as to account for the extraordinary result upon the ship, and for her dangerous leaks, had she been seaworthy in both hull and stowage when she sailed. Accepting the testimony of the master, that her hull was in good condition when she left Libau, and her rating A1 three years previous, the only adequate cause that can be perceived for this extraordinary result is in the mode of loading the iron rails,

namely, too great quantity amid-ships. The evidence leaves no doubt that the chief sinking of the vessel at the bottom was in the middle, from the fore part of the main hatch to the after hatch, and this is where it appears, upon satisfactory proof, that the ship was overloaded. Cumming, the expert in behalf of the vessel, would allow as proper but 150 to 170 tons weight along that portion of the ship; the evidence indicates that there were at the least 225 tons within that space, and probably considerably more. Nine hundred and sixty-two of the rails were placed in the trunk-way in that part of the ship; if of average weight, they alone amounted to 176 tons. The trunk-way, which was on top of the first course of rags, was eight feet wide, running fore and aft along the center. The general mode of stowage was approved by all the witnesses, provided the upper course of rails was sufficiently distributed in length fore and aft. While the testimony on this point is not so exact and explicit as could be desired, the inference from the testimony of the mate and stevedore is strong that this trunk-way was amid-ships, and did not extend to the fore-mast, as claimed. The expert for the vessel testified that the frequent loosening of the stanchions, to which he referred, was between the main-mast and the fore-mast, and that there ought not to be weight enough aft to loosen the stanchions in the end of the ship; and that the loosening he referred to was not from the dropping of the keel, but from the ends of the beams going down. In this case, the chief dropping of the bottom was from the main hatch aft; while the captain and all the other witnesses from the ship spoke of her bottom and keel as giving way in the middle; "not worth mentioning," the captain said, "except in the middle." The mate said "the bottom sank four inches, and in the seas kept jumping up and down from four to five inches." The carpenter said "the ship gave way; she sank in the middle four inches." The weight of the cargo in the middle, even according to the testimony of the ship's own expert, with the corresponding special injury and extraordinary leaking arising from her bottom's giving way, particularly in just that part of the ship, seem to me to leave no reasonable doubt that she was overloaded in the center; and the testimony of the master, that the rails were loaded by a common laborer, while a stevedore was employed to load the rags only, would indicate that the overloading of the center arose from a want of suitable judgment and experience in the distribution of the cargo. As I must find, therefore, that this improper stowage was the cause of the vessel's giving way at the bottom, it follows that the ship must answer for the damage caused by the giving way of the vessel and by the consequent leak; since, in such a case, the damage is not to be ascribed to perils of the sea, but to the negligence and fault of the vessel. *Clark* v. *Barnwell*, 12 How. 280; *The Regulus*, 18 FED. REP. 380.

2. Under the circumstances of this case, I cannot doubt that it was the duty of the master, by the general maritime law, to communicate

with the shipper before selling the damaged rags at Cowes. Communication between Cowes and Libau could be had in the ordinary course of mail within three days, and by telegraph within twenty-four hours. There was abundant time and opportunity for communication. The ship was laid up there several weeks for repairs, and the rags were condemned by the surveyors as unfit to be taken to New York on the third of June, a week after the ship's arrival at Cowes. It is not questioned that, under the English maritime law, notice to the owner, where notice is easy and practicable, is an essential condition of a master's authority to sell or to hypothecate either the ship or cargo, whether the object be to obtain money for the repair of the ship, or merely the sale of damaged or perishable goods. *Acatos* v. *Burns*, 7 Exch. Div. 282; *The Australasian, etc.*, v. *Morse*, L. R. 4 P. C. 222; *Cammell* v. *Sewell*, 3 Hurl. & N. 634; *The Gratitudine*, 3 C. Rob. 240; *The Hamburg*, 2 Marit. Law Cas. 1; *Atlantic Mut. Ins. Co.* v. *Huth*, 16 Ch. Div. 474. These cases all rest upon one common principle, that the master, by virtue of his general authority, does not have any right to sell or hypothecate either the ship or the cargo; that his authority in these respects rests upon necessity solely and upon the particular emergencies of the occasion; and that this authority is therefore limited by the nature and extent of the necessity. If the owner is at hand and can be easily communicated with, the master must advise the owner of the facts, and take his directions; and where such directions may be obtained, there is neither necessity, nor authority, nor justification for the master to assume to sell or to hypothecate without notice. These principles I understand to be substantially adopted by the supreme court in the case of *The Julia Blake*, 107 U. S. 418, [2 Sup. Ct. Rep. 191,] affirming the judgment of the district and circuit courts of this district. 16 Blatchf. 472. See, also, *The Amelie*, 6 Wall. 18, 27; *The C. M. Titus*, 7 FED. REP. 826, 831; *Butler* v. *Murray*, 30 N.Y. 88, 99; *The Joshua Barker*, Abb. Adm. 215; *Pope* v. *Nickerson*, 3 Story, 465; *Myers* v. *Baymore*, 10 Pa. St. 114; *Hall* v. *Franklin, etc. Ins. Co.* 9 Pick. 466; *Pike* v. *Balch*, 38 Me. 302. In a case like the present, where there was no need of selling the cargo for the benefit of the ship, but the sale was made for the reason only that the damaged cargo could not properly be taken to the port of destination, and where there was abundant time and means of communication with the owner or shipper to ascertain his wishes as to the disposition of his goods, there was plainly no necessity for a resort by the master to any extraordinary and exceptional powers. While I should sustain, therefore, the principle invoked by the counsel for the shipper, I am not prepared to find, upon the case as submitted, sufficient evidence of remissness on the part of the master to hold the sale unauthorized.

No question was made as to the want of notice in the pleadings in either of these two cases. In the examination of witnesses upon commission, no question was put by way of examination or cross-ex-

amination upon this subject, nor in the examination of the master here in 1880 was any allusion made to it by counsel on either side. The counsel at Cowes, in his deposition, however, in answer to the last general interrogatory on the part of the ship, stated that his firm, as agents, and the captain personally, communicated with the shipper at Libau; but the shipper made no reply, and gave no directions. From this answer it is obvious that the consul, under whose advice the several surveys and repairs of the ship, as well as the surveys and sales of the cargo, were made, was familiar with the well-settled English rule requiring notice to be given; otherwise he would not naturally have volunteered this testimony without his attention being directed to the subject. This, of itself, furnishes a strong presumption in aid of his own testimony that such communication was sent, and that no answer was received. Upon the trial, counsel for the shipper moved to strike out this answer, for the reason that it was volunteered, and was upon a subject as to whi. h the witness was not interrogated, and as to which there had consequently been no opportunity for cross-examination. The commission, however, had been returned and filed more than a year before the case was brought on for trial, and the court declined to strike out the testimony, for the reason that it was material, and because there had been abundant opportunity either for the motion to strike out to be made earlier, or for the return of the commission for further cross-examination if that had been desired; and as neither party had taken any steps in regard to this part of the commission, the answer should be allowed to stand. Although the consul's answer is quite general, and does not state what particular facts were communicated to the shipper, yet as the evidence of a public officer, acting in discharge of known duties under the maritime law, and in no way personally interested, it seems to me that every intendment is to be made in its favor. The goods being consigned to order, only the shipper's name was known; no other communication or notice was therefore required than to the shipper; and the consul's statement is that they communicated with the shipper at Libau and got no answer nor any directions. Du..ng the long time that has elapsed since this commission was returned and filed there has been abundant opportunity to obtain the shipper's testimony by commission, and to show, if such was the fact, that no such communication was ever received, or if received, that it was too late, or for any other reason insufficient. As no evidence of this kind has been procured, and no reason given for not obtaining it, if material, I think the answer of the consul, though brief and general, is nevertheless *prima facie* sufficient evidence of compliance with the obligation to communicate with the owner. The objection upon this ground cannot, therefore, be sustained.

3. In regard to the sale itself I see no reason to doubt that it was fairly conducted, with every reasonable preliminary effort to do the best that could be done, and to realize the best prices for the dam-

aged goods. It appears to have been well advertised; a numerous company was in attendance on the sale, and the competition brisk. No evidence was adduced that the prices obtained were inadequate. The fact that one of the purchasers, shortly after the sale, sold his lot at more or less profit, the amount not stated, is not sufficient evidence that the sale was unfair or the price realized too low.

4. The evidence as to the condition of the rags when the hatches were opened on the twenty-third of April, and when the bark arrived at Cowes on the twenty-seventh, is such that I cannot resist the conclusion that a part of the rags was not shipped in good order. The evidence as to the filthy, rotten, and offensive condition of many of the bales when unladen a few days after the arrival at Cowes, some being so hot as to be actually smouldering, is so strong as, in my judgment, to necessitate the inference of bad condition when shipped. The qualification on the bill of lading, "quality, weight, and marks unknown," takes away any presumption which might otherwise be derived from the bill of lading, of good condition internally when put aboard, and leaves this question entirely open to any inferences which may be properly drawn from the proofs. *Clark* v. *Barnwell*, 12 How. 272; *The Querini Stamphalia*, 19 FED. REP. 123, and cases cited. In the absence of any testimony as to the condition of the rags when shipped, or as to the time within which sound rags might become injured to such a degree from sea-water, the damages, as described by the witnesses, seem to me too great to be ascribed solely to the leak arising on the twenty-second of April.

In the libel filed by Lewy and others, the libelants are therefore entitled to a decree for such damages to the rags as arose from the giving way of the bottom of the vessel in the storm of April 21st and 22d, and a reference will be ordered to compute this damage. As the evidence is very meager and is insufficient to form any confident or certain judgment concerning the condition of the rags when shipped, the whole question touching that matter, as affecting the damages caused by the fault of the ship, may be heard before the commissioner upon this reference on such further evidence as either party may introduce, without prejudice from anything herein contained on that subject. The ship will be responsible for such injury only as is properly attributable to her springing a leak on the twenty-second of April through the giving way of her center, excluding whatever damage may have arisen from any improper packing or condition of the rags then shipped, if any such be found. Upon this reference, also, the condition of the rags that arrived in New York will necessarily form a part of the evidence bearing upon the question of the condition of the rags when originally shipped; and hence any question of damage to the bales which were delivered here should also be determined now, to avoid further suits on the same subject; and an amendment of the pleadings may be made accordingly, as moved for. *The North Star*, 15 Blatchf. 532, 536.

An order in conformity herewith may be settled on two days' notice.

THE ALABAMA.

(District Court, S. D. Alabama. 1884.)

ADMIRALTY—MARITIME LIEN—VESSELS—DREDGE AND SCOWS.

Dredges and scows, though never used in the transfer of passengers or freight, and furnished with no motive power of their own, are vessels, and subject as such to maritime liens for services rendered and supplies furnished.

In Admiralty.

Lyman H. Faith, for Fobes & Co. and Michael Merrigan.

Overall & Bestor and *F. G. Bromberg*, for August Kling and Cavanagh, Barney & Brown.

Pillans, Torrey & Hanaw, for Hyer & Co. and Horsler and others.

J. L. & G. L. Smith and *R. H. Clark*, for claimants.

BRUCE, J. A number of libels have been filed in this court against the dredge Alabama and two scows. One of them is founded upon a claim for towage of the dredge and scows from Mobile bay, Alabama, to Tampa, in the state of Florida. Another is for services of the operator of the dredge while engaged in her operation of dredging, and others are for materials and supplies furnished to the dredge. To these libels exceptions are filed, and one of the exceptions is common to all the libels, and excepts to the jurisdiction of the court on the ground that the claims or contracts sued on are not maritime contracts, and that no lien exists which can be enforced in the district courts of the United States as courts of admiralty. The question raised is whether the things libeled (the dredge and scow) are of such a nature as to make them the subjects of a maritime contract and lien. Evidence has been introduced to show the character of the dredge and scows, the manner in which they are built and constructed, the purpose for which they are constructed and used, and the mode by which they carry on the business of dredging. The evidence shows that the hull of the dredge is built like the hull of other boats or vessels intended for navigation. That she is strongly built to support heavy machinery placed upon her, including a steam-engine which furnishes the power necessary to operate the machinery used in dredging and deepening channels in the water-ways of commerce. The scows are constructed like other decked scows, except that they have in them what are called wells, which are inclosed spaces open in the deck and closed at the bottom of the scows with doors, which wells or spaces receive the earth which is brought from the bottom of the channel by the dredging process, and when filled the barge is towed to some place where the earth is to be dumped, when, by opening the doors in the bottom of the wells the earth passes out, and the scow, relieved of its burden, rises up. Neither the dredge nor the scows have rudder or masts, though it is in proof that some dredges similarly constructed do have masts and sails. The dredge and scows

have no means of propulsion of their own except that the dredge, by the use of anchors, windlass, and rope, is moved for short distances, as required in carrying on the business of dredging. Both the dredge and the scows are moved from place to place where they may be employed by being towed, and some of the tows have been for long distances and upon the high seas. The dredge and scows are not made for or adapted to the carriage of freight or passengers, and the evidence does not show that, in point of fact, this dredge and scows had ever been so used and employed.

It is insisted that structures of the kind described are not vessels, and are not the subjects of admiralty and maritime jurisdiction; that contracts for the service or supply of such structures are not maritime contracts; that, in order to be so, they must pertain in some way to the navigation of a vessel having a carrying capacity and employed as an instrument of trade and commerce, and that the dredge and scows in question have no relation to commerce or navigation, and in no proper sense can be considered instruments of commerce. The function of a dredge and scows, such as we have been considering, is to clean out and deepen channels in the water-ways of commerce so as to aid and facilitate ships in their passage to and from, and while a service of this kind in aid of commerce is a very different thing from commerce itself, yet it could hardly be said to have no relation to commerce or navigation. The relation may not be the most direct, and the authority relied on is not so definite and clear as necessarily to exclude water-craft which may not be engaged or adapted to the carriage of freight and passengers.

In the case of *Thackarey* v. *The Farmer*, Gilp. 524, the rule is thus stated: "It (the service) must be a maritime service. It must have some relation to commerce or navigation, some connection with a vessel employed in trade. * * *"

In the case cited and relied on by the claimants, reported in Flippen, 543, where Judge BROWN, in the Western district of Tennessee, had laid down the rule that the contract must pertain in some way to the navigation of a vessel having carrying capacity, it should be borne in mind that it was a case of a raft of logs that was before him, quite unlike the case at bar here. He says the contract must pertain in some way to the navigation of a vessel having carrying capacity; * * * and in the case of *The Farmer*, *supra*, it is said it must have some relation to commerce or navigation, which is certainly no very definite and exact statement of the rule, though perhaps as much so as the question admits, for it is often difficult and even impossible to formulate a general proposition in words that will unerringly suit every case.

To say that the dredge in question has some relation to commerce or navigation is perhaps no stretch of the rule at all, but upon this subject we are to bear in mind not only the idea of commerce in the sense of the carriage of freight and passengers, but the idea of navi-

gation comes into the question as well. The dredge and scow are constructed to float in and upon the waters, they are made to sail, and for navigation, and can be used only in and upon the waters. They may have no motive power of their own, and be moved only by power applied externally, still they have the capacity to be navigated in and upon the waters, and they are water-craft made for navigation, and the dredge in question has actually made voyages on the high seas.

The case of *Cope* v. *Vallette Dry-dock Co.*, in the Eastern district of Louisiana, reported in 10 FED. REP. 142, and decided on appeal to the circuit court, Justice WOODS delivering the opinion, and the circuit judge (PARDEE) concurring, reported in 16 FED. REP. 924, is claimed to be in opposition to this view, but I think it is not really so. That was a case of a claim for salvage services, and in the opinion the court says:

"The structure (a dry-dock) to which they (the services) were rendered, was not designed for navigation, and, being practically incapable of navigation, it had no more connection with trade or commerce than a wharf, a ship-yard, or a fixed dry-dock, into which water-crafts are introduced by being drawn up on the ways. As shown by the findings, it had remained securely and permanently moored to the bank for a period of more than 14 years; it partook more of the nature of a fixture attached to the realty than of a boat or ship."

To say that the dredge Alabama, in the light of the testimony adduced in this case, partook more of the nature of a fixture attached to the realty than of a boat or ship, is out of the question. It is essentially in its nature a boat or vessel; and the fact that to operate the dredge it is not necessary to have licensed officers or skilled seamen is not important, for that does not furnish the test or criterion by which the question is to be determined. The doctrine or rule upon this subject is more satisfactorily and more authoritatively stated by the supreme court of the United States, in the case of *The Rock Island Bridge*, 6 Wall. 216, where the court, speaking by Justice FIELD, say: "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters." The court goes on speaking more particularly to the case there under consideration, and says: "But it [a maritime lien] cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind." Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of a maratime lien. The court here distinctly recognizes mobility and capacity to navigate as a prime element, in determining what things are the subjects of maritime lien.

Tested by this rule, the scows and dredge in question must be held to be the subjects of a maritime lien. It will not do to say that every water-craft which is not used in the carrying of freight and passengers is therefore not engaged in and has no relation to commerce and

navigation. That is too narrow, is not sustained by the authorities, nor can it be sustained by right reason.

In support of these views, in addition to the cases cited and commented upon, the case of the floating elevator, *Hezekiah Baldwin*, 8 Ben. 556, and *Endner* v. *Greco*, 3 FED. REP. 411, may be cited.

The result is that the exception to the jurisdiction of the court is overruled.

LEONARD and others *v.* WHITWILL.

(*District Court, S. D. New York.* February 6, 1884.)

1. COLLISION—VALUE OF VESSEL—HOW ASCERTAINED.
   In ascertaining the market value of a vessel sunk in a collision, the commissioner or court is not restricted to the evidence of competent persons who knew the vessel and testified as to her market value, though that is in general the best single class of evidence.
2. SAME—COST OF CONSTRUCTION.
   Where the period of collision is one of great stagnation in the market, and there are no actual sales to furnish a criterion of market value, the cost of the vessel, with deductions for deterioration, especially when the vessel was recently built, may be properly resorted to in determining the value.
3. SAME—CARE AND RETURN OF CREW.
   Though the rescue and care of the crew of a ship sunk in a collision is not, in the absence of statutory provisions, a legal obligation in the sense of entailing penalties or pecuniary damages for neglect of it, it is a maritime obligation recognized in the admiralty; and any actual expenses incurred by the surviving ship in cases of collision in the rescue, support, and return to land of the crew of the vessel sunk, should be held a part of the pecuniary damage arising from the collision, and divided between the two vessels, where both are in fault.
4. SAME—DAMAGES—DEMURRAGE.
   Where the British steamer A., which, after a collision with a schooner off Long Island, took on board the captain and crew of the schooner which was sunk, and put back towards New York with them, and on meeting a pilot-boat paid £25 for the conveyance of the captain and crew to New York, and then put about on her voyage for Europe, being detained thereby one day, and having consumed £11 worth of coal extra, *held*, that under the maritime law, as well as under the St. 25 and 26 Vict., the steamer should be allowed to bring into the account, as part of her damages arising from the collision, £20 demurrage for one day's detention, together with the £11 for coal, and £25 for the money paid for conveying the captain and crew to New York.
5. SAME—VALUE OF FURNITURE AND PERSONAL EFFECTS.
   In estimates of the value of furniture or personal effects lost, a deduction may be made from the market value of similar articles new, according to the period and time of use, notwithstanding the owner's testimony that to him they were as good as new.

Exceptions to Commissioner's Report.

Scudder & Carter and *Geo. A. Black*, for libelants.

Foster & Thomson and *R. D. Benedict*, for respondents.

BROWN, J. The schooner Job M. Leonard having been sunk in the Atlantic ocean, off Long Island, on April 18, 1877, through a collision with the steamship Arragon, owned by the respondent, this

court, by its decree in November, 1879, found both vessels in fault, and it was referred to a commissioner to ascertain the damages. *Leonard* v. *Whitwill*, 10 Ben. 638. Exceptions to the report have been filed by both parties. The value of the schooner at the time of the loss has been reported at $20,551. On the part of the libelant three witnesses who had seen the schooner testify that her value at the time of the loss was at least $26,000; other witnesses for the libelant estimate her at from $25,480 to $33,000. Witnesses for the respondent place her value at the time of the loss from $15,750 to $18,000. In this wide discrepancy, the mode of ascertaining the value adopted by the commissioner was to take her cost of building, $24,000, in 1874, and deduct therefrom 6 per cent. per annum for deterioration up to the time she was sunk in 1877, add the cost of a new set of sails recently put on her, less a slight reduction for a short period of use, and then from this deduct 5 per cent. for the difference in the cost of building and consequent market value between the year 1874 and the year 1877.

The libelant's principal exception is to the mode in which the commissioner arrived at the value of the ship, as above stated, insisting that as evidence was given of her market value by persons who had seen her and knew her, that the commissioner had no right to resort to other methods. *The Colorado*, Brown, Adm. 411; *The Ironmaster*, Swab. 443; *Dobree* v. *Schroder*, 2 Mylne & C. 489. While it is undoubtedly true that the best single class of evidence of market value is the opinions of competent persons who knew the vessel and who knew the state of the market at the time of the loss, it does not follow in any given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered. The cases cited by the appellant recognize equally the competency of evidence of the cost and deterioration as bearing on the amount to be allowed. Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to ascertain any actual sales which would furnish proper *data* or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible in such cases to determine the amount to be allowed with mathematical certainty. I do not find from the evidence sufficient reason to interfere with the result at which the commissioner has in this case arrived. In the case of *The North Star*, 15 Blatchf. 532, the value put upon the Ella Warley by the witnesses varied from $25,000 to $140,000; the court fixed it at $42,000. In the

case of *The Utopia*, 16 FED. REP. 507, the estimates of value ranged between $8,000 and $15,000; $10,000 was allotted.

The charges of the captain for superintendence during the construction of the ship were, I think, rightly disallowed as no proper part of the cost of her building.

Another item excepted to by the libelant is the allowance by the commissioner of certain expenses incurred by the ship in providing for the captain and crew, in consequence of the sinking of the schooner at the time of the collision. These men were obliged to take refuge upon the steamer. Instead of taking them with her to Europe, she returned towards New York, and after proceeding a part of the way, came up with a pilot-boat, to which she transferred the captain and crew of the schooner, paying £25 for conveying them to New York, whereupon the steamer turned about and proceeded on her voyage. The steamer was detained in this way about a day, and consumed additional coal to the value of £11. The commissioner has allowed the value of the extra coal, the £25 paid, and £20 as demurrage for the detention of the steamer in going back with the crew, as part of her damages arising out of the collision. Counsel for libelant claims that the expenses thus incurred, amounting to £56, for the return of the captain and crew to New York, were not legal obligations on the part of the steamer, and are therefore to be regarded as charges voluntarily incurred, and not a ground of compensation in this account. In the case of *The Mary Patten*, 2 Low. 196, where both vessels were in fault, an allowance was made to one of the steamers for towing into port the other which was disabled, not by way of salvage, but as a *quantum meruit* for an act which was proper and necessary, and for the benefit of both parties, and therefore as part of the damage which the common fault had caused to the steamer. LOWELL, J., says in that case that "the duty to stand by and save life, at least, cannot be said to be of strictly legal obligation, because no law has yet visited the offender with damages for a breach of it." Nevertheless, the obligation of the ship not disabled, in cases of collision, to render all possible assistance to the injured vessel and to her crew, has been recognized as affecting the pecuniary rights of the parties when suing in admiralty. In the case of *The Celt*, 3 Hagg. 321, Sir JOHN NICOLL, in a suit against the ship that was uninjured, while he dismissed the libel because it appeared that the collision arose from no fault of the vessel sued, yet he condemned her in costs and expenses because the master had neglected to render assistance to the vessel as requested, and after taking her master and crew aboard his own vessel, had landed them in a state of destitution on the coast of Ireland.

The schooner in this case having been sunk immediately through the fault of both, some provision for her master and crew was necessary. They could not be left to drown or starve. If not returned to New York, the nearest port, they must have been taken to Europe

and back, and supported in the mean time. The necessary care of the master and crew, upon the sinking of their ship, necessarily devolved upon the Arragon, which was substantially uninjured by the collision; and the expenses necessarily attending such care should be deemed to have been incurred in the performance of a maritime duty, and not as a mere voluntary charity. Practically, these expenses were unavoidable. They were the immediate and necessary result of the collision, and consequent sinking of the schooner; and as the collision arose from the joint fault of both, these charges, which were the unavoidable result of the collision, should be held to be at the expense of both. There is no reason why they should be borne by one rather than by the other. In a court of admiralty, at least, the obligation to provide for the master and crew of the sinking ship should be regarded as obligatory, so far as to entitle the ship rendering assistance to the other to bring the necessary expense of doing so into the common account. The Arragon in this case, moreover, was an English steamer, and by 25 and 26 Vict. c, 63, § 83, failure to render such assistance is declared to be misconduct; and by that act the duty was imposed upon her master to render to the other ship and to her master, crew, and passengers such assistance as might be practicable, and failure to do this is not only made presumptive evidence that the collison was by his own wrongful act, but would have made the master liable to have his certificate canceled for misconduct. This statute having thus made the assistance to the crew of the schooner legally obligatory, there would seem to be no room for doubt that the expense to which she was put in rendering this assistance should be held a part of the legal damage arising from the collision. No objection was made to the mode in which the assistance was rendered. It seems to have been the most convenient and reasonable that could have been adopted; and this item should therefore be allowed.

In estimating the value of the captain's furniture and personal effects, certain deductions were made by the commissioner from the cost price, varying on some articles from 10 to 50 per cent., while on the remainder the market value, at the time of the loss, was allowed. Where articles have been in use for a considerable time, the owner has no right to insist upon the full cost price because he may claim that they are to him as good as new. A reasonable deduction may certainly be made from the cost of such articles, having reference to the period and manner of their use, as might be done by a jury in similar cases in an action at common law. *Jones* v. *Morgan*, 90 N. Y. 4, 10. As regards this and the other items excepted to, I think the commissioner's report should be confirmed.

THE MARYLAND.

THE P. SMITH.

(*District Court, S. D. New York.* January 24, 1884.)

1. COLLISION—RIVER NAVIGATION—HUGGING THE SHORE—STATUTES.
   By the statutes of New York, steam-boats in passing up and down the East river, from the Battery northward, are bound to go as near as practicable in the center of the river, except in going in or out of their usual berths or landings, and steam-boats meeting each other in the rivers are required to go to that side which is to the starboard of such boat, so as to enable them to pass each other with safety. *Held*, the above statutes forbid steamers to keep close to the shore on going round the Battery either way.
2. SAME—ROUNDING BATTERY—MUTUAL FAULT.
   Where two unwieldy steamers, one a tug with two schooners, were coming round the Battery in opposite directions so close to the shore that they were not visible to each other in time to avoid a collision, *held*, both in fault for being too near the shore, and that such fault in this case directly contributed to the collision.
3. SAME—VIOLATION OF STATUTE.
   Where a violation of the statute does not directly contribute to the collision, there being plenty of time and room for the vessels to avoid each other, *semble*, such violation is immaterial.
4. SAME—CAUSE OF COLLISION.
   Where the steamer M., 240 feet long and 60 feet wide, with square bows, bound from Jersey City to Harlem river, upon the ebb tide, passed close to the Battery and collided about 250 feet off pier 2 with the steam-tug P. S., having a schooner lashed on each side in tow, and both steamers had exchanged a signal of two whistles as soon as they were visible to each other around the bend, and no fault was apparent in the navigation or maneuvering of either from the time the signals were given, *held*, that the cause of the collision was that both were so near the shore that they were not visible to each other in time; that each was alike in fault in this respect, and that both were therefore liable for the damage to the schooner in tow.
5. SAME—LIABILITY OF VESSEL.
   Irrespective of the statutory provisions, the obligations of prudence in navigation forbid close approach to the piers or slips in rounding the battery. The common practice in this respect affords no justification, and vessels adopting it do it at their peril, and must be held liable for the damage when this is the proximate cause of the collision.
6. SAME—AMENDMENTS TO PLEADINGS—EVIDENCE.
   Where a cause of collision is fully presented upon the merits and all the facts have been put in evidence without objection, and there is no question of surprise or desire for further evidence, the cause should be determined upon the merits, as justice requires, and the pleadings be deemed amended to conform to the facts proved.
7. SAME—AMENDMENT ALLOWED—COSTS.
   Where the facts necessarily known to the libelant are misstated to his proctor, so that the precise faults, as finally determined, are not stated in the libel, though charged in one of the answers, *held*, the libel should be deemed amended and the libelant recover, but without costs.

In Admiralty.

Scudder & Carter and *Lewis C. Ledyard*, for libelant.

Beebe & Wilcox, for the Maryland.

W. W. Goodrich, for the P. Smith.

BROWN, J. This libel was filed to recover damages for injuries to the schooner Francis C. Smith through a collision with the steamer Maryland on the fourth day of May, 1881, in the East river, off pier 2, New York. The Maryland is 240 feet long and 60 feet wide, with square bows, used for transporting railroad cars between Jersey City and Harlem river. She is a side-wheel steamer, with double engines, working independently. She was upon one of her regular trips from Jersey City, having left there at about a quarter before 4 P. M. After crossing the North river she passed into the eddy very near to the Battery wall, and probably within about 200 feet of the south ferry, the tide being strong ebb. The schooner was in tow of the tug P. Smith, coming down the East river, lashed upon the tug's starboard side, and projecting some distance forward of the tug. Another schooner was similarly lashed to the tug's port side. The mainsail of the port schooner had been up for some time previous, and about the time the tug was passing pier 10 the foresail was wholly or partly raised. The tug was intending to drop the port schooner upon reaching the North river, and go up the river against tide with the other. The wind was moderate from south to south-east and the day fair.

The libel charges fault upon both the tug and the Maryland in not keeping out of the way of each other, and in not having stopped and backed in time. The Maryland in her answer charges the tug with the sole responsibility, through an alleged want of sufficient power to handle the two schooners properly, and for having the sails of the port schooner raised, whereby, through the wind's being abeam, coupled with the small power of the tug, they drifted down upon the Maryland with the ebb tide, making more leeway than the tug could overcome, though headed all the time two or three points off shore. The answer of the tug charges the Maryland with fault, *first*, in keeping too near the New York piers, and that she did not change her course to avoid the tug, and did not slow, stop, and reverse in time. The pilot of the Maryland testified that when off Staten Island ferry he saw the tug and schooners apparently off about pier 10, well out towards the middle of the river, and headed rather off the New York shore towards the southern part of Governor's island; that he gave two whistles, to which the tug immediately replied with two, and that he then starboarded his wheel and stopped his port engine. Shortly after, on noticing that the tug, though headed away from the shore, was rather making towards it and towards the Maryland, he repeated the signal of two whistles, which was immediately answered with two from the tug, and that he then reversed the port engine and also the starboard engine. The answer of the tug avers that the Maryland was first seen when the tug was off Coenties' slip, that is, piers 6 to 8, and that the Smith was then well out in the river.

A careful comparison of the testimony compels me to reject entirely the estimates given of the distance of the tug and the schooners from the New York shore as they came past Coenties' slip. All the testi-

mony agrees that they were headed a little off shore; the tug was going at the rate of at least two miles through the water, and, with the strong ebb tide, about six by land. Her sails, with the wind abeam, would aid the motive power of the tug, while causing also some leeway; but her speed ahead was doubtless more, rather than less, than at the rate of six knots per hour. It could not be, therefore, over a minute and a half from the time she passed Coenties' slip until the moment of collision; and the leeway of the tug and schooners during this interval must have been comparatively slight, not over 40 or 50 feet, as stated by one of the witnesses. The precise place of the collision is, I think, very approximately fixed through the testimony of disinterested witnesses, as well as by the witnesses from the Maryland, particularly the witnesses Clark and Cahill. Their testimony, with other circumstances in reference to the position of the steamer Connecticut, which I need not here repeat, satisfy me that at the time of the collision the Maryland extended from about abreast of pier 2, back and across the south ferry, and that she was not over 250 feet distant from the end of pier 2,—probably less than that,—while the outer schooner was not over 300 feet distant from it. It is impossible for the tug with the schooners to have reached this position while headed two or three points off shore, if they were much further off when opposite Coenties' slip or pier 10. I have no doubt, therefore, that the Smith, when first seen, was within 350 feet of the shore, and she was probably intending to go into the eddy, as the Maryland had done, in rounding the Battery.

There are circumstances which lead to great doubt, also, whether, when the two steamers first sighted each other, they were not much nearer to each other than the estimates given in the testimony. From Staten Island ferry to pier 10 is about 2,000 feet; to pier 2, only about 300 feet. Hence the Maryland, from the point whence her pilot first saw the tug, viz., from off Staten Island ferry, to the point of collision, though she was going at first at a speed of five or six knots in the eddy as she passed Staten Island ferry, and then slowed down, did not go ahead much over 300 feet. The time, therefore, between the first whistles and the collision must have been very short, probably less than a minute. The clerk of the Maryland on hearing the whistles and the bells went at once from his office forward, a short distance only, and then he found the schooners but 50 feet distant. The pilot of the tug testifies that he did not see the Maryland or give his first signal of two whistles until he had reached pier 2, and that the collision was about 200 yards west of that. I have no doubt this pilot is partly in error as to where he first sighted the Maryland, but the distance of 600 feet apart at the time the first whistles were exchanged is an average between the evidence of Clark, who estimates the distance apart at 300 feet, and that of the other witnesses on the tug and schooners, who state that the Maryland was first seen when the tug was about off Coenties' slip, which was about 600 feet from the place

of collision. Their position enabled them to state exactly where they were when the whistles were blown, and their testimony is therefore much more reliable on that point than the testimony of those on the Maryland who could only estimate the position of the tug. Taking, then, the situation of the two vessels as determined upon this finding of the facts, the Maryland being a boat 240 feet long by 60 wide, in the eddy, within 200 feet of the shore off Staten Island ferry and heading for the east abutment of the Brooklyn bridge, and the tug and her two schooners coming down with a strong ebb tide, about 300 feet off Coenties' slip, and the two then for the first time seeing each other, and immediately exchanging signals of two whistles, I am not prepared to find upon the evidence any fault in the subsequent navigation of either vessel. The Maryland with her great length would not, I think, have been likely to clear the schooners by porting under a signal of one whistle, had that signal been given instead of the signal of two whistles. The evidence of the engineer and quartermaster shows that the port engine was reversed as soon as the first signal of two whistles was given. This brought the bows of the Maryland, which before were headed a little off shore, about parallel with the New York shore, but the ebb tide, when near the place of collision, catching her starboard bow, prevented her swinging further in shore; nor does it seem to me likely if the starboard engine had been reversed as soon as the signal of two whistles was given, instead of the port engine only, that this would have been any more likely to avoid the collision. The tug and schooners, also, as soon as the signal of two whistles was given, put their helms hard-a-starboard; but the motion of the tug was slow through the water, and though the schooners swung a couple of points under a starboard helm, the time was so short that they could not make any considerable offing to avoid the Maryland.

If this view be correct, the cause of the collision is to be sought further back, for it is manifest that vessels have no right to get into a position where a collision is inevitable, notwithstanding proper maneuvering by both. The charge that the P. Smith was too feeble in power to handle the schooner, properly is not sustained by the evidence, as respects her navigating where there is plenty of room, and where no quick maneuvering is required; but for quick handling in a narrow space, the tow was manifestly too cumbersome for such a tug, and she was therefore specially bound for this reason to be well out in the river. Nor can the collision be ascribed to the leeway caused by the sails. As I have said above, the effect of this cause would at most be small in the short time that elapsed between the signals and the collision, and it would certainly be partly, if not wholly, counterbalanced by the aid which the sails would give in increasing the speed, and consequently the steerage-way, of the tug through the water. The cause of the collision must, therefore, be ascribed either to the failure of the vessels to keep a proper lookout,

and to signal each other in time; or, if they were in such a situation as not to be visible to each other earlier, then either one or both vessels were in fault for navigating so close to the shore as not to come within view of each other in time to avoid the collision. The evidence shows that the two boats exchanged their first signals as soon as they came in sight of each other, viz., when the Maryland was off Staten Island ferry and the tug off Coenties' slip, each being from 200 to 300 feet only away from the piers. It follows, therefore, that the collision arose from both vessels' navigating too near to the New York shore when approaching and rounding the Battery in opposite directions.

Both boats, moreover, were proceeding in violation of the statutes of the state. By the act of April 12, 1848, (4 Edm. St. 60,) it is provided that "all the steam-boats passing up and down the East river, between the Battery, at the southern extremity of the city of New York, and Blackwell's island, shall be navigated as near as possible in the center of the river, except in going into or out of the usual berth or landing place of such steam-boat." Section 1, tit. 10, *c.* 20, p. *683, Rev. St., provides that "whenever any steam-boats shall meet each other on the waters of the Hudson river or any other waters in the jurisdiction of this state, each boat so meeting shall go to that side of the river or lake which is the starboard or right side of such boat, so as to enable the boats so meeting to pass each other with safety." The tug with her schooners was navigating in plain violation of the provision first above quoted, as she was far from the middle of the river. The Maryland, from the time she passed the barge office, was required by the same statute to be in the middle of the East river, instead of close to pier 2, (*The Columbia*, 8 FED. REP. 718,) and she was also plainly navigating in violation of the second provision above quoted. She had crossed the North river from Jersey City upon a course which, in the traffic about the Battery, her pilot well knew would in the ordinary course of business involve meeting other craft coming in the opposite direction. The Maryland had no call or business at the berths or slips along the New York shore, and by the statutory provisions she was, therefore, required to go around the Battery well out in the stream, so that vessels coming in the opposite direction could pass to the right with safety. Her course, however, was so near to the New York shore as to prevent other vessels' going with safety to the right at all, and it necessarily crowded them out in the stream to the left, instead of allowing them to pass to the right. So far as the statutory provisions are concerned, therefore, both vessels were equally in the wrong.

It is true that the practice is common for vessels in passing either way to hug the Battery shore in order to get the benefit of the slack water there on the ebb tide. The testimony was explicit, however, that there is no usage which gives this right to the vessels going one way rather than to those going the other way. It is practiced equally by

vessels going in either direction, and in either case it is alike contrary to the statutes and unlawful, except when the vessels are going in or coming out of their slips. Though vessels be navigating in violation of statute when a collision occurs, they will not for that reason be held liable, if this violation did not in any way contribute to the collision. Where vessels, though in unlawful proximity to the shore, see each other in time and agree upon mutual signals, and there is abundant room for either or both to keep out of the way of each other, the fact that one or both of the vessels were navigating in violation of the statute will then be deemed immaterial, as not contributing to the collision. *The Fanita*, 8 Ben. 11; *The Frederick M. Wilson*, 7 Ben. 367; *The Delaware*, 6 FED. REP. 195. But in this case the facts, I think, show that the vessels, by reason of their nearness to the shore, could not be seen by each other in time to avoid the collision, and that from the time they were seen by each other and their first whistles exchanged the collision was inevitable. The collision in this instance must, therefore, be regarded as the direct and necessary result of their close and unlawful proximity to the New York shore; in other words, their unlawful navigation in this respect was the direct and sole cause of the collision. While navigating so close to the New York piers that they could not see a half mile along the shore, each vessel also violated rule 5 of the inspectors' rules, in not giving one long whistle in rounding such a bend.

It is no answer to a failure to comply with these various rules to say that the navigation around the Battery is so crowded that these several rules and statutes are no longer practicable or applicable, or that if followed they would produce confusion. The frequency and the constancy of the danger arising from the increase of vessels makes the need of observing all these rules the more urgent; nor is there anything impracticable in keeping well out towards the middle of the East river in going into it, or in coming out of it. Both steamers in this case were about equally unwieldly and incapable of rapid handling, so as to avoid quickly any unexpected danger;—the Maryland, by reason of her great size; the tug, by reason of her comparatively slow motion through the water with two large schooners attached. Both were, therefore, equally bound by considerations of common prudence, as well as by statute, and the frequent adjudications of the courts, to keep away from the vicinity of the piers and slips. *The E. C. Scranton*, 3 Blatchf. 50; *The Monticello*, 15 FED. REP. 474, and cases cited; *McFarland* v. *Selby, etc., Co.* 17 FED. REP. 253.

The language of BENEDICT, J., in the case of *The Columbia*, 8 FED. REP. 716, 718, is specially applicable here.

"I have not overlooked the argument based on the testimony in respect to a usage for vessels passing up the East river keeping close to the piers in order to take advantage of the eddy-tide. But no such usage can be countenanced. It is forbidden by the law, and must in every instance be held illegal by the courts. It would, indeed, be held illegal by the courts if there were no statute, because of the unnecessary danger of collision created thereby."

Upon the argument it was urged with much warmth that the court should take no notice of faults not specifically alleged in the pleadings; and that in the determination of the case all proofs or considerations not *secundum allegata et probata* should be disregarded. *The Rhode Island*, Olcott, 505, 511; *The Vim*, 12 FED. REP. 906. In the case last cited the observations of the court were upon exceptions taken for want of sufficient definiteness in the libels in various particulars. While there can be no difference of opinion in regard to the proper practice and the policy of requiring early in the cause a definite statement of the faults charged by each, so far as they are known or may be reasonably ascertained, it is as well settled in the admiralty practice as it is in the practice under the state Code, that where the cause is fully presented upon the merits, and all the facts have been received in evidence without objection, and there is no suggestion of surprise, or desire to put in further evidence, the cause should be determined upon the merits of the whole case, according as justice requires, and that the pleadings should be deemed amended to conform to the facts proved. This was clearly laid down in the case of *The Syracuse*, 12 Wall. 167, 173, and has been repeatedly applied. *The Quickstep*, 9 Wall. 670; *The Clement*, 2 Curt. 363, where CURTIS, J., discusses this question at large; *The Lady Anne*, 1 Eng. Law & Eq. 674; *The Oder*, 13 FED. REP. 272, 283; *The Rhode Island*, 17 FED. REP. 554, 560.

In this case the answer of the tug distinctly sets up as a fault that the Maryland was hugging the New York shore. The Maryland was, therefore, fully apprised of this charge; but the libel does not charge this as a fault, and, except the charge that the vessels did not keep a proper look-out, and slow and back in time, neither of which charges do I find sustained, the libel only avers that neither vessel kept out of the way of the other,—a general charge which could not have been intended or understood to mean an unlawful proximity to the shore. The collision seems to me plainly the result, and solely the result, of the dangerous and illegal practice of navigating close to the Battery shore, instead of keeping off in the stream, as required by law. For this, both are equally answerable. All vessels following this course must be held to do so at their peril, and be held liable for the damages, when this proves to be the proximate cause of the collision. *The Uncle Abe*, 18 FED. REP. 270.

The libelant is entitled to the usual decree against both. But as the facts in regard to this specific fault were sufficiently known to those on the libelant's schooner, and ought to have been made known to the libelant's proctors and specifically pleaded in the libel as a fault, costs will be withheld, in order that no encouragement may be given to loose pleadings, or to any omission to state clearly and specifically all the material facts, showing how and why the collision came about, and the particular faults on account of which a recovery is sought, in accordance with the long-established practice in admiralty causes.

THE EMPIRE.

(*District Court, E. D. Michigan.* February 18, 1884.)

ADMIRALTY—JURY TRIAL—REV. ST. § 566—VERDICT.

The verdict of a jury, in an admiralty cause arising upon the lakes, and tried by jury pursuant to Rev. St. § 566, is merely advisory, and may be disregarded by the court, if, in the opinion of the judge, it fails to do substantial justice. The practice of calling nautical assessors approved.

In Admiralty. On motion for a new trial.

This was a libel for damages suffered by the barge James F. Joy, while in tow of the steam-barge Empire, and by reason of her alleged negligence. The case was tried by a jury, pursuant to Rev. St. § 566, and a verdict returned for the libelant in the sum of $200. Motion was made for a new trial, upon the ground that there was no evidence to justify the jury in rendering a verdict for so small an amount.

H. H. Swan, for the motion.

James J. Atkinson, contra.

BROWN, J. By Rev. St. § 566, "in causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes, and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it." This somewhat unfortunate clause was introduced by the revisors into the statutes from a hasty *dictum* of Mr. Justice NELSON in the case of *The Eagle*, 8 Wall. 25. In delivering the opinion of the court he remarked "that we must therefore regard it (the act of 1845) as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by a jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it." The history of the incorporation of this *dictum* into the Revised Statutes is fully given in the case of *Gillett* v. *Pierce*, 1 Brown, Adm. 553. But, whatever be the origin of the clause in question, there is no doubt that it is the law of the land and must be respected as such. There has been great difficulty, however, in determining in what cases and in what manner it is to be given effect. It creates what appears to be a very unjust discrimination in favor of the particular classes of vessels and causes of action enumerated in the act. Why it should be given in actions of contract and tort, and denied in those of salvage, general average, and prize, and why it should be limited to American vessels plying between domestic ports, and denied to all foreign, vessels, and to American vessels engaged in foreign trade, it is impossible to conceive. *The Eagle, supra.*

A still more serious objection to the clause as it now stands arises from the fact that no provision is made for the review of cases so tried. If the same weight is to be given to the verdict of a jury impaneled under this act, that is given to a verdict in a common-law case, then it clearly falls within the inhibition contained in the seventh amendment to the constitution, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." As there is no provision for a writ of error in this class of cases, the defeated party would be remediless. This question was, however, passed upon in the case of *Boyd* v. *Clark*, 13 FED. REP. 908, in which the defeated party took both an appeal and writ of error to the circuit court. Mr. Justice MATTHEWS, before whom the case was argued, dismissed the writ of error and allowed the appeal, holding that the fact that the case was tried by a jury made no difference in determining the remedy to which the defeated party was entitled. He further observed that the provisions regarding trials by jury, in the seventh amendment, applies only to common-law juries, and that, upon appeal, admiralty cases tried by a jury in the district court stand for trial in the circuit court precisely as if they had been tried by the district judge in person.

These objections to the act as it now stands, and the further one that there is probably no class of cases which a jury, as ordinarily constituted, is so unfitted to deal with as actions for torts upon navigable waters, have been deemed so serious that the practice of trying admiralty causes by a jury has not obtained in the district court to any extent. This case, and that of *Boyd* v. *Clark*, *supra*, are, so far as I am informed, the only actions of tort tried by jury in this district during the almost 40 years in which the act has been in force. In lieu of this method of procedure, we have for several years past, in analogy to the trinity master system obtaining in the English court of admiralty, adopted the practice of calling to the assistance of the court, in all difficult cases involving negligence, two experienced shipmasters, who sit with the judge during the argument and give their advice upon the questions of seamanship or the weight of testimony. I believe a somewhat similar practice has obtained in some of the other district courts. *The Emily*, Olcott, 132. *The Rival*, 1 Spr. 128. The practice appears also to have received the sanction of the supreme court. *The Hypodame*, 6 Wall. 216–224; *The City of Washington*, 92 U. S. 31–38. I have frequently derived great assistance from the advice of nautical assessors myself, and have found this a most satisfactory and expeditious method of trying these cases.

The question still remains to be decided, however, what weight we shall give to the verdict of a jury impaneled under section 566. The question has never been directly decided; but in view of the opinion in *Boyd* v. *Clark*, *supra*, that their verdict is not binding upon the circuit court upon appeal, it seems to be a logical inference that it ought to be regarded in this court only as advisory. There is no rea-

son for giving it greater weight in one court than in the other. In chancery cases the province of the jury is said to be to "enlighten the conscience of the court," and as the court of admiralty is but the chancery of the seas, I see no reason why we should not give it the same effect here.

In the case of *Lee* v. *Thompson*, 3 Woods, 167, a supplemental libel was filed in the district court, upon which there arose a question as the validity of a certain assignment. The court made an order that the matter be tried by a jury, and it was tried accordingly. Upon appeal to the circuit court, Mr. Justice BRADLEY held that, although there was no power in the court of admiralty to try causes by jury, it was nevertheless proper to submit a question of fact to them for their opinion and advice; but that their decision was, after all, not conclusive, and the matter must be finally submitted to the judge of the court; citing *Dunphey* v. *Kleinsmith*, 11 Wall. 610.

In *Basey* v. *Gallagher*, 20 Wall. 670, a provision in a statute of Montana, declaring that an issue of fact "shall be tried by a jury, unless a jury trial is waived," was held not to require the court in equity cases to regard the findings of the jury as conclusive, though no application to vacate the findings be made by the parties, if, in the judgment of the court, such findings are not supported by the evidence. In delivering the opinion of the court Mr. Justice FIELD observed that "if the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury; and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. * * * Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. Its discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion."

While the language of the section (566) is peremptory, that either party is entitled to a jury trial, it is no more so than was the statute of Montana; and yet, notwithstanding the absolute right to a jury trial given by this statute, it was held that the jury was merely advisory. See, also, *Dunn* v. *Dunn*, 11 Mich. 284.

In the case under consideration the verdict of the jury was not consonant with any theory upon which the case was tried. If the jury had found there was no negligence, it was their duty to have returned a verdict for the defendant. If they found the tug was in fault, they should have returned a verdict for the damages suffered by the libelants, which the testimony showed were not less than $800; and if demurrage were included, were nearly $1,500. There was no evidence in the case to justify a verdict of $200; and it must be set aside.

WESTERN UNION TEL. CO. v. NATIONAL TEL. CO. and others.

(*Circuit Court, S. D. New York.* March 6, 1884.)

1. JURISDICTION OF FEDERAL COURTS — RIGHT OF REMOVAL — CASE INVOLVING FEDERAL LAW.
   A case may be removed to the federal courts whenever rights of the parties are alleged to depend in any way upon an act of congress, even though the act is only set up by way of defense, and though other questions not of a federal character enter into the controversy.
2. SAME—SEPARATE CONTROVERSY BETWEEN CITIZENS OF DIFFERENT STATES.
   Boyd v. *Gill*, 19 FED. REP. 145, followed.

Motion to Remand.

Dillon & Swayne, for Western Union Tel. Co.

Dorsheimer, Bacon & Steele, for Nat. Tel. Co. and B. & O. Tel. Co.

P. B. McLennan, for N. Y., W. S. & B. Ry. Co.

WALLACE, J. Whether the complainant acquired any exclusive right as against the telegraph companies, the defendants, to build or maintain its lines upon the lands of the railway company; whether it acquired any easement not subject to a co-extensive easement in favor of the other telegraph companies; and whether any easement it may have acquired is of such character as would entitle it to compensation before the other telegraph companies can occupy the lands of the railway company with their lines, are all questions which may depend upon the force and effect of the act of congress of July 24, 1866, and arise under the issues presented by the pleadings. The suit was therefore properly removed from the state court as a controversy arising under the laws of the United States. Cases arising under the laws of the United States, within the meaning of the removal act, are such as grow out of the legislation of congress, whether they constitute the right, claim, protection, or defense, in whole or in part, of the party by whom they are asserted. If a federal law is to any extent an ingredient of the controversy by way of claim or defense, the condition exists upon which the right of removal depends, and the right is not impaired because other questions are involved which are not of a federal character. *Cruikshank* v. *Fourth Nat. Bank*, 16 FED. REP. 888; *Mayor* v. *Cooper*, 6 Wall. 247–252; *Railroad Co.* v. *Mississippi*, 102 U. S. 135. The motion to remand is denied.

The defendant the Baltimore & Ohio Telegraph Company, has also removed the suit upon its separate petition, alleging that there is a controversy which is wholly between it and the complainant citizens of different states. Within the recent decision of this court in *Boyd* v. *Gill*, 19 FED. REP. 145, such a separate controversy is not disclosed by the pleadings. See also *Peterson* v. *Chapman*, 13 Blatchf. 395. So far as the removal has been effected upon this petition the suit should be remanded.

CARDWELL *v.* AMERICAN RIVER BRIDGE CO.

(*Circuit Court, D. California.* March 3, 1884.)

NAVIGABLE RIVERS—UNSETTLED QUESTION OF STATE AND FEDERAL POWERS.

The supreme court of the United States, in the case of *Escanaba Co.* v. *Chicago*, 2 Sup. Ct. Rep. 187, determines that the control of "rivers wholly within the bounds of a state" is held by the legislature thereof, until the congress of the United States passes some act assuming control for the national government. In the *Wheeling Bridge Case*, 13 How. 519, the same court held that the mere confirmation by congress of a compact theretofore made between Kentucky and Virginia, relative to keeping open the Ohio river, was tantamount to an act assuming such control. Under these two decisions, *quære* whether such navigable rivers of California are within the control of that state, or have been removed therefrom by the act of congress admitting it into the Union, which act contains these words: "All navigable rivers within the state of California shall be common highways and forever free, as well to the inhabitants of that state as to the citizens of the United States, without any tax, duty, or impost therefor." Decided (*pro forma*) the latter.

Escanaba Co. v. *Chicago*, 2 Sup. Ct. Rep. 187, and other cases reflecting on the matter in discussion, noted and commented upon, and their various distinguishing points mentioned.

In Equity.

Scrivener & McKinney, for complainant.

H. O. & W. H. Beatty and *J. B. Haggin*, for defendant.

SAWYER, J. This case is clearly within the rule as laid down in the *Wallamet Bridge Case*, 7 Sawy. 127; S. C. 6 FED. REP. 326, 780. If that case can be sustained in the broad terms of the rule stated, then the demurrer in this case should be overruled. Since that decision was rendered, the supreme court of the United States has decided the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 679, S. C. 2 Sup. Ct. Rep. 185, which defendant insists overrules the principle announced in the *Wallamet Bridge Case;* that, under the clause of the act admitting Oregon into the Union, the state has no power to authorize the construction of bridges over the navigable waters of the state which shall materially obstruct their navigation. It must be admitted, I think, that there is language in the opinion that favors that view; and I am by no means certain that the court did not intend to go as far as its broadest language indicates. It is sought to distinguish this case from the *Chicago Bridge Case*. If it can be distinguished, it must be on the following grounds: In the *Blackbird Creek Case*, 2 Pet. 245, arising in Delaware, the *Schuylkill Bridge Case*, 14 Wall. 442, in Pennsylvania, and all others since decided, following the decisions in those cases, it was held that congress, under its authority to regulate commerce and establish post-roads, had power to control, for those purposes, the internal navigable waters of the various states; that as soon as congress legislates in regard to any such navigable waters, its power becomes exclusive and the states cannot afterwards authorize any material obstruction to their navigation; but, till congress acts, the legislature of any state has the power to authorize the ob-

struction of any navigable waters within its borders, by the erection of bridges, dams, or other structures for the convenience and advantage of commercial intercourse. It was held, with respect to the navigable waters of Delaware and Pennsylvania, that congress had never acted, and, consequently, the legislation of these states authorizing the obstructions complained of was valid.

The question, therefore, is, has congress acted, with reference to the navigable waters of California, by legislating upon the subject, in such sense that its control has superseded the power of the state legislature and become exclusive? If so, then the case is distinguishable from any of the cases, other than the *Wheeling Bridge Case*, before decided by the supreme court. If congress has so acted, that legislation is found in the act admitting California into the Union, which act provides "that *all* the navigable waters within the state *shall be common highways*, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor." 9 St. 452, 453. How can the American river be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the state," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be *practically used as a highway*, and such capacity is wanting where there is an impassable barrier or obstruction. This provision is a law of congress, and it is valid, not as a compact between the United States and the state of California, but as a law of congress, passed by virtue of the constitutional power of congress to regulate commerce among the states and with foreign nations, and to establish post-roads. *Pollard's Lessee* v. *Hagan*, 3 How. 224, 225, 229, 230; *Wheeling Bridge Case*, 13 How. 566; *Mining Debris Case*, 18 FED. REP. 753. What does this provision of the statute mean? Can there be any reason to suppose that congress intended anything else than to make or continue the navigable waters of the state, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the state to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the act of admission, but subsequently, after the admission of California into the Union "on an equal footing with the original states in all respects whatever," congress had passed a separate, independent act, with no other provision in it, providing "that all the navigable waters within the state of California shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that congress, by the passage of such an act, under the circumstances indicated, could have any other purpose than to take control of the navigable waters of the state for the purpose of preventing any interference with, or obstruction to, their navigability, or "so far as might be necessary to insure their free navigation?"

Or would it be seriously doubted that congress had acted upon the subject-matter within the meaning of the terms of the decisions in the *Blackbird Creek* and *Schuylkill Bridge Cases* mentioned? If such would be the construction in an independent act passed subsequently to the admission of the state, it must be the construction of the same language as found in the act of admission. If such is not the purpose of this provision, it would be difficult, I think, to determine what the purpose is. Following the direct decision upon this point in the *Wheeling Bridge Case*, 13 How. 565, I had no difficulty in concurring with the district judge in the ruling that a similar provision in the act admitting Oregon into the Union constituted legislative action by congress upon the subject-matter, of such a character as to withdraw it from the jurisdiction of state legislation.

In the *Chicago Bridge Case*, *supra*, the court still recognizes the power of the national government to control the navigable waters of the several states. It says:

"The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States, which *are navigable in fact, so far as it may be necessary to insure free navigation*, where, by themselves or their connection with other waters, they form a continuous channel for commerce among the states or with foreign countries." 107 U. S. 682; S. C. 2 Sup. Ct. Rep. 185.

The question, then, is whether the provision quoted from the act of admission is legislation by which congress takes control of the navigable waters of the state, "so far as it may be necessary to insure their free navigation;" and whether there can be a "common highway," or "free navigation," where the passage of steamers or other vessels is absolutely obstructed by impassable barriers thrown across the channels of waters otherwise navigable, in fact. In the case of the state of Illinois, neither the act authorizing the inhabitants to form a state government, (3 St. 428,) nor the resolution admitting the state into the Union, (Id. 526,) contains the provision, or any provision of a character similar to that, found in the acts admitting California and Oregon into the Union. Both the act and the resolution relating to Illinois are silent upon the subject, and I am not aware that there is any subsequent legislation on the subject affecting the *status* of Illinois. In the *Chicago Bridge Case*, the supreme court seems to regard the provision of the ordinance of 1787 as inoperative after the admission of Illinois as a state. Says the court:

"Whatever limitation upon its powers as a government, while in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, *it ceased to have any operative force*, except as voluntarily adopted by her, after she became a state of the Union. On her admission she became entitled to and possessed all the rights and dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original states in all respects whatever.' 3 St. 536. Equality of constitutional right and power is a condition of all the states of the Union, old and new. Illinois, therefore, as was well ob-

served by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird creek, and Pennsylvania over the Schuylkill river." 107 U. S. 688, 689; S. C. 2 Sup. Ct. Rep. 185.

There being no legislation by congress, then, assuming the control of the navigable waters of Illinois, there was nothing more to prevent legislation by the state in regard to the navigable waters of Illinois than there was to prevent legislation by the states of Delaware and Pennsylvania. But I do not understand it to be held, or intimated, that congress cannot, by legislation in the interest of interstate commerce, take control of any one, or all, of the navigable waters, either of Illinois, Delaware, or Pennsylvania. Only it has not yet done so. I suppose congress might take control of any one navigable river by name, as the Sacramento, for the purpose of facilitating interstate commerce, or it might take control, generally, of all the navigable waters of any particular state, without reference to the waters of other states, and there might well be special reasons, making it desirable with reference to some particular waters, or some particular states, which are not applicable to other waters, or other states. I do not understand that special legislation as to particular rivers or particular states, not applicable to others, would affect the "constitutional right or power," or the equality, of the states in any particular. All of the states are alike equally subject, at any and all times, when congress sees fit to act, to the power of congress to "regulate commerce among the states" and with foreign nations, and the power to "establish post-roads" within their several borders and over their several navigable waters. But the regulation of commerce on the waters of, and establishment of post-roads in, some states, before it is done on the waters of or in other states, does not affect their constitutional *status* of equality. Congress may take its own time and occasion to regulate the navigable waters of a state without affecting its constitutional condition of equality. I suppose congress might now, by an act duly passed, apply the provision in the acts of admission of Oregon and California to Illinois, Delaware, and Pennsylvania—to any one or all of them; and if it should do so, it would seem that there ought not to be any doubt that the object would be to take exclusive control for the benefit of commerce, and to suspend the power of regulation, or at least of obstruction and destruction, by the states. But until some legislation of the kind is had, those states concerning whose waters congress has not legislated, under the decisions referred to, may themselves legislate upon the subject. If the provision in the California act of admission is legislation taking control of the navigable waters of the state for the benefit of commerce, then congress has legislated in reference to the navigable waters of California, while it has not done so with reference to the navigable waters of Delaware, Pennsylvania, and Illinois; and, in this respect, California and Oregon stand upon a footing

entirely different from that of those states, and the decisions as to them are inapplicable. The foregoing observations indicate the distinction, if any sound distinction there be, and it seems to me that there is, between this case, the *Wallamet Iron Bridge Case*, and the *Wheeling Bridge Case*, and those other cases cited, already decided by the supreme court. If the distinction is not sound, then it appears to me that the *Wheeling Bridge Case* must also be regarded as overruled, although the supreme court does not expressly indicate any intention to overrule it.

There is an intimation, however, in the opinion of the *Chicago Bridge Case*, not necessary to the decision of the case upon the other views expressed by the court, that the provision of the ordinance of 1787, corresponding to the provision in question in the acts of admission of California and Oregon, if in force, would not affect the question. 107 U. S. 689; S. C. 2 Sup. Ct. Rep. 185. If this be so, then the distinction referred to is of no practical consequence. But the bridges, and other obstructions referred to as illustrations following this intimation, were all *draw*-bridges, or other *partial* obstructions, while the bridge now in question is an absolute, unqualified, entire obstruction to the navigation of the river. In view of these intimations, and other general observation in the opinion of the court, and not feeling quite certain as to how far the supreme court intended to go on these questions, and not wishing even to seem to disregard the decisions of the supreme court, I shall, for the purposes of this case, sustain the demurrer and dismiss the bill. The bill presents the case fully, and it will be much better for all parties to have the effect of the provision of the act of admission determined now before going to the expense of a trial. As the complainant has already submitted to the obstruction for many years, the right, I think, should be finally determined on appeal, before an injunction should be decreed. The supreme court does not appear to me to have considered carefully, or finally determined, what the purpose and effect of the provision in question in the act of admission is. It must have some object, and if that object be not to protect and preserve the navigability of those waters against obstructions equivalent to destruction by authority of the state, what was the purpose? The fact that the provision is in the act of admission, instead of in subsequent independent legislation, cannot affect its construction, or its force and effect. But for the observations in the *Chicago Bridge Case*, which I think unnecessary to the decision, and believing that congress had acted upon the subject, I should have followed the ruling of the circuit court in the *Wallamet Bridge Case*, and what I understand to be the decision in the *Wheeling Bridge Case*, and overruled the demurrer. I do not wish to be regarded as having changed my own views upon the rulings in the *Wallamet Bridge Case*. I still think it similar to the *Wheeling Bridge Case*, and distinguishable from any other cases hitherto decided by the supreme court brought to my attention. I

still think the decree in that case correct, on the ground that congress has acted upon the subject, also on other grounds than the point discussed in this case. But the case will be appealed, and if the circuit court was wrong, the rights of the parties will be finally settled by the supreme court. I only write this opinion to indicate upon what distinction, if any, the case I suppose should be taken out of the decision of the *Chicago Bridge Case*, with the hope that the attention of the supreme court will be specially directed to that supposed distinction.

UNITED STATES *v.* O'NEILL and others.

(*Circuit Court, E. D. Wisconsin.* February 5, 1884.)

1. SURETYSHIP—ALTERATION OF INSTRUMENT—DISCHARGE.
When, after a bond had been signed by two sureties with the understanding between them and the obligor and obligee that it was to be signed by a third surety whose name was written in the bond, the name of the third surety was altered in the body of the instrument, with the knowledge of the obligee, by the substitution of a different surety, who then signed the bond, *held*, that the two sureties were discharged.

2. INTERNAL REVENUE—CONSTRUCTION OF REV. ST. § 3182.
Under section 3182 of the Revised Statutes, the commissioner, in making a reassessment upon distilled spirits for the purpose of rectifying an error, is not confined to a period of 15 months last past.

3. STATUTE—TIME OF TAKING EFFECT—ASSESSMENT—VALIDITY.
A statute took effect March 3d, changing the rate of duty upon spirituous liquors from 70 cents to 90 cents. An assessment was made for a period previous to and including March 3d at 70 cents. *Held*, that though the statute was in force during the whole of March 3d, so that the rate for that day should have been 90 cents, the tax-payer could not on that account dispute the validity of the assessment.

4. ASSESSMENTS FOR SAME PERIOD—VALIDITY PRESUMED.
Two assessments, covering partially the same period, will be presumed to be for different liquors till the contrary is shown.

5. ACTION UPON BOND—ALLEGATIONS OF COMPLAINT.
An action upon a bond, conditioned upon the payment of an assessment, will not fail because the complaint does not set forth the whole of the assessment.

This was a suit on a distiller's bond. The bond was executed by the defendant O'Neill as principal, and by two of the other defendants as sureties, April 30, 1874, and covered the period from May 1, 1874, to May 1, 1875. The complaint set out the conditions of the bond, and then alleged that these conditions were broken, in this: that O'Neill failed to pay the internal revenue tax due and payable on 15,344 gallons of distilled spirits, distilled by him at his distillery from the first day of May, 1874, to and including the thirty-first day of December, 1874, amounting to $10,740.80, and on 29,440.40 gallons of distilled spirits distilled by him from December 1, 1874, to and including March 3, 1875, amounting to $20,608.28, and also on 30,873.36 gallons of distilled spirits, distilled from March 4, 1875, to

and including June 30, 1875, amounting to $27,786.02, making an aggregate sum alleged to be due to the United States of $59,135.10. The complaint further alleged that the commissioner of internal revenue assessed on the monthly list of November, 1875, against O'Neill a tax for the several amounts aforesaid, which assessment was duly returned to the collector, who demanded payment, which was refused. Judgment was therefore asked against the several defendants for the amount of the penalty of the bond, namely, $25,000. The case was tried by the court without a jury. The proofs, oral and documentary, were voluminous, and numerous points bearing upon the validity of the assessment and the alleged liability of the defendants were discussed at the bar. The defendants Stowell and Walsh, as sureties on the bond, made a special defense solely applicable to them, and which, if maintained, would still not relieve the defendant O'Neill, nor the surety, John B. Reynolds, if O'Neill's liability as the principal in the bond was established. That part of the opinion of the court which covers the questions of law involved in the case is as follows:

G. W. Hazelton, for the United States.

N. S. Murphey, for defendants.

DYER, J. The bond was prepared April 30, 1874, in the office of the collector of internal revenue. The written part of the instrument is in the handwriting of one Sherman, who at that time was a deputy in the office. As originally drawn, the names of John M. Stowell, Patrick Walsh, and Hugh P. Reynolds, with their respective residences, were written in the body of the bond. This makes it manifest that the collector understood that Hugh P. Reynolds was to sign the bond as one of the sureties. The bond was signed, as thus drawn, by O'Neill, Stowell, and Walsh, in the collector's office, on the day of its date. The testimony satisfactorily shows that it was the distinct understanding between O'Neill, Stowell, and Walsh that Hugh P. Reynolds should be a co-surety on the bond; and I think it was competent for the defense to show this, in view of the fact that the face of the bond as drawn by the collector indicated that Hugh P. Reynolds was to sign the bond as one of the sureties, and that this must have been so understood by the collector. There is a dispute upon the question whether the bond, after its execution by O'Neill, Stowell, and Walsh, remained in the custody of the collector, in expectation that Hugh P. Reynolds would come in and sign it, or whether O'Neill was permitted to take the bond away for the purpose of getting Reynolds' signature thereto. It seems most probable that the collector retained the custody of the bond; but whether this be so or not, is not in my opinion very material. At all events, there was such delay in procuring the signature of Hugh P. Reynolds—in consequence, as the testimony tends to show, of his absence—that the collector became urgent in his requirement that the execution of the bond by a third surety should be completed. Thereupon O'Neill proposed to the col-

lector that John B. Reynolds should be substituted as a surety in place of Hugh P.; and upon the representation of O'Neill that John B. Reynolds was as responsible, pecuniarily, as Hugh P., and that the other sureties would be satisfied with the proposed substitution, the collector caused the word and letter "Hugh P.," where they occurred in the body of the bond before the name Reynolds, and the residence of that person as written in the bond, to be erased, and substituted therefor the name of John B. Reynolds, and a description of his residence. Thereupon John B. Reynolds signed the bond as the third surety, and the testimony tends to show that this was done on the twenty-fifth day of June, 1874. Of this erasure in the bond, and substitution of John B. Reynolds for Hugh P. Reynolds, the proofs positively show the defendants Stowell and Walsh knew nothing until this suit was begun in 1876. Thus it appears that when Stowell and Walsh signed the bond they understood and expected that Hugh P. Reynolds was to be a co-surety with them; that it must have been also so understood by the collector, because he had drawn the bond accordingly; that subsequently, without consulting Stowell and Walsh, and without their knowledge, the collector, by arrangement with O'Neill, made the change in the bond and permitted the substitution of sureties, which have been stated. Was not this such an alteration of the bond, and such an unauthorized deviation from the original understanding of all the parties, as precludes a recovery against Stowell and Walsh? I am of the opinion that it was.

On the back of the bond there purports to be an acknowledgment of the execution of the bond by all the parties,—O'Neill, Stowell, Walsh, and John B. Reynolds,—dated June 25, 1874, before Sherman, deputy collector. If this acknowledgment was in fact taken, it must have been after John B. Reynolds signed the bond, and in that case Stowell and Walsh would be clearly precluded from objecting to the substitution of John B. Reynolds for Hugh P., and to the change in the body of the bond, because it would then be a conclusive presumption that they knew or ought to have known at the time of the acknowledgment of such substitution and change. But both Stowell and Walsh testify with great positiveness that they never acknowledged the execution of the bond. Their testimony upon that point is not overcome by any proof to the contrary on the part of the government. Sherman cannot be sworn because of mental incapacity. The testimony of the collector, so far as it was thought competent for him to speak upon the subject, is not adequate to meet the positive affirmations of Stowell and Walsh.

The certificate of acknowledgment is not conclusive, but only *prima facie* evidence of what it states. It may be shown to be untrue. Of course, the evidence to overcome it should be strong and convincing. "While a certificate of acknowledgment to a conveyance establishes a *prima facie* case that the signature of the person purporting to have executed the conveyance is genuine, this presumption will not prevail

against positive evidence to the contrary." *Borland* v. *Walrath*, 33 Iowa, 130. See, also, *Paxton* v. *Marshall*, 18 FED. REP. 361.

The general proposition of law in relation to the liability of sureties laid down by Mr. Justice STORY, in *Miller* v. *Stewart*, 9 Wheat. 703, is elementary. He says:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

There is a class of cases, many of which have been cited by the learned counsel for the government, in which it is held that a bond, perfect on its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. *Dair* v. *U. S.* 16 Wall. 1; *Tidball* v. *Halley*, 48 Cal. 610; *State* v. *Peck*, 53 Me. 284; *Cutler* v. *Roberts*, 7 Neb. 4; *Nash* v. *Fugate*, 24 Grat. 202; *Millett* v. *Parker*, 2 Metc. (Ky.) 608; *State ex rel.* v. *Pepper*, 31 Ind. 76. Then there are other cases in which it has been decided that if a bond be written as if to be executed by two or three or more sureties, and it is in fact executed by only one, and is then delivered to the obligee, it is valid and effectual against that one. *Cutter* v. *Whittemore*, 10 Mass. 442. In *Russell* v. *Freer*, 56 N. Y. 67, M., plaintiff's intestate, held the office of collector of internal revenue. Proposing to appoint C. as his deputy, he required security that C. would pay over all moneys collected, etc. For this purpose a bond was prepared, which was executed by H. and F., and delivered to C. When they signed it the name of J. appeared as obligor in the bond, and they were told by C. before signing that J. would sign it also, and they signed with this expectation. The name of J. was subsequently stricken out of the bond without their knowledge or consent, and it was delivered to M., *who had no knowledge of the facts*, and who thereupon appointed C. deputy. In an action on the bond, held that H. and F., having placed it in the power of C. to deliver the bond as a valid and complete instrument, it having been so delivered, and M., having incurred responsibility relying thereon, it was valid and binding.

As will be seen, none of the cases cited meet the facts of the case at bar. Here the conclusion must be, from the manner in which the transaction took place, that it was the understanding of all parties,

the collector included, when Stowell and Walsh signed the bond, that Hugh P. Reynolds should sign it as a co-surety. As before observed, the bond was so prepared in the collector's office, and such was the expectation when Stowell and Walsh signed it, and left it with the collector. The collector had notice of the understanding of the parties. It was not the case of a delivery of the bond with a private agreement between the obligor and the sureties that others should sign it,—an agreement unknown to the obligee. It was not the case of a bond in the hands of an obligor with other names written therein, and then delivered by him absolutely to the obligee, signed by some and not by others. It is not like the case in 56 N. Y. Here the bond was confessedly yet incomplete after Stowell and Walsh signed it, and while it was in the hands of the collector; and through the active instrumentality of that officer or his deputy, and by agreement between him and the obligor, without the knowledge or consent of Stowell and Walsh, the erasure was made in the bond, and a new surety substituted for the one whose name was originally written therein, and whom all parties originally expected and understood would sign it as a co-surety. Upon this state of facts I feel obliged to conclude that the bond is not an obligation binding upon Stowell and Walsh.

In *Smith* v. *U. S.* 2 Wall. 219, Mr. Justice CLIFFORD states the rule to be that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which *may prejudice* him, or which may amount to a substitution of a new agreement for the one he has subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni*. And of this case it may be observed that in its facts and upon the law it is highly instructive as bearing upon the kindred question involved in the case at bar.

Several points are made impugning the validity of the assessment described in the complaint, and offered in evidence. The assessment list was for the month of November, 1875, and bears date December 18th of that year. It is contended that in making the assessment the commissioner exceeded his authority in this: that by section 3182 of the Revised Statutes he was limited in making an assessment against the defendant O'Neill to a period 15 months anterior to the date of assessment; that therefore he could not go back of September 18, 1874; whereas, he did in fact extend the assessment back to May 1, 1874. I do not understand section 3182 as thus limiting the time for making the assessment here in question. By that section the commissioner is first given general power to make the inquiries, determinations, and assessments of all taxes and penalties imposed by title 35 of the statutes relating to internal revenues, and he is required to "certify *a list* of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so cer-

tified." Then the section provides that whenever it is ascertained that any list which has been or shall be delivered to any collector—that is, any list of assessments already made and certified by the commissioner to a collector, and such as is just before spoken of—is imperfect or incomplete in consequence of the omission, etc., the commissioner may, at any time within 15 months from the time of the delivery of the list to the collector as aforesaid,—that is, within 15 months *after* the delivery of the list by the commissioner to the collector,—enter on any monthly or special list the name of such person omitted, etc., and he shall certify and return such list to the collector as required by law. It is observable that this statute does not forbid a reassessment for a period 15 months back of the time when such reassessment is made, but when an assessment has been made on discovery of an omission, etc., the commissioner may, within 15 months after such assessment, enter on *any* monthly or special list the name of the person previously omitted. This is what I understand the statute to mean, and the court cannot say, upon the facts before it, that the special taxes against O'Neill here in question, and appearing on the monthly list of November, 1875, or any part of them, were assessed at a time more than 15 months subsequent to any previous list or assessment that may have been imperfect or incomplete from any cause mentioned in the statute. But it is immaterial, for the purposes of this case, whether I am correct in my interpretation of this provision of the statute or not; for the assessments in question were undoubtedly made under the provisions of section 3253, Rev. St., which declares that "the tax upon any distilled spirits removed from the place where they were distilled, and not deposited in bonded warehouse as required by law, shall, at any time when knowledge of such fact is obtained by the commissioner of internal revenue, be assessed by him upon the distiller of the same," etc.

The validity of the assessment is further questioned on the ground that an erroneous rate was adopted by the commissioner in imposing the tax of $20,608.28 on 29,440.40 gallons of distilled spirits from December 1, 1874, to and including March 3, 1875. The tax imposed was at the rate of 70 cents per gallon. On the third day of March, 1875, an act was approved and became the law, changing the rate of tax on distilled spirits to 90 cents per gallon. 18 St. at Large, 618, pt. 3, *c.* 127. The argument is that this act took effect at midnight of March 2d, and therefore that a tax imposed on spirits distilled March 3d at the rate of 70 cents per gallon was illegal, and that this illegality as to spirits made on that day vitiates the entire assessment. The point thus made is not without force. The question respecting the *punctum temporis* when a statute takes effect is often one of difficulty; but it would seem that the act of March 3, 1875, changing the rate of the tax from 70 cents to 90 cents per gallon, took effect and was in force from the first moment of that day. *Arnold* v. *U. S.* 9 Cranch, 104; *In re Welman*, 20 Vt. 653; *In re*

Howes, 21 Vt. 619. So that, as to spirits produced on the third day of March, the assessment should have been at the rate of 90 cents, instead of 70 cents, per gallon. Nevertheless, I am not prepared to hold that this vitiated the entire assessment which extended back to December 1, 1874. The defendant O'Neill was not prejudiced by the fact that for one day he was not assessed at as high a rate as the law in force on that day authorized. I do not, therefore, see how he can complain of the alleged irregularity. If liable at all, he was liable to pay 90 cents per gallon on account of spirits produced March 3d, and he was required by the assessment to pay only 70 cents for that day's production. At most, there was an omission on the part of the commissioner to comply with the full requirement of the law, so far as his act embraced the single day in question, but his action in that respect was not wholly *ultra vires*. I cannot, therefore, hold that the assessment was invalidated by the act of the commissioner complained of.

The validity of the assessment is further attacked on the ground that a tax of $10,740.80 was imposed on spirits distilled between May 1 and December 31, 1874, and that another tax of $20,608.28 was imposed on spirits produced between December 1, 1874, and March 3, 1875, thus, as it is claimed, making a double tax on the same spirits for the month of December, 1874. But this objection is untenable, because the court cannot say that the two assessments for the month of December covered the same spirits. Presumably they did not, and if it is a case of double assessment, it is for the defendant affirmatively to show it. The court can by no means presume, in the absence of proof, that the two assessments for the month of December covered the same spirits. It was said on the argument that it was impossible to separate from the property assessed the second time that which had been already assessed once, and which was therefore exempt from taxation. But this assumes, in the absence of proof, that the same spirits were assessed twice, and this assumption is not, in the opinion of the court maintainable.

Concerning that part of the assessment which embraces spirits alleged to have been produced between March 4, 1875, and June 30th of that year, and amounting to $27,786.02, the court does not see how it can be included here as part of the basis of liability upon the bond in suit. The bond expired May 1, 1875. Of course, it only covered transactions occurring between May 1, 1874, and May 1, 1875. The assessment just spoken of, as will be seen, covers a period extending beyond the life of the bond, namely, May and June, 1875. That assessment, covering the period from March 4 to June 30, 1875, is not under the proofs before the court, separable. That is, it is impossible, upon any facts shown here, to correctly and justly determine what, if any, proportion of the spirits produced during that period was so produced and removed during the life of the bond. Perhaps some proportion could be mathematically ascertained on the

basis of the whole amount alleged to have been produced and the number of months and days embraced in the period covered by the assessment. But that would be a calculation in its nature arbitrary, and might be wholly incorrect, and therefore very unjust. Liability on the bond in suit cannot, therefore, be based upon that assessment.

In the assessment list in evidence, which embraces the items of special tax before enumerated, the non-payment of which is alleged to constitute a breach of the bond in suit, is included another special tax on 1,752½ gallons of spirits, entered as produced in March and April, 1874, which tax amounts to $1,226.75. This tax or assessment is not set out in the complaint as any part of the plaintiff's demand against O'Neill, and so it is insisted that there is a substantial and fatal variance between the allegations of the pleadings and the proofs. It is argued that this is an action of debt on the assessment; that the defendant's answer is in effect a plea of *nul tiel* record; that the assessment, embracing all the items of special tax named therein, must be treated as an entirety, and as a single cause of action; that the items of this cause of action cannot be divided up, and separate suits maintained on each; and that since the assessment as an entirety, and as proven, does not conform in amount to the aggregate of the items of tax contained in the assessment described in the complaint, there is a variance fatal to the maintenance of the action. The answer to this is, that the suit is not, strictly speaking, upon the assessment. It is upon the bond. It is alleged that the conditions of the bond have been broken, in this, that the defendant O'Neill has not paid certain taxes assessed against him, and these taxes are shown in the assessment offered in evidence. In fact, the assessment only constitutes the evidence in part, of the alleged breach; and it is the breach of the condition of the bond that constitutes the cause of action. The failure to pay either of the items of tax contained in the assessment, if the tax was legally and justly imposed, would be a breach of the bond, and that would be the basis of liability. Suppose the defendant O'Neill had paid one or more of the items of tax embraced in the assessment, but had neglected to pay the other items, would not an action lie on the bond on account of such default? Clearly it would, and so it cannot be necessary in order to maintain the action to allege and to show that there has been a default upon the entire assessment, but default may arise upon either of the items of tax, and thereupon an action for such default, based upon the conditions of the bond, may be maintained.

It is in proof that on a special assessment list of the date of November 30, 1875, there had been previously assessed against the defendant O'Neill a tax on 5,117 gallons of spirits, claimed to have been distilled between July 1, 1874, and March 1, 1875; that presumptively this assessment covered all the spirits manufactured and removed by the defendant during that period, and that therefore the

assessment in evidence, which is made the foundation of liability on the bond in suit, was unauthorized. In maintaining this contention, everything depends upon the fact whether or not the different assessments cover the same spirits. It is not shown that they do. It cannot be presumed that they do. The exercise of authority in making the earlier assessment did not exhaust the power of the commissioner to make another assessment, embracing the whole or a part of the same period, if the two assessments did not cover the same spirits; nor does the first assessment raise such a presumption that it covered all the spirits manufactured and removed during the period named therein, as to invalidate the second and later assessment. It is, after all, a question of fact whether the two assessments cover the same spirits, and, as just remarked, it is not proven that they do.

On further review of the merits of the case, the court held that the proofs on the part of the defendant O'Neill, attacking the assessment, were not sufficient to overcome the force and effect of the assessment and the proofs adduced in its support on the part of the government, and ordered judgment against the defendant O'Neill, and the surety, John B. Reynolds, for the sum of $25,000, the amount of the penalty of the bond.

STEVENSON *v.* WOODHULL BROS.

(*Circuit Court, W. D. Texas.* 1884.)

PROMISSORY NOTE—TRANSFER TO ONE PARTNER—PAYMENT TO ANOTHER.

When a note payable to a partnership firm is indorsed by the firm in blank and transferred to one of the partners before maturity, the maker, if he has notice of the transfer, is not discharged of his liability to the transferee by payment of the amount of the note to another member of the firm.

TURNER, J. This suit is upon a promissory note made and executed by the defendants June 24, 1878, payable to Priest & Severance, or order, for the sum of $1,000, and due the fifteenth of November, 1878. This note was indorsed upon the back in blank by Priest & Severance. The legal effect of this blank indorsement is and was to make the note payable to the legal holder of the same; it transferred the interest of the firm of Priest & Severance to the legal holder. The note is not shown to have had any vice in it at the date of its execution; on the contrary, the evidence shows the same to have been given for a valuable consideration. Therefore, no defense could be set up against this note, either as against the original payees or any subsequent holder, except the one made here, viz., payment in whole or in part. It is not pretended that the indorsement was not made by one of the firm of Priest & Severance, nor is there any

evidence showing when the blank indorsement was made, as matter of fact. In the absence of any proof, the law presumes the indorsement to have been made before maturity. If partners see fit to transfer their partnership property to an individual member of the firm, they have an undoubted right so to do, and certainly, as between themselves, they are bound by that act. The legal effect of this indorsement was to change the ownership of the same from Priest & Severance to the legal holder of the note, wherever that might be, and if it be true that Priest was the holder, and that the same was placed in his possession, the legal presumption would be that the firm had transferred their interest in the note to the individual member, who thus became the bearer or holder of the note. The law will not presume that an act that may lawfully be done was unlawful in the absence of proof. There is no evidence here that repels the legal presumption arising from the facts established that this note was transferred by the firm to Mr. Priest, when it is shown that Priest was the holder of the instrument. Severance is not produced as a witness, nor is there any evidence which shows that this legal presumption is not in accordance with the real facts of the case; in fact, the evidence shows that all the money that was paid, was paid to Priest, and no objection was made at the time, so far as the evidence shows. As I have stated, the partners may, if in the course of their business, transfer partnership property to an individual member of the firm, and none but the creditors of the firm have a right to complain of such act. The effect of such transfer is to divest all the other members of the firm of any property in the thing so conveyed, so far as the partners are concerned, and the title thereto actually passes to the individual member.

The question next arises, how does such a transfer of a promissory note, as in this case, affect the debtor? If the fact of such transfer were unknown to the debtor, and he paid to one of the members of the firm, who had transferred his interest to his copartner, such payment would unquestionably be a good payment. But suppose the debtor knew at the time he paid to the member who had sold that he had parted with all his interest in the note, and consequently knew that he had no more right to the money than a stranger, can it be insisted for a moment that such a transaction would deprive the true owner of his right to recover against the maker, such a rule would open the door to the grossest fraud. The legel presumption then must be (and there is no proof to rebut it) that the firm had sold this note to Priest. As Priest is shown to have had possession, use, and control of the same, it follows, admitting all that is claimed by the defendant to be true, from all that appears, if the payment was made to Severance, and at the time of the payment Woodhull Bros. had notice that the note was transferred either to Priest or any body else, the Woodhulls paid with their eyes open, because they had notice that the note had been transferred. The Woodhulls, as the

evidence shows, were cautious enough to take a bond of indemnity, protecting them against any recovery upon the note. The note was here in the bank, and Severance could not get control of the same. The bond taken by the defendants is not produced in evidence, and the presumption arises that if produced it would militate against them; but the fact that they took the bond shows that they were put upon their guard. Further than this, the defendant pleads that the payment was made by the delivery of sheep, and produces a receipt from O. Severance, dated October 30, 1878, which recites that defendants had paid that day to O. Severence the note in suit, and further shows that defendants received from Severance a bond of indemnity, to protect them in case the payment should turn out invalid at this time. October 30th there was a suit pending in the state court, and the defendants were garnishees; the writ of garnishment was served upon them the twenty-fourth of October, 1878, six days before they answered the same. On the first day of November, 1878, the next day after the date of the receipt, these defendants, or one of them, made answer that they had not paid this note, or any part thereof, and, further, that Priest had notified him by letter of the transfer of the note. It is a little strange, if they had paid this note after the garnishment was served, and but the day before the answer in garnishment was made, that he should have forgotten so important a transaction; such a presumption cannot be indulged in. He is not here to make any explanation, and I conlucde that he preferred to let the case rest as it is, rather than state here that he had in fact made the payment to Severance, allowing that Severance had a right to collect the note. If he thought Severance had a right to collect the note, he knew also that he had the right to control the note, and defendants had the right to have the same surrendered up to them. The note was not lost; on the contrary, it was in the bank here, and defendants knew it, and Severance could not control it. Defendants therefore acted at their peril, and it is a matter of no consequence whether J. E. Severance or O. Severance was the real partner with Priest. They had, however, notice in the most impressive form that J. E. Severance was the real partner, as they had been made parties to a suit wherein J. E. Severance sued Priest, claiming that he, J. E. Severance, was the partner of Priest, to whom the note was given. And the very note in question was a part of the matter in litigation, and if they then had any doubt about who it was that comprised the firm of Priest & Severance, to whom they had executed this very note, it does not appear here, and yet it seems that upon floating rumor and general understanding that O. Severance was the real partner, they took the hazard, as they say, of paying this very note to O. Severance.

The judgment is for the plaintiff, for the note and interest, cost of protest, and cost of suit, and defendants must look to their bond of indemnity for redress, if any they have.

BALFOUR and others *v.* SULLIVAN, Collector, etc.

(*Circuit Court, D. California.* March 10, 1884.)

CUSTOMS DUTIES—GRAIN BAGS—RE-ENTRY FREE OF DUTY—POWERS OF SECRETARY.

The customs and revenue laws provide that "grain bags, the manufacture of the United States, when exported filled with American products, may be returned to the United States free of duty, under such rules and regulations as shall be prescribed by the secretary of the treasury." Grain bags manufactured in this country from imported materials were exported full of California wheat. The exporter demanded and received according to law, out of the public treasury, the drawback due him on account of the duty formerly collected upon the materials of which the bags were made. Upon the return of the grain bags, *held*, that they were entitled to pass free of duty. The power of the secretary to prescribe rules and regulations does not authorize him to impose a duty, not provided for by congress, in repayment of the drawback.

At Law.

Page & Eells and *Milton Andros*, for plaintiffs.

S. G. Hilborn, U. S. Atty., and *Ward McAllister*, Asst. U. S. Atty., for defendant.

SAWYER, J. This is a suit to recover of defendant the sum of $180, collected as duties on 11,850 grain bags, which collection of duties is claimed to be unlawful. The grain bags had been manufactured by Detrick & Co., manufacturers of bags, at San Francisco, out of material of foreign production, upon which the importers had paid the proper duties. The bags were stamped, "Detrick—Drawback Right Reserved," and sold to grain producers of the state of California. These bags having been purchased by the grain growers, and filled with wheat produced in California, were, with their contents, afterwards sold to plaintiffs, in the ordinary course of business in the grain market, who shipped the wheat in the bags, as so purchased of the producers, to Liverpool, England, where the wheat was sold, and emptied from the bags, and the bags were afterwards brought back to San Francisco, whence they had been shipped by plaintiffs, the ownership of the bags remaining in the plaintiffs from the time of their purchase, filled with California wheat, till their return to San Francisco empty. Upon their leaving San Francisco, filled with wheat, Detrick & Co. claimed the drawback of duties paid on the material used in the manufacture of the bags, and the drawback was paid to them in assumed pursuance of the provisions of section 3019 of the Revised Statutes of the United States, and the regulations of the secretary of the treasury for carrying those provisions into effect. On the return of the bags the plaintiffs claimed, upon various grounds, that they were entitled to bring the bags to San Francisco and receive them free of duty. The collector took the ground that the drawback having been paid on exportation, in pursuance of section 3019, and the regulations of the secretary of the treasury, duties must be paid; and plaintiffs were compelled to pay the duties claimed in order

to obtain the bags. The action of the collector, in collecting the duties, was affirmed by the secretary of the treasury, and this action is brought to recover the duties so collected.

Section 9 of the act of congress of February 8, 1875, "To amend existing customs and internal revenue laws, and for other purposes," (Supp. Rev. St. 130,) provides that "*grain bags*, the manufacture of the United States, when *exported, filled with American products, may be returned* to the United States *free of duty*, under such rules and regulations as shall be prescribed by the secretary of the treasury." There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were "the manufacture of the United States," and they were exported *filled with American products*, and being such were entitled under this act to "be returned to the United States *free of duty*." It does not appear to me that this explicit language is open to construction. The only exception is that they shall be returned "under such rules and regulations as shall be prescribed by the secretary of the treasury." The authority of the secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the "grain bags;" and that power does not extend to an imposition of a duty in the face of the provision of the statute that they "may be returned * * * free of duty." The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a "drawback" for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were "exported filled with American products," "to be returned * * * free of duty," which congress either did not see fit or omitted to adopt. The secretary of the treasury was not authorized to make any such exception. *Morrill* v. *Jones*, 106 U. S. 466; S. C. 1 Sup. Ct. Rep. 423; *Merritt* v. *Welsh*, 104 U. S. 702; *Balfour* v. *Sullivan*, 8 Sawy. 648; S. C. 17 FED. REP. 231.

Under the provision of the act cited the bags in question were entitled to re-enter the United States "free of duty," and the duties on that ground were illegally demanded and collected. None of the other provisions of the statute cited affect this ground relied on for a recovery, and they therefore need not be discussed.

There must be a judgment for plaintiffs for the amount of duties unlawfully collected, and it is so ordered.

KENNEDY *v.* CITY OF SACRAMENTO.

(*Circuit Court, D. California.* February 18, 1884.)

1. MUNICIPAL BONDS—SACRAMENTO CITY—NO ACTION MAINTAINABLE.
The legislature of California in 1858 enacted that thereafter no action should be brought against the city of Sacramento by its creditors; that the city should issue its bonds for the purpose of funding its debt, and should levy an annual tax of 1 per cent., of which a specified portion should be set aside for the payment of the bonds. Those who held claims against the city surrendered their evidences of indebtedness, and took the bonds instead. *Held*, that no action would lie upon the bonds, but that the remedy of the bondholders was by *mandamus* against the proper officers to compel them to carry out the terms of the statute. The creditors, by accepting the bonds, contracted that the city should not be liable to be sued.
2. STATUTE PERMITTING PERFORMANCE OF A DUTY CONSTRUED AS MANDATORY.
In 1863 the legislature revised the act of 1858, re-enacted its provisions with regard to the payment of the bonds, except that the terms of the re-enacted clause, sanctioning a tax of 1 per cent., was permissive instead of mandatory. But, *held*, that the provision was still compulsory, since words in a statute permitting officers to discharge a public duty are to be construed as mandatory. If the act were susceptible of any other construction it would impair the obligation of contracts.
3. WAIVER OF CONSTITUTIONAL RIGHT.
The constitution of the state provided that all corporations should be subject to be sued like natural persons. *Held*, that (even supposing the clause to apply to municipal corporations) the bondholders had by their contract divested themselves of their constitutional right.

At Law.

J. W. Winans, for plaintiff.

J. H. McKune, *A. P. Catlin*, and *W. A. Anderson*, for defendant.

SAWYER, J., (*orally.*) This is an action brought to recover $9,000 due on coupons of the Sacramento city bonds. It is an ordinary action upon the instruments, not a *mandamus* against the officers of the city, but an action against the city of Sacramento to recover on these coupons as upon a contract. Under the charter of Sacramento, of 1851, a large amount of indebtedness had accrued, for which bonds were issued. In 1858 the city and county of Sacramento were consolidated into a municipal corporation, like the city and county of San Francisco; the boundaries of the city and county being co-extensive with the former boundaries of the county. In that act consolidating the city and county, provision was made for funding the then existing debt of the city and of the county of Sacramento, and provision was made in the act for the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento hereinafter specified. "The treasurer shall cause to be prepared suitable bonds for the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento not exceeding one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum, from the first day of January, 1859." St. 1858, p. 280, § 37. Then it provides for raising a fund for the payment of the interest, and ultimate extinguishment, of that

prior indebtedness of the city of Sacramento so funded. In the last clause of the section it provides that "*none of the claims herein specified shall be liquidated or paid except in the manner herein provided.*"

The act also provides that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects, be subject to any attachment, levy, or sale, *or any process whatever, either mesne or final,*" (Id. p. 268, § 1,) thereby cutting off all right of suit, and providing that none of the funds, or revenues from taxation, or otherwise, shall be reached, on account of this indebtedness, otherwise than as provided in the act.

Section 34 provides that the board of supervisors shall not have power to levy any greater taxes than as follows, viz.: "On the real and personal estate, except such as is exempt by law throughout the city and county, a tax of one hundred cents on the one hundred dollars," shall be levied, and the amount is limited to that sum annually, except for state and special purposes. But it provides further, that "they shall levy for municipal purposes, on all real and personal property within the city, except such as is exempt by law, a tax of one hundred cents on one hundred dollars."

Section 35 provides that "the revenue derived from and within the city limits for municipal purposes,—namely, taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise,—when paid into the treasury, shall be set apart and appropriated as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act,*" referring to the bonds which were to be issued in liquidation of the prior indebtedness of the city in pursuance of the terms of the act.

Section 38 provides: "*The annual interest and principal of all bonds issued for claims against the city shall be paid from the interest and sinking fund provided in section 35, and in the manner otherwise provided in this act.*"

There is, then, a provision for funding the prior indebtedness of the city to the amount of $1,600,000, and provision that 55 per cent. of the taxes and other revenues of the city shall be set apart to pay the interest, and to secure the ultimate extinguishment, of the bonds; and it is provided that "*none of the claims herein specified shall be liquidated or paid, except in the manner herein provided;*" and it is further provided that there shall be no suit against the city on these or any other claims, and that no execution or other process shall issue by which any of the property or revenues or moneys or other resources of the city shall be reached.

The rate of interest was 6 per cent. per annum, to be paid upon the indebtedness. The parties who surrendered their prior evidences of indebtedness and took these bonds, took them under the provis-

ions of this act, which was a contract made between the city and them; that the bonds should be collected only in that particular manner, and paid in that particular mode, and no other; that there should be no other remedy for them; that the city should not be sued. The advantages which they obtained are subject to the provisions made for their payment—to the limitations put upon their remedy. The advantage to the city was that it should not be harassed by any other kind of suit; an extension of the time for payment; and the reduction of the rate of interest. The advantage to the holders was the specific, certain, and permanent provision made for prompt payment in future. This was a fair contract, entered into between the city on the one hand and its creditors on the other, in virtue of the provisions of this act. There were advantages gained and rights surrendered by each, and a valuable consideration moving from and to both contracting parties. In 1863 that charter was repealed and another one passed. The city and county were restored by the charter of 1863. In that charter it is provided that the city of Sacramento may be sued upon bonds or covenants, etc., "provided, however, that such bond, covenant, agreement, contract, matter, or thing, that was the cause of action, has been made or entered into after the passage of this act," (St. 1863, p. 415, § 1;) so that, by implication, in providing the kinds of bonds upon which suit might be brought, it was limited to the covenants or bonds or liabilities accruing after the passage of the act. Thus, as to these bonds in question, there is no change in the law with reference to the liability of the city to be sued. And in that act it is also "provided further that none of the lands, tenements, hereditaments, taxes, revenues, franchises, action, choses in action, property, or effects of any kind or nature whatsoever, of said city or of either or any of its trusts or uses, shall be attached, levied upon, or sold, on any process whatever, either original, mesne, or final," thereby continuing, as to *all* demands against the city, that provision of the charter of 1858 having reference to the inability to execute a judgment when obtained, by virtue of any process, mesne or final, against the city itself. With reference to the city of Sacramento, therefore, and with reference to these bonds, in both of these particulars, the law as laid down in the act of 1858 is continued.

The third clause of section 2 of the the act of 1863 also provides that the board of trustees shall have power "to levy and collect taxes and assessments on all property within the city, both real and personal, made taxable by law for state or county purposes, which taxes shall not exceed 1 per cent. per annum upon the assessed value of all property." St. 1863, p. 416. That is the same amount that they could levy under the old charter. Section 26 continues the provision for the payment of the bonds in question with one exception in language. In this act the words "*net water rents*" are used instead of "water rents." This is the only change. The provision is as follows, viz.:

"The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, *net* water rents, and fines collected in the police courts or otherwise, except as hereinafter provided, when paid into the treasury, shall be appropriated and divided as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest upon the bonds legally issued for city indebtedness, issued under the act of* 1858; *the excess of said fund, after the payment of said interest, shall be applied to the redemption of said bonds, in such manner as the board of trustees may determine.*" Id. p. 426, § 26.

Thus in the act of 1863 the same provision for the payment of these bonds is continued that was made in the act of 1858, and the the same limitations upon the remedy are continued by providing that no suit shall be maintained against the city, and that none of its property, or revenues, or funds, shall be reached under any process, mesne or final.

With reference to the amount levied, one word is changed only, the positive provision in the old act that 100 cents on the $100 shall be raised each year for the purposes of revenue is made permissive in form instead of mandatory in the new act. This is the only change in the act in that particular, the same provision otherwise continuing as provided in the other act. But words permissive in form, when a public duty is involved, are construed as mandatory. Under the provisions of these acts, in my judgment, the city is not liable to be sued on these bonds or coupons. It is one of the terms of the contract between the city and the bondholders, and a part of the consideration upon which the bonds were issued, that the city shall not be sued on them. The remedy alone is to compel the treasurer, by *mandamus*, to pay any money in the sinking fund upon the coupons. If the board of trustees refuse to provide that fund, the remedy is to compel them to provide a fund by a *mandamus*, in accordance with the duty imposed upon them by law. These are proceedings personally against the officers to compel them to perform a duty enjoined by law, in respect to which they have no discretion. Both of these remedies are remedies against officers to compel the performance of duties required by these express provisions of the act for the payment of these bonds, and not a suit against the city. Those remedies, the supreme court of California has held, are available.

In the case of *Meyer* v. *Brown*, decided on September 28, 1883, the supreme court held that the board of trustees is subject to be compelled to perform its duty to provide this fund by *mandamus*. On page 157 of the Pacific Coast Law Journal, the court says:

"Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents

on the one hundred dollars, fifty-five per cent. of which to be set apart and appropriated to an interest and sinking fund to be applied to the payment of the annual interest upon the bonds and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds, for whose payment with interest provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding, and as much beyond subsequent legislation, as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States in a case entitled *Louisiana* v. *Pilsbury*. 105 U. S. 278."

I have examined that case, and it fully sustains this proposition. It is a similar case. The contract was enforced by *mandamus* upon the officers. "It is well occasionally," added the court, "to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other." In that case, then, it was held that the board of trustees was bound to go on and levy this tax in pursuance of the old law, if that was more advantageous to the parties than the new one. It is incompetent for them to repeal the old statute, so far as it affected the right of these bondholders; and in a recent case, decided February 13, 1884, (the case of *Meyer* v. *Porter*, 2 Pac. Rep. 884,) the supreme court of California again takes a similar view. The question was whether the treasurer may be compelled to pay the interest out of the fund provided; and the supreme court holds in this case that the treasurer may be compelled to pay out of the moneys which are in that sinking fund the interest due upon coupons that are presented, irrespective of the fact that only one party presents his coupons. Under this decision, so long as there is any money in the fund, the holder of coupons due is entitled to his money on their presentation, and it is not necessary to file a bill in equity to enforce a trust, making all the holders of the bonds and coupons parties, for the purpose of distributing the fund *pro rata*, but that any man having overdue coupons may by *mandamus* compel the treasurer to pay out the funds upon such coupons, so long as there are funds. Under those decisions of the supreme court of the state, supported by the authority of the supreme court of the United States, the holders of bonds and coupons have the exact remedy which the provision of the charter of 1858 provides for the payment of those bonds, and which the act of 1863 continues; and if the latter act does not in all respects continue the remedy in the particulars wherein the former act was repealed, the repeal is void, and the old act in force.

The plaintiff insists that the provisions of the charter of Sacramento of 1858, that the city shall not be sued, and continued with respect to the bonds and coupons in question in the act of 1863, is void under the provision of the state constitution that "all corpora-

tions shall have the right to sue, and shall be subject to be sued, in all courts in cases like natural persons." Old Const. art. 4, § 33. It may well be doubted whether this provision applies to municipal corporations and counties made corporations. But if it be otherwise, the contract in this case takes the bonds in question out of the provision. It was one of the conditions upon which the bonds were issued by the city and accepted by the bondholders that there should be no suit on the bonds, and no other remedy than that provided by the charter. This was a part of the benefit to inure to the city by the arrangement, and an important and valuable part of the consideration for its action in issuing the bonds and making the extraordinary and permanent provision and appropriation for payment beneficial to the bondholders. This part of the contract is as important and as binding as any other. The provisions are that the city shall not be sued, and that none of its property, revenue, or funds shall be taken upon any mesne or final process, and that none of the claims herein specified shall be liquidated or paid except in the manner herein provided. Also, that "the annual interest and principal of all bonds issued for claims against the said city shall be paid from the interest and sinking fund provided by section 35, and in the manner otherwise provided in this act." The action brought against the city, therefore, in the face of these provisions of the contract, cannot, in my judgment, be maintained, for the reasons and upon the grounds stated. The only remedy is to proceed by *mandamus* against the officers personally, to compel them to perform their respective duties, as prescribed by the act of 1858, and under the act of 1863, also, so far as that act is in accord with the act of 1858. The supreme court, as we have seen, has held that it was incompetent for the legislature to repeal the provisions of the charter of 1858, so far as they affect the means provided for liquidation of these bonds. Consequently, that the board of trustees could be compelled by *mandamus* to provide the funds in accordance with the requirements of the charter of 1858; and, when so provided, that the treasurer, having the custody of the funds, could be compelled in like manner to pay the coupons as presented out of the funds provided.

There must be judgment for defendant on the grounds indicated, viz., that a suit against the city is not the proper remedy, and cannot be maintained in the face of the contract entered into under the statute; and it is so ordered.

Ex parte WORLEY.

(*District Court, W. D. North Carolina.* 1884.)

POWERS AND DUTIES OF A MARSHAL AS TO PRECEPTS IN HIS HANDS AT THE EXPIRATION OF HIS TERM OF OFFICE.

In North Carolina a marshal, whose term of office has expired, may be required so to amend his return upon an execution as to furnish his successor with a description of the land levied upon, sufficiently accurate to enable him to execute a valid deed to the purchaser at the execution sale.

A Petition for Orders to perfect title to lands sold on execution sale.

P. A. Cummings, for petitioner.

DICK, J. The petitioner, Henry Worley, alleges that he is a purchaser at a sale made by a deputy of R. M. Douglas, late marshal of this district, under a writ of execution founded upon a regular judgment of this court, and levied upon the lands of the judgment debtor, Solomon Davis; that the purchase money has been paid by him to said deputy, and has been returned into court in part satisfaction of said judgment; that the term of office of the late marshal has expired, and a deed has not been executed, and the levy indorsed upon the execution is defective in not describing the land sold with sufficient certainty. The relief prayed for is an order to the late marshal, directing him to amend his levy so as to set forth a description of the land sold with more certainty as to location and boundaries. The petitioner also prays for an order to the present marshal, Thomas B. Keogh, directing him to perfect title and execute a deed to said lands, in conformity with section 994 of the Revised Statutes.

Upon hearing the petition, the suggestions of counsel, and the evidence presented, it is considered that the petitioner is entitled to the relief he seeks. A court has the power to direct writs of execution to be amended at any time, so as to set forth necessary facts for the purpose of supporting proceedings under them. This power is indispensable to the administration of justice and the due regulation of the officers of the court. Under section 788 of the Revised Statutes, marshals and their deputies possess in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such state have in executing state laws. Section 790, among other things, provides that marshals and their deputies, when the term of office expires, shall have power to execute all such precepts as may, at the time, be in their hands. We will, therefore, consider the laws of this state in determining some of the questions presented in this proceeding.

It is well settled in this state that a sheriff may be directed or permitted by the proper court to make a return on a writ of execution, or to amend the same, at any time, so as to make it conform to the truth, even in cases where important consequences as to the rights of

parties are produced by such amendments. *Cody* v. *Quinn*, 6 Ired. Law, 191, and cases cited. This power cannot be exercised by a court so as to affect the rights of third persons, who are not parties to the record, and innocent purchasers for value without notice. *Williams* v. *Sharpe*, 70 N. C. 582; *Phillips* v. *Holland*, 78 N. C. 31. It does not appear that the right of third persons are in any way involved in this matter; and as this is an *ex parte* proceeding, such rights —if any exist—cannot be affected, as such persons will not be prevented from asserting such rights by an order made in a case in which they are not parties and have no notice. If the marshal who made the sale was still in office, the amendment asked for would not be necessary, as he could make a deed with full description as to boundaries, even if there had been no levy of the execution. In this state there is no necessity for a sheriff to make a levy on real property. A judgment creates a lien on all such property belonging to the judgment debtor in every county in which the judgment may be docketed. The writ of execution operates as an authority and order of sale. The only effect of a previous levy is the specific appropriation of the property on which it is made; and this may be a matter of importance where there are other lands and other judgment creditors of a common debtor. *Surratt* v. *Crawford*, 87 N. C. 376. It is well settled by many decisions that the rights as to real property are largely regulated by local state laws, and it is the duty of federal courts—having acquired jurisdiction—to administer those laws under the same modes of procedure as if they were local courts in the state in which they are held. Spear, Fed. Jud. 641, 662. In accordance with the laws of this state a docketed judgment in a federal court of this district is a lien upon all real property within its jurisdictional limits, and may be enforced by such modes of procedure as are provided by the laws of this state. As section 994 of Revised Statutes provides that a deed to a purchaser at execution sale, in cases like the one before us, shall be executed by the present marshal, it is necessary that he should derive information from his predecessor as to the location and boundaries of the lands sold; or from evidence passed upon by the court. If he obtained information upon this subject from other persons, their statements, set forth in a deed executed by him, would in no way be operative against either parties or strangers. The return upon process made by a duly qualified officer of the law is *prima facie* evidence of what it states, and cannot be collaterally impeached, although it may be corrected so as to speak the truth with more completeness and certainty, under the direction of the court to which the return is made. *Edwards* v. *Tipton*, 77 N. C. 222. From the return of the late marshal it appears that the lands of the judgment debtor were duly sold to the petitioner, and the purchase money has been received and paid into office, and the levy indorsed on the execution does not specify the location and boundaries.

The only question which remains to be considered is whether the late marshal—since the expiration of his term of office—can be legally directed or permitted by this court to make an amendment to his return on the writ of execution under which he acted in making sale of said lands. We have heretofore referred to section 790, which, among other things, provides that a marshal or his deputy, after the expiration of his term of office, shall have power to execute all such precepts as may be in his hands at the time of such expiration of office. As to such precepts, until they are executed, he is still marshal, and subject to all official duties and responsibilities imposed upon him by law. The statute, in conferring the power, imposed the duty of exercising that power as far as required by law; and within such limits, the marshal, by necessary implication, is entitled to have and enjoy the rights and privileges incident to such official position; and is also invested with the authority to use all legal means which may be appropriate and necessary to enable him to execute the power conferred, and perform the duties imposed by law; and he must, in such matters, obey the proper orders and directions of the court to which such precepts are returnable. Bump, Fed. Proc. 482. In making sale of land under a writ of execution, the marshal acts under a power conferred by law, and when this power is properly exercised by a sale, the title of the judgment debtor passes to the purchaser, but it is not perfected until a deed is executed which has relation to the date of sale. *McArtan* v. *McLaughlin*, 88 N. C. 391. As the deed in this case cannot be made properly until the late marshal, by an amended return, furnishes a more complete description of the land sold by him, the process may be regarded as still in his hands unexecuted, and he may be directed by this court to amend his return so as to furnish information to the present marshal by which he may finish the execution of a power and perfect title by making a proper deed. The petitioner is clearly entitled to the *prima facie* evidence of the location of said lands, which will be afforded by the return of the officer who made the sale.

It is therefore ordered that the clerk of this court send said writ of execution to the late marshal, R. M. Douglas, with instructions to direct his deputy to amend the return so as to set forth a more specific description of the boundaries of the lands sold by him. If the said marshal fail to give such directions, he is hereby ordered to show cause at the next term of this court why the amendment should not be made. If the amendment should be made as directed, then the present marshal, Thomas B. Keogh, is ordered to perfect the title of the petitioner by executing a deed for such lands, as required by section 994, Rev. St.

In re Lowe, Bankrupt.

(*District Court, D. Indiana.* 1884.)

1. Bankruptcy — Fraudulent Conveyance by Bankrupt — When Judgment Becomes Lien.
   A judgment recovered, defendant having meantime made a fraudulent conveyance of his property, is deemed to have attached at the date of its rendition as if the fraudulent conveyance had never been made.
2. Same — Who to Bring Suit to Annul.
   An action to annul a fraudulent conveyance by a bankrupt can be brought only in the name of the assignee. Failure, therefore, on the part of a creditor to anticipate the assignee in bringing such action cannot be deemed a lack of diligence.
3. Same — Priority of Judgments as Liens — Partnership and Individual Claims.
   Under the statutes of Indiana a judgment against a fraudulent grantor is made a lien, and accordingly he who obtains the first judgment is first in diligence, and, except as against innocent purchasers of the fraudulent grantee, first in right. But this rule is subject to the priorities, respectively, of partnership and individual creditors in and to partnership and individual property.
4. Same — Assignee Represents all Creditors Alike.
   Assignee represents all creditors alike, and his recovery of property wrongfully conveyed must redound to the benefit of all interested, according to their several interests.

On Exceptions to Master's Report.

Taylor, Rand & Taylor, for themselves.

McMaster & Boice, for assignee.

Woods, J. The facts shown by the report of the master are to the effect that on the second day of January, 1877, Taylor, Rand & Taylor recovered, in the superior court of Marion county, a judgment against Nahum H. Lowe. Lowe owned real estate in Marion county which, before the rendition of that judgment, he had conveyed to another with intent to cheat his creditors, the grantee not being a good-faith purchaser. After the rendition of this judgment Lowe was adjudged a bankrupt. The assignee afterwards obtained a decree against the grantee in said conveyance, declaring the same void; and Taylor, Rand & Taylor having presented a claim that their judgment constituted a lien upon the property from the date of rendition, the court ordered that the assignee sell the property and report the proceeds, and that all liens be transferred to the fund. Upon these facts the master reports that Taylor, Rand & Taylor have a lien as claimed which should be first satisfied. The assignee insists that this is not so; that the judgment did not constitute a lien so long as the title remained in the fraudulent grantee; and that the decree setting aside that sale, rendered at the suit of the assignee, inured to the benefit of the estate—that is to say, to the benefit of all creditors alike. This conclusion is based mainly upon the proposition that the assignee, having been first to institute suit to set the fraudulent conveyance aside, became entitled, by virtue of his superior diligence, to prefer-

ence over a judgment creditor who had failed to bring any such suit.

It seems clear, under the Indiana Statutes, (Rev. St. 1881, §§ 608, 752,) that the judgment of Taylor, Rand & Taylor became at once, upon rendition, a lien upon the real estate in question. Section 608 declares that such judgments "shall be a lien upon real estate and chattels real, liable to execution;" and by section 752 it is enacted that "lands fraudulently conveyed with intent to delay or defraud creditors" shall be liable to all judgments and attachments, and to be sold on execution against the debtor. It has been determined, too, that the sale upon execution may precede any suit or proceedings to set aside or annul the fraudulent conveyance. *Frakes* v. *Brown*, 2 Blackf. 295. It is not deemed necessary now to determine whether or not there may be a race of diligence between the owners of different judgments in such a case, or whether or not, when the conveyance has been set aside at the suit of any of them, the lien of each judgment must be deemed to have attached at the date of its rendition, as if the fraudulent conveyance had never been made. The latter would seem to be the logical conclusion. The complaint to set the conveyance aside must aver the facts which show that the property is subject to the lien of judgments already rendered against the fraudulent grantor, and the complainant cannot well disclaim or escape the result; certainly not on the pretense that he had, in ignorance of the facts or of the legal consequence, put forth effort or incurred costs which should not be turned to the benefit of another. Indeed, the very doctrine of superior diligence would seem to lead to the same conclusion, when properly applied.

Under the statute a judgment against the fraudulent grantor is made a lien, and consequently he who obtains the first judgment is first in diligence, and thereafter, except as against innocent purchasers of the fraudulent grantee, should be deemed to be first in right, unless by actual neglect or abandonment of his claim, or by other affirmative act, he lose his preference. If this is not so, a judgment creditor, who delayed for a day in procuring the issue and levy of an execution, or in commencing proceedings to annul the fraudulent transfer, might find himself postponed to another, who had no judgment, but, in the mean time, had brought a single suit (as may be done in this state) to obtain a judgment and to avoid the fraudulent deed. On this subject see *Hardy* v. *Mitchell*, 67 Ind. 485; *Hanna* v. *Aebker*, 84 Ind. 411. But, however this may be, I think it quite clear that the doctrine proposed cannot apply when the fraudulent conveyance has been annulled at the instance of the assignee in bankruptcy of the fraudulent grantor. By express provision of the bankrupt law, all property of the bankrupt, conveyed in fraud of his creditors, is, by virtue of the adjudication, and by the appointment of an assignee, vested in the assignee, to whom also the power and authority are given "to manage, dispose of, sue for, and recover all his property or estate, real or personal, debts or effects, and to defend all suits at law

or in equity pending against the bankrupt." 14 St. 525. Accordingly it has been held, and is well settled, that after the appointment of an assignee in bankruptcy, an action by a creditor to set aside a fraudulent conveyance of the bankrupt or to reach, in any way, property fraudulently transferred, cannot be maintained, and that the remedy must be had in a suit or action by or in the name of the assignee. *Glenny* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 U. S. 647; *Moyer* v. *Dewey*, 103 U. S. 301. The bankrupt law, moreover, provides for the protection of existing liens upon all property vested in the assignee. It follows clearly that the assignee is the representative of all creditors alike, and if he obtains a decree for the recovery of property fraudulently conveyed, it is for the benefit of all interested, according to their respective interests. There is certainly no room for the proposition that the judgment creditor, by failing to sue in his own name, (when forbidden so to do by the law which gave the assignee the right to sue,) lost any right which he had, and by superior diligence might have saved.

Another objection to the report is that the judgment of Taylor, Rand & Taylor is not in fact the oldest, and therefore not entitled to preference. It is in fact not the oldest unsatisfied judgment; but the older judgments against *Lowe* were all rendered against him as one of a firm, and in favor of partnership creditors; while the judgment of Taylor, Rand & Taylor is for the individual debt of *Lowe*, and therefore properly first payable out of this fund which was derived wholly from *Lowe's* individual property. *Hardy* v. *Mitchell*, *supra*; *Weyer* v. *Thornburgh*, 15 Ind. 125; *Dean* v. *Phillips*, 17 Ind. 406; *Bond* v. *Nave*, 62 Ind. 505; *Nat. Bank* v. *Locke*, 89 Ind 428.

Judgment liens, except in Indiana, as against innocent purchasers, are subject to prior equities in the property. Freem. Judgm. §§ 356, 357; *Glidewell* v. *Spaugh*, 26 Ind. 319; *Jones* v. *Rhoads*, 74 Ind. 510; *Huffman* v. *Copeland*, 86 Ind. 224, and cases cited.

It follows that the remainder due upon the judgment of Taylor, Rand & Taylor should be first paid. So ordered.

UNITED STATES *v.* RUSSELL.

(District Court, W. D. Texas. 1884.)

1. EVIDENCE—SIMILAR BUT UNCONNECTED TRANSACTIONS—GUILTY KNOWLEDGE.
   In an indictment for the falsification of an account, other false accounts made by the defendant at about the same time may be introduced in evidence for the purpose of proving guilty knowledge.
2. FALSE ACCOUNT.
   An account including items for services not actually rendered or moneys not actually paid is a false account.

3. SAME—BY MEANS OF AN AGENT.

An officer who conspires with others to obtain money by false accounts is guilty of falsification though he may be ignorant of the items of any particular account.

TURNER, J., (*charging jury.*) The law of the land is that every man is presumed to be innocent until his guilt is established by the evidence in the case beyond a reasonable doubt. By a reasonable doubt is not meant a hypothetical, speculative doubt, but a doubt arising from a want of sufficient evidence to satisfy the judgment and reason of the jury that the defendant is really guilty as charged. In order to convict the defendant you should be satisfied from the evidence (1) that the account set out in the indictment is a false account; (2) that defendant made, or caused the same to be made, if not actually made by defendant, but by some other person acting for him and under his direction and authority, then he caused it to be made; (3) you must find that the same was made with the view and purpose of presenting the same to the first auditor of accounts of the treasury of the United States for approval; and (4) you must find that the defendant *knew* the account to be false.

You must resolve each of these propositions in the affirmative before you should return a verdict of guilty. The three first propositions you must determine from the evidence which relates to the particular account mentioned in the indictment. When you come to the consideration of the fourth proposition, *then*, and not till *then*, you may consider the other accounts that have been introduced in evidence. You may ask why were these accounts put in evidence at all? The answer is, the law has made guilty knowledge an indispensable ingredient in the offense, and you are required to pass upon this element. The difficulty of proving by direct evidence what another man knows you will readily discover. The law requires the best evidence that the nature of the case admits of. And the idea being, as applied to this case, that the defendant would be more likely to make out *one* false account by accident, mistake, or otherwise, than he would to make several. In other words, the likelihood that the defendant knew the true character of the account would be strengthened in proportion to the number of acts of a similar character done at or about the same time. To illustrate, suppose you lose your horse; you find it in the possession of A.; he asserts that he took the horse by mistake; but you find that about the same time he took horses belonging to several others; would not the fact that he took others about the same time be proper evidence to be considered in determining the question whether the particular taking was or not by mistake? The chances of mistake decrease in proportion as the alleged mistakes increase.

I have tried by this branch of the charge to lay down the rule and also to give you an idea of the reason upon which it is based, and upon this point it is for you to determine from all the evidence whether defendant knew the account to be false, if false it is. There

is no conflict in the evidence as to the character of the Jones account. It is shown that the defendant verified the account mentioned in the indictment, together with others, by his oath, stating that the same were *just;* that the services charged for had been actually rendered; and that the expenditures therein stated were actually paid in lawful money, as he believed, etc. This oath came properly in the line of his official duty, and it is upon the faith of this oath in a great measure the authorities act in approving and paying these accounts. The defendant has been upon the witness stand, and he states that, as a matter of fact, he did not know that the account mentioned in the indictment was and is a false account. The law has given to defendants the privilege of testifying in their own behalf. The weight to be given to his testimony is left with the jury to determine just as they determine the weight of the evidence of any other witness. If the jury believe him, they act upon his evidence accordingly. If, however, there is a conflict between his evidence and other evidence in the case, and the facts and circumstances in evidence which they do believe are inconsistent with the defendant's testimony, then, of course, the jury disregard his evidence. The jury being the exclusive judges of the weight of the evidence, and in the exercise of this function juries are not to lay aside their powers of reason and discrimination or their common sense.

What is a false account, within the meaning of the statute, as the same applies to marshals' accounts? Upon this point I charge you that if an account is made out for services that have not been rendered, it is to that extent a false account. If an account is made out for money actually paid out and expended, which, in fact, had not been paid and expended, the account is to that extent a false account. The mode of keeping marshals' accounts, as stated, is this: The marshal makes an estimate of moneys needed by him to defray expenses in serving process and in holding courts, and he makes a requisition for such amount. A draft is drawn upon the proper officer in favor of the marshal for the amount furnished, and the marshal is charged with that amount. To balance this or these charges, the marshal makes out his verified accounts, showing the actual services rendered and moneys actually paid out, for which he is credited, and when the supply is exhausted he makes another requisition, the government proceeding upon the pay-as-you-go system. When a man seeks and obtains a public office of confidence and trust he undertakes to bring to the discharge of the duties of that office care, caution, skill, and diligence proportionate to a full and fair discharge of the duties imposed, and if he knowingly shuts his eyes to passing events pertaining to a faithful discharge of the duties imposed he is guilty of negligence and dereliction of duty in case the confidence and trust reposed is thereby violated. While this is true, the law makes knowledge of the falsity of an account that is made out by the marshal, or by his direction, a necessary element in the offense,

which must be proven to the satisfaction of the jury before conviction. Still, it is proper for the jury to consider the nature of the trust, the duties thereby imposed, the intelligence of the party, the likelihood of knowledge upon a given point in issue, together with all the evidence before them upon the question of actual notice.

It is urged by the government that the evidence establishes as a fact that the defendant entered into a conspiracy with his clerks or deputies, or both, to the end that accounts should be made out, not for the actual services rendered, not for the actual expenses incurred, but for all such amounts as could be gotten through the departments at Washington and paid. If from the evidence you find that there was such an understanding between the defendant and any one or more of his clerks or deputies, and you further find that the account mentioned in the indictment is a false account, and was made in pursuance of the understanding that accounts were to be made out that should be false, then in that event I charge you that the law holds defendant guilty, the same as if he had made out the account himself, and he cannot protect himself by saying that he did not know the real character of the account. The rule of law being that when persons combine to do an unlawful act, the act of one is the act of all, and notice to one is notice to all, so far as it relates to acts done in furtherance of the common design and purpose. This question you will determine from all the facts and circumstances in evidence before you touching this particular question. It is insisted here by the able counsel for the defendant that the wrong, if any there be, is chargeable to the clerks and deputies of the defendant. In regard to that, I have this to say: The United States marshal has the absolute control of the business, as well as of the accounts of his office, and if from the evidence you believe that his clerks and deputies made out false accounts, but that the same was done with his knowledge and consent, then, as he had control over them, it would be unjust to cast reproach and obloquy upon them, they being but the instruments in the hands of the defendants to do the bidding of their principal, and in that event the consequences should be visited upon the defendant, and not upon those who had simply carried out the will and direction of their superior, as that would be making a scapegoat for the defendant of the agents he had employed to do his bidding in the matter, and for which he more than they should be held responsible, if responsibility there be. As I have said, the accounts in evidence, save and except the one set out in the indictment, are permitted to go to you only to aid you in determining the question whether the defendant knew the account mentioned in the indictment to be a false account, and further than that they have nothing to do with your deliberations. But it is proper for you to ask, could all these things that have been detailed by the evidence be done, and the defendant be ignorant thereof? for the evidence you have listened to, if true, shows a fearful condition of things, and you have a right to inquire for whose

interest have all these things been done. From an honest, actual expense account, no money could legitimately be realized by the defendant, or any one else. You have heard and seen that a large per cent. of the accounts in evidence are what is called actual-expense accounts, and you have been told what disposition was made of the money, as well as how those accounts were made up, and I charge you that if an actual-expense account is made out, and verified as such, when in fact the amount of moneys therein mentioned as expended were not in fact actually paid, the same is to that extent a false account.

It is urged that, as Sheely and McFarland had in fact spent time in endeavoring to arrest Smith and other persons that were accused of mail robbery, that the account is not false, because the same character of service had been performed by Sheely and McFarland for the government. The accounts should show just who rendered the service, and just what the services were, and just what was actually paid, and to whom. The accounts of Sheely and McFarland are before you, and if you shall find that they have been paid, or have been charged in their individual accounts for services rendered on other process, covering the same period as charged in the Jones account, it would follow that both cannot be true. One deputy may be allowed a *per diem* for endeavoring to make an arrest, but if his own account shows that he has charged for a given day or days, it would be a false charge to put a charge for *per diem* for the same days in somebody else's account, so as to reap the benefit thereof and get double or treble *per diem* pay. In other words, one deputy cannot have his own *per diem* and that of another for the same time. The accounts other than the Jones account, that have been given in evidence before you, are not for your consideration, except so far as they are shown to be false, and then for the purpose only, as I have heretofore stated.

It is urged that marshals could not make anything by charging only their fees as allowed by law. If it be true that the government is a hard taskmaster, it must also be admitted that no man is compelled to hold office, and a marshal is at liberty at any time to resign; so that the hardship, if hardship it be, is not a forced one.

As to the plea of a former conviction, I have this to say to you; That the record introduced by the defendant disproves the plea, and that matter constitutes no defense here, and you will not consider it. The case, so far as it relates to Mr. Wolf, has been dismissed, and with him as a defendant you have nothing to do.

I am not unmindful of the unrest that you have felt at what may have seemed to you as unnecessary delays in reaching a final determination of the case. But you must remember that from the first Tuesday of last month until the close of the term in Austin next July, this court may be in almost constant session, and that the district attorney, as well as myself, constantly employed, and that the mind as well as the body cannot stand a constant strain, and that therefore some little relaxation may be the best economy of time. I do not say

this because I have discovered any want of attention; quite the contrary; but I am conscious of your desire to return to your homes and to your families, and to your daily avocations. Justice demands a patient and careful investigation in order to arrive at a just conclusion. The case is of great interest both to the government and to the defendant, and the responsibility now rests with you to ascertain the truth, and when you shall have done so, it will be your bounden duty to declare it without reference to consequences. And your verdict will simply be, "We, the jury, find the defendant, Stillwell H. Russell, guilty as charged in the indictment;" or that "We, the jury, find the defendant, Stillwell H. Russell, not guilty." The question as to whether the defendant intended to defraud is not in the case, as that is not made an element in the offense charged.

Verdict of guilty, April 4, 1883. Defendant sentenced to two years' confinement in penitentiary at Chester, Illinois.

MORGAN and others *v.* ROGERS.

(Circuit Court, D. Rhode Island. February 12, 1884.)

TRADE-MARK—TRANSFER BY GENERAL CONVEYANCE.

A trade-mark will pass under a general conveyance of all the assets and effects of a firm, though not specifically designated.

In Equity.

Nathan F. Dixon, J. Van Santvoord, and *A. Chester,* for complainants.

Benj. F. Thurston and *J. C. B. Woods,* for defendant.

COLT, J. It appears by the bill and evidence that the complainants had, from time to time, advanced large sums of money to the firm of J. Miller & Sons, who were carrying on the business in Providence, Rhode Island, of the manufacture and sale of certain proprietary medicines, notably the compound known as Dr. Haynes' Arabian Balsam. To secure the complainants, Miller & Sons executed a chattel mortgage to them, dated June 1, 1875. On or about March 22, 1876, the complainants took possession under the mortgage and proceeded, through an agent, to carry on the business of the manufacture and sale of these medicines. Subsequently, on February 13, 1877, Miller & Sons conveyed to the defendant, Rogers, the exclusive right to use their trade-marks, and to make and sell their medicinal compounds. The present suit is brought to restrain the defendant from using these trade-marks. The main question in the case turns upon the meaning of the following clause in the mortgage:

"The following articles of personal property, now in our possession, and now in and upon the premises known and designated as numbers (8) eight and (12) twelve High street, in said city of Providence, viz.: The entire property, stock, furniture, and fixtures, and other articles, now in and upon said premises, together with all debts and book accounts, assets, and effects of every kind and nature, belonging to said firm of J. Miller & Sons."

The complainants contend that the above recital includes all trade-marks then owned and used by Miller & Sons in their business on High street, and that such was the intention of the contracting parties. The defendant claims that this description does not cover any trade-mark, but only the property, stock, accounts, etc., belonging to the firm; that such was the intention of the parties; and that the proof shows that at most, and independent of the mortgage, the complainants have a parol license to use the trade-marks until reimbursed for their advances to Miller & Sons. The clause of conveyance in the mortgage is very broad in its terms. Clearly the language bears the construction, and will bear no other than that the whole property of Miller & Sons, upon the premises occupied by them, together with their assets of every kind, passed by way of mortgage to the complainants. The description plainly identifies the property and states what is conveyed. It is not a case where there is an ambiguity by reason of two inconsistent descriptions in the same instrument, nor is it a case where the instrument fails to point out the subject-matter so that a stranger, after examination, might be deceived, but in plain and unequivocal language, and for the large consideration of $48,500, the entire property of the firm of Miller & Sons, at their place of business, and all the firm assets, are conveyed by way of mortgage to the complainants. There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright. But in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. Browne, Trade M. §§ 360, 361; *Hall* v. *Barrows*, 10 Jur. (N. S.) 55; *Ainsworth* v. *Walmsley*, 35 Law J. Ch. 352; *Kidd* v. *Johnson*, 100 U. S. 617; *Walton* v. *Crowley*, 3 Blatchf. 440; *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.* 57 Barb. 526, and 4 Amer. L. T. Rep. 168; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewst. 321. For a trade-mark to pass under a bill of sale it is not necessary that it should be specifically mentioned. In *Shipwright* v. *Clements*, 19 Weekly Rep. 599, there was a sale by one partner to the other of all his interest in the partnership, stock in trade, goods, chattels and effects, book debts, moneys in the bank, and all other property not being on the premises, the defendant covenanting that he would not carry on the trade within one mile of the premises, or in any way affect the business to

be thereafter carried on by the purchaser. The court held that this was a sale of the business, and that a trade-mark passed under such a sale, whether specially mentioned or not. If a trade-mark is an asset, as it is, there is no reason why it should not pass under the term assets, in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage, is to say that the most valuable part of the partnership property is not covered by the words assets and effects of every kind and nature.

The evidence, in our opinion, strongly confirms the construction we have put upon the instrument, and shows that such was the intent of the parties. The complainants proceeded to take possession under the mortgage of the entire property and assets of the firm, to use the trade-marks, and to manufacture and sell the medicinal compounds. At the time possession was taken, one of the Millers sent for Mr. Morgan, and surrendered the keys. Two of the Millers for months after this continued to sell the medicines under the direction of the agent who was carrying on the business for the complainants. The annual royalty due Dr. Haynes the complainants assumed and paid. The defendant, Rogers, as shown by his letters, understood that the complainants had succeeded to all the rights of Miller & Sons, and were running the business. He says, however, that in the fall of 1876, after a consultation with the Millers, and after what they said, he took legal advice, and found that the complainants had title under the mortgage only to the goods and effects of Miller & Sons. But that his mind was not clear on the question of the trade-marks is shown by the fact that subsequently, in his conveyance from Miller & Sons, of February 13, 1877, under which he now claims the right to use these trade-marks, there is a provision that if, at the expiration of two years, he should not be in the exclusive enjoyment of the trade-marks in consequence of any act done by the Millers in *conveying* or *incumbering* them, then, at his option, the annuities to be paid to the Millers under the agreement were to cease. The fact that the complainants agreed to turn over the property to the Millers after they had been paid cannot operate to divest them of the exclusive right to the trade-marks if they had acquired such under the mortgage. With such exclusive right they, as well as Miller & Sons, might hope the debt would soon be extinguished, but without such exclusive right such a result would be most improbable.

Upon a proper construction of the clause of conveyance in the mortgage, and upon the evidence showing the intent of the parties, we are satisfied that the relief prayed for should be granted, and that the defendant should be enjoined from the use of the trade-marks.

TUTTLE, Trustee, etc., *v.* CLAFLIN and others.

(Circuit Court, S. D. New York. March 10, 1884.)

1. PATENTS—CRIMPING-MACHINE—PATENT NO. 37,033.
   The first claim of patent No. 37,033, for an improvement in frilling and crimping machines, being limited by its terms to a combination in which the blade acts to space the crimps as well as to form them, is not infringed by a crimper which does not space the crimps.
2. SAME—CRIMPER AND SMOOTHER—SECOND CLAIM.
   The specifications for the second claim of the same patent, describing a combined crimper and smoother, point out the method in which the parts can operate without spacing the crimps, and the claim is infringed by a machine which crimps and smooths the cloth by a similar device.

C. B. Stoughton, for complainant.

Vanderpoel, Green & Cuming, for defendants.

WALLACE, J. The complainant's patent, (No. 37,033, Crosby & Kellogg, patentees, granted December 2, 1882,) for an improvement in frilling and crimping machines, describes and claims devices which constitute distinct inventions residing in the same machine. The devices for forming and spacing the frill or crimp, and those for securing them in place after it is formed, accomplish distinct results, both of which are useful, and either of which would support a patent. The devices also co-operate to make the stitched plait. The sewing mechanism is essential only for making the complete or stitched plait. The claims of the patent cover all the devices in combination, and also the sub-combinations, which are operative only in forming and spacing the frills or plaits. The first claim covers the crimping devices with and without the stitching mechanism. It is limited, however, by its terms to a combination in which the blade or crimper acts to space the crimps as well as to form them. The defendants' crimper does not act to space the crimps, and they do not therefore infringe this claim. The second claim is as follows: "In combination, a crimper and a smoother, substantially such as described, and acting substantially as specified, to fold the crimps to an edge." The crimper described in the specification is a blade actuated by a cam and spring, and its mode of operation is to engage the cloth, advance and make a crimp of the cloth lying between it and the holder, and shove the cloth along under the holder; it then retreats for another advance. While it moves forward to crimp it acts as a crimper. After the crimp is formed it acts as a spacer to space the crimps apart, and as a pusher to force the goods through the machine. The space between the crimps depends upon the length of advance of the crimper after the crimp is formed, which is determined and made adjustable by other mechanism. The crimper which is included in this claim is one which is to operate in combination with the other necessary co-operative parts substantially in the manner thus pointed out. It may operate effectively to fold the crimp to an edge without

spacing them regularly, and in this regard may be an improvement upon the Singer, or Arnold, or Magic ruffle contrivance. In describing their invention, the patentees state that the invention "consists essentially of two parts,—the one for forming the crimps, and the other for securing them in place after they are formed;" and they then proceed to say that "the mechanism for forming the crimps consists of a crimper which both forms and spaces them." The specification plainly describes how the parts can operate to fold the crimps to an edge without spacing them. The language of the claim is apt and precise to cover such a combination, and clearly distinguishes the functions of the operative parts from those assigned to the parts in the first claim.

While the defendants' machines do not employ a crimper which operates independently to space the crimps, their crimper and smoother effect the operation of folding the crimps to an edge, and their devices in this behalf are the substantial equivalents of those in the combination described in the second claim. In their machines the spacing is done by revolving rolls or holder, which, after each crimp is formed, advances the cloth, while the blade is retreating through a distance equal to the space between the successive crimps.

The second claim and the fourth claim of the patent are infringed. The fifth claim is not infringed, as the defendants have no auxiliary smoother such as is described in the patent.

The decree is ordered for the complainant, adjudging infringment of the second and fourth claims of the patent.

TAFT *v.* STEERE and others.

(*Circuit Court, D. Rhode Island.* February 9, 1884.)

1. PATENTS—IMPROVEMENT IN LOOMS—SHUTTLE-RACE.
   The characteristic feature of the second claim, patented by letters No. 63,853, for improvements in looms, is the vertical spring adjusted over each end of the shuttle-race; and a contrivance for checking the flight of the shuttle by other means is not an infringement.
2. SAME—ADJUSTABLE NOSE-PIECE.
   The third claim of the same patent, if valid at all, is not infringed without the use of an adjustable nose-piece upon the cam.

In Equity.

A. J. P. Joy, for complainant.

Eugene F. Warner and *Walter B. Vincent*, for defendants.

Before LOWELL and COLT, JJ.

COLT, J. The complainant in his bill charges the defendants with the infringement of certain letters patent for improvements in looms, dated March 26, 1867, No. 63,853, issued to James J. Walworth and

Gustavus E. Buschick, assignees of Caspar Zwicki, the inventor. By subsequent assignments the plaintiff became the owner of the patent. The alleged infringements relate to the second and third claims. The second claim is as follows:

"In combination with the shuttle-race the springs, H, at either end, arranged over the top of the shuttle-path, and provided with means for vertical adjustment substantially as described."

The specification says:

"Above each end of the shuttle-race, E, are springs, H, each fastened to holding-pieces, *e*, on the side of the race, so that they can be adjusted in a vertical direction, and provided with a set, or thumb-screw, at *f*, for the purpose of further adjustment of the free end of said spring, H, in a vertical direction. The function of these springs, H, is to stop the shuttle gradually, and without recoil, and to keep it in its proper position on the shuttle-race to receive the blows of the picker staffs, T."

The essence of this claim is a spring, capable of vertical adjustment, over each end of the shuttle-race, to check the flight of the shuttle, and keep it in its place. The defendants do not use this. Their looms have no spring over the top of the shuttle-race, and no means of vertical adjustment. They use a piece of wood screwed on to the top of the shuttle-race, or a narrow piece of wood screwed on to the inside of the top, and the evidence goes to show that these have been in use for a period of 35 years. The side of the shuttle-box in the defendants' looms is of such shape that it operates to check the flight of the shuttle, and it also appears to be adjustable, but the important element in the plaintiff's claim is a spring on the top of the shuttle-box, capable of vertical adjustment, and this we do not find, nor any equivalent therefor, in the defendants' machine, and so there is no infringement.

The third claim is as follows:

"In combination with the picker staff of a loom, the cam, N, when provided with the adjustable piece, *o*, substantially as described."

It is not contended that Zwicki was the first to make a cam with a nose, in two pieces, instead of being solid, but the adjustable character of the nose-piece upon the cam is claimed as an improvement.

After carefully examining the evidence and exhibits, we are satisfied that the cams used by the defendants are not adjustable for any practicable purpose, that such adjustment is not attempted in their use; and that it is doubtful, at least, whether there is any utility in this feature of the patent, supposing the nose-piece to be attached to the cam exactly as shown in the model. It does not appear that any looms embodying the improvements claimed in this patent have ever been put in operation.

These conclusions dispose of the two main questions raised in this case, and we therefore deem it unnecessary to consider any others.

The bill should be dismissed.

SMITH *v.* HALKYARD and others.

(*Circuit Court, D. Rhode Island.* February 9, 1884.)

MOTION FOR CONTEMPT—PLAIN EVIDENCE REQUIRED.

To sustain a motion for contempt on account of the violation of an injunction issued to restrain the infringement of a patent, it must appear clearly and indisputably that the infringement continues.

In Equity. Motion for contempt.

John L. S. Roberts and *George L. Roberts*, for complainant.

Wilmarth H. Thurston and *Benj. F. Thurston*, for defendants.

Before LOWELL and COLT, JJ.

COLT, J. The defendants contend that they are not violating the injunction recently granted by this court by reason of certain changes made in their machine. The plaintiff claims that the defendants still infringe the first and seventh claims of the lacing-hook patent, as well as the patent for lacing-hook stock. The lacing-hook patent is for a combination. One of the elements of the feeding device mentioned in the first and seventh claims is a spring inserted in the groove along which the stock is fed, which operates to raise the stock and clear it from the dies. In their present machine the defendants use no spring. The inclines in the groove of the feeding mechanism are not, in our opinion, the equivalents of the spring, and do not perform the same function, and, as shown in the affidavit of Mr. Renwick, may be dispensed with altogether. By leaving out one element of the combination a serious doubt is raised as to the defendants' infringement.

As to the lacing-hook stock patent the position is strongly urged by the defendants that the patent is for stock with a series of alternate necks and indentations, and that in their present machine they only use a single neck and indentation at the end of the stock strip, and not a series. The plaintiff contends that, while at no moment of time a series exists, this is due to the fact that each neck and indentation is cut out as soon as formed, and that a series does exist in order of time or successively, as is shown by the successive holes in the waste strip. It is clear, from the specification and drawing, that the patentee contemplated the co-existence of a series of alternate necks and indentations. It is from stock so specially prepared in a series from which the blanks for the formation of lacing-hooks were to be cut. It may well be doubted whether, in view of the terms of the patent and the prior state of the art, the patent can be held to extend to a single neck and indentation.

Motions of this character are not granted unless the violation of the injunction is plain and free from doubt. Walk. Pat. 481; *Birdsall* v. *Hagerstown Manuf'g Co.* 2 Ban. & A. 519; *Liddle* v. *Cory*, 7 Blatchf. 1; *Welling* v. *Trimming Co.* 2 Ban. & A. 1; *Bate Refrig. Co.* v. *Eastman*, 11 FED. REP. 902.

Motion denied

THE C. D. BRYANT.

(District Court, D. Oregon. March 18, 1884.)

1. SALVAGE BY PILOT.
   Under the Oregon pilot act of 1882, (Sess. Laws, 15,) a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk."
2. CASE IN JUDGMENT.
   The libelant in a smooth sea and calm weather boarded the Bryant in a thick fog, while she lay aground at low tide on the outer edge of the middle sand of the Columbia river, and at the next flood sailed her over into deep water in the south channel, and, after drifting out to sea in the night, brought her into port the next morning. *Held*, that the service of the libelant did not involve any "extraordinary danger or risk," and that he was only entitled to a pilot's compensation therefor.

In Admiralty.

Frederick R. Strong, for libelant.

M. W. Fechheimer, for claimant.

DEADY, J. The libelant, Henry Olsen, brings this suit to obtain a decree for salvage against the American bark C. D. Bryant and her cargo, for services rendered her at the mouth of the Columbia river on September 4 and 5, 1883. The master of the Bryant, James P. Butman, intervening for his interest and that of his co-owners in the vessel, as well as the owners and consignees of the cargo, answers the libel, denying that the libelant performed any salvage service on the occasion in question, and alleging that he acted as bar pilot merely, for which service he was duly paid. The evidence is very voluminous, and, as usual in such cases, is largely irrelevant, immaterial, and repetitious. The material facts appear to be that on September 4, 1883, the Bryant being bound on a voyage from Hong Kong to Portland, drawing about 19 feet of water, was off the mouth of the Columbia river, when, about 2:30 P. M., and near high water, she grounded on the outer edge of the middle sand in 12 to 15 feet of water at low tide, and about three miles south-west of Cape Disappointment light—the sea being smooth, the weather calm, and a thick fog or smoke on the bar; that about 5 o'clock she was boarded by the libelant, a bar pilot from the pilot-schooner Cousins, who thereupon took charge of her; that the vessel lay quietly in her bed in the sand after the libelant took charge, until the flood tide began to make, and the wind freshened from the north-west, when with the aid of her sails and the swell of the sea she rubbed across the sand some time before 3 o'clock on the morning of the 5th, in a south-easterly direction, into deep water, and was afterwards carried by the ebb tide and an easterly wind in a south-westerly direction to sea, where she laid off until daylight, and then came in over the bar with a light breeze and the flood tide, and was taken in tow by a tug, and brought to Astoria and beached with three or four feet of water in her

hold; that the vessel commenced to leak before 9 o'clock in the evening of the 4th, and continued to do so until beached in the mud at Astoria, both pumps being worked continuously in the mean time, which leak was wholly caused by the displacement of 30 or 40 feet of the after-part of the keel, while on the sand as aforesaid; and that the vessel is worth $15,000, and her cargo, which consists of rice and China goods, is worth about $50,000.

Much of the testimony and controversy in the case relates to the question whether the conduct of the libelant, while in charge of the vessel, was that of a skillful and diligent pilot or not. For instance, it appears that soon after boarding the vessel, while the tide was ebbing to the south-west and a light breeze was blowing from the north-west, the libelant caused the port anchor to be dropped from the cat-head and went below to change his clothes, which were wet, and take some rest, where he remained until near 9 o'clock, when, at the suggestion of the master, he came on deck and had the anchor taken up, because the master insisted that the vessel was surging ahead—taking chain—and would soon be on the anchor, all of which the libelant denied at the time and since. Upon the vessel being brought to Portland and hove down, it was found there were some bruises and indentations well forward on her port side, which were thought to have been made by the vessel coming in contact with the fluke of the anchor while she lay on the sand. All of them were mere surface bruises, the wood in the worst one not being bruised more than three inches deep, and were all repaired by cutting out the bruised portions and letting in a scarf-piece in its place at a comparatively small cost, and did not at all affect the tightness of the vessel or cause her to leak. So far as appears, the dropping of this anchor was a useless act. It might prevent the vessel from going off as she went on, of which there was not the least probability at that time, if ever; and it was impossible for her to go further on until the tide flooded. At the same time it was certainly a harmless act, provided it was taken up, as it was, before the flood-tide commenced to make; and even then, with the heave of the sea and the wind, both from the north-west or thereabout, the vessel would be driven, not upon the anchor, but to the southeast of it.

But the management of this anchor, whether skillful or unskillful, does not affect the libelant's right to salvage. If any damage was caused to the vessel by the neglect or want of skill on the part of the libelant in this respect, at most, the amount thereof could only be deducted from the salvage to which the libelant might otherwise be entitled. But no claim is made in the pleadings for any damage on this account, and it is doubtful if any was sustained. If, under the circumstances, the act was bad seamanship, it is a matter for the consideration of the pilot commissioners, and not a defense to this suit. Salvage service is a meritorious one, and it has always been the policy of the law to reward liberally those who successfully engage

in it, according to the skill, danger, and property involved in the undertaking. But the drift of American legislation and decision is against the policy of allowing pilots to act as salvors on their own pilot grounds. It has been thought or found that the temptation to become a salvor might induce a pilot to make or allow an occasion for such service that he might profit by the distress of the ship which he is bound to navigate. *Hobart* v. *Drogan*, 10 Pet. 120; *The Wave*, 2 Paine, 136; 2 Pars. Ship. & Adm. 271. A pilot is a public officer whose duties and compensation are prescribed by law; and when acting in the line of his duty he is not entitled to any other compensation. As was said by Mr. Justice WASHINGTON, in the *Case of Le Tigre*, 3 Wash. C. C. 571, while considering the question whether official duty could be compensated by salvage:

"Of this class of cases is that of the pilot who safely conducts into port *a vessel in distress at sea*. He acts in the performance of an ordinary duty, imposed upon him by the law and the nature of his employment, and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment."

The pilot laws of the several states generally require pilots to render aid to vessels, if possible, on their cruising ground whenever needed; and in cases when extraordinary risk and danger is thereby incurred, provision is made for extra compensation. The duties and compensation of an Oregon Columbia river bar pilot are prescribed by the pilot act of 1882. Sess. Laws, 15. The act (section 27) gives the pilot so much a foot draft of the vessel for his service; and (section 21) provides that he must keep a suitable pilot-boat, on which he shall cruise outside the bar "unless prevented by tempestuous weather," and he "must at all times promptly extend aid to vessels in stress of weather or in case of disaster: * * * provided, that this section shall not affect any claim for salvage arising out of services involving extraordinary danger and risk." Under this section 21 it was the duty of the libelant to extend to the Bryant whatever aid she might need and he, as pilot, could give, and in so doing he did not entitle himself to salvage or other compensation than that prescribed by law, unless he thereby incurred "extraordinary danger and risk." Neither the value of the vessel nor the benefit she receives from the service enter into the question of compensation. Unless the pilot incurs more than ordinary "danger and risk in the discharge of his duty, he is only entitled to the ordinary compensation. Whether this section includes the case of a wreck, properly speaking,—that is, a vessel abandoned at sea, or stranded and abandoned,—is a question not necessary to decide in this case. If it does, as it well may, the pilot must render what aid he can, as such, and if in so doing he does not incur extraordinary "danger or risk" he must be content with the ordinary compensation.

The Bryant was not a wreck in any sense of the word. She had just gone easily on to a sand-bank, where, if the weather had con-

tinued as calm as it then was, she might have remained for weeks without any serious injury. Her master and crew were on board, with reason to believe that the vessel could be floated off at the next tide, as she was; and, in any event, that the tugs would come to her assistance and pull her off as she went on. There is a conflict in the testimony as to whether the libelant boarded the vessel and took charge of her as a pilot or not. But there is not much room for doubt about the matter. He boarded her from a pilot schooner, saying he was a pilot, and did nothing while on board but a pilot's duty. It is true that the libelant testifies that he told the master after he got on board that his vessel was aground, and that he would not take charge as a pilot until she was afloat. But this, under the circumstances, is a very improbable statement, and was not remembered by the libelant on his examination in chief, nor until he was pressed on cross-examination; and it is absolutely denied by the master of the bark. But, be this as it may, the law did not authorize the libelant to go on board and take charge of the vessel, without the master's consent, in any other capacity than that of pilot. *The Dodge Healy*, 4 Wash. C. C. 656. This was not a case for a salvor, but a pilot, unless the former had a tug or other means external to the vessel at his command wherewith to pull her off the sand, with or without the aid of the wind and tide. But the libelant could be of no aid to the vessel personally, otherwise than from his knowledge of the tides, channels, and shoals in the vicinity, and his skill in handling her by means of her sails, rudder, and anchors, and all this he was bound to know and do as a pilot. If the master had possessed this local knowledge he could have sailed the Bryant over the sand into deep water as well as the libelant. Indeed, nothing was done by the latter except to set the sails and wait for the wind and tide, which fortunately—I may say providentially—came and pushed her over into the south channel. But even then, but for the local knowledge of the libelant, she might, in the darkness and fog, have gone on to Clatsop spit. The services rendered by the libelant were those of a pilot; and unless in boarding her, or while on her, he personally incurred "extraordinary danger and risk," he is not entitled to anything more than a pilot's compensation therefor; and this is so whether or not his services saved the vessel from a great peril or imminent danger of destruction.

I hardly know how to discuss the question of the "danger and risk" incurred by the libelant personally. I suppose that a bar pilot, when on duty, is always involved in more or less danger. He is bound to cruise outside the bar, and board and render aid to vessels, unless the weather is so "tempestuous" as to prevent it—as to make it absolutely unsafe to do so. In this case, in my judgment, the libelant did not incur oven the ordinary danger of a pilot service in that locality. It was a remarkably calm time—not wind enough to clear the bar of the smoke and fog incident to that season of the year.

There was a light breeze from the north-west, and the ebb tide made a ripple on the sand where the vessel lay aground. On sighting the Bryant, the Cousins ran down from the windward and hove-to some distance astern and south of the former, from whence the libelant, with the aid of another oarsman, undertook to pull up to the Bryant in a small boat, but on account of the wind and tide, particularly the latter, was unable to do so, and had to return to the schooner, which by this time had drifted further to the southwest. The schooner then beat up into the vicinity of the Bryant and hove-to again under the lee of the latter, in comparatively still water, from whence the libelant, with the aid of the oarsman, boarded her without any trouble; the latter taking the boat back to the schooner, which then, by the libelant's direction, stood out to sea. In all this there was some time and labor spent, and much of it because of the libelant's mistake in not bringing his schooner around under the lee of the Bryant in the first instance, but certainly no "extraordinary danger or risk." And while on the vessel the libelant incurred no such danger or risk; for if there was any immediate prospect or probability of her going to pieces on the sand or sinking in the deep water, as there was not the least, all hands could safely have taken to the boats. But the libelant has himself furnished very satisfactory evidence that he did not, at the time, regard this service as dangerous, or otherwise than an ordinary pilot service. On September 6th, it appears that he made out a bill against the Bryant for "pilotage" at the prescribed rates, amounting to the sum of $136, and delivered the same to the agent of the schooner for collection, and as his report of the transaction, which was paid accordingly. Nothing then appears to have been said or thought of any claim for salvage on account of any unusual danger or risk incurred by the libelant in this service.

There must be a decree for the claimant dismissing the libel, and for costs

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THE PRIDE OF AMERICA.

(District Court, N. D. New York. January, 1884.)

MARITIME LIEN--DRAFT RECOGNIZING THE LIEN.

Where a maritime lien attaches to a vessel, and her owner gives a draft for the debt, the draft in terms recognizing, confirming, and continuing the lien, an assignee of the draft and claim can enforce the lien against the vessel.

In Admiralty.

George N. Burt, for intervenor.

Webb & Benedict, for owner.

COXE, J. In September, 1881, the schooner Pride of America was lying in the harbor of Cheboygan, Michigan, in a disabled condition.

As it was not possible to proceed under sail, an agreement was made with the tug George W. Wood to tow her to Milwaukee for $700. The journey was safely accomplished and the master and owner of the schooner—James McDonnell—executed a draft for the amount. Indorsed thereon was a memorandum, signed by him as follows: "It is understood this draft takes the place of a receipted tow bill, and is good against the within-named vessel her owner and underwriters, until paid." The draft was not paid. Its holder, who is also the assignee of the claim, now seeks to enforce his demand against the remnants in the registry of the court, the vessel having been heretofore sold upon a decree in favor of seamen. That the intervenor has a valid lien there can be little doubt. The vessel was bound to the owner of the tug, the towage contract was executed and the maritime lien fully established. *The Queen of the East*, 12 FED. REP. 165. The services rendered were meritorious and satisfactory. It must have been the intention of all concerned that the lien should be continued. It is hardly conceivable that the tug would have consented to release the vessel and give a credit of 60 days, upon any other terms. That a sane man would thus surrender ample security and take in lieu thereof the personal obligation of a stranger, an alien and a sailor, of whose responsibility he could know but little, is not within the limits of reasonable conjecture. The draft, with the indorsement, was given for a debt for which the vessel was liable, and it was given by her master and *owner*. The lien was not thereby divested, but continues till the draft is paid. *The Woodland*, 104 U. S. 180. It was the evident purpose of the owner in executing a negotiable instrument, that the lien should be recognized, confirmed, and continued, in the hands of all *bona fide* holders.

The reasons for the rule which discharges the lien in cases where there has been an assignment of claims for mariners' wages, etc., has little pertinency to the present inquiry. *The Norfolk and Union*, 2 Hughes, 123. Here the owner of the vessel to which the lien attached, in consideration of the credit given, expressly consented that the security should remain unimpaired. How can he now escape the consequences of his own act, especially when he is seeking to avoid the payment of a valid claim the justice of which he has repeatedly recognized? The court should not permit merely technical defenses to prevail against a meritorious claim. Such considerations may be entertained in aid of equity, but not to defeat it.

The intervenor is entitled to a decree for $700 and interest from December 5, 1881, besides costs. The commissioner's fees amounting to $18 should first be paid from the fund.

UNITED STATES *v.* CITY OF ALEXANDRIA and another.

(*Circuit Court, E. D. Virginia.* October 6, 1882.)

1. LIMITATION—GOVERNMENT.
   Time does not run against the sovereign government.
2. LACHES—AGENTS OF GOVERNMENT.
   The government is not chargeable with laches by reason of the procrastination of its officers.
3. LAPSE OF TIME—PUBLIC CORPORATIONS.
   Equity will not refuse to enforce an obligation merely because of the lapse of time, unless evidence has been lost, or the rights of third parties have become involved, or the personal relations between the parties have been so much altered as to change the essential character of the obligation. Governments and municipal corporations are of such a permanent nature that their mutual relations are presumably unaffected by the lapse of years.
4. SPECIFIC PERFORMANCE—AFTER-ACQUIRED TITLE.
   A party agreeing to transfer property which he does not own at the time, cannot refuse to perform his contract after acquiring title.
5. SAME—ONLY PART PERFORMANCE POSSIBLE.
   One who, by his own fault, is unable to perform a part of his contract, cannot upon that account resist a bill for the specific performance of the rest.
6. SAME—PECUNIARY DAMAGES REFUSED.
   Where congress authorized an advance of money to a city upon the surrender to the government of stock which it held, and the money was advanced but the stock was not transferred, *held* that, though specific performance of the obligation to transfer the stock would be decreed, no pecuniary damages could be awarded.

In Equity.

H. H. Wells, for plaintiff.

Kemper, Johnson & Stewart, for defendants.

HUGHES, J. The cities of Georgetown, Washington, and Alexandria united their corporate credit and resources with the United States, Virginia, and Maryland in the construction of the Chesapeake & Ohio canal. About the year 1836 they had exhausted themselves in this behalf, and the canal was unfinished. They applied to congress for relief. The form in which this relief should be given was not definitely settled upon in the first instance. But it finally took the form indicated in the "Act for the relief of the several corporate cities of the District of Columbia," passed May 20, 1836. 5 St. at Large, 32. The act provided that the three cities should convey the legal and equitable title in their stock to the secretary of the treasury, to be held in trust for the United States, with power in the secretary of the treasury "at such times, within ten years, as may be most favorable for the sale of the said stock, to dispose thereof at public sale, and reimburse to the United States such sums as may have been paid under the provisions of this act;" and "if any surplus remain after such reimbursement, he shall pay over such surplus to said cities." The plan was that the United States should pay certain debts of the three several cities, incurred on account of the canal, taking in lieu of them the shares they respectively held in the canal company. It was stated in argument at bar that the debts thus paid

by the United States in cash amounted to about 85 cents on the dollar of the par value of the stock received in exchange. While this measure was pending before congress, the city of Alexandria brought to the attention of that body, by an elaborately-drawn memorial, her embarrassment and urgent need of relief in respect to the Alexandria canal, which was an extension of the Chesapeake & Ohio canal from Georgetown into her own corporate limits. This memorial was presented in January, 1836. It simply asked relief, and did not suggest any form in which it should be given. In May the act for the relief of the three cities on account of the Chesapeake & Ohio canal was passed; and in December, 1836, Alexandria filed an additional memorial, suggesting that the relief which she separately asked should be in the form in which the three cities had received it in the act of May preceding, in respect to their indebtedness for the main canal. Alexandria's claim for relief in respect to her branch canal rested upon the same equities and considerations of public justice and policy on which that of the three cities had rested in respect to the main work. She then owned 3,500 shares of the stock of the Alexandria Canal Company, though it seems now that she had as yet completed paying for only 1,500 shares. There is nothing to show that congress was informed at this time of the fact that she had not yet paid up her subscription for part of her shares in the stock of the branch canal, and could not deliver them.

Congress responded favorably to Alexandria's separate and additional claim to relief in respect to her separate and branch canal. Congress voted $300,000 out of the treasury to Alexandria, which was almost precisely 85 per cent. of the par value of her 3,500 shares. The act by which this payment was authorized was passed on the third of March, 1837. See section 2 of chapter 44 of the acts of 1836–37, (5 St. at Large, 190.) The act provided—

"That when the corporate authorities of the town of Alexandria shall deposit the stock held by them in the Alexandria Canal Company in the hands of the secretary of the treasury, with proper and competent instruments and conveyances in law, to vest the same in the secretary of the treasury and his successors in office, for and on behalf of the United States, to be held in trust upon the same terms and conditions in all respects as the stock held in the Chesapeake & Ohio canal by the several cities of the district were required to be held in and by virtue of the act approved on the seventh day of June, eighteen hundred and thirty-six, entitled 'An act for the relief of the several corporate cities of the District of Columbia;' that the secretary of the treasury be and he is hereby authorized and empowered to advance, out of any moneys in the treasury not otherwise appropriated, to the canal company, from time to time, as the progress of the work may require the same, such sums of money, not exceeding three hundred thousand dollars, as may be necessary to complete the said canal to the town and harbor of Alexandria."

That act simply repeated, in respect to the branch canal, the policy and purpose of the act of the preceding May already mentioned, respecting the main work, and I cannot entertain a doubt that it was in the contemplation of congress that all the 3,500 shares which Al-

exandria had thus subscribed to the stock of the Alexandria Canal Company should be turned over to the secretary of the treasury on his payment to her of the $300,000 of cash appropriated by the act of March 3, 1837. To contend otherwise seems to me to be contrary to reason and all probability. Shortly after the act last mentioned, the authorities of Alexandria turned over to the secretary of the treasury, upon a payment then made by that officer of part of the sum that had been appropriated for the city, 1,500 shares of canal stock, which was all that she could then deliver. The secretary went on at different times to pay other installments of the appropriated $300,000 until all was paid. With this money Alexandria presumably completed the payment of her subscriptions on her remaining 2,000 shares of stock; but these shares were never delivered to the secretary of the treasury, nor never called for. I regard this omission as an act of sheer inadvertence. The stock became or had become absolutely valueless in the market; and it never seems to have occurred to the mind of any secretary of the treasury to call upon Alexandria for the undelivered 2,000 shares still due. The city afterwards subscribed for 1,500 additional shares of this stock in the Alexandria canal, making in all, with that delivered to the secretary of the treasury, 5,000 shares. Ten years after the act of congress which has been mentioned, she made an exchange of 2,720 of her shares with the state of Virginia for an equivalent amount of state bonds at par value, and has now only 780 left at her disposal.

The bill in this case is filed to require a specific performance by Alexandria of her obligation under the act of congress of March 3, 1837. I think that nothing could well be more clear than the obligation of Alexandria to comply with the prayer of the bill, by delivering to the secretary of the treasury the 2,000 additional shares of the stock of the Alexandria Canal Company still due. It is objected by her counsel that the lapse of time has been so great, and the laches of the United States so signal, that it would be inequitable now for Alexandria to be called upon to perform this obligation. But time does not run against the United States, and public policy forbids that the negligence of the officers of an immense government like ours should be held to create laches on the part of the government, except, probably, as to third persons who are strangers to transactions as to which the negligence may occur.

In *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, the supreme court say:

"The general principle is that laches is not imputable to the government. The utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions. It would, in effect, work a repeal of all its securities."

In *U. S.* v. *Vanzandt*, 11 Wheat. 190, the court say:

"The neglect in the one case and the other imputes laches to the officer whose duty it was to perform the acts which the law required; but, in a legal point of view, the rights of the government cannot be affected by these laches."

"A claim of the United States is not released by the laches of the officer to whom the assertion of that claim was intrusted." *Dox* v. *Postmaster General*, 1 Pet. 325. "Statutes of limitation do not bind the United States unless it is specially named therein." *Lindsey* v. *Lessee of Miller*, 6 Pet. 666; *U. S.* v. *Hoar*, 2 Mason, 311. "The unauthorized act of the officer of the United States (in the matter of a claim for or against it) cannot bind the United States." *Filor* v. *U. S.* 9 Wall. 49.

If, indeed, there could be any rational doubt entertained in regard to the reason why not more than 1,500 shares of the canal stock were delivered in 1837, or any reasonable pretension that such delivery was, in fact, accepted by the United States as completing the obligation of Alexandria, and if this doubt could not be cleared up because of the death of witnesses who were cognizant of the transaction, and loss of evidence touching it, this court, as a court of equity, might hesitate to enforce the specific performance of a contract thus rendered obscure by a long lapse of time. But, as already said, I do not think there can be any reasonable doubt of the facts of the original transaction, or of the intention of congress or of Alexandria in entering into it. Where an obligation is clear, equity will not refuse to enforce it because of mere lapse of time since its origin. True, in cases where the rights of third persons have become involved, equity will often refuse to enforce a long-standing obligation to the injury or prejudice of such persons. So, where the terms or nature of a long-standing obligation have become uncertain, in consequence of the lapse of time, the loss of evidence, or the death of witnesses, equity will sometimes refuse to enforce it in consequence of this uncertainty; it will not make a decree, apparently just, where there is danger, in making it, of doing real injustice. Such are some of the considerations on which equity will refuse to enforce an old obligation. But where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly as between the immediate parties to the transaction. See the case of *Etting* v. *Marx*, 4 Hughes, 312, S. C. 4 FED. REP. 673, where the doctrine of limitations in equity is very elaborately discussed as to suits between private individuals.

But the parties to the present transaction are, on one side, a government of permanent stability, and on the other, a municipal corporation older than the government. They are not like natural persons, whose relations and obligations are all more or less affected by mere lapse of time. The reason which induces equity to look with disfavor upon old and stale claims, as between natural persons, ceases when applied to governments and public corporations. Forty years in the life of such bodies are but as so many days or months in the life-time of individuals. Obligations between them are just as enduring. I must hold that, as between the United States and Alexandria, time has not released the city from the obligation to deliver

to the secretary of the treasury the 3,500 shares which she had in March, 1837.

It cannot be necessary to answer at length the wholly untenable pretension that the corporation of Alexandria, when it delivered the certificates for 1,500 shares, was absolved from further obligation because it did not own the remaining 2,000 shares; for it is a familiar doctrine that if one undertakes to grant property not yet in his possession or paid for, but which he subsequently does acquire and pay for, the title inures to his first grantee.

It is no objection to a decree being made for specific performance of a part of a contract when the performance of the remainder has been made impossible by the act of the defendant. To permit such an objection to prevail would be to violate the maxim that no man shall take advantage of his own wrong. See Fry, Spec. Perf. § 294, citing Lord ELDON, who, in speaking of one who had undertaken to convey a greater interest than he possessed, says:

"For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, * * * and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole."

See, also, *Morss* v. *Elmendorf*, 11 Paige, 287; *Hatch* v. *Cobb*, 4 Johns. Ch. 559; *Kempshall* v. *Stone*, 5 Johns. Ch. 193; Fry, Spec. Perf. §§ 554, 258.

The latter is to this point, that where a hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defense against the specific performance of the contract, at least whenever the thing he has contracted to do is reasonably possible.

In *Bennett* v. *Abrams*, 41 Barb. 619, it is said, where specific performance of a contract is impossible, the plaintiff may have approximate relief in some other form which will secure him the substantial advantage of the agreement.

The state of Virginia is not a party to this suit, and could not be required to return any part of the 2,720 shares which she obtained from Alexandria if she were. It is not shown that she was made cognizant of the fact that Alexandria had not an equitable right to deliver to her as many of the shares of the canal company as she did deliver. The evidence does not show that this fact was brought home to the mind of the Virginia legislature when that body passed the act authorizing the exchange of state bonds for these shares, though it does show that Alexandria, in the person of her agents, was informed that she was violating her obligations to the United States in soliciting and making that exchange.

As to the damages claimed by the bill against the city, from the non-delivery of the 2,000 shares to which the United States are still entitled, I do not think it would be equitable for this court to do more than require these missing shares to be delivered. It was not intended

by the United States, in the act of March 3, 1837, to create a money demand directly or indirectly against the city, and I am not disposed to make a money decree against the city. I do not think the measure of damages in this particular case is the highest price which the shares of the canal company have commanded in the market since the delinquency, as contended by counsel for plaintiffs. What steps should be taken in this suit to enforce the full performance of the obligation of the city must be hereafter determined. I will at once make a decree requiring the city to transfer to the secretary of the treasury the 780 shares still held by her, and to make up the remainder of the 2,000 shares yet due.

See *U. S.* v. *Southern Colorado Coal & Town Co.* 18 FED. REP. 273; *U. S.* v. *Beebee*, 17 FED. REP. 36.

UNITED STATES *v.* CITY OF ALEXANDRIA and another.

(*Circuit Court, E. D. Virginia.* February 7, 1884.)

1. PUBLIC STATUTES—CONSTRUCTIVE NOTICE OF PROVISIONS.
   Public statutes affect, with constructive notice of their provisions, all the world, including domestic states as well as individuals.
2. SAME—ACT OF CONGRESS—CERTAINTY—STATUTE OF LIMITATIONS.
   But where an act of congress provided that all the shares held in a canal company by a city (A.) should be delivered to the secretary of treasury, not naming the number of shares intended, and that within 10 years the secretary should sell the shares to satisfy a trust defined by the act, and the city did deliver 1,500 shares, all that she held at the date of the act, though she had subscribed, but had not paid, for, and did not actually hold, a greater number, and after 10 years the city sold to the state of Virginia a large block of shares, including some of the shares it had subscribed for but did not hold when the act of congress was passed, *held*, that the act was not sufficiently certain in its terms to convey constructive notice to Virginia of any equity the United States might have in a greater number of shares than 1,500, and that Virginia had a right after 10 years to purchase in good faith from A. any shares then owned by that city. *Held, also*, that although time does not run against the United States, and they are not prejudiced by the *laches* of public officers, yet equity will be unwilling to enforce the doctrine of constructive notice more than 40 years after the passage of a public statute in a case where stock purchased *bona fide*, claimed to be affected by the notice, has been held for more than 30 years.

By an act of May 20, 1836, (5 St. at Large, 32,) congress, after authorizing the secretary of treasury to assume the payment of certain bonds, respectively, of Georgetown, Washington, and Alexandria, which those cities had issued in aid of the canal which had been constructed from Georgetown to the town of Cumberland, in Maryland, provided that before the secretary should execute this duty "the corporate authorities of said cities should deposit in the hands of the said secretary the stock in the Chesapeake & Ohio Canal Company, held by them respectively; and that the secretary might, at such time within

ten years as should be most favorable for the sale of said stock, dispose thereof at public sale, and reimburse to the United States such sums as might have been paid under the provisions of this act, and if any surplus remained after said reimbursement, he should pay over said surplus to said cities in proportion to the amount of stock now held by them respectively." This was in reference to the stock of the three cities in the canal between Cumberland and Georgetown. In its river and harbor bill, passed on the third of March, 1837, congress inserted a section which enacted, in respect to the canal, extending the other from Georgetown to Alexandria, (5 St. at Large, 190,)—

"That when the corporate authorities of the town of Alexandria should deposit the stock held by them in the Alexandria Canal Company in the hands of the secretary of treasury, with proper and competent instruments and conveyances in law to vest the same in the secretary for and on behalf of the United States,—to be held in trust upon the same terms and conditions in all respects as the stocks held in the Chesapeake & Ohio canal by the several cities of this district were required to be held in and by virtue of the act of May 20, 1836, (above cited,)—then the secretary should be and he is hereby empowered and authorized to advance to the Alexandria Canal Company, from time to time, as the progress of the work might require the same, such sums of money, not exceeding $300,000, as might be necessary to complete the canal to the town of Alexandria."

This case requires only the latter act to be considered. At the time of its passage Alexandria held only 1,500 shares of the stock of the Alexandria Canal Company, and, upon a strict reading of the act, a deposit by the city of that number of shares was such a compliance with its literal terms as to entitle the canal company to receive the whole appropriation of $300,000. Alexandria had indeed at that time subscribed for a total of 3,500 shares, but she had paid for but 1,500 of them, and actually "held" only the latter number. Doubtless congress had contemplated the deposit of 3,500 shares, but the act did not expressly require the deposit of any other shares than those which Alexandria "held" at the passage of the act. Sometime afterwards that city subscribed for an additional 1,500 shares of the canal stock, thereby running up her total subscription to 5,000 shares. Soon after the passage of the act of March 3, 1837, Alexandria deposited with the secretary of treasury the 1,500 shares of canal stock which she then held; whereupon an installment of the $300,000 was paid to the canal company; and afterwards, from time to time, the secretary of treasury paid over to the canal company the residue of the appropriation, without requiring of the city of Alexandria any further deposit of stock. Probably this was done in conformity with the literal terms of the act which failed to define the number of shares contemplated, and instead of requiring payments to be made *pari passu* with deliveries of stock by the city, required payments to be made to the canal company "as the progress of the work should require the same." All this transpired in the year 1837. The secretary did not call upon Alexandria to deposit, nor did the

city deposit, any other shares of the canal stock than the original 1,500 shares. Nor did the secretary, during the period of the ensuing 10 years, sell the stock which he had of the Alexandria Canal Company, to satisfy the trust for which he held it, as defined in the act first above referred to, of May 20, 1836, defining the purposes for which the stock should be sold. As before said, Alexandria, after March 3, 1837, acquired 3,500 shares of the canal stock, in addition to the 1,500 shares which she had deposited with the secretary of treasury. And no call having been made upon her within the period of 10 years within which the secretary was empowered to sell the stock in satisfaction of her indebtedness to the United States, she, in 1847, under an act of the general assembly of Virginia, (acts of assembly for 1846–47, p. 93,) passed March 1, 1847, exchanged 2,720 of the 3,500 shares of canal stock then held by her, with the state of Virginia, for bonds of the state to the amount of $272,000, the canal stock going into the custody and possession of the board of public works of Virginia, where it now is.

In 1881 a bill was exhibited by the United States in this court, against the city of Alexandria and the Alexandria Canal Company, demanding, among other things, a specific performance of what was alleged to have been the contract between Alexandria and the United States embodied in the act of March 3, 1837, which has been quoted above. The present proceeding is part of that suit. On all the proofs taken in the progress of that suit it was held, on final hearing, that congress in the act mentioned had contemplated the surrender of 3,500 shares of canal stock by Alexandria to the secretary of treasury, and it was decreed October 6, 1882, that the city was bound to deliver that number of shares. But it had been developed in that suit that Alexandria then held but 780 shares, having assigned and transferred the rest—2,720 shares—to the state of Virginia for valuable consideration. The 1,500 shares deposited in 1837 with the secretary of treasury, and these 780 shares delivered under the said decree of October, 1882, made up only 2,280 shares, leaving still due from Alexandria to the United States 1,220 shares. Her total subscription of 5,000 shares had gone,—first 1,500 shares, and afterwards 780, under decree, to the secretary of treasury, and 2,720 to the state of Virginia; making in all, 5,000 shares, and leaving none in her possession with which to supply the additional claim of the United States for 1,220 shares. Since the decree for specific performance entered October 6, 1882, the United States has filed its petition in this cause against the board of public works of Virginia, asking that that corporation, which has possession of the 2,720 shares of canal stock which it received from Alexandria in 1847, should be made party defendant in this suit, and required by this court to deliver 1,220 shares of the same to the secretary of treasury of the United States; the petition maintaining that the act of congress of March 3, 1837, affected the state of Virginia with notice of the trust

which bound that stock as defined in the act of May 20, 1836, and that the state, in equity and good conscience, should surrender the same to the secretary of treasury.

Edmund Waddill, U. S. Atty., and *H. H. Wells*, for the United States.

Frank S. Blair, Atty. Gen., for Board of Public Works.

HUGHES, J. I am now to pass upon the question of constructive notice as affecting the state of Virginia. I refer to my opinion delivered on the original hearing of this cause on October, 6, 1882, filed in the papers of the cause, and reported in 4 Hughes, 545; S. C. *ante*, 609, as showing the grounds on which I held that Alexandria was bound to deliver 3,500 shares of the canal stock in all, 2,000 in addition to those formerly deposited, to the United States. It will be seen that one of the questions at issue in that litigation was whether Alexandria, by depositing all the stock which she owned on the third of March, 1837, and at the time of the deposit, had not fully complied with the requirements of the statute? This was a pretension strongly supported by the fact that the secretary of treasury, by not having demanded a deposit of more than 1,500 shares, had seemed to adopt and act upon that view of the subject. But I held, on all the proofs, that the act had contemplated the deposit of 3,500 shares, and therefore that Alexandria was bound to make further deposit of the remaining 2,000 shares due. I also declared in that case, which declaration, however, was then but a *dictum*, that Virginia could not be required, even if she were a party to the suit, to return any part of the 2,720 shares which she had purchased from Alexandria in 1847. The ground of this declaration was stated to be that Virginia was not made cognizant of the fact of Alexandria not having an equitable right to dispose of as many as 2,720 shares of the canal stock as she did dispose of; that fact not having been brought home to the mind of the legislature of Virginia when it passed the act authorizing the exchange of state bonds for these shares, which was made.

Now that Virginia, in the corporate person of her board of public works, has been made a party to this suit, and that point is especially under litigation, and has been argued, I find no cause to change that opinion. Conceding, for the sake of argument, that the act of congress of March 3, 1837, being part of a public act, did affect Virginia with constructive notice that the shares then held by Alexandria in the canal company, when delivered to the secretary of treasury, would be liable to the trust defined in the previous act of May 20, 1836; yet it is certain that such notice only embraced the express contents of the act, and such other facts as, upon reasonable inquiry, were suggested or implied by the act. As an instrument of constructive notification, interfering with the freedom of commercial dealing, the act was to be strictly construed: Third persons could not be expected to know all its history,—all the considerations which inspired its passage,—and its relations to all the bonds of Alexandria Canal

Company, which at any time, however remote in the future, Alexandria might own; nor were third persons bound to look through a period of 44 subsequent years, and to anticipate the litigation instituted in this court in 1881, to determine how many shares of canal stock congress had intended that Alexandria should deposit with the secretary of treasury. The act gave notice that the stock then held by Alexandria should be deposited; inquiry would have developed that the number of shares then held was 1,500, and that these were deposited. The act gave notice that within 10 years from its date the secretary should sell all the stock which the act had required to be deposited; inquiry would have disclosed that after the expiration of the 10 years Alexandria held 3,500 shares, more or less of it possibly repurchased at the secretary's sale. The reasonable inference was that stock held after March 3, 1847, was not affected by the act of 10 years previous, nor by the trust which it defined and imposed. In short, it is plain to me that the act of March 3, 1837, was not such in terms, nor the proceedings of the secretary such, under it, as to convey notice to Virginia that any part of the 2,720 shares which she purchased in 1847 from Alexandria was affected by a trust which could invalidate her title. Indeed, as before suggested, that question was not actually settled, even as against Alexandria herself, until the decree in this cause, before mentioned as having been entered on October 6, 1882. Such being the state of things as to constructive notice, there is no proof that the legislature of Virginia, or her board of public works, had actual notice of the *status* of the stock which she purchased from Alexandria, in its relation to the congressional act of March 3, 1837. I believe it is not pretended by counsel that there was actual notice in any degree or form. Virginia is therefore an innocent and *bona fide* holder, for full consideration paid, of the whole 2,720 shares of canal stock now held by her board of public works. She has equitable title to it, and she has, besides, the legal title in and lawful possession of it.

Besides the foregoing consideration, it may be added that the deposit of stock provided for in the congressional act of March 3, 1837, was an executory contract. The trust established upon the stock was not to attach until it had been actually deposited, "with proper and competent instruments and conveyances in law to vest the same in the secretary of the treasury." Until so deposited and legally transferred, Alexandria, though bound in equity to deliver a certain portion of it to the United States, was in law at liberty to transfer and sell it, and make good title to it to any *bona fide* purchaser for valuable consideration who was not cognizant of her obligations respecting it. As the case stands, the United States has an equity to have 1,220 shares of the canal stock once owned by Alexandria transferred to the secretary of treasury, unless they have lost their equity by sleeping for more than 40 years upon their rights. On the other hand, Virginia has an equity to have the whole 2,720

shares of the stock which she purchased in good faith and without adverse notice, from Alexandria, and has also the legal title derived by legal transfer, and by quiet possession of more than 30 years. Her right therefore must prevail.

Entertaining these views on the merits of the case, it was useless for me to go into the question of jurisdiction raised at bar, or into the question how far governments and states are bound by the *laches* of their public offices, or by the lapse of time.

The petition of the United States must be dismissed.

DILLARD and another *v.* PATON and others.

(*Circuit Court, W. D. Tennessee.* March 15, 1884.)

1. CONTRACTS—SALE—EXCHANGE ASSOCIATIONS—RULES AND REGULATIONS—EFFECT OF NON-OBSERVANCE.

   Where merchants form voluntary associations "to establish just and equitable principles, uniform usages, rules, and regulations, which shall govern all transactions" between the members, parties dealing with each other, who are members, make the rules and regulations a part of their contract, and the courts will enforce them as such; but this only when they are observed by the members involved in the controversy; for the habitual non-observance by them in their dealings with each other will abrogate the particular rule violated, and relegate the contract to the ordinary rules of law governing it.

2. SAME—COTTON EXCHANGE OF MEMPHIS—RULE 9—RISK OF LOSS BY FIRE.

   Where two members of the Cotton Exchange of Memphis, in their dealings with each other, for a series of years paid no attention on either side to a rule of the exchange which provided that delivery of cotton should not be considered final until the cotton was paid for, the contract involved in this suit should not be governed by the rule of the exchange, but by the general law. Where, therefore, a sale of 270 bales was made by sample, an order given by the seller to the warehouseman to deliver to the buyer, the warehouseman and the buyer weighed the cotton, the buyer sampled it, approved 268 bales, and rejected two, put his "class" and "shipping" marks upon it, and gave written directions to his drayman to remove it from the shed, *held*, that the title passed to the buyer when these things were done, and a loss by fire before removal from the warehouse was his loss, although the cotton had not, at the time of the fire, been actually paid for.

3. SAME—CONSTRUCTION OF THE RULE—WAIVER.

   Where the rule of the Cotton Exchange of Memphis provided "all cotton shall be received within five working days from date of sale. The weighing and examining of cotton shall constitute a confirmation of sale, but delivery shall not be considered final until paid for,—the factor's policy of insurance to cover until delivered and paid for; payment being considered final act of delivery,"—*it seems* that a transaction under this rule is not an executory agreement to sell when payment is made, but that it is mere stipulation for the security of the seller, which enables him at his option to refuse to part with the posession until payment is made. But, whatever be the proper construction of the rule, where parties by an habitual course of dealing with each other had wholly disregarded it on both sides, and the seller in the particular transaction, as in all others, delivered unconditionally, and without restraint as to possession and use, and manifested no concern about securing payment through the rule, *held*, that this amounts to waiver by the seller of a stipulation solely for his benefit, and the risk of loss by fire passed with the title to the buyer on actual delivery to him. This waiver by the seller need not be in express terms, but may be fairly inferred from his conduct and acts.

FINDING OF FACTS.

This case, by stipulation of the parties under the statute, was submitted to the court without a jury. The court found the following to be the material facts:

I. The plaintiffs and defendants are members of the Memphis Cotton Exchange, an incorporated association, the purposes of which are thus described by its constitution:

"ARTICLE II.—PURPOSES.

"Section 1. The purposes of this association shall be to provide and maintain suitable rooms for a cotton exchange in the city of Memphis; to adjust controversies between members; to establish just and equitable principles, uniform usages, rules, and regulations, and standards for classifications, which shall govern all transactions connected with the cotton trade; to acquire, preserve, and disseminate information connected therewith; to decrease the risks incident thereto; and, generally, to promote the interests of the trade, and increase the facilities and the amount of the cotton business in the city of Memphis."

II. Among other things, not necessary to mention, the constitution also contains the following:

"ARTICLE VIII.—DUTIES OF MEMBERS.

"Section 1. Every member, upon admission, pledges himself to abide by the constitution, and also by all by-laws, rules, and regulations of the exchange."

III. The rules and regulations for the sale and transfer of cotton prescribed by the association are as follows:

"1. All resampling, or examination by boring, shall be performed after cotton shall have been weighed.

"2. All cotton must be examined and received by the purchaser before removal from its place of storage.

"3. The seller of cotton is entitled to his samples, but, when required by the buyer, shall allow him to take them to his office for the purpose of comparison, and when that is done shall return them, and a failure to do so will forfeit his right in the future to remove them from the office of the seller.

"4. Three hundred pounds shall constitute the minimum weight of a merchantable bale of cotton, and the buyer shall have the right to reject all bales below that weight; but if received an allowance of four dollars per bale shall be made to the buyer.

"5. Six ties only shall be permitted on each bale, unless an allowance is made of two pounds for every tie above that number.

"6. All seedy, mixed, fraudulently packed, and damaged cotton may be rejected, and must be done at its relative value in the list purchased; but the grade of the cotton by marks shall be given to the buyer at the time of sale, or before the day of delivery, if required by him, and cotton sold by samples must be delivered accordingly, unless rejected for causes above stated.

"7. The practice of examination by boring cotton, which prevails in this market, before passing of same, is understood to be the rule as to the manner of receiving, and relieves the seller from any liability for reclamation on mixed, fraudulently packed, or damaged cotton.

"8. All cotton shall be understood to be in good order; but if not, it shall be repaired within twenty-four hours from the time of delivery, and if not done within that time the necessary repairs may be made by the buyer at

the expense of the seller. No claims for repairs shall be allowed after the removal of cotton from its place of storage.

"9. All cotton shall be received within five working days from date of sale. The weighing and examining of cotton shall constitute a confirmation of sale, but delivery shall not be considered final until paid for. The factor's policy of insurance to cover until delivered and paid for; payment being considered final act of delivery.

"10. No order for the delivery of cotton is transferable without the knowledge and consent of the seller."

IV. When rule 9 of the cotton exchange was under consideration by the association it did not contain the last clause, viz., "payment being considered the final act of delivery." But a resolution was adopted appointing a committee to confer with the board of underwriters "to gain information regarding the insurance of cotton under process of delivery," and upon such conference a report was made that "after a lengthy discussion as to the indorsement and acceptance of rule 9 by the board of underwriters," a committee was appointed by that body to meet the directory of the exchange, "in order that rule 9 may be so amended, if thought proper, as to harmonize the different views." Whereupon the matter was discussed between the directors and the underwriters' committee, and resulted in adding the above clause to the rule, its acceptance by the underwriters, and at the same time the adoption by them of the following resolution: "Resolved, that our policies on cotton in sheds as now written provide all the security to the assured which they require, therefore additional legislation on the subject is superfluous."

V. The plaintiffs are cotton factors, and the defendants cotton brokers or buyers, doing business in the city of Memphis; and at the time of the transaction in controversy in this suit were members of the cotton exchange, while the above provisions of the constitution and by-laws were in force.

VI. The plaintiffs and defendants bargained with each other for the sale and purchase of 270 bales of cotton, selected by sample, and identified by certain marks upon the bales and samples. The cotton was at the time, with other cotton of the plaintiffs', stored in a public warehouse in Memphis. The date of this bargaining was on the seventeenth and eighteenth of October, 1882.

VII. The plaintiffs, as soon as the bargain was made, sent to the warehouseman, according to the usual course of business, written orders for its delivery to the defendants, specifying the lots and marks corresponding to those upon the samples, of which orders the following is a specimen: "MEMPHIS, TENN., Oct. 17, 1882. Merchants' Cotton Compress & Storage Co. will please deliver to A. A. Paton & Co. nineteen bales of cotton, of the following marks and numbers. DILLARD & COFFIN."

VIII. Upon the receipt of these orders the warehousemen turned out the lots of cotton specified, and aligned them in the yard of the shed for convenience of examination, weighing, and marking. On Saturday, October 21, 1882, the agents of the defendants appeared at the shed, and the weigher of the warehouse, jointly with the weigher of the defendants, weighed this cotton, each taking down the weights and agreeing as to the weight of each bale; whereupon the borers of the defendants examined each bale by boring with the auger, and the "classer" of defendants sampled and classed it, two of the bales being rejected and discarded from the lot. These agents of the defendants then marked the cotton with the "class" and "shipping" marks of the defendants, and, according to the usual course of business, placed upon a hook, kept for the purpose outside the warehouse office, a written direction to defendants' drayman to remove the cotton to the place designated therein. It was the habit of defendants' drayman to come to the shed whenever, in the

course of the business, he could, and to take this order from the hook and remove the cotton. The plaintiffs and the warehousemen had done everything required of either in the usual course of business to place the cotton in possession of the defendants, and nothing remained to be done by either to complete the transaction, so far as the right of removal of the cotton by the defendants was involved. About noon this part of the business was completed, and the defendants' agents left the shed, taking with them, as usual, the borings or loose cotton. They reported their weights, etc., to the defendants' office, but at what precise time does not appear by the proof, though it does appear that, in the usual course of business, this was done the same day, or that night, or next morning.

IX. The warehouseman, according to his custom, promptly reported his weights and the rejections to the plaintiff's office, and thereupon, during the afternoon of Saturday, October 21, 1882, they sent their bill or account of the cotton to defendants for $14,945.56, the price agreed upon for the 268 bales, which was not paid. The messenger was instructed to deliver the bill and bring back the check, if paid, but not to insist on payment. The bill was handed to some one in defendants' office, and left there by the messenger. It was the usual custom of defendants to pay for cotton purchased by them at about 2 o'clock P. M., on the day following the examination and weighing, after comparison of the factor's bill as rendered with their own report of the weights and rejections. It was also their custom to have cotton hauled to the compress, and, on receipt of the dray tickets showing its delivery there, to take the tickets to their transportation agent, receive bills of lading, attach them to drafts on their correspondents at Liverpool, or elsewhere, negotiate them in their bank at Memphis, and pay factors by checks on that bank. It was also their custom to remove cotton promptly after examination and weighing, but pressure of business, bad weather, and like circumstances, sometimes delayed removals, so that there was no fixed business custom in that matter, except to remove as speedily as possible in all cases.

X. The defendants were and are entirely solvent, and paid promptly for their purchases, never asking indulgence of plaintiffs.

XI. The plaintiffs never insisted that defendants should pay for their purchases of cotton before its removal from the warehouse or before they took possession, and it was their custom to present their bills to defendants as soon as they received reports of weights, and sometimes, when their bank account was not easy, to ask payment on account before the bills were made out, but not to press for payment on the same day of receiving reports of acceptance by defendants.

XII. The defendants, in a very large proportion of their dealings with the plaintiffs, which dealings covered many years prior and subsequent to the organization of the Cotton Exchange, removed the cotton purchased before paying for it. In the same season of this transaction there were given in evidence 17 other transactions between them of like character, and in 13 of them the cotton was removed before payment; in one instance how this fact was does not appear, and in two of them the cotton was removed and paid for the same day, but which preceded the other, does not appear; and in the remaining transaction the largest part of the lot was removed and paid for the same day, but whether removal or payment first took place does not appear, while a few bales of the lot were paid for before removal. Or, to state these facts somewhat differently, there were covered by these 17 transactions 2,294 bales of cotton, of which 1,720 were removed by the defendants before payment, 531 were removed and paid for on the same day, but whether payment or removal came first does not appear; as to 30 bales no showing whatever is made by the proof, and 13 bales were paid for before removal.

XIII. About 7 o'clock Saturday evening, October 21, 1882, the cotton in the warehouse caught fire, including the 268 bales involved in this contro-

versy and was almost entirely consumed, one bale only of this lot being saved without damage. There were besides this lot of 268 bales in dispute between the parties, 618 bales belonging to the plaintiffs burned in the fire, this disputed lot being in the yard of the shed in the same place it was left at the time of the weighing, examination, and marking above mentioned.

XIV. One of the defendants was at the fire for a short time and knew that their agents had weighed and examined this cotton on that day at this shed, but supposed it was in the compress building, which was separated from the shed by a wall between the two; and on the following morning plaintiffs sent a message to defendants' manager that the cotton could be partiallly saved, and invoked the assistance of defendants to that end, but he declined to have anything to do with it, and denied the defendants had any interest in the cotton. The plaintiffs did all that could be done towards saving this 268 bales with theirs, and, it having become indistinguishable from the other cotton by the destruction of the marks, the whole was sold in a mass as damaged cotton, and plaintiffs did then and now offer to give defendants credit for their share of the proceeds, amounting to $1,110.74, about which estimate there is no dispute; nor is there any dispute about the weights and price of the entire lot of 139,388 pounds for $14,945.56.

XV. The plaintiffs have frequently demanded payment of the defendants, which has been refused.

CONCLUSIONS OF LAW.

The court found the following conclusions of law, arising upon the foregoing facts:

1. The delivery of the cotton was complete and sufficient to pass the title to defendants before the fire, and the risk of loss was theirs.

2. The plaintiffs are entitled to judgment against the defendants for the sum of $13,834.82, and interest thereon at 6 per cent. per annum from the twenty-first day of October, 1882, to this date, and the amount of the judgment should therefore be $14,996.95, and costs.

Wright, Folkes & Wright and *Metcalf & Walker*, for plaintiffs.

Gantt & Patterson and *Dyer, Lee & Ellis*, for defendants.

HAMMOND, J. Outside of the rules of the cotton exchange there could be no possible doubt about this case. The delivery was as complete as it was possible to be, and under the general law the title passed to the defendants from the moment they examined, approved, and marked the cotton, and the risk of loss by fire was theirs. *Leonard* v. *Davis*, 1 Black, 476, 483; *Hatch* v. *Oil Co.* 100 U. S. 124, 128; *Tome* v. *Dubois*, 6 Wall. 548, 554; *Williams* v. *Adams*, 3 Sneed, 358; *Bush* v. *Barfield*, 1 Cold. 93; *Porter* v. *Coward*, Meigs, 25; 1 Amer. Law Rev. 413, and authorities cited. The defendants concede this; but they say that under these cotton-exchange rules the contract of the parties was "not a sale, but a mere executory agreement to sell," by the terms of which contract the sale was not completed by the agreement as to quantity, quality, and price, or by that agreement accompanied by delivery, but only by the actual payment of the price, until which payment the title remained with the plaintiffs, and the risk of loss by fire was theirs. And it is as frankly conceded by these plaintiffs that if this case falls within the rules of the cotton

exchange, and this be the proper and legal construction of the contract, the defendants are not liable.

The first inquiry then is, does this contract come within rule 9 of the exchange? It cannot be denied that parties may contract as they please, no matter how injudiciously, in the light of subsequent events, the contract may appear to have been made, or how absurd it may seem in the relation of the parties to it. Nor can it be denied that merchants may voluntarily associate together, and prescribe for themselves regulations to establish, define, and control the usages or customs that shall prevail in their dealings with each other. These are useful institutions, and the courts recognize their value and enforce their rules whenever parties deal under them, in which case the regulations become, undoubtedly, a part of the contract. *Thorne* v. *Prentiss*, 83 Ill. 99; *Goddard* v. *Merchants' Exchange*, 9 Mo. App. 290. But they have not, any more than other customs and usages, the force and effect of positive statutes nor of the rules of the common law, and the courts do not particularly favor them. *The Reeside*, 2 Sumn. 568; *The Illinois*, 2 Flippin, 422. Parties are not bound to contract under them if they choose to disregard them, and they may, and often do, observe part and discard part, as the plaintiffs and defendants here have evidently done. In all the dealings between these parties during that season, exclusive of this, amounting to more than 2,000 bales, only 13 were actually paid for before they were in fact delivered to defendants and by them removed, so far as we can certainly see how that fact was, while more that 1,700 bales were permitted by the plaintiffs to pass into the hands of defendants without payment. And yet, we are asked, as to these 268 bales, to reverse, on the strength of this rule, such a course of dealing, and adhere to its literalism in order to throw this loss on the plaintiffs. Take the rule for all it is worth and it amounts only to this: The plaintiffs and defendants have voluntarily agreed to be bound by it, and, by the same volition, have in all their dealings hitherto paid no attention to it. They have thus established, for themselves and as between each other, a different and special custom to which this rule has had no application, and in direct contravention of it; and this they can always do. *Thorne* v. *Prentiss*, *supra*. Nor is it necessary to expressly stipulate for such exclusion of the operation of the rules, usage, or custom.

"And not only," says Mr. Parsons, "is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by a necessary implication, as by providing that the thing shall be done in a different way. For a custom can no more be set up against the clear intention of the parties than against their express agreement." 2 Pars. Cont. 59; Id. (6th Ed.) 546, which was approved in *Ins. Cos.* v. *Wright*, 1 Wall. 456, 471. The supreme court says the usage or custom, when the contract is made with reference to it, becomes a part of the contract, and may not improperly

be considered the law of the contract. *Renner* v. *Bank of Columbia*, 9 Wheat. 581, 588. And the actual custom or usage of the parties in dealing with each other is as much a part of the contract under this rule as a general custom prevailing in the trade. *Bliven* v. *New England Screw Co.* 23 How. 420, 431. "A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict, or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing." *Nat. Bank* v. *Burkhardt*, 100 U. S. 686, 692. Here the intention of the parties to deal with each other, without reference to this custom or rule established for them by the cotton exchange, is manifested in the clearest way by their habitual and uniform dealings with each other for a long series of years prior and subsequent to the organization of the exchange. Neither party has thought it necessary to be governed by it, and like many other rules, usages, and customs it has become, by their voluntary disregard of it, a dead letter. And the explanation of this is found in the fact that the plaintiffs, for whose protection it was evidently intended, did not deem it necessary to enforce it against the defendants, who are so amply solvent that it is their boast in the proof that they never asked indulgence.

If it be conceded that the defendants had an interest in this rule, by reason of the provisions in reference to insurance, the principle is not changed. It would be, then, a stipulation collateral to the contract of sale, and wholly so. Whether the plaintiffs or defendants should, under this rule, have insured the cotton is immaterial and unimportant to the issues in this case. Its insurance or non-insurance by either could not affect the title, or change the risk of loss by fire which always follows the title in the absence of any agreement to the contrary. Either or both might have insured their respective interests in the cotton; and whether one or the other did insure, or omitted to insure, would only tend to show, if they did not intend to assume their own risk, that in their opinion they had an interest, or did not have an interest, as the case might be. But such an opinion by either would not bind the other as to which of them the cotton belonged, in a controversy about the title, as this is. The title must depend on the facts about the contract of sale, and wholly on them. Nor, if we treat it as a question of evidence, does the existence of any supposed interest of the defendants in rule 9 change the result. It is perfectly plain to my mind, in view of the history of this rule in its relation to the underwriters, as shown by the proof, that this last clause was added by the underwriters to make more clear the requirement that the factor's policy should terminate with payment for the cotton; and it may be a proper construction of the rule, as between a factor and his underwriters, if it be true that the policy be written

by this rule, that his policy shall cover his interest in the cotton until it is paid for, no matter how long payment may be delayed, or where the cotton may be, whether in the shed or at Liverpool, or *en route* to that or some other destination. But what interest does this give the buyer in that question, or how can it affect his obligation to pay? Not in the least, it seems to me. Suppose the factor has no insurance,—and he need have none,—of what concern is that to the buyer, and how can it affect his obligation to pay, after he has taken the cotton into his possession and, it may be, consumed it in the mills? Insured or uninsured, as the factor may be, the contract of sale between him and the buyer is independent of the fact, and must stand upon its own bottom, and be determined on its own facts. This rule is clearly not a stipulation by the factor to keep the cotton insured for the *buyer's* benefit; but if it were, the remedy would be a suit by the buyer against the factor for a breach of that stipulation, if it had not been complied with, and not to withhold the purchase money on the theory that there had been no sale. He might set off his claim for damages in a suit for the price, but this case presents no feature of that kind. The provision in this rule about insurance, then, if not one wholly relating to the factor and his underwriter, with whom the buyer has no concern, as it manifestly is, can only be a collateral contract between the factor and the buyer, and in no sense does it afford any solution to the question we have in hand. All evidence whether either plaintiffs or defendants were insured as to this cotton was therefore properly excluded as irrelevant and immaterial.

Looking, then, as we must, beyond and outside of all questions of insurance or supposed insurance, and we are brought back to the fact that, in all their dealings with each other, notwithstanding the pledge contained in article 8 of the constitution of the cotton exchange, the plaintiffs and defendants have, in violation of their constitutional pledges, dealt with each other without regard to the stipulation of rule 9, that "delivery shall not be considered final until paid for;" that is, until the cotton is paid for. The plaintiffs have never refused delivery or retained the cotton until paid for, but have almost always delivered before payment, while the defendants have never been careful to pay before taking possession of and removing the cotton, nor at all scrupulous in regard to it. Perhaps, in the usual order of business, they would prefer to get the cotton, put it under bills of lading, assign them *and the cotton* to their bank in negotiation of bills of exchange with which to supply the funds, and thereby make each shipment or purchase of cotton pay for itself. This is not according to rule 9, for when they have put their bills in bank they have not only had "delivery," but have likewise "delivered" the cotton to another. There is nothing very sacred about the constitutional pledge or rule 9 when the parties mutually agree to the violation, and they need not do this by *express* agreement, as I have already shown. On this subject the supreme court of Illinois says:

"We do not entertain a doubt but that all contracts of sales within the contemplation of these rules must be construed as if the rules were expressly made a part of the contract; but there is nothing to which our attention has been directed, in the charter of the board of trade, and certainly nothing in the general law which prohibits members of that board from contracting 'on 'change,' or elsewhere, so as to bind themselves to obligations beyond and independently of these rules. The only difficulty that can arise in this respect must be in determining whether the parties intended their contract should be construed with reference to the rules of the board of trade, or that obligations were assumed outside of those rules." *Thorne* v. *Prentiss*, 83 Ill. 99, 100.

We may add that the presumption of the law is that merchants deal with each other under the wise provisions and protection of the general law that governs all men in their dealings, unless the contrary clearly appears; and if they expect the courts to observe their rules and enforce them they must themselves observe them. Otherwise, they are neither a custom or usage to control the contract.

This view of the case disposes of it, and, strictly, we need take no further notice of rule 9, but might leave it until its perplexities appear in some dispute between a factor and an insolvent buyer or his attaching creditors, or between a dishonest factor and conflicting buyers, or between some factor and his insurance company,—all of which situations have been suggested in aid of its interpretation. But the learned argument of the defendants' counsel in favor of their contention that this was an executory agreement to sell, and not a sale, under rule 9, should receive from the court that attention it deserves, particularly since this may not be a final disposition of the case, and another court may, possibly, think it necessary to construe this rule as a part of the contract. But I must be permitted to say that the real contention of the defendants is that their risk on cotton purchased by them does not attach until they actually remove it from the warehouse; but there being no such rule among these regulations, they have seized on this contrivance of an executory agreement to sell in order to effectuate the same result. Yet it needs only a little analysis to show that this construction of rule 9 goes further than this and leads to some very absurd consequences, so far, at least, as it concerns the factor—so very absurd that the wonder is sane men should ever have adopted a rule to be so construed.

If the title does not pass to place the risk of loss by fire on the buyer until the buyer pays for the cotton, why draw the line at the cotton-shed? When it reaches the compress, if not yet paid for, the risk of loss by fire is still with the factor. So it is, if not paid for, on the rail or river, at a sea-port, on the ocean, in Liverpool, at the mills, in the store where the cotton goods are on display, and when they have been sold to consumers. Until paid for there is no sale of the cotton, say defendants, and by withholding payment we need not insure at all, but leave the risk with the factor or his insurance company under his

ninth-rule policy; and if burned at sea or elsewhere, not having paid him, he cannot make us pay, and must lose the cotton.

Again, why draw any line at a loss by fire, or at any loss at all? The defense is just as effective were the cotton still in existence. Paton & Co. say to Dillard & Coffin, when sued for the price of the cotton, as they are here sued: "We have not yet paid you, and until it suits our pleasure to pay no title passes, and there has been no sale—only an executory agreement to sell; wherefore, your suit must fail and be dismissed." The result is they keep the cotton and never pay for it, for this is as good an answer to every suit for the price until payment has been made *in fact*, (when there is no longer any need of a suit at all,) as it is here. This is little short of the case put as an illustration by Mr. Justice GRIER, where a man sued by his tailor for the price of a suit of clothes comes into court with the clothes on his back and sets up that the goods were smuggled by the tailor. *Randon* v. *Toby*, 11 How. 480, 521. Indeed, the defense is not so good, for here there is no fault of the plaintiffs alleged,—absolutely none,—but only that the defendants themselves have not paid what they had agreed to pay. Is it not apparent that the accident of a loss by fire does not change the merits of the defense? It is equally available with or without the loss, for it in no way depends on that accidental circumstance. It is as good with the cotton in Liverpool as it is with its ashes in the Memphis cotton-shed, and no better or worse in either place. Simply stated, the broad proposition is, "This was a conditional sale, or an executory agreement to sell when I pay for the cotton; and, although I have appropriated it to my own use, so long as I do not pay there is no obligation on me to pay, and no suit for the price will lie."

"Was such a thing ever heard of," asks THOMPSON, J., in the Missouri court of appeals, "as that a creditor loses his remedy against his debtor by not demanding payment on the day when the debt fell due?" (*Beveridge* v. *Richmond*, 16 Chi. Leg. N. 93;) and we may, paraphrasing the question, ask, "Was ever it heard that a buyer can refuse payment for the sole reason that he has not paid?" It must be confessed this may be a possible inference from the literalism of the rule, but it does not certainly appear that it was ever intended to have such a construction as that by the men who made it; nor does the case of *Leigh* v. *M. & O. R. Co.* 58 Ala. 165, justify such a construction of it. Nor does the case clearly fall within the third rule of Mr. Justice BLACKBURN, so much relied upon by the defendants. 1 Benj. Sales, (4th Amer. Ed.) p. 359, § 366; Id. p. 376, §§ 391–393; Id. p. 396, §§ 425–436. And for the reason that these authorities all show that where delivery has been actually made to the buyer, the intention to reserve the title to the seller and consequent risk of loss by accident, must plainly appear from the terms of the contract. Now, this rule does not say, in terms, that the title is reserved to the seller, but, on the contrary, says that "weighing and

examining the cotton shall be a confirmation of the sale," (whatever that may mean,) but that "*delivery* shall not be considered final until paid for." The construction contended for by defendants is merely inference from this language, and it is susceptible of different and antagonistic constructions. The implications of the parties' dealings and surroundings are not favorable to this construction, and the nature of the trade and property is against it. It is not to be presumed that the seller assumes such peril in the cotton trade without an express or clearly-implied intention to do so. Occasional and exceptional circumstances might prompt a merchant to make such a contract to secure his price, but he would hardly desire it as a business usage in the cotton trade.

The more reasonable construction is that it was intended as a security of a different character, for the sole benefit of the factor against insolvent buyers, and to enable him, in a case where his interest requires, to keep the cotton in his possession, and refuse to surrender that possession until payment is made. It may be the courts would, possibly, in favor of the factor, extend the construction to cover a case where the purchaser was in actual possession and refused to pay, by holding that it was a conditional sale, and that the title remained, as between these two, with the factor until payment actually made,—or as between the factor and creditors of the purchaser,—but it is hardly possible the courts would, in favor of the buyer after he had taken absolute dominion, construe the rule to be only an executory agreement to sell when payment was made. If so, as to either construction, without a stipulation to the contrary, the risk of loss by fire would, undoubtedly, remain with the factor. These are, however, perplexities about this construction, as between the factor and those claiming against him, it is best to leave for decision when the cases arise. But as between the factor and the buyer, no matter what the proper construction of the rule may be, the factor may always waive this security in his favor, deliver the cotton unconditionally, and collect his money. Whenever he delivers the cotton absolutely, without any manifestation of an intention to claim his security, or, rather, with an expressed or plainly implied relinquishment of it,—whatever be its legal characteristics,—from that moment the title passes to the buyer, the risk of loss by fire is his, and he can never defend a suit for the price by refusing to perform the condition or carry out his part of the executory agreement. As to him the contract becomes executed whenever the seller chooses to so deliver and he accepts. The seller may, under such a contract, always waive the stipulation in his favor, and he does this whenever he delivers with the intention of not claiming it. That the plaintiffs did this here is abundantly shown by the proof. The waiver need not be express, but may be by implication resulting from acts and conduct. 2 Benj. Sales, p. 742, § 858. Of course, I need not say that plaintiffs here would not be permitted to exercise their right of waiver

after a loss by fire, so as to change the risk. They did not do this, but waived their security under this rule by delivery prior to the fire, without insisting on payment under the rule before delivery, as they had often done before. Neither will the defendants, after accepting this waiver by taking the cotton, be permitted to change the risk by refusing a payment which they were under legal obligation to have made on Saturday, before the fire. I do not think either the plaintiffs or defendants had any intention of making the kind of contract the defendants now pretend to have made, by distorting the language of this rule; but if they ever did intend to trade under the rule, they never carried out that intention, so far as this proof shows, and this is a waiver of it. The proposed usage of rule 9 has never become a usage at all as to these two members, and this by their own act.

Judgment for the plaintiffs.

BROWN and others *v.* LEE and others.

(*District Court, N. D. Mississippi.* March 12, 1884.)

MISJOINDER OF CAUSES OF ACTION—JOINT AND SEVERAL LIABILITY.

Where two or more defendants are sued jointly, a count in the same action against one of them alone upon his several liability cannot be sustained.

Demurrer to Declaration.

Lamar, Mayes & Branham, for plaintiffs.

C. B. Howry, for defendants.

HILL, J. The questions presented for decision arise upon the demurrer of the defendant A. C. Jobes to the second count in the declaration. The declaration in the first count charges that the defendants Lee and C. S. Jobes, under the firm name of Lee & Jobes, drew their bill of exchange upon the bank of Kosciusko, of which said Lee, C. S. Jobes, and A. C. Jobes were the owners and partners, the same being a private and unincorporated banking house, payable 90 days after date, which was delivered to plaintiffs and afterwards presented to the bank for acceptance and accepted, and when due was presented for payment, which was refused, of which the drawers had due notice. The second count charges that afterwards A. C. Jobes, for a valuable consideration, promised in writing that if plaintiffs would send the bill back he would pay it, which was done, but payment was refused. The letter, which is alleged contains this promise, is exhibited with the declaration, and is signed "Cashier." There is no objection to joining the drawers, acceptors, and indorsers liable upon a bill of exchange in an action. This suit is properly brought against Lee and C. S. Jobes, as drawers, and the same parties, with A. C. Jobes, as

partners, under the name of the Kosciusko Bank, as acceptors. The question is, can A. C. Jobes be sued in the same action, in a separate count, upon an individual undertaking in which neither of the other defendants are sought to be made liable. If in writing the letter upon which the promise is based he acted as a member of the banking firm, then he would be liable, if at all, by the promise made in the letter as a partner in the banking firm, and not as an individual. It is true that by the laws of this state all partnership contracts are both joint and several, and an action may be maintained against one partner upon a partnership contract as a several and individual obligation; and if the suit was brought against A. C. Jobes alone, upon the acceptance as a several and individual obligation, then I see no reason why the second count might not be joined in the declaration. But the general rule of pleading stated in Chit. Pl., and all the other elementary works on that subject, is that the joint action must be in favor of all as plaintiff, and against all as defendants, and that there cannot be united in one action a count against two or more, and in the same action a count against one of the defendants; and the high court of errors and appeals of the state, in the case of *Miller* v. *Northern Bank of Mississippi*, 5 George, (Miss.) 412, announced the same rule, which stands unreversed, so far I am informed. Under this rule I am of opinion that the demurrer to the second count must be sustained, with leave to the plaintiffs to amend their declarations if they shall be so advised.

UNITED STATES *ex rel.* SPINK.[1]

UNITED STATES *ex rel.* WILLIAMS.[1]

(*Circuit Court, E. D. Louisiana.* March 3, 1884.)

1. HABEAS CORPUS.
   Where parties have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana, to imprison them for exercising this right is to imprison them in violation of the laws of the United States.
2. SAME.
   The orders and writs of this court are issued under and by the authority of the laws of the United States, and when the affidavits against the relators were made in contempt of the restraining orders of this court, and the relators are imprisoned by virtue of such affidavits, they are imprisoned in violation of the laws of the United States.
3. SAME—JURISDICTION—REV. ST. 753.
   If relators are imprisoned in violation of the laws of the United States, this court, under section 753, Rev. St., has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of their detention, and upon the hearing it has jurisdiction, and it is its duty to discharge them.

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

Habeas Corpus.

E. Howard McCaleb, Joseph P. Hornor, and *F. W. Baker,* for relators.

James R. Beckwith, contra.

PARDEE, J. In our opinion these parties, Spink and Williams, have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana. It has been practically so decided by this court in *The Flynn Case,* the district judge presiding, at the November term, 1882, which case is now pending on appeal in the Supreme Court of the United States. To imprison them for exercising this right is therefore, in the opinion of this court, to imprison them in violation of the laws of the United States. We desire to express our great respect for the opinions and decisions of the supreme court of the state of Louisiana; and the opinion here presented in the case *Ex rel. Williams* v. *Livaudais,* 35 La. Ann. ——, lately decided, we have considered attentively; but as the question in controversy is one as to the proper construction of the laws of the United States, and of their force and effect, we feel bound to follow the adjudicated cases of our court, rather than the opinion of a state court, although of conceded high rank and authority in all questions of law. Further, in these present cases it appears that the affidavits upon which these relators have been arrested, and are now imprisoned, were made by several persons who are each defendants in certain equity cases now pending in this court, wherein this same right to pilot through South pass is involved, and wherein these persons have been severally restrained and enjoined, until the further orders of court, from making such affidavits and instituting such proceedings. The various orders and writs of this court are issued under and by authority of the laws of the United States. As the affidavits were made in contempt of the restraining orders of this court, and as the relators are imprisoned by virtue of such affidavits, it would seem from this view also that the relators are imprisoned in violation of the laws of the United States. If these relators are imprisoned in violation of the laws of the laws of the United States, this court, under section 753, Rev. St., has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of their detention, and, upon the hearing, it has jurisdiction, and it is its duty to discharge them.

BILLINGS, J., concurred.

UNITED STATES v. KELLER.

(Circuit Court, D. West Virginia. 1884.)

1. CRIMINAL LAW—PROVINCE OF JURORS.
   Jurors are not the judges of the law as well as the facts, but must take the law as given by the court.
2. SAME—INDICTMENT.
   Where each count in an indictment constitutes a distinct and separate offense, if one is found to be true the verdict must be "guilty," even though the jury finds against the other counts.
3. SAME—EVIDENCE—REASONABLE DOUBT.
   Preponderance of evidence against an accused party will not of itself warrant a conviction, but the jury must be satisfied beyond a reasonable doubt of his guilt as charged in the indictment.
4. MANSLAUGHTER—COLLISION—PROOF—MALICE—NEGLIGENCE.
   In trials for manslaughter, under the statute of the United States, making the officers of a steamer, in case of a fatal accident, liable to prosecution for that offense, it is not necessary to prove malice, provided negligence is proved, and a violation of the navigation laws, nor need it be proved that such negligence or violation were willful and intentional.
5. SAME—DEFINITION OF NEGLIGENCE.
   Negligence is the omission to perform some duty, or the violation of some rule, which is made to govern and control one in the discharge of some duty.
6. SAME—NAVIGATION LAWS—DUTIES OF PILOTS.
   In the event of there being no signal made on a descending steamer, as required by the navigation laws, or a signal made not understood on board of the ascending steamer, the latter must stop and not proceed again until the two steamers come to a complete understanding as to the course to be pursued.
7. SAME—RESPONSIBILITY OF PILOTS.
   If the ascending steamer fails to return the signal of the steamer descending, and chooses rather to make a cross-signal, the acceptance of this by the descending steamer does not excuse the pilot of the other for his first fault.
8. SAME.
   The wrongful act of the pilot of one vessel contributing to the accident does not justify the pilot of the other vessel for his neglect of duty.

For Manslaughter.

The case arose out of a collision between the steamers Scioto and John Lomas, in the Ohio river, between Mingo island and Indian Cross creek. The defendant was the pilot of the steamer Scioto, and was navigating his boat up the Ohio river on the fourth day of July, 1882, with about 500 persons on board. The John Lomas was at the same time coming down the river, also heavily loaded, but was much the smaller boat of the two, although much more strongly built than the Scioto. The boats came in sight of each other when they were about 1,200 yards apart, the Scioto being about Cross creek and the Lomas about the head of Mingo island. The defendant was indicted for manslaughter, under section 5344 of the Revised Statutes. The indictment contained four counts. The first count charged that the pilot of the John Lomas (his being the descending boat) blew one sound of his whistle for passing, by keeping to the right, when the boats were 900 yards apart; that the Scioto at the time this whistle

was blown was to the left of the Lomas, on the West Virginia side of the river; and that after said whistle was blown the defendant, without answering the whistle, steered his boat deliberately across the river in the direction the Lomas was going down; and when about the middle of the river answered with two sounds of his steam-whistle instead of one, as he should have done; and that by reason of this cross-whistle, and of other acts of misconduct, negligence, and inattention to his duties as pilot by the defendant, the boats collided, the Scioto was sunk, and that by reason and in consequence thereof the lives of 58 persons, whose names were given, and 25 others, whose names were unknown, were destroyed. This count also contained various specific charges of misconduct on the part of the defendant, such as being drunk, having too many people in the pilot-house, allowing women to steer the boat, etc. The second count was like the first except that it omitted a part of the specific acts of misconduct, etc., contained in the first. The third count charged that the signal for passing had not been sounded by the pilot of the John Lomas and answered by the defendant when the boats arrived at a distance of 800 yards from each other; that when they arrived at a distance of 800 yards from each other they were likely to pass near each other; that notwithstanding this fact both pilots failed to stop their engines, or to change their course, or to do anything to prevent a collision, but kept on in the direction of each other until the distance between them was about 500 yards, when the pilot of the John Lomas blew one sound of his steam-whistle for passing to the right and the defendant, the pilot of the Scioto, after some delay and without any necessity therefor, crossed the whistle and answered with two sounds of his whistle instead of one; and then contained the proper averments, showing that the death of the persons above referred to was caused by the misconduct, negligence, and inattention to his duties as pilot by the defendant. The fourth count was general, and charged in a general way, without any specific acts of misconduct, negligence, and inattention to his duty as pilot by the defendant; that the collision which was the immediate and direct cause of the death of these persons was caused by the misconduct, negligence, and inattention to his duties as pilot of the defendant. The evidence as to the position of the boats in the river at the time the whistle for passing to the right by the pilot of the steamer John Lomas was blown, and also as to the position of the Scioto in the river when the defendant answered with two sounds of his whistle, was conflicting.

The evidence for the government was that the first whistle of the John Lomas was blown when that boat was between the island and Mingo furnace; and that the Lomas was shaping her course towards the Ohio shore; and that at the same time the Scioto was down about De Vinny's warehouse, and about one third of the way out from the West Virginia shore; that after this one whistle of the Lomas the Scioto shaped her course, *quartering* (as the witnesses called

it) toward the Ohio shore, and at about the middle of the river the pilot of the Scioto blew his cross-whistle. On the other hand, the evidence of the defendant was that after passing around Cross-creek bar he shaped the course of his boat to the Ohio shore, and ran up that shore from 80 to 90 yards from it, and about parallel with the shore, to the place of the collision. He admitted that he did not stop the engines of his boat, or do anything else to prevent a collision, from the time the boats came within 800 yards of each other until he blew his cross-whistle, when they were from 350 to 400 yards apart; and that he then for the first time stopped his engines, and set them to backing, when he blew his cross-whistle; and that this was, in his best judgment, at the time, all he could do to prevent the collision which followed.

The pilot of the Lomas was examined as a witness for the defendant, and testified that when the defendant sounded his two whistles the boats were, in his opinion, about 500 yards apart, the Lomas running down the Ohio shore and the Scioto about the middle of the river and running *quartering* to the Ohio shore; and that her position in the river was such that he supposed her pilot was determined to run to the Ohio shore; and that for this reason he determined to give him the Ohio shore by starting his engines to backing and thereby get out of his way; and for that reason he answered the Scioto with two whistles and gave her the Ohio shore, which, in his opinion, was the best thing he could do under the circumstances; that when he set his engines to backing he supposed that his rudder was straight in the water, but he found, whether by his carelessness or what else, he did not know, his rudder had changed to the Ohio shore, and the force of the current took his wheel out of his hand and threw the stern of his boat towards the Ohio shore, and she ran in that position half way to the place of the collision before he got the control of his wheel again, but that when he did so the collision had become inevitable. He further testified that the blowing of the cross-whistle by the defendant had nothing to do with his wheel getting out of his hands. On cross-examination he testified that this cross-whistle did have something to do with the stopping of his engines, and the attempt to back his boat; and that but for those two whistles by the defendant he would not have stopped his engines, nor attempted to back his boat, and would have had no occasion to do so; and that if the defendant had answered with one whistle, and steered his boat accordingly, there would have been no collision.

Several pilots were examined as experts, and all of them testified that if the boats were running directly towards each other when they were 500 yards apart, and that the pilot of the John Lomas, even at that distance, blew one whistle, if the pilot of the Sciota had promptly answered with one whistle, and each boat had steered to the right in accordance with these whistles, that the collision could have been avoided.

W. H. H. Flick, Dist. Atty., and *James H. Ferguson*, Spec. Asst. Dist. Atty., for the Government.

John A. Hutchinson and *B. B. Dovener*, for defendant.

JACKSON, J., (*charging jury.*) It must be gratifying to you that we are at last approaching the conclusion of this protracted trial. Its great importance, both to the country and the accused, fully justifies the time consumed in its investigation. The defendant is indicted under section 5344 of the Revised Statutes, which declares "that every captain, engineer, pilot, or other person employed on any steam-boat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed; and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter." The indictment in this case contains four distinct counts, setting up and charging the offense in as many different ways. The difference in the counts consists in the manner the offense is stated, and in describing different acts under the statute charged as general misconduct, negligence, and inattention to duty. Each count in the indictment constitutes a distinct and separate offense; and if you find from the evidence that the allegation as laid in any one of the counts in the indictments are true, it will be your duty to return a verdict of guilty, although you may find against all of the remaining counts. It is not the practice of this court to discuss the effect of evidence submitted to the jury, but to leave its consideration with the jury, as being more properly within the province of its duty. It is my duty to give you the law applicable to the issue as made up, which you are sworn to try and a true verdict to render, under the law and the evidence.

The court is asked to tell you that in the trial of criminal cases the jury is the judge of both the law and the fact. Such is not the case. The court explains the law, and it is both your moral and legal duty to accept it as given you "unless you can say upon your oaths that you are better judges of the law than the court." Of course you can disregard the instructions of the court and refuse to accept the law as given to you by it; but if you do you exercise a purely arbitrary power, which, in the case of an acquittal, makes the decision final, although the guilt of the party may have been fully established. It therefore follows that a jury which desires to discharge its whole duty must take the law from the court and apply it to the facts of the case it is called to pass upon. Before you can return a verdict of guilty against the accused, under this indictment, you must reach the conclusion that all the material allegations contained in some one of the counts in the indictment have been fully proved. It is not enough to convict that there is a preponderance of evidence against the defendant; but you must be satisfied from the evidence, beyond a reasonable doubt, of his guilt as charged in the indictment. This doubt must be real and substantial, and not an

imaginary or speculative doubt. It must rest upon the fact that the evidence is insufficient, in your judgment, to justify you in returning a verdict of guilty against the accused. If, therefore, you have such a doubt as I have described, it will be your duty to give the accused the benefit of it. It is manifest that when congress passed this act that its intention was to make all officers or persons who fall within its terms responsible for the loss of human life, when it results from their misconduct, negligence, or inattention to their duty. The law is humane in its provisions, and no one can question the wisdom and policy of congress in passing and placing it upon the federal statute books. It is the duty of the court, however unpleasant it may be, when called upon, to enforce it, and you, gentlemen of the jury, being an arm of the court in the execution of the law, if you reach the conclusion that this defendant has violated this statute, your plain duty is to return a verdict of guilty. You will observe, under the statute, that it is not necessary for you to find that the defendant was guilty of willful or intentional misconduct, negligence, or inattention to duty. It is sufficient if you find that he was guilty of a violation of the statute, in the absence of any intent; and if you so find, then a verdict of guilty should be returned. Otherwise your verdict should be for the accused.

In this connection it is proper that I should inform you what constitutes negligence. It has been well defined to be "a breach of duty." I think, however, the better definition is that it is an omission to perform some duty, or it is a violation of some rule, which is made to govern and control one in the discharge of some duty. Applying this rule of law, if you should find from the evidence that the accused omitted to perform any duty, or that there was an absence of proper attention, care, or skill, and the performance of his duties as pilot of the Scioto, then you must of necessity find him guilty of negligence; and that if in consequence of such negligence the life of any person was lost, then you must find him guilty as charged in the indictment. Upon your retirement to your chamber the first inquiry that should engage your attention is whether any of the persons named in the indictment lost his life in this collision. The fact that a number of lives were lost at the time of the collision is not disputed; but it is claimed by the defendant that the collision was not the immediate cause of the losing of life of any one of the persons named in the indictment. You will determine this question of fact, and ascertain whether the collision was the immediate cause of the death of any one of the persons named in the indictment. If you find the fact to be as the prosecution claims it, your next inquiry will be whether the loss of life was in any respect attributable "to the misconduct, negligence, or inattention to duty of the accused;" for if it was solely due to other causes, then the defendant would be excused. If, however, it is answered in the affirmative, you should then ascertain whether the accused was, as charged in the indict-

ment, the pilot on the Scioto, at the wheel, steering and guiding her, shortly before and at the time of the collision. In considering these questions, you should bear in mind the rule of law, that every one accused of crime is presumed to be innocent until his guilt is established by proof.

I have heretofore called your attention to the rules of criminal law applicable to this case, and it now becomes my duty to construe the rules and regulations for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico and their tributaries. These rules are authorized by an act of congress, and were adopted by the board of supervising inspectors, June 1, 1871, and, as amended in 1880, were in force on the fourth day of July, 1882, when the collision occurred. Since their adoption they furnish the paramount rules for pilots in guiding and steering steamers on the rivers flowing into the Gulf of Mexico.

Under rule 1[1] it is the duty of the descending boat, when the steamers are approaching each other, to give the signal for passing, indicating on which side she will pass the ascending boat, and when such signal is given it is the duty of the ascending boat to promptly answer and accept such signal so given, which, being done, becomes an understanding between the pilots of the two steamers as to the course each steamer will take to avoid a collision in passing. This rule was binding on the pilots of both boats at the time the Lomas blew her first whistle and before the collision occurred, and it was their duty to obey it. Neither of them should have disregarded it, unless there was at the time such imminent danger of collision that to accept it would tend to increase that danger. It is a conceded fact in this case that the first signal was given by the Lomas blowing one blast of her steam-whistle, indicating that she desired to pass to the right of the Scioto, and that the pilot of the Scioto replied with two whistles. Under this rule it was clearly the duty of the pilot of the Scioto to accept promptly the signal given by the Lomas, if in his power to do so. This was his plain duty, and he had no right to disregard it so as to change and "cross the whistle." If he could not accept the signal of the Lomas without imminent danger to his boat from collision or otherwise, he should have stopped, and, if necessary, backed her, and waited until he had arrived at an understanding with the Lomas. Ordinary prudence demanded this much from an officer in his position, and if he failed to do this he neglected to pursue the course that ordinary care and prudence would require him to do. If you should reach the conclusion that this action of the pilot of the Scioto, in replying with two whistles instead of one, produced confusion between the pilots which contributed to or caused the col-

[1] Rule 1. When steamers are approaching each other, the signal for passing shall be one sound of the steam-whistle to keep to the right, and two sounds of the steam-whistle to keep to the left; the signals to be made first by the descending steamer.

lision, there can be no escape from the conclusion that he not only did what he ought not to have done, but he omitted to do what he should have done. But if the blowing of the cross-whistle did not contribute to or cause the collision, then the act would not of itself be negligence. But if you should find that the Scioto was in such a position, *without fault of her pilot*, when the Lomas blew her first whistle, that it was either too dangerous or too late to accept with safety the signal so given by the Lomas, and that a collision was so imminent as to be unavoidable, then you would be justified in excusing the defendant. Under this rule this is the only excuse the defendant can offer to justify his conduct. If, therefore, you find from the evidence that there was no contingency such as I have just referred to, it was his duty to accept the signal as given to pass to the right of the Lomas, if he could thereby avoid a collision. Otherwise he should have resorted to all the means in his power to prevent it.

Under rule 2[1] the first clause provides, where two steamers are likely to pass near each other, and the proper signals have not been made and answered by the time they have arrived at the distance of 800 yards of each other, the engines of both boats should be stopped. Applying this rule, if you find from the evidence that the two boats were likely to pass near each other, it was the duty of the Scioto, if the Lomas had given no signal by the time they had arrived at *that distance*, to stop her engines and check her headway. It becomes, then, a pertinent inquiry to ascertain whether this was done, and was the rule complied with. If it was, and still the collision could not have been avoided, then, so far as this defendant was guilty of a neglect of duty under the first clause of this rule, he should be excused. But if an observance of the rule on his part would have prevented the collision, then it was his duty to comply with it, and stop the engines of his boat until a proper understanding was had with the Lomas as to the course each boat would pursue in passing; and a failure to do so was a culpable neglect of duty on his part, which would be inexcusable. Under the second clause of this rule, if the two boats had arrived at a distance less than 800 yards from each other, and no proper signals had been given and answered, or, if given, not properly understood, it was the duty of the pilot of the Scioto to stop the engines of his boat and back her until her headway was fully checked, and not to start his boat ahead again until the proper signals had been made, answered, and understood. You will perceive

[1] Rule 2. Should steamers be likely to pass near each other, and these signals should not be made and answered by the time such boats shall have arrived at the distance of 800 yards of each other, the engines of both boats shall be stopped; or should the signals be given and not properly understood from any cause whatever, both boats shall be backed until their headway shall be fully checked, and the engines shall not be again started ahead until the proper signals are made, answered, and understood. Doubts or fears of misunderstanding signals shall be expressed by several short sounds of the whistle in quick succession.

that this clause of the rule requires the pilot to stop his boat as soon as he arrives inside the 800 yards—the distance fixed by the rule. If the evidence should satisfy you that this was not done, then clearly this is a violation of the rule that was obligatory on him, and which it was his duty to observe. It is for you to decide whether such are the facts, and whether if the rule had then been observed in all its parts, this collision would have been avoided by stopping the engines of his boat and checking her headway. It was his plain duty to do so, and a failure to do it was a culpable neglect of duty.

Under rule 4,[1] if the Scioto was running close on the shore, and at that time the Lomas had come so near that it was possible for a collision to ensue, then the Scioto would not have been justified in crossing the river in front of the Lomas. This rule, of course, must be construed with rule 1, and it is intended to prevent the descending boat from requiring the ascending boat unnecessarily to cross the river, and at the same time to inhibit her from crossing in front of the ascending boat. But if the jury should reach the conclusion that when the Lomas blew one whistle she was either on a line with, or to the left, of the Scioto, and that when she replied with two whistles they continued the same course toward each other until the collision occurred, then rule 4 has no application to the facts of this case. You will, however, apply this rule to the facts, and determine whether these boats bore such a relation to each other as this rule contemplates.

In this case the defendant is responsible only for his own negligence and inattention to duty, and not for that of any other. You are to pass upon the charges as stated in the indictment against him, as it is a matter of no importance, so far as this trial is concerned, whether the pilot of the Lomas was guilty or not guilty of contributing to the collision. Both may be guilty, or one may be guilty and the other innocent. And in this connection it is to be remembered that any wrongful act of the pilot of the Lomas does not justify this defendant for neglect of duty; and the fact that the pilot of the Lomas accepted the cross-signal given by the pilot of the Scioto in replying with two blasts, is no justification for the action of the defendant in this case, and does not release him from the consequences of, or justify his act in, refusing to accept the first signal given by the pilot of the Lomas. And by this I mean that the rules did not authorize the pilot of the Scioto to change the signal. All he could properly do, if the signal given was one he could not accept, was to stop his boat and use all the means in his power to avert a collision. And it is for you to say whether he did follow the rules adopted for his guide in steering his boat; and whether he did all that any prudent and

[1] Rule 4. When a steamer is ascending and running close on a bar or shore, the pilot shall in no case attempt to cross the river when a descending boat shall be so near that it would be possible for a collision to ensue therefrom.

careful pilot could have done to avert the great calamity that overtook his boat. If this collision was the result of misconduct, negligence, and inattention to duty of others then the defendant's, and he in nowise contributed to it, of course it follows that no blame for it can attach to him. He is responsible only for his own conduct on this occasion, and not for the conduct of any other. You must try him upon the charges as laid in the indictment, and find whether they are true or false, and in your investigation you are to pass upon his acts and ascertain for yourselves whether he did, under the rules of navigation, and under the circumstances surrounding him from the time the two boats came in full sight of each other, all that he could do as a careful and prudent pilot to avoid the collision. In this case no question of error of judgment arises, but simply questions of fact which involve his duty, from the time the boats sighted each other until the collision occured.

I trust that you will bring to the examination of this case that calm and considerate reflection that a case of this importance requires. It is important both to the country and the defendant that the facts should be fairly and impartially considered, and the law properly applied, that you may arrive at a just and proper conclusion, and your action fully justified.

The jury found the defendant guilty of manslaughter in manner and form as charged in the indictment against him; and the court refused to set the verdict aside.

SWIFT *v.* JENKS and others.

(*Circuit Court, N. D. New York.* March 3, 1884.)

1. PATENTS—NON-CLAIM OF APPARENT DEVICE—ABANDONMENT.
   The omission by an inventor to claim a combination or device apparent upon the face of his patent amounts to a dedication of the neglected contrivance to the uses of the public.
2. INJUNCTION—NOT TO ISSUE WHEN IT WOULD WORK INJUSTICE.
   An injunction should not issue when it would work great harm to one party without corresponding benefit to the other, at least where adequate protection can be afforded by other means.

Motion for Preliminary Injunction.

Duell & Hey, for complainant.

Neri Pine, for defendants.

COXE, J. This is a motion for a preliminary injunction. The complainant is the inventor of an alleged improvement in lubricators for which letters patent were issued August 28, 1883. The claims in controversy are as follows:

"(5) In combination with the steam-condensing duct and its horizontal extension, *c*, the lubricant-cup composed of metal and provided in front of the duct-extension, *c*, with an observation-port, *r*, covered with a transparent plate, substantially as and for the purposes set forth.

"(6) In combination with the oil-cup of a lubricator, the port, *r*, covered by a glass plate, and the pipe or tube, *c*, having an inclined end or face, substantially as set forth."

Prior to this time, and on the second day of May, 1882, letters patent for a similar invention were issued to the defendants. An interference was declared, and, after a thorough investigation, the examiners and commissioner concurred in deciding that the complainant was the prior inventor. But the proceedings in the patent office determined more. Upon defendants' motion to dissolve the interference the commissioner was required to pass upon the question whether or not the subject-matter claimed was patentable. Various references, which, as was urged by the defendants, anticipated the complainant's invention, were presented, and although the examiners in chief and the commissioner were not in accord upon this question it cannot be denied that the issuing of the patent was, to the extent that the question was there investigated, a decision in favor of the complainant. The proceedings in the patent office having, as between these parties, determined,—*First*, that the complainant was the prior inventor, and, *second*, that the subject-matter of the patent was not void for want of novelty, the complainant would be entitled, if there were no other considerations, to the injunction prayed for, there being no dispute as to the infringement. *Smith* v. *Halkyard*, 16 FED. REP. 414; *Shuter* v. *Davis*, Id. 564.

But the defendants again insist that the patent is void for want of patentable novelty, and in support of this defense they produce various references not presented to the examiners. They also produce affidavits tending to show that one Giles was the original inventor of the patented device or combination. But the argument having the most weight with the court is the one based upon the complainant's prior patent of March 21, 1882. It is urged that he there fully discloses the subject matter of claim 5, *supra*. The language of the specification is as follows:

"It is not essential that the cylinder should be wholly of glass, so long as that portion directly opposite the end of the tube or pipe, E, is transparent, to expose to view the end thereof * * * the cylinder may be constructed of metal, with a window or 'sight' on a line opposite the tube or pipe."

The metal cylinder with the glass observation port opposite the end of the tube was not claimed in the March patent, and the language of Mr. Justice BRADLEY in *Miller* v. *Brass Co.* 104 U. S. 352, is therefore applicable:

"But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is

not claimed. It is a declaration that that which is not claimed is either not the patentee's invention or, if his, he dedicates it to the public."

It is argued for the complainant that the patent in suit is not for a particular device but for a combination, and that, construed most favorably for the defendants, the March patent discloses but one element of that combination. This contention presents for consideration a number of questions not argued upon the motion, but which may perhaps be sufficiently suggested by an examination of *Slawson* v. *Grand St. R. R.* 107 U. S. 649; S. C. 2 Sup. Ct. Rep. 663, and other like authorities.

Although the papers presented on this motion have been carefully examined it is not the purpose of the court to discuss the defenses referred to at this time or express an opinion regarding them; they should be disposed of only after careful consideration on final hearing. They are mentioned here simply to show that the defendants have succeeded in raising a sufficient doubt as to the validity of the complainant's patent to induce the court to withhold the writ asked for provided the complainant's right can be fully protected without resort to so positive a remedy. Where an injunction will work great injury to one party without corresponding benefit to the other it should not ordinarily issue, especially where adequate protection can be had without it.

An injunction should issue unless the defendants within 15 days after service of a certified copy of the order entered upon this decision shall give a bond with two or more sureties to be approved by a commissioner of this court, conditioned to keep an account of all the lubricators manufactured and sold by them and to file such account duly verified once a month in the office of the clerk of this court, and to pay the amount of any final decree which may be awarded against them; the penalty of the bond to be in such sum as may be agreed on by the parties, or if they are unable to agree, as may be fixed by the court upon proof by affidavit or otherwise of the extent of the defendants' business.

THE FISH-WHEEL CASE.

WILLIAMS *v.* MCCORD and others.

(*Circuit Court, D. Oregon.* March 26, 1884.)

PATENT FOR "REVOLVING DIP-NET."

The patent issued to Thornton F. Williams on August 2, 1881, and numbered 245,251, for an "improvement in revolving dip-nets," declared void for want of both invention and novelty, the same having been invented and put into operation by Samuel Wilson at the Cascades of the Columbia in the spring of 1879, from which machine the said Williams, in the fall of that year and the spring of 1880, constructed his "revolving dip-net."

Suit for Infringement of Patent, and for an account and injunction.

D. P. Kennedy and *William B. Gilbert*, for plaintiff.

H. B. Nicholas, for defendant.

DEADY, J. This suit was commenced on January 12, 1883, and is brought against the defendants for an account, and to recover damages for the wrongful use, by them, of a certain "revolving dip-net," alleged to have been invented by the plaintiff, and for an injunction to restrain them from the further use thereof. The bill alleged that the plaintiff, being the first and original inventor of such dip-net, on November 4, 1880, applied for letters patent thereon, which were duly issued to him on August 2, 1881, and numbered 245,251; that the defendants, on March 1, 1882, without the consent of the plaintiff, constructed "a revolving dip-net on the south side of Bradford's island, in the Columbia river, * * * embracing the improvement and invention described in said letters patent," and maintained the same "in operation during the fishing season of 1882,"—that is, from April 1st to August 1st,—to the damage of the plaintiff, $100; and still continues to operate the same.

The defendants, answering the complaint, deny that the plaintiff is the original inventor of the net in question, and that the same was not in public use when the plaintiff applied for his letters patent, and allege that said dip-net was fully described in Harper's *Monthly Magazine* for May, 1880; that Samuel Wilson, of Dallas, Iowa, invented and put in operation, on the Columbia river, the dip-net described in the bill, in April, 1879, long before the alleged invention of the plaintiff, and that the plaintiff surreptitiously availed himself of said Wilson's idea and invention, and obtained a patent for the same while the latter was engaged in perfecting it; but that neither said Wilson nor the plaintiff were the first inventors of said dip-net, and that the same had been in use in other places, by other persons, for the purpose of catching fish, for many years before, specifying, among others, sundry places and persons on the Catawba and Pee Dee rivers, in North Carolina, where it had been in use, in some instances, for more than 50 years; that on January 4, 1882, the defendant McCord, being the first and original inventor of certain improvements in a fish wheel, made application for letters patent thereon, which, on May 16th of the same year, were duly issued to him and other defendants, as the assignees of said McCord, and numbered 251,960, for an invention entitled a "fish wheel;" that afterwards, in 1882, the defendants licensed the "Snail Wheel Fishing Company," a corporation duly formed under the laws of Oregon, the defendants being the officers and stockholders thereof, to conduct such a fish wheel on the south side of Bradford's island, and that said corporation did construct and operate such wheel at said place during the fishing season of 1882, which is the same machine referred to and mentioned in the bill as being an infringement on the plaintiff's dip-net.

It appears from the evidence that fish wheels or dipping wheels

have been used on various rivers in North Carolina for the purpose of taking shad and other fish that are in the habit of ascending the same, as alleged in the answer. The wheel consisted of an axle or shaft of four or five feet in length, resting horizontally upon two upright posts or forked timbers planted on either side of a sluice or chute in the river, into which were let three pairs of arms or bows from three to eight feet long, owing to the depth of the water, and equidistant from each other. These arms were made of tough wood, and bent forward at the outer end like a plow-handle, and covered with a netting of twine so as to constitute a "dipper," not unlike in appearance, according to the language of a witness, "the top of a falling top buggy." The wheel was turned down stream by the force of the current striking the back of the "dippers," one of which was always in the water, and into which the fish ascending the stream by that chute or sluice went, and were carried upwards and backwards over the shaft and lodged on an inclined trough made of slats placed between the inner ends of the arms, on which they slide down into a box or tank immediately outside of the in-shore post.

In the spring of 1879 and prior thereto, Samuel Wilson, a carpenter, who was living at the Cascades of the Columbia, on the Washington side, conceived the idea of taking fish by means of a wheel driven by the current, and actually constructed one and put it in operation there by April, 1879, but on account of the health of himself and family he returned to Iowa in May of that year, leaving his wheel in charge of James Parker, who took a few fish in it before the high water carried it away. Afterwards, on March 28, 1882, Wilson applied for a patent on his invention of "a new and improved fishing wheel," which was issued to him on September 12, 1882, and numbered 264,395. In the specification it is described as "a wheel constructed with nets embraced in four or more sections thereof, to each of which nets an opening is made from the periphery or near it, and from which there is an escape passage from the center of the wheel, and at one side, to a chute leading to a cage-net, all so arranged that the wheel, being located in a fish-way, to be rotated by the water flowing against it, or by another wheel attached to the shaft outside of the fish-way, the mouths of the passages into the nets of the wheel will open at the rear of the wheel to the fish ascending the stream, to be entered by them as they attempt to pass under the wheel, whereby, as that side of the wheel rises, the fish will be caught, carried up, and shunted out through the aforesaid side central passages into the chute, by which they will be delivered into the trap-cage, to be taken out at pleasure, as hereinafter more fully described." The size of the wheel might vary from 10 to 40 feet, owing to the depth of the water; and the one constructed was about 20 feet in diameter.

As early as the spring of 1877 the plaintiff lived at the Cascades of the Columbia, on the Oregon side, and was engaged in taking fish there with the ordinary gill and dip net, and has lived there ever

since. It is asserted in his testimony that he "conceived" the idea of this revolving dip-net in the fall of 1878; and that he commenced to construct it then, but did not get the lumber in time to finish it for the fishing season of 1879, and therefore abandoned it or gave it up till the fall of that year, when he went to work on it again, and got it into operation in time for the fishing season of 1880, and afterwards obtained a patent for the same, as alleged in the bill. In his specification the plaintiff describes his alleged invention as "a new and useful improvement in revolving dip-nets," and claims "as new" therein:

(1) "The box-nets, I, constructed with holes, M, at their inner ends, substantially as herein shown and described, whereby the first (?) [fish or nets] are discharged, as set forth; (2) the nets, I, secured to arms of shaft, E, leaving an opening at the front, except at the inner part, for the inlet of the fish, and at the rear an opening for their outlet, as shown and described; and (3) the combination, with a rotary wheel having nets, I, with discharge openings, M, near the hub, and having the inner part inclined towards said openings. of a receptacle, J., arranged as shown and described."

But the decided weight of the evidence is that, in the fall of 1878, the plaintiff was engaged in getting together the material and preparing the timbers for a fish "trap" at the Cascades, and not a wheel or net, which he never completed, and is now falsely claiming to be the *conception* or beginning of his "revolving dip-net;" and that in the fall of 1879 he availed himself of his knowledge of Wilson's invention, thinking, it may be, that he had abandoned it, and constructed the machine for which he afterwards obtained a patent.

In the May number of Harper's *Monthly* for 1880 there is a wood cut of the North Carolina wheel, (page 849,) illustrating an article, "The Shad and the Alewife." The Wilson wheel, either as patented by himself or the plaintiff, although in the main anticipated by the North Carolina wheel, was, so far as appears, constructed without any knowledge of the existence of the latter, and is an improvement upon it in some material particulars. But the plaintiff's wheel being a mere copy of Wilson's, with some immaterial changes in form and material, his patent is void, both for want of invention and novelty. Walk. Pat. §§ 23, 52. The wheel used and patented by the defendants is probably an improvement on Wilson's, particularly in the arrangement of the basket or nets, whereby the fish are discharged below the shaft, and are less liable to be injured. But as the patent to the plaintiff appears to be void for the reasons stated, it is not necessary to consider that question. But I cannot refrain from adding, on behalf of the public, that I think the best disposition that could be made of this controversy would be for the legislature to intervene in the interest of the fish in the future, and prohibit the use of these murderous machines anywhere in the waters of the state.

The bill is dismissed, with costs.

DUKE *v.* GRAHAM.

(*District Court, N. D. Mississippi.* March 5, 1884.)

1. CONTRACT TO ASSIGN PATENT-RIGHT—SPECIFIC PERFORMANCE—INJUNCTION.
Where it was mutually agreed between a patentee and the inventor of an improvement upon his device that the patentee should surrender his individual right, and a new patent for the improved device should be applied for by the two parties jointly, *held* that in equity they were joint owners of the patent as improved by the subsequent invention, and that the inventor of the improvement could restrain the patentee from using his patent, except for their joint benefit.
2. SAME—JURISDICTION OF FEDERAL COURT.
Held, also, that the controversy related to the patent-right itself, and was within the jurisdiction of the circuit court, without respect to diversity of citizenship.

In Equity.

Lamar, Mayes & Branham, for complainant.

H. A. Barr, for defendant.

HILL, J. This cause is submitted upon bill, answer, exhibit, and proofs, from which the following facts appear:

In 1876 the defendant, being the sole owner of the patent of what is known as the Swift cotton press, employed complainant as his agent to sell the right to erect and use said cotton press, and to manufacture and put the same up in the state of Texas. During that time complainant invented and made certain valuable improvements on said press, rendering it much more valuable. An agreement was entered into between complainant and defendant, by which it was mutually agreed that the defendant should surrender his individual right under the Swift patent, and that a new patent should be applied for, for the same invention, with the improvement of complainant—in other words, of the Swift invention as improved by complainant; the application to be made and the patent to be issued in the joint names of complainant and defendant; complainant before that time having assigned the one-half interest in his said invention to defendant.

The bill charges that defendant fraudulently represented to complainant that he could not use his invention without an infraction of the Swift patent, and that if he used it he would charge him as a royalty upon each press the sum of five dollars; and to induce complainant to transfer to him the one-half interest in his invention, he promised that the new patent named be extended for 21 years, instead of 17 years; and further charges that the defendant did not comply with his contract by the surrender of the Swift patent, but, upon the contrary, continued to manufacture and sell presses under it, to the injury of complainant. The allegation that defendant continued to manufacture presses under the Swift patent alone and in his own name is denied in the answer; and denies that he has abandoned its use since said contract, but does not know whether his solicitors, as they were authorized to do, made a formal surrender of all rights under the Swift patent. The proof on this point is not sufficient to overcome this denial in the answer. The contract was evidently a mutual

one between the parties. Complainant could not rightfully make his invention available without the benefit of that secured by the Swift patent, unless he procured a license to do so, for which he would have had to pay a royalty such as might be demanded by defendant; and defendant could not rightfully avail himself of the advantages of the invention and improvement made by complainant, without a license, and such royalty by way of compensation as complainant might demand. To obtain the benefit of the Swift invention, and to prevent its being used in any other way than in connection with his improvement and invention, was the consideration moving complainant to make the assignment, and was a good and valid consideration upon complainant's part; and to get the benefit of complainant's invention and improvement was the consideration moving defendant to agree to surrender his individual right under the Swift patent, and was a good and valid consideration, and estopped defendant from using the invention for his individual benefit, or, aside from its use, under the invention and improvement of complainant. The result is that the complainant is entitled to a decree enjoining and restraining defendant from all right under the Swift patent, or of transferring the right to make and use presses according to that invention only in connection with and as part of the invention of complainant, secured by the letters patent of November 16, 1880: provided, however, that this court has jurisdiction to maintain the bill and grant the relief prayed for, or any part thereof, which it is denied that this court has conferred upon it.

If this had been a transaction accruing after the issuance of the letters patent, the parties both being citizens of this state, it is clear that this court would have no jurisdiction of the subject-matter of the suit, but it is a question involving the property rights, so to speak, of the defendant in the letters patent themselves, and as between the copartners themselves. The bill seeks to set aside the rights conferred upon defendant as one of the partners, and to vest the entire right in complainant. This, it seems to me, affects the patent, and also seeks to restrain the defendant from using in any way the rights conferred under the Swift patent, and which, by the understanding of the parties, was to become, in connection with complainant's improvement thereon, the joint property of complainant and defendant,—the rights secured by the letters patent issued by the government November 16, 1880,—and is essentially different from rights growing out of contracts between the patentees and third parties.

I am of opinion that this court has jurisdiction to determine the question as to the right of the parties to the rights and benefits conferred by the patent issued to them by the government, and enforce their rights by a proper decree. I am further of opinion that the complainant and defendant are in equity the joint owners of the Swift patent, or the rights secured under it as improved by the invention of complainant, and that the complainant has a right to have defendant, and all persons claiming under or through him, enjoined

and restrained from making or using cotton or hay presses as invented and made, and secured by the letters patent known as the Swift invention and patent, except as in connection with complainant's improvement, and under the rights conferred under the patent last issued. A decree will be entered accordingly, and that each party pay one-half the costs of this cause.

MATTHEWS and others *v.* GREEN.[1]

(*Circuit Court, E. D. Pennsylvania.* February 11, 1884.)

PATENT—LICENSE—SALE OF, TO SATISFY JUDGMENT DEBT.

A license to use a patented invention may, by a bill in equity, be subjected to sale for the payment of a judgment debt.

Hearing on Bill, Answer, and Proofs.

This was a bill in equity by John Matthews and others, citizens of New York, against Robert M. Green, a citizen of Pennsylvania, setting forth that by an agreement under seal, dated the thirteenth of February, 1874, complainants, in consideration of one dollar, granted to defendant the exclusive right to use Matthews, patent steel fountains for aerated beverages, patent dated June 25, 1872, No. 182,411, and "Mathews' patent wagons for transporting soda-water fountains," patent dated April 9, 1872, No. 125,592, for the term of the patents, within the city of Philadelphia, provided that defendant should purchase from complainant within four years a number of fountains, equal to one for each 500 inhabitants of the territory; and the defendant agreed to purchase from complainant all the fountains he might need in his business, and not to sell or dispose of the fountains to go outside of the territory without the written consent of the owner of the territory in which he might desire to send them, nor to continue to use the same, except within the territory granted after notice given by complainants. In pursuance of this agreement, a large number of fountains, to the value of about $24,000, were furnished to defendant, and for a balance of the price he gave certain promissory notes, upon which the complainants had obtained judgments, in the court of common pleas of Philadelphia, for $4,709.99, $1,117.17, and $1,203.16, respectively, and upon the first judgment a writ of *fieri facias* had been returned, "no goods." That the defendant had neglected and refused to perform the covenants of said agreement by failing to pay the notes, and by using the fountains without the limits of Philadelphia, after notice. It was provided in the agreement that, upon the failure of the defendant to perform the covenants, the

[1] Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

complainants, at their option, and they being the judges thereof, might cancel the same. The bill prayed an injunction restraining the further use of the patents; that the agreement should be delivered up and canceled; or, in the alternative, that the license or right (if any there be) of the defendant in the patents be ordered to be sold by the decree of the court, to satisfy, so far as may be, the complainants' judgments, and an account of the profits realized by the use of fountains outside of Philadelphia. The defendant claimed that he had sustained damage by reason of defects in the fountains, and by the failure of the complainants to protect him from an interference by parties manufacturing similar fountains, and contended that the written contract had been modified by an understanding that in certain cases he should have the right to use the fountains without the limits of Philadelphia. It appeared that the defense of defects in the fountains had been made by the defendant in the actions upon the above-mentioned promissory notes, and that in one case the jury had rendered a verdict for $1,000 less than the claim of the plaintiffs, and in the remaining two cases the jury had rendered verdicts for the full amounts of the notes. The defense of failure to protect from infringement by other manufacturers was also set up as a defense in these suits. Whether, however, any evidence was given under it, or whether it entered into the computation of damages, was a question in dispute. It also appeared that in 1879 complainants made oath to the invalidity of their patent for fountains, and surrendered it for the purpose of obtaining a reissue.

Wayne McVeagh, (with whom was *G. T. Bispham*,) for complainants.

The matters of defense have passed *in rem judicatam*. The defendant's right was *to use*, not to *make* and *sell*, and not being a grant of an *entire* interest, was a mere license. *Gayler* v. *Wilder*, 10 How. 494; *Hayward* v. *Andrews*, 106 U. S. 673; S. C. 1 Sup. Ct. Rep. 544; Walk. Pat. 216. A patent-right may be taken in execution by bill in equity. *Ager* v. *Murray*, 105 U. S. 126. A license may be equitably conveyed. *Wilson* v. *Stolley*, 4 McLean, 275.

Frank P. Prichard, (with whom was *John G. Johnson*,) for defendant.

Complainants are not entitled to an injunction to restrain a purchaser from using purchased machines because he has failed to pay a balance of the price; nor are they entitled to an injunction restraining the use of the machines outside of Philadelphia since the remedy provided by the agreement for that use was the forfeiture of respondent's exclusive right within the territory. Complainants have shown no such irreparable damage as entitles them to the aid of a court of equity.

BUTLER, J. We see no serious objection to granting the relief asked for by the third prayer of the bill—that the license held by the respondent be sold towards satisfying the complainants' judgments. The paper of February 13, 1874, executed by the parties, was in-

tended to and does control and regulate the use of all the "fountains" obtained. It is, in effect, a license conferring on the respondent a right to use the fountains in the city of Philadelphia, to the exclusion of all other persons. The compensation or price named, and to be paid, was the consideration for the fountains, and the use, thus limited. The respondent having failed to pay the judgments recovered, for money due under this contract, it is just that the license should be subjected to sale for this purpose.

The questions arising out of the first and second prayers need not be discussed. It is sufficient to say that the relief just indicated is all the complainants should have on the bill.

A decree may be prepared accordingly.

THE ASHLAND.[1]

(Circuit Court, E. D. Louisiana. February 12, 1884.)

1. SALVAGE.
   Salvage refused in case where the facts showed that libelants should have had some knowledge of how the vessel got adrift, with her chains and ropes missing, she having been shown to have been securely fastened a short time before.
2. COSTS.
   Where both parties have unnecessarily encumbered the record, no costs will be allowed.

Admiralty Appeal.

R. King Cutler, for libelants.

A. G. Brice, Joseph P. Hornor, and *F. W. Baker*, for claimants.

PARDEE, J. The Ashland was undoubtedly cast adrift from the landing where she was tied by some person or persons, for unlawful purposes. If she was loosed from the shore the ropes and chains with which she was tied would have remained fastened to her, and been dragged along after her in her course down the river. If she was loosed from her deck or from aboard, the ropes and chains would have remained fast to the posts ashore. If she was loosed by casting off both ashore and aboard, the chains, at least, would have remained to show the fact. The shore showed signs of the ropes and chains having been dragged out as the boat went down stream, and neither ropes and chains were found attached to the mooring posts. The conclusion is irresistible that she was cast adrift by letting go the shore end of the ropes and chains with which she was moored, and that she dragged the ropes and chains out after her. The libelants say that they stood on the levee about one and one-half

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

squares above where the Ashland was tied, and saw a light out in the river which looked like a barge afloat, and which they boarded and found to be the Ashland. From where they say they stood it was impossible for them to have seen the Ashland "*out in the river,*" for they stood directly above where she was tied and from where she was cast adrift, without she was pulled out into the river. Unless she was pulled out, she would, of necessity, go down with the current, drifting directly away from libelants and not getting out into the river until a long distance further down stream; and it seems this was the fact, for when she passed the coal-yard, four squares below, she was from 100 to 150 feet out from the bank. From these facts it is safe to say that libelants boarded the Ashland either at or very near her landing. They should have found the ropes and chains attached and dragging after. They found nothing of the kind, except a piece of rope.

Taking the aforesaid facts into consideration, with the evidence of libelant Fisher, corroborated by libelant Deibel, and by Stubbs, Defuer, and Merchant, to this effect, "I was standing on the levee at Burdette street. Mr. Deibel and myself were together, and we started up the street, and stopped at Schilling's box factory, and Stubbs, Defuer, and Merchant came along, and *so I then saw a light out in the river,* and I said, 'Don't that look like a boat going down the river?' and they all said 'Yes, it does;' and then Deibel said, '*There is no harm in going to see;*' and then Deibel and Fisher went to Deibel's boat, already prepared with a 550-foot line,—it would appear that some explanation should be given of the means by which the Ashland got adrift, with her chains and ropes missing, before salvage should be awarded libelants, who, under the circumstances, should have had some knowledge of the matter.

This unfavorable view of libelants' demand for salvage, derived entirely from undisputed facts and circumstances in the case, renders it unnecessary for me to review and analyze the great mass of conflicting evidence brought up in the transcript. And it is a relief to me to escape this task, for, after a thorough examination and consideration of it all, I am unable to say on which side the truth lies. It is inexplicable to me that so much evidently manufactured evidence should be brought forward in such an originally trifling case. And it is not confined to one side; for, while the claimants have offered some ridiculously gotten-up stories as to a conspiracy on the part of libelants to cast the Ashland adrift, the libelants have not hesitated to swear away the reputation for truth of some highly respected and disinterested parties, personally known to me for years as men of fair reputation for honesty and veracity. And then the record shows all the details at length of a disgraceful transaction between Fisher, one of the libelants, and the agent of claimants, in regard to paying money for evidence, of which it is impossible to say from the evidence whether it was honest on either side. If Fisher was acting

honestly in this transaction, then the inference is strong that he was implicated in casting the Ashland adrift. That claimants' agent was acting honestly in the transaction can only be found at the expense of his intelligence. Swindling on the one side, and attempted subornation of perjury on the other, seems to be the most apparent conclusion from the showing made in the record. In the argument each side charged the other with the blame in incumbering the record with so much immaterial matter, so largely increasing costs in the case. Apparently the charge is correct, and on that account I deem it proper to divide the costs.

A decree will be entered in the case dismissing the libel, neither party recovering costs in the district court, but each party paying his own; the costs of this court, including cost of transcript, to be divided, each party to pay one-half.

THE PRINZ GEORG.[1]

(*District Court, E. D. Louisiana.* February, 1884.)

1. JOINDER OF PARTIES.
   Where a thing is defendant, and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; *i. e.*, whenever it is necessary to rank the claims or to proportion the proceeds.
2. SAME.
   When the claims rest upon a charge of a voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz., whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision, in this respect, and for this reason the joinder would be permissible.
3. SAME.
   The joinder is allowed even in cases which are in their origin distinct, and have no connection, save that they are asserted against a common *res*.

In Admiralty. An exception.

Richard De Gray and *R. King Cutler*, for libelants.

E. W. Huntington, *H. L. Dufour*, *Geo. H. Braughn*, *Chas. F. Buck*, *Max Dinklespeil*, and *Emmet D. Craig*, for claimants.

BILLINGS, J. This cause has been heard on an exception of a misjoinder of parties. The numerous libelants were steerage passengers on the libeled vessel on a voyage from Palermo to the port of New Orleans, and have joined in the suit to recover the penalty against the vessel established by the act of August 2, 1884, entitled "An act to regulate the carriage of passengers by sea," (22 St. at Large, 186,) as well as for the recovery of further damages. The suit is a proceeding *in rem*, and the numerous libelants assert distinct

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

claims, each for himself. Can such claims be joined in one suit? I think, upon principle as well as authority, the question must be answered in the affirmative. Where a thing is defendant and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; *i. e.*, whenever it is necessary to rank the claims or to proportion the proceeds. This would happen whenever the proceeds should be insufficient to pay all the claims in full. Again, when, as in this case, the claims rest upon a charge of a voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz., whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision in this respect, and for this reason the joinder would be permissible. But I think the joinder is allowed even in cases which are in their origin distinct, and have no connection save that they are asserted against a common *res*. When there is a suit *in rem*, it is a prerequisite of jurisdiction that there should be a warrant and a seizure. In these cases there must be either the expense of 60 seizures, or there must be a joinder that one seizure may arrest for all the claims. Therefore the joinder is allowed. The difficulties of answering and defending are not enhanced, and the expense is reduced. It is for this reason, also, that the statute permits that suits separately commenced may be consolidated by the court when they are "of a like nature or relative to the same question." 3 St. 21; Rev. St. § 921.

Judge WARE, speaking of unconnected claims of material-men, thus lays down the rule:

"Being maritime liens, there is no doubt that they may be enforced by process in the admiralty, where all may join and have their rights settled in a single suit, or may intervene for their own interest, after a libel has been filed, and have the whole matter disposed of in or under one proceeding, or one attachment, instead of having as many suits as there are creditors." The *Hull of a New Ship*, Davies, (2 Ware,) 203, 205. See, also, Judge BETT'S opinion in *The Childe Harold*, where the same rule was followed, Olc. 275.

The objection is not that the cause of each libelant is not distinctly and issuably stated, but that they are all stated in one pleading, and are in their nature separate causes of action accruing to distinct persons. In other suits the ruling might be very different, but in a proceeding *in rem*, in the admiralty, this is not irregular or unauthorized, and the exception must be overruled.

THE COROZAL.[1]

(*District Court, E. D. Louisiana.* February, 1884.)

AMENDMENTS TO PLEADINGS—ADMIRALTY RULE NO. 24.

Admiralty rule No. 24 is not an arbitrary rule. It does not mean that in every case counts presenting new causes of action may, under all circumstances, be added, but leaves the matter to the discretion of the court, the rule being merely permissive, and the discretion to be exercised upon principles of justice toward the defendant. "Amendments are always limited by due consideration of the rights of the opposite party, and where, by the amendment, he would be prejudiced, it is not allowed."

In Admiralty. An exception to amended libel.

Richard De Gray, for libelant.

Charles B. Singleton, R. H. Browne, and *B. F. Choate*, for claimant.

BILLINGS, J. The vessel had been seized under the libel and released on a stipulation when the amended libel was filed. The original libel was for wages as engineer on a voyage from Cincinnati to the port of New Orleans. The amended libel seeks to recover for wages commencing at the time when the voyage is asserted in the original libel to have begun, and at the same rate, namely, at the rate of $125 per month, for employment down to December 5th, under a contract whereby libelant agreed to devote his time, and did devote his time, first, to an attempt to purchase for the party, who subsequently owned and now owns the Carozal, and later to the superintendence of the building, for the present owner, the said Carozal. The further allegations in the amended libel are that after December 5th the libelant was employed as engineer, making the trip from Cincinnati to New Orleans. The fact that the property has been released on bail would not preclude a proper amendment of the libel; the principle being that the person bailing property is considered as holding it subject to all legal dispositions by the court. *The Harmony*, 1 Gall. 123, 125; *Rex* v. *Holland*, 4 Term R. 457, 458; and Dunlap, Adm. Pr. (marginal paging,) 214; *Newell* v. *Norton*, 3 Wall. 266. The question, then, is to be determined by the general rules controlling amendments in pleading in admiralty. The cause of action is clearly a new one, distinct from that set out in the original libel. The weight of authority is that new counts in revenue and instance causes may be added, but only under particular circumstances. *Sackett* v. *Thompson*, 2 Johns. 206; *The Harmony*, 1 Gall. 124. In *Petre* v. *Craft*, 4 East, 433, the court allowed the amendment on the ground that the amendment was of such a nature that the plaintiff could not thereby introduce any new fact in proof not originally within his contemplation; and in *Newell* v. *Norton*, *supra*, the court sanctioned the allowance of the amendment because it neither increased nor diminished the liability of the sureties upon the bond. I do not un-

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

derstand that the court meant liability in amount, but liability intrinsically. For, though the amount of this liability might not be increased, the substitution of another ground of recovery would substantially vary it.

There is another circumstance which should be considered. The original libel is for mariner's wages solely, and in such class of suits the libelant is dispensed with giving a stipulation with surety for costs. In the libel as amended the cause of action, if it be within the admiralty jurisdiction, presents such a cause of action as would require the actor to give surety for costs. To allow such amendment would be to allow a complaining party to derive an advantage by the amendment which he could not have had in an original suit. Admiralty rule 24, prescribed by the supreme court, is not an arbitrary rule. It does not mean that in every case counts presenting new causes of action may under all circumstances be added, but leaves the matter to the discretion of the court, the rule being merely permissive, and the discretion to be exercised upon principles of justice towards the defendant. The meaning was not to abrogate or qualify the universal rule of pleading, as stated by Stephen in his work on Pleading, at page 75, that "amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment he would be prejudiced, it is not allowed." In the system of pleading in the admiralty, the rules of the common-law courts, so far as they are technical, are relaxed, but, so far as they are founded upon justice between the parties, are unabated.

Considering the case with reference to both the claimant and sureties, I am of the opinion that the exception should be maintained, and the amended libel is accordingly dismissed.

HULL v. DILLS.

(*Circuit Court, D. Indiana.* February 26, 1884.)

JURISDICTION OF UNITED STATES COURTS—HOW AFFECTED BY STATE LAWS.

A bill of complaint having been filed by a ward against his guardian in the United States circuit court for Indiana, it was contended by the defense that, according to the laws of Indiana, in matters of probate, relief could be granted only by the courts in which the proceedings were had, and that these could not be made subject to any collateral proceedings. *Held*, that the equity courts of the United States are not affected by the restrictions laid by the several states upon their own equity courts.

On Demurrer to Bill.

Sullivan & Jones, *W. L. Penfield*, and *E. Callahan*, for complainant.

Coombs, Bell & Morris, for defendant.

WOODS, J. The bill, stated generally, charges that the defendant was appointed guardian of the complainant by the probate court of De Kalb county, Indiana, and that, as such guardian, he wrongfully and fraudulently sold real estate of the complainant for less than its value, and afterwards, in like manner, procured an order of the court for the investment of the proceeds of the sale in other lands, owned by the defendant, at and for a sum greatly exceeding the value of the land, and thereupon conveyed the land to the plaintiff, and procured the approval of the court to the conveyance, by concealing from the court the fact that the land belonged the guardian himself; that the guardian had made false and fraudulent reports, and had been guilty of other official delinquencies specified, (but which need not be particularized here;) and that in October, 1878, the defendant filed with the court his resignation as guardian, concerning which the entry of record made at the time is of the tenor following, to-wit: "Which resignation is accepted." That plaintiff became of lawful age in December, 1882, and on the next day after attaining his majority, executed and tendered to the defendant a reconveyance by quitclaim deed of said land, and demanded an accounting of said guardianship, all of which the defendant refused. The prayer of the bill is "to have the said record and proceedings examined in this court and corrected or revised; annulled, canceled, and set aside;" that the order authorizing such sale may be reviewed and wholly reversed; and that the plaintiff be restored to his rights as if the sale had not been made; and, if this cannot be done, "that an account may be taken of the matters and things charged," etc.; and for general relief.

The objections made to the bill is that it shows a case wherein relief should be sought, and can be granted, only in the circuit court of De Kalb county, Indiana,—the court which is clothed with probate powers, and in which the proceedings complained of were had. In support of this view, counsel for the defendant insist, and the fact cannot be denied, that the supreme court of Indiana has repeatedly

decided that the orders of the probate courts, whether final or interlocutory, are binding until set aside; that they cannot be attacked collaterally; and that they can be set aside or corrected only in the particular court which made them; that a bill in equity is a collateral attack, and cannot be maintained in any other court. Among the cases cited are *Spaulding* v. *Baldwin*, 31 Ind. 376; *Barnes* v. *Bartlett*, 47 Ind. 98; *Holland* v. *State ex rel.* 48 Ind. 391; *Sanders* v. *Loy*, 61 Ind. 298; *Parsons* v. *Milford*, 67 Ind. 489; *Briscoe* v. *Johnson*, 73 Ind. 573; *Candy* v. *Hanmore*, 76 Ind. 125; *Jennison* v. *Hapgood*, 7 Pick. 1; *Paine* v. *Stone*, 10 Pick. 75; *Negley* v. *Gard*, 20 Ohio, 310; *Goodrich* v. *Thompson*, 4 Day, 215; *State* v. *Rolland*, 23 Mo. 95; *Short* v. *Johnson*, 25 Ill. 489; *Iverson* v. *Loberg*, 26 Ill. 180; Freem. Judgm. §§ 319*a*, 608.

Counsel for the complainant, on the contrary, contend that, notwithstanding the statutes which confer probate jurisdiction upon particular courts, courts of equity continue to have jurisdiction in such cases, and consequently that an original bill of review may be maintained in any court of general equity powers, state or national, which can obtain jurisdiction of the parties; and cite *Bond* v. *Lockwood*, 33 Ill. 212; *Wickizer* v. *Cook*, 85 Ill. 68; *Fogarty* v. *Ream*, 100 Ill. 366; Jones & C. Pr. p. 270, § 6; Rorer, Jud. Sales, p. 125, § 317; 2 Story, Eq. § 1339.

Whatever may be the rule in and in respect to the state courts, the jurisdiction of the federal courts, in such cases, if the parties be citizens of different states, seems to have been distinctly declared and upheld. In *Payne* v. *Hook*, 7 Wall. 425, a case wherein the bill sought "to open the settlements with the probate court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator because obtained by false representations," the proposition was advanced "that a federal court of chancery sitting in Missouri will not enforce demands against an administrator or executor, if the state court, having general chancery powers, could not enforce similar demands." In response to this, the supreme court, by DAVIS, J., says: "If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court and overruled."

"We have repeatedly held 'that the jurisdiction of the courts of the United States cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject to neither limitation nor restraint by state legislation; and is uniform throughout the different

states of the Union. *Hyde* v. *Stone*, 20 How. 175; *Union Bank* v. *Jolly's Adm'rs*, 18 How. 503; *Suydam* v. *Broadnax*, 14 Pet. 67." See, also, *Fiske* v. *Hills*, 11 Biss. 294; S. C. 12 FED. REP. 372; *Cornett* v. *Williams*, 20 Wall. 249.

This bill shows that the complainant is a citizen and resident of Illinois, and the respondent of Indiana, and, except in the respect already considered, its sufficiency has not been questioned. The demurrer is therefore overruled.

CARTER *v.* CITY OF NEW ORLEANS.[1]

(Circuit Court, E. D. Louisiana. February, 1884.)

1. INTERVENTIONS IN EQUITY CASES.
   Third persons may be permitted to intervene for their rights in equity cases, if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected. 1 Daniell, Ch. 287, note 2; Story, Eq. Pl. § 220.
2. INJUNCTION—TRUST FUND.
   A creditor of a trust fund is not entitled to an absolute injunction restraining the trustee from paying over any part of the fund, absolutely, but only from making any payment until the complaining creditor is paid.

On Motion of Intervenors to Quash Injunction, and on motion of complainant to strike out the interventions.

Thomas J. Semmes, J. C. Payne, and *Charles Carroll,* for complainant.

Joseph P. Hornor and *Francis W. Baker,* for intervenors.

Charles F. Buck, City Atty., for defendant.

PARDEE, J. This is a suit by a creditor to secure payment from an alleged trust fund, in preference to other creditors, over whom priority is claimed. The fund is not enough to pay all the claims. The intervenors are some of the other creditors, over whom priority is claimed. If their rights are to be affected they are necessary parties. At the hearing, if their rights would be lost by a decree, the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected. 1 Daniell, Ch. 287, note 2; Story, Eq. Pl. § 220. As they are here of their own motion, and as no decree can be rendered without them, and as the court can compel the complainant to bring them in, I see no impropriety in permitting the interventions to remain. The motion to strike off the interventions is therefore denied.

The injunction *pendente* is warranted by the allegations of the bill, but it apparently goes further than is necessary to protect complain-

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

ant's rights. If he is paid in full, his interest ceases, and he cannot complain. The injunction will, therefore, be modified so as only to restrain the defendants from paying other claims out of the fund in question until the complainant is paid the amount of his demands, and this modification will be effected by inserting in the injunction, as set forth in the transcript, page 36, in the tenth line from the bottom, after the word "until," and before the word "ordinances," the words "the demands of the complainant arising under."

Solicitor for defendant will see that the proper order is taken.

WESTERN UNION TEL. Co. *v.* BALTIMORE & O. TEL. Co. and others.

(*Circuit Court S. D. New York.* March 28, 1884.)

RAILROAD IS A POST-ROAD, AND AS SUCH AMENABLE TO ACT OF CONGRESS, JULY 24, 1866.

A railroad is, under the statutes of the United States, a post-road, and accordingly the act of congress of July 24, 1866, giving to all telegraph companies alike the right to construct, maintain, and operate lines along all post-roads of the United States, is paramount over any agreement made by a railroad company securing to a telegraph company the sole use of its line of road for its wires.

In Equity.

Wager Swayne and *Burton N. Harrison*, for Western Union Tel. Co.

Dorsheimer, Bacon & Steele, for Baltimore & O. Tel. Co. and Nat. Tel. Co.

P. B. McLennan, for N. Y., W. S. & B. Ry.

WALLACE, J. The complainant moves for a preliminary injunction to restrain the two telegraph companies defendants from erecting and operating the telegraph line upon the land of the defendant railway company, and to enjoin the railway company from permitting either of the defendant telegraph companies to use its right of way for such purpose, and from violating any of the provisions of an agreement entered into between the complainants and the Jersey City & Albany Railway Company on the seventh day of January, 1880.

The facts are these: On the seventh day of January, 1880, the complainant entered into a written agreement with the Jersey City & Albany Railway Company, which, among other things, contained the following clause:

"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company an exclusive right of way on and along the line and lands of the railway company, and on any extension or branches thereof, for the construction and use of lines of poles and wires for commercial or public uses or business, with the right to put up from time to time such additional wires, or lines of poles and wires, as the telegraph company may deem expedient; and the said railway further agrees * * * that it

will not furnish for any competing line any facilities or assistance that it may lawfully withhold."

At the time this agreement was entered into, the Jersey City & Albany Railway Company was constructing a line of railroad from a point on or near the Hudson river, in the county of Hudson, in the state of New Jersey, and thence northerly to a point at or near Fort Montgomery, on the Hudson river, those points being the *termini* of its route, as provided in its articles of association. It appears by the affidavits that the complainant constructed a telegraph line of about 26 miles in length, along the right of way of the railroad company, between Richfield Junction, New Jersey, and Haverstraw, New York, which was carried into and connected with the several stations of the railway; which line was operated by the complainant under its contract with the Jersey City & Albany Railway Company. In March, 1880, the North River Railway was incorporated and organized, and in May, 1881, the Jersey City & Albany Railway Company consolidated with this corporation. In February, 1880, the defendant the New York, West Shore & Buffalo Railway Company was incorporated and organized, and in June following consolidated with the North River Railway Company, and by the agreement of consolidation succeeded to and assumed all the obligations of the Jersey City & Albany Railway Company to the complainant. The bill alleges that the defendant railway company is now seeking to disaffirm and violate the obligations of the contract of January 7, 1880, and is allowing and assisting the defendant telegraph companies to construct and operate over its right of way a line of telegraph to be operated in competition with any line which may be constructed by the complainant, and that the defendant telegraph companies are proceeding to construct and erect their competing line upon the lands of the railway company without the consent of the complainant, and without acquiring any right of way by condemnation and compensation to the complainants therefor.

It is claimed on the part of the complainant that along certain portions of the lands of the railway company, owing to the physical characteristics of the route, there is not sufficient room for more telegraph lines than are or may be necessary for the convenient operations of the complainant's business. The proofs do not sustain this contention.

Without considering the question whether the railway of the New York, West Shore & Buffalo Company is an extension of the Jersey City & Albany Railway Company, the case may be disposed of upon other grounds. If it was the purpose of the agreement to enable the complainant to exclude all other telegraph companies from acquiring a right of way for constructing and operating their lines over the lands of the railway company, the agreement was void as against public policy, and in contravention of the act of congress of July 24, 1866. That act authorized any telegraph company then organized, or thereafter to be organized, under the laws of any state of the Union, to

construct, maintain, and operate lines of telegraph over and along any post-road of the United States. The railroad here, and all railroads in the United States, are such post-roads; the act of congress applies to them, and its provisions are operative and supreme as a legitimate regulation of commercial intercourse among the states. This was decided by the supreme court in *Pensacola Tel. Co.* v. *Western Union Tel. Co.* 96 U. S. 1. It was not held in that case that a telegraph company could acquire a right of way over a railroad without the consent of the owner of the railroad, or even that the act gave to telegraph companies the power to acquire such a right of way by compulsory proceedings, upon due compensation to the owner; and the contrary was plainly intimated. But the act was considered and expounded as intended, and effectual, to deny to any one telegraph company the power to acquire any such easement in the lands of a railroad for telegraphic facilities as would exclude other companies from obtaining like privileges, and as a declaration by congress of a policy in the interests of the public and of the government which was reasonable and lawful. Since that decision it has been adjudged in two cases in the circuit courts of the United States that a railroad company cannot grant to a telegraph company the exclusive right to establish a line over its right of way. *Western Union Tel. Co.* v. *American Union Tel. Co.* 9 Biss. 72; *Western Union Tel. Co.* v. *Burlington & S. Ry. Co.* 11 FED. REP. 1. See, also, *Western Union Tel. Co.* v. *American Union Tel. Co.* 65 Ga. 160. Whether an agreement of this kind would not be void as intended to strangle competition, and therefore as being in restraint of trade and obnoxious to public policy, irrespective of the act of congress, is a question which it is not necessary to discuss; it suffices that such an agreement is void because contrary to the policy declared by congress.

The agreement here is to be interpreted so as, if possible, to give it some efficacy and validity. Its language is carefully chosen so as to permit it to be thus interpreted. The railway company assumes to grant only "so far as it legally may." Were it not for this qualification the grant would be void. The complainant can take nothing by the agreement beyond such an easement as is necessary for its legitimate use in constructing and operating its lines. To this extent it could acquire the exclusive right. It could not acquire the right to dictate to other telegraph companies upon what terms they may be permitted to construct and operate competing lines. Nor could the railway company put it out of its own power to permit any telegraph company to enjoy the privileges given by the act of congress, by a cession of that power to the complainant. This would be as obnoxious to the spirit and meaning of the statute as a grant excluding other telegraph companies from the lands of the railway. It would be doing indirectly what cannot be done directly. It would lodge the power with a favored company to impose such onerous terms upon other companies as to preclude competition.

If it were impracticable for the defendant telegraph companies to construct their lines upon the lands of the railroad without invading the complainant's easement by using its poles or otherwise, they would be obliged to obtain the consent of the complainant, or resort to such proceedings as are authorized by the laws of the state under the power of eminent domain. Such is not the case exhibited by the record, and the railway company consents. As to these defendants, therefore, the motion for an injunction is denied.

The complainant alleges that the railway company has removed some of the old line of poles and wires erected by the complainant between Richfield Junction and Haverstraw, with the intention of preventing complainant from operating its line. This is denied by the railway company. Sufficient appears, however, to indicate that the railroad company is hostile to the complainant and in sympathy with the defendant telegraph companies, and, in view of all the circumstances, it is deemed reasonable that the complainant be protected during the pendency of the suit in its possession of the line it has actually constructed. To this extent an injunction will be granted as against the railway company.

The agreement between the complainant and the predecessor of the present railway company contains various stipulations for the benefit of the complainant, which the complainant insists the railway company proposes to violate, and should be enjoined from violating. One of these stipulations is that the railway company shall furnish office-room, light, and fuel, free of charge, to the complainant whenever the complainant elects to establish an office at a station of the railway company. As to all these stipulations, it is sufficient to say that the complainant has an adequate remedy at law for any breach that may take place. Although equity interferes by injunction to restrain breach of agreement when the case is one in which a decree for a specific performance might be made, as also in some cases to restrain the breach of negative covenants, the ground of the jurisdiction is that compensation in damages will not afford redress to the complaining party. This is not such a case.

BRASSEY *v.* NEW YORK & N. E. R. Co. and others.

(Circuit Court, D. Connecticut. March 7, 1884.

1. CORPORATION—RECEIVERSHIP—WHEN PROPER.

An insolvent railroad corporation may, in the discretion of the court, upon a bill for an injunction and a receivership, be put in the hands of a receiver whenever the welfare of the various interests clearly requires it, even though no default has actually been made by the corporation in its obligations to the petitioner, but a default is imminent and manifest, and the corporation is in peril of a breaking up and destruction of its business.

2. SAME—COLLUSION, WHEN FRAUDULENT.
The mere concurrence of the directors, in an attempt to secure the appointment of a receiver, does not amount to fraudulent collusion, unless they design some injury to the company or its creditors.
3. FINANCES OF THE NEW YORK AND NEW ENGLAND RAILROAD.
The financial condition of the New York & New England Railroad Company reviewed, and *held* to warrant the appointment of a receiver.

Motion of Jonas H. French and others to dissolve order appointing receiver, etc.

SHIPMAN, J. The petitioners have put their case upon the ground that neither the allegations of the original bill nor the facts in regard to the New York & New England Railroad Company existing at the time of the appointment of the receiver justified the order, but that, on the contrary, the institution of the suit and the procurement of the vote of the directors at a special meeting assenting to the proposed appointment were a plan on the part of sundry directors and the president to injure the corporation, perhaps for selfish purposes. On the other hand, the corporation and the trustees of the second mortgage have placed their opposition to the revocation of the order in part upon the fact that the present acknowledged financial condition of the corporation demands a receivership, and that the taking of the road out of the hands of a receiver, in view of the pendency of three petitions before three legislatures for additional legislative authority to raise money, (the petitions being based upon the financial necessities of the corporation,) would put the corporation in the midst of perplexities and dangers from which it is now relieved, and would imperil the success of any attempt to place the corporation in a condition of solvency.

It is of course apparent that, in their opposition to a revocation of the order, the trustees of the second-mortgage bonds and the corporation have a great leverage, from the fact that the business community, the shippers of freight, and the creditors of the corporation are now perfectly aware that the company has not been able to pay its debts, has lived by borrowing and by the grace of a portion of its creditors, and from a natural fear of the danger which might result from putting the corporation back into a condition where it might not be able either to serve the public or to help itself. The position which the commonwealth of Massachusetts, by virtue of its ownership of about seventeen twenty-eighths of the whole number of outstanding second-mortgage bonds, has taken in regard to the receivership, is also, in this part of the case, entitled to much respect. But it is not my purpose to dispose of this motion upon such considerations. The petitioners have given voice to their suspicions, not to say their accusations, that this receivership was the result of a plan to injure either the corporation or the holders of its securities, and that the suit was collusive between the parties, in the sense of a fraudulent collusion to deceive the court, and thereby to accomplish selfish

and improper purposes. If this is true it is the duty of the court either to set aside the order or to remove the receiver.

I, therefore, propose briefly to examine into the facts, and see whether there was or was not a necessity, arising out of the financial condition and circumstances of the road, for the appointment of a receiver, and to look into the validity of the charges or suspicions of collusive fraud, recognizing the fact that the changed position and relations of the active petitioners in regard to the controlling management of the corporation resulting from the election of directors in the early part of December, might naturally engender suspicions in their minds either of the good faith or of the propriety of the conduct of the new board, although those suspicions might not be well founded. And I re-examine the condition of things on December 31, 1883, with reference to a receivership, with the more willingness because it has been stated here that it was said in another court that probably, if I had known all the facts, the order would not have been granted.

Previous to the annual election of directors of the corporation, Lee, Higginson & Co. gave public notice, by advertisement, that an attempt would be made to elect a new and different board, intimating plainly a dissatisfaction with the policy of the existing management, and solicited the proxies of the stockholders for that purpose. This attempt was openly and plainly proclaimed, and resulted in dropping from the board Gen. Wilson, the former president, and Messrs. Grant and Cannon, who apparently were efficient financial friends of the existing management. Col. French, who was also on friendly terms with these gentleman, was re-elected, and Mr. Kingsbury, a member of the board for many years, was also re-elected. Whether others of the old board were re-elected I do not know.

The report of the retiring president showed that from various causes the road had not, during the year ending September 30, 1883, earned its fixed charges. Promptly, with the announcement of the probable or actual result of the election, Mr. Cannon and the firm of which Mr. Grant is a member demanded and received payment of demand notes against the company amounting to $104,000. I do not speak of this action as unnatural or improper, but simply as one of the financial facts in the case. The retiring directors probably thought it not improper that they should no longer be obliged to address themselves to the work of providing means to sustain the credit and pay the overdue debts of the company.

The new board, as appears both from the official record of their action, and as appeared more in detail upon the original hearing, found themselves compelled to turn early and prompt attention to this subject, and found the company in unexpected straits for money. The pressing debts were apparently larger than they had anticipated. No money was in the treasury to meet the interest on the first-mortgage bonds, maturing on January 1st. There was no money to pay the old debts due to connecting roads. Money could not be spared

to pay maturing notes, except under supposed compulsion. The directors set themselves to the task of borrowing money to meet pressing obligations. It was estimated that some $800,000 were needed, and but about $300,000 could be promised. At this point, in reply to a letter from Mr. Clark, was received a letter from the president of the Erie Railroad Company, in which Mr. Jewett stated that he desired payment of $90,000 of the debt of $190,000 due that company, and that $100,000 might remain for a time. Payment of the January interest could neither be made from the receipts of the New York & New England road, nor could the money be borrowed. A plan was projected and finally carried into effect that the January coupons should be cashed or bought by money furnished by the persons interested in the road, and held until the succeeding July, and that $10,000 should be furnished by the company in consideration of this forbearance and as commission for the services of the bank, which was to receive and disburse the money. Notice to all creditors and the public was thus given of the company's inability either to pay their interest or to borrow the money with which to pay it, and that the company was without either money or adequate credit. For purposes of the present inquiry, an examination of the causes which had brought about this result would neither be gracious nor useful, neither have I sufficient *data* to state them with accuracy.

The fact that the corporation was at a standstill, so far as the payment of its debts and obligations was concerned, existed. The fact that no duty rested upon the directors or upon the stockholders to lend money upon unsecured notes and thus to meet these obligations seems to me to be plain. The directors owed two duties—one to the public, that this road should be kept in running condition so that it could serve the public; the other to the stockholders and to the bondholders, that if possible the property might be kept intact and preserved, so that finally unsecured and secured creditors might be paid and the stock might be saved, and they were called upon to take all proper measures to discharge these two duties. At this time, from the twenty-seventh to the thirty-first of December, the question of temporary relief by a receivership from the peril in which they found the corporation undoubtedly presented itself to the minds of the directors. It would be natural that the idea of protection to the property and benefit to the public through such an instrumentality should have suggested itself. On the thirty-first of December the agent of the syndicate which had agreed to take second-mortgage bonds and thus provide the means for the payment of the expenses of double-tracking the road, the proceeds of the bonds to be used only for work already done, refused to answer the call which was made upon him to take and pay for 170 bonds. I do not propose to consider the propriety or impropriety of the refusal, but, on the contrary, to assume that the agent took the proper course. It is a fact in the case, and a fact which, taken with the occurrences of that day, led the

president to believe that not only no more bonds would be taken, and therefore that the double-tracking of the road must be stopped, but also that Messrs. Cannon, Grant, and French were planning themselves to procure the appointment of a receiver who would act in harmony with them and in hostility to the new policy of the new board, if that policy should prove to be a radical departure from the system of the old board.

In pursuance of authority which had been previously given by the board to call special meetings, the president called a meeting of his board at Hartford on the evening of December 31st, to act upon the question of agreeing or consenting to the appointment of a receiver. Messrs. Clark, Nickerson, Higginson, and French left Boston on the same train, and the silence of the three first-named gentlemen in reply to Col. French's questions in regard to the proposed meeting is seriously criticized. The answer to these criticisims is that they honestly believed that if he was informed of the object before the hour of meeting he would take prompt and effectual measures to communicate with his friends and obtain a hostile receivership in the courts of New York. Their silence and expedition led him to distrust their good faith. This mutual distrust was the cause of the subsequent excitement which attended the issuing of the order. Messrs. French, Cannon, and Grant all deny under oath that the suspicions were well founded or that they had any knowledge of or privity in such a design, and there is no evidence before me which casts doubt upon the truth of the denial. Neither is there any more room for doubt that the other directors really believed that they were only endeavoring to forestall similar action on the part of the gentlemen whom I have named. When the meeting was held a quorum of seven was present and a vote approving of a receivership was carried by a vote of five to two. This action was at a meeting held on January 7th, deliberately approved by a large majority of all the directors. At the hearing on the evening of the first meeting Col. French urgently opposed the granting of the order. The case resolved itself into this: The inability of the corporation to pay its coupons and its other debts was admitted. The expedient which had been adopted for the payment of the coupons was explained. The plan which all parties then agreed was the only feasible plan by which to raise money, was to obtain the requisite permission from the legislatures of Massachusetts, Connecticut, and Rhode Island, and also from the requisite number of the existing second-mortgage bondholders, to issue second-mortgage bonds in payment of the floating debt—a proceeding which would evidently require time and care. Col. French was of the opinion that no danger would arise from attachments, or cessation of business, from connecting roads, or from any other adverse causes, while the applications were pending. The other gentlemen thought that the corporation would be put into great hazard as soon as the knowledge of their actual inability to pay their January interest was known,

and that the announcement of this fact would be a signal for the commencement of hostilities. Mr. Kingsbury, the trustee of the second mortgage, who resided in Connecticut, and who had long been a director of the road, and had given much time and thought to the affairs of the company, reluctantly assented to the necessity of a receivership. I believed then, and I still think, that the condition of the corporation was such that there was not only no safety, but that there was absolute and imminent peril to all the interests of stockholders, bondholders, and creditors if a receivership should be refused, and that the welfare of all the various interests required that the corporation should temporarily be placed in a position where hostile arms could not attack it. The corporation is now enabled actively and efficiently to discharge its obligations to the public from the fact that it is under protection. Subsequent events simply confirm the conclusion to which I then came. It could not even now do business, unless it had been permitted to use some of its receipts to pay a part of the outstanding debts due to connecting roads. The receiver has been seeking from the Connecticut legislature the remission of taxes which are a first lien upon the Connecticut real estate of the company. A receivership by some court was inevitable.

The question still remains to be considered, was the institution of this suit, and the efforts on the part of the directors to promote it, an attempted fraud upon any one? I have carefully listened to the facts and suggestions and inferences which have been stated by the counsel for the petitioners, and I can discover no actual trace of a desire to injure the property or securities, or the honest and true character of the company. I see circumstances which a mind predisposed to suspicion can easily fasten upon as indicative of a sinister and indirect motive. The petitioners were carrying a large amount of the second-mortgage bonds, and would naturally distrust action which would depreciate the market value of these securities; but when the circumstances are looked at in the light of other existing facts, the idea of attempted fraud disappears. I am at a loss to find where the fraud exists when the pecuniary condition of the company is really understood. If the directors had in mind the wrecking of the road, they could have done it easily by not favoring a receivership. At the time when the original order was granted, the substantial facts, which have been stated, were apparent, except that I do not now recollect that the refusal of the syndicate to take the bonds, or the payment of the notes to Cannon and Grant & Co., were adverted to, and except that the relations between some of the directors also favored a receivership, and some of the members of the old board were not clearly understood by me. The facts in regard to the pecuniary condition of the company, and the impossibility of any immediate ability to obtain more money, and thereby gain relief, were clearly perceived. Upon this hearing the conduct of the receiver, since his appointment, in closing his fast through freight contract

with the New York, Lake Erie & Western Railroad Company, and his printed statements or reports in regard to the financial condition of the company, have been criticised. If the traffic arrangement resulted, through too low rates to the New York & New England road, in constant pecuniary loss to the company, I can see no propriety in continuing the contract, and in continued pecuniary losses. In regard to his financial exhibit, I have heard no adequate reason to doubt its truth, and it was certainly his duty to inform the stockholders and the bondholders of the exact condition of the company.

Were the allegations of the bill sufficient to justify the appointment of a receiver? The petitioner's position is that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought—as to foreclose a mortgage. It is true that in general a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by a receivership, such relief must be refused, because the time has not arrived when other substantial relief can be asked. For example, although as a rule, a mortgagee cannot ask for relief until his mortgage debt has become due, he can go into a court of equity before that time has arrived and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted. As was said in *Long Dock Co.* v. *Mallery*, 12 N. J. Eq. 431:

"The power of the court to preserve the pledge from destruction, and to answer to the exigency of the mortgage, is undoubted. * * * If the bill shows a case for an injunction and a receiver, the exercise of the power is called for, although the time of payment, set in the mortgage, has not come unless the equity of the bill is met by the answer."

This bill alleged the existence of the corporation and the first and second mortgage bonds, and of the actual inability of the road to pay its interest, to become due on January 1st; the existence of the floating debt, and its inability to pay that; the intention of some of the creditors to attach the mortgaged property; the peril to the road arising from anticipated attachments of the property covered by the second mortgage; and the loss of and breaking up of the business of the road from its inability to pay connecting lines; and its consequent inability to pay the interest due on February 1st. In brief, it alleged the insolvency of the road, though not in terms, and the danger and hazard of serious injury to the revenues of the company, unless suits were prohibited, and those who did business with it were assured that its current expenses were to be paid. Those allegations were admitted both by the corporation and by the trustees of the second mortgage. I am of the opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent, and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and destruc-

tion of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for an injunction against attacks upon the mortgaged property, and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed.

It is next said that this was a case of collusion between the orator and the railroad corporation. There is no claim that there was any collusion on the part of the second-mortgage trustees. If by collusion it is meant that the preparation for and institution of the suit were known and desired by the directors, or some of them, in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion. If by collusion it is meant that the institution of the suit, or its management, was marked by fraudulent design or purpose, then there was not collusion. The complainant was the actual owner of five mortgage bonds. They were not placed in his hands, and were not transferred to him fictitiously, and were not bought by him for the purpose of this suit. The firm of Lee, Higginson & Co. had the authority to bring suit in his name, or their action has been ratified and approved. The railroad company consented, prior to coming into court, to the appointment, as is frequently and properly the course in cases of this kind. No one attacks the fidelity of the second-mortgage trustees, and they also assented.

In regard to the prayer of the petition for the removal of the receiver, no adequate reason has, in my opinion, been given for such a course. The affidavits of the second-mortgage trustees contain a sufficient reason why such a prayer should be denied.

In regard to the prayer of the petition for the appointment of a co-receiver, I see no reason for antagonistic receivers; and a receiver who should be in accord with Mr. Clark would not, probably, be satisfactory to the petitioners.

The prayer of the petition is denied.

SPINK *v.* FRANCIS and others.[1]

WILLIAMS *v.* SAME.[1]

(*Circuit Court, E. D. Louisiana.* February 20, 1884.

INJUNCTION.

A bill for an injunction to prevent interference by criminal procedure will lie when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matter or right affected by or involved in the criminal procedure.

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

In Equity. On demurrer.

A. G. Brice, Joseph P. Hornor, and *F. W. Baker,* for complainant.

James R. Beckwith, for defendants.

BILLINGS, J. These are bills of complaint, which are, in their general scope, bills for an injunction to prevent interference by criminal procedure. The extent to which such a bill will lie is well defined. It is when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matter or right affected by or involved in the criminal procedure. In such case the court will by a decree, affecting the parties so situated personally, enjoin. *Atty. Gen.* v. *Cleaver,* 18 Ves. 220, 211, note *a;* Story, Eq. Jur. § 893; Jeremy, Eq. Jur. 308, 309; and 3 Daniell, Ch. Pr. (Perkin's Ed. 1865,) p. 1721. These cases have been considered upon the ground that the parties defendant in these bills are in this category. As to such parties the bills would be good, but as to no others. The bills do not show this. The demurrers must therefore be sustained, with leave to amend the bills, so as to set forth in a distinct form which of the parties sought to be enjoined have as plaintiffs in civil causes submitted the matter or right involved in or affected by the criminal procedure to this court.

PARDEE, J., concurs.

UNION MUT. LIFE INS. CO. *v.* STEVENS and others.

(*District Court, N. D. Illinois.* December 17, 1883.)

1. LIFE INSURANCE—LAPSE OF POLICY BY COLLUSION TO DEFEAT INTERESTS OF BENEFICIARY.
   If the insured, even by collusion with the company, suffers his policy to lapse, with the intention of securing another policy containing the name of a new person as beneficiary, the courts will not regard the second policy as a mere continuation of the first.
2. SAME—RIGHTS OF THE ASSURED AS TO THE RECIPIENT OF BENEFITS OF POLICY.
   A policy of insurance may be considered as an inchoate or uncompleted gift from the assured to the beneficiary. The former ought to be able to make it at will, or to change the direction of its benefits.
3. SAME—POLICY IN FAVOR OF ASSURED HIMSELF—AMOUNT BECOMES ASSETS.
   If the assured himself appears by name in the policy as the beneficiary, the money accruing on the policy at his death becomes assets in the hands of the administrator.

In Equity.

Swett, Haskell & Bates, for complainant.

H. F. Vallette and *Pliny B. Smith,* for Mrs. Taylor.

Gary, Cody & Gary, for Mrs. Stevens.

BLODGETT, J. This is a bill of interpleader filed by the complainant, the Union Mutual Life Insurance Company of Maine, charging,

in substance, that on the seventeenth of June, 1853, it issued to Samuel P. Stevens a life insurance policy for the sole use of his wife, Mary F. Stevens and heirs, for the sum of $1,200, which policy was payable on the death of the said Samuel P. Stevens, and upon which an annual premium of $42.24 was to be paid on or before the seventh day of June in every year during the continuance of said policy. It is further charged that on the fifteenth of June, 1870, the said Samuel P. Stevens, by an agreement with the complainant, surrendered the aforesaid policy to complainant and took out a new policy, bearing the same number, for the same amount, and for the payment of the same premium, and the agreement was that this new policy should, in all respects, stand in lieu of the first policy, except as to the party to be benefited thereby, and that the new policy insured the life of the said Samuel P. Stevens for the sole and separate use and benefit of himself. It is also charged that the said Samuel P. Stevens has since died testate, and that Eliza M. Stevens, executrix of his last will and testament, has brought suit at law in the circuit court of the county of Du Page, in the state of Illinois, upon the last-described policy, declaring upon the promises, undertakings, and conditions of said policy, and claiming judgment as such executrix, against complainant, for the sum of $1,200 named therein, and that said suit is now pending in the circuit court of Du Page county. The complainant further charges that one Mary Taylor has brought suit at law in the circuit court of Cook county, in this state, claiming that the money due under the last-mentioned policy should be paid to her as sole heir at law of said Mary F. Stevens. The bill then prays that the defendant Eliza M. Stevens, as executrix of said Samuel P. Stevens, and the said Mary Taylor, may interplead in this cause, and that the court shall determine which of said parties is entitled to the proceeds of the said policy, and the money admitted to be due from complainant upon the last-issued policy has been paid into court for the benefit of whoever the court shall determine is entitled thereto. Eliza M. Stevens, as executrix, and Mary Taylor have answered the bill, and each claims the benefit of the money in question. The defendant Mary Taylor contends that the second policy was issued by fraudulent collusion between said Samuel P. Stevens and the complainant, and is but a continuation of the original policy, which was payable to Mary F. Stevens and heirs, and that she, the said Mary Taylor, is the sole child and heir at law of the said Mary F. Stevens.

The case is submitted to the court upon the bill and answers, and certain stipulated proof, including the original policy, the new policy, and the correspondence between Samuel P. Stevens and the officers of the complainant at about the time the second policy was issued. The material facts, as they appear from the pleadings and the proofs submitted, are, briefly, these: Samuel P. Stevens took out the first policy in question, and paid the premiums regularly thereon until and including the premium which matured in June, 1869. In June, 1856,

Mary F. Stevens, the wife of Samuel P. Stevens, mentioned in said policy, died, and at some subsequent date between the death of the wife and October, 1869, Samuel P. Stevens married Eliza M. Stevens, now the executrix of his will. In October, 1869, Samuel P. Stevens requested that the life insurance company would change the terms of the policy so that the amount of insurance thereby on his life should be made payable to himself, and giving as his reasons that the circumstances of his family had materially changed, and others were dependent upon him who, in justice, should receive a proportion of the policy whenever it became available. The insurance company, in substance, replied that they could not consent to any change of the beneficiary in the policy, but suggested that the change desired might be brought about by Stevens forfeiting the policy by non-payment of the premium, and then making an application for the issue of a new policy; and in pursuance of this suggestion Stevens did not pay the premium which fell due June 7, 1870, and the policy was declared forfeited. He then applied for the issue of another policy for the same amount and on the same premium as the first, and in pursuance of that application the second policy, mentioned in the bill, was issued, insuring the life of said Samuel P. Stevens for the sum of $1,200, for the sole and separate use and benefit of himself, on the payment of the same annual premium provided for in the first policy, during the continuance of his life.

It further appears in the case that Samuel P. Stevens had one child born to him by his first wife, Mary F. Stevens, who is the Mary Taylor made a defendant in this case, and that said Mary Taylor is, so far as this case discloses, the sole heir at law of the said Mary F. Stevens. It also appears that the said Mary F. Stevens was killed in 1856, in a railroad accident in the state of New York, and that Samuel P. Stevens, her husband, received from the railroad company the sum of $2,000 in settlement of the claim against the company for having caused her death, which claim he collected as the representative and guardian of his daughter, the said Mary Taylor, as heir of her mother, Mary F. Stevens, but has never paid the same to her. It further appears that said Samuel P. Stevens, by his will, which has been duly probated in Du Page county, in this state, provides "that the sum of $2,000, received by him from the New York Central Railroad on account of the death of his former wife and the mother of his daughter Mary, should be paid to his said daughter Mary as soon after his decease, and from his estate, as conveniently may be, and made the said legacy a charge and lien upon all his estate, real and personal, including any money that may be due "on any life insurance policy, or any other property or money."

The first question made in the case is, is this a proper case for a bill of interpleader? Does the case show such a state of facts as places the complainant in the position of an innocent stakeholder who has no interest as to which of the contending parties shall re-

ceive the sum of money in question? It is contended on the part of the defendant Eliza M. Stevens that if the complainant is in danger of having two judgments against it for the same contract, it is in consequence of its own imprudent acts and mistakes, and that a proper case for appeal to a court of equity by bill of interpleader is not shown. It seems to me, however, from a consideration, not only of the facts in the case, but the allegations in the answers of both defendants, that the only question is, to whom does the money due upon the last policy belong? Which of these defendants is entitled to it? As it is clear from the proof that the insurance company never intended to make but one contract, as far as the company and Stevens could do, the purpose was to let the first policy lapse and issue the second policy in place of the first. The defendant Mary Taylor insists that the second or new policy is but a continuation of the old policy; that the mere change of form as to the beneficiary does not and cannot defeat her rights as the heir of her mother, Mary F. Stevens, to receive the money due on the latter policy; and it seems quite clear to me that if Mrs. Taylor is to recover anything in this suit, it must be by reason of the correctness of the assumption, that, so far as she is concerned, the new policy is but a substitution for the old, and she is still the beneficiary under it. In other words, that the contract of June 17, 1853, is as to her the only contract in force, and if she recovers at all, it must be because she is still entitled to the benefit of the old policy. The whole question, it seems to me, depends upon whether Samuel P. Stevens had the right to make the change in the beneficiary of this policy. There is no doubt that there is a conflict of authority as to the power of a person, situated as Samuel P. Stevens was, to change the direction of the money to accrue in this insurance on his life so as to divert it from the person named as beneficiary in the original policy. The most notable cases, and probably the ones most directly in point, and which have been most generally followed are the cases of *Pilcher* v. *N. Y. L Ins. Co.* 33 La. Ann. 332, and *Ricker* v. *Charter O. L. Ins. Co.* 27 Minn. 195, S. C. 6 N. W. Rep. 771, where it is held that there is a vested right in the beneficiaries in a policy of life insurance which renders the policy irrevocable as to them. The contrary rule has been held in Wisconsin, Missouri, and Illinois. *Clark* v. *Durand*, 12 Wis. 248; *Kerman* v. *Howard*, 23 Wis. 108; *Foster* v. *Gile*, 50 Wis. 603; S. C. 7 N. W. Rep. 555; *Charter O. L. Ins. Co.* v. *Brant*, 47 Mo. 419; *Baker* v. *Young*, Id. 453; *Gambs* v. *Cov. M. L. Ins. Co.* 50 Mo. 44; *Swift* v. *R. P., etc., Ass'n*, 96 Ill. 309. Where a question has never been decided by the supreme court of the United States, and as to which the state authorities are conflicting, this court is at liberty to follow such authority as is deemed most consonant with what seems to be just and equitable. I do not intend to decide that in all cases where a life insurance policy has been taken out, payable to a certain person as the beneficiary, it is in the power of the person

whose life is so insured, by a subsequent agreement with the insurance company, to change the beneficiary, because it is obvious that each case of that character must depend almost wholly upon its own peculiar facts, and an examination of the apparently conflicting cases upon the points raised in this case satisfies me that the apparent conflict grows more out of the variant facts, acted upon by the courts in the different cases, than from any essential difference in principle.

In this case, it can hardly be contended that, after the death of Mary F. Stevens, her daughter, Mary, had any vested right in the proceeds of the then existing policy, payable to her mother and heirs. It is even doubtful whether the true construction of the language of that policy, describing the beneficiary, does not mean that the money should be payable to the wife, Mary F. Stevens, and the heirs of Samuel P. Stevens; that is, whether the words "his wife, Mary F. Stevens, and heirs" do not really mean his wife, Mary F. Stevens, and his heirs; thereby making the children by the second wife, or the heirs at law of Samuel P. Stevens, if he has any other than his daughter, by his first wife, equal participants in the proceeds of this policy. But, be that as it may, the facts in this case show that Samuel P. Stevens retained possession of this policy, and that he, and he alone, always paid the premium; that in June, 1870, he failed to pay the premium on the original policy, and that by its own terms it lapsed and became void by such non-payment; and that he subsequently applied for and obtained this second policy. Now, it is very clear that no one could compel him to continue to pay the premiums on this original policy. He had a right to suspend paying the premiums at any moment, and the policy would at once lapse by reason of such failure. He was under no obligation to his daughter, now Mrs Taylor, to continue to pay these premiums for her benefit. As he says in his letter, addressed to the officers of this insurance company, the circumstances of his family had so far changed that he did not consider it right to continue paying these premiums for the sole benefit of his daughter. It seems to me, therefore, that he had the right to make the arrangement with the insurance company, and it may be assumed, for the purposes of this case, that he did arrange before hand with the insurance company to allow the policy to lapse, with the understanding that he was to have a new policy issued to him, payable to himself, for the express purpose and no other purpose than to change the beneficiary. If Mrs. Taylor could not compel her father to continue paying those premiums for the purpose of keeping the policy alive for her sole benefit, it seems to me very clear that he was under no legal obligations to her to do so. In other words, it strikes me very forcibly that this policy, at the time the change was made, was, at most, an inchoate or uncompleted gift from Samuel P. Stevens to his wife and heirs. He had the right to change his mind. He was in a position where he could revoke that gift, and direct that the money secured by this policy should go elsewhere. I can see no

reason why he was not as much at liberty to change the direction of the money which would accrue at his death upon this policy, as he was to change his will in reference to the disposition of any of his estate at any time preceding his death.

It is urged, however, that Mrs. Taylor has certain equitable claims in this fund, from the fact that, as heir of her mother, she has never received the amount which Samuel P. Stevens, her father, collected from this railroad company as compensation for the death of his wife, and to which the daughter was entitled; and that in his will Samuel P. Stevens directed the application of this insurance money to the payment of his indebtedness to her. A sufficient reply to this, as it seems to me, is that the money accruing on this policy, being payable to the assured, becomes assets of his estate, and is to go into the hands of his executor like any other money collected in the due administation of the estate, and that Mrs. Taylor's claim is to be paid in the due course of administration, with proper regard to the will, under the directions of the probate court in which that estate is being settled. It may be that the probate court can award or has awarded the proceeds of this policy to the widow of Samuel P. Stevens. With that, this court, I think, has nothing to do. If this money is an asset of the estate of Samuel P. Stevens, then it is to be applied as the court charged with the settlement of that estate shall order.

The decree will therefore be entered ordering the payment of the money involved in this suit to Eliza M. Stevens, executrix of Samuel P. Stevens. It is further ordered that each party shall pay their own costs.

EVANS *v.* STATE NAT. BANK.[1]

(*Circuit Court, E. D. Louisiana.* February, 1884.)

VERBAL AGREEMENTS.

No verbal agreement of parties or their counsel, touching any cause pending before this court, shall be deemed of any validity, or be noticed in any way by the court, in case of dispute or disagreement.

In Equity.

J. R. Beckwith and *W. R. Mills*, for plaintiff.

H. B. Kelly and *James McConnell*, for defendant.

Thomas Gilmore, for heirs of Lapeyre.

BILLINGS, J. The sole question which can be considered is as to the effect to be given to an alleged verbal agreement. It is the general rule that such an agreement cannot be noticed by the court. *Parker* v. *Root*, 7 Johns. 320; *Dubois* v. *Roosa*, 3 Johns. 145, and num-

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

erous cases there cited in note, as *Huff* v. *State*, 29 Ga. 424; *Reese* v. *Mahoney*, 21 Cal. 305; and *Shippen's Lessee* v. *Bush*, 1 Dall. 250. Rule 22 of this court is but a statement of the universal canon or precept which is observed by all courts where the matter of rights is involved. That rule is as follows: "*No verbal agreement* of parties or their counsel, touching any cause pending before this court, *shall be deemed of any validity, or be noticed in any way, by the court,* in case of dispute or disagreement." The rule is thus stated in Hoff. Ch. Pr.: "It will be noticed that the agreement or consent, unless thus established, is not even to be suggested against the party; and our chancellors have been strict in adhering to this rule." Page 26. The necessity and wisdom of the restriction is manifest by its universal adoption by the courts, and, having been further emphasized by being enrolled as a rule of this court, is obligatory, and must be followed. The rule must therefore be discharged.

BARLOW *v.* LOOMIS and others.

(Circuit Court, D. Vermont. March 20, 1884.)

1. TRUST—POWER OF REVOCATION—FAILURE TO EXERCISE.
   A trust declared by testator during his life-time, with the privilege of revocation, will, if unrecalled, prevail over the title of a residuary legatee.
2. SAME—STATEMENT.
   Testator transferred stocks and bonds to L., upon trust to pay him the income while he lived, and after his death to transfer them to others, reserving the power, however, to revoke this disposition of the property at any time. He died, leaving the trusts unrevoked. *Held*, that the power of revocation died with him, and that upon his death the trusts became absolute.

In Equity.

E. R. Hard, and *A. G. Safford*, for orator.

Daniel Roberts and *Robert Roberts*, for defendants.

WHEELER, J. The orator is a residuary legatee under the will of Sidney Barlow, who, in his life, at three several times, delivered and transferred to the defendant Loomis stocks and bonds, under written agreements made between them, providing in two of them that Loomis should hold the stock and bonds in trust, to pay over the interest and dividends to Barlow during his life, and at his decease to transfer them to the other defendants; and in the other that Loomis should hold the bonds for the benefit of other defendants at the death of Barlow, reserving the right to him to demand and have the income while he should live, and to revoke the trust altogether and have the bonds returned to him if he should so elect. Loomis paid the income to Barlow during his life; he did not revoke the trust, but died leaving the stocks and bonds in the possession of Loomis. This bill

is brought to have these stocks and bonds brought into the assets of the estate, so that the orator may have his share of them. The orator's interest in them depends wholly upon whether they were a part of the estate of the testator at the time of his death. If they were, his share in them goes to him by the will; if they were not, nothing of them would pass by the will to him, or any one. There is no question as to mental capacity, nor as to the rights of creditors, nor in any way as to the right and power of the testator to give or dispose of these securities to Loomis, or the beneficiaries, or any one else, in any manner he might see fit. The sole inquiry is as to the effect of of what he did do. He could control the disposition of his estate after his death only by will, executed according to the statute of wills; but he could divest himself of this property during life by mere delivery and transfer, such as he fully accomplished. Had there been no reservations, there could have been no question. But these reservations were all optional and personal to himself. If he did not exercise his right to them, they were gone. He died without exercising the right, and it expired with him, leaving the property absolutely gone out of his estate, and wholly beyond the orator's rights. The transaction was in Vermont, (governed by Vermont laws,) which fully uphold it in this view. *Blanchard* v. *Sheldon*, 43 Vt. 512. Upon the case made, there is no relief to which the orator is entitled.

Let there be a decree dismissing the bill, with costs.

SPINK *v.* FRANCIS and others.[1]

BROWN *v.* SAME.[1]

(*Circuit Court, E. D. Louisiana.* February 20, 1884.)

CONTEMPT.

Where the acts of the defendants were violations of the orders of the court, when strictly considered and construed, and where the defendants in their sworn answers purge themselves of any intentional violation of the court's orders, and may have misconceived the responsibility for the acts committed, the court reserved for future consideration, in connection with subsequent conduct, the doings of the defendants as presented by the evidence, and taxed against them the costs of the rules.

On Rule for Contempt.

A. G. Brice, *Joseph P. Hornor*, and *F. W. Baker*, for complainants.

James R. Beckwith, for defendants.

BILLINGS, J. These causes are before us on rules for contempt. The cases show the issuance of the injunctions and the defendants' knowledge of them by service or otherwise. It also appears that the

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

defendants were connected with prosecutions which were prohibited by the injunctions, and aided such procedures after the existence of the prohibitory orders. We think the acts of the defendants were violations of the orders of the court when strictly considered and construed. On the other hand, the defendants, in their sworn answers, purge themselves of any intentional violation of the court's orders; and the nature of the things done rendered it possible that the defendants, in advance of any judicial interpretion of the orders, might have misconceived the responsibility for the acts committed. On the whole, we are inclined, for the present, to suspend the imposition of any punishment for what we must adjudge to be acts of disobedience, and therefore of contempt. The authority of the court and the rights of the parties will be sufficiently maintained if we reserve for future consideration, in connection with subsequent conduct, the doings of the defendants as presented by the evidence now before us. The costs of these rules will be taxed against the defendants in the rules; those in each rule against the defendant in that rule.

LOUISVILLE & N. R. CO. *v.* RAILROAD COMMISSION OF TENNESSEE.

EAST TENNESSEE, V. & G. R. CO. *v.* SAME.

(*Circuit Court, M. D. Tennessee.* February 29, 1884.)

1. RAILROADS—LEGISLATIVE CONTROL.
   Railroads having been created mainly for the accommodation of the public, and to facilitate the business of the country, and being indispensable to the rapid and cheap transportation of commodities, are subject to legislative control within the limits of state and federal constitutional restrictions, and may be required by law to refrain from so using their property as to injure others, and by appropriate pains and penalties may be restrained from unjust discrimination and extortionate charges, compelled to observe precautionary measures against accident, and in other ways regulated for the public welfare.
2. SAME—VESTED RIGHTS.
   But the legislation adopted must observe the contract rights of corporations under their charters; must be confined to the exercise of the *police power*, and not interfere with the vested rights of the companies in their property or franchises; must not inflict punishment or take property otherwise than by due process of law nor without compensation; must not deny to them the equal protection of the law; and must in all respects observe the constitutional guaranties prescribed for the protection of all citizens—railroad companies being for such purposes as much citizens as natural persons.
3. SAME—TENNESSEE ACT OF MARCH 30, 1883—UNCERTAINTY OF THE ACT—CONSTITUTIONAL LAW.
   The act of the general assembly of Tennessee of March 30, 1883, to establish a railroad commission analyzed, and *held* to be invalid because its provisions are too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and do not sufficiently define the offenses therein declared. It leaves to the jury to say whether, upon the proof, the difference in rates amounted to discrimination, or whether the charges were unjust and unreasonable, thus making the guilt or innocence of the accused depend upon the finding of a jury,

and not upon a construction of the act. It relegates the administration of the law to the unrestrained discretion of the jury, and there could be therefore no reasonable approximation to uniform results, but verdicts would be as variant as their prejudices, and inevitably lead to inequalities and injustice.

4. SAME—STANDARD PRESCRIBED BY THE ACT.

Neither is the objection to the act for uncertainty removed by its attempt to prescribe a standard of compensation for the guidance of the jury. It does not with precision point out the assessment for taxation which is to furnish the basis of judgment, nor prescribe the rule under which the net earnings are to be computed. But if these difficulties were overcome, there remains no method of measuring what is a "fair and just return" on the value of the property of the companies which they are allowed to earn before becoming liable to the penalties of the statute, but the act leaves it to the unqualified discretion of the jury, whose verdicts may vary not only as between different companies, but as between different suits with the same company. One jury may fix it at one rate per cent., and others at different rates, so that no company could tell whether it was violating the law or not, and the fact would be determined by the fluctuating contingencies of business, and a charge made on the calculation that 6 per cent. would be fair, might, by the verdict of a jury, upon facts transpiring subsequent to the alleged violation, be pronounced unreasonable and unjust. The legislature cannot delegate such power to a jury without a practical confiscation of the citizen's property.

5. SAME—CONSTITUTION OF TENNESSEE, ART. 11, § 8—CONSTITUTION OF UNITED STATES, FOURTEENTH AMENDMENT.

The act violates the eighth section of the eleventh article of the state constitution and the fourteenth amendment of the constitution of the United States. It discriminates against railroad *corporations*, in its third and thirteenth sections, by imposing upon them penalties in favor of the state, which are not imposed for like offenses or conduct upon other persons operating railroads in the state, although the act professes to regulate both. It also, in the twenty-ninth-section, discriminates in favor of roads not completed, or the construction of which has not commenced, by exempting them from regulation and punishment for 10 years. The act also reverses the presumption of innocence, and substitutes one of guilt, to be removed only by the accused proving innocence, and puts the power to raise this presumption in the hands of three commissioners, who can, by their act, place the burden on the accused, or leave it off, and arms them with authority to enforce their decree by imposing penalties, which may amount to the taking of private property without compensation. Besides, it enables a political party to bring to its aid the immense railroad property and influence, by action through the commissioners, which shall be friendly or unfriendly, as the railroad companies favor one party or the other.

Per BAXTER, J.

6. SAME—INTERSTATE COMMERCE—STATE REGULATION OF RAILROAD RATES.

The act of the Tennessee legislature, approved March 30, 1883, *c.* 199, entitled, "An act to provide for the regulation of railroad companies and persons operating railroads in this state, to prevent discrimination upon railroads in this state, and to provide for the punishment of the same, and to appoint a railroad commission," is invalid so far as it applies to the plaintiffs in these cases, because it is a regulation of interstate commerce, acting directly, by a control of the rates of compensation, upon the transportation of persons and commodities in transit from one state into another. The states have surrendered the power to do this by the federal constitution, art. 1, § 8, which confers on congress the exclusive power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

7. SAME—POWER OF THE STATES DEFINED.

The power of the states to regulate railroad rates by such direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more states as will cover the

distance traveled within the limits of any one of those states; for this construction would utterly destroy the exclusive power of congress over the interstate transportation, abrogate the constitutional provision, and enable the states to restrict, obstruct, or impair that freedom of commerce between the states which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the state, or else it may be to shipments beginning and ending in the state, without reference to the character of the road in that regard. This is the utmost reach of state power, and, as to this, no decision is now made, because the act itself makes no discrimination, and attempts to control *all* rates.

8. SAME—REGULATING THE INSTRUMENTALITIES OF COMMERCE—INVALID STATUTES—WHEN WHOLLY VOID.

Until congress chooses to exercise whatever power it may have over domestic commerce, as above described, by reason of any relation it may bear to interstate commerce as an auxiliary or instrumentality thereof, the states may continue their control over it as over any other such instrumentality within their territorial limits, although the interstate commerce of which it is an instrumentality may be indirectly or incidentally affected by such control, but they can never touch the interstate commerce itself by direct action upon it or any part of it, by these regulations, and any state law, be it wise or unwise, valid or invalid in other respects, and no matter what its character or the necessity for such a law may be, which acts upon the contract between the carrier and shipper for interstate transportation to regulate the charges for it, or any part of it, or the conditions thereof in any respect, operates directly on the commerce itself, of which the transportation is certainly a part, and not on an instrumentality of it. These distinctions must be observed in legislation, and that which neglects or overlooks them, or assumes to disregard them, is necessarily invalid; and the courts cannot cure the defect by supplying through judicial decree the necessary qualifications to conform the legislation to constitutional limitations.

9. SAME—POWER TO REGULATE CORPORATIONS.

It is as impossible for a state to make a regulation of interstate commerce by the exercise of its power over the corporations of its creation as by any other power, if it permits them to engage in interstate commerce. Possibly, it may bind the corporations permitted to engage in interstate commerce to schedules of rates *agreed* upon by them; but this is binding only by force of the contract of the carrier to be so bound, and not as a regulation of the rates under any municipal power of the states over the commerce. A regulation of interstate commerce, *as such*, is as invalid in a charter as elsewhere in a state statute.

10. SAME—CASE IN JUDGMENT.

The Louisville & Nashville Railroad Company, being a Kentucky corporation, was authorized by license of the laws of Tennessee to extend its road into that state; and, subsequently, by laws passed for the purpose, to consolidate with other railroad companies, and thereby became an extensive system of intercommunication between the states from the Ohio river to the Gulf of Mexico. The East Tennessee, Virginia & Georgia Railroad Company, a Tennessee corporation, by authority of law, became a consolidated corporation, operating a system of railroads between the states and extending through Tennessee into Georgia, Alabama, and Mississippi, forming with its connections a united line of intercommunication, traversing North and South Carolina, Virginia, and other states. *Held*, that an act of the legislature which attempts to control the rates for fares and freights of persons and commodities passing over these roads from one state into another, on the theory of regulating the charges for the distances traveled within the state of Tennessee, is invalid as a regulation of interstate commerce, and the railroad commissioners will be enjoined from executing it as to these roads.

Per HAMMOND, J.

Application for Preliminary Injunction.

The Louisville & Nashville Railroad Company filed its bill alleging that it was a Kentucky corporation, extending its road into the

state of Tennessee by authority of the laws of the latter state; that by other laws passed for the purpose it had been authorized to acquire and to consolidate with other roads extending into neighboring states; that by its charter, and the charters of the other roads so acquired by it, there were fixed certain maximum rates of charges for transportation, which conferred a contract right to establish its own rates within the maximum, which had not been exceeded by it. The East Tennessee, Virginia & Georgia Railroad Company, by its bill, alleged that it was a Tennessee corporation, authorized by law to consolidate its roads with others, and operating a system of roads extending into neighboring states, and that by its charter there were fixed certain maximum rates which conferred upon it the contract right to establish its own rates within the maximum, and which it had not exceeded. Both bills alleged that the defendants had been appointed railroad commissioners, and were assuming to act by authority claimed under the act of the general assembly of the state of Tennessee, approved March 30, 1883, which is as follows:

"*Chapter CXCIX.*

"RAILROAD COMMISSION BILL.

"A bill to be entitled 'An Act to provide for the regulation of railroad companies, and persons operating railroads in this state; to prevent discrimination upon railroads in this state; and to provide for the punishment for the same; and to appoint a railroad commission.'

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that the main track and all the branches of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freights, on the payment of just and reasonable compensation to the owner of the railroad for such transportation; and any person or corporation engaged in the business of transporting passengers or freights over any railroad in this state who shall exact and receive for any such transportation more than just and reasonable compensation for the services rendered, or demand more than the rates specified in any bill of lading issued by such person or corporation, or who for his or its advantage, or for the advantage of any connecting line, or of any person or locality, shall make any unjust and unreasonable discrimination in transportation against any individual, locality, or corporation, shall be guilty of extortion, and in every case it shall be for the jury to determine from all the evidence whether more than just and reasonable compensation was exacted and received, or whether any such discrimination in transportation, which may be established by the evidence, against the individual, locality, or corporation, as the case may be, was made for the benefit or advantage of the person or corporation operating such railroad, or of any person or locality: provided, that nothing in this act shall be construed to prevent contracts for special rates for the purpose of developing any industrial enterprise, or to prevent the execution of any contract now existing.

"Sec. 2. Be it further enacted, that the party injured may recover of the person or corporation guilty of extortion, as defined in this act, ten times the amount of damages sustained by the overcharge or unjust discrimination, as the case may be, and a reasonable fee for the counsel prosecuting the case in any court having jurisdiction of the amount, in any county where the person or corporation operating the railroad does business; but if it appears that the service in which the extortion was committed was done at rates or upon terms

previously approved by the railroad commission hereinafter established, only actual damages, and no attorney's fee, shall be recovered.

"Sec. 3. Be it further enacted, that it shall be the duty of the commission to investigate and determine whether the provisions of this bill have been violated; and whenever said commissioners shall become satisfied that any railroad corporation has violated any of the provisions of this act, they shall immediately cause suit or suits to be commenced and prosecuted against any railroad corporation guilty of such violation in any court having jurisdiction of the subject-matter. Said suit shall be prosecuted in the name of the state of Tennessee, and conducted by the attorney general of the judicial circuit in which the same is instituted, under the direction of said commissioners, and no suit so instituted shall be dismissed without their consent. All moneys so collected shall be paid into the state treasury. If upon the trial of any cause for the recovery of the penalties provided in this bill, the jury shall find for the state, they shall assess and return with their verdict the amount of the penalty to be imposed on the defendant at any amount not less than $100, nor more than $1,000, and the court shall render judgment accordingly.

"Sec. 4. Be it further enacted, that in all suits or proceedings under this statute the defendant may give in evidence the fact that the rates or terms in respect to which extortion is alleged had been previously approved by the railroad commission hereinafter established, and such approval shall be *prima facie* evidence that such rates or terms were not extortionate.

"Sec. 5. Be it further enacted, that no rates or charges for service in the transportation of freight over any railroad shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings of such railroad transporting freight, if done without such discrimination on the basis of such rate or charge, together with the net earnings from its passenger and other traffic, would not amount to more than a fair and just return on the value of which such railroads with its appurtenances and equipments to be assessed for taxation.

"Sec. 6. Be it further enacted, that all actions to recover damages under this act shall be commenced within six months after the cause of action accrues.

"Sec. 7. Be it further enacted, that the foregoing sections of this act shall not take effect until the first day of July, 1883.

"Sec. 8. Be it further enacted, that it shall be the duty of all persons or corporations in this state, who shall own or operate any railroad therein, to publish by posting at all the depots the tariffs of rates, which have been approved by said commission for transporting freights, showing the rates for each class, including general and special rates, and it shall be unlawful for such person or corporation to make any reduction or rebate from such tariff in favor of any person or corporation which shall not be made in favor of all other persons or corporations by a change in such published rates.

"Sec. 9. Be it further enacted, that it shall be unlawful and within the prohibition of this act for any railroad corporation doing business in this state, to make any contract, agreement, or arrangement with any other railroad corporation, or with any common carrier by water in respect to the transportation of freights of any description, from any place within this state by which it is to transport only a certain portion of such freights, or by which it is to refuse to transport such freights or any portion thereof, or by which any common carrier by water is to refuse to transport such freights or any portion thereof, or by which it is to receive any sum of money, or anything of value for not transporting all or any part of such freights, or by which it is to pay any sum of money, or part with anything of value as an inducement to any other railroad corporation or common carrier by water not to compete with it in the transportation of such freights, or by which it and other railroad corpo-

rations or common carrier by water, distribute among themselves for transportation, according to percentages, any freights offered for shipment; and railroad corporations are required to remove freights when delivered or offered for shipment to the extent of their facilities without unnecessary delay and without regard to any contract, agreement, or arrangement expressed or implied as aforesaid, and all railroad corporations refusing or neglecting so to do are hereby declared to be subject to the penalties imposed by this act.

"Sec. 10. Be it further enacted, that this act shall not prevent any railroad company from transporting freight free of charge, provided it is not done to evade the provisions of this act.

"Sec. 11. Be it further enacted, that it shall be the duty of the governor to nominate three competent persons, one from each grand division of the state, subject to the confirmation of the senate, if in session, who shall constitute the railroad commission of the state of Tennessee, and the commissioners, after qualifying, as prescribed in section 11 of this act, shall proceed to elect one of their number as president and one as secretary; and said commissioners shall hold their offices until the first day of January, 1885, and their successors shall be elected by the qualified voters of the state at the November election, 1884, and every two years thereafter.

"Sec. 12. Be it further enacted, that the said railroad commissioners shall be state officers, and before entering on their duties shall take the oath of office prescribed for other state officers, and may be impeached and removed from office for the same causes, and in the same manner, as other state officers. They shall hold office for two years and until their successors respectively are duly elected or appointed and qualified, and any vacancy shall be filled by the governor; the person so appointed shall hold office until his successor is duly appointed, confirmed, and qualified as above provided. No person in the employ of any railroad corporation, or other person, owning or operating a railroad in this state, or owning any stock in any railroad corporation, shall be nominated by the governor as a member of such commission, and any commissioner who shall accept any gift, gratuity, or emolument, or employment from any person or corporation owning or operating a railroad in this state, during his continuance in office, except a permit for himself to pass over the railroad of such person or corporation, shall forfeit his office, and may be impeached and removed from office for that cause, as well as any of the causes specified by law for the impeachment of other state officers.

"Sec. 13. Be it further enacted, that it shall be the duty of the commission to consider and carefully revise all tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state, and if, in the judgment of the commission, any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charges amount to unjust and unreasonable discrimination against any person, locality, or corporation, the commission shall notify the person or corporation of the changes necessary to reduce the rate of charges to just and reasonable compensation, and to avoid unjust and unreasonable discrimination; when such changes are made or when none are deemed proper and expedient, the members of the commission shall append a certificate of its approval to such tariff or charges, and in case such change shall not be made, or if any charge subsequently made shall not conform thereto, said corporation shall be held *prima facie* guilty of extortion.

"Sec. 14. Be it further enacted, that it shall be the duty of said commission to hear all complaints made by any person against any such tariff or rates so approved, on the ground that the same in any respect is for more than just and reasonable compensation, or that such charges, or any of them, amount to or operate so as to effect unjust and unreasonable discrimination, such complaint must be in writing and specify the items in the tariff against which

complaint is made, and if it appears to the commission that there may be justice in the complaint, or that the matters ought to be investigated, the commission shall forthwith furnish to the person or corporation operating the railroads a copy of the complaint, together with notice that, at a time and place stated in the notice, the tariff as to said items will be revised by the commission, and at such time and place it shall be the duty of the commission to hear the parties to the controversy, or by counsel, and such evidence as may be offered, oral or in writing, and may examine witnesses on oath, conforming to the mode of proceedings as nearly as may be convenient to that required of arbitrators, giving such time and latitude to each side, and regulating the opening and conclusion of any argument as the commission may consider best adapted to arrive at the truth, and when the hearing is concluded, the commission shall give notice of any changes deemed proper by them to be made, to the person or corporation operating the railroad. And any subsequent charge higher than the amount fixed shall be *prima facie* evidence of extortion. And all railroad companies or persons operating railroads in this state shall make out and deliver for revision to the commissioners a schedule of their rates of charges for the transportation of freights, cars, and passengers, within twenty days after the president or superintendent is notified by the commissioners that they are ready to consider the same, and on failure to do so, said railroad company, or other persons so operating said railroad, shall be liable to a fine of $100 for every day of said failure after the expiration of said twenty days; and said railroad company or other persons operating any railroad shall have the right to appear and make such proof as they may desire in regard to revision by said commissioners, under such regulations as the commissioners may prescribe.

"Sec. 15. Be it further enacted, that said commission shall have an office at the capital, and shall meet there on the first Monday in every month, and shall remain in session until all business before them is disposed of; and shall hold other sessions at such times and places as may be necessary for the proper discharge of their duties, or as the convenience of parties in the judgment of the commission may require. The members of said commission shall each receive a salary of two thousand dollars, unless restrained by law from the performance of their duties, to be paid as the salaries of the other state officers. It shall be the duty of the commission to keep a record of all its proceedings, which shall be open at all times to the inspection of the public.

"Sec. 16. Be it further enacted, that all money paid out under this act shall be paid on warrant of the comptroller to the treasurer, as by law provided, including such sum as may be necessary to procure office furniture, stationery, and other office expenses, including rent of office of said commission: provided that such office expenses shall not exceed five hundred dollars per annum.

"Sec. 17. Be it further enacted, that whenever, in the judgment of the railroad commission, it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling stock, or any addition to or change of the station or station-houses, or any change in the rates of fares for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper, and a report of the proceedings shall be included in the annual report of the commission to the legislature.

"Sec. 18. Be it further enacted, that the said commissioners shall have the right to pass free of charge in the performance of their duties on all the railroads in this state. That said commissioners shall have general supervision over all the railroads of Tennessee, and shall examine the same from time to time, and keep themselves informed as to their condition, and the manner in

which they are operated with reference to the security and accommodation of the public, and the compliance of the several corporations with their charters and the laws of the state.

"Sec. 19. Be it further enacted, that said commission shall, as often as they deem it necessary, examine the several railroads in this state, and shall recommend in writing to the several railroad companies, or any of them, from time to time, the adoption of such measures and regulations as said commissioners deem conducive to the public safety and interest.

"Sec. 20. Be it further enacted, that the managers operating the several railroads of this state shall furnish the said commission with all the information required, relative to the management of their respective lines, and particularly with copies of all leases, contracts, and agreements for transportation, with express, sleeping-car, or other companies, to which they are parties, with schedules of tariff rates.

"Sec. 21. Be it further enacted, that the several railroad companies, trustees, or receivers, or other persons operating railroads in this state, be and are hereby required to make annual returns of their business to the board of commissioners on or before the first day of September of each year, made up to the close of business on the thirtieth day of June next preceding, which annual returns shall be made in duplicate in the manner prescribed by said commissioners, upon the blank forms to be furnished by said commissioners to said railroad companies. Any railroad company which shall neglect or refuse to make such terms shall forfeit to the state $100 for each day of such refusal or neglect.

"Sec. 22. Be it further enacted, that every railroad company shall, within twenty-four hours after the occurrence of any accident to a train, attended with serious personal injury, on any portion of its line within the limits of the state, give notice of the same to the railroad commissioners, who, upon receiving such notice, or upon public rumor of such accident, may repair or dispatch one or more of their number to the scene of said accident, and inquire into the facts and circumstances thereof, which shall be recorded in the minutes of their proceedings, and embraced in their annual report.

"Sec. 23. Be it further enacted, that the said commissioners may summon and examine, under oath, such witnesses as they may think proper in relation to the affairs of any railroad company.

"Sec. 24. Be it further enacted, that the board, through their chairman, shall make annual reports to the governor, on or before the first day of December in each year, for transmission to the legislature, of their doings for the year ending on the thirtieth day of June next preceding, containing such facts as will disclose the actual workings of the railway system in this state, and such suggestions as to the general railroad policy of the state as may seem to them appropriate. They shall also submit such recommendations for further legislation upon the subjects of railroads as they may deem necessary or advisable for the interests of the state.

"Sec. 25. Be it further enacted, that the railroad commissioners shall have at all times access to the list of stockholders of every corporation operating a railroad in this state, and may, in their discretion, at any time, cause the same to be copied in whole or in part for their own information, or for the information of persons owning stock in such corporations.

"Sec. 26. Be it further enacted, that it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other states of the Union, and with such persons from states having no railroad commissioners as the governor of such states may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each state, which shall secure such uniform control of railroad transportation in the several states, and from one state into or through another state, as will best subserve the interest of trade

and commerce of the whole country; and said commission shall include in their annual report to the governor an abstract of the proceedings of any such conference or convention.

"Sec. 27. Be it further enacted, that no person holding the office of railroad commissioner shall, during his continuance in office, personally, or through any partner or agent, render any professional services, or make or perform any business contracts with or for any railroad owned or operated in this state, excepting contracts made with such railroad in its capacity as common carrier.

"Sec. 28. Be it further enacted, that nothing in this act contained shall be construed to affect in any manner or degree the legal duties, rights, and obligations of any railroad corporation or other person owning or operating any railroad in this state, or its legal liability for the consequences of its neglect or mismanagement, whether adjudged by said commission to be reasonable, expedient, and proper, or not.

"Sec. 29. Be it further enacted, that none of the provisions of this act shall apply to any railroad now being constructed, or which may hereafter be begun and constructed, in this state, until ten years from and after the completion of such new railroad.

"Sec. 30. Be it further enacted, that witnesses summoned to appear before said commission shall be entitled to the same *per diem* and mileage as witnesses attending the circuit court. Witnesses summoned by the commissioners shall be paid by warrant on the treasury, to be drawn by the comptroller on the certificate of the president of the board, of the amount to which such witness is entitled; witnesses summoned by any party, to be paid by the party by whom they are summoned. And the commissioners are hereby clothed with the same power to enforce the attendance of witnesses as is now possessed by any court of record.

"Sec. 31. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

"Passed March 29, 1883. W. L. LEDGERWOOD,
"Speaker of the House of Representatives.
"B. F. ALEXANDER,
"Speaker of the Senate.
"Approved March 30, 1883. WM. B. BATE, Governor."

The bills further averred that the defendants had notified the plaintiff corporations that they would proceed under that act to revise all their tariffs of rates within the state of Tennessee, and alleged that the proposed action of the commissioners, as well as the said legislation, were in violation of the state and federal constitutions in several respects, not necessary to report, as the decision of the court is not based upon them. The constitutional provisions relied upon, together with the averments of the bills pertinent thereto, are sufficiently stated in the opinions.

The defendants filed their *affidavits* in each of the cases, in which they denied the contention of the plaintiffs as to the construction of their respective charters, and the allegations upon which the validity of the passage of the act was attacked, denied that the act in any way violated the constitutional provisions relied on by the plaintiffs, or that they were about to act illegally or in violation of plaintiffs' rights, and explained in detail what they had done under the act in respect of the plaintiffs' roads, and what course of conduct they proposed to pursue. They averred the power of the state to pass

the act, and elaborately detailed certain facts in the conduct of the plaintiffs respectively, to show the necessity of regulation in order to prevent the unreasonable and unjust charges and discriminations of which affiants alleged the plaintiffs had been guilty, including excessive charges beyond the maximum prescribed by the respective charters of the plaintiffs. They also expressed a great desire to exercise their powers under the act with becoming caution and moderation, and in the best of faith to the railroad companies and the public, so that the interests of all should be reasonably promoted and protected.

The circuit judge granted a restraining order, and directed the application for a preliminary injunction to be argued at Nashville before himself and the two district judges of Tennessee.

Ed. Baxter, East & Fogg, Dickinson & Fraser, and *Smith & Allison,* for Louisville & N. R. Co.

Wm. M. Baxter, for East Tennessee, V. & G. R. Co.

Vertrees & Vertrees and *S. F. Wilson,* for defendants.

Before BAXTER, HAMMOND, and KEY, JJ.

BAXTER, J. The complainant, the Louisville & Nashville Railroad Company, claims to be a corporation and citizen of Kentucky, and the defendants are the "railroad commission," appointed under and pursuant to the act of March 30, 1883. The provisions of this act, so far as they are material, will be recited in the progress of this opinion. It is enough, for the present, to say that it purports to vest the defendants with general supervision of all the railroads and railroad operations in Tennessee. The complainant, who owns and operates several railroads in the state, contends—*First,* that said act was not passed in the manner prescribed and according to the formalities required by the constitution, or, if it was, it was not passed in the form in which it has been promulgated; and, *secondly,* if constitutionally enacted, it is repugnant to the state and federal constitutions, and therefore void and inoperative. It furthermore complains that the defendants are about to enforce the same to its great detriment and irreparable injury, and prays for an injunction to restrain the defendants from interfering, under the color thereof, with its property or business. *Per contra,* the defendants insist that the act was regularly passed as promulgated, and that it is, in all of its provisions, within the constitutional prerogatives of the general assembly, and a valid enactment; and that the enforcement thereof by them will be no legal wrong of which the complainant has any right to complain.

Our duty, therefore, is to inquire and determine whether there is any irreconcilable repugnance between the act and the state or federal constitutions. Its first declaration is that all railroads in the state are public highways, over which all persons have equal rights of transportation for their persons and freight, on the payment of a just and reasonable compensation therefor. To this we fully assent.

Railroads have been created mainly for the accommodation of the public and to facilitate the business of the country. They are indispensable to the rapid and cheap transportation of commercial commodities. Under the fostering care and protection hitherto extended to them, they have expanded into huge proportions. With the beginning of this year we had 125,000 miles of road, representing more than $5,000,000,000 of capital, giving employment to 500,000 people, and in the annual receipt of more than $800,000,000 of earnings. They permeate every part of this extended country, and in a large measure monopolize the entire inland carrying business. Everybody, from the very exigencies of business, is compelled to patronize them. In this regard business men are left without any option. If unrestrained by wholesome legislation the public would be very much at their mercy. They could, by unjust discriminations, made under the name of drawbacks, rebates, or other disingenuous pretenses, favor friends and oppress opponents, and so adjust and graduate their rates according to the exigencies of fluctuating markets, as to secure to themselves or those who operate them an undue proportion of advancing prices. It would, therefore, in view of these obvious possibilities, be a humiliating confession to admit that there was no reserved power, either in the court or the legislature, to protect the public against such possible abuses. *We* do not hesitate to affirm the existence of such a power. Every owner of property, however absolute and unqualified his title, holds it subject to the implied liability that the use thereof shall not be injurious to the public. Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment as shall prevent them from being injurious to the rights of others, and to such reasonable restraints and regulations, to be established by law, as the legislature may from time to time ordain and establish. It is, in this principle, applicable alike to all kinds of property, generally denominated the "*police power*" of the state, that the authority is found for such control over individuals and corporations, and over their property, as is necessary to insure safety to all and promote the public convenience and welfare. And in the exercise of this reserved authority the legislature may require railroad corporations and persons operating railroads in the state to observe precautionary measures against accident, forbid unjust discrimination and extortionate charges, and, where there is no valid contract to the contrary, prescribe a reasonable maximum of charges for the services to be performed by them, and enforce the same by appropriate pains and penalties. There are many other things that may be lawfully exacted of them, which need not be recapitulated here. The legislature, however, cannot, under the pretense of regulation, deprive a corporation of any of its essential rights and privileges. In other words, the rules prescribed and the power exerted must be within the *police power* in fact, and not covert amendments to their charters in curtailment of their

corporate franchises. Nor can the legislature, in the exercise of this power, make any regulation in contravention of the state or national constitution. Every statute which invades vested rights, inflicts punishment or takes private property otherwise than by due process of law, impairs the obligation of valid contracts, or denies to any one or more persons the equal protection of the law, are unconstitutional and invalid.

Does the act in question violate any of these principles? As we have seen, it assumes to vest the defendants with a general supervision of all railroads and railroad operations in the state, and makes it their duty "to consider and carefully revise the tariffs of charges for transportation," etc., and if, in their judgment, the rate charged by them "is more than a just and reasonable compensation" for the service to be performed, or if such rate "amounts to unjust and unreasonable discrimination" against any person, locality, or corporation, they are to notify said corporations, etc., of the changes necessary to reduce the rate to "a just and reasonable compensation," and to "avoid unjust and unreasonable discrimination," and "when such changes are made or deemed unnecessary," said commissioners are commanded to append a certificate of approval to the schedule of charges so authorized by them, and the rates thus fixed, approved, and certified shall be *prima facie* evidence of the reasonableness and justice of the same; but they are nevertheless subject to revision by juries as will be hereinafter shown. The act does not, in express terms, command railroad carriers to adopt the rates prescribed by the commissioners, but provides that if they shall "exact and receive" more than "a just and reasonable compensation," or "demand more than the rates specified in any bill of lading" issued by them respectively, or shall for their "advantage or for the advantage of any connecting line," or of "any person or locality;" or if such railroad corporation makes any "unjust or unreasonable discrimination," etc., (unless in the fulfillment of an existing contract or some contract to be thereafter made for the purpose of developing some industrial enterprise,) it shall be held *prima facie* guilty of the crime of extortion, as defined by the act, and subjected to the pains and penalties therein imposed; and every "injured" party is authorized to sue for each extortionate charge, and recover "ten times the amount of the damages sustained," and a reasonable fee for his counsel, unless it shall appear that the alleged extortionate charge conformed to the rates fixed by the commission, in which contingency, (if the jury shall entertain the opinion that the rates so fixed are too high or amount to an unjust and unreasonable discrimination,) they are required to find for the plaintiff, but only for his actual damages, excluding the fee to counsel. Furthermore, the commissioners themselves are not bound by the rates prescribed by them. On the contrary, they are charged with the duty of "investigating" and "determining" whether any of the provisions of said act are violated, and whenever satisfied

that violations thereof have occurred, notwithstanding the corporation may have charged the rates fixed and authorized by them, they are peremptorily commanded by the statute to bring suits for every such violation against the offender in the name and for the benefit of the state; and if upon the trial the jury shall believe from the testimony adduced that the charges are "unjust and unreasonable," or that they "amount to unjust and unreasonable discrimination," their verdict must be for the state, and they are required to assess and return therewith a penalty of not less than $100 nor more than $1,000, and the court *shall* render judgment therefor.

The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—*First*, the taking of "unjust and unreasonable compensation;" and, *secondly*, the making of "unjust and unreasonable discriminations." But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan* v. *East Tenn., V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, "it would have to be left to a jury, upon the proof, to say whether the difference" in the rates "was discrimination or not," and that the same difference "might in one instance be held a violation of the law and in another not," thus making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act. "This," he said, "I think cannot be done." If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a *standard* of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the *measure* of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice. Hence, the statute under consideration undertakes to supply this *desideratum* by which juries are to be governed in the determination of the questions submitted to them. That standard is "that no rates or charges for service in the transportation of freight over any railroad, shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings * * * from its passenger and other traffic

would not amount to more than a *fair* and *just return* on the value of which such railroads with its appurtenances and equipments to *be assessed for taxation.*"

This definition is somewhat obscure. But, however interpreted, it does not obviate the objection made or mitigate its force, but intensifies pre-existing doubts. The value is to be the amount at which the road, its appurtenances and equipments are "*to be assessed for taxation.*" But what assessment is to govern? The one made before or after the alleged overcharge or prohibited discrimination? The language of the act is, "*to be assessed.*" But we will not tarry here. Suppose the value satisfactorily ascertained, how and upon what basis are the net earnings to be computed? Is the estimate to be based on past receipts, current income, or anticipated earnings? Is the accused corporation to be held to anticipate its future operations, foresee the amount of its receipts and expenditures, and accurately foreknow its future profits and losses, so as to be able to strike a balance in advance of actual results in order to make its charges conform to the requirements of the statute? If so, how far in the future must their foreknowledge extend? These are some of the many difficulties with which railroad companies are to be embarrassed, and against which the act requires them to provide. But we will suppose these to have been successfully surmounted, and another and more obstinate problem remains. These corporations are, in addition to their expenses, allowed to charge at a rate that will insure a "fair and just return" on the value of their property. But what is a fair and just return? This vital question is by the act left to the unqualified and unrestrained discretion of the jury. There is no legal standard erected whereby the jury can measure the amount. One jury may fix it at 2 or 3 per cent. per annum, while another jury may, in view of business contingencies and fluctuating values, allow 6, 8, or 10 per cent., and their action would be so far conclusive as to be beyond the revision of any reviewing court. The facts that the jury are to ascertain are—*First*, the *net* earnings; and, *secondly*, what would be a "fair and just return." The ascertainment of net earnings involves necessarily an inquiry into the gross receipts and expenditures. May the jury revise the expense account, and if so, to what extent? Both the earnings and expenses vary in accordance with the exigencies of business. Are rates to be varied in accordance with the fluctuating fortunes of railroad operations? If so, a charge reasonable in itself and honestly made might be rendered extortionate, and hence criminal, by a reduction of expenses or an unexpected increase of business, or a charge honestly made on the supposition that 5 or 6 per cent. would be fair and just, might be converted into a crime by the verdict of a jury subsequently rendered, based, it may be, upon facts transpiring subsequent to the alleged violation of the law.

We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—cannot be thus imperiled by such

vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned, shall, in their judgment and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a 5 per cent., instead of a 4 per cent., basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This cannot be permitted. Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms. No citizen, under the protection of this court, can be constitutionally subjected to penalties and despoiled of his property, in a criminal or *quasi* criminal proceeding, under and by force of such indefinite legislation.

The act furthermore conflicts with the eighth section of the eleventh article of the state constitution and the fourteenth amendment to the constitution of the United States. The first of these provides that "the legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to every member of the community who may be able to bring himself within the provisions of such law;" and the last—the fourteenth amendment—prohibits the states from "depriving any person of life, liberty, or property without due process of law, or denying to any person within their jurisdiction the equal protection of the law." It is not necessary for us to undertake, in this case, to define the boundaries or limit the operation of these just con-

stitutional restrictions upon legislative authority. Their general object is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority; to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for the redress of wrongs done, either to his person, reputation, or property. Such, we say, is the general purpose and intent of these constitutional provisions. The accuracy of this interpretation is not, as we understand, questioned by the defendants. Their contention is that railroad property is, in many respects, peculiar in its characteristics and uses, requiring legislation peculiarly adapted to them, and that to so legislate is not within the prohibitions of the foregoing constitutional guaranties, as, for instance, the enactment of a statute to regulate the running of trains by railroads. We admit the contention that it is competent for the legislature to enact laws for the government and regulation of railroads, and that the same could not be rendered invalid because of their non-applicability to other and dissimilar properties. But it does not follow that the legislature can enact statutes applicable as well to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. Certainly, they cannot so distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them. Nevertheless, the act in question, if valid, has made this discrimination in the most direct and positive terms. Although it professes to provide for the regulation of railroad companies and persons operating railroads in this state; and although both are common carriers by rail, use the same kind of machinery and motive power, are under equal obligations to the public and to their patrons, and compete in business, railroad corporations are thereby burdened with pains and penalties not imposed on persons operating railroads in competition with them. By the first section of the act both are declared amenable to "injured parties" for the causes therein enumerated. But the third section, prescribing penalties in favor of the state, as hereinbefore stated, for charges made in excess of what a jury may subsequently find in manner aforesaid and upon the basis stated, to be more than just and reasonable compensation, or unjust and unreasonable discrimination, is expressly confined to corporations. Under this section, corporations are subject to be sued, harassed, and worried by expensive and ruinous litigation, and to the payment of the penalties and costs therein provided, while persons operating railroads in active competition with them, engaged in the same kind of *quasi* public service and under the same obligations of fidelity and diligence, are exempt therefrom.

Another and like invidious discrimination is contained in section 13. This section makes it the duty of the commissioners to "consider and carefully revise all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state," and if, in their judgment, "any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation," the commissioners are to "notify the person or corporation of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination;" and "when such changes are made," or "when none are deemed proper and expedient, the commissioners are to append a certificate of approval to such tariff of charges, and in case such change" suggested by the commission "shall not be made," or if "any charge, subsequently made, shall not conform thereto," said "*corporation* shall be held *prima facie* guilty of extortion." It is *corporations*, and not persons operating railroads, who are to be held *prima facie* guilty of extortion under this section, and it is corporations, and corporations *only*, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt. But the unconstitutional discrimination of this act is not confined to discrimination between railroad corporations and persons operating railroads, but extends to a discrimination between railroad corporations themselves, the twenty-ninth section thereof expressly declaring that "none of its provisions" shall apply to any railroad then being "constructed," or which might thereafter be "begun and constructed in the state," until "ten years from and after its completion." Wherefore this distinction between existing roads and roads to be thereafter built? If the act was a proper regulation, why not apply it to roads to be hereafter built? If the legislature can thus draw the line between different railroads based on the date at which they were or are to be constructed, where and at what point is legislative discrimination to cease? If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another; and if it can do this, the foregoing wise and just provisions of the state and national constitutions, intended to secure an equality of rights to every citizen, may as well be eliminated from those sacred instruments.

Notwithstanding the act under consideration professes to regulate railroad operations, it, in effect, places the business of all railroad corporations in the state under defendants' supervision and control. In addition to the authority to revise their tariffs of charges, as hereinbefore shown, the commissioners may, for undisclosed reasons, and

without accountability to any one, give better rates to one corporation than to another. And (section 17) whenever, in their judgment, "it shall appear that repairs are necessary," or that "additional rolling stock" is needed, or "any change of stations or station-houses," or "any change in rates" are desirable, or "change in the mode of operating any road, and conducting its business is reasonable or expedient," the commissioners "shall give information in writing" to the corporation of the "improvements and changes which they may adjudge proper," etc. These powers, in addition to the authority to prescribe rates, include all the incidents pertaining to the absolute ownership of property. In the exercise of them the commission can limit receipts and dictate expenditures, insure prosperity to one company and drive another into bankruptcy, and assume the management and control of the business and operations of every railroad corporation in the state.

But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which, by force of the *prima facie* effect therein given to the *ex parte* action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or *quasi* criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them, will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its *future* net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property *to be assessed for taxation*, the jury being the exclusive judges of what a fair and just return is. This much is expressly commanded. But "injured parties" are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers *ten times* the amount of the damages sustained,

and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the state can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offense and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the state to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the state to the public use, without that just compensation provided for by the constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands.

Of what avail, then, is the suggestion that the powers of the commission are only advisory? To whom and in relation to what is their advice to be given? They speak to the owners of $50,000,000 of railroad property; and, although they may speak in the most deferential language, the companies to whom their gentle admonitions are to be addressed, thoroughly understand and justly appreciate the unlimited authority with which they are clothed by the act, the uncertainties ahead, the dangers with which they are environed, and the ruinous litigation to which they will be exposed if they decline to adopt the suggestions made, and they will, therefore, with a lively sense of their utter helplessness, cravenly submit to the will of the commission, although such submission may remotely involve the company in hopeless insolvency. Like apprehension would continue them the ready and flexible tools of the power thus placed over them, and the expressed wishes of the commission would, in every instance, be accepted and acted upon as if it was a positive command. No prescience is requisite to forecast the consequences. The commission would become the practical managers of all our railroads. They are to be elected every two years by a popular vote. In the absence of some radical change of party methods, the commission, to be elected from time to time, would represent and execute the policy of the dominant party, and, unconsciously or intentionally, manipulate this great interest for the benefit of the political organization to which they belong. Railroad property, on the successful, judicious, and just management of which the future growth and prosperity of the state so essentially depend, would become the prey of the spoilsmen; and an irresponsible oligarchy, far more dangerous to political morals and the business interests of Tennessee than any possible railroad combination, would be firmly established in our midst.

We do not, by these comments, intend to cast any imputation upon the defendants. There is nothing in this record which, in any degree, impugns either their actions or motives. So far as we can see, they have, in good faith, endeavored to perform their duties as they understand them. Our object is simply to point out the extraordinary powers attempted to be conferred by the act, and to indicate the large opportunities which it affords for an abuse of power and an invasion of vested rights under the color of authority; how it is that railroad organizations could be subjected to party service under its provisions and be manipulated as well against as in furtherance of the public interests, and to say, in the language of the supreme court of Tennessee, in the case of *Farnsworth* v. *Vance*, 2 Coldw. 108, that "this tremendous power" does not, as we think, "*lurk* within the principles of legislative power." We repeat, the regulating power of the legislature and the courts is sufficient to compel railroad companies to perform all their undertakings in favor of the public, and to prevent or punish all derelictions of duty. The legislature can enact laws, within constitutional limits, for the regulation of railroads and railroad operations, but it cannot lawfully authorize a commission, by direct or indirect legislation intended to accomplish that end, or necessarily involving that result, to take control of their business and operations. Such legislation would be an unauthorized and unconstitutional invasion of private rights. The act is also, as we think, a regulation of interstate commerce, and to that extent an intrusion upon the exclusive legislative authority of congress. The reasons for this belief will, by special request, be stated by brother HAMMOND.

Other objections to the constitutional validity of the statute, which we think are entitled to grave consideration, have been urged in argument. But as those already discussed are decisive of the case, we do not deem it necessary to further consider or discuss them in this case.

The prayer of complainants for a preliminary injunction will be granted.

HAMMOND, J. It is, in our judgment, a grave misapprehension of the *Granger Cases* to affirm that they support the legislation involved in this controversy. *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, etc., R. Co.* v. *Iowa*, Id. 155; *Peik* v. *Chicago, etc., R. R.* Id. 164; *Chicago, etc., R. R.* v. *Ackley*, Id. 179; *Winona, etc., R. R.* v. *Blake*, Id. 180; *Stone* v. *Wisconsin*, Id. 181; *Shields* v. *Ohio*, 95 U. S. 319. The overshadowing question in those cases, obviously, was that arising out of the claim to entire exemption from all legislative control over their business by the warehousemen and common carriers. This claim they based upon the supposed inviolability of their property rights, and the leading feature of the decisions is that they had not been "deprived of their property without due process of law" by legislation regulating the maximum of charges they might make, because they had, like ferrymen, millers, etc., embarked their property in a busi-

ness affected with a public interest, whereby it ceased to be *juris privati* only. The court said comparatively little upon the subject of interstate commerce in its relation to such legislation, and it is some- understand the language of the court on this topic, but when they what difficult, from the meagre report of the cases, on that point, to are read, in the light of previous and subsequent decisions, on that especial subject, there is no difficulty whatever in reaching a full understanding of its meaning. The decisions amount, we think, only to this—where a warehouseman or common carrier is engaged in the storage of goods or their carriage *within a state, and exclusively within it*, the rates of charges for such business are subject to legislative control by the state, and the fact that such legislation may *indirectly* and *remotely* affect commerce between the states does not invalidate it; because, if congress has, by reason of this indirect and remote relation of such local business to interstate commerce, any right to assert control over what is primarily domestic commerce only, it is to be presumed, until congress acts, that it does not intend to displace the right of the state to control its domestic commerce.

While it does not appear by the report of these cases, it is familiar to all who are informed about the general character of the discussions had over these questions, that the railroad companies have contended, at all times and in all places, that there is such a necessary co-relation and interdependence between domestic commerce by rail within a state and that which is carried on among the states, and between local and through rates of charges for transportation and competitive rates from more or less distant points, that local rates cannot be regulated by the several states, or any one of them, without disturbing disastrously all rates whatever, thereby seriously and directly affecting interstate commerce. It was undoubtedly in reply to this argument that the decisions were directed, and there is no denying that they close the argument and preserve the right of state control, notwithstanding any disturbance it may occasion rates for transportation between the states. But there is a vast difference between that principle and the argument made here in support of this legislation, that until congress chooses to regulate interstate commerce in respect to rates for transportation from one to another state, the states may regulate it, each within its own limits. It is applying the doctrine of the supreme court, in these cases, to an entirely different subject-matter. To say that the state may regulate the rates of transportation for its domestic commerce until congress chooses to exercise any power it may have over that transportation, because of its more or less intimate connection with commerce between the states, is one thing, and to say that all rates of transportation on articles in transit within the borders of the states, whether passing between two or more states or not, concern domestic commerce, and are *pro hac vice* subject to state control, is quite another.

One of the learned counsel for defendants seemed to shrink from taking this position at the argument, struggling in the face of the plain language of the act to somewhat confine its operation to local limits, but the other, following the attorney general of Illinois, in *People* v. *Wabash, etc., R. R.* 104 Ill. 476; S. C. 105 Ill. 236, boldly assumed that until congress acts the legislature may regulate *all* rates for carriage "within the state," no matter where the carriage is to be done, on the theory that it is the act of making the charge or rate for transportation that the state condemns or regulates, and not the transportation itself; wherefore its effect on interstate commerce is only indirect. By this counsel mean—for the illustration was put to test the argument—that the state may regulate charges on a car-load of coal coming from the Ohio river at Cincinnati, or Louisville, to Nashville, or passing through the state to Montgomery, so long as the regulation is confined to the charges for transportation over those miles of the route within the boundary of Tennessee. But we do not think this is what the supreme court means in the *Granger Cases*. It is true, counsel say this is only affecting interstate commerce "*incidentally*," but they are driven to this because the supreme court has declared that it can only be so affected. But for that exigency it is probable no ingenuity would suggest that the control of compensation for the carriage of goods was not a direct control of the carriage itself, nor that the control of a part was not as direct in its action as the control of the whole compensation. Nor does it in the least change this result to affirm that it is the act of making an unjust charge or discrimination at which the law is aimed. What is making the charge? Plainly, it is simply the act of contracting for the transportation, and the operation of the law is just as direct when the contract is forbidden, or regulated as to its terms, as when the act of transportation itself is forbidden or only permitted on those terms. It is, in fact, the most direct and, of all regulations, the most vital to that intercourse we call commerce, to control the compensation for that transportation by which an exchange of the commodities is effected; for without the transportation there can be no exchange between different places, and it is therefore the chief element of *interstate* commerce. It is like saying the control of the circulation of the blood for a space of one inch along the aortal trunk affects the victim's life only "incidentally," to say that the control of the rates of compensation of that part of a great line of interstate commerce, lying between the boundaries of a state, so affects that commerce. The injury may be small, but it is none the less direct, and not at all incidental, because it is only slight. And, as the circuit judge well remarked at the argument, if Tennesee may control the rates for interstate commerce within its limits, Kentucky may, and so on until the states have usurped the regulation of the whole matter. Indeed, this act of the legislature seems to be grounded on

this very notion, for we find in section 26 that the railroad commission is constituted a kind of diplomatic agency to accomplish that purpose. It enacts:

"That it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other states of the Union, and with such persons from states having no railroad commissioners as the governor of such states may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each state, which shall secure such uniform control of railroad transportation in the several states, and from one state into or through another state, as will best subserve the interest of trade and commerce of the whole country; and said commission shall include, in their annual report to the governor, an abstract of the proceedings of any such conference or convention."

It was to obviate the necessity for making commercial treaties—and in effect this section is a provision for such treaties—and to avoid the danger, confusion, and disaster certain to result to commerce between the states from this power of sovereign states over that commerce that the exclusive power was conferred upon the federal government "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." Const. art. 1, § 8. This operates as a necessary, wise, and self-imposed limitation upon the otherwise sovereign power of the states over the subject. It is not a police power in any proper sense, and in our judgment much confusion has arisen by so treating it in the struggle to find some method of evading the federal compact to surrender it. It belongs, it may be, to that immense and almost illimitable residuum of governmental power which has not been technically classified; but if it has been, there is no better name for it than that by which it is known among all nations—the commercial power; or, as it is called in the constitution itself, the power to regulate commerce. It is one of the chief functions of all governments to promote and encourage the interchange of commodities and intercourse of the people among themselves and with foreign nations and neighboring states. In the exercise of this power innumerable laws are made, and, in matters relating to the international or interstate concerns of commerce, treaties and compacts are formed, of which the federal constitution is, in this respect, a conspicuous example.

If the interchange or intercourse be "within the state," it is properly called domestic commerce, if from one to another, international, or, as to our Union, *interstate* commerce; and the government may, and often does, where it can control at all, under this power "to regulate commerce," control the instrumentalities of that commerce. There are, to be sure, certain limitations on the power, as on all its other powers, arising out of the laws of private right and private property; but it is too late now to deny, in view of these decisions of the supreme court, that charges for transportation are a matter of public concern, the private property engaged being dedicated, so to speak, to a public use, and the government may therefore exercise

certain legislative control of these charges. But *non constat* that the states may, under our system of government, exercise it. If it be domestic transportation, wholly within the state, they may; nor does it cease to be wholly within because the thing transported has come from without, nor because it may be destined to go, ultimately, beyond the state; but the particular transportation for which the charge is made must be wholly within the state. If it be partly within and partly without, the state cannot regulate that within and leave the federal power to act on that without, but has no control whatever over the charges for such a transportation. It is in the very nature of the thing itself not local or of domestic concern, and the states have no more power by such a construction or characterization to regulate the rates by the uniform legislation suggested by the section of the act just quoted than they have to so regulate the rates of postage or the weights of coins. That congress refrains from establishing such uniform regulation only indicates an expression of the federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the states. Declamation and argument in favor of the wisdom or necessity for some regulation are appropriate in the halls of congress, at the ballot-box, or wherever the state, as one of the federal units, may bring its power to bear upon the federal will, but they cannot and should not influence the courts, state or federal, to evade or deny this distributive principle of our governmental power over the subject of transporation as an instrumentality of commerce.

Again, to interpret the opinions of the supreme court in the *Granger Cases*, as they are by this act of the Tennessee legislature and the arguments made at the bar interpreted, is to convict the court of an expression of the barest platitude by a declaration, in another form, that an act of a state legislature can have no extraterritorial force; for it amounts to nothing more to hold that when a car-load of merchandise starts across the country from New York to New Orleans, each state may, until congress acts, regulate the charges for its transportation over the rails situated in that state; because, it is apparent that, whether congress has acted or not, neither state could regulate it elsewhere, and this without the least regard to the "domestic" or "interstate" character of the commerce, or to the "direct" or "incidental" effect upon it. Every mile of the route lies in some state, and when each has acted successively on the transportation, whether the action be "direct" or "incidental," and the subject-matter of it "domestic" or "interstate," becomes wholly immaterial, and there is nothing left to support the force of these terms as used in the opinions. But they are full of significance, if we observe the distinction between a transportation that commences in one state and ends in another and one that commences and ends within the limits of a single state. By this act, and the argument in support of it, all distinctions are obliterated and all commerce is forced to become do-

mestic in order that the states may act upon it. While the car-load of goods is in New York it is domestic to that state, and so on as it rolls over each state line to the end. The inexorable logic of the argument, therefore, is that, until congress acts, there is no such thing as interstate commerce in the matter of the transportation of commodities passing in exchange between the states.

This construction ignores the most prominent predication in the opinions of the court on the subject of interstate commerce. In every case of the series affecting railroad transportation, the court affirms with great distinctness the analogy to the *Warehouse Case*, the first of the series. Now, the subject-matter of that case was *storage*, which was held to be wholly within the state, and therefore subject to its regulation as to rates, and this regulation was not to be evaded because some of *the grain* might have come from another state, and might be destined for sale beyond it. We can scarcely imagine interstate storage, and the analogy of transportation to it would be incomplete unless the transportation involved were wholly between points within the state, as it plainly was in the *Shields Case* of the series. But let us imagine an elevator on wheels, and engaged in the storage of grain while passing from one state to another. It may be affirmed on these cases, keeping the analogy in view, that grain received and stored while passing from one point in Illinois to another in the same state was a transaction within that state, and subject to its control. But surely there is nothing in them to justify the claim that for the storage of grain received at Chicago, to be delivered in Detroit, the state of Illinois could regulate for the time consumed in passing through that state, and Michigan for the time in that state. So, as to railroad transportation, keeping again the analogy in view, we do not understand these cases to justify the claim that a state may be measured from east to west and from north to south, as appears in argument has been done by the defendants here, and on the basis of distance within the state regulate the charges for all property and persons passing over the rails within the territorial jurisdiction, but only that the state may regulate local rates on shipments commencing within the state and ending within it, although the article carried may have come from without and be destined to go beyond the state, and although in this remote and indirect way interstate commerce may be involved. For example, a car-load of merchandise shipped at Nashville to Memphis, on a route wholly within the state, may have come from Louisville and may be intended to be sent from Memphis into Arkansas, without affecting the state's power of regulation, but it does not follow if it came from Richmond via Nashville or Memphis *en route* to Arkansas, or to Nashville or Memphis, that the state would have the same power of regulating rates on the distance traveled within the state; and this is the important distinction which this act overlooks.

The court does not say in these *Granger Cases*, and has not elsewhere definitely determined, that congress can ever control or regulate local rates for domestic transportation, as we have above described it, by reason of any remote or indirect influence such regulation may have on interstate commerce, but it does say that until congress assumes that power the states may continue their control. This view of these cases carries out the analogy to storage in a warehouse, and no other is consistent with it. Any argument which disregards this pre-eminently distinctive and descriptive analogy that is the very foundation stone of the opinions in the railroad cases of the series, does the cases injustice and puts them in irreconcilable conflict with every decision the court has made on the subject of interstate commerce, while the construction we give them preserves their harmony with the others. It is proper to remark here that, for the purposes of this judgment, we deem it unimportant to determine whether any particular transportation is to derive its character of locality or domesticity from the *status* of the road over which it passes as lying and having its legal existence only within the state,—in which case all transportation over it might fall within the definition of domestic commerce,—or from the nature of the contract for a carriage which, by its terms, begins and ends at points within the state, without any regard to the *status* of the road. This act makes no distinctions in either aspect of this question, and is equally defective whichever view we take of it, and this whether either or both be correct. Moreover, neither of the plaintiff's roads in the cases we are deciding is local or domestic in the sense above described.

This opinion would be unpardonably incomplete if we did not, in view of the magnitude of the interests here involved, justify our judgment by a careful examination of the adjudications above construed. In the Iowa case it does not appear what particular acts of transportation, if any, were involved. It was an injunction bill by the railroad company to enjoin the prosecution of suits against it; whether those only threatened or already brought does not appear. The opinion is mainly devoted to other questions; but, although there were two railroads connected by a bridge and making, in one sense, a continuous line between two states, and, in that sense, engaged in interstate as well as state commerce, we have the authority of the opinion itself that the plaintiff's roads, "like the warehouse, is situated within the limits of a single state. Its business is carried on there and its regulation is a matter of domestic concern." This being so, all transportation upon it was, in a legal sense, exclusively within the state, and it mattered not that the goods or passengers had come from another state or where they were destined—the transportation was wholly domestic, and the analogy to the storage of grain is complete. It was a local road leased by a foreign corporation, and in contemplation of the opinion, all transportation over it was essentially domestic, and

its interstate commerce was such only in the indirect way in which the grain elevator was engaged in like commerce.

We have the authority of the supreme court of Iowa for this construction, in a decision made long afterwards, declaring the Iowa act unconstitutional, as an attempt to regulate interstate commerce. Says that court:

"The cases of *State* v. *Munn*, 94 U. S. 113, etc., (citing them,) do not appear to us to sanction the validity of acts of the state legislature regulating the transportation of freight and passengers between the states. They merely determine the power of the states to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the states, respectively, and that, when such power is exercised, although it may incidentally affect commerce between the states, yet the laws of the state are not regulations of interstate commerce because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of *Hall* v. *De Cuir*, 95 U. S. 485, and *Railroad Co.* v. *Husen*, Id. 465." *Carton* v. *Illinois Cent. R. Co.* 59 Iowa, 148, 153; S. C. 13 N. W. Rep. 69; S. C. 22 Amer. Law Reg. 373, and note.

That was a case of the continuous shipment of car-loads of wheat from Ackley, Iowa, to Chicago, Illinois, and a claim for conformity to the rates established by the state act for so much of the distance as lay in Iowa, and the act was held a violation of the commerce clause of the federal constitution.

In the Wisconsin case, the next in the series of the *Granger Cases*, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge DRUMMOND tells us the question we are considering was scarcely argued at all in the court below, and evidently it was only incidentally considered in the supreme court. *Piek* v. *Railroad Co.* 6 Biss. 177. The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for "carrying freight which comes from beyond the boundaries of the state and to be carried across or through the state." Possibly, notwithstanding its terms, the act may have been construed, within the purview of this exception, not to apply to persons and property coming from other states into Wisconsin, or going from that into other states, which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the *State Freight Tax Cases*, 15 Wall. 232, was reserved, and not decided in that court. The opinion of the supreme court says:

"The law is confined to state commerce or such interstate commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to interstate commerce it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without."

Now, strange to say, the bill in that case attacked the law because the exemption we have noticed was itself a regulation of interstate commerce, on the theory, perhaps, that it gave an advantage to the citizens of the state over those of other states, which is sometimes applied as a test to determine whether a given law be a regulation of interstate commerce. But whether the court had the exemption section of the Wisconsin act in view, and construed the act in reference to it, is not satisfactorily shown. If, however, we turn to the report of the case to see what is meant by "this company" having "domestic relations" with the people of Wisconsin, the analogy of the warehouse case reappears, though not as distinctly as in the other cases. No particular freight charges were involved in the controversy, it being a bill by bondholders and stockholders to enjoin the company from obedience to, and the railroad commissioners from enforcing, the act, and although this Wisconsin company had been consolidated with an Illinois corporation, the court is at the greatest pains to show that it had not ceased by that consolidation to be, in a legal sense, a local road, as the Iowa road had just been held to be. Counsel say in argument here that this was for another purpose in the opinion, which is true, but it is as potential for one purpose as another, and the opinion in the language quoted so treats it by connecting the "domestic relations" of "this company" with the people of Wisconsin to this subject of interstate commerce. There is certainly nothing in the case to show *specifically* that the court held, as we are asked to hold, that a state may regulate fares and freights, for carriage between two or more states, over that portion of the route lying in that state. This construction is purely an inference drawn by those who claim it. We freely admit that, looking alone to this series of cases, and ignoring all others on the subject of interstate commerce, the construction we are giving them is somewhat inferential, but it seems to us the fairest and most reasonable. And this more clearly appears by reference to the report of this case in the court below, and to that of a contemporaneous case under the same statute in the state courts of Wisconsin, in which the pleadings and argument are more fully shown. *Atty. Gen.* v. *Railroad Co.* 35 Wis. 425, 449, 453, 470, 478, 484, 485, 511. The court below complained that the case, now under analysis, was scarcely argued on this point, and for that reason refused to consider it, while in the court above it was thought of so little relative importance that the dissenting opinions do not notice it, and the court disposes of it in a comparatively few lines. And yet, the misconception of these *Granger Cases*, which we are seeking to remove, is undoubtedly the foundation of a belief in the power of the states to legislate, as this act does, without limitation or qualification.

In the next case of the series, the particular character of the transportation involved is not shown, and it is of no importance on this subject; nor do the next two shed any further light on it, except by the constant reference to the *Warehouse Case*. But when we come

to the Ohio case, generally classed as one of the series, we find for the first time that the particular act of transportation is given, and that it commenced and ended within the state. Going back to the *Warehouse Case*, we find that the language of the court on this subject of interstate commerce seems to have been selected with a purpose to use the case for convenience as an analogy in the subsequent cases affecting railroads. The court says: "The warehouses of these plaintiffs in error are situated and their business carried on *exclusively within the limits of the State of Illinois.*" They are likened to the carts and drays transferring grain from one railroad station to another, and their instrumentality in interstate commerce is said to be *incidental.* Certainly, this cannot be said of either of the roads in the cases we have in hand. One plaintiff is a Kentucky corporation, extending its road into this state by license of our own laws, presumably, for the primary purpose of interstate commerce. *Louisville & N. R. Co.* v. *Henry Co.*, (unreported,) by BAXTER, J.; *Callahan* v. *Louisville & N. R. Co.* 11 FED. REP. 536, by KEY, J. The other road, as shown by the bill, extends into Georgia, Alabama, and Mississippi, and in no sense can they be said to be carrying on their business exclusively within the limits of a single state. They are not like warehouses, carts, and drays, or purely local roads engaged incidentally in interstate commerce, but are great arteries of intercourse and transportation with neighboring states—as much so as the Tennessee, Cumberland, or Mississippi rivers. The analogy wholly fails unless we limit the regulation, which this act does not pretend to do, to purely local transportation commencing and ceasing at points within the state; and, even then, it may be doubtful, on these *Granger Cases*, whether the analogy they establish would apply, unless the roads were local in the sense the roads in those cases were held to be, which point we need not determine, as the act itself makes no distinction.

Turning now from the *Granger Cases* to others, and this interpretation of them becomes so plainly the correct one that it seems impossible to resist the conviction that they have been misunderstood in the reliance placed upon them to support this act. It was held in the *State Freight Tax Case*, 15 Wall. 232, that the transportation, whether by land or water, of commodities from one state to another was interstate commerce, and the prominent idea of such commerce in the minds of the framers of our federal constitution; that its direct regulation is exclusively within the control of congress; that when the subjects of regulation are in their nature national, or admit of uniform regulation, that fact demonstrates the exclusive power of congress over them; and that the state cannot, even in the exercise of its taxing power, jeopardize the freedom of transportation between the states. That the regulation of rates of charges for such transportation does admit of uniformity, cannot be denied, and certainly not by the advocates of the power to pass this act, since it provides for such uniform regulation by inviting and promoting separate ac-

tion by all the states in the manner therein pointed out. And, if the state may not, by the exercise of its *taxing power*, interfere with the freedom of inter-state commerce, under what power can it act more potentially? Again, if a tax upon a commodity in transit between the states be a direct interference with the freedom of the transportation, can it possibly be said that an act which forbids the carriage by punishing the carrier unless he complies with certain prescribed conditions is any less direct in its action? We think not. The *Granger Cases* and that just cited may be harmoniously reconciled, understood as we have interpreted them, but not as the defendants' counsel and the framers of this act have construed them.

The *Daniel Ball Case*, 10 Wall. 557, and the *Montello Case*, 11 Wall. 411, S. C. 20 Wall. 439, are very clear illustrations of the force and effect of the *situs* of an *instrumentality* of commerce in determining whether the subject-matter of the given regulation be one of domestic concern only incidentally connected with interstate commerce, or a direct instrumentality of that commerce itself, and in the first case is a complete and careful definition of "commerce between the states" and the power of congress over it. We had intended to quote extensively from the opinion, because, more than any other perhaps, it explains the language used in the *Granger Cases*, but since it would prolong this opinion we forbear, and simply invite a careful scrutiny of the case. The distinctions are there pointed out between the domestic commerce, which the states may regulate as well as its agencies, and that interstate commerce which, *as to itself*, they cannot regulate at all, directly nor indirectly, incidentally or otherwise, whether congress has acted or not; but *as to the agencies of which*, until congress acts, there is left to the states almost illimitable control in any department of governmental power, so long as such control affects the commerce itself only incidentally, and does not directly interfere with its freedom. This is the thing secured by the constitutional provision, which is really a treaty or compact for absolute free trade between the states, subject to such uniform regulations as congress alone may impose. And it is doubtful if congress itself could impose one rate for Tennessee and different rates for the other states, as separate action by the states must do.

In another case the supreme court says:

"The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled." *Welton* v. *Missouri*, 91 U. S. 275, 282.

It is to be noticed in the *Daniel Ball* and *Montello Cases*, *supra*, that there was no question involving the commerce itself, but only an *instrumentality* of it, namely, a steam-boat; the inquiry being whether it was subject to the navigation laws of the United States, and its solution depending on whether Grand Rapid and Fox rivers were *do-*

mestic in the sense that they lay exclusively—like the railroads, in the *Granger Cases*—within the limits of a single state. It was found—and it is worthy of remark that one of them was artificially made so, like railroads—that these rivers were, as a *geographical fact*, not *domestic*, but *interstate* rivers, (if they may be so called,) and that the steam-boats were within the power of congress. But had the fact been the other way, as in the *Granger Cases*, the result would have been the same, so far as the power of congress was concerned, because it was shown that the boats were actually carrying goods between the states, and this fact would support the power of congress, which had acted as to steam-boats so engaged. This was plainly intimated, if not decided. The power of congress to regulate such an *instrumentality of commerce* is practically unlimited, because it may reach the commerce itself as well as its agencies; wherefore, there is no need to look to the character of the regulation in determining the power, but only to the character of the commerce. But when we turn to the power of the states, we must necessarily scrutinize both. The definition of interstate commerce, as given in these cases, does not change; it is fixed whether congress has acted or has not acted, and the real question, as to the states, always is twofold,—does the proposed law act upon the *commerce itself*, or does it act *only* on the *instrumentality?* If the first, it is always void; if the second, its validity depends on the circumstances. Here lies the fallacy of this and all legislation, which overlooks the not always broad distinction between regulating the *commerce itself* and *its instrumentalities*, and we have the authority of the supreme court in the next case cited for saying it is often disregarded. We quote again:

"Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the great power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce." *Mobile Co.* v. *Kimball*, 102 U. S. 691, 702.

Can anything be more explicit than this, and does it not apply to this legislative act? The court has repeatedly said, as here, that the transportation of the commodity exchanged is a part of the commerce itself; and if the transit be between two or more states, it is, *ex vi termini*, interstate transportation and interstate commerce. Being so, does not any law which controls the price of the transportation, or restricts it under pains and penalties, affect the commerce itself, and this as directly as possible? It is a delusion to call such a law a regulation of the *instrumentality*, and the delusion is not concealed by naming the process a regulation of railroads or corporations or mo-

nopolies, nor yet by decrying these as instrumentalities which *need* regulation, as no doubt they often do in this regard. It is the instrumentality by which we reach that intangible thing called commerce, and in that sense the instrumentality, and not the commerce, is always regulated; but this confuses the distinction above adverted to by the supreme court.

To illustrate again, take a person engaged in interstate commerce as a carrier on ocean, river, railroad, or highway. If he or his agents be found within the limits of any state violating its laws, he may be arrested and imprisoned; if his property fall under condemnation of the law, it may be seized, although engaged in the commerce; he, his agents and property, and even his receipts for the freight, may be taxed, as well as any special franchise or privilege enjoyed by him, if these taxes be not disguised regulations of commerce. *State Tax Gross Receipts Case*, 15 Wall. 284; *Memphis & L. R. R. Co.* v. *Nolan*, 14 FED. REP. 532. By these and numerous other laws the commerce may be incidentally affected, even to destruction in some cases, through operation upon the *instrumentality* or *agency* alone; and where the carrier is a corporation, there are extended fields for such operation.

But if the carrier in the illustration is engaged in *domestic* commerce, where the state can act *directly* upon it, the capacity for affecting the articles of interstate commerce which may fall into his hands *to be locally transported* is increased; but the effect on *interstate* commerce is still incidental, and although the particular regulation ceases to act on the instrumentality alone, but acts directly on the state commerce itself, yet the distinction between a direct action upon the interstate commerce, and an incidental effect upon it through action upon the instrumentality, remains obvious; for, in such a case, the domestic transportation is itself only an instrumentality, agency, or auxiliary of the interstate commerce, which, until congress act, remains subject to state control. This distinction must be observed in determining what is incidental only in its action on interstate commerce and what is direct; and it runs through all the cases. But when a plain and unmistakable case of direct action on the commerce itself is presented,—as all regulations or restrictions on the contract of transportation must be,—all that need be looked to is the character of the commerce so regulated, and if it be interstate transportation, as defined in the cases cited, regulation or restriction by the state is void. If, for example, as in *Hall* v. *De Cuir*, 95 U. S. 485, the state, exercising its power to secure equal civil rights in the matter of transportation, undertakes to prescribe the privileges a passenger shall enjoy, it is void, although congress has not acted upon that matter, and the passenger be going only between points in the same state. If, again, the state undertake, beyond the scope of vital necessity, to exclude or regulate the entrance of diseased cattle into the state, it is void. *Railroad Co.* v. *Husen*, 95 U. S. 465. And if, under the disguise of an inspection law—the power of inspection being especially reserved to

the states in the federal constitution—the state attempt to exclude or regulate the introduction of passengers thought to be paupers, criminals, etc., it is void. *People* v. *Co. Gen. Transatlantique*, 107 U. S. 59; S. C. 2 Sup. Ct. Rep. 87. And these examples might be multiplied.

It does not advance the argument to invoke the *police power* of the state to support this act of the legislature; for, with noticeable emphasis, it is held in the last two cases cited, as everywhere, that neither in the exercise of its police nor any other power, can the state make a law which is in effect a regulation of interstate commerce. Nor does an appeal to the power of the state over the corporations of its own creation strengthen the argument; for it cannot, by the charters themselves, make regulations of interstate commerce. Such regulation is as void there as elsewhere. *Telegraph Cases*, 96 U. S. 1. If control over the rates be desired by the state under all circumstances, it might possibly secure it by prohibiting its corporations from engaging in interstate commerce in any other way than as domestic roads, and confining them absolutely to the business of transportation within the state, if this would not of itself be an invalid prohibition as a discrimination against interstate commerce. Possibly, when incorporators ask a grant of franchises to enable the company to engage in interstate commerce, and, in consideration of the grant, *agree* not to charge more than a certain *maximum*, or to establish a certain schedule of rates for the trasportation of commodities carried in such commerce, they would be bound by it; but not, be it remembered, because there has been a lawful exercise by the state of a municipal power to prescribe such rates,—for that would be none the less a regulation of interstate commerce, and *as such* void,—but because the incorporators, as owners, with power, in the absence of paramount regulation by law, to prescribe their own rates, have established these. *Consensus facit jus.*

It is obvious, however, in such a case, that the contract cannot be subsequently changed *qua* contract without the consent of both parties, and the remedies for its violation would be those available for a breach of the contract; and where, in the absence of congressional legislation, the consent of the carrier is wanting to any change in the charter, it is inoperative to bind him, not so much because the legislature cannot impair the obligation of a contract as because, without his consent as owner, there can be no regulation at all by state legislation. It being in such case a matter of contract simply, and not of municipal law to regulate the rates, there can grow out of it no enlarged power over interstate commerce, whatever else may grow therefrom. The act *qua* a regulation of interstate commerce is as invalid in the charter of a transportation company as elsewhere in any statute, and necessarily as invalid in any subsequent statute, no matter how full the reservation of power over the charter may have been made.

We need not say that, as to the power to regulate the domestic or local commerce of the company chartered, other principles may come into play. There is no doubt that the fact that our railroads, until recent years, and before the day of consolidations, combinations, trunk lines, and continuous rails were regarded as purely *local* institutions, beginning and ending within the boundaries of a single state, and the further fact that they were all owned by corporations whose migratory capacity was limited and almost denied, have done much to intensify the notion of their still being mere local agencies of commerce. But by active state legislation had for the purpose they have now, for the most part, become continuous avenues of commerce among the states, sweeping over state lines as easily as the Mississippi river rolls along them, and stretching quite as far. We do not see why this fact should not have the same influence it had in *Hall* v. *De Cuir, supra,* and the other cases, and which was suggested by Mr. Justice MILLER in *Gray* v. *Clinton Bridge,* 7 Amer. Law Reg. (N. S.) 149.

The supreme court of Iowa denied validity to the law of that state on the same ground we take, as did also the circuit court of the United States for that state. *Canton* v. *Illinois Cent. R. Co., supra; Kaeiser* v. *Illinois Cent. R. Co.* 18 FED. REP. 151. The case of *Georgia R. R.* v. *Com'rs,* (not yet reported,) did not touch this question, nor does the case in the circuit court of the United States for that state mention it. *Tilley* v. *Railroad Com'rs,* 4 Woods, 427; S. C. 5 FED. REP. 641.

The scope and extent of the principle we are enforcing with the distinctions we have endeavored to point out between the characteristics of federal power over commerce between the states, and the domestic power of the state over the instrumentalities thereof found within its borders, find an illustration in the power of the federal congress, on the one hand, over canals owned and constructed by the state itself, and wholly within it, and on the other, of the state legislature over ships and watercraft in the establishment of liens for domestic supplies furnished in the home port. *In re Boyer,* 3 Sup. Ct. Rep. 434; *The B. & C.* 18 FED. REP. 543; *Escanaba Co.* v. *Chicago,* 107 U. S. 678; S. C. 2 Sup. Ct. Rep. 185; *The Lottawanna,* 21 Wall. 558; *The Illinois,* 2 Flippin, 383.

It is not necessary to go into any more elaborate examination of the cases in the supreme court on this particular subject of interstate commerce, for we are relieved of that necessity by an eminent writer, who has, by his thorough and superior authorship, distinguished himself above the mere book-makers of this day. He has carefully examined and classified the cases in a useful manner, and evidently laments that he cannot find in the rulings of the court any larger jurisdiction for the states over this subject of interstate commerce than he thinks they establish. The cases since Mr. Pomeroy wrote will be cited in a foot-note to this opinion for convenience of consultation. 4 South. Law Rev. (N. S.) 357. See, also, 7 South. Law Rev. 377; 3

South. Law Rev. (O. S.) 656; 13 Amer. Law Reg. (N. S.) 1, 185; 23 Amer. Law Reg. 81; 12 West, Jur. 17; 12 Cent. Law J. 194; Pierce, R. R. 468.

The whole list, from *Gibbons* v. *Ogden*, 9 Wheat. 1, and *Brown* v. *Maryland*, 12 Wheat. 419, to the latest, point with reasonable certainty to the line between valid and invalid legislation by the states. The *Granger Cases* must take their places in this line and conform to it, for there is not the least indication of any purpose to overrule the other cases, and an abundant manifestation in subsequent cases of adherence to them. They show that the states may tax, inspect, police, and in other abundant ways, by the exercise of any kind of power they possess, regulate the agencies and instrumentalities of interstate commerce; they may dig canals, build railroads, improve rivers and harbors, establish ferries, build wharves, construct dams and bridges, and control pilotage; or they may authorize persons and corporations to do these things, and regulate them after they are constructed or established; but neither in their taxation, their inspection, their policing, or other exercise of power, can they by their regulations act directly on the commerce, as these cases define it, between the states. As to that, until congress acts, the commerce must be free.

We do not overlook the argument that this act leaves the carriers free to charge what they please, so long as it is not unreasonable and unjust. Nevertheless it prescribes regulations for determining what is unreasonable and unjust, based on an assumed power over the subject which we have endeavored to show does not exist. The character of the regulation is immaterial where you cannot regulate at all. Carriers cannot charge more than is reasonable and just, but if there be needed any legislation to more effectively determine what is unreasonable and unjust, and to prevent discrimination, it must come from congress in cases like this. We hold, without the least hesitation, after this examination of the subject, that an act of the legislature which attempts, as this does, to regulate, no matter how, *all* transportation over the railroads in this state, and to revise *all* tariffs of charges for transportation over those roads, is, so far as it relates to the plaintiffs in these cases before us, an attempt to control the compensation to be charged by them for the transportation of commodities and persons in transit between two or more states, for that portion of the route lying within this state, and therefore invalid as a regulation of interstate commerce, acting, as it does, in the most direct way possible on that commerce itself. This act makes no discriminations whatever in this regard, and we cannot, by judicial action, insert them in the act by limiting our injunction in respect of the interference of defendants with the charges by plaintiffs for fares and freights in any way. This would be to legislate by judicial decree, for there is nothing in the act to guide us in fixing our limitations. It does not appear that the legislature would have passed this law, or any law, confining its power as we have suggested it is

confined by the federal constitution, or the interpretation we here give that instrument. If the legislature cannot legislate as it has proposed to do, we do not know that it wishes to legislate at all. Cooley, Const. Lim. (4th Ed.) 214–219; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Neely* v. *State*, 4 Baxt. 174. Hence, we must take the statute as we find it, and restrain the defendants from any action under it as to these plaintiffs.

There are other grounds of fatal objection to this legislation which have been stated by the learned circuit judge in which we all concur; and other questions have been ably argued by counsel, but we do not deem it essential to express any opinion on them because their determination, either way, would not affect our decision on this motion.

Consult *Turner* v. *Maryland*, 107 U. S. 38; S. C. 2 Sup. Ct. Rep. 44; *People* v. *Co. Gen. Transatlantique*, 107 U. S. 59; S. C. 2 Sup. Ct. Rep. 87; *Wiggins* v. *East St. Louis*, 107 U. S. 365; S. C. 2 Sup. Ct. Rep. 257; *Transp. Co.* v. *Parkersburg*, 107 U. S. 691; S. C. 2 Sup. Ct. Rep. 732; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Bridge Co.* v. *U. S.* Id. 470; *Packet Co.* v. *Catlettsburg*, Id. 559; *Webber* v. *Virginia*, 103 U. S. 344; *Tiernan* v. *Rinker*, 102 U. S. 123; *Lord* v. *Steamship Co.* Id. 541; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *St. Louis*, Id. 423; *Guy* v. *Baltimore*, Id. 434; *Machine Co.* v. *Gage*, Id. 676; *Trade-mark Cases*, Id. 82; *Transp. Co.* v. *Wheeling*, 99 U. S. 273; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Cook* v. *Pennsylvania*, Id. 566; *The Telegraph Case*, 96 U. S. 1.

KEY, J. I have not thought it necessary to prepare any opinion in these cases, and am content to announce that I concur in the opinions just read.

ESTES and others *v.* SPAIN and others.

(*District Court, N. D. Mississippi, W. D.* March 3, 1884.)

DEED OF ASSIGNMENT BY INSOLVENT—VALIDITY—BURDEN OF PROOF.

A deed of assignment *prima facie* good may be impeached for circumstances connected with, and conduct of the insolvent at and about the time of, the execution of it. In such cases the burden of proof is on the grantor or his beneficiaries under the assignment to show the validity of the deed.

In Equity.

R. H. Taylor, *J. G. Hall*, and *Luke Wright*, for complainants.

Sullivan & Sullivan and *E. Mayes*, for defendants.

HILL, J. This cause is submitted to the court upon bill, answers, exhibits, and proofs, from which the following facts appear:

S. H. Gunter, a merchant of the town of Sardis, in this state, was, on the twenty-fifth day of March, 1882, largely indebted to the complainants, and other merchants,—a number of whom are made defendants to the bill,—and on that day executed a deed of general assignment, purporting to convey all

of his property, real and personal, and all his notes, books of account, and other assets of every description, to S. G. Spain, as trustee, for the purpose of paying his debts, which, it is admitted on the face of the assignment, he was unable to pay in full, reserving, however, from the conveyance the property owned by him exempt by law from execution and sale, a schedule of which is given. Soon before, and about the same time, said Gunter executed another conveyance, conveying to J. B. Boothe, as trustee, certain real estate described therein, to secure and save harmless his sureties upon a note which he owed to the Sardis Bank; and at or about the same time said Gunter transferred and delivered to a number of his clerks and employes certain notes and accounts in payment of an alleged indebtedness to them; and shortly before this time, and at a time when, from the proof, he contemplated conveying away and dispossessing himself of all his visible means, he delivered to his wife the sum of $900 in payment of an alleged indebtedness to her for money which it is claimed by him he received from the estate of his wife's grandfather, and belonging to his wife, in the year 1858. Within a short time after these conveyances were made and money paid, defendants Bickham and Moore, and other creditors, sued out attachments in this court and caused the same to be levied by the marshal on the goods and assets in the hands and possession of said Spain, the trustee to whom they had been delivered under the assignment. Complainants, who are by far the largest creditors, who are preferred under the assignment, filed this bill, alleging, among other things, that the assignee was unwilling further to execute the trust conferred upon him by said assignment, and had abandoned the same; that the amount of the debts upon which attachments had been levied upon the property far exceeded its value, and that unless the trustee, or some one else interested, would give a claimant's bond, the property would be sold at a great sacrifice; and alleged that the assignment executed to said Spain was made in good faith, valid, and a binding security for the debt due to complainants; and prays that these attaching creditors be enjoined from proceeding further with their said attachment suit; that said deed of assignment be, by decree of this court, declared a valid assignment; and that a trustee or assignee be appointed to execute the trusts created by it, in the room and stead of said Spain, the assignee therein.

The answers deny that the assignment was made in good faith, and is a valid and legal transfer of the property and assets therein conveyed for the purposes expressed, as against the defendants, who were creditors of the assignor before the assignment was made, and deny that complainants are entitled to the relief prayed for in their bill. The question of the validity of the assignment is the main question to be determined. If there is any provision on the face of the assignment, or if there is any provision wanting in it, which renders it fraudulent and void in law, or if the facts as shown by the evidence show a purpose on the part of the granter to reserve a benefit to himself, or to hinder or delay his creditors, or any of them, in the collection of their debts, then the assignment must be declared fraudulent and void and the bill dismissed. As the debt due complainants is an antecedent debt, under the well-settled rule in this state, they or the assignee do not occupy the position of a *bona fide* purchaser without notice; so that if the assignment is fraudulent and void for any reason, as against the grantor, the beneficiaries under it can take nothing by it.

The first question to be considered is, does the assignment on its face contain any provision, or omit any provision, which, in its effect, will or may hinder and delay the grantor's creditors, or work an injury to them, not sanctioned by law? The assignment was evidently drawn by a skillful lawyer, with unusual care, and most of the provisions and omissions which are most usually relied upon and sustained in holding such conveyances fraudulent and void are in this assignment avoided, and at first view there would appear no objection to it, appearing on its face. The clause in the assignment providing for the disposition of the moneys arising from the collection of debts and the sale of property, after providing for the payment of the costs and expenses of executing the trust, and for the payment of the preferred creditors, provides that the supplies, if any, shall be paid *pro rata* to the unsecured creditors, whose names are given and the amount due to each, as stated in a schedule annexed to the assignment, and made part of it, and to any other creditors who are omitted therefrom, but does not mention a time in which these omitted creditors shall present their claims, nor the mode in which they shall be established. The assignee is directed to make the distribution with convenient speed, but fixes no limit of time in which it should be done. It is insisted by defendants' counsel that these omissions leave it to the discretion of the assignee, who is the assignor's confidential friend, former book-keeper and wife's present partner, to postpone the distribution to an indefinite period, and to the delay and hinderance of the creditors in collecting their debts.

It has been held by the supreme court of this state in the case of *Mayer* v. *Shields & Mulhallan*, 59 Miss. 107, and by this court in the recent case of *Bickham & Moore* v. *Lake & Austin*, that, whenever, in a general deed of assignment by an insolvent debtor, it is required that something must be done by the debtor in order to participate in the funds, that a reasonable time, not too long nor too short, must be given, in which to do the thing required to be done, and that the want of such a provision will enable the assignee to unduly postpone the distribution to the hinderance and delay of the creditors, and thereby render the assignment in law fraudulent and void. In this case nothing is required of the omitted creditors to be done in order to participate in the funds to be distributed, and it is a matter of some doubt whether this defect alone renders the conveyance void; but these omissions are circumstances to be taken in connection with the proof in the cause to determine whether or not there existed fraud, in fact, in the execution of the assignment. The assignment further provides that if any property or debts have been inadvertently or by mistake omitted, the assignees shall place them upon the proper schedules; and this, it is claimed, renders the assignment void. The indebtedness mentioned means the debts due to the assignor, and not those due by him, and this provision was right and proper, and could not in any way prejudice the creditors; but the contrary.

Admitting the assignment to contain nothing on its face to invalidate it, the next question is, does the evidence show a fraudulent purpose in the grantor in making it? The proof abundantly shows that the grantor was hopelessly insolvent, and that for 12 days, by his own testimony, he knew it, and contemplated making a general assignment of all his property and assets, saving his exemptions. Hence, all he did subsequent to that time in the disposition of his property, assets, and money must be considered in determining this question. The proof shows that the goods and merchandise were sold mostly for cash, and at low rates. The proof further shows that subsequent to that time he paid his wife the sum of $900, which he claims he was advised by his counsel to do, in payment of a debt which he claims he owed her for money received from her grandfather's estate in Alabama in the year 1852. There is proof tending to show that his wife repeatedly took money from the drawer during this time, and that more goods than usual were taken to his residence from the store.

If all this was fair, it might have been explained by the testimony of Mrs. Gunter. She was present when her husband's deposition was taken; yet she was not examined. The rule is that the transactions between husband and wife are to be strictly scrutinized, and if there are even slight circumstances going to impeach the *bona fides* of the transaction, the burden of proof is thrown upon those claiming under it, to establish the fairness and validity of the transaction. Coupled with this is the rule that when suspicious circumstances are shown against the fairness of the transaction, and the party required to explain it, if fair, fails to produce proof to establish its fairness, the presumption is that the transaction was unfair, or that it is to be taken against its fairness. This rule applies to the facts of this case with no little force. Notwithstanding the assignor in his testimony refers to the records of the courts in Alabama and in this state, it was the duty of the complainants to produce the proof, and not that of the defendants to disprove it. As part of the same scheme to dispose of all his means, the assignor disposed of part in the payment of what was due his clerks. This he had a right to do, as well as to pay a *bona fide* debt due his wife. The only question in either case is, was the debt due and owing, and that received for it reasonable in value, and the payment made in good faith and free from fraud? The proof further shows that upon the same night that the assignment was executed, acknowledged, and delivered to the clerk for record, there was another deed executed by the assignor in the form of a deed of trust, for the declared purpose of securing his sureties upon a note due to the Bank of Sardis for $1,000. This deed being executed, evidently, as part of the same purpose and scheme of an entire disposition of his means by the assignor, and as the assignment provided for the payment of the same debt as a preferred claim, and also embraces the same property conveyed in the trust deed, subject to the provisions of the trust deed, the two instruments must be considered together, and the trust deed, under the circumstances of

their execution, must be considered as a partial assignment of the property of said Gunter, and controlled by the same rules of law applicable to the deed of assignment to Spain.

The liability of the sureties was on an antecedent debt to the bank. There was no new consideration to sustain it. The grantor was then hopelessly insolvent, and at the time of its execution was then in the act of transferring all of his property and assets of every description. The conveyance provided that the grantor should retain possession of the property until the maturity of the debt, which did not take place until December 1, 1882, and not until the beneficiaries in the trust deed should request the trustee to take possession of the property conveyed, and sell the same. Unless the property should become endangered as a security for the indebtedness, when the trustee might take possession of it and hold it until the debt and costs were paid, or the property was sold, but until possession should be demanded by the trusteee, the grantor should hold the same subject to the trust deed. If this had been a general assignment, this reservation of the use of the property would unquestionably render it fraudulent in law. The assignment conveys the same property to secure the same debt, as a preferred debt, but subject to this trust deed. According to the trust deed a sale could not take place until the first of December, 1882, and not then until the trustee was notified in writing by the beneficiaries to take possession of and sell the property, unless there was danger of its being lost; and, as the property is real estate and immovable, it is difficult to see how this contingency could arise; and, in the mean time, the grantor was to hold and enjoy the use of the property. It is difficult to determine that this delay would not have the effect of hindering and delaying Gunter's other creditors; and were this all that is in the case, I am of opinion it would establish the fraudulent character of the conveyance. It will not do to say that the property might have been sold subject to the trust deed, for in that event the value of the interest sold would be too uncertain for the purchaser to pay any but a small sum.

But the complainants allege in their bill that the conveyance was made in good faith and free from all fraud, and claim affirmative relief. This allegation is denied under oath by the answer, and throws the burden of establishing the averment upon complainants. To grant to complainants all that they here claim, that is, that the conveyance is *prima facie* valid, and free from fraud; yet, when circumstances are proved casting a doubt upon the validity of the conveyance, the burden is thrown upon the complainants to establish its fairness and freedom from fraud. When all the circumstances already stated, and others shown from the proof, are considered, occuring before and at the time of the execution of this assignment, I am satisfied that the conveyance must be held as fraudulent and void, and that complainants are not entitled to any relief under their bill.

The result is that the injunction heretofore granted must be dissolved, and the bill dismissed, at complainants' cost.

MULLER and another *v.* NORTON and others.[1]

(*Circuit Court, N. D. Texas.* February, 1884.)

1. ASSIGNMENT TO CREDITORS.
An assignment for the benefit of creditors, under the laws of Texas, wherein the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, is null, void, and of no effect.
Lawrence v. *Norton*, 15 FED. REP. 853, followed.

2. SAME.
Such an assignment is a contract between the assignor and assignee, which, while it may be aided by the law, must be taken and construed by the terms and provisions expressly stipulated therein; and any stipulation therein which is intended to hinder or delay non-consenting creditors must find warrant therefor in the law, or the assignment to such creditor is null and void.
Donoho v. *Fish*, 58 Tex. 167, and *Keevil* v. *Donaldson*, 20 Kan. 168, followed.

On Demurrer.

Wright & Wright, for plaintiffs.

Crawford & Crawford, for defendants.

PARDEE, C. J. It was held by this court, in *Lawrence* v. *Norton*, that an assignment for the benefit of creditors, under the laws of Texas, wherein the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, is on its face null, void, and of no effect, (see 15 FED. REP. 853;) and in that case we also held, considering the act of 1879 in relation to assignments, that, under the third section of that act, assignments for the benefit of preferred creditors, who are preferred on their own election, under stress of a penalty forfeiting their whole claim, are not in terms aided by the law, and are not favored by the courts. We still adhere to the correctness of our conclusions in that case, and now, as then, we see no antagonism between them and the decisions of the supreme court of the state of Texas in relation to the same law.

In the case now under consideration, it seems to us, the following propositions are equally well taken, and can be equally supported on principle and authority. The assignment in favor of creditors, under the act of 1879, is a contract between the assignor and assignee, which, while it may be aided by the law, must be taken and construed by the terms and provisions expressly stipulated therein. *Donoho* v. *Fish*, 58 Tex. 167; *Keevil* v. *Donaldson*, 20 Kan. 168. That when an assignment is made, under the third section of the act of 1879, any stipulation therein which is intended to hinder and delay non-consenting creditors must find warrant therefor in the law, or the assignment as to such creditors is null and void. *Keevil* v. *Donaldson*, *supra*; *Lawrence* v. *Norton*, *supra*; *Bryan* v. *Sundberg*, 5 Tex. 423. See, also, *Jaffray* v. *McGehee*, 107 U. S. 361; S. C. 2 Sup. Ct. Rep. 367.

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

The assignment in this case, which is under the third section, provides: "And for said purpose the said Fred. Muller and A. Jacobs are hereby authorized and directed to take possession at once of the property above conveyed and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors." This provision authorizes the assignees, in their discretion, to dispose of the assigned property on credit. See *Moir* v. *Brown*, 14 Barb. 39; *Schufelt* v. *Abernethy*, 2 Duer, 533; *Rapalee* v. *Stewart*, 27 N. Y. 311; *Hutchinson* v. *Lord*, 1 Wis. 286; *Keep* v. *Sanderson*, 2 Wis. 31. For other authorities see Burrill, Assign. § 222. It is a badge of fraud. *Carlton* v. *Baldwin*, 22 Tex. 731; and see Burrill, Assign. § 221. Such provision is not authorized by law, the said act of 1879 being silent as to the method of disposing of assigned property. The non-consenting creditors being compelled, under the law, to submit to a forced stay of execution until the consenting creditors are paid in full, it follows that a sale on credit, the same not being authorized by law, hinders and delays such non-consenting creditors beyond the sanction of the law, and consequently defrauds them. It is urged that the assignee need not sell on credit, and, unless he does, the creditors are not hurt. This may be true, but the creditors are not obliged to await the event. The assignment placed it in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. This was not only unauthorized by law, but was against the policy of the law, for it cannot be denied that the policy of the law is to secure a speedy settlement of the trust and distribution of the assigned property. An assignment in favor of creditors which in effect authorizes the assignee to sell the property conveyed in a method not permitted by the statute, must be void; for contracts and conveyances in contravention of the terms or policy of statute will not be sanctioned. See *Jaffray* v. *McGehee*, *supra*.

It is further claimed in argument that to give effect to the objections urged against the assignment, and to hold the same invalid for fraud apparent on its face, is to sanction and permit the very evil which is the subject of complaint—that is, to give the attaching creditors a preference, and a preference, too, over creditors who have been snared and entrapped by the law. To this it is sufficient to answer that the court is compelled to decide between two sets of preferred creditors—the consenting creditors and the attaching creditors. The one may be as meritorious as the other; but while the former may be open to the charge of collusion, and the latter to the charge of rapacity, the law favors the diligent and vigilant. The trouble arises with the debtor who wants to go further than the law of 1879 warrants, in driving creditors to abandon their just claims and demands.

The demurrer should be sustained; and it is so ordered.

McCormick, J., concurs.

STADLER and others *v.* CARROLL, Garnishee.[1]

(*Circuit Court, S. D. Texas.* February, 1884.)

ASSIGNMENT.

An assignment which authorizes the assignee to sell the assigned goods on credit, which undertakes to distribute the remnant after paying consenting creditors, in opposition to the terms and provisions of the law, and by which the assignees, by such distribution, exclude from the benefits of the assignment their individual creditors, and reserve an interest for themselves, is unauthorized by law. *Lawrence* v. *Norton*, 15 FED. REP. 853, and *Muller* v. *Norton*, *ante*, 719, followed.

On Demurrer to Answer of Garnishee.

Crawford & Crawford, for plaintiffs.

Wright & Wright and *J. A. Carroll*, for garnishee.

PARDEE, J. The assignment in this case, which is under section 3 of the act of 1879, is attacked for fraud apparent on its face, to-wit: (1) It prefers creditors for rent, taxes, and assessments. (2) It authorizes the assignee to sell the assigned goods on credit. (3) It undertakes to distribute the remnant after paying consenting creditors, in opposition to the terms and provisions of the law. (4) The assignors, by such distribution, exclude from the benefits of the assignment their individual creditors, and reserve an interest for themselves.

The case of *Lawrence* v. *Norton*, 15 FED. REP. 853, and *Muller* v. *Norton*, *ante*, 719, gives sufficient reasons for sustaining the second, third, and fourth grounds. On the first ground it is not necessary to pass.

The demurrer is sustained.

MCCORMICK, J., concurs.

MALVIN and others *v.* WERT, Assignee.[1]

(*Circuit Court, N. D. Texas.* February, 1884.

ASSIGNMENT TO CREDITORS.

An assignment for the benefit of all the creditors, without proof or suggestion of insolvency, where there is no attempt to prefer any creditor, but a decided attempt to hinder and delay them all, is unauthorized by law.

On Demurrer to Answer.

Ray & Stanley and *L. T. Smith*, for plaintiffs.

Wright & Wright, for defendant.

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

PARDEE, J. In this case, which is one of assignment for the benefit of all the creditors, there is no attempt to prefer any creditor, but a very decided attempt to hinder and delay them all. Without any suggestion of insolvency, or contemplation of insolvency, the assignor provides that his assignee shall dispose of the assigned goods, consisting of wares, liquors, and merchandise, in the customary course of trade, for 60 days, and then, if there is anything left undisposed of, the remaining goods shall be sold at public auction for cash, after advertising during the time provided by law for the sale of property seized under execution, and providing that during the delay of advertising the assignee shall continue the disposition of goods at private sale. The assignee is given no option. The course laid out in the assignment is the one he is bound to follow. The time required by law for advertising goods to be sold under execution is not less than 10 days. The assignment, then, without any suggestion of insolvency, compels the creditors to a forced stay of 70 days. If the assignor can compel a stay of 70 days, why not for 7 times 70 days? We find no authority in the law of 1879 for such provision. We are aware that assignments that make no preferences, but provide for an equal distribution among all the creditors, should be favored. "Equality is justice." It is with this view that we lay no stress on the objections urged against this assignment, that the deed does not show the maker's insolvency, nor assign in terms all the property that the debtor may have subject to the demands of his creditors. If the debtor has property concealed within the state, the law aids the assignment, and if the property can be found it passes to the assignee. See *Blum* v. *Welborne*, 58 Tex. 157. If the debtor has property beyond the state it can be reached by creditors who may so choose, just as well as if the assignment had not been made, for the assignment compels the discharge of no debt, nor the release of the debtor. But with this disposition to favor and sustain this assignment, we are unable to see our way clear to sanction the enforced stay of execution which hinders and delays all creditors, and, being unauthorized by law, consequently defrauds them all.

The demurrer is sustained.

MCCORMICK, J., concurs.

UNITED STATES v. WHITE, Receiver, etc.

(*Circuit Court, N. D. New York.* March 13, 1884.)

TAXATION—NOTES USED FOR CIRCULATION—NOTES REDEEMABLE IN GOODS.

The tax imposed by the act of congress of February 8, 1875, § 19, upon "notes used for circulation," is a charge upon such notes only as are intended to circulate as money. The act bears no reference to the so-called notes issued by mercantile firms to be redeemed in goods.

At Law.

Martin I. Townsend, U. S. Atty., for the United States.

John L. White, for defendant.

WALLACE, J. This is a writ of error to the district court for the Northern district of New York, brought to review a judgment of that court in favor of the defendant. The first question presented by the bill of exceptions is whether certain obligations issued by the firm of Aldrich, Sweetland & Co. are liable to taxation under section 19 of the act of congress of February 8, 1875, entitled "An act to amend existing customs and internal revenue laws, and for other purposes." Section 19 reads as follows:

"Every person, firm, or association other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation, and paid out by them."

The firm of Aldrich, Sweetland & Co., merchants, had issued, paid out, and put into circulation, in the neighborhood of their place of business, their obligations or promises to pay in goods at their store, varying in amount from 5 cents to $5 each, and amounting in the aggregate to nearly $5,000, in form as follows: "Due the bearer one dollar in goods at our store. Kennedy, N. Y., Oct. 14, 1878. ALDRICH, SWEETLAND & Co."

If the meaning of the term, "notes used for circulation," could not be satisfactorily ascertained by a reference to other acts of congress *in pari materia*, the question presented would be a more doubtful one, because, although such promises to pay are not negotiable notes, inasmuch as they are not payable in money, they are notes within the generally-accepted meaning of the word. A literal reading of the section would subject to taxation every note an individual might execute and deliver, unless there is some special meaning to the term, "used for circulation;" yet no one would contend that the section was designed to have this extended application. More especially would such a construction be a startling one, in view of the provisions of section 20 of the same act, which imposes a tax of 10 per centum on the notes of any person, firm, or corporation used for circulation by all other persons, firms, and corporations. It is not to be supposed that congress intended by the act in question to subject all promissory notes circulating in the business of the country to a tax of 10

per centum—a tax double that imposed in 1862 to meet the exigencies of the war to preserve the Union. It is therefore necessary to look for some more restricted meaning of the term, "notes used for circulation." That meaning may be found by a reference to other provisions in the laws of congress *in pari materia,* which, upon familiar rules of construction, should always be considered in solving questions of interpretation of statutes. By such reference it will appear that "notes used in circulation," "circulating notes," and "circulation," as that word is used in relation to the instrumentalities of banking operations, are equivalent and synonymous terms.

Section 21 of the act in question provides how the tax imposed by section 19 shall be returned and collected, and, instead of the words "notes used in circulation," uses the words, "circulating notes." The context of the three sections, 19, 20, and 21, shows plainly that the taxes, within the contemplation of congress and the subject-matter of the legislation, are those relating to banking capital in the hands of corporations and individuals. According to the scheme of the existing internal revenue laws, those taxes are imposed not only on the capital directly employed, but also upon the deposits and circulation incident to banking operations. The word "circulation," in this connection, is defined by the lexicographers as "currency; or circulating notes or bills current for coin." Webster. That this is the subject of taxation in the sections in question is obvious, because these sections in the act of 1875 are a substitute for the pre-existing provisions of law, respecting the taxation of banks and bankers, as found in the third clause of section 3408, Rev. St. That clause imposed a tax of "one twenty-fourth of one per centum each month upon the average amount of circulation issued by any bank, association, corporation, company, or person, *including as circulation* all certified checks and *all notes or other obligations calculated or intended to circulate or to be used as money.*" In lieu of the tax of one twenty-fourth of one per centum a month, upon notes "calculated or intended to circulate for money," thus imposed, the act of 1875 imposes a tax of ten per cent. per annum on "notes used for circulation." Both the earlier and the later law deal with the same persons, and the same subject of taxation; but the later act, in harmony with the general legislation of congress since, lightens the burden imposed. It thus seems clear that the "notes used for circulation," taxed by the act of 1875, are notes calculated or intended to circulate for money. That obligations or notes of the character put forth by the makers here are not obligations intended to circulate as money was distinctly held by the supreme court in *U. S.* v. *Van Auken,* 96 U. S. 366. In that case the defendant was indicted for paying out and circulating similar obligations, under an act of congress declaring that no private corporation, firm, or individual, should make, issue, circulate or pay out any note or other obligation for a less sum than one dollar, *intended to circulate as money,* and the court decided that, as such obligations were not

solvable in money, but only in goods, there was no offense within the meaning of the statute.

As the obligations in question were not circulating notes, or notes used for circulation, as that term is used in the act imposing the tax, it is unnecessary to consider the other questions which are presented by the bill of exceptions, and the judgment of the court below is affirmed.

Only negotiable promissory notes payable in money are subject to taxation as "notes used for circulation." *Hollister* v. *Zion's Co-operative Mercantile Inst.* 4 Sup. Ct. Rep. 263.—[ED.

RICH *v.* TOWN OF MENTZ.

(Circuit Court, N. D. New York. March 17, 1884.)

1. MUNICIPAL BONDS—STATUTORY REQUIREMENTS—CERTIFICATE OF JUDGE.
   The act of 1871, of the New York legislature, authorizing municipal corporations to aid in the construction of railroads, requires the petition to show to the satisfaction of the county judge that the petitioners are a majority of the tax-payers, "not including those taxed for dogs or highway tax only." *Held*, following the case of *Cowdrey* v. *Town of Caneadea*, 16 FED. REP. 532, that municipal bonds issued under the act are void unless the record shows that the county judge was satisfied of the sufficiency of the petition.
2. SAME—TAX-PAYERS—DEFINITION BY STATUTE.
   The act of 1871 defines the term "tax-payer," "when used in this act," to mean such tax-payers as are not assessed for dogs or highway tax only. But, *held*, that this definition did not cure a petition which merely showed the consent of "a majority of tax-payers," where the act explicitly required the approval to appear of "a majority of tax-payers, not including those taxed for dogs or highway tax only."

At Law.

Jas. R. Cox, for plaintiff.

F. D. Wright, for defendent.

Before WALLACE and COXE, JJ.

WALLACE, J. The same questions arise in this case as were presented in *Cowdrey* v. *Town of Caneadea*, 16 FED. REP. 532, where it was ruled that the bonds of the town were void because the county judge did not adjudicate that the requisite majority of tax-payers had consented to the creation of the bonds. No reasons have been advanced in the arguments of counsel that are deemed sufficient to change the conclusions reached in the *Caneadea Case*. It is proper, however, to advert to an argument that was urged in that case, and considered, but not discussed in the opinion, and which has been urged again here. It is insisted that because the amended act of 1871 defines the term "tax-payer" "when used in this act," to mean such tax-payers as are not assessed for dogs or highway tax only, it is not

necessary to comply with the explicit language of the act as to the form and substance of the petition. The petition is the basis and groundwork of the whole bonding proceeding. When the amended act was passed many of these proceedings had been set aside by the courts of this state because of defects of form in the petition; and it was the well-settled law of the state courts that any such defect was jurisdictional, and rendered the whole proceeding futile. Speaking of the act of 1869, the court of appeals said in *People* v. *Smith*, 45 N. Y. 772: "The authority conferred by the act must be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the statute." The first section of the amended act provides, in language as explicit as could be employed, that the petition, verified by one of the petitioners, shall set forth that the petitioners are a majority of tax-payers of the town who are taxed or assessed for property "not including those taxed for dogs or highway tax only." It subsequently provides that the word "tax-payer," "when used in this act," shall mean "any corporation or person assessed or taxed for property, * * * not including those taxed for dogs or highway tax only." Section 2 makes it the duty of the county judge "to proceed and take proof as to the said allegations in the petition;" and if he finds that the requisite majority of tax-payers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the tax-payers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the tax-payers of the town; and, in this view, there was no need of amending the act of 1869 in this behalf. If the argument for the plaintiff is sound, this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the word "tax-payer." It occurs several times in the act. It was defined for convenience, in order to avoid repetition of description whenever the word was used in the act, and in order that there should be no room for doubt what kind of a tax-payer was meant whenever the word was used.

As it seems to me the real question in this case is not whether the county judge made an adjudication which is binding upon the defendant, under the rules of law which control a court or officer exercising a special statutory power, and which require every step to be in strict conformity with the statute which confers the power, but whether the acts of the legislature are not to be treated as creating a jurisdiction of a special character which cannot be assailed collaterally, in which all errors of fact and of law, even those respecting the existence of jurisdictional conditions, are to be corrected in the proceeding itself upon a review by the appellate tribunals. There is much to be said in support of the latter suggestion. *Munson* v. *Town of Lyons*, 12 Blatchf. 539.

As one of the cases now pending in this court, and presenting the same questions as this, involves a sufficient sum to be reviewed by the supreme court, and is to be presented to that court, all proceedings in this case will be stayed, and no judgment be entered, until the decision of that case on writ of error, or until the further order of this court.

COXE, J. I concur in the disposition made of this case; but, for the reasons heretofore stated by me, (*Rich* v. *Town of Mentz*, 18 FED. REP. 52, and *Chandler* v. *Town of Attica*, Id. 299,) I cannot agree with the circuit judge in the construction placed by him upon the act of 1871.

COGHLAN *v.* STETSON.

(Circuit Court, S. D. New York. March 17, 1884.)

1. CONTRACT—RULES OF INTERPRETATION.
   Where a contract is ambiguous, contradictory, or obscure in its language, and is capable of two interpretations, it must be given that construction which inclines most nearly to justice and common sense.
2. SAME—ESTOPPEL.
   Where an actor is employed by a manager who agrees that the actor shall appear at least seven times a week and be paid $100 for each appearance, which stipulation the manager violates by failing to provide employment for the actor for a period of three weeks, the actor waives none of his rights by subsequently appearing under the contract and receiving pay pursuant to its provisions.
3. SAME—IMPLIED AGREEMENT.
   Where an employe agrees to work during a definite period for a stipulated sum, and enters upon the discharge of his duties under the contract, and renders services which are accepted by the employer, the law implies an agreement upon the part of the latter to furnish employment to the servant and pay for it as stipulated in the agreement.
4. PLEADING—AMENDMENT.
   Amendments will be allowed to correct errors in pleading when the opposite party is not misled and substantial justice so requires. It is not the policy of modern procedure to defeat a party who has a meritorious cause of action because he has not declared in the right form.

Trial by the Court.

Olin, Rives & Montgomery, for plaintiff.

A. J. Dittenhoefer, for defendant.

COXE, J. On the thirty-first day of August, 1883, the parties to this action executed the following contract:

"This agreement, made and entered into this thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-three, by and between John Stetson of Boston, in the county of Suffolk and commonwealth of Massachusetts, manager of Fifth Avenue Theater of New York, of the first part, and Charles F. Coghlan, of London, England, of second part; witnesseth, that the said party of the second part contracts that he shall give his professional services as leading man of the Fifth Avenue Theater, New

York, in such dramatic performances as shall be given in said theater, also in such theater in cities in the United States and Canada as said party of first part may direct for a season beginning October 8, 1883, and ending Saturday evening, May 3, 1884. It is understood and agreed that when said party of second part shall play in any theater outside of New York, he shall have his name featured on all printing and advertisements, and be recognized as the stock star of said Fifth Avenue Theater Company. Said party of second part agrees to furnish all his costumes and to pay his own fare and expenses to New York. Said party of first part agrees to pay railroad fares for party of second part, including sleeping cars and transportation of luggage, should party of second part be required to play in any other theater outside of New York during this engagement. Said party of the second part agrees to report for rehearsal in New York, on or before Monday, September 24, 1883, and be in readiness to perform Monday, October 8, 1883. It is understood and agreed that seven performances each week shall constitute a week's business, but wherever it is customary in theaters to give more than that number, said party of second part shall give that number of representations. Said party of the first part shall have the selections of the plays to be presented at each entertainment, in which party of second part shall appear. Said party of first part agrees to pay party of second part the sum of one hundred dollars ($100) for each performance in which he shall appear, settlement to be made on the regular salary day of the theater. Said party of second part agrees that he will not perform in any theater in the United States or Canada till this contract shall have been faithfully fulfilled.

"In witness whereof, we have hereunto set our hands and seal.

"JOHN STETSON. [L. S.]
"CHARLES F. COGHLAN. [L. S.]

"It is further understood that said Stetson can continue this contract for six weeks by giving said Coghlan notice to that effect on or before March 1, 1884."

The plaintiff came to this country in September, 1883, commenced acting at the Fifth Avenue Theater, New York, on the eighth of October, and continued until the tenth of November, a period of five weeks. On the evening of the latter day, having discovered that his name was omitted from the play advertised for the ensuing week, he called upon the defendant, and was informed that his services would not be required for an indefinite period. The plaintiff protested, and notified the defendant of his entire willingness to play, and that if he was compelled to remain idle through the defendant's neglect, he should insist upon being paid at the rate of $700 per week. The plaintiff was not permitted to play for three weeks. He demanded his salary for this period and was refused. Subsequently he appeared at Boston under the defendant's auspices. This action is to recover $2,100, alleged to be due under the contract for the three weeks aforesaid, commencing Monday, November 12, 1883.

It is argued that the plaintiff cannot recover for the reasons: *First.* He did not "appear" during the period aforesaid, and the defendant was not required by the contract to permit him to appear. *Second.* Having subsequently accepted payment at the rate of $100 for each performance in which he appeared the plaintiff is estopped from claiming payment when he did not appear. *Third.* The de-

fendant does not agree to employ the plaintiff, the agreement is by the plaintiff alone to render services for the defendant. *Fourth.* In any event, the complaint is defective, the action should have been for damages.

The principal controversy arises upon the construction of the written contract and must be determined by that instrument alone. The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity that the court should not hesitate to reject it provided the instrument is susceptible of any reasonable construction. According to the defendant no obligation rests upon him to do anything. The plaintiff, on the contrary, who, to use the language of the defendant's brief, is "an actor of fame and success in England," is required to leave his home and his profession there, cross the Atlantic at his own expense, pay his board in this country from September 24th till May 3d, and possibly for six weeks thereafter, furnish his own costumes, remain at the beck and call of the defendant for seven months, and refuse all other employment. To all this the plaintiff is bound, and the defendant is not bound at all. In other words the plaintiff must cross 3,000 miles of ocean, lose time, money and reputation, and if it suits the fancy or whim of the defendant to put some other actor in his place, he is wholly remediless, he cannot compel the payment of a single dollar. The charge that this interpretation is severe is not strenuously denied by the defendant, but he insists that the contract is one which the plaintiff was at liberty to make and having made it, he must abide the consequences. Undoubtedly, this is so. If the plaintiff made such a contract he cannot recover. But whether he made it or not is the precise question involved. If the language used clearly establishes the defendant's version it would unquestionably be the duty of the court to enforce it. But where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former construction should prevail. In such cases the court may well assume that the parties do not intend that which is opposed alike to justice and to common sense. Unless the language is so definite and certain that no other interpretation can be upheld a construction should not be adopted which must inevitably cast a reflection upon the sanity of one of the contracting parties.

The contract contains several clauses which read separate and apart from the context sustain the defendant's version, and they have been pressed upon the attention of the court with much learning and ingenuity. But taken as an entirety, read as one instrument, read in the light of surrounding circumstances it must be said that the plaintiff's construction is the true one. The contract provides, among other things, that the plaintiff is to be leading man in such dramatic performances as shall be given in the Fifth Avenue Theater

during the season of 1883–84. It is then mutually agreed that seven performances each week shall constitute a week's business. The plaintiff agrees to appear seven times a week and the defendant agrees that he will employ the plaintiff at least seven times a week. This provision is as binding on one of the parties as on the other, neither can avoid it. The defendant agrees to pay the plaintiff $100 for each performance *in which he shall appear.* The clause italicised is the one upon which the defendant bases his principal argument. It is possible that these words are unnecessary, that the contract would be perfect without them, and yet, taken in conjunction with the stipulation as to the number of performances each week, there is little difficulty in reconciling them with the other clauses. The contract would then read in substance: "The party of the first part agrees to pay the party of the second part the sum of one hundred dollars for each performance in which he shall appear, and it is understood and agreed that seven performances each week shall constitute a week's business." The plaintiff shall be paid for the seven performances but for no more, unless he actually appears in more. The clause referred to was also a wise provision in case the plaintiff through sickness, or otherwise, neglected to appear.

I am unable to see how the plaintiff waived any of his rights by his subsequent appearance at Boston. His action in that regard was entirely consistent with his theory of the contract. By accepting pay under the contract he did not accede to the defendant's interpretation to any greater extent than the defendant acceded to his by paying the amount due.

The objection that the defendant does not agree to employ the plaintiff has already been disposed of. If it were necessary, the law would imply an agreement to employ him during the stipulated period, the plaintiff having entered upon the discharge of his duties under the contract and rendered services for the defendant which were accepted by him. But there is here an express agreement. The contract is not unilateral. The one party agrees to act and the other agrees to pay.

Regarding the objection disputing the plaintiff's right to maintain the action in its present form it is sufficient to say that upon the trial the plaintiff asked leave to amend the complaint so as to meet the criticisms of the defendant. This request should be granted. It is not the policy of modern procedure to defeat a party who has a meritorious cause of action because he has not declared in the right form, especially when all of the facts are disclosed and the opposite party not misled. The fault here pointed out is that the plaintiff seeks to recover a sum of money *as wages* which he should recover as damages. The objection, though quite likely it is well founded, is a formal and technical one. Every element of surprise is wanting. Had the complaint been in the form suggested the result would inevitably have been the same. It is said that the defendant should be permitted to

offer, in mitigation of damages, proof that the plaintiff could have obtained an engagement elsewhere during the time he remained idle. The short answer is, that by the terms of the contract the plaintiff expressly bound himself "not to perform in any other theater." He could not have accepted a position under another management without himself violating the contract. The amendment is within the discretion of the court and is one which clearly should be allowed; to withhold it would simply protract litigation without change of result.

The plaintiff is entitled to the judgment demanded in the complaint.

FLETCHER and others *v.* NEW ORLEANS & N. E. R. Co.[1]

(Circuit Court, E. D. Louisiana. February, 1884.)

ARBITRATION.

Under a contract by which the defendant was to pay plaintiffs for work done upon certificates and estimates of defendant's chief engineer for the time being, the obligation of the defendant does not practically arise until the defendant is satisfied that the plaintiffs are entitled to compensation; and it was *held* that the defendant may not avail itself of the labor performed by the plaintiffs, and then "wrongfully, arbitrarily, unreasonably, and in bad faith," stand upon the literal terms of the contract and refuse to pay.

On Demurrer.

Thomas J. Semmes, J. Carroll Payne, Henry J. Leovy, and *Ernest B. Kruttschmidt,* for plaintiffs.

Robert Mott and *Walter D. Denegre,* for defendant.

PARDEE, J. Under the terms of the contract sued on in this case, the defendant is to pay the plaintiffs for work done, upon certificates and estimates of the defendant's chief engineer for the time being. "The chief engineer for the time being" is the creature of the company. Practically, then, under the terms of the contract, the obligation of the defendant to pay the plaintiffs for work done does not arise until the defendant is satisfied that the plaintiffs are entitled to compensation. The question in this case is whether the defendant, under its contract, may avail itself of the labor performed by plaintiffs, and then may "wrongfully, arbitrarily, unreasonably, and in bad faith" stand upon the literal terms of the contract and refuse to pay. The decisions are to the effect that, "in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his (the umpire's) action in the premises is conclusive." 97 U. S. 402; *Sweeney* v. *U. S.* 3 Sup. Ct. Rep. 344. In this case "fraud" is not specifically charged, but "bad faith" and "a failure to exercise an honest judgment" are. And it seems to me, with the relation between the umpire and the defend-

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

ant existing as seen above, that charging the action of the umpire to be arbitrary, unreasonable, wrongful, and in bad faith would include all the charges of fraud, collusion, and gross mistake necessary. In *Chapman* v. *Lowell*, 4 Cush. 378, it is held that in cases like this the umpire must not act arbitrarily, capriciously, and unreasonably. In a Wisconsin case similar to this it was held: "If fraud in the arbiter can ever be established by proof that he refused to certify the execution of the work when the same has been duly and properly performed, it can only be in those cases where the refusal is shown to have been palpably perverse, oppressive, and unjust, so much so that the inference of bad faith and dishonesty would at once arise were the facts known." *Hudson* v. *McCartney*, 33 Wis. 331. The difference in meaning between "perverse, oppressive, and unjust," in the Wisconsin case, and "arbitrary, unreasonable, and wrongful," in this case, is so little that the two cases may be considered as identical. Without undertaking to determine now how much the plaintiff may be required to prove on the trial of the case of arbitrary, unreasonable, and wrongful action in order to avoid the action, or failure of action, on the part of the defendant's "chief engineer for the time being," I am satisfied enough is alleged in the petition to put the company on its defense.

The exception that plaintiffs cannot demand further payment from the company without showing that all laborers, subcontractors, and material-men have been paid, and that no liens are recorded against the company, does not seem to be well taken. The suit is for damages in a large sum, as well as for balance due under the contract. The petition alleges that what, if anything, is due to such laborers, etc., is primarily due from the company, and plaintiffs reserve their rights to sue for it, if they are compelled to pay. Any rights the defendant may have in this regard may be brought in defense.

The exception will be overruled; and it is ordered.

In re SCHREYER, Bankrupt.

(*District Court, S. D. New York.* February 20, 1884.)

GUARANTY—CONSIDERATION—ASSIGNMENT OF MORTGAGE—INTENT OF PARTIES—BANKRUPTCY—PROOF OF DEBT.

Where V., a builder, agreed with G., owner, by contract in writing, to build the latter a house for $8,175, and G. agreed to pay B. therefor $8,175, lawful money, as follows: when topped out, $5,000, by the assignment of a bond and mortgage held by one S. on certain premises named, and $3,175 when the buildings were completed; and when the buildings were topped out, V. refused to proceed unless the bond and mortgage were guarantied by S., reasonable doubt having arisen as to the value of the mortgage, and S. having thereupon assigned the mortgage with his guaranty for the consideration of $5,000, expressed in the assignment, and the mortgage security having turned out worth-

less, and S. becoming bankrupt, a claim upon his guaranty being presented to the register by the representatives of V. after his death, and disputed on the ground that it was given without any actual consideration; and the attorney who drew the assignment having testified that S. stated at the time that he intended to make the mortgage as good as cash, and that V. ought to have his money: *held*, that the guaranty should be sustained, as given in accordance with the actual intention of the parties, as upon a modification of the original agreement to that effect, and as supported, therefore, by the consideration named in the assignment; and that the claim upon the guaranty should be allowed to be proved in bankruptcy against the estate of S.

In Bankruptcy.

T. M. Tyng, for Vanderbilt.

A. O. Salter and *John L. Lindsay*, for bankrupt.

BROWN, J. In the case of *Vanderbilt* v. *Schreyer*, 91 N. Y. 392, it was held to be competent for the defendant to show by parol evidence that the guaranty of the mortgage assigned by him to Vanderbilt was without consideration, although the guaranty was expressed in the instrument of assignment, stating a consideration of $5,000 for the whole transaction. Without in the least questioning the correctness of this decision, the counter proposition is also obvious: that it is competent for Vanderbilt also, or his representatives, to show by parol evidence that there was a consideration for the guaranty. Had the original agreement between Gebhardt and Vanderbilt, whereby the latter was to take an assignment of the mortgage in part payment for erecting the building contracted for, provided that the mortgage should be guarantied by the assignor, no question could exist that the consideration of $5,000, mentioned in the assignment of the mortgage, would be deemed a consideration for the guaranty as well as for the assignment. So, also, if such had been the actual intention of the parties to the original agreement, although the agreement, as reduced to writing, omitted the stipulation for the guaranty, there could be no question that the guaranty, when given in execution of the actual agreement and understanding of the parties, would be deemed a part of the original agreement, and would be sustained by the same consideration named in the written assignment of the mortgage, of which the guaranty forms a part. That, in substance and effect, is what the evidence of McAdam, though brief, sufficiently shows to have been the fact. He testifies that Schreyer, when directing him to draw the assignment, told him that there was a difficulty with Vanderbilt about the value of the mortgaged property; that he, Schreyer, intended to make it as good as money, and therefore ordered his guaranty to be inserted on the agreement; that on the next day, when Schreyer called to execute the assignment, it was all read over to him, and that he then said the guaranty was right, and that he intended to make the mortgage as good as money; that Vanderbilt's work was well done, and that he ought to have his money. That it was the intention of Vanderbilt to have the equivalent of money there can be no doubt, so far as Schreyer's guaranty could make it so. The case is one, therefore, in which both the parties

represented here agree as to what the intention was. Schreyer had received from Gebhardt the full amount of the mortgage in money, or its equivalent. The written agreement between Gebhardt and Vanderbilt was therefore defective in not fully expressing the actual intention of these parties as to the transfer of the mortgage. In a court of equity, if such a mutual intention was admitted, the agreement would be reformed by inserting the proper provision requiring Schreyer's guaranty. The case is one in which the maxim of equity is applicable, that that will be deemed done which ought to have been done; namely, the constructive insertion in the original agreement of a provision for the guaranty of the mortgage by Schreyer, according to the actual intention.

The agreement itself contains strong evidence that Vanderbilt was to have the equivalent of money. He first contracts to build a house, not for a bond and mortgage, whatever they may be worth, but for so much *money*, viz., $8,175; next, Gebhart agrees to pay him therefor that same amount of *money;* and he finally agrees to pay Vanderbilt $5,000, by Schreyer's assignment to him of the bond and mortgage in question. Had the agreement been to pay $5,000 by the delivery of a certain horse, instead of assigning a bond and mortgage, and the horse had died before the time of delivery, it is well settled that Gebhardt could not have tendered the dead animal in payment. In such a case the law presumes conclusively that the intention of the parties was the delivery of a living horse, and not of a dead carcass. So, if at the time when this bond and mortgage were to be assigned they had become utterly worthless, through the bankruptcy of the bondsman, and the cutting off of the lien of the mortgage by the foreclosure of prior mortgages, the presumption of law would, I think, have been equally conclusive that Vanderbilt was entitled to an existing bond and mortgage, having value, and not to two worthless pieces of paper. The law looks at the intention of the parties, to be gathered from the agreement itself, or from the surrounding circumstances.

In the present case, Vanderbilt might also have shown that he was deceived in the agreement to take the mortgage; or that it was agreed to be guarantied; or that he was to take no risk of depreciation between the time of the contract and the time of the assignment. The written agreement is silent as to who should bear the risk of such depreciation meantime. But the agreement shows so clearly a general intention to give the equivalent of money in the assignment of the bond and mortgage, that an ambiguity arises concerning the risk of depreciation, such, as it seems to me, would admit parol evidence even to supply the defect in the written agreement. The evidence shows that Vanderbilt refused to take the assignment of the mortgage without additional security, and stopped work on the buildings. He is dead, and his side of the controversy cannot now be fully known. But as the mortgage was found, not long after, to be worth-

less, there was evidently just ground for Vanderbilt's hesitation. I see no reason to question the fact that whatever dispute or controversy there was at the time was a *bona fide* controversy, based upon probable grounds, on Vanderbilt's part. An adjustment of such a controversy, made by the parties themselves, must be presumed *prima facie* to have been made in accordance with their actual, original intention; and this intention is moreover shown, by the testimony of McAdam, to have been in accordance with the setttlement made. It was at all times competent for the parties to modify their original agreement by adding a new clause providing for the guaranty. Such a modification would have been sustained as part of the original intention. No other consideration than that intention would have been necessary to sustain it. When an adjustment of a *bona fide* controversy on such a point has been fully executed, it should be sustained as being, *prima facie*, done upon a modification of the original written contract to accord with such intention; precisely as if the original agreement had at the same time been modified accordingly. Schreyer, it is true, denies the statements of McAdam; but the latter is sustained by the evidence of the acts and conduct of Vanderbilt, and his testimony should, I think, be followed.

For these reasons the proof of debt on the guaranty is directed to be allowed.

LYMAN *v.* MAYPOLE and others.

(*Circuit Court, N. D. Illinois.* February 11, 1884.)

1. PATENTS FOR INVENTION—PERFECTING DEVICE—PUBLIC USE.
   The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it and ascertaining whether it will perform the functions claimed for it, and if these machines are strictly experiments, made solely with a view to perfect the device, the right of the inventor remains unimpaired: but when an inventor puts his incomplete or experimental device upon the market, and sells it, as a manufacturer, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. In such case his patent cannot be allowed to relate back and cover forms which he gave to the public more than two years before he applied for a patent.
2. SAME—PATENT NO. 179,581 CONSTRUED—INFRINGEMENT.
   The Wilfred C. Lyman patent of July 4, 1876, No. 179,581, construed, and *held* not to be infringed by a condenser head having an enlarged drain-pipe instead of a hand-hole, and not having inside cones with turned rims or edges.

In Equity.

George P. Barton, for complainant.

Banning & Banning and *Charles C. Linthicum*, for defendants.

BLODGETT, J. This is a bill to enjoin an alleged infringement by the defendants of a patent issued to the complainant for an "improve-

ment in traps for exhaust steam pipes." The object and scope of the invention is set out by the patentee as follows:

"The object I have in view is to provide the top of the exhaust pipe of a non-condensing steam-engine with a head which will not only trap off the water of condensation carried up the pipe with the exhaust steam, but also the grease used for lubricating the cylinder, and carried up by the exhaust steam. The invention consists in the peculiar construction of the cap and the combination therewith of the deflectors and conduits, and a hand-hole in one side of the cap, through which access is had to the interior for removing grease and solid matter settling therein."

The general scope of this invention is, that the steam, carrying with it some spray or water, and the melted grease or oil ejected with the steam, reaches by the exhaust pipe the arrangement shown in the condensing head; there the steam is deflected, sent around the cold edges of the large surface, where the water, which has already become condensed, is caught upon the deflectors and upon the head of the cap of the condenser, and is condensed, so that the water falls into some of the receptacles for it; it either is condensed and passes into the lower skirt, which is inverted, and runs down and passes into the channels and flows through the outlet pipe, or it is held by the upturned edges, which are shown by the model, so that whatever steam is discharged is mainly dry steam that will not readily condense, and passes into the air without depositing any water or grease on the adjacent roofs or buildings.

The defendants deny the infringement of the complainant's patent, and also insist that the complainant made, and sold, and put in public use condensers, in the form now made and used by the defendants, more than two years prior to the complainant's application for a patent and the issue of his patent. It is insisted that by such public use the complainant has lost the right to cover a device so given to the public by his patent. The proof in the case, which I will not stop to read, is briefly this: Some years ago, in 1870, 1871, and 1872, the complainant commenced the manufacture of these condensing heads. He began by manufacturing a condenser head something like that shown in the proof marked, "Lyman's Old Head," which is admitted to be a substantially correct illustration of what the defendant now makes. In 1872 he manufactured several of these, at least four of which he sold and put in public use. They were not experimental heads, in the strict sense of the word, such as are allowed within certain limits to be made and used by an inventor as experiments. The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it, and ascertaining whether it will perform the functions claimed for it; and if these machines are strictly experiments, made solely with a view to perfect the device, the right of the inventor remains unimpaired; but when an inventor puts his incomplete or experimental device upon the market and sells it, as a manufacturer, more than two years be-

fore he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. The proof in this case shows that during the year 1872, and forepart of 1873, complainant made and sold at least four of these condenser heads, made in all respects like the "Exhibit Lyman's Old Head." They were not experiments, but were made, sold, and put in use by complainant in his business as a manufacturer. In the mean time the complainant continued his experiments, and after a time increased the size of the upper deflector so that it overhung the lower one, and turned up the edges of the upper, and turned down the edges of the lower deflector, so that they have the shape shown in his final patent; and in April, 1876, he applied for his patent, which was issued a few months afterwards, in which he specifically describes his device, including the upturned edges of the upper deflector, and the downturned edges of the lower deflector. His claims specifically call for the deflectors with the edges turned as described. The claims are as follows:

"(1) The combination of the cap, B, B', escape pipe, A', deflectors, C, C', and conduits, *c*, D, said deflectors and conduits provided with curved outer rims or edges, with the exhaust pipe of a non-condensing engine, substantially as and for the purpose set forth.

"(2) The combination of the cap, B, B', escape pipe, A', deflectors, C, C', conduits, *c*, D, and hand-hole, E, with the exhaust pipe, A, of a non-condensing steam-engine, substantially as and for the purpose set forth."

Both these claims, as I construe them, call for these deflecting plates with turned edges.

The complainant's device also shows a "hand-hole" for the purpose of removing the grease, soot, or other solid matter which may collect in the condenser. The defendants, instead of using a "hand-hole" located as shown in the patent, insert a large screw plug near the lower end or apex of the inverted cone, through which plug the drain pipe passes, and by unscrewing and removing this plug, a hook or wire can be inserted and used to clean out the solid matter. This is not a "hand-hole," as called for by the specifications of complainant's patent, but is a mere enlargement of the drain or discharge pipe. I find, therefore, that in the general features of the condensers made by defendants, they conform to those which complainant made and gave to the public at least three years before he applied for his patent; and, in construing complainant's patent, I must hold him bound by the state of the art as he developed it up to 1872 and 1873, and that his patent cannot be allowed to relate back and cover the forms of condensers which he gave to the public more than two years before he applied for his patent. The complainant's bill must be dismissed for want of equity.

Prior to 1836 our patent laws contained no provision in reference to abandonment or dedication of an invention to the public by uses or sales before the filing of an application for a patent. The supreme court, however, decided

in 1829 that an inventor might abandon his invention to the public by such uses or sales, and, speaking through Justice STORY, said: "Upon most deliberate consideration we are all of opinion that the true construction of the act is that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. His voluntary act or acquiescence in the public sale and use is an abandonment of his right, or rather creates a disability to comply with the terms and conditions on which alone the secretary of state is authorized to grant him a patent."[1] This doctrine, which had been previously announced by Justice STORY[2] and by Justice WASHINGTON,[3] was reiterated by the supreme court in 1883.[4] And "at common law the better opinion, probably, is that the right of property of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public as common property, and subject to the common use and enjoyment of all."[5]

The act of 1836 provided that a patent should not be issued for an invention which was, "at the time of his [the inventor's] application for a patent, in public use or on sale with his consent and allowance." The act of 1839 changed this so as to allow uses or sales for not "more than two years prior to such application for a patent;" and, so far as regards time, this provision has been frequently re-enacted, and is still in force. It has never been considered, however, that this rule, first announced by the supreme court,[6] and afterwards made the subject of legislation, has the least application to uses purely experimental, made in good faith for the purpose of testing or perfecting an invention. The question, how far an invention may be used for the purposes of experiment or test, is often a difficult one, but the general rule on this subject, particularly when the question of sales comes in, is well stated by Judge BLODGETT in the foregoing opinion: "The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it, and ascertaining whether it will perform the functions claimed for it, and if these machines are strictly experiments, made solely with the view to perfect the device, the right of the inventor remains unimpaired; but when an inventor puts his incomplete or experimental device upon the market, and sells it, as a manufacturer, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it." And so it is always to be borne in mind that there is a clear distinction between mere experiments and ordinary uses or sales made for other purposes than testing or perfecting an invention.

EXPERIMENTS ENCOURAGED. Patents are only to be granted for useful inventions, and to prevent their being issued for crude, imperfect, or impracticable ones, the law encourages, not to say requires, an inventor to make proper experiments to fully test and determine the practical utility of his invention before applying for a patent. "He is the first inventor, in the sense of the act, and entitled to a patent for his invention, who has first perfected and adapted the same to use; and until the invention is so perfected and adapted to use it is not patentable. An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and in-

[1] Pennock v. Dialogue, 2 Pet. 22.
[2] Mellus v. Silsbee, 4 Mason, 108; 1 Rob. 509.
[3] Treadwell v. Bladen, 4 Wash. 703; 1 Rob. 539.
[4] Shaw v. Cooper, 7 Pet. 292.
[5] Nelson, J., in Wilson v. Rousseau, 4 How. 674. See, also, American Leather Co. v. American Tool Co. 4 Fisher, 294; Dudley v. Mayhew, 3 N. Y. 9.
[6] Pennock v. Dialogue, supra.

deed cannot be, patentable under our patent acts; since it is utterly impossible under such circumstances to comply with the fundamental requisites of those acts." [1] Justice CLIFFORD quotes this language in *White* v. *Allen*,[2] but first says: "While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form.[3] Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new; but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use."[4]

"The relation borne to the public by inventors, and the obligations they are bound to fulfill in order to secure from the former protection and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; nor do they forbid a discreet and reasonable forbearance to proclaim the theory or operation of a discovery during its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to the perfecting the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor." [5]

"It is when speculation has been reduced to practice; when experiment has resulted in discovery, and when that discovery has been perfected by patient and continued experiments; when some new compound, art, manufacture, or machine has been thus produced, which is useful to the public,—that the party making it becomes a public benefactor, and entitled to a patent." [6]

"When the idea first enters into the mind of the inventor, it is almost necessarily in a crude and imperfect state. His mind will naturally dwell and reflect upon it. It is not until his reflections, investigations, and experiments have reached such a point of maturity that he not only has a clear and definite idea of the principle, and of the mode and manner in which it is to be practically applied to useful purposes, but has reduced his idea to practice and embraced it in some distinct form, that it can be said he has achieved a new and useful invention." [7]

"The terms 'being an experiment,' and 'ending in experiment,' are used in contradistinction to the term 'being of practical utility.' Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial." [8]

"If he has been practicing his invention with a view of improving it, and thereby rendering it a greater benefit to the public before taking out a patent, that ought not to prejudice him." [9]

"Crude and imperfect experiments are not sufficient to confer a right to a patent; but in order to constitute an invention the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." [10]

[1] Story, J., in Reed v. Cutter, 1 Story, 590; 2 Rob. 90.
[2] 2 Fisher, 446.
[3] Gaylor v. Wilder, 10 How. 498; Parkhurst v. Kinsman, 1 Blatchf. 494; Curt. Pat. § 43.
[4] Sickles v. Borden, 3 Blatchf. 535.
[5] Daniel, J., in Kendall v. Winsor, 21 How. 328.
[6] Grier, J., in Roberts v. Reed Torpedo Co. 3 Fisher, 631.
[7] Jones, J., in Matthews v. Skates, 1 Fisher, 606.
[8] Sprague, J., in Howe v. Underwood, 1 Fisher, 166.
[9] Morris v. Huntington, 1 Rob. 455.
[10] Seymour v. Osborne, 11 Wall. 552. As to this general question of experiments,

DILIGENCE REQUIRED. Although an inventor is thus allowed and encouraged to make such experiments as will fully test and determine the practical utility of his invention, still he must exercise due diligence, and not be unreasonably slow in making them. "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any farther use than what should be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries."[1]

"The question of diligence is not an absolute but a relative one, and must be considered in reference to the subject-matter of the experiments. Could the value and practical utility of such an invention be sooner ascertained?"[2] It must also be considered with reference to the position and circumstances of the inventor. "The law means, by invention, not maturity. It must be the idea struck out, the brilliant thought obtained, the great improvement in embryo. He must have that; but if he has that he may be years improving it—maturing it. It may require half a life. But in that time he must have devoted himself to it as much as circumstances would allow. * * * You would not trip up a man of genius, who had made a discovery, in consequence of a want of means to prosecute his labors to their final consummation, if you thought he intended to persevere."[3] "There must be what we would consider reasonable diligence, looking at all the facts of the case."[4] "But mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption" of abandonment.[5] "The question of abandonment * * * is a question of fact, and to be determined by the evidence. Lapse of time does not, *per se*, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But in the absence of that, and of any other colorable circumstances, we know of no mere period of delay which ought, *per se*, to deprive an inventor of his patent."[6]

"It should always be a question submitted to the jury, what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent should not be considered an abandonment or present of it to the public.[7] But "the objection rests upon the principle of forfeiture, and is

see, also, Whitely v. Swayne, 7 Wall. 687; Draper v. Potomska Mills Corp. 3 Ban. & A. 215; N. W. Fire Exting. Co. v. Philadelphia Fire Exting. Co. 1 Ban. & A. 189; Albright v. Celluloid Harness Trimming Co. 2 Ban. & A. 635.

[1] Pennock v. Dialogue, 2 Pet. 19; Kendall v. Winsor, 21 How. 330.

[2] Nixon, J., in American Nicholson Pavement Co. v. City of Elizabeth, 6 Fisher, 432.

[3] Woodbury, J., in Adams v. Edwards, 1 Fisher, 7, 11. See, also, Smith v. Goodyear D. V. Co. 93 U. S. 491; Sprague v. Adriance, 3 Ban. & A. 124.

[4] Drummond, J., in Cox v. Griggs, 2 Fisher, 177.

[5] Agawam Co. v. Jordan, 7 Wall. 607, Jones v. Sewall, 6 Fisher, 365; Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co. 1 Ban. & A. 483; Miller v. Smith, 5 Fed. Rep. 364; Webster v. New Brunswick Carpet Co. 1 Ban. & A. 91; Kelleher v. Darling, 3 Ban. & A. 448.

[6] Woodruff, J., in Russell & Erwin Manuf'g Co. v. Mallory, 5 Fisher, 641; Benedict, J., in Andrews v. Carman, 2 Ban. & A. 295.

[7] Morris v. Huntington, 1 Paine, 348; 1 Rob. 455; Shaw v. Cooper, 7 Pet. 316.

not to be favorably regarded. Every reasonable doubt should be raised against it." [1]

KINDS OF EXPERIMENTS. Of course, the character of an inventor's tests or experiments must depend largely on the nature of his invention. "Some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. An invention may consist of a lever or spring hidden in the running gear of a watch, or of a ratchet, shaft, or cog-wheel covered from view in the recesses of a machine for spinning or weaving. Nevertheless, if its inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is a public one. So, on the other hand, a use necessarily open to public view, if made in good faith, solely to test the qualities of the invention and for the purpose of experiment, is not a public use within the meaning of the statute." [2]

"When the subject of invention is a machine, it may be tested and tried in a building either with or without closed doors. In either case such use is not a public use, within the meaning of the statute, so long as the inventor is engaged in good faith in testing its operation. He may see cause to alter it and improve it or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though during all that period he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a *bona fide* intent of testing the qualities of the machine, would be a public use within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment; still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use within the meaning of the statute." [3]

"Nor has it any bearing upon the case that Smith's experiments were made in public, and that his experimental engines were run upon a railroad that was a public highway. Thus only could the invention be tested. *There is an*

[1] Birdsall v. McDonald, 1 Ban. & A. 167; Henry v. Francestown Soap-stone Stove Co. 2 Ban. & A. 224; American Leather Co. v. American Tool Co. 4 Fisher, 291; Jones v. Sewall, 6 Fisher, 368; Jennings v. Pierce, 3 Ban. & A. 365; Graham v. McCormick, 11 Fed. Rep. 863; 5 Ban. & A. 249; Emery v. Cavanaugh, 17 Fed. Rep. 243; Hovey v. Henry, 3 West. Law J. 153.

As to effect of delays in the patent office after an application has been filed, see Planing Machine Co. v. Keith, 4 Ban. & A. 100; 101 U. S. 479; Adams v. Jones, 1 Fisher, 527; Bevin v. East Hampton Bell Co. 5 Fisher, 23; McMillin v. Barclay, Id. 200; and for particular cases in which use has been held not to have been experimental, but sufficient to invalidate patent, see Shaw v. Cooper, 7 Pet. 322; Watson v. Bladen, 1 Rob. 514; Sanders v. Logan, 2 Fisher, 167; Worley v. Tobacco Co. 104 U. S. 340; Sisson v. Gilbert, 5 Fisher, 112; Perkins v. Nashua Card & Glazed Paper Co. 2 Fed. Rep. 451; 5 Ban. & A. 398; Edgerton v. Furst & Bradley Manuf'g Co. 9 Fed. Rep. 450; Clark Pomace-holder Co. v. Ferguson, 17 Fed. Rep. 79; Manning v. Cape Ann Isinglass & Glue Co. 2 Sup. Ct. Rep. 860; Kells v. McKenzie, 9 Fed. Rep. 284.

[2] Woods, J., in Egbert v. Lippmann, 104 U. S. 336. See, also, Elizabeth v. Pavement Co. 97 U. S. 126; Shaw v. Cooper, 7 Pet. 292.

[3] Bradley, J., in Elizabeth v. Pavement Co. 97 U. S. 134.

obvious distinction between a public use, or a use by the public, and an experimental use in public. In many cases it has been decided that a use in public, for test or experiment, is not such a public use as was contemplated by the act of congress, nor such a use as can be held evidence of dedication to the public. The *Nicholson Pavement Case* was notably one."[1] "Public use in good faith for experimental purposes, and for a reasonable period, even before the beginning of the two years of limitation, cannot affect the rights of the inventor."[2] "I agree his acts are to be construed liberally; that he is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege."[3] "It is clearly immaterial whether the experiment be made by himself or by others; the only question being, is he the original inventor of an art not before known or used?"[4] "It does not appear to me that the submitting of an invention to the test of examination by experts, in competition with other inventions, is the public use to which the statute refers. A use for the mere purpose of competitive examination, experiment, and test, is not a public use."[5]

"I consider it too nice a point to say that the future patentee, when he permits a person to test his tool by a short use with a view to interest him in its being patented, is not testing his tool, but only the mind of the borrower. I do not know that an inventor is bound to satisfy his own mind alone by his experiments. The question to be determined is, not only whether the tool will work, but in what modes and with what advantages over old tools; how well it will work, and how cheaply; and I am of opinion that he may, in such a case as this, test not only its patentability, but the degree of it, if I may so say; that is, whether it is worth while to patent it. I must not be understood as speaking of a case in which the tool or thing patented has been sold more than two years before the application."[6]

"The evidence does not show any such public use or sale, with the consent of Dodge, for two years prior to his application, as would work a forfeiture of his patent. There is one case only of a sale clearly proved before February 14, 1855, and no evidence tending to show more than two or three sales before that time, and all of them accompanied with a notice of an intention to apply for a patent, and all of these during the time when he was experimenting upon and before he had perfected his invention, and attained sufficient perfection in the castings to satisfy him that his invention was practically successful. As in most, if not in all, of these instances the stoves were delivered on trial, to be returned if the invention did not work satisfactorily, they are to be regarded rather in the light of such practical tests as the law permits an inventor to make, than as such public sales as would tend to show abandonment, or mislead the public into a belief that the inventor had made a dedication to the public."[7] On a rehearing of this case Judge LOWELL took a different view as to the effect of these sales, and held that the mere fact that they were conditional did "not, without further explanation, prove that they were experimental," and that "the evidence should be unequivocal that a test of the invention was one of the purposes of the seller."[8]

[1] Strong, J., in Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co. 1 Ban. & A. 484.

[2] Birdsall v. McDonald, 1 Ban. & A. 167; Henry v. Francestown Soap-stone Stove Co. 2 Ban. & A. 223.

[3] Story, J., in Mellus v. Silsbee, 4 Mason, 108; 1 Rob. 509. See, also, Jones v. Sewall, 6 Fisher, 364.

[4] Washington, J., in Pennock v. Dialogue, 4 Wash. 538; 1 Rob. 472.

[5] Shipman, J., in U. S. Rifle & Cartridge Co. v. Whitney Arms Co. 2 Ban. & A. 501.

[6] Lowell, J., in Sinclair v. Backus, 4 Fed. Rep. 542; 5 Ban. & A. 84.

[7] Shepley, J., in Henry v. Francestown Soap-stone Stove Co. 2 Ban. & A. 224.

[8] Henry v. Francestown Soap-stone Stove Co. 2 Fed. Rep. 80; 5 Ban. & A. 110. See, also, Kells v. McKenzie, 9 Fed. Rep. 284.

"It is manifest that the only machine made in 1863, which is distinctly proved to have been sold, was delivered on trial and warranted, and should be regarded rather in the light of a use of the invention for such practical tests as the law permits an inventor to make, than as such a public sale or use as is contemplated by the statute. At that stage of the inventor's work his invention was largely in experiment and trial. It could only be tested by practical use in the field, and it was essential that it should be so tested by farmers on their farms. The inventor was then struggling, as inventors often do, to establish the success of his invention. It was necessary that thorough experimental tests should be made, and that he should have the assistance of others in making them; and it is manifest, we think, that the machines of 1863 were not yet so perfected as to be practical machines, capable of successful work." [1]

"If it was merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons, as an act of personal accommodation or neighborly kindness for a short and limited period, that would not take away his right to a patent." [2] "The law permits an inventor to construct a machine, * * * and place it in friendly hands for the purpose of testing it and ascertaining whether it will perform the functions claimed for it." [3] "The use of an invention by special permission of the patentee is not a use of it by the public. * * * A right abandoned to the public, doubtless, cannot be resumed; but a license restrained to individuals is not an abandonment." [4] "But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it would be in public use and on public sale within the meaning of the law." [5] And "to constitute the public use of an invention it is not necessary that more than one of the patented articles should be publicly used." [6]

"He is not allowed to derive any benefit from the sale or the use of his machine without forfeiting his right, except within two years prior to the time he makes his application." [7] But "it would be a harsh limitation of the statutory rights of an inventor which should give to a naked infringer the privilege of using an invention because the patentee had attempted, in good faith and in secrecy, to incidentally make his experiments of some pecuniary benefit, while he was patiently endeavoring, amid many failures, to remedy the defects of the machine, test its value, and ascertain whether it could be used advantageously, and whether it ever would be of any benefit either to himself or to the public." [8] And "whilst the supposed machine is in such experimental use the public may be incidentally deriving a benefit from it." [9]

"When an inventor puts his incomplete or experimental device upon the market and sells it, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. * * * His patent cannot be allowed to relate back and cover the forms of condensers which he gave to the public more than two years before he applied for his patent." [10]

[1] Drummond, J., in Graham v. McCormick, 11 Fed. Rep. 862; 5 Bann. & A. 249; and Dyer, J., in Graham v. Geneva Lake Crawford Manuf'g Co. 11 Fed. Rep. 142.

[2] Story, J., in Wyeth v. Stone, 1 Story, 273; 2 Rob. 30.

[3] Blodgett, J., in Lyman v. Maypole, supra.

[4] McKay v. Burr, 6 Pa. 153.

[5] Elizabeth v. Pavement Co. 97 U. S. 135.

[6] Egbert v. Lippmann, 104 U. S. 336; Consolidated Fruit-jar Co. v. Wright, 94 U. S. 94; Manning v. Cape Ann Isinglass & Glue Co. 2 Sup. Ct. Rep. 860; Worley v. Tobacco Co. 104 U. S. 343; Jones v. Barker, 11 Fed. Rep. 597: Clark Pomace-holder Co. v. Ferguson, 17 Fed. Rep. 83.

[7] Nelson, J., in Pitts v. Hall, 2 Blatchf. 235. See, also, Consolidated Fruit-jar Co. v. Wright, 94 U. S. 94; Jones v. Sewall, 6 Fisher, 364.

[8] Shipman, J., in Jennings v. Pierce, 3 Ban. & A. 365.

[9] Elizabeth v. Pavement Co. 97 U. S. 135.

[10] Blodgett, J., in Lyman v. Maypole, supra.

As to Design Patents. These rules also apply to design patents. "The law applicable to this class of patents does not materially differ from that in cases of mechanical patents. * * * The same general principles of construction extend to both."[1] "An inventor is not permitted to exhibit his skill and taste in decorative art by the publication of elegant designs through a course of years, and then debar the public from any further use by obtaining letters patent for the same."[2]

It will be observed that I have simply collated the authorities, and made but few comments and no criticisms. The language of some of the cases, particularly when they speak of the inventor's "consent and allowance," should be understood with reference to the law then in force or governing the decision; but this does not affect their bearing on the general question of experiments. As to this question the following principles may be considered as fully established: (1) The law permits and encourages proper experiments to test and determine the practical utility of an invention; (2) these experiments must be made with reasonable diligence, considering all the circumstances of the case; (3) they may be made secretly or in public, by uses or sales, and by the inventor personally or through others; (4) they must not be for profit, but for the honest purpose of testing and perfecting the invention; and (5) where improvements are added within the two years, the patent cannot be allowed to relate back and cover forms previously given to the public.

Ephraim Banning.

Chicago, March, 1884.

[1] Brown, J., in Northup v. Adams, 2 Ban. & A. 568; Blodgett, J., in Western Electric Manuf'g Co. v. Odell, 18 Fed. Rep. 322.

[2] Nixon, J., in Theberath v. Celluloid Harness Trimming Co. 15 Fed. Rep. 250.

Doyle *v.* Spaulding and others.

Illingworth *v.* Same.

(Circuit Court, D. New Jersey. March 15, 1884.)

1. Patent—Infringement.
   Infringement of patent for the manufacture of combined ingots of iron and steel by means of moulds and a mechanism producing a variable cavity in the moulds.
2. Same—Invention in a Foreign Country.
   The use or knowledge of the use of an invention in a foreign country by persons residing in this country will not defeat a patent which had been granted to a *bona fide* patentee who, at the time, was ignorant of the existence of the invention or its use abroad.

In Equity.

J. C. Clayton, for complainants.

Francis Forbes, (with whom was *A. Q. Keasbey,*) for defendants.

Nixon, J. These two cases will be considered together, for reasons which will hereafter appear. On March 5, 1881, the complainant, Illingworth, commenced a suit in this court against the defendants for infringement of letters patent No. 166,700, dated August 17,

1875, for "improvements in moulds for ingots." The defendants answered, setting up, among other things, that said letters patent were void (1) on account of prior knowledge and use of the alleged invention; (2) because every substantial and material part of the invention was described and claimed in letters patent No. 99,299, and granted to one Patrick Doyle, February 1, 1870, for "improvement in moulds for making combined ingots of steel and iron," and in English letters patent No. 3,801, issued to William Moore by the queen of Great Britain and Ireland, dated November 21, 1873, and sealed May 19, 1874; and (3) denying the right of the complainant to recover, because the defendants were the assignees and owners of letters patent No. 240,727, granted to one Alfred E. Jones, and were entitled to use the invention therein described and shown, notwithstanding the letters patent of complainant, on which the suit was brought.

It appears in the testimony that for several years previous to the filing of the bill, two of the defendants, Fitzsimmons and Jennings, were in the employ of the complainant's firm, and these became familiar with the use of moulds made under the Doyle patent, which is set up as anticipating the alleged invention of Illingworth. It also appears that the complainant used the Doyle patent for several years previous to 1875, in the manufacture of iron and steel ingots, the inventor Doyle, during the time being in business with the complainant; that the above patent was obtained by Illingworth in view of the fact Doyle was about going out of the firm, after which, it was supposed, that the continued use of his patent would not be allowed; and that he went out and remained away from the complainant from 1875 to 1880, when he returned and became the superintendent of his works.

On the seventh of May, 1881, Patrick Doyle began his suit against the defendants for the infringement of the letters patent, which had been set up in the former action as anticipation of the Illingworth patent. The answer of the defendants denies (1) that Doyle was the original and first inventor of the improvements therein claimed, and (2) alleges that every substantial and material part of the invention was known to several persons now residing in this country, and by whom it had been used in Sheffield, England, during their residence there.

Pending the taking of testimony in these suits, two applications were made to the court by the respective parties—one by the defendants in the Illingworth suit, asking that they might be allowed to amend their answer by inserting the allegation that the invention claimed by Illingworth was known to certain persons residing in this country, who used it in the city of Sheffield, England, before coming hither; and the other by the complainant in the Doyle suit, who moved to strike out the said allegation in the answer filed therein. The questions involve the interpretation of the clause, "not known or used by others

in this country," in section 4886 of the Revised Statutes, which first appeared in section 24 of the act of July 8, 1870, and which had never received judicial construction. Being willing to afford the parties an opportunity, without embarrassment, to correct any mistake which the court might fall into in deciding a matter of first impression, we allowed the allegation to stand in the answer in the Doyle suit and to be inserted in the Illingworth answer, and directed the parties to make their proofs of the facts and to present their views more fully at the final hearing. See *Illingworth* v. *Spaulding*, 9 FED. REP. 611. After a careful consideration of the provisions of the three sections of the patent act which bear upon the subject, (sections 4886, 4920, and 4923, Rev. St.,) we are of the opinion that the use, or a knowledge of the use, of an invention in a foreign country by persons residing in this country will not defeat a patent which has here been granted to a *bona fide* patentee who at the time was ignorant of the existence of the invention or its use abroad.

When the parties began to take the proofs they united in a stipulation that the evidence should be entitled in both causes, and that the two should be argued together. The defendants also admitted in writing, in each of the cases, that before the commencement of the suits, and since the granting of the letters patent, respectively, they had manufactured combined ingots of iron and steel in the following manner and for the following purposes:

(1) By means of a mould made in conformity to letters patent of the United States, No. 240,727, granted to them April 26, 1881, as assignees of Alfred E. Jones, a copy of which is hereto annexed, marked Complainants' Exhibit "Jones' Patent."

(2) By means of a mould made with two covers, in all respects like that shown in the above-named letters patent, except that there were two covers instead of one, and the slide was omitted. The covers are so made that a part of the cover first used projects into the mould. The process is as follows: The mould being clamped together, the first metal to be cast is poured into it, and, when sufficiently set, the cover is removed and a second one, perfectly flat, is inserted in its place. When this is done there remains a space between the newly-cast metal and the side or cover of the mould into which is cast the remaining part of the ingot. The mould is shown in the model, complainants' Exhibit E, where both covers are used and the slide is omitted—one cover having a projection into the mould and the other being flat.

(3) By means of a mould of three parts, each part being composed, as usual, in two-part moulds, of three sides rising from a closed base. The operation of the mould is as follows: The two parts of the mould are joined together in the usual manner by rings and wedges, and an ingot is cast therein in the usual way. Immediately that the metal is set, one side of the mould is removed and another, a little larger, is fixed by rings and wedges in the place of the side removed. Into the space thus made, adjacent to the glowing ingot of metal, the molten metal, to complete the ignot, is poured. When sufficiently cooled the combined ingot is removed, as is usually done in ingot moulds of two parts. This mould is represented by complainant's Exhibit F. The size and proportions of the parts, however, are not correct; only the arrangement and operation of the parts are intended to be illustrated.

(4) By means of a mould of two parts, in which one of the parts is like the

ordinary two-part mould, viz., with three sides and a bottom, the other part being made flat on one side, and with a projection on the other, so arranged as to project between the sides and into the other part, when the two are joined together. The operation of the mould is as follows: The two parts of the mould being joined together by rings and wedges, in the usual way, (the projecting part of one side extending into the recess in the other,) the metal is cast into it; and when the metal is set, the side with the projection is removed and turned so that its flat side is towards the center of the mould; there is thus left an open space in the mould into which is cast the metal which is intended to complete the ingot. The combined ingot is removed in the ordinary way of removing single ingots. This mould is represented by complainant's Exhibit G. The same limitation is made in regard to this exhibit as to Exhibit F, above.

(5) By means of a mould similar to that last described, with the exception that instead of one cover there are two—one being flat, and one having a projection on its inner surface, as just described. The operation is the same as of Exhibit G, with the exception that instead of turning the cover so that the projection shall be outermost, the flat cover is used. This mould is represented by Exhibit H. The same limitation is made to this exhibit as to Exhibit F, above.

FRANCIS FORBES,
Solicitor for the Defendants in the Above Causes.

Newark, New Jersey, October 8, 1881.

The subject-matter of the controversy has reference to the use of moulds in casting combined ingots of iron and steel. The patent oldest in date for the employment of mechanism for such a purpose was granted to Patrick Doyle on February 1, 1870, and numbered 99,299. The patentee says that his invention relates to improvements in moulds for making ingots of iron and steel in a manner so as to dispose of the one metal on one or more sides of the other, and to secure a perfect union of the two; and that it consists of a vertical mould of four or other number of plain sides, one or more of which may be detachable and clamped to the others by strong bands, in which a strong thick plate of metal is arranged to fit near one side, from top to bottom, snugly, to occupy a part of the space when the metal, of which the greater part of the ingot is to be composed, is poured in, and to remain until the same has solidified sufficiently to retain its position, when it is withdrawn, leaving a space for the other metal, which, being poured in, unites perfectly with the first, and forms the required composition ingot.

In introducing his specifications, the patentee speaks of his invention as an *improved* mould for making combined iron and steel ingots, thereby implying that other moulds were in use, of which he regarded his as an improvement. Not only the scope of this patent, but the validity of the subsequent issues to Illingworth and Jones, must be determined by the state of the art at the time when the Doyle patent was granted. The evidence on this subject is meager. After looking through the testimony with care, we fail to find anything relating to the state of the art, except the statement of Mr. Illingworth, that he had been engaged in the steel business for 17 years; that prior to Doyle's invention he had never seen any moulds or other

mechanism with which skate metal, which was a combination of steel and iron, could be made; that the only mode of manufacturing such a combination, of which he had any knowledge, was to weld together the iron and steel into one bar, and then rolling it out; and that this was the only method then in use at his works. Accepting this as the state of the art at this time, it must be conceded that there was novelty and value in the Doyle improvement. It was a step from the mere mechanical combination by welding, to a chemical one resulting from the fusion and union of the two metals when in a heated state. It was the introduction of the variable cavity, whereby the amount of the one metal or the other could be accurately adjusted and obtained by the exercise of ordinary mechanical skill. We are confirmed in our view of the novelty of the Doyle patent by the fact that as late as 1873 a patent was granted in England to William Moore, for substantially the same device for making combined ingots of iron and steel, securing the variable cavity by the use of a slide, which would hardly have been applied for if such a method of casting ingots had previously been in use in England as the defendants so earnestly contend.

On the argument, the counsel for the defendants insisted that the complainant had failed to prove any infringement. The reason why specific proof was not offered was doubtless owing to the circumstance that the defendants admitted the performance of acts and the use of instrumentalities which the complainant assumed would be sufficient to satisfy the court of the fact of infringement. For instance, the defendants filed in the cases an admission that they had manufactured combined ingots of iron and steel by means of a mould made in conformity to the letters patent No. 240,727, granted to them April 26, 1881, as assignees of Alfred E. Jones. If we understand the argument of counsel, it is that there was a failure of expert testimony to inform the court whether or not such an act was an infringement of the several patents of the complainants. We fail to see how experts' testimony would be of service. Numerous experts could, undoubtedly, have been found both by the complainant and the defendants who would respectively maintain the views of their employers on a question of that sort, but their evidence would not greatly help the court in deciding what is simply a question of mechanical equivalents. Having in our hands the respective letters patent, the models, and the moulds used, we trust it will not be set down as presumption to add that we have quite as much confidence in our own judgment as we should have in the opinion of experts whether the use of the one was an infringement of the claims of either of the others.

It need not be claimed that Doyle was the first person who used moulds in casting ingots of iron or steel; but the evidence shows that he was the first who manufactured combined ingots of these metals by the use of mechanism which produced a variable cavity in the

moulds. The several patents of Illingworth and Jones reach the same result as to the variable cavity, but Illingworth has changed and, as we think, improved the mechanism. In the Doyle patent the cavity for one of the moulds is made by the use of an iron or steel slide, and in the Illingworth by two covers—one with a plain or straight surface, and the other recessed. If such a substituted instrumentality of the mechanism is not a mere equivalent for the metal slide of Doyle, the patent may be held good for the improvement, although it is valueless except in combination with Doyle's invention, and can no more be used without his consent than Doyle can use Illingworth's improvement without his consent.

The *first* admission of the defendants is their use of moulds made in conformity to the Jones letters patent. We regard this as a clear infringement of the Doyle patent. Their *second, third, fourth,* and *fifth* admissions embrace the use of instrumentalities which not only infringe the Doyle invention, but also the improvement of the Illingworth patent. There are differences in construction and mode of operation shown, but these are not radical or independent enough to take them out of the category of mechanical equivalents.

Let a decree be entered in favor of the complainant in both cases for an injunction, and the usual order of reference be made for an account.

HICKS *v.* OTTO and others.

(*Circuit Court, S. D. New York.* March 18, 1884.)

1. PATENT—VALIDITY OF REISSUE—CLINICAL THERMOMETER.
   The original patent for a clinical thermometer, in place of which reissued letters No. 10,189 were taken out, was broad enough to cover a tube in which the mercurial column is magnified by means of a raised ridge having a sharper curvature than the main shaft, even though the column is not placed beyond the mechanical center of the main tube. The reissue, therefore, more specifically describing this device, is valid.
2. SAME—PRIOR USE—LOCATION OF THE BORE.
   The characteristic of this patent is that the bore is back of the mechanical axis of the curved surface through which it is viewed. Prior use of a so-called magnifying tube, with the bore at the center or in front of it, does not defeat the patent.

In Equity.

Frost & Coe, for plaintiff.

Briesen & Steele, for defendants.

WALLACE, J. Infringement is alleged of the first and second claims of reissued letters patent No. 10,189, granted August 29, 1882, to L. Peroni, assignor of James Joseph Hicks, for an improvement in thermometers. The invention of Peroni was patented in England, January 24, 1878, and the original patent here was issued December 9,

1879. It relates to the class of thermometers known as clinical thermometers, in which it is desirable that the bore should be as small as possible in order that the column of mercury may respond rapidly to changes of temperature at the bulb. The employment of a bore almost microscopic in its caliber necessitates the use of a magnifying lens; otherwise it is very difficult to detect the exact point in the bore at which the mercury stands. Peroni's improvement is directed to such a construction of the glass tube surrounding the bore for the mercury column as will increase the lens power of the tube.

The defenses principally relied upon, besides that of non-infringement, are: (1) That the reissue is void, being for that which was abandoned on the application for the original patent, and as enlarging the claim of the original; (2) anticipation by description in prior foreign publications; (3) prior public use.

The specification of the original patent follows *verbatim* that of the English patent. The invention is substantially described as consisting in locating the bore for the mercury in the glass tube beyond the mechanical center or axis of the magnifying curves of the tube. This involves discarding the circular glass tubes commonly used, and employing those in which there is a convex surface so located as to be eccentric to the bore. Several illustrations are given to show how the bore is located when the magnifying surfaces of the tube differ in their form and location, and all of which exhibit how the scientific fact is utilized, that the apparent size of an object is magnified more when it is beyond the mechanical center of the convex face through which it is viewed than when it is located at the center of the arc formed by the convex face. There were two claims in the original: (1) A thermometer tube having its bore out of or beyond the mechanical axis or center, as and for the purposes described. (2) A thermometer tube having its bore out of or beyond the center thereof, and a curved portion or portions for magnifying said bore, substantially as set forth.

It is insisted for the defendants that these claims are intended to emphasize the theory that the invention consisted of a tube, in which the bore was to be outside the center of the tube, and were intended to limit the patent to such an invention, and that this was done in order to obviate the danger that the claims would otherwise be anticipated by the Negretti and Zambra English patent of 1852, although the language of the claims, read without a careful analysis of the specification, would seem to limit them to a tube in which the bore is out of or beyond the center of the tube itself. The first claim is certainly capable of a construction as broad as the invention described in the specification, and, if the case were now here upon that claim, such would be the construction which it would receive. The mechanical axis or center referred to in the claim would be construed to refer to the mechanical axis or center of the convex or curved surface of the tube. There was nothing in the prior state of the art to

require a more limited construction to the claim. The Negretti and Zambra patent merely describes a thermometer with a flat glass tube, instead of a round one. It nowhere suggests the existence of any magnifying effect by reason of the change in the form of the tube or the location of the bore. So far as appears, Peroni was the first to suggest this. A reference to Peroni's English patent shows that in the claim he specifically stated the nature of his invention to consist in making tubes in which the bore is out of or beyond the mechanical axis or center of the magnifying curve. In the specification of his original patent here he describes one form of tube, which has a curved top and perpendicular sides, and another in which the curves are located between the top and the sides, which he states, "by reason of the bore being beyond the mechanical center or axis of such curves act as magnifying curves or lenses, and thus magnify the appearance of the bore more than is the case when the bore is placed in the mechanical center or axis of the tube or of the curved portion of the tube." Again, he represents a different section of tubing, with his invention applied thereto, and states:

"In this case the tube is mainly circular in section, and the bore is in the center of the main portion thereof, but the tube is formed with a curved portion standing up above the general surface of the tube, and, by reason of the bore of the tube being beyond the mechanical axis or center of such raised curved portion, the latter acts as a lens or magnifying curve, and greatly magnifies the appearance of the bore."

All this is quite inconsistent with a construction of the first claim that would limit the invention to one in which the bore is out of or beyond the mechanical axis or center of the tube itself.

In the reissue the specification has been amended so as to express clearly what was plainly suggested, but left to be spelt out by inference in the original. This has been done by a statement of the principle of his invention and a more specific description of the means employed to carry it out. The first claim of the reissue is: "A thermometer having its bore in rear of or beyond the mechanical axis or center of the convex surface through which it is viewed, as and for the purpose described." The second is: "A thermometer having a convex or lens front for magnifying the bore, formed of a smaller curve than that of the body of the thermometer, substantially as set forth." The second claim, as also the third, (which is not involved in this suit,) cover details of construction described in the specification, but the first claim is broadly for the principle and means of producing the magnifying effect as described in the specification. While any uncertainty which existed in the first claim of the original patent is eliminated by the first claim of the reissue, it is not a broader or a different claim, upon a fair and reasonable construction of that claim in the original. What has already been said concerning the Negretti and Zambra patent disposes of any defense of anticipation resting upon that patent.

Reliance is also placed on a printed publication, which was a catalogue circulated by the defendant in 1876, in which he advertised thermometers for sale. One of these, designated as No. 450, is described as one "with an oval back and front." Another (No. 451) is described as one "with flat back, the front made in the form of a lens, so as to magnify the mercurial column." Neither of these descriptions suggest a tube in which the bore is so located as to be beyond the center of the lens or curved surface through which it is to be viewed.

The defense of prior use is not satisfactorily established by the evidence. So far as it rests upon the thermometer of Hicks, sold in this country, those of the class described as No. 450 in his catalogue, and which were made with a flat back and front so that they would not roll off a table when in use, if they magnified the column at all, they did so in a hardly appreciable degree, and were of no practical utility in that behalf. The class described as No. 451 was passed upon by the patent-office before granting the reissue, and held not to show the invention of Peroni. Although they had been described in complainant's catalogue as magnifying the mercurial column, the proofs show the bore to have been located between the lens surface and the center of the arc of the lens, and consequently the magnification was much less than that produced by Peroni, and did not involve his principle. As to the thermometers made and sold by Adolph Bayer, the evidence indicates that although he made half a dozen or a less number on one occasion, they were made experimentally, and the result was not sufficiently encouraging to induce him to repeat the experiment. He was a manufacturer and dealer in the article. The Peroni thermometer was a success as soon as it was introduced to the trade, while Bayer's fell still-born upon the current. The proof is not satisfactory that they were a practical success, but, on the contrary, indicates that they belong to the catalogue of abandoned experiments. The specimen exhibited was made years later, for the purpose of meeting a motion for an injunction in a suit brought upon the complainant's patent. Without considering with particularity the other instances of prior use relied upon, it suffices to say that the defendants' case fails to meet and overthrow the presumption arising from the grant of the patent by such cogent and satisfactory proof as the rule of law applicable to the defense requires.

The more difficult question in the case is as to infringement. The defendant is manufacturing ostensibly under the letters patent granted to Henry Weinhagen October 19, 1880, and reissued January 16, 1883. The claim of the original was for a thermometer tube having a flat bore and a flat back, and sides forming acute angles with said back, and converging towards and joining each other at an acute angle opposite the flat bore, so as to form a prismatic front. The theory of the invention is that the magnifying power is due to the refracting action of the prismatic sides in combination with the flattened bore in a plane at right angles to the line of view. Indeed, it

is insisted by the experts for the defendants that the substantial and practical magnifying effect found in the Peroni thermometer is not due to the lens action of the cylindrical tube, whether the bore of the tube be placed in its axis or beyond that axis, or beyond the axis of curvature of any part of the tube, but is due to the refracting action of the sides; and an attack is made upon the complainant's patent as containing a false and deceptive specification in this regard. A careful consideration of the evidence taken, in connection with the experimental tests made upon the hearing, has led to the conclusion that the theory of the defendants' experts is not correct. In his original specification, Weinhagen states "that his tube is made as sharp as possible at its junction, and forms a prismatic portion or front," and "that the prismatic sides join each other at an acute angle opposite the bore." If the defendants' thermometer tubes were in fact of this description they would not infringe the complainant's patent. The magnifying curve, which is the convex surface of Peroni's, would be absent, and the two inventions would not involve the same principle. But it is believed that Weinhagen found it necessary to adopt the principle of Peroni's invention. In his reissue the feature of the acute angle in front of the bore, formed by making the tube as sharp as possible at its junction, is modified by a description of the mode of making the tube which results in the angles remaining "slightly rounded." This configuration of the angle appears quite clearly in the photographic representations of a section of his tubes. These present a "slightly rounded" angle or lens surface, which is substantially the same as is shown in figure 2 of the drawings of complainant's patent. The bore is located beyond the center of the magnifying curve. It is therefore held that the defendants infringe.

A decree is ordered for the complainant.

SHAW RELIEF VALVE CO. *v.* CITY OF NEW BEDFORD

(Circuit Court, D. Massachusetts. March 12, 1884.)

PATENTS HELD PERSONAL PROPERTY.

A patent-right is personal property, and goes to the executor. Section 4884 of the Revised Statutes, providing for the grant of a patent to the patentee, "his heirs and assigns," does not change the law by which executors and administrators take the title to a patent on the death of the owner: as appears by other sections of the same chapter.

In Equity.

Chas. H. Drew, for complainant.

C. J. Hunt, for defendant.

LOWELL, J. This bill is brought upon two patents, and the demurrer of the city of New Bedford raises several objections, all but

one of which, it is agreed, can be, and may be, removed by amendment. A question which cannot be thus disposed of, and which has been argued with earnestness, and is pending in at least one other circuit, is whether the complainant's title to an undivided part of one of the patents is sufficient. It seems that this title comes through an administrator of the patentee; and the defendant contends that the grant of a patent, by Rev. St. § 4884, is to the patentee, "his heirs and assigns," and that by force of these words a patent descends directly to the heirs, without the intervention of the administrator. This is a new and somewhat surprising proposition. It has never been doubted before that a patent is personal property, which follows the ordinary course, and goes to the executor or administrator in trust for the next of kin. The cases take this for granted, and when any question has been mooted, it has had reference to the due qualification of the executor or administrator, or something of that sort, as in *Rubber Co.* v. *Goodyear*, 9 Wall. 788. The text-writers treat of patent-rights as personal property which goes to the executor. Norman, Pat. 145; Schouler, Ex'rs, § 200. The defendant argues that the statute of 1870 changed the rule, by omitting the words "executors and administrators" from what is now section 4884, intending to make a sort of real estate of this incorporeal right. He has not argued that the widow can be endowed of it, but I suppose that will follow. A grant of personal property to a man and his heirs, without further qualification, means to him and his next of kin, according to the statute of distributions. 4 Kent, Comm. (5th Ed.) 537, note *d*, and cases; *Vaux* v. *Henderson*, 1 Jacob & W. 388*n*; *Gittings* v. *McDermott*, 2 Mylne & K. 69; *Re Newton's Trusts*, L. R. 4 Eq. 171; *Re Gryll's Trusts*, L. R. 6 Eq. 589; *Re Steevens' Trusts*, L. R. 15 Eq. 110; *Re Thompson's Trusts*, 9 Ch. Div. 607; *Houghton* v. *Kendall*, 7 Allen, 72; *Sweet* v. *Dutton*, 109 Mass. 589. Such a grant is simply a limitation of an estate of inheritance, having no reference one way or the other to the administrator. He takes in trust for the next of kin, because the estate is more than a life estate.

The acts of congress have not been drawn with technical accuracy in this particular. Down to 1836 the word "executors" was omitted, and patents were issued to the patentee, his "heirs, administrators, or assigns," (St. April 10, 1790, § 1; 1 St. 110; St. Feb. 21, 1793, § 1; 1 St. § 321;) but no one ever doubted that executors would take the title. In 1836 executors were added, and the grant was to the patentee, his "heirs, administrators, executors, or assigns." St. July 4, 1836, § 5; 5 St. 119. In 1870, administrators and executors were left out. This omission is not significant. The law was not changed by it; the proof of which is that executors and administrators are mentioned as taking title in five of the sections of the Revised Statutes which re-enact the law of 1870. Thus, by section 4896, if an inventor dies before a patent is granted, the right to obtain it devolves on his executor or administrator, in trust for his heirs at law, (that

is, his next of kin, as we have seen,) or to his devisees, as the case may be, which, technically, should be legatees. By section 4898 every patent shall be assignable, and the patentee and his assigns, "or legal representatives," may, in like manner, grant, etc. Now, legal representatives usually means executors or administrators, (*Price* v. *Strange*, 6 Madd. 159; *Re Gryll's Trusts*, L. R. 6 Eq. 589;) and it has that meaning in this statute; for by section 4896, above mentioned, by which the executors or administrators are authorized to apply for a patent, it is provided that when the application is made "by such legal representatives," the oath shall be varied to meet their situation. By section 4900 it is made the duty of all patentees and their assigns, and "legal representatives," to do certain acts by way of informing the public that the article they make or sell is patented. By section 4922, when a patentee has innocently claimed more than his invention, he, his executors, administrators, and assigns may maintain a suit on the patent, notwithstanding the mistake. By section 4916, if a patentee is dead, without having assigned the patent, and there is occasion for a reissue, it shall be made to his executors or administrators. From a comparison of these sections it is made clear that a patent-right, like any other personal property, is understood by congress to vest in the executors and administrators of the patentee, if he has died without having assigned it. It is really of no consequence whether they hold in trust for heirs or for next of kin, so long as they take the legal title.

It was argued that congress may have intended to express by the word "heirs" that a patent should not be assets for the payment of debts. But they have not only not exempted patent-rights from being taken for the debts of the owners, but have required that they should be so taken by assignees in bankruptcy, (Rev. St. § 5046;) and the supreme court have failed to discover such an intent, for they hold that, by due process in chancery, a patent-right may be applied to such payment. *Ager* v. *Murray*, 105 U. S. 126. Indeed, section 4898 is decisive of this question, for it expressly provides that the legal representatives of the patentee may assign. Even if this were a mere statutory power, the authority would be sufficient; but it is, of course, a recognition of a fact, and not a new grant of power.

Demurrer overruled.

FRYER, Jr., *v.* MAURER.

(*Circuit Court, S. D. New York.* March 19, 1884.)

PATENTS—TILING—PREVIOUS STATE OF THE ART.

Reissue No. 5,174, for a sectional arch of hollow tiles having plane joints, to be used underneath the floors of fire-proof buildings, is void for lack of patentable novelty. All of the features except the plane *voussoirs* were incorporated in previous foreign patents, and the use of plane *voussoirs* for analogous purposes was not new.

In Equity.

Geo. W. Van Siclen, for complainant.

Gen. John A. Foster, for defendant.

WALLACE, J. The invention described in the complainant's patent (reissue No. 5,174 granted December 3, 1872, to Balthazar Kreischer, original granted March 21, 1871) relates to an improvement in tiling used in fire-proof buildings under the floors. The specification describes it as consisting in a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans the space between opposite girders, the end sections being supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under-surface. Considered with the aid of the drawings, the invention may be more intelligently understood as being an arch composed of sections of hollow tiles, and supported by girders against which it abuts at either side, the intrados having no curve, and the sections being *voussoirs* radiating to a center, and the points of the section being plane; and, as an incidental arrangement for supporting the arch, the end sections are provided with a recess, where they rest upon the flanges of girders for receiving and interlocking with the flanges. The arch may be so formed on the upper side as to furnish air spaces for ventilation under the flooring; and it may also be provided with recesses in the sections at the joints, on the upper side of the arch, into which the sleepers may be inserted; but neither of these features is essential, and neither enters into the claims as one of their constituents. The claims are as follows:

(1) In combination with supporting beams or girders, a sectional hollow tile, whose end sections abut against opposite beams or girders, and whose middle section forms a key, and so constructed that the under side of the tile forms a flat surface, substantially as described. (2) A hollow tile made in sections, one of which forms a key for the end sections, which are provided with recesses to catch over the flanges of the girders, substantially as described.

The several publications relied on by the defendant as anticipating the patent are ineffectual for this purpose, because none of them describe an arch of hollow tiles in which the several sections have plane joints, or are supported merely by the wedging power of the plane *voussoirs*. These publications, however, contribute important in-

formation concerning the prior state of the art, and materially assist the argument for the defendant that there was no invention in what Kreischer did. In considering them the drawings are of great assistance, as they illustrate clearly what the descriptive words alone would fail to point out adequately. These publications show that it was not new to employ an arch of hollow tiles made in sections, supported by girders in either side between the stories of fire-proof buildings. The French letters patent to Vincent Garcin, of October 11, 1867, and amendment of October 9, 1868, show such an arch having a flat under surface or intrados. The *voussoirs* are, however, interlocked by indented joints, so that the sections support each other by this means. The key-stone has also an indented joint. The French letters patent to Roux Freres, of March 24, 1868, show the same thing. They also show a recess in the end sections of the arch where they rest upon the flanges of girders for receiving the flanges and air spaces for ventilation, on the upper side of the arch. Every substantial feature of the complainant's patent is here shown except the plane joints of the arch, the sections in the Roux Freres patent having indented joints, but indented differently from Garcin's construction. Other publications show very similar arches which are supported by rods or bolts instead of interlocking joints.

It is common knowledge that the flat arch, in which the joints are plane and the intrados has no curve, is old. It was generally employed in door-ways, fire-places, and windows. If Kreischer had been the first to introduce the plane joints of this arch into tiling for spanning the space between the girders of buildings, the case would resolve itself into the single question of fact, whether the substitution of the plane joints for the indented joints of Garcin and Roux Freres was such an obvious thing as not to involve invention. But the English provisional specification of George Davis, of July 10, 1868, for filling pieces for iron floors and ceilings, describes a filling of hollow bricks, in which the pieces which abut against the joists have one side perpendicular and the other oblique, the intermediate pieces have parallel sloping sides, and the center filling piece is of a tapering or wedge form, "so that when the filling pieces are fitted together between the iron beams or joists they form a self-sustaining flat arch, of which the center piece is the key." It thus appears that Kreischer was not the first to employ the plane joints in an arch of tiling for spanning the space between the girders of buildings. Such joints having been used for this purpose, it was not invention to employ them for the same purpose in the arches of Garcin and Roux Freres. This was merely improving a known structure by introducing a known equivalent for one of its features.

The bill is dismissed

CHICAGO MUSIC CO. *v.* J. W. BUTLER PAPER CO.

(*Circuit Court, N. D. Illinois.* February 24, 1884.)

PLEADING—INFRINGEMENT OF COPYRIGHT—NECESSARY ALLEGATIONS.

In a suit to recover for the infringement of a copyright, the declaration must set out in detail a substantial compliance with the various requirements of the copyright laws.

Demurrer to Amended Declaration.

Frank J. Bennet, for plaintiff.

McCoy, Pope & McCoy, for defendant.

BLODGETT, J. This is a demurrer to the amended declaration, in which there are five counts. It is a suit for the alleged infringement of a copyright. The allegation in each of these counts is that the plaintiff was proprietor of a certain musical composition entitled "I will meet her when the sun goes down," words and music by William Welch; that on October 19, 1882, plaintiff caused the same to be recorded in the office of the librarian of congress, and afterwards published divers copy of this musical composition, with the words "Copyrighted by the Chicago Music Company" printed on each copy; and that the defendant, since the recording of the said work in the office of the librarian of Congress, has infringed upon the plaintiff's exclusive right so secured to him by virtue of the copyright laws of the United States.

The question made by the demurrer is whether the plaintiff has sufficiently set out his title as the holder and owner of this copyright by this averment. The law authorizes the owner, author, or proprietor of a book, musical composition, etc, to copyright the same, and it is to be copyrighted by delivering at the office of the librarian of congress, or by depositing in the mail addressed to said librarian, before publication, a printed copy of the title of such book or musical composition; and also, within 10 days from the publication of such book or musical composition, the author or owner of the copyright must deliver at the office of the librarian of congress, or deposit in the mail addressed to such librarian, two copies of such book or composition. These are the steps which must be taken to secure the copyright in a musical composition like this. This exclusive right to authors is a monopoly for the term of the copyright, and in order to secure it there must be a substantial compliance with the terms of the statute. It is not like a patent in this: that an applicant for a patent applies to the commissioner of patents, setting out his claim, and a *quasi* judicial proceeding is instituted before the patent-office. An examination is made as to the novelty and usefulness of the invention, and if the allegations of novelty and usefulness are adjudged to be sustained, the patent-office issues a patent, which is *prima facie* evidence of both the novelty and usefulness of the device, and that the patentee

is the first inventor thereof. But the librarian of congress possesses no power in the premises; he simply receives the title when it is delivered or forwarded to him, and makes a record of it in his office, and receives the two copies of the publication when published, and which must be forwarded to him within 10 days after the publication is made, and makes a record of the receipt of the copies. The librarian issues no certificate, or anything in the nature of a patent; he simply makes a record, and whenever called upon has to make a certificate of whatever the records of his office show towards a compliance with the terms of the law. The rights of the party holding a copyright, therefore, depend wholly on whether he has in fact complied with the terms of the law or not, and not upon the fact that he has obtained a certificate from the librarian. In this case the five counts in the declaration are barren of any averment of compliance with the terms of the law. The plaintiff alleges he was proprietor of this musical composition, but he does not state how he became proprietor; he does not state except inferentially who was the author of the composition in question. He says that he was proprietor of a musical composition known by a certain title, the words and music by William Welch, but how he acquired the proprietorship from William Welch, or whether William Welch was the author, is only, as I said, inferentially to be obtained from any statement in the declaration. Nobody but the author, or some person who has acquired the author's right to a copyright, can obtain a copyright under the law; and I think that where a person attempts to copyright as proprietor, and avers that he has copyrighted as proprietor, he must show how he became proprietor, because no intendment will be made in favor of an exclusive monopoly of this character. The plaintiff must show that he has taken the steps required by law. Here there is no statement in the first place, as I have already said, that he ever was either the author or proprietor by virtue of having acquired the rights of the author; there is no averment that he ever filed with the librarian of congress, before publication, the title of the work, and that within 10 days after publication he delivered or forwarded to the librarian of congress the two copies required by the law which make his copyright complete.

The demurrer to this amended declaration must therefore be sustained.

THE MARINA.

(*District Court, D. New Jersey.* March 8, 1884.)

1. CONDITIONAL SALE—ATTACHMENT.
   An engine was furnished to a steam-lighter under a written contract of sale, by which it was to remain the property of the vendor till paid for. The engine was attached by screws to the vessel. The contract was made in New York, but the lighter afterwards went into New Jersey, where an attempt was made by the creditors of the vessel to attach the engine. *Held*, that the engine remained the property of the vendor, and could not be attached.
2. SAME—NOT A CHATTEL MORTGAGE.
   An agreement by which goods delivered to the vendee are to remain the property of the vendor till paid for is a conditional sale, and not a chattel mortgage, within the meaning of the registration acts. In the absense of fraud the vendor's title will prevail over an attachment.
3. CONFLICT OF LAWS—LEX SITUS.
   Such is, at all events, the law of New Jersey, (*Cole* v. *Berry*, 13 Vroom, 308;) and property brought into a state becomes subject to its law and policy, which will govern the construction of contracts made elsewhere with regard to the transfer and disposition of the property.

In Admiralty.

John Griffin, Jr., (with whom was *Bedle, Muirheid & McGee,*) for libelants.

Hyland & Zabriskie, for petitioner.

NIXON, J. On the twenty-ninth of July, 1880, the Lidgerwood Manufacturing Company furnished to the steam-lighter Marina a double hoisting engine, at the request of her owner, J. A. Cottingham, upon the terms specified in a paper, of which the following is a copy:

"NEW YORK, July 29, 1880.

"*Lidgerwood Man. Co. Machine Ware-rooms, No.* 96 *Liberty street, New York*—GENTS: Please furnish and ship to steam-lighter Marina, to remain as your property until fully paid for by me in cash as below stated, the following: One double hoisting engine, same as provided me for steam-lighter Joseph Hall, at $450. To be paid for as follows: Fifty dollars in equal monthly payments. And unless so paid for, you are authorized to enter and retake the same into your possession, wheresoever she may be found. The same to be held fully insured by me against loss or damage by fire, and to be kept in good order. J. A. COTTINGHAM, 11 Dey St., New York."

The engine was placed on board the steam-lighter, attached to the deck by screws, and used since that date in her ordinary business of lighterage. In this condition of affairs a number of libels *in rem* were filed, and monitions issued out of this court against the said steamer, her engines, and tackle, in favor of creditors claiming liens for supplies, repairs, labor, etc. The marshal of the district, by virtue of said writs, seized the vessel, her engines, tackle, and apparel, and, by order of the court, has advertised her for sale for the satisfaction of alleged liens amounting to about $7,000. The Lidgerwood Manufacturing Company has demanded of the marshal the surrender of the possession of the hoisting engine, claiming the same as its property.

This has been followed by a petition to the court, and a motion that the marshal be ordered to deliver up to said company the custody of the same before any sale of the vessel and her tackle takes place. There seems to be no dispute about the facts, and the proctors of the respective parties have stipulated, in writing, as follows:

It is admitted that the hoisting engine in question was delivered to Mr. James A. Cottingham by the Lidgerwood Manufacturing Company, under and in accordance with the terms of a paper, a copy of which is hereto annexed, and marked Exhibit A; that $250 has been paid by Cottingham on account of said engine, and that he has made default in the payment of the balance of the sum specified in said paper, according to the terms thereof, and that he had made such default prior to the incurring of the claims herein; that the libelants herein did not know at the time they performed the repairs and labor, and furnished the materials and supplies in question, that the said hoisting engine was claimed to be owned by any company or person, other than the owner or owners of the steam lighter Marina, and that they at such times never inquired, and said Cottingham never told them, who claimed to own said engine; that during all the times referred to in said libels said Cottingham was a resident of Jersey City, New Jersey; that none of the labor, supplies, or materials in question were performed upon or supplied to said hoisting engine itself; that while said repairs were being made, or a portion thereof, the said engine, which prior thereto had been attached to said vessel, was removed, and afterwards replaced thereon and reattached thereto; that the rent usually charged by the Lidgerwood Manufacturing Company for the use of an engine such as this is fifty dollars a month, in a case where they rent one; that said engine is attached to the vessel by $\frac{7}{8}$ or $\frac{7}{8}$ inch wood screws passing through the deck and into the deck-beams of the vessel about four inches.

The paper referred to in the foregoing admission of facts, as marked Exhibit A, is the above-quoted writing addressed to the Lidgerwood Manufacturing Company by Cottingham. The question presented is whether the contract shown in the writing is a conditional sale, which did not pass the ownership until the condition was performed, or whether the title passed by the contract and what was reserved was a mere lien or security for the payment of the price of the engine. If the former, then the engine remains the property of the vendor, and is not subject to seizure by creditors claiming leins against the vessel. If the latter, the reservation is void as contrary to the provisions of the chattel-mortgage act of the state, requiring a record of all chattel-mortgages, and *bona fide* creditors or purchasers without notice may hold it discharged of the claim of the manufacturing company. The question is not without difficulty, which arises chiefly from the conflicting views of the courts as to whether the instruments of writing evidencing the sales of chattels are within the registration laws of the state. This much, however, I think has been settled by the supreme court, that the federal tribunals will follow the decisions of the state courts in determining whether or not the registration act of the particular state includes a conditional sale. *Hart* v. *Barney & Smith Manuf'g. Co.* 7 FED. REP. 552.

Is the instrument of writing under which the transfer of the en-

gine took place a mere conditional sale of the property, liable to be defeated if the purchaser fails to pay the purchase money, or is it "a conveyance intended to operate as a mortgage," which is void as to creditors because not recorded? The contract between the company and the owner of the vessel was executed in New York, and the proctors of the petitioner invoke the application of the usual rule that it must be interpreted, and its validity determined by the laws and judicial decisions of that state. It is undoubtedly the settled doctrine of most, if not all, civilized countries that personal property has no locality, and that it is subject to the law which governs the person of the owner, both with respect to its disposition and transmission. Out of this principle has grown the rule in the construction of contracts that, where they relate to movables, they are construed according to the law of the place where they are made, and not according to the local law where they are attempted to be enforced. But this rule is not without its exceptions. It is founded in comity, and must yield when the legislation of a state in which the property happens to be has prescribed a different rule. Story, Confl. Laws, § 390. Thus the supreme court in a series of cases (*Green* v. *Van Buskirk*, 5 Wall. 307; S. C. 7. Wall. 139; and *Hervey* v. *Locomotive Works*, 98 U. S. 671) have held that every state has the right to regulate the transfer of property within its limits, and that whoever sends property into it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides, or where the contract was entered into.

The present case comes within the exception to the general rule; and as the controversy has arisen in New Jersey, I must look to the statute and the decisions of the courts of this state, rather than New York, for the construction of the contract. The statute of New Jersey (Rev. 709, § 39) enacts that every mortgage or conveyance intending to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof be filed in the clerk's office of the county, etc. Supplements to the same have been approved on March 19, 1878, (P. L. 139,) on April 5, 1878, (P. L. 347,) and on March 12, 1880, (P. L. 266,) none of which affect the original act, so far as any questions arise in the present case, except the last recited supplement, which requires a *record* of the mortgage in the place of filing. This statute being in force, the supreme court of New Jersey, in the case of *Cole* v. *Berry*, 13 Vroom, 308, had occasion to construe an instrument of writing substantially similar to the one under consideration. Cole, the plaintiff, being the owner of a Domestic sewing-machine, sold the same to one Gustave Wetzel, and gave him possession. While thus possessed, Berry, the defendant,

one of the constables of the county of Hunterdon, seized and sold it by virtue of a writ of attachment issued against said Wetzel. Cole brought an action of trespass against the constable, and claimed the ownership of the machine under the following written agreement, entered into by Wetzel at the time of the purchase:

"ANNANDALE, June 26, 1876.

"Whereas, the subscriber has this day purchased of Josiah Cole one Domestic sewing-machine for the sum of fifty-five dollars, for which I have given fifteen dollars in cash and my note for forty dollars, payable in installments of five dollars a month, and I have allowed him to take the machine in his possession. Now, it is agreed that the said machine is to be and remain the property of the said Cole, and be subject to his control, until the same is actually paid for in cash. GUSTAVE WETZEL."

The learned judge (DEPUE) who spoke for the whole court, in the course of an able opinion, stated the law in New Jersey in regard to the conditional sale of chattels to be as follows:

"(1) Delivery of possession under a conditional contract of sale, which stipulates that the goods shall remain the property of the vendor until the contract price be paid, will not pass title to the vendee until the condition be performed. (2) A vendor who delivers the possession of a chattel under an executory contract of sale, on condition that the property shall not pass until payment of the contract price, may forfeit his property by conduct which the law regards as fraudulent. But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee upon an agreement that they shall remain the property of the vendor until payment of the purchase money be made, the transaction is not fraudulent *per se*, and the property in the goods will remain in the vendor until payment be made, without being subject to execution at the suit of creditors of the vendee."

This would seem to be decisive in the present case, and the more so as the decision is in accord with the best elementary writers on the subject.

Thus Kent in his Commentaries, vol. 2, p. 497, says:

"When there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it; and the right continues in the vendor, even against the creditors of the vendee"

Story, Sales, § 313, says:

"A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, do not pass the title to the vendee until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors; and, also, if guilty of no laches, the vendee may reclaim the goods so sold and delivered, even from one who has purchased them from his vendee in good faith and without notice."

Benjamin, in his work on Sales, in the chapter on the "Sale of Specific Chattels Conditionally," (book 2, *c.* 3, § 320,) adds to Judge BLACKBURN'S two rules, a third rule, as follows:

"Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property de-

pends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

To the same effect, also, is the opinion of Mr. Justice WASHINGTON, in this circuit, in the case of *Copland* v. *Bosquet*, 4 Wash. C. C. 588, and of Judge SHIPMAN, in the second circuit, in the case of *Bauendahl* v. *Horr*, 7 Blatchf. 548.

It may seem at the first glance that the foregoing view is in conflict with the circuit court of Kentucky in the case of *Hart* v. *Barney & Smith Manuf'g Co.* 7 FED. REP. 543, and with the supreme court of the United States in the cases of *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, and *Heryford* v. *Davis*, 102 U. S. 235.

It will be found, however, on a more careful examination that these decisions turned upon the statutes and the adjudications of the state courts of the respective states, in regard to their registration laws. In the case first stated, the learned judge, after quoting the Kentucky act, said that he must follow the Kentucky courts, and that their later decisions were all to the effect that agreements that are usually called conditional sales were within the law, and therefore void without registration. In *Hervey* v. *Rhode Island Locomotive Works*, *supra*, the parties to the contract of sale lived respectively in New York and Rhode Island, and it was insisted that it must be interpreted by the laws of the state where the contract was made. But the court held that the property, the ownership of which was in dispute, was in Illinois, and that the courts of that state should be followed in determining the controversy, and that these courts had uniformly decided that the policy of the law in Illinois would not permit the owner of personal chattels to sell them, either absolutely or conditionally, and still continue in the possession of them. In *Heryford* v. *Davis*, *supra*, the court admitted, at least by implication, that the chattel-mortgage act of Missouri allowed conditional sales of personal property, and conceded that if the contract under consideration was found to be of that character the court must give it effect. Mr. Justice STRONG, speaking for a majority of the court, said: "If the contract was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company." But, on examining the terms of the agreement, the court found that it lacked the necessary elements of a conditional sale, but, on the other hand, contained every element of an absolute sale and transmission of ownership. Promissory notes were given for the stipulated price of certain railway cars sold, and these notes were to be paid to the vendor in any contingency. If not paid, the vendor reserved the right to take the property into its own possession, and sell it, but was bound, after retaining the sum remaining due upon the notes, to pay the surplus, if any, to the vendee. In view of these provisions, the court determined (Judge BRADLEY dissenting) that it was the intention of the parties, manifested by the agreement, that the ownership of the

cars should pass at once to the vendee, in consideration of its becoming debtor for the price, and that, notwithstanding the efforts to cover up the real nature of the contract, its substance was the hypothecation of the cars to secure a debt due the vendor for the price of a sale.

It only remains to inquire whether the case exhibits any conduct on the part of the vendor which the law regards as fraudulent. If so, I fail to perceive it. If any exist it was the duty of the petitioner to show it. The engine was delivered over to the lighter, to be used, doubtless, for loading and unloading cargoes; but it was to continue the property of the vendor until fully paid for in cash "in equal monthly payments of fifty dollars." That ownership was not forfeited because the vendee attached the engine to the deck of the vessel by wood screws, in order to its more convenient or more efficient use, whether such attachment was made with the knowledge and consent of the vendor or not. He never performed any act, or made any statement, from which the inference could be drawn that he meant to mislead the public, or individuals, in regard to the ownership.

Let an order be entered directing the marshal, in making sale of the vessel, etc., to except the hoisting engine from the property sold. It is not a case where costs should be allowed.

THE JAY GOULD.

(District Court, E. D. Michigan. March 10, 1884.)

1. COLLISION—PROPELLER AND TUG-SIGNALS.
   A propeller and tug were approaching each other under signals of one whistle each, and in such relative positions that the propeller was exhibiting her red light to the tug. When about 600 feet apart, the propeller starboarded so far as to show her green light and shut in the red. The tug immediately blew two whistles, starboarded, and continued at full speed, and was struck by the propeller at a right angle and sunk. *Held*, that both vessels were in fault—the propeller for starboarding too far, and the tug for not stopping her engine.
2. SAME—APPROACHING VESSEL—COURSE.
   A vessel approaching another is bound to pursue a consistent and steady course, and not to embarrass or confuse the other by unnecessary changes of her wheel.
3. SAME—STEAMER—FAULT.
   Wherever by the fault of another vessel a steamer is placed in danger of collision, she is bound to stop or reverse, and will not be excused for a departure from the statutory rule, except upon clear proof that such departure was rendered necessary by the circumstances of the case, or that it could not have contributed to the collision.

In Admiralty.

This was a libel for a collision between the tug Martin Swain and the propeller Jay Gould, which took place about 3 o'clock in the morning of September 27, 1881, in the Detroit river, between the head of Bois

Blanc island and the main Canadian shore. At the head of the island are two range lights, by which vessels coming down the channel from the Lime-kiln crossing, so called, are accustomed to take their course until they turn down the channel between the island and the main land. Nearly opposite these lights, and about 250 feet from the main land is a red can-buoy, marking the easterly limit of the channel. The navigable channel, which at this point is about 1,000 feet wide, lies between the range lights and this buoy, and here the collision occurred. At this point the channel deflects about two points from a straight course, so that a steamer in coming down the river will exhibit her red light to an ascending steamer, while the latter exhibits her green light to the former, until after she passes the buoy. On the night in question the tug was proceeding up the river with the barges Marengo and Maria Martin in tow, and when opposite Amhurstburgh, made the red light of the Jay Gould descending the river. She thereupon gave a single blast of her whistle, to which response was made by a single blast from the propeller, and both ported a little and proceeded, with the understanding that each was to pass to the right, and upon the port side of the other. When they had approached each other within about 600 feet, the propeller's wheel was starboarded to go down the river, and she swung so far to port as to exhibit her green light to the tug, which immediately blew two whistles and put her helm hard a-starboard. The tug swung to port under this order about a point, when the propeller, whose wheel had been put hard a-port, struck her amidships on the starboard side, nearly at a right angle. In two or three minutes the tug stranded or sunk at the head of the island.

Upon the argument the court was assisted by Commander Cooke, of the navy, and Capt. Hackett, of the lake marine, sitting as nautical assessors.

Moore & Canfield, for libelant.

H. C. Wisner, for claimant.

BROWN, J. Much testimony was introduced upon either side, tending, upon the part of the libelant, to prove that the collision took place on the easterly side of the channel, and within two or three hundred feet of the red can-buoy; and, on the part of the claimant, to show that it must have occurred within a short distance of the head of the island, and upon the extreme westerly side of the channel. As usual, each crew swears almost as one witness to its own theory of the case, and in direct conflict to the other, each endeavoring to get his own vessel, as far as possible, toward its own side of the channel. We think, under these circumstances, it is much easier to extract the truth from the admitted facts and probabilities of the case than from any attempt to reconcile these contradictions or determine which of the two crews is more worthy of belief. Assuming that a tow bound up, with a light southerly wind, would naturally keep the center of the channel between Bois Blanc island and Amhurstburgh, we find nothing to in-

dicate that this was not the course actually pursued, except the fact that when opposite Amhurstburgh the tug met the tug Prindiville coming down with a tow, and passed her to the right. This would naturally incline the Swain somewhat to the starboard side of the channel. In support of his theory the learned advocate for the propeller insists that, inasmuch as the tug grounded and sunk at the head of the island, and a little to the west of the ranges, and was keeled over on her port side, she must have received the blow very near there, and was propelled by the immense weight of the propeller to the spot where she was sunk, and was driven over on to her port side. There is much plausibility in this suggestion, as the wound in the side of the tug was a very deep one, and it is impossible that she could have been kept in motion long after the propeller's bow was withdrawn from her side. Upon the other hand, the engineer and some of the tug's crew swear that the coal bunkers, which were against the spot where the propeller struck the tug, prevented the water rushing in with great rapidity, and allowed the engine to be kept in motion long enough to carry the tug some two or three lengths until she grounded at the head of the island. We think this was not impossible. The difficulty with the propeller's theory is that it compels us to believe that the tug executed the wholly inexplicable and improbable maneuver of starboarding and crossing the channel to the wrong side after she had signaled the propeller that she would port and keep to the right. The master of the tug was born at Amhurstburgh; had sailed for 20 years; knew every foot of the river at that point; and we would not believe him guilty of so gross an error without the most convincing testimony of the fact. Upon the whole, we think the collision occurred very near the center of the channel.

We do not, however, deem this question of vital importance, as we are all agreed that the propeller was guilty of fault in exhibiting her green light to the tug, after signals of one whistle had been exchanged between them. The propeller was coming down the channel, exhibiting her red light to the tug. Good seamanship and her signals both required that she should pursue a consistent course, and exhibit her red light, and her red light only, until she had gotten abreast the tug. Assuming that she must leave the ranges and starboard a point or two to take her course down the river, she had no right to swing so far to port as to exhibit a green light to the ascending tug. It was a movement which could not fail to embarrass and confuse the master of the Swain, and was, in our opinion, the primary cause of the collision which ensued. Even if the tug was on the westerly side of the channel, as the propeller insists, and the propeller starboarded her wheel to prevent running upon the island, she was still in the wrong, as she should have stopped long enough to permit the tug to pass her, instead of starboarding so far as to exhibit her green light. We have no doubt that she swung further to port under this order to starboard than her master intended, and that

the accident was due to the bad steering qualities of the propeller. The admissions of her wheelsman, made at Buffalo, that she first swung too far to port, and then too far to starboard, after she recovered herself, are strongly corroborative of this theory. Knowing, as her officers were bound to know, this defect in the propeller, we think it was clearly their duty to have provided against it, and kept so far away from the tug as to prevent the possibility of this occurrence.

The question as to the liability of the tug is a much more difficult one, and depends entirely upon the conduct of her master after the propeller had swung to port so far as to shut in her red and exhibit her green light, and the danger of collision had become imminent. Some minutes prior to this the two vessels had exchanged signals of one whistle, and where proceeding with a perfect understanding that each was to pass upon the port side of the other. The sudden starboarding of the propeller, and the exhibition of her green light, were calculated to create an uncertainty in the mind of Capt. Tormey as to the intention of the propeller. He might draw the inference either that the propeller had starboarded to go down the channel between Bois Blanc island and the mainland, as was actually the fact, or that she had repudiated the understanding, and was endeavoring to take a new course down on the starboard side. Acting upon this hypothesis, he blew two whistles, and starboarded. This would have been a proper maneuver had the intention of the propeller been as he supposed; he was mistaken, however, and the maneuver brought about the collision it was intended to avoid. His proper course was to comply with rule 3 of the Supervising Inspectors, which reads as follows:

Rule 3. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The same obligation to slacken speed is contained in the twenty-first sailing rule of the Revised Statutes, (section 4233,) in the following terms:

"Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

As it is substantially agreed that the propeller was only about 600 feet off when her green light was exhibited, it is at least open to doubt whether the action of the tug did, in fact, contribute to the collision, and whether any maneuver upon her part could have prevented it. The gentlemen by whom I have been assisted upon the argument advise me that, in their opinion, the vessels were then too close together for any efficient action upon the part of the tug. But

to exonerate her for her departure from the rules I apprehend that it must be shown with reasonable certainty that such departure could not have contributed to the disaster which followed. The rule is entirely well settled, both in this country and in England, that the violation of any statutory requirement will be presumed to have contributed to the collision. Thus, in the case of *The Pennsylvania*, 19 Wall. 125, where a bell was rung by a sailing vessel under way in a fog, when the rule prescribed that a fog-horn should be blown, Mr. Justice STRONG, speaking for the supreme court, observes:

"That when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was, at least, a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not* have been. Such a rule is necessary to enforce obedience to the mandate of the statute. * * * The evidence in the present case leaves it uncertain whether, if a fog-horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way. * * * It may be assumed, therefore, that the legislature acted under the conviction that a fog-horn could be heard a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the legislature was not in error—whether, in fact, a bell did not give notice to the steamer that the bark was where she was as soon as a fog-horn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power."

The obligation to slacken speed whenever by a false maneuver on the part of another vessel a steamer incurs the danger of collision, has been enforced in numbers of cases, and under circumstances very similar to those which existed in the case under consideration. *The Huntsville*, 8 Blatchf. 228, 231; *The Comet*, 9 Blatchf. 323, 329; *The Ogdensburg*, (*Chamberlain* v. *Ward*,) 21 How. 548, 560; *The Manitoba*, 2 Flippin, 241, 255. By far the most exhaustive discussion of this question is contained in the judgment of the house of lords in *The Voorwarts and Khedive*, L. R. 5 App. Cas. 876. This was a collision in the straits of Malacca. The two steamers were heading upon nearly opposite courses, and appeared about to pass each other safely, green light to green light; but when they were about half a mile apart the Voorwarts suddenly ported her helm and threw herself across the bows of the Khedive and rendered a collision imminent. The captain of the Khedive ordered the helm to be put hard a-starboard and the engineers to stand by the engines. Two minutes afterwards he ordered them to stop and reverse; and a minute and a half afterwards the collision took place. The judge of the admiralty court held that both vessels were in fault. The court of appeal found the Voorwarts solely to blame for the collision, and reversed the judgment of the admiralty court. The house of lords reversed the judgment of the court of appeals and restored that of the admiralty court,

their lordships holding generally that it was the duty of the Khedive to stop and reverse as soon as the Voorwarts threw herself across the bows of the Khedive, notwithstanding the fact that it was shown that the master had acted with ordinary care, skill, and nerve as a seaman, and stopping and reversing at once would not have prevented the collision. It is true that this case was decided under section 17 of the merchant-shipping act of 1873, which declared that "if in any case of collision it is proved to the court before which the case is tried that any regulation for preventing collisions contained in or made under the merchant-shipping acts, 1854 to 1873, has been infringed, the ships by which said regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." I think, however, this statute does not vary the rule laid down in the case of *The Pennsylvania, supra,* to any appreciable extent. Their lordships acted upon the opinion of the court of appeal, that the Khedive was not to blame until after the collision was imminent, or, perhaps, inevitable. The court held generally that it was the duty of the Khedive to have stopped and reversed her engines, and that there was nothing in the circumstances rendering a departure from the rule necessary to avoid immediate danger; and that even if it would be, in the absence of a positive rule, proper seamanship to keep way on the ship in order to make her more manageable, which was not clear, the legislature had thought it better to prescribe the course which must be followed. Lord WATSON, in his opinion observes:

"It appears to me that it was the deliberate policy of the legislature to compel sea captains, when their vessels are in danger of collision, to obey the rule, and not to trust to their own nerve and skill; and that it was an essential part of the same policy to admit of no excuse for non-observance of the rule, short of satisfactory evidence, either that the captain was constrained to disobey it by other perils of the sea or that he adopted a course which, in the circumstances, was better than that prescribed by the rule. And, for my own part, I cannot think the legislature has acted unwisely in applying a uniform statutory test to all such cases, instead of leaving them to be decided by the variable test of '*fault*,' as ascertained in each case, with the aid of nautical opinion."

The same rule was applied to the non-exhibition of lights by the privy council in the case of *The Hochung and Lapwing*, L. R. 7 App. Cas. 512.

There are cases, it is true, in which a master is justified in continuing at full speed even though a collision be imminent; but they are rare and depend upon circumstances wholly exceptional. Such a case was presented at the last term in *The Colwell and Joy*, where a tug having three vessels, with their sails up, in tow, was proceeding down Lake Erie, with a favorable wind, and met another tow coming up, which attempted to cross the bows of the former. We held in this case that the tug was justified in proceeding at full

speed, both because it was her duty to pull her own tow as far away from the other as possible, and because the force and direction of the wind was such that a collision with her own tow would have been almost inevitable in case she had stopped; but it must be made to appear beyond a reasonable doubt, in all cases where the twenty-first rule applies, that the failure to stop or reverse was demanded by the special circumstances of the case, and that collision would in all probability have occurred had the statutory course been pursued. It would be exceedingly dangerous to allow the masters of steam-vessels to exercise their best judgment in all cases in determining whether or not the statute should be obeyed, although we understand this to be the general practice upon the lakes. This is substantially held in the cases above cited. The better rule is to hold the master in fault for the disobedience of the statute in every case where he cannot make it appear that a departure was imperatively demanded.

In the case under consideration, while I differ from the nautical assessors with great hesitation, I am not entirely prepared to concur in their opinion that the collision would still have happened had the tug kept her course and stopped her engines. Considering that the propeller had time, not only to recover from her swing to port, but to swing so far to starboard as to strike the tug at nearly a right angle, although the tug herself swung only one point to port, it seems to me that if the tug had kept her helm and stopped her engine she would have swung clear of the propeller, and the disaster would have been averted. As the tow was proceeding against a current of two or three miles an hour with sails furled, there would have been little, if any, danger of fouling the tug or each other. I have not overlooked, in this connection, the many rulings which hold that an error of the master committed at the moment of collision is not a fault. Such an error is pardonable upon the theory that the master may resort to any maneuver to ease the blow. But I am not aware of any case which holds that a steamer may continue at full speed, unless she can show *beyond a reasonable doubt* that the collision was then inevitable.

There must be a decree adjudging both vessels in fault, and referring it to the clerk as commissioner to assess the damages.

THE LELAND.

(*District Court, N. D. Illinois.* February 25, 1884.)

1. COLLISION—OBLIGATION OF UNITED STATES NAVIGATION LAWS.
   The obligation of the United States navigation laws, relative to the rate of speed allowed a steamer in order to prevent its colliding with other vessels in its path, does not become operative until the vessels are known to be about to meet. Nevertheless, *moderate* speed must *always* be used by steamers in a fog.

2. SAME—MODERATE SPEED.
The criterion of moderate speed is the condition of the steamer to be stopped immediately upon the apprehension of danger ahead.
3. SAME—EVIDENCE—BURDEN OF PROOF.
Proof that the party has violated the navigation laws, and been otherwise negligent, lays upon him the burden of proving that the damage did not result from such violation and neglect.
4. SAME—SCIENTIFIC THEORIES.
Scientific acoustic theories cannot be safely accepted generally in explanation of the failure of fog-horns to be heard.
5. SAME—MEASURE OF DAMAGE.
The originator of the damage whereby the vessel is exposed, more or less helpless, to destruction by the elements, is responsible for the entire damage done.

In Admiralty.

H. W. Magee, for libelant.

Schuyler & Kremer, for respondent.

M. H. Beach, of counsel, for respondent.

BLODGETT, J. This is a libel by the owner of the schooner E. M. Portch to recover damages sustained by a collision between said schooner and the steam-barge Leland, on the waters of Lake Michigan, on the evening of March 26, 1882, the collision in question having occurred about 17 miles off the west shore of the lake, and nearly opposite a point midway between Manitowoc and Sheboygan. The Portch was running light, bound on a voyage from Chicago to Rowley bay for a cargo of railroad ties. The Leland was loaded with about 500 tons of pig-iron and some other freight, making a total cargo of about 550 tons, and bound on a voyage from Elk Rapids, Michigan, to Chicago. The libelant charges that this collision was caused wholly by the negligence of those in charge of the Leland; and the defense, on the part of the respondent, is that there was either contributory negligence on the part of those in charge of the schooner, or that the alleged negligence on the part of the Leland did not cause the collision. The collision in question, as near as it can be determined from the proof, occurred a few minutes before 8 o'clock in the evening; the wind was about south-east, a light sailing breeze of from four to five miles an hour, and the weather very thick and foggy; the course of the Portch was about N. by E., and that of the Leland S. by E. From a careful study of the proof I conclude that the Leland was running at the rate of at least eight miles an hour, and the Portch was making from four to five miles an hour, at the time the vessels sighted each other. It must be conceded, I think, from the proof, that neither of the crews of these two vessels was aware of the proximity of the other until they were about 300 feet apart, when they seem to have sighted each other about simultaneously. The proof on the part of the libelant all tends to show that the fog-horn was properly and continuously sounded on the schooner, "as required by the sailing rules, for more than two hours before the collision, and that her rate of speed was not dangerous."

The negligence on the part of the Leland, relied on by the libelant, is (1) that she had not a sufficient steam-whistle; (2) that her steam-whistle was located abaft the funnel, instead of before the funnel; (3) that said steam-whistle was not sounded as required by law, at intervals of not more than one minute; (4) that said steamer was running at too high a rate of speed; (5) that she had not a proper look-out.

It is admitted that the steam-whistle of the Leland was located abaft of the smoke-stack or funnel, and I am satisfied from the proof that this whistle was not as strong and effective as a steamer engaged in the navigation of the lake should carry for the purpose of giving sufficient warning to other vessels in the vicinity. It is true the law does not specify the dimensions or power of the steam-whistle to be carried by a steamer, but it is manifest that the whistle must be such as to give an effective warning to other craft in time, by the use of ordinary care and skillful seamanship, to avoid a collision.

Rule 15 of section 4233, Rev. St., reads as follows:

"Whenever there is a fog or thick weather by day or night, fog-signals shall be used as follows: (*A*) Steam-vessels under way shall sound a steam-whistle, placed before the funnel, not less than 8 feet from the deck, at intervals of not more than one minute. (*B*) Sail-vessels under way shall sound a fog-horn at intervals of not more than five minutes."

By a later regulation of the board of marine inspectors, approved by the secretary of the treasury, which gives this regulation the force of a statute, the intervals between the sounding of the fog-horn is reduced to two minutes. The proof on the part of the libelant tends to show that the whistle on the Leland was not sounded oftener than once in eight to ten minutes, and the proof on the part of the respondent does not show that it was sounded more frequently than at intervals of from three minutes to a minute and a half, so that the proof, even on the part of the respondent, shows a disregard of this rule as to the frequency with which the whistle was sounded, as well as of the location of the whistle. Rule 21 provides that "every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed." The obligation imposed by this rule, to slacken speed, or, if necessary, stop and reverse when a steamer is approaching another vessel so as to involve risk of collision, does not, of course, become operative until those in charge of the steamer know that they are approaching another vessel; but the duty of a steam-vessel, when in a fog, to go at a moderate speed is one constantly resting upon her under such circumstances; and it is an undoubted violation of the sailing rules for a steamer to run at a reckless or dangerous rate of speed in a fog. What is a moderate, and what is a dangerous, rate of speed, are, of course, to some extent, comparative terms, depending upon surrounding circumstances. The testimony of the various witnesses in this

case as to the speed of the steamer, at the time she sighted the schooner, varies from seven miles an hour, which is the lowest estimate of respondent's witnesses, to eleven miles an hour, which is the highest estimate of libelant's witnesses. I conclude, however, from the proof that the speed of the steamer was at least eight miles per hour, and may have been eight and a half, at the time the schooner was sighted by those on board the steamer; and this rate of speed, I have no doubt, was too great in a dense fog, in the night-time, upon waters where the liability to collision was so imminent as on the waters of Lake Michigan, even at this early season of the year; as this collision occurred upon one of the great thoroughfares of the lake, where vessels engaged in the lumber trade between ports on this lake are almost constantly passing at all times when navigation is open.

The case of *The Pennsylvania*, 19 Wall. 133, is instructive upon this question. The court, by Mr. Justice STRONG, says:

"The two vessels were not more than two or three hundred feet apart, and the steamer had the bark almost across her bow, yet it is possible that if her helm had been put to starboard, instead of port, when the lookout announced 'bell on the starboard bow,' and had been kept starboarded, the collision might either have been avoided or have been much less disastrous. * * * But if this is not to be attributed to her as a fault, there is no excuse to be found in the evidence for the high rate of speed at which she was sailing during so dense a fog as prevailed when the vessels came together. The concurrent testimony of witnesses is that objects could not be seen at any considerable distance, probably not further than the length of the steamer, and yet she was sailing at the rate of at least seven knots an hour, thus precipitating herself into a position where avoidance of a collision with the bark was difficult, if not impossible, and would have been even if the bark had been stationary, and she ought to have apprehended danger of meeting or overtaking vessels in her path. She was only 200 miles from Sandy Hook, in the track of outward and inward bound vessels, and where their presence might reasonably have been expected. It was therefore her duty to exercise the utmost caution. Our rules of navigation, as well as the British rules, require every steam-ship, when in a fog, 'to go at a moderate rate of speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the danger of meeting vessels is increased. In the case of *The Europa*, Jenk. Rule Road, 52, it was said by the privy council, 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour."

So, in the case of *The Colorado*, 91 U. S. 692, the supreme court, speaking by Mr. Justice CLIFFORD, said:

"Lights and other signals are required by law, and sailing rules are prescribed to prevent collision, and to save life and property at sea, and all experience shows that the observance of such regulations and requirements is never more necessary than in a dense fog, whether in the harbor or in the open ocean, if the vessel is in the common pathway of commerce.

"Mariners dread a fog much more than high winds or rough seas. Nautical skill, if a ship is seaworthy, will usually enable the navigator to overcome the dangers of the winds and the waves, but the darkness of the night, if the fog is dense, brings with it extreme danger which the navigator knows may defy every precaution within the power of the highest nautical skill. Signal lights in such an emergency are valuable, but they may not be seen; bells and fog-horns, if constantly rung or blown, may be more effectual, but they may not be heard. Low speed is indispensable, but it will not entirely remove the danger, nor will all these precautions in every case have that effect. Perfect security, under such circumstances, is impossible."

In the case of *The Manistee*, 7 Biss. 35, the learned circuit judge of this circuit found from the proof that the rate of speed of the steamer was seven miles per hour, and said:

"Now, without laying down any absolute rule as to speed at which a steamer should run in a fog on these lakes, there can be no question but that when a steamer is running in the fog, surrounded by sail-vessels, as this steamer knew that she was, and in close proximity, that to run at the rate of speed that this propeller was running was a gross wrong—a great risk which she had no right to incur—to the sailing vessels that were near. I know what steam-boat men say, that they must make their time; that they must run in the fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail-vessels, against which they are liable to collide at any moment."

The proof as to the want of a sufficient lookout is substantially this: The collision occurred during the captain's watch. There was no second mate to assist the captain. The only persons on deck were the wheelsman inside the pilot-house, the captain who was attending to the sounding of the fog-whistle signals, and a night-watchman by the name of Cook who was doing the duty of lookout and also had charge of the lights and such other duties as devolve upon a night-watchman on board of a steamer. A few minutes before the collision this watchman had been below to call the watch, which was changed at 8 o'clock. And although both he and the captain concur in the statement that he was standing near the captain by the pilot-house just at the moment of collision, yet from the disclosures in the testimony he could have been there but a few moments prior to the time the schooner was sighted; the testimony on the part of the schooner showing that her fog-signals were sounded regularly and continuously, as required by law, it is possible, if not probable, that if Cook or any other competent lookout had been stationed in the proper location upon the steamer, charged with the single duty of looking out for other vessels and listening for fog-signals, he might have heard the fog-horn from the deck of the schooner; and I conclude, therefore, that this steamer at the time of this collision had not a competent lookout, such as the ordinary rules of prudent navigation require. A vigilant lookout, whose sole business it is to look out for other vessels and listen for fog-signals, is deemed absolutely necessary on any vessel running in the night-time, but all the more necessary in a fog.

In *St. John* v. *Paine*, 10 How. 585, the court said:

"A competent and vigilant lookout, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indespensable to exempt the steam-boat from blame in case of accident in the night-time, while navigating waters on which it is accustomed to meet other crafts."

In *The Genesee Chief* v. *Fitzhugh*, 12 How. 447, it is said:

"It is the duty of every steam-boat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steam-boat but the helmsman, or that such lookout was not stationed in a proper place, or not actively and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

In *Chamberlain* v. *Ward*, 21 How. 570, Mr. Justice CLIFFORD says:

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookout stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty, and, for a failure in either of these particulars, the vessel and her owners are responsible."

In *The Colorado*, 91 U. S. 699, the same judge said:

"Lookouts are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation." *Baker* v. *City of N. Y.* 1 Cliff. 84; *Whitridge* v. *Dill*, 23 How. 453; *The Catharine*, 17 How. 177.

But it is contended by respondent that, although these acts of neglect may be established by the proof, still the proof fails to show that the collision was occasioned by any one, or all combined, of these violations of the sailing rules or acts of negligence; and it is insisted that the collision in question was an inevitable accident; that the fact that the fog-horn was properly blown on the schooner and the whistles sounded on the steamer at intervals of from one and a half to three minutes, and that these signals were not heard on the other vessel, is proof that the condition of the atmosphere was such that sounds were not transmitted in the usual and ordinary manner, and that hence neither was notified of the proximity of the other vessel; and the well-established rule is invoked by the respondents, that the mere violation of sailing rules, or an act of negligence, is not of itself proof to sustain a claim for damages, or make the party guilty of these acts of negligence liable for damages, unless it appears that the damage or injury was occasioned by reason of such acts of negligence or vio-

lation of the sailing rules. It is also contended by respondents that the schooner was at fault because her lights were placed in the mizzen instead of her fore rigging, thus placing the lights further aft, and thereby diminishing, by the distance between the fore and mizzen rigging, the distance forward at which the lights could be seen; but as the proof shows that the upper sails of the schooner were seen before her lights were discovered on the steamer, owing to the fact that the fog was more dense near the water, I cannot believe that the location of the lights had anything to do with the collision. I think the more correct statement of the point involved in this branch of the case would be to say that where a party sought to be charged with the damage is shown to have been guilty of palpable negligence in seamanship, or to have violated the statutory rules of navigation, such parties should be held responsible, unless it is shown that the damage complained of was not the result of such negligence or violation of the rules of navigation. In other words, proof of violation of the fixed statutory rules of navigation, and of other acts of negligence by the party causing the damage complained of, casts upon such party the burden of proof that such damage was not occasioned by this neglect.

In the case of *The Morning Light*, 2 Wall. 550, Mr. Justice CLIFFORD says:

"Different definitions are given of what is called an inevitable accident on account of the different circumstances attending the collision to which the rule is to be applied. Such disasters sometimes occur when the respective vessels are each seen by the other. Under those circumstances it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. When applied to a collision occasioned by the darkness of the night, perhaps a more general definition is allowed. 'Inevitable accident,' says Dr. LUSHINGTON, in the case of *The Europa*, 2 Eng. Law & Eq. 559, 'must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case; viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly have prevented by the exercise of ordinary care, caution, and maritime skill."

So in the case of *The Grace Girdler*, 7 Wall. 196, the supreme court said:

"While fault is shown on the part of the damaging vessel, it is incumbent on her to show that such fault had in no degree the relation of cause and effect to the accident."

And in reference to the point that these fog-signals were unavailing on account of the peculiar condition of the atmosphere, I can only say that the researches and experiments of scientists, as detailed in later works on acoustics, as well as the common experience of the unlearned, seem to show that the capacity of the atmosphere to transmit sounds is not only much less at some times than others, but at times there is a condition of nearly or quite "acoustic opacity."

Tynd. Sound, Pref. to 3d Ed.; also chapter 7 of same edition. But unfortunately we seem to have as yet no test, except actual experiment at the time, to show or prove when such conditions exist. The "acoustic cloud," as it is called, is not visible to the eye or palpable to the touch. It, as observation would seem to show, may exist only momentarily, and even some sounds may be transmitted and others not. It can hardly be safe, therefore, to accept this assumed scientific theory as a defense upon the mere proof that sound-signals were not heard, at least until the party invoking this defense shows that he has fully complied with all the requirements and conditions of the law in regard to the giving of his signals and the appliances by which they are to be made. It will not do to accept the defense that the atmosphere was acoustically opaque without something more than the proof in this case. The effect of accepting such a defense on such proof would be to hold that in all cases where signals are not heard in a fog, it was attributable to the atmosphere, and not to the negligence of the parties charged by the law with the duty of giving such signals by means of certain instrumentalities, and at certain intervals.

I do not find anything in the record in this case which would justify me in presuming that this condition of the atmosphere existed on the night in question. It was a foggy night; the fog was thick and dense; no high wind was blowing and nothing unusual or out of the ordinary appearance of foggy nights was noticed or observed by any of the witnesses in the case. The mere fact, standing by itself, that the crew on one of these vessels did not hear the signals upon the other before the vessels sighted each other, is not, I think, sufficient to sustain the assumed scientific theory invoked by respondents. We must remember these vessels were approaching a common point where their courses intersected at a very oblique angle, and at the rate of at least 12 miles an hour. Assuming, as I think we are justified in doing, from the evidence, that the whistle was not sounded oftener than once in three minutes, the two vessels might have been 2,100 feet, or two-fifths of a mile, apart at the time the last blast was given from the whistle of the steamer prior to the collision; and from the proof in regard to the distance at which it could be heard on the night in question, it is extremely doubtful whether the sound from the whistle would have penetrated this dense fog in face of whatever breeze was blowing, to a distance of one-third of a mile on the night in question, without assuming that a phenomenal atmospheric condition prevailing at the time prevented these signals from being heard. The fog-horn on the schooner probably could not have been heard over 300 to 500 feet; and with the vessels approaching a common point at the velocity shown by the proof, the last blast from the fog-horn might have been properly blown and yet not have been heard on the steamer before the vessels were in sight of each other and in peril of collision.

It is urged that if the schooner had heard the whistle of the steamer she could have only done precisely what she did do, and that is, keep her course; and that as the two vessels were approaching each other upon courses which would bring them together, the collision might have occurred, although the schooner did hear the fog-signals on the steamer. The answer to this is that if the schooner had heard the fog-signals on the steamer they might have displayed a torch or flash-light, which would have penetrated the fog a greater distance, and given the steamer notice of the proximity of the schooner; and it is also worthy of suggestion that, if the schooner had heard the fog-signal on the steamer, and the steamer, by reason of the density of the fog, or from any other reason, had not heard the signal from the schooner, the schooner would have been bound by rule 24 to have done all she could to avoid the immediate danger, which she could readily have done, as soon as the locality of the steamer was determined, by sounds from her fog-signals. So, also, if the steamer had been going at a moderate rate of speed, say four to five miles an hour, she would not have crossed the course of the schooner in time to have brought the two vessels together. It required just the speed at which the steamer was running, combined with the course and speed of the schooner, to bring about a collision between the two vessels at the point where their courses crossed, and if the steamer had been going slower, the collision would not have occurred; but the main reason in my mind for insisting that the speed was too great in this case, is the fact, disclosed in the proof, that when the master of the steamer sighted the schooner, when the two vessels were about 300 feet apart, he at once ordered his helm hard a-port, stopped and reversed his engine, and backed, and yet he was so near to the schooner that this maneuver was ineffectual, and this collision occurred.

The rule, as intimated in the authorities I have cited, would indicate that the standard or criterion of speed at which a steamer can safely proceed in a dense fog, upon a highway of commerce like this, and when the peril of collision is ever present, is only such speed as will enable her to stop, so as to avoid a collision after she sights or hears the signals of a sail-vessel crossing her path. If the condition of the atmosphere is such that approaching vessels can be seen or heard half a mile away, a steamer may run at a rate of speed which will enable her to stop or change her course in a half mile, but if it is so thick or dark that other vessels cannot be seen over 200 feet, then, the steamer's speed must be proportionally slower, so that she can stop or safely change her course so as to avoid the collision after she discovers the sail-vessel. We find then that this steamer directly violated the rules of navigation by locating her whistle abaft her smoke-stack. It must be presumed that congress in expressly enacting that the steam-whistle must be placed before the funnel, did so because the funnel would intercept or break the waves of sound from the whistle and prevent their being projected or sent forward

in the pathway of the steamer, as they should be, in order to prove effective as fog-signals. We find, further, that these fog-signals were not sounded with such frequency as the statute expressly requires. We find, also, that there was no such efficient lookout on the deck of this steamer as common prudence required; and these faults, being clearly brought home to the steamer, I think she must be held responsible as the direct cause of the collision.

But it is further urged that the loss of this schooner was not the direct and necessary consequence of this collision. The proof upon this branch of the case shows that the schooner was struck upon her port bow, and her entire bow broken in down to the water-line. She did not take in water very rapidly at first, however, and the steamer took her in tow and headed, for a time, towards Manitowoc, as by running in that direction away from the wind she did not encounter the waves so heavily but that her pumps could keep her clear. After a time the wind changed somewhat, and her course was shifted, and the schooner was towed nearly opposite the entrance of Sheboygan harbor, where she was let go at about half-past 4 o'clock in the morning after the collision. Attempts were made, by the master and crew of the steamer, to get her towed into the harbor, and the assistance of some light tugs, employed in the fishing business at Sheboygan, was obtained, they being the only tugs available for the purpose there; but by the time the tugs got hold of her, so much water had been taken in that she had sunk so deep as to prevent her being taken over the bar and inside the harbor. The wind shortly afterwards increased in violence, and the result was the vessel was driven on shore, sunk, and broken up. It is contended, from these facts, that the destruction of the vessel was in consequence of the storm which came up after the steamer had towed her to the mouth of Sheboygan harbor, and that the injury from the collision was not the direct and proximate cause of the loss of the schooner. But it seems to me the proper way of looking at the matter is to inquire what would have been the probable effect of this blow upon the vessel if she had been left out in the lake, 17 miles from land, where the collision took place. Would she have probably survived this injury, and could she, by proper seamanship and care, have been taken into a place of safety? With her bows broken open, as is shown by the proof in this case, I can hardly imagine that this vessel could have been safely navigated by herself to a port of safety, and I can only consider her final disaster as occurring in spite of all that was done by the steamer and the crew of the schooner to save her. In my estimation, from the proof, she would have sunk if left out in the lake where the collision occurred. She only sunk and went to pieces upon the shore after she was towed to the mouth of the harbor. What was done to save her was unavailing. If nothing had been done, the same result would have, perhaps more speedily, followed, and she would have more readily waterlogged out in the lake, and either sunk or

drifted upon the shore, and finally fallen a helpless victim of the same gale which drove her ashore and wrought her final destruction; but the helpless condition which made her the victim of this gale was the injury received in the collision. I therefore come to the conclusion that the loss of the Portch is fairly and properly chargeable to the acts of the Leland, and that she should be held responsible therefor.

There is a large amount of testimony in the record in regard to the value of the Portch, and as her loss was substantially total, only about $600 worth of wreckage having been saved from her, it becomes very material to inquire what was the value of the vessel at the time of the collision. Libelant claims not only the value of the vessel, but the value of the net amount of freight, which she would have earned on the voyage she was then prosecuting, together with nearly $6,000 which he expended in endeavoring to get her off after she had been driven on shore by the gale. In regard to the claim for freight and the cost of the unavailing efforts to save the vessel, I am clearly of the opinion that none of these items can be allowed, and that the true measure of damages is the value of the schooner at the time of the collision and interest from that time. *The Baltimore*, 8 Wall. 386; *The Falcon*, 19 Wall. 75; *Pajewski* v. *Canal Co.* 11 FED. REP. 313. The commissioner, from the proof before him, came to the conclusion that the value of the schooner was $16,800, and so finds by his report. I am of the opinion that this estimate is somewhat high, and that the more reliable proof in the case does not justify the finding of the value to have exceeded $15,000. It is true, there is a wide range of judgment among the various witnesses as to the value of the schooner at the time of the collision, but a large proportion of the libelant's testimony, in my estimation, gives a speculative value; and while the respondent's testimony seeks to limit the liability to what was considered by the insurance inspectors as her insurable value, I think the more reliable testimony is that of Oliver, Dunham, Holmes, and such witnesses, who were engaged in buying and selling vessels, and who offered to buy this vessel, and would have bought her if they could have got her for $15,000, but were not willing to pay more than that. I therefore conclude that her value was $15,000. The exceptions to the commissioner's report are therefore overruled in all respects, except that said report is modified by finding the value of the schooner to be $15,000 instead of $16,800. In reaching this conclusion as to the value of the schooner, I am not disposed to make any deduction for the value of the wreckage saved. The libelant expended a large sum of money, as I have no doubt, in good faith, in efforts to get the schooner off after she had gone ashore. This amount being disallowed, I do not think injustice will be done by allowing the benefit of this salvage to the libelant.

A decree will be entered finding the Leland at fault, and finding the libelant's damages to be $15,000, the value of the schooner, and interest thereon at 6 per cent. per annum from the twenty-sixth of March, 1882, when the collision occurred.

THE C. N. JOHNSON.

(*District Court, E. D. Michigan.* February 18, 1884.)

1. MARITIME LIEN—CREDITOR ENFORCING LIEN AGAINST VESSEL—DUE DILIGENCE.
   The obligation of a creditor to use due diligence in the enforcement of his lien upon a vessel, as against a *bona fide* purchaser, is not always discharged by taking out process in the port or district where the claim accrued and putting it in the hands of the marshal, even though that may be her home port or one she has been in the habit of frequenting. There are circumstances under which he may be bound to follow her into other districts.
2. SAME—BONA FIDE PURCHASER—KNOWLEDGE OF CREDITOR.
   A vessel was repaired at Chicago in the spring of 1880, and was soon afterwards taken to Lake Erie. In the spring of 1881 she was sold to a person residing in Buffalo, who had no notice of the claim for repairs, and continued to run upon the lower lakes. The creditor was thereupon informed of such sale, soon after it took place, and of the fact that she was navigating the lower lakes, but made no attempt to enforce his claim until December, 1882. *Held*, that he should have endeavored to seize the vessel at Buffalo, or some other port which she frequented, as soon as he was informed that she had been sold; and that his claim was stale.

In Admiralty.

This was a libel for repairs put upon the schooner C. N. Johnson, at the port of Chicago, in the spring and early summer of 1880, to the amount, including interest, of $710.34. Defense, stale claim. One Buckley was the real owner of the vessel, though the title stood of record in the name of Joseph Single, of Wausau, Wisconsin. Milwaukee was her home port. After the completion of the repairs, in June, 1880, the schooner made one trip to Green Bay, and was then taken to the lower lakes, where she continued to run until the libel was filed. Payments of money on the work done were made by Buckley to libelants as late as July, 1881. In the fall of 1880 Buckley, representing himself as the real owner of the vessel, began negotiating with one Weeks, the present claimant, to exchange her for the schooner Malta, then known as the Vosberg, stating, as Weeks claimed, that the Johnson was unincumbered, though Buckley denied this. The parties met in March, 1881, at Buffalo, where two or three conversations occurred between them as to their respective vessels, Weeks insisting on $500 in cash, in addition to the Johnson, for the Vosberg. But he finally concluded to make an even exchange; and mutual transfers took place on April 4, 1881, the outfit of each vessel being excepted from the trade. On the eighteenth of April, Weeks received from Joseph Single a bill of sale of the Johnson, with covenant to defend her against all demands, and executed a like bill of sale of the Vosberg to Single. At the time of the exchange there was a mortgage upon the Vosberg, given by Weeks to Vosberg and Baker, of Buffalo, on which there was due about $1,000. This Weeks procured to be discharged within a few days after the sale, executing and delivering to the mortgagee, in lieu thereof, a mortgage for the

like amount upon the C. N. Johnson. This latter mortgage Weeks paid in full, in November, 1882.

BROWN, J. Two questions are presented by the record in this case: (1) Whether Weeks, the present owner, purchased the schooner without notice of libelants' claim; (2) whether libelants were guilty of laches in not taking earlier proceedings against the vessel. The claimant, Weeks, is sought to be charged with notice by the testimony of Buckley, the vendor, who says he told Weeks, on two different occasions, that the Johnson owed a ship-yard bill at Chicago, but did not state the amount, as he did not know himself the balance due to the libelants. Weeks, he says, made no reply. In this connection he states that he told Weeks that if the Malta was as good as represented he would take care of this bill himself. Libelants' proctor also swears that when he presented the bill to Weeks, in December, 1882, he admitted knowledge of it at the time of the purchase. This is all the direct testimony upon the subject of notice. Upon the other hand, Weeks swears positively that he had no notice of the claim, and denies the conversation with the proctor. He is corroborated by his wife, by the witness Edward Smith, and Frederick Emery, all of whom were present at one or more conversations, during which the terms of the sale were settled, and who testified that Buckley represented to Weeks that the Johnson was unincumbered. It is quite improbable, too, that after holding the matter under advisement for several months he should have bought the vessel, knowing there was a claim against her, without inquiring who owned it, or its amount.

Buckley's testimony is open to grave suspicion, as he induced the person who held the legal title to give a bill of sale, in which there was an absolute and unqualified covenant to pay all demands against the vessel. This is a direct contradiction of his assertion that he agreed to pay such demands only in case the Vosberg proved to be as good as represented. He also expressly admits that, by the terms of the sale, the vessels were exchanged even and clear of incumbrances. It is not denied that Weeks carried out his part of the bargain by procuring the release of the Malta from the mortgage running to Vosberg and Baker, who consented to accept, and actually received, from Weeks security upon the Johnson for the debt from which the Malta was released; and that Weeks paid the mortgage before the filing of this libel. I think the probabilities of the case outweigh the testimony of libelant's proctor as to Weeks' admissions to him. While there is nothing to criticise in his credibility as a witness, he may have misapprehended the drift of Weeks' statement. As was said by Judge BETTS in *Sunday* v. *Gordon*, Blatchf. & H. 569–576, too much reliance should not be placed upon the version of conversations given by a witness who is seeking through them the means of maintaining an action in favor of his employer. However honest or commendable his motive might have been, a witness so employed would be exceedingly apt to remember statements favoring the

wishes of his employer, and to forget or not listen to explanations and qualifications made at the time. While there is no impropriety in an attorney taking the stand to make parol proof of uncontested facts, such as the signature to an instrument, or the indentification of a public record, the practice of making a case for his client in the character of a witness is not usually favored by the courts, although there is now little question of his competency to testify. Weeks, Attys. §§ 124, 125; Whart. Ev. § 420; *Potter* v. *Inhab. of Ware*, Cush. 519–524; *Follansbee* v. *Walker*, 72 Pa. 230.

The question of laches on the part of the libelants is less difficult of solution. It may be conceded that they were under no obligations to take proceedings during the season of 1880. The sale was made early in the spring of 1881, and the testimony shows conclusively that they were informed of it very soon after it took place. They made no effort, however, to collect of the vessel until December, 1882, when the claim was forwarded to their proctor here for collection, and the vessel was seized a few days thereafter. Their excuse for this delay is that the vessel left Lake Michigan shortly after the repairs were made, and continued upon the lower lakes, out of the reach of process of the district court of Northern Illinois, during all this time. This defense raises the question whether the duty of a creditor to use due diligence in the enforcement of a lien, as against a *bona fide* purchaser, is discharged by taking out process in the district court where the claim accrued, and awaiting the return of the vessel to that district for her seizure. Courts have held in general terms that, as against innocent third parties, the lien will be presumed to have been waived if the creditor has not availed himself of a fair opportunity to enforce it; and in some cases it has apparently been assumed, but I believe never decided, that the creditor need do no more than wait for the return of the vessel to his own port, or take out process in his own district, and put it into the hands of the marshal.

In *The Emma L. Coyne*, 11 Chi. Leg. N. 98, I had occasion to hold that, under the peculiar circumstances of that case, where the lienholder and the owner of the vessel were both residents of the same district, there was no obligation on the part of the former to pursue the vessel into another district to prevent his claim from becoming stale. No opinion, however, was intimated as to the necessity of doing this in case the vessel were sold to an owner living in another state.

In *The D. M. French*, 1 Low. 43, 45, the learned judge for the district of Massachusetts intimated that, with the modes of communication now within reach of every one, lienholders might be required to follow a vessel into another state, at the risk of losing their privilege, though he was not called upon to decide the question.

Where a vessel leaves a port of repair upon a long voyage, and does not return, and, in the mean-time, it is impossible, or very difficult, to ascertain her whereabouts, there is certainly reason for saying

that a creditor would not be chargeable with laches, as against innocent parties, even by the lapse of several years, if he had reasonable expectation of her return. But I find it quite impossible to say that, as a universal rule, the creditor may wait until her return to the port of repair, even though that be her home port, or a port which she has been in the habit of frequenting, without losing the benefit of his lien. A rule of this kind would be particularly inequitable upon the lakes, where the arrival and departure of vessels at all lake ports, from Chicago to Ogdensburgh, are noticed in the principal daily papers, and for four months in the year the entire shipping of the lakes is laid up by the ice to await the opening of navigation. I think that a reasonable opportunity to enforce a lien is given, within the meaning of the law, whenever the creditor is able, by the exercise of reasonable diligence, to ascertain the whereabouts of the debtor vessel. Each case must be governed largely by its own circumstances.

In the case under consideration, libelants were not only informed of the sale very soon after it took place, but of the removal of the vessel to the lower lakes, and were notified by Buckley in the spring of 1882, that he should pay nothing more upon the bill, as the Malta was not as represented, and that they must look to the Johnson for the residue. They took no steps, however, even to notify the purchasers of the claim, until December of that year, when it was forwarded to Detroit for collection and the vessel seized within 10 days thereafter. There is nothing in the testimony to show that the vessel might not have been arrested during the season of 1881, or at least in the winter of 1881–82. It is true that no damage was occasioned to the present owner by the libelants' delay after the sale took place, but this objection was disposed of in the case of *The Theodore Perry*, 8 Cent. Law J. 191, and it is unnecessary to repeat what was said upon the subject upon that occasion.

Under the circumstances of this case, it seems to me entirely clear that the libelants were guilty of laches, and that the libel must be dismissed.

THE JOSEPH W. GOULD.

(*District Court, W. D. Pennsylvania.* February 4, 1884.)

1. COLLISION—NEGLIGENCE—EVIDENCE.
   In a case of collision the libelant must show the alleged negligence by a fair preponderance of the evidence.
2. SAME—RUNNING ON OHIO RIVER.
   Running on the Ohio river in a fog is not negligence *per se*.
3. SAME—MUTUAL FAULT—APPORTIONMENT OF DAMAGES.
   Boats so running should observe great care and caution; but, this being done, the court will not apportion the damages in case of a collision upon the ground that the colliding boats were both in fault in running in a fog. Having voluntarily encountered the hazard of the navigation the loss must lie where it falls in the absence of proof of negligence.

In Admiralty.

Morton Hunter, for libelants.

D. T. Watson and *F. F. Sneathen*, for respondents.

ACHESON, J. This a suit by the owners of the steam-propellor Stella McCloskey against the steam tow-boat Joseph W. Gould, to recover damages sustained by the first-named vessel in a collision on the morning of February 2, 1881. At the time of the occurrence both boats were proceeding on short trips down the Ohio river. They left the Pittsburgh wharf at nearly the same time, between 9 and 10 o'clock A. M., the McCloskey turning out first and being somewhat in advance of the Gould. When the latter was at the Point bridge the former was at Painter's mill, or a little above. Painter's mill is about 460 yards, and the place of collision is some 840 yards, below the bridge. When the boats started out there was a "frost fog" upon the surface of the river above the bridge, rising a few feet only above the water, and not interfering with navigation. But at or about Painter's mill the boats encountered a dense fog which came out of Saw-Mill run, and it was while they were in this "fog-bank," as the witnesses term it, and hidden from each other, that the collision occured.

The boats were proceeding to points on opposite sides of the river. The destination of the Stella McCloskey was Manchester, on the north side, and therefore it was necessary for her to cross the river, following the channel, which here runs in a quartering direction from the south towards the north shore. She was in the act of crossing when the Gould ran against her starboard side, about one-third forward of her stern. The effect of the collision was to upset the Stella McCloskey or overturn her on her larboard side. Her pilot says she was "shoved over." She sank almost instantly. The saddest thing connected with the disaster was the drowning of her fireman, William Salt. The pilot and engineer, the only other persons upon her, were thrown or jumped into the river, and were picked up by the Gould. So sudden was the mishap that the pilot of the Stella McCloskey did not see the Gould until he was in the water, and the first notice her engineer had of the impending calamity was when he saw "the cabin break, and the nosing of a boat at the glass sky-light just where the cabin broke in." The pilot of the Gould testifies that when he discovered the Stella McCloskey she was not further away than 35 to 40 feet. He states that he instantly rang his backing bell, and the proof is that the order to back was promptly obeyed. Indeed, the engineer of the Stella McCloskey, speaking, as I understand him, of what he observed immediately after the collision, says: "When I came out of the cabin or engine room I suppose the Gould was about 25 or 30 feet away from us and abreast of us. *She had been backing*, and her wheel was just stopping." Later on that day the sunken boat was raised by crane-boats, the Gould staying by and assisting. The injuries to the Stella McCloskey, as the direct result of the collision, were found to be these,

viz: About three feet of her nosing, which was two or two and a half inches thick, was torn off the guard, but the latter was not broken; and there was a break at the corner of the cabin, a foot below the roof, eight or ten inches wide, which, a witness states, "appeared to have been made by a sliding lick from the guard of another boat." The evidence does not disclose the dimensions of either vessel, but it appears that the Stella McCloskey was of considerably lighter burden than the other, and was much the smaller boat. She was originally built for a "pleasure boat," but had been changed into a regular passenger boat.

The seventh rule, for the government of pilots on the western rivers, provides that "when a steamer is running in a fog or thick weather, it shall be the duty of the pilot to sound his steam-whistle at intervals not exceeding one minute." Each of the pilots testifies that he obeyed this rule, and each is corroborated, to some extent, by other witnesses. The testimony, corroborative of the pilot of the Gould, is especially strong, and, in part, comes from witnesses who were on shore. True, the witnesses who were on the respective boats say they did not hear any whistle but their own. The explanation of this, however, may possibly be that the pilot-houses and engine-rooms were closed, the day being extremely cold, and that the whistles of the two boats were nearly simultaneous.

In respect to the speed of the Gould, the testimony of her pilot is that she proceeded under a slow bell, and with great caution. To the same effect testifies the engineer; and of this there is some other direct corroborative testimony. Moreover, the circumstantial evidence that the Gould was so running is very strong. The wounds which the Stella McCloskey received indicate that the Gould had little headway. And then, again, the witnesses on both sides all say that when the boats come together they felt no jar, and heard no crash to denote a collision. There is no direct evidence in the case that the Gould was running at an improper rate of speed. Mr. Neeld, indeed, testifies that a boat leaving the Point bridge at the same time another leaves Painter's mill, and overtaking the latter boat at the place of this collision, would have to run twice as fast; and the pilot of the Gould states that she ran 2,950 feet while the Stella McCloskey ran 1,650 feet; but this does not necessarily imply undue speed on the part of the Gould, and much less would it justify such conclusion in the face of the positive testimony to the contrary.

In a case of collision the libelant must show the alleged negligence by a fair preponderance of the evidence; otherwise the libel will be dismissed. *Butterfield* v. *Boyd*, 4 Blatchf. 356; *The Albert Mason*, 2 FED. REP. 821; *The Edwin H. Webster*, 18 FED. REP. 724. Applying this rule here, there must be a decree dismissing the libel unless, indeed, the Gould is to be adjudged guilty of negligence in running at all in the fog. But a charge of culpability in that regard would come with an ill-grace from the Stella McCloskey, for she led the way into

the obscurity of the fog, and certainly was equally blameworthy with the Gould, if either herein were censurable. But running in a fog is not negligence *per se*. The above-quoted rule, prescribed for the government of pilots, regulates such running, and, by implication, sanctions it. True, great care and caution should be observed under such circumstances; but, this being done, the court, in case of a collision, will not apportion the damages upon the ground that the colliding boats were both in fault in running in a fog. *The Sylph*, 4 Blatchf. 24. Having voluntarily encountered the hazard of the navigation, the loss must lie where it falls, in the absence of proof of negligence. Id.

Let a decree be drawn dismissing the libel, with costs.

THE ALICIA A. WASHBURN, etc.

THE B. K. WASHBURN, etc.

(*District Court, S. D. New York.* February 21, 1884.)

1. COLLISION—STEAM-TUG WITH TOW—ROUNDING BEND.
   A steam-tug with a tow, in going around a dangerous bend, where the tide sets strongly across the river, is not entitled, as a matter of right, to occupy the full half of the river on the right-hand side.
2. SAME—DUTY OF SCHOONER BECALMED.
   A schooner rounding such a bend in the opposite direction, becalmed or nearly so, is bound to make use of the customary means of oars, or a small boat ahead, to keep some steerage way in order to avoid collision with other vessels.
3. SAME—CASE STATED.
   Where the steam-tug W., with a tow on a hawser, was proceeding northward around West Point in the Hudson river, and met several sailing vessels becalmed, floating down with the tide, a short distance apart, and the W., having overtaken another tow a little below West Point, passed it on the left instead of the right, as she might have done, thereby going round the bend nearly in the middle of the river, when there was abundant room to go to the eastward; and the schooner H., nearly becalmed, drifted down around the bend with the tide, which there set strongly to the eastward across the river, carrying the H. against the W.'s tow, and the schooner used no oars or small boat, as she might have done, to give her some headway and aid in avoiding the tow: *held*, that both were in fault,—the tug for proceeding unnecessarily towards the middle of the river, knowing the strong set of the tide, and the danger to sailing vessels becalmed; and the schooner, for not using customary means to aid in avoiding the collision.

Collision.

Benedict, Taft & Benedict, for libelant.

P. Cantine, for respondent.

BROWN, J. On the night of March 31, 1880, the libelant's schooner Maria E. Hearn, of about 130 tons burden, with a cargo of 27,000 bricks, came into collision with an ice-barge in tow of the A. A. Washburn, on the Hudson river, off the West Point light, and shortly after

capsized and sank. The night was cloudy and dark, but not thick; the wind light, from the north-east; the tide about half ebb, and strong. The Washburn, a powerful steam-tug, was coming up the river, making against the tide about six miles per hour by land, having two ice barges in tow upon a hawser about 450 feet long. When a little way below the West Point light she overtook the steam-tug McDonald, with a large and heavy tow upon a hawser about 500 feet long, making by land about three miles per hour. The Washburn, with her tow, passed on the west side of the McDonald, between Boat-house Point and West Point. The ice-barge on the Washburn's starboard side, in passing, rubbed along against the fenders on the port side of the McDonald, being set against her, doubtless, by the ebb tide, which, in passing around and below West Point, sweeps strongly to the eastward. While the Washburn and her tow were thus passing the McDonald and her tow, three schooners and a sloop were observed coming down the bend, between Magazine Point and West Point, in the following order: the Dubois, the Hearn, the Voorhees, and the sloop, estimated to be respectively from 400 to 500 feet apart, and nearly in line. About the same time the Albany night boat, the St. John, or the Drew, came down past Magazine Point, and sounded two whistles, to which the Washburn at once replied with two. All the sailing vessels had their sails set. The witnesses from them testify that they had not wind enough, between Magazine Point and West Point, to give them steerage way; that they drifted down with the tide, and got wind again after passing West Point. The Dubois passed on the west side of the Washburn and her tow, using an oar at the bows to keep the schooner's head to the westward, but passing so near that they apprehended collision. The witnesses from the Dubois testified that when she passed the tow of the Washburn that tow was about 75 feet distant to the eastward, and that the McDonald was then abreast of the Washburn's tow. The pilot of the McDonald testifies that when this tow was abreast of him he was about due east from the light, and that the collision between the Hearn and the tow was when the latter had gone about 200 feet ahead of him. This fixes very approximately the place of collision, except as respects the distance from the shore, and shows that the Washburn, which was some 450 feet ahead of the place of collision, must have been headed well round towards the westward in the bend. The witnesses from the Hearn testify that they came past Magazine Point nearly in the middle of the river; that they drifted with the set of the tide to within 200 feet of the West Point shore; and that, as they approached the Washburn and her tow, they put their boom to port, and struck the tow of the Washburn when not over 200 feet from the west shore. The main sheet of the Hearn got caught in the samson's-post of the barge, which held her fast for a short time; but, being soon released, the schooner drifted downward and to the eastward, upon and across the port hawser of the McDonald's tow, and

there filled, capsized, and sank. The Voorhees also passed on the west side of the Washburn, being headed in towards the westward, by means of an oar. Her witnesses testify that she narrowly escaped collision with the Washburn's tow, though going within about 30 feet of the rocks on the western shore. The sloop passed to the east of the Washburn and of the McDonald; and the St. John, or Drew, having checked her speed, passed on the east side of all the other boats, the sloop going between the steamer and the McDonald at an estimated distance of about 100 feet from each.

The case has been elaborately considered by counsel on both sides. For the claimants it is urged that no liability exists on their part; because, as they claim, the evidence shows that they were not on the westerly half of the river; and that the collision could have been avoided had the Hearn used an oar, or a small boat rowing ahead, as they allege is customary with sailing vessels becalmed. Very little reliance is to be placed upon the extremely different estimates of the distances of the various boats from shore. Untrustworthy as such estimates at night always are, they are especially so in this case, when the night was so dark, and the testimony is given several years after the occurrence. All that can be done in such cases is to endeavor to arrive at the most probable solution of the case from other circumstances less liable to great mistake.

Without discussing further the numerous points of difference in the testimony, the following facts seem to me sustained by the evidence and the probabilities of the case: (1) That the McDonald was going up not far from the middle of the river. (2) That there was room for the Washburn to pass her on the east side had she wished to do so. This I consider to be clearly established by the subsequent passage of the sloop and of the St. John to the eastward. (3) That the Washburn's tow rubbed against the McDonald in passing on the west side of the latter; and that her port boat was consequently not over 100 feet to the west of the McDonald. (4) That the collision between the Hearn and the Washburn's tow was some 200 feet ahead and somewhat to the westward of the McDonald, as is shown by the fact that the Hearn, after the collision, drifted with the easterly set of the tide down and across the McDonald's port hawser. (5) That there was not sufficient wind between Magazine Point and West Point to give steerage way to the sailing vessels; and that in such circumstances it was customary for sailing vessels to make use of an oar at the bows, or of a row-boat in front, in order to keep steerage-way and to guide their course.

The easterly set of the ebb-tide in coming around West Point; the liability to meet sailing vessels coming from above, as well as their liability to be becalmed between Magazine and West Points; and the risk of meeting tows coming up,—are familiar facts, presumably known to all the parties. The especial danger arising from these circumstances in going around West Point bend, where vessels could not be

seen to each other more than a mile distant, imposed upon both parties alike the obligation of acting with a prudence and caution commensurate with the known danger. The captain of the McDonald testified that between Boat-house Point and West Point "was no place for one tow to pass another," on account of the dangers incident to the place. This case, I think, proves that he is right. I have no doubt that the cause of the collision was the Hearn's drifting with the tide against the tow of the Washburn in going around the bend. A steamer, in going around such a bend, where a sailing vessel is likely to be becalmed, and where the tide has so strong a set across the river, is bound to keep well out of the way, when there is nothing to prevent her doing so, and thus give plenty of room for becalmed and drifting vessels to pass, without danger of collision. There is no rule which allows to a steamer, in such a situation, the full half of the river; nor is it any sufficient defense that she was not on the westerly side, where, from the peculiar set of the tide, the westerly half of the river is not sufficient for sailing vessels, becalmed and drifting, to pass around such a bend with safety. I am satisfied, therefore, that the Washburn should be held in fault because she did not go nearer to the easterly shore of the river, where there was abundant room for her to go. The McDonald herself was further to the westward than was necessary; and tows overtaking each other in that vicinity, unless they are sailing to the extreme right of the river, should forbear attempting to pass each other until they have gone beyond the points of danger.

The Hearn, however, cannot be held blameless. There was no reason why she should not have used oars at her bows, so as to give her some headway, or change her heading, as the other schooners did; or else have made use of a row-boat, as was proved to be frequently done by other vessels for the same purposes; no reason, I say, except, possibly, the fact that she was tardy in discovering the approach of the tug and tow, and her own danger. The evidence is very strong to the effect that her captain did not see the Washburn at all until within 150 feet of her. He states this twice explicitly; although the lookout says that he gave him notice of it at a much greater distance. If the captain is right, his knowledge of the Washburn's approach was, doubtless, too late to enable him to accomplish much by oars or a row-boat. But that would only convict him of another fault, viz., that of not keeping a proper lookout; and upon his own testimony I strongly suspect that that was the fact. Considering the known danger from tugs that might be coming up around that bend while he was nearly becalmed, there is no excuse for his not keeping a sharp lookout, or not being fully prepared for the instant use of oars or a boat, if any danger should be descried; and either of these might have been used effectively if the Washburn was seen at the distance stated by the lookout. From the fact that all the vessels made use of a change in the position of their sails, evidently for the purpose of

making some change in their courses, and particularly from the testimony of the captain of the sloop in this regard, I think there is some doubt whether the sailing vessels in the reach between Magazine and West Points were in fact totally becalmed, and whether they did not have at least some little headway, though it was doubtless slight. The evidence, I think, indicates that the captain of the Hearn was tardy in the change of his boom. In the various particulars above stated it seems to me that he did not act with the watchfulness, alertness, and prudence which the situation reasonably demanded of him, and which, if observed, might have enabled him to avoid the collision; and that the Hearn must, therefore, be held in fault.

As I must find the collision tc have arisen, therefore, through fault on the part of both vessels, the damages must be divided, and an order of reference may be taken to compute the amount.

The Ella B.

The Russell Sage.

(*District Court, N. D. New York.* March, 1884.)

1. Negligence—Sudden Emergency.
   One who, in the confusion of a sudden emergency caused by another's fault, fails to adopt the most prudent measures of safety, is not chargeable with negligence on that account.
2. Same—Collision of Vessels.
   Accordingly, where a tug-boat was coming down the stream with a canal-boat in tow, and a steam-propeller, whose officers might easily have seen the tug, suddenly and without warning swung out into the stream, thus rendering a collision imminent, and the master of the tug endeavored to pass by in order to escape the danger, *held*, that even though some other course might have been in fact more prudent, the owner of the tug was not answerable for any part of the damage sustained by the canal-boat when struck by the propeller.

In Admiralty.

Benjamin H. Williams, for libelants.

Joseph V. Seaver, for the Ella B.

Josiah Cook, for the Russell Sage.

Coxe, J. On the morning of June 12, 1883, the steam-propeller Russell Sage was lying in the Buffalo river at a dock on the north side near the foot of Washington street, her bow being headed up stream. She is 233 feet in length, 33 feet beam, and has a carrying capacity of 1,500 tons. Directly in front of her was a small, low scow, used in pile-driving, from 15 to 20 feet in width. With this exception there was nothing to intercept the view for a thousand feet and more up the river, and as the scow was only half the width of the propeller the view from the starboard bow of the latter was ab-

solutely unobstructed. Diagonally opposite the Sage, and between 200 and 300 feet further up the stream, three boats, aggregating 63 feet in width, were lying abreast at French's dock. In these circumstances the Ella B., a small tug, 35 feet in length and 10 8-10 feet beam, having the canal-boat Henry L. Schutt in tow, started from a slip on the north side of the river, about a thousand feet above the point where the Sage was lying, and proceeded down the river, keeping very near the center. When the tug was 100 or 150 feet from the propeller the latter cast off her head lines and swung her bow into the stream. The tug put her wheel to starboard and opened her throttle-valve hoping to pass in safety. In this she was unsuccessful, for the propeller's stem struck the starboard bow of the canal-boat causing the damage for which this action is brought. The river t the point where the collision occurred is 221 feet wide. The witesses, with great unanimity, agree that at the time of the accident the tug and tow were about in the center of the river, rather nearer the south than the north side. It follows, therefore, that the propeller in order to have reached the canal-boat must have swung out 110 feet or more. The proof shows no fault on the part of the canal-boat. Indeed, it was virtually conceded on the argument that the libelants are entitled to recover, but each of the libeled vessels contended that the accident occurred solely by reason of the negligence of the other. The controversy is, then, between the Russell Sage and the Ella B., and the court is called upon to decide, if it is found that the accident was not the result of their joint negligence, which of the two was responsible therefor.

There can be no doubt as to the negligence of the Russell Sage. There was no difficulty in seeing the tug the moment she entered the river. The Sage knew, or ought to have known, that the tug, not a powerful one, was coming down the river with a loaded canal-boat, and yet, when they were in close proximity, she swung out so that her stem was nearly, if not quite, in the center of the stream. Had she waited a few moments the tug and tow would have passed by and all danger of collision would have been averted. She had no look-out, and the great weight of testimony is to the effect that she gave no signal. In any view it was unnecessary to swing out so far. Her object was to proceed further up the river, and had she adopted the usual course there would have been ample room between her bow and the center of the stream for the tug and tow to pass in safety. Without apparently taking any precaution to guard against danger, with an utter recklessness as to consequences, the Sage suddenly and unexpectedly let go her head-lines and swung herself half way across a narrow channel directly in the track of an approaching vessel. All this was negligence for which she must be held responsible.

Regarding the Ella B. there is more doubt. The impression entertained at the trial was that her conduct contributed to the accident, but upon a more deliberate and careful examination a different con-

clusion is reached. In determining this question the previous habits of her master should not be considered, in the absence of proof connecting them with the collision or with some dereliction of duty on that occasion. The tug was passing down the river in a careful and prudent manner. No fault as to her rate of speed, her position in the center of the river, or the management of the tow is suggested until she was within about 150 feet from the propeller. She then found herself confronted with sudden and imminent peril. Three courses were open to her; she could reverse, and by going along-side, endeavor to stop the canal-boat; she could sheer off and attempt to haul the canal-boat to the south side of the stream, or she could do as she actually did, make an effort to pass. Each of these courses was attended with danger. The tow-line was about 16 feet or thereabouts in length. In backing with so short a line it is not impossible that the boat might have been forced into a position even more hazardous than the one she actually assumed. So, too, in sheering off, the canal-boat might have been so placed that she would have been struck amid-ships or near the stern where the blow would have been attended with far more serious results. The tug attempted to go clear by turning towards the south and accelerating her speed. In deciding upon this course her master had a right to assume that the Sage would swing out only the usual distance, which is 40 or 50 feet. He could not foresee, and was not required to do so, that the Sage would occupy half the channel in executing an ordinary maneuver. It is not necessary to decide that he took the wisest and safest course, for the reason that he had not time or opportunity to enter into a nice calculation as to which of the dangers which confronted him was the least to be apprehended. He was placed in a position of extreme peril by the sudden and extraordinary action of the Sage. If, in such an exigency, attended as it must have been with excitement and apprehension, he failed to give the most judicious orders or take the wisest course, the failure cannot be imputed to him, but to the vessel which placed him in this hazardous predicament. The conclusion, therefore, reached is that the Sage is solely responsible for the accident.

There should be a decree for the libelants, with costs, and a reference to a commissioner to ascertain and report the amount of the damage sustained. As against the Ella B. the libel must be dismissed, but without costs.

THE COL. ADAMS, etc.

(*District Court, S. D. New York.* March 22, 1884.)

1. SALVAGE—VESSEL AND CARGO.
   Where a vessel and cargo, owned by different owners, are libeled for the recovery of salvage, and the different owners file separate answers, claims, and bonds, and one of them claims an apportionment of the salvage, and a sum in gross is agreed upon between the parties, it is the duty of the court to apportion the amount awarded upon the interests of the different owners; it would be error to award a gross sum which might be collected wholly out of the property of either.
2. SAME—APPORTIONMENT.
   Where in such a cause all the issues are referred to a commissioner to hear and determine, *held*, such apportionment is a part of the issues referred; and the commissioner's report having been filed without apportionment, it was sent back on exceptions that such apportionment might be made upon the evidence of the respective values of the vessel and cargo.
3. SAME—AVERAGE BOND.
   If, as alleged, an average bond has been entered into between the parties, affecting the distribution of the salvage, the apportionment made in this action will be without prejudice to the covenants and obligations of the bond.

In Amiralty.

Jas. K. Hill, Wing & Shoudy, for libelant.

Butler, Stillman & Hubbard and *Wm. Mynderse*, for cargo.

Owen & Gray, for The Col. Adams.

BROWN, J. The libel in this case was filed to recover salvage against the vessel, freight, and cargo, all of which were attached. The vessel and cargo were owned by separate owners, who appeared separately, filed separate claims, and gave separate bonds for their respective interests. The claimants of the cargo, in their answer, demanded that, in the event of the libelant's recovery, the amount of recovery should be apportioned upon the cargo, vessel, and freight. By consent, the action was referred to a commissioner "to hear and determine the whole issue, subject to exceptions upon his report." At the close of the libelant's proofs, the claimants of the cargo and the claimants of the vessel and freight united in an offer of $8,000, which the libelants accepted, and which the commissioner reports as the whole salvage allowed. The claimants of the cargo demanded of the commissioner that he should apportion the amount properly chargeable against the cargo; and to that end they gave evidence of the values of the vessel, freight, and cargo. The claimants of the vessel objected to such apportionment, and the commissioner ruled it not within the issue referred to him. The former, therefore, gave no evidence of the relative values of vessel and cargo, and the report contains no apportionment of the amount of salvage to be paid by either.

Upon the hearing of the exceptions, the claimant of the cargo states that an average bond has been entered into between the owners of the vessel and cargo, and that the apportionment should, therefore, be left to be adjusted under that bond. The bond, however, was not

put in evidence, and the claimant of the cargo insists that the report is defective for want of apportionment. In a suit for salvage, where there are separate owners of the vessel and cargo libeled, who appear separately to defend their separate interests, the action is essentially for a several and separate demand against the property of each owner. It would be error, therefore, in the court to treat these separate interests as joint and consolidated, despite the separate answers and claims demanding the recognition of the separate rights of each, or to render a decree for the whole salvage in such a form as to make it collectible wholly from either. Under such several claims and pleadings the court is bound to make the apportionment upon the respective separate interests. This was long since clearly announced by the supreme court in the case of *Stratton* v. *Jarvis*, 8 Pet. 4, where STORY, J., says, (p. 11:)

"It is true that the salvage service was, in one sense, entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*. It would otherwise follow that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject."

The same question has a direct relation to the right of appeal of the claimants to the supreme court, as dependent upon the amount involved, since this right is to be determined according to the amount chargeable against each severally. *Stratton* v. *Jarvis*, *supra*; *The Connemara*, 103 U. S. 754; *Ex parte Baltimore & O. R. Co.* 106 U. S. 5; S. C. 1 Sup. Ct. Rep. 35, and cases there cited. An apportionment in some form has been the ordinary practice in such cases, and is clearly a substantial right, which it would be error to disregard. *The Minnie Miller*, 6 Ben. 117; *The Cyclone*, 16 FED. REP. 486, 489. The apportionment of the salvage was, therefore, a material part of the issue referred to the commissioner; and as under his ruling the owner of the vessel gave no evidence of value, the case must be sent back that an apportionment may be made upon such proofs as the parties may offer. If an average bond has been entered into between the parties, any apportionment ordered by the court in this action would be without prejudice to the covenants and obligations of such a bond, so far as the subject of salvage is covered by it. An order may be entered in accordance herewith.

THE CURTIS PARK.[1]

(District Court, E. D. New York. February 19, 1884.)

COLLISION ON ERIE CANAL—RULE OF THE ROAD—BURDEN OF PROOF.

A loaded boat, the B., bound east on the Erie canal, towed by a cable-boat, met a light boat, the C. P., while turning a bend where the cable-boat must keep close to the inside of the turn, which was the tow-path side. The C. P. passed the cable-boat on the outside, and then, in accordance with the rule of the canal, attempted to regain the tow-path side by passing between the cable-boat and the B., over the tow-line of the cable-boat, and in so doing was struck by the B. In an action against the C. P. for the damage done the B., *held*, that the C. P., having taken a course in accordance with the rule of the canal, and the B. having done otherwise, the burden was on the B. to excuse her omission to conform to the rule; and that, as the B. failed to do so upon the evidence, her libel must be dismissed.

In Admiralty.

J. M. Mulchahey, for libelant.

E. G. Davis, for claimant.

BENEDICT, J. This is an action to recover for damages done to the canal-boat E. M. Blazier in a collision with the canal-boat Curtis Park, on the Erie canal, at Middleport bend. The Blazier was a loaded boat, bound east, and being towed by a cable-boat, No. 8. The Curtis Park was a light boat, bound west. The Curtis Park met the cable-boat and her tow just as the cable-boat was turning the bend, and when, owing to the position of the cable, the cable-boat must necessarily keep close to the inside side of the turn, which was there the tow-path side of the canal. Accordingly, the Curtis Park passed the cable-boat on the outside, or heel-path side. It was then her right, according to the rule of the canal, to regain the tow-path side by passing between the cable-boat and the Blazier, thus going over the tow-line of the cable-boat, the same being slackened for that purpose. This course was taken by the Curtis Park; but before she reached the tow-path she was struck by the Blazier. The collision would not have occured had not the Blazier, instead of keeping towards the berme bank, hauled in towards the tow-path. Her excuse for doing this is that she supposed the Curtis Park would go outside of her, as she had gone outside of the cable-boat. The Curtis Park having taken a course in accordance with the rule of the canal, and the Blazier having done otherwise, the burden is upon the libelant to excuse her omission to conform to the rule.

The assertion in behalf of the Blazier is that the Curtis Park at first hauled to the berme bank, with the intention of passing on the outside, thereby leading the Blazier to haul towards the tow-path side, and afterwards abandoned this intention by direction of the master of the Curtis Park, who came on deck as the boats were passing and directed his steersman to take the tow-path when it was too late to do

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

so without collision. The evidence has failed to satisfy me of the truth of this assertion. There is very positive testimony from several witnesses that the Curtis Park at no time took the berme bank, but passed along the cable-boat close by; and the fact stated by the libelant's witnesses to show that the Curtis Park would be likely to take the berme bank, namely, that a strong wind was blowing off the tow-path, rendering it impossible for a light boat to regain the tow-path in the manner attempted by the Curtis Park, is contradicted by the libel itself, where it is expressly stated that the wind was light.

Upon the evidence as it stands, I am unable to find that the libelant's boat has proved her excuse for being where she was when the collision occurred, she then being inside of the middle of the canal, instead of nearer to the berme bank, and accordingly I must dismiss the libel, with costs.

THE DAUNTLESS.[1]

(*District Court, E. D. New York.* December 31, 1883.)

PERMISSION TO EXTRACT GUANO—RIGHTS THEREBY ACQUIRED.

One J. obtained permission from the government of Brazil to extract a cargo of guano or mineral phosphate from R. island, and sent out a vessel to get it, but the voyage was broken up. W., learning of this, went to the island with his vessel and obtained the cargo by virtue of a subsequent permission obtained by W. himself. J. filed a libel against W.'s vessel and cargo, claiming as owner to recover the cargo obtained by W. *Held*, that J.'s right of property could only attach to what phosphate he might acquire possession of by extracting it and loading it upon his vessel under the permit issued to him, and that, in the absence of proof of false representations on W.'s part in obtaining his permission that he was acting as J.'s agent, the libel must be dismissed.

In Admiralty.

Dan. Marvin, for libelant.

Goodrich, Deady & Platt, for claimant.

BENEDICT, J. It is conceded on the part of the libelant that there can be no recovery in this action unless the libelant's ownership of the cargo proceeded against has been proved. This has not been done. It has been shown that the libelant, one Jewett, had obtained from the government of Brazil permission to extract, for his own use, from Rat island, a cargo of guano or mineral phosphate. He sent out the brig Katie to obtain such cargo, but she was condemned in Rio Grande do Sul, and her voyage broken up. At the time of the condemnation of the Katie, Williams, the claimant in this action, learned of the destination of the Katie and the object of her voyage, and, acting upon such information, proceeded to Rat island with his vessel, the Dauntless, and there obtained the cargo now proceeded

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

against. But this cargo was not obtained by virtue of the permit that had been issued to the libelant, but by virtue of a subsequent permission which Williams obtained for himself. By the permission issued to the libelant, the libelant acquired no interest in any of the phosphate on Rat island. His right of property could only attach to what he might acquire possession of by extracting it and loading it upon his vessel under the permit issued to him. I am, therefore, unable to see any ground upon which to hold the libelant to be owner of this cargo, which was not extracted by him and was never in his possession. If this cargo had been obtained by Williams through a false representation that in applying for the permission that was given to him he was acting in behalf of the libelant, and he had been allowed to take this cargo as the agent of the libelant, and not for himself, his acts could have been adopted by the libelant, and in such case it might not be open to Williams to deny the libelant's ownership of cargo so obtained. But no such case has been proved. The most that can be said is that the circumstances proved are calculated to cast suspicion upon the account given by Williams in regard to his acts in obtaining this cargo. It is not enough, however, in a case like this, to raise suspicion. The libelant's ownership must be proved. That not having been done, the action must fail.

Let a decree be entered dismissing the libel, with costs.

See opinion on argument of exceptions to libel in same case. *The Dauntless*, 7 FED. REP. 366.

THE J. W. DENNIS.

(*District Court, N. D. New York.* March 28, 1884.)

RETAINING OF VESSEL BY A SHIP-KEEPER.

A vessel which has been detained by a ship-keeper, pending a controversy, must be delivered up to her owner immediately upon the settlement of the suit. The marshal will not be justified in employing a ship-keeper after the suit has been settled, merely because a formal order of discontinuance has not been entered.

In Admiralty.

This is a motion in the nature of an appeal from the taxation of the marshal's bill of costs, by the clerk. The marshal employed a ship-keeper at $2.50 per day to take charge of the libeled vessel. The clerk allowed the bill at $1.75 per day. Various affidavits were submitted by the parties. Some to the effect that the amount was too high; others that it was a very reasonable charge for the work done. It appears from the affidavits that the controversy between the parties has been settled, though no formal order to that effect has been entered. It also appears that since the settlement and the taxation by

the clerk as aforesaid the ship-keeper has retained possession of the vessel and has demanded pay for his services.

George N. Loveridge, for motion.

James A. Murray, opposed.

COXE, J. I have read with care all of the affidavits and papers submitted in this case and have reached the conclusion that the bill of costs and disbursements as taxed by the clerk, February 28, 1884, cannot with propriety be reduced. As the stipulation limits the inquiry to the items of that bill, I express no opinion upon the question as to the right of the ship-keeper to compensation since that day. There should be no delay, however, if the controversy is settled, in discontinuing the action and restoring the vessel to her proper owner.

THE ONTONAGON.

(*District Court, N. D. New York.* March, 1884.)

COSTS—LIBEL IN REM—SETTLEMENT.

The respondent in a suit for seamen's wages cannot avoid the payment of costs by settling with the libelant without the knowledge of his proctors.

Cook & Fitzgerald, for libelant.

Williams & Potter, for respondent.

COXE, J. This is a libel for seamen's wages. The simple question is: can the respondent by a settlement with the libelant avoid the payment of costs? I am clearly of the opinion that he cannot. The libelant was compelled by the respondent's refusal to pay his wages to commence this suit. Costs and disbursements were incurred, due not only to the proctors, but to the marshal and clerk. By paying the libelant the respondent admits that the claim against him was a just one. Why should he not discharge all the debts which his own conduct made it necessary to incur? To permit a party, by means of what Judge BETTS sententiously terms "an out-door settlement," to avoid the payment of such obligations would be to encourage practices which the court should be slow to sanction. Courts of admiralty in actions of this character have seldom failed in similar circumstances to grant protection to the injured party. *The Sarah Jane*, 1 Blatchf. & H. 401, 422; *The Victory*, Id. 443; *The Planet*, 1 Spr. 11; *Angell* v. *Bennett*, Id. 85; *Collins* v. *Nickerson*, Id. 126; *Gaines* v. *Travis*, 1 Abb. Adm. 301.

The libelant's proctors are entitled to recover their costs to be taxed by the clerk.

PHELPS v. CANADA CENT. R. CO.

(*Circuit Court, N. D. New York.* April 3, 1882.)

REMOVAL OF CAUSE—AMENDING COMPLAINT.

Where, before the removal of a cause, the state court has restricted plaintiff to his cause of action for breach of contract, on which an attachment has been granted, and he has elected to consent to such order, and it is still in force when the case is removed to the federal court, a motion by plaintiff in the circuit court for leave to amend his complaint may be denied, no change in the relative position or rights of the parties having been made.

Motion to Serve Amended Complaint.

Mullin & Griffin, for plaintiff.

Edward C. James, for defendant.

WALLACE, J. Before this action was removed into this court the state court had granted an order restricting the plaintiff from averring in his complaint any cause of action against the defendant other than for alleged breach of contract set forth in the affidavit upon which the defendant's property was attached and its appearance thereby compelled. Although the main point considered by the state court upon the motion which resulted in such order was the right of the plaintiff to incorporate into his complaint a cause of action and prayer for equitable relief, the order made was both broad and explicit in its terms, and confined the plaintiff to the cause of action set forth in the affidavit for the attachment. The plaintiff elected to consent to that order as a condition of retaining his attachment, which would otherwise have been vacated. Whether the state court would have thus adjudged if the plaintiff had complained upon a cause of action at law only, it is not for this court to determine. It suffices that the order, as made, was in force when the action was removed to this court. Undoubtedly, this court has power to modify that order, but it would be unseemly, when nothing has occurred since the removal to change the rights or position of the parties, to disregard the adjudication of the state court made upon hearing and deliberation and consented to by the plaintiff.

Although the plaintiff is entitled, by the Code of Procedure of the state, to amend, as of course, within the time limited by the Code after the defendant has answered, that right was waived, in so far as the exercise of it would involve any departure from the terms of the order, by the election signified upon the hearing which resulted in the order.

The motion for leave to serve the amended complaint is denied.

SIMPKINS *v.* LAKE SHORE & M. S. RY.[1]

(*Circuit Court, E. D. New York.* December 28, 1883.)

REMOVED CAUSE—JURISDICTION OF STATE COURT—DETERMINATION OF CONTROLLING JURISDICTIONAL ISSUE NOT PROPERLY HAD ON MOTION FOR SECURITY FOR COSTS.

An action having been begun in a state court, under a state statute giving that court jurisdiction of such actions when brought against a foreign corporation, provided the plaintiff be a resident of the state, the answer averred, as an objection to the jurisdiction, that the plaintiff was not a resident of the state. The defendant having removed the action to this court, moved for security for costs on affidavits tending to show such non-residence of the plaintiff, which were met by counter affidavits. *Held*, that the issue thus presented was one of the issues of the cause presented by the pleadings and was controlling; for if the action would fail in the state court on account of the plaintiff's non-residence, it would fail in this court; and that the determination of a jurisdictional fact, which might involve a dismissal of the action, could not properly be sought by a motion on affidavits, but should be left to abide the trial of the issue presented by the answer.

Motion to Compel Security for Costs.

C. Ferguson, Jr., for plaintiff.

Burrill, Zabriskie & Burrill, for defendant.

BENEDICT, J. This case comes before the court upon a motion on the part of the defendant to compel security for costs, upon the ground that the plaintiff is a non-resident. The action was commenced in the supreme court of the state. The complaint filed in the state court averred that the defendant is a foreign corporation. By a statute of the state, the supreme court of the state has jurisdiction of actions like the present when brought against foreign corporations, provided the plaintiff be a resident of the state, not otherwise. The answer filed in the state court averred, by way of objection to the jurisdiction, that the plaintiff was not a resident of the state of New York, but of England. Thereafter, the defendant removed the case to this court, and now moves for security for costs upon affidavits tending to show the plaintiff to be a non-resident of the state. Counter-affidavits are read in support of the plaintiff's averment that he is a resident. The issue thus raised is the same raised by the defendant's answer. It is one of the issues of the cause presented by the pleadings while the cause was in the state court. This issue tendered by the defendant's answer is, moreover, controlling; for if the defendant be a non-resident, as the answer asserts, the action would have failed in the state court for want of jurisdiction, and must therefore fail here, notwithstanding the plaintiff, if a non-resident, may also be an alien, and the action, for that reason, one which this court is competent to entertain. For it is the cause instituted in the state court which is to be determined by this court, and the plaintiff's residence, if fatal to the action in case it had remained in the state court, must

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

be fatal here. The defendant, therefore, by the present motion, seeks the determination of a jurisdictional fact, which determination, if in accordance with the defendant's contention, would involve a dismissal of the action. Such a determination cannot, in my opinion, be properly sought in this manner by a motion upon affidavits, but should be left to abide the result of the trial of the issue presented by the answer.

Motion denied.

MOORE and others *v.* NORTH RIVER CONSTRUCTION Co. and others.

(*Circuit Court, N. D. New York.* April 3, 1884.)

JURISDICTION OF FEDERAL COURTS—SEPARATE CONTROVERSY.

Where citizens of New York, who are creditors of a New Jersey corporation, bring suit in the nature of a creditor's bill to reach real estate which they allege was fraudulently and unlawfully conveyed to a New York corporation, no relief being demanded against the New Jersey company, *held*, that there was no separate controversy between citizens of different states such as to give jurisdiction to the United States courts.

On Motion to Remand.

Edward W. Paige and *Alonzo P. Strong*, for plaintiffs.

P. B. McLennan, *Otto T. Bannard*, and *Albert B. Boardman*, for defendants.

COXE, J. The plaintiffs are citizens of New York. The defendant, the North River Construction Company, is a New Jersey corporation. The other two defendants are New York corporations. The plaintiffs are creditors of the construction company. There being no pleading before the court but the complaint, it must be the sole guide in determining the character of the action. The relief demanded is that certain real estate alleged to have been paid for by the construction company, when insolvent, and conveyed direct to the railway company in fraud of the plaintiffs' rights, be sold to satisfy their claims. Also that an injunction issue restraining the defendants from disposing of or incumbering the land. No judgment is asked against the construction company.

Because the plaintiffs are not judgment creditors, it is argued that there is a controversy between them and the construction company, and that this court therefore has jurisdiction. In one sense, undoubtedly, this is true, but is it such a controversy as is contemplated by the statute? Is it, to use the language of the chief justice in *Hyde* v. *Ruble*, 104 U. S. 409, "a separate and distinct cause of action?" Does the complaint state two causes of action or one? No separate judgment could be entered against the construction company. Should the trial court find on the main issue that there were no purchases of land as alleged, the complaint would be dismissed as

to all of the defendants without reference to what the proof might be upon the question of indebtedness. Test it in another way. Suppose on the trial the plaintiffs prove that they are creditors of the construction company and there stop. Would there be a judgment against that company for the amount so proved or a general decree in favor of all the defendants? It is thought that under the allegations of this complaint the latter would be the inevitable result. In *Barney* v. *Latham*, 103 U. S. 205, on the contrary, there were two entirely distinct controversies in each of which judgment could be entered. In the case at bar the perplexities which surround the question of jurisdiction are enhanced by reason of the anomalous character of the action, but it may be said with certainty that the goal which the plaintiffs seek is the land in the possession of the West Shore company. In order to reach it they must establish a number of facts, regarding which undoubtedly a controversy may arise between them and the construction company. For instance: they must prove that the company was insolvent, that its money paid for the land, that the transfer was collusively made, that they are creditors, etc. The construction company is interested in disproving each of these propositions: but are they not, if denied, issues to be tried rather than separate and distinct causes of action? I am constrained to hold that the motion should prevail on the ground that the action, if it can be maintained at all, must proceed upon the theory that there is no separate and distinct controversy which can be fully determined between the plaintiffs and the construction company, within the meaning of the second clause of the second section of the act of 1875.

The complaint has been considered solely with reference to the question of jurisdiction. It is not intended that anything said upon this question shall be considered as an intimation that a creditor who has not established his claim by a judgment can maintain an action of this character.

The motion to remand is granted.

NASHUA & L. R. CORP. and others *v.* BOSTON & L. R. CORP. and others.

(*Circuit Court, D. Massachusetts.* March 25, 1884.)

1. CONSOLIDATED RAILROADS—STATUS IN DIFFERENT STATES.
   Two corporations, charted under the laws of different states and afterwards consolidated under the laws of both, are separate in so far that each state is left the control over the charter it grants, and identical in so far that the corporations may represent each other in suits by or against either of them.
2. SAME—EQUITY—POOLING AGENT.
   The pooling agent, under a contract between railroad companies, is a trustee, and as such is accountable in a court of equity for his acts.

3. SAME—PARTIES TO SUITS.
The plaintiff is entitled to join as defendants with the corporation all persons into whose hands they can trace the funds of the joint management.
5. SAME—CONTRACT—ESTOPPEL.
A pooling contract being once executed, one corporation is estopped from denying the validity of its own act in making it, in defense of an action for its infraction brought by the other. Still less can the agents of the parties set up such a defense.

In Equity.

F. A. Brooks, for plaintiffs.

S. A. B. Abbott, for defendants.

NELSON, J. The bill sets forth, in substance, that for the term of 20 years from and after October 1, 1858, the Nashua & Lowell Railroad and the Boston & Lowell Railroad were operated jointly under a pooling contract, by the terms of which both roads were to be placed under the control and management of a joint agent to be appointed by the directors of the two corporations, and the joint earnings and expenses were to be shared in the proportion of 31 per cent. of the whole to the plaintiff and 69 per cent. to the defendant corporation, the division to be made on the first days of April and October in each year; that the defendant Hosford was appointed and acted as the joint agent under the contract from April, 1875, until the expiration of the contract; that the defendant Bartlett, who was also the treasurer of the defendant corporation, was appointed and acted as cashier of the joint funds; that Hosford, while agent, had, in violation of the contract and without authority, paid over to the defendant corporation from the joint earnings large sums of money, amounting, as alleged, to $208,086, being 31 per cent. of the interest, reckoned at 7 per cent. a year, from 1872 to 1878, on the entire outlay of the defendant corporation in the erection of new passenger stations in Boston and Winchester, in building the Mystic River Railroad, and in purchasing certain shares of the Salem & Lowell and Lowell & Lawrence Railroads, (after deducting dividends on the shares,) the whole of which expenditure was, by the terms of the contract, to be borne solely by the defendant corporation; that Bartlett, at the termination of the contract in 1878, had in his possession as cashier the sum of $60,000 of the joint funds, 31 per cent. of which belonged under the contract to the plaintiff; and that, acting under the direction of the defendant corporation, he had refused to pay the plaintiff its share thereof, but had either retained such share in his own hands, or had paid it over to the defendant corporation. The prayer of the bill was for an account.

The Boston & Lowell Railroad Corporation and Bartlett have demurred to the bill, assigning various grounds of demurrer.

By the familiar rules governing courts of equity the plaintiff is clearly entitled to equitable relief upon the case stated in the bill. The joint earnings of the roads constituted a trust fund in the hands of the joint agent, to be held by him as a trustee for the benefit of the

two corporations, and to be applied by him in the manner specified in the contract. A failure on his part to perform this duty rendered him liable to account to the party aggrieved. If, through the mistaken or wrongful act of the agent, the Boston & Lowell road has received a larger share of the net earnings than belonged to it under the contract, the plaintiff is at liberty to follow the fund into the hands of the defendant corporation and compel its restitution. If, as the defendants argue, the pooling contract was not within the corporate powers of the parties to it, that can afford no defense to the Boston & Lowell road, when called upon to restore to the plaintiff the sums received in excess of its due share. As the contract has been fully executed, and the defendant road has availed itself of all the benefits to be derived from it, that corporation is now estopped to deny its validity. Still less can the agents of the parties set up a defense of this character which is not open to their principals.

Bartlett is properly joined as a defendant. The plaintiff is entitled to join as defendants with the defendant corporation all persons into whose hands it can trace any part of the funds of the joint management.

It has already been decided in this case that the plaintiff, as a corporation chartered by the laws of New Hampshire, can maintain this suit in this court against the defendants, who are citizens of Massachusetts, although the plaintiff is a part of a joint or consolidated corporation under the laws of New Hampshire and Massachusetts. 8 FED. REP. 458. Corporations thus created are separate for the purposes of jurisdiction, and to enable each state to exercise control over the charters which it grants and over the acts of the corporation within its own limits. But the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. *Horne* v. *Boston & M. R. R.* 18 FED. REP. 50. The Massachusetts corporation is therefore not a necessary party to this bill.

The bill waives an answer under oath. By waiving the oath no discovery is sought, and it is not necessary to interrogate the defendants specially and particularly upon the statements of the bill. Equity rules 40, 41.

The bill prays that the defendant corporation may answer by its president, J. G. Abbott. This must be regarded as mere surplusage, and not as ground of demurrer. The plaintiff is entitled to the answer of the corporation, but has no right to require that it shall answer by its president.

Demurrers overruled.

UNITED STATES v. STOWE and others.

(District Court, D. Minnesota. February 23, 1884.)

1. DOUBLE COMPENSATION—PROHIBITION APPLICABLE ONLY TO OFFICIAL SERVICES.
   Officers and agents of the government are not forbidden to receive extra compensation for services rendered entirely apart from their official functions, but only for services required of them within the scope of their employment.
2. PAYMENT OF FREIGHT—AGENT ENTITLED TO REIMBURSEMENT.
   The statutes do not forbid the payment of freight by an Indian agent when supplies are demanded at once by a sudden emergency, and an agent paying such charges is entitled to reimbursement.

Action upon the bond of Lewis Stowe, late Indian agent at the White Earth Reservation. Defendant Stowe, as such agent, and under the direction of the commissioner of Indian affairs, hired Warren, the official interpreter at the agency, to render certain services as a day laborer in the government warehouse, and as a clerk in the agent's office. For such services he paid Warren $336. This item was disallowed by the accounting officers of the government in the settlement of Stowe's account, under sections 1764, 1765, 2074, 2076, Rev. St. For the transportation, in 1876 and 1877, of certain government property from St. Paul to Detroit, Minnesota, for the use of the agency, defendant Stowe paid to the Lake Superior & Mississippi Railroad Company $210.67, and to the Northern Pacific Railroad Company $52.55, which expenditures were disallowed by the accounting officers of the government, under paragraph 2, § 1, *c.* 133, (18 St. at Large, 452,) also section 1, Supp. Rev. St. 171, (Richardson's.) For the deficiency caused by these disallowances this action is brought.

C. A. Congdon, Asst. U. S. Atty., for plaintiff.

Gordon E. Cole, for defendants.

NELSON, J. Stowe, the agent, was authorized by the commissioner of Indian affairs to have the services performed for which he paid Warren, the interpreter. The law required the agent to execute this order. Rev. St. § 2058, p. 362. Warren was not forbidden to receive compensation for doing the work. Sections 1764 and 1765, Rev. St., do not apply to this case, for the employment was not in the line of his official duty as interpreter, and had no connection with it. It is only when extra and additional duties are imposed upon an officer as a part of his duty, and he is bound to obey or perform them, that such officer is not entitled to and cannot receive extra pay, unless it is fixed by law, and "the appropriation therefor explicitly states that it is for such additional pay," etc.

2. In my opinion section 1, par. 2, Supp. Rev. St. p. 171, and section 5, act of 1864, granting land to the Lake Superior & Mississippi Railroad Company, and section 11, charter Northern Pacific Railroad Company, do not forbid the payment of freight by the defendant; and

it was admitted in the argument that a sudden and unforeseen emergency had arisen, requiring prompt action in the interest of humanity. If so, an equitable credit, at least to the extent of the claim made by the defendant, should be allowed, under the act of March 31, 1797. See *U. S.* v. *Lowe*, 1 Dill. 585.

Judgment is ordered for defendants.

A provision in an act of congress, prohibiting persons holding office under the United States from receiving compensation for discharging the duties of any other office, does not apply to services entirely unconnected with their official position. *U. S.* v. *Brindle*, 4 Sup. Ct. Rep. 180.—[ED.

ROSE *v.* STEPHENS & CONDIT TRANSP. CO.

(*Circuit Court, S. D. New York.* April 8, 1882.)

NEW TRIAL—DAMAGES—PERSONAL INJURY—NEWLY-DISCOVERED EVIDENCE.

In an action to recover damages for a personal injury a motion by defendant for a new trial because of newly-discovered evidence as to the extent of plaintiff's injuries will not be granted where it does not appear that defendant, before the trial, made any investigation as to the character of the injuries received.

Motion for New Trial.

Chauncey Shaffer, for plaintiff.

Thomas E. Stillman, for defendants.

WALLACE, J. The motion for a new trial upon the ground of newly-discovered evidence should not be granted, because the defendant has failed to show that by the exercise of reasonable diligence the evidence newly discovered could not have been obtained and used upon the trial. The evidence relates to the extent of the injuries received by the plaintiff through the negligence of the defendant. The plaintiff alleged in his complaint that he had sustained severe injuries, and claimed $5,000 damages. It does not appear that prior to the trial the defendant made any investigation to ascertain the character or extent of these injuries. Its officers seem to have contented themselves, in their preparation for a defense of the action, with accepting the plaintiff's case as it might appear upon the trial, so far as this issue is concerned. If it had been shown, upon this motion, that an effort had been unsuccessfully made upon their part, by inquiry of such persons as would be likely to have knowledge of the facts, to ascertain the character of the plaintiff's injuries, a very different case would be presented, and one which might appeal with some force to the favorable consideration of the court. To grant the motion upon such a case as is made would encourage supineness on the part of defendants. The precedent would encourage defendants

to ignore proper preparation upon one material issue, in order to obtain the chances of a second trial in case of failure upon the other issues.

The motion is denied.

In re Account of ALLEN, Chief Supervisor of Elections, etc.[1]

(*District Court, E. D. New York.* November 12, 1883.)

ACCOUNTS OF SUPERVISOR OF ELECTIONS—ACT OF FEBRUARY 22, 1875, (18 ST. AT LARGE, 333,)—U. S. REV. ST. § 2031—CERTIFICATE OF JUDGE UNDER § 846.

The effect of Rev. St. § 2031, is not such as to bring the accounts of a chief supervisor of elections within the scope of the act of February 22, 1875, (18 St. at Large, 333,) providing for the passing of accounts of clerks, marshals, district attorneys, and United States commissioners in open court.

Account of Supervisor of Elections.

Frank W. Angel, Asst. U. S. Atty., for the United States.

John J. Allen, for himself.

BENEDICT, J. The account of John J. Allen, the chief supervisor of elections in this district, was presented to the district judge of the district, and was certified by him pursuant to section 2031 of the Revised Statutes in the manner heretofore adopted with reference to other similar accounts. The same account is now submitted to the district court by the district attorney, for the purpose of having the account passed on in open court, in the manner provided for the accounts of clerks, marshals, district attorneys, and United States commissioners by the act of February 22, 1875, § 1, (18 St. at Large, 333.) This action on the part of the district attorney has raised, among others, the question whether the effect of section 2031 is to bring the accounts of a chief supervisor of election within the scope of the subsequent act of February 22, 1875, which act is, by its terms, limited to the accounts of clerks, marshals, district attorneys, and United States commissioners. Upon this question my opinion is that no such effect can be given to section 2031, and that the act of February 22, 1875, has no application to the accounts of a chief supervisor of election. For this reason, therefore, if there were no other, the court is constrained to decline to enter upon the inquiry tendered by the district attorney in reference to this account, without passing upon the validity of a statute like this of February 22, 1875, which seeks to authorize proving of an account "in open court" before a circuit or a district court, and at the same time provides for the revision of the action of the court by the accounting officers of the treasury. See *U. S.* v. *Ferreira*, 13 How. 40; *U. S.* v. *Todd*, Id. note, p. 52; *Ex parte Gans*, 17 FED. REP. 471.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

A further suggestion having been made that the judge's certificate attached to this account is not a certificate such as contemplated by section 846, I take this occasion to say that the certificate is in the form adopted many years ago, and, so far as I am aware, it has always, up to this time, been deemed a sufficient compliance with the provisions of section 846. In my opinion, no other or different certificate can be required of the judge in respect to this account.

The account is therefore directed to be returned to the district attorney, to be dealt with by him as he may be advised.

HENDRYX and others *v.* FITZPATRICK.

(Circuit Court, D. Massachusetts. April 2, 1884.)

CONTEMPT—POWER OF COURT TO REVOKE ITS ORDERS.

An order committing a defendant for contempt, in refusing to pay a sum of money, is civil, and not criminal, in its nature, and the court which committed him is at liberty to release him again in case he shows himself unable to comply with the requirements of the court

In the Matter of Contempt of Court.

T. W. Porter and *J. McC. Perkins*, for complainants.

A. H. Briggs, for defendant.

Before LOWELL and NELSON, JJ.

LOWELL, J. In this case the defendant was enjoined from infringing a patent, *pendente lite*, because, though the court had serious doubts of its validity, the defendant had himself sold the patent to the plaintiffs for a considerable sum of money, and it was thought no more than justice that he should refrain from violating his own implied warranty until the final hearing. Afterwards proceedings for contempt for a violation of the injunction were prosecuted by the plaintiffs, and after evidence taken and a hearing, the defendant was ordered to pay the fees of the master by a certain day, the costs of the proceedings, and certain profits assessed by the master, by certain other days, and in default of payment to be committed. These last two sums, when paid in, were to be paid out to the plaintiffs. The defendant failed to make the last two payments, and was committed to prison. After he had been in confinement for about two weeks the district judge, with my approval, though I was unable to sit in the case, permitted the defendant to go before the master and prove, if he could, in proceedings like those under the poor-debtor law of Massachusetts, that he had no property which he could apply to the payment of his debts. The plaintiffs were duly notified of the hearing before the master and did not attend, and the master admitted the defendant to take the poor-debtor's oath; and thereupon the court discharged him upon his own recognizance.

The plaintiffs now move that the defendant may be recommitted under the original order. They argue that every order since made in the cause is *ultra vires* and void, because the first order was a final decree in a criminal case, and could not be varied after the term; and because the defendant could only be discharged from arrest by the pardon of the president. It would be a sufficient answer to this argument, that, if the order was a criminal one, having the consequences contended for, the fine should have been made payable to the United States, and the plaintiffs would have no concern with it; but we will explain why all the orders are, in our opinion, proper. The original order was an interlocutory civil order, for the benefit of the plaintiffs; and the commitment was for failure to pay the money, not for the original contempt. While, therefore, the imprisonment may not have been strictly and technically within our poor-debtor law, (Rev. St. § 991,) which, however, we think it was, yet it should, at all events, be governed by similar rules. It was made in this way, because the master found that the contempt was not willful, and I thought that no punishment was necessary. The process of contempt has two distinct functions,—one, criminal, to punish disobedience, the other, civil and remedial, to enforce a decree of the court and indemnify private persons. In patent causes it has been usual to combine the two, and to order punishment if it is thought proper; or indemnity to the plaintiff, if that is all that justice requires; or both. *Re Mullee*, 7 Blatchf. 23; *Doubleday* v. *Sherman*, 8 Blatchf. 45; *Schillinger* v. *Gunther*, 14 Blatchf. 152; *Phillips* v. *Detroit*, 3 Ban. & A. 150; *Dunks* v. *Gray*, 3 FED. REP. 862; *Searls* v. *Worden*, 13 FED. REP. 716; *Matthews* v. *Spangenberg*, 15 FED. REP. 813.

We are aware that it was at one time the opinion of Judge BLATCHFORD that a sum of money ordered to be paid to a plaintiff, in a cause of this kind, was a criminal fine, which could only be remitted by a pardon; but we are of opinion that such a fine for the benefit of a private person cannot be remitted by the president, and is a debt of a civil nature; and that Judge BLATCHFORD has so treated it in the latest case which has come before him. His first opinion is stated in *Mullee's Case*, 7 Blatchf. 23, and *Fischer* v. *Hayes*, 6 FED. REP. 63; but when the latter case came before the supreme court, they expressed a significant doubt whether the order to pay money for the use of the plaintiff was not an interlocutory decree in a civil cause, (*Hayes* v. *Fischer*, 102 U. S. 121;) and when the case came back, Judge BLATCHFORD admitted the defendant to bail, (*Fischer* v. *Hayes*, 7 FED. REP. 96,) which he could not have done if the judgment were criminal in its nature. The doubt of the supreme court might well have been even more strongly expressed. An order upon a defaulting trustee, assignee in bankruptcy, or other person subject to account, to pay money into court, is civil, and may be waived by the party adversely interested, and is a debt to which a bankrupt law, discharging the debt, and an insolvent law, discharging the person, are applicable.

See *Baker's Case*, 2 Strange, 1152; *Ex parte Parker*, 3 Ves. 554; and the decisions hereinafter cited.

In *McWilliams' Case*, 1 Schoales & L. 169, a defendant in contempt for not paying a legacy into the court of chancery in obedience to its order was attached while attending the commissioner to be examined as a bankrupt. His arrest was lawful, if the contempt was a criminal offense. That very learned chancery lawyer, Lord REDESDALE, said that it was merely a mode of enforcing a debt; that if it were not so he had no right to make the original order; that the substance and not the form of the proceeding must govern, and its substance was not criminal. The petitioner was discharged. The same point was decided in the same way in *Ex parte Jeyes*, 3 Dea. & Ch. 764; and *Ex parte Bury*, 3 Mont. D. & D. 309.

The remark of the lord chancellor in *McWilliams' Case*, that he had no right to make an order of this sort for the benefit of a private person, excepting as a civil remedy, is highly pertinent to this case.

Where a person had been committed to prison for nine months for contempt in not paying money into a county court, sitting in bankruptcy, JAMES, L. J., said: "The order, on the face of it, is wrong, for it is an absolute order of commitment for contempt of court for non-payment of money. This is a penal sentence. The court of chancery never made an order in this form." And again: "The order of commitment was such as had never been made in the court of chancery, and was justly characterized by the chief judge as novel and surprising." *Ex parte Hooson*, L. R. 8 Ch. 231. This distinction is preserved in our Revised Statutes. The courts have power to punish for contempt, (section 725;) but all forms and modes of proceeding which are usual in equity may be followed in cases in equity. Section 913. By virtue of section 725 the district court may punish contempts. Like power is given the district judge when sitting in chambers in bankruptcy, by section 4973; and the cognate but distinct power of enforcing his decrees "by process of contempt, and other 'remedial' process," is recognized by section 4975. See *In re Chiles*, 22 Wall. 157. Some of the older cases hold that in contempt in civil cases at common law, the proceedings, after the order of attachment, should be on the crown side of the court; that is, in the name of the sovereign. *The King* v. *Sheriff of Middlesex*, 3 Term R. 133; *Same* v. *Same*, 7 Term R. 439; *Folger* v. *Hoogland*, 5 Johns. 235. This is still the better practice, or, at least, a good practice, if punishment is asked for. *Cartwright's Case*, 114 Mass. 230; *Durant* v. *Sup'rs*, 1 Woolw. 377; *U. S. ex rel.* v. *A., T. & S. F. Ry. Co.* 16 FED. REP. 853. If this was ever the rule of chancery, it has long since ceased to be so, when the sole purpose of the attachment is to enforce a decree or order, such, for instance, as to sign an answer, to make a conveyance, to pay money, etc. All such orders may be waived or condoned by the private person interested in them, and are civil and remedial. *Ex parte Hooson, supra; Ex parte Eicke*, 1 Glyn.

& J. 261; *Wall* v. *Atkinson*, 2 Rose, 196; *Wyllie* v. *Green*, 1 De Gex & J. 410; *Buffum's Case*, 13 N. H. 14; *People* v. *Craft*, 7 Paige, 325; *Jackson* v. *Billiags*, 1 Caines, 252; *Anon.* 2 P. Wms. 481; *Const* v. *Ebers*, 1 Mad. 530; *Smith* v. *Blofield*, 2 Ves. & B. 100; *Brown* v. *Andrews*, 1 Barb. 227; *Ex parte Muirhead*, 2 Ch. Div. 22; *Lees* v. *Newton*, L. R. 1 C. P. 658; *Re Rawlins*, 12 Law T. (N. S.) 57.

In patent cases it has been usual to embrace in one proceeding the public and the private remedy—to punish the defendant if found worthy of punishment, and, at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff, as is seen by the cases cited in the beginning of this opinion. A course analogous to this has been said, *obiter*, to be proper, by MILLER, J., in *Re Chiles*, 22 Wall. 157, 168. "The exercise of this power has a twofold aspect, namely,—*First*, the proper punishment of the guilty party for his disrespect of the court and its order; and, the *second*, to compel his performance of some act or duty required of him by the court which he refuses to perform," citing *Stimpson* v. *Putnam*, 41 Vt. 238, where a defendant was, at the same time, fined $50 for the benefit of the state, and $1,170 and interest and costs for that of the party injured by breach of an injunction. The chancellor in that case said: "This proceeding for contempt is instituted not only to punish the guilty party, but also, and perhaps chiefly, to cause restitution to the party injured." Such, we repeat, has been the practice in patent causes. It is used in other cases, as in the familiar one of a witness neglecting to answer a summons, who may be fined for his disobedience, and also be required to testify.

If the proceedings should be criminal in form it would make no difference. A criminal sentence, for the benefit of a private person, is to be treated as civil to all intents and purposes. It is beyond the king's pardon, and within the equitable jurisdiction of the court at all times. 4 Bl. Comm. 285. At this place the author, speaking of disobedience to any rule or order of court, of the sort we are considering, says:

> "Indeed, the attachment for most part of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of an individual for a private injury, are not released or affected by the general act of pardon."

Where a defendant had been convicted of an offense against the laws prohibiting lotteries, and had been sentenced to a term of imprisonment, which had expired, and to pay costs for the use of the prosecutor, and had not paid them, he was discharged from custody under the lord's act, which was an early insolvent law, like our poor-debtor laws, so far as the discharge of the person is concerned. *Rex*

v. *Stokes*, Cowp. 136. ASTON, J., after saying that an attachment is an execution for a civil debt, and that the public offense had been purged by the imprisonment, added: "This stage of the cause, therefore, is merely of a civil nature, and a matter solely between party and party, unconnected with the offense itself;" that it comes within the insolvent debtor's act: "If not, the consequence must be imprisonment for life; for a general pardon would not extend to him;" that is, would not release him from costs due a private person, or from imprisonment on account of them, "as was agreed in *Rex* v. *Stokes*, 23 Geo. II." So, where a penalty was inflicted by a criminal proceeding, but for the benefit of a private person, and an attachment was issued for want of a sufficient distress, BULLER, J., said that the proceeding was like a civil action, and that *Ex parte Whitchurch*, 1 Atk. 54, where attachment for not performing an award was held to be criminal, was no longer law. It was held, therefore, that the defendant could not be attached on Sunday. *The King* v. *Myers*, 1 Term. R. 265. We do not mean to be understood that the court has a general discretion to annul orders passed for the benefit of a party to the suit; but that where inability is shown to comply with the order,—as, for instance, insanity, if the decree requires an act to be done, or poverty, if the decree is for the payment of money,—it is according to the course of the court, and of all courts, to discharge the imprisonment, of which the end is proved to be unattainable. See, besides the cases already cited, *Wall* v. *Court of Wardens*, 1 Bay, 434; *Re Sweatman*, 1 Cow. 144; *Kane* v. *Haywood*, 66 N. C. 1; *Galland* v. *Galland*, 44 Cal. 478; *Pinckard* v. *Pinckard*, 23 Ga. 286.

Where an attorney of any court fails to pay over money to his client, the court may, after due proceedings, commit him for a contempt. This was formerly considered to be criminal, and is fully explained in 2 Hawk. P. C. 218 *et seq.* But it has long since been settled that it is of a civil character. *Ex parte Culliford*, 8 Barn. & C. 220; *Rex* v. *Edwards*, 9 Barn. & C. 652. The lord chief justice in the latter case said that it had "always" been held that attachments for non-payment of money were in the nature of civil process.

In *Reg.* v. *Thornton*, 4 Exch. 820, and *The Queen* v. *Hills*, 2 El. & Bl. 175, costs in a criminal case were in question, and the defendant was discharged—in one, because the prosecutor had proved for the amount in bankruptcy, and thus waived the attachment, and in the other, because the defendant had been discharged as an insolvent. In the former of these cases, it was said by PASHLEY, *arguendo*, that the courts had exercised the power to discharge a defendant in such a case, on account of poverty, as early as 29 Edw. I.

It was admitted, in argument, in the case before us, that the court would not have been justified in imposing a pecuniary fine upon the defendant if he had proved his poverty before the order was made, but that afterwards it was too late. We are of opinion that no such

distinction can be maintained, but that the defendant should be released from imprisonment in such a case, though his evidence is produced while the order is in process of enforcement against him.

Petition denied.

See *In re Cary*, 10 FED. REP. 622, and note, 629.—[ED.

SEARLS *v.* MERRIAM and another.

(*Circuit Court, S. D. New York.* January 30, 1882.)

PATENTS FOR INVENTIONS—PATENT NO. 221,482—INVENTION.

Patent No. 221,482, granted to Anson Searls, as assignee of John M. Underwood, the inventor, November 11, 1879, for an improvement in whip-sockets, is void for want of invention.

In Equity.

J. P. Fitch, for plaintiff.

N. Davenport, for defendants.

BLATCHFORD, J. This suit is brought on letters patent No. 221,482, granted to the plaintiff, as assignee of John M. Underwood, the inventor, November 11, 1879, for an "improvement in whip-sockets." The whip-socket is formed of a hollow cylinder, the upper open end of which is provided with a flexible elastic ring of India rubber or analogous material, for the purpose of holding the whip-stock upright by the pressure between it and the interior of the ring. The ring fits in a recess or annular groove in the upper open end of the socket, so as to be retained therein by its own elastic expansive force. The inner edge of the ring is corrugated, or provided with projections formed on and extending from the inner edge of the body of the ring, inwards towards its center. These projections are entirely separated from each other, with spaces between them, so that they will not be pressed into contact with one another, by the insertion of the butt of the whip-stock in the socket. The extreme inner faces of the projections form a circle and support the stock by pressing against it, while they yield to permit it to be pushed in or drawn out, and the ring, though disturbed in place by those movements, will readjust itself in the recess when the stock is removed, because it is held therein by its elastic force alone. The patent has two claims:

"(1) The combination with a whip-socket having an annular recess in it, of a flexible elastic ring, which may be held in such recess by its own elastic force, and which is provided on its inner edge with non-contiguous projections, separated so that they cannot be pressed into contact with one another by the insertion of the whip-stock into the ring. (2) The ring composed of a body with such projections."

The specification sets forth that "a simple rubber ring, without projections, had been used, held in an annular recess in the mouth of the socket, the interior of the ring being made small enough to grasp the whip-stock, and such a ring has been held in place in the recess in the socket by its own expansive force;" also, that radial slits have been cut in the inner edge of the ring without removing any of the rubber. The point of the new arrangement is stated to be, that "the separated projections, while they are rigid enough to hold the whip upright and prevent it from wabbling, will yet so easily give way to the pressure of the stock as to allow the stock to be readily inserted and removed."

It is obvious that a plain ring, or a ring with radial slits, has the same action in combination with an annular recess, in which it is held by its elastic force alone, so far as regards its readjustment in the recess when disturbed, that a ring with inward non-contiguous projections has. The co-action between the recess and the part of the ring in it, when the part of the ring out of it and next the stock is disturbed, is the same in all three cases. Therefore, if the ring with inward non-contiguous projections existed before, even though without the annular recess, there was no patentable invention in using such ring with the old annular recess with which the plain ring had been used.

The date of the Underwood invention was May, 1878. The rubber disk, defendants' Exhibit C, with non-contiguous projections, existed in 1873. The number of projections and the number and size of the openings between the projections depended then, and depends now, on the thickness of the rubber. That fact was then known. It was also then known that the capacity of the rubber to exert the expansive force necessary to maintain its place in the annular recess depended on its substance and thickness. In view of the use in an annular recess of a plain ring of sufficient substance and thickness to maintain its place in the annular recess, the fact that defendants' Exhibit C was not used in an annular recess, but was clamped between the end of the socket and a cap, is not sufficient to make it a patentable invention to use in an annular recess a rubber thicker than defendants' Exhibit C, with the same character of non-contiguous projections. The action of the inner part of the ring against the stock, so far as the non-contiguous projections are concerned, is the same whether the outer part of the ring is held in an annular recess, or is clamped between the end of the socket and a cap. It is quite apparent, as is stated by the expert for the plaintiff, that the number, or size, or shape of the openings between the projections does not constitute a substantial difference, so long as they are of sufficient size and of a proper shape to permit the stock to pass through the ring without forcing the edges of the projections in contact with each other, and the smaller portions of the projections are extended towards the center. These conditions are found in defendants' Exhibit C.

When the idea is once suggested, as in that exhibit, to have openings of that character, it is but ordinary knowledge to vary their number and size according to the thickness of the material.

Neither claim of the patent can be sustained, and the bill is dismissed, with costs.

PENTLARGE *v.* PENTLARGE.[1]

(Circuit Court, E. D. New York. January 22, 1884.)

INTERFERING PATENTS—ACTION UNDER REV. ST. § 4918—PLEA IN BAR.

In an action under Rev. St. § 4918, where the plaintiff seeks to have the defendant's patent declared void on the ground that it is for the same invention, and subsequent to the plaintiff's patent, a plea in bar by the defendant, which admits the priority of the plaintiff's patent for the same invention, but sets out a fact which would render the plaintiff's patent void for want of novelty, must be overruled, because the fact is immaterial in this proceeding.

In Equity.

Preston Stevenson, for plaintiff.

Brodhead, King & Voorhees, for defendants.

BENEDICT, J. This case has, for the convenience of counsel, been presented in several aspects. To an amended bill the defendants have filed a demurrer. The questions raised by this demurrer are the same as those heretofore raised and determined upon a demurrer to the original bill in this cause. The action, so far as it rests upon facts supposed to make out a case of duress, is not strengthened by anything contained in the amended bill, nevertheless the amended bill can stand for the same reason that the original bill was allowed to stand. The demurrer to the amended bill is therefore overruled.

Next may be considered the question raised by a motion on the part of the plaintiff to strike from the files a plea interposed by the defendants; or, otherwise, that the plea stand as an answer. By this motion the question has been raised whether the fact stated in the plea must not be brought before the court by answer, and not plea. This action is a proceeding taken by virtue of Rev. St. § 4918, where provision is made for a suit in equity whenever there are interfering patents. The bill, after setting forth a certain patent issued to the plaintiff, as the first inventor of the invention therein described, charges that the defendants have a patent issued subsequent to the plaintiff's patent, and for same invention, which patent the plaintiff prays may be declared void, pursuant to the provisions of section 4918. To this bill the defendants have interposed a plea in bar of the action, in which plea they say that the invention described in the plaintiff's patent was described in an English patent issued in 1855

[1]Reported by R. D. & Wyllys Benedict, of the New York bar.

to William Rowland Taylor, and printed and published, and filed in the United States patent-office prior to the time of the plaintiff's alleged invention, by reason whereof plaintiff's patent is void, and does not entitle him to maintain any action based thereon. And the question arises whether the subject-matter of this plea can be brought before the court by plea. If a decision of this question of practice were necessary on this occasion, it might be difficult to assign any substantial reason why, if the facts stated in the plea respecting the English patent be fatal to the plaintiff's right of action, such facts may not be presented by plea, provided the defendant elect, as this defendant has done, to present them in that way, and not by answer. But a decision of that question is not called for here, inasmuch as the argument of the plea, which was had without prejudice to the question raised by the motion, has satisfied me that the plea must be overruled upon the ground that the fact pleaded, if true, is immaterial in an action like the present.

The proceeding is statutory, instituted by virtue of section 4918. Such a proceeding, as I conceive, has for its sole object a determination of the question of interference and of priority of invention. It is, by the terms of the statute, limited to cases of interfering patents, and it is only in case interfering patents are found to have been issued that the court is empowered to "adjudge and declare either of the patents void." The implication is that when the patents are found to interfere, the result of the proceeding shall be a decree making void the patent issued to the later inventor. But if the defendant in such an action may attack the plaintiff's invention upon any ground which the statute permits to be set up by answer in an action for infringement, it would often result that the proceeding would fail to secure an adjudication of the question of interference; and so the proceeding be rendered futile for the purpose which the statute intended should be accomplished. Such would be the result in this case. By this plea the defendant admits the averment of the bill that the plaintiff's patent is for the same invention as that described in the defendant's patent, and also that the plaintiff was the first inventor. Upon these facts, according to the statute, the plaintiff should have a decree declaring the defendant's patent void, and yet if the plea be allowed the plaintiff will obtain no adjudication upon this question, while the defendant will obtain a decree declaring the plaintiff's patent void and leaving his own to stand; and this, too, when the fact stated in his plea, if true, taken in connection with the facts stated in the bill, which are admitted, show the defendant's patent to be also void. The defendant, then, by his plea and his admission, taken together, shows his own patent void, and, upon that showing, claims a decree declaring the plaintiff's patent void and leaving his own unaffected. Such a result cannot, as it seems to me, be permitted. According to my understanding of the statute, the proceeding permitted thereby is to be confined to a

determination of the questions of interference and priority, and, if I am right in this, the issue tendered by the plea is immaterial. This conclusion has not been reached without giving careful consideration to the opinion expressed by TREAT, J., in *Foster* v. *Lindsay*, 3 Dill. 126, where the opposite conclusion was arrived at. With all my respect for the opinion of that distinguished judge, I am unable to agree with him.

An order will accordingly be entered overruling the plea.

GLOBE NAIL CO. *v.* UNITED STATES HORSE NAIL CO. (Two Cases.)

(Circuit Court, D. Massachusetts. March 20, 1884.)

1. PATENT—HORSE-SHOE NAIL—INFRINGEMENT.
   Patent No. 92,355 for a horse-shoe nail made by cold-rolling the shank of a headed blank cut from a hot-rolled ribbed bar, *held* to be infringed by the manufacture of a nail produced in the same manner, except that the head is cold-rolled, and a small portion of the shank next to the head not rolled at all.
2. SAME—METHOD NOT SHOWN IN PREVIOUS PATENT.
   The nail secured by letters No. 92,355 differs in hardness in its different parts; and the validity of the patent is not affected by the description in a previous patent of a method of manufacturing nails of uniform hardness throughout.
3. SAME—REISSUED PATENT No. 5,207.
   Reissued patent No. 5,207 *held* to be substantially identical with the original, No. 78,644, and therefore valid.
4. SAME—INFRINGEMENT—HORSE-SHOE NAILS.
   The process described by reissue No. 5,207, of beveling the points of horse-shoe nails by spreading the metal laterally and then shaving off the superfluous projections, *held* to be infringed by a method purporting to force the metal upwards instead of sidewise

In Equity.

Chauncey Smith and *George L. Roberts*, for complainant

Browne, Holmes & Browne, for defendant.

Before LOWELL and NELSON, JJ.

NELSON, J. The first of these suits is for the infringement of patent No. 92,355, granted to Arlon M. Polsey, July 6, 1869, for an improved manufacture of nails. According to the description given in the specification, the invention consists in a horse-shoe nail, the head of which is in that condition of softness which is produced by hot-rolling the metal, and the shank or body of which is hardened by rolling, when cold, with a constantly increasing pressure from head to point. A blank is first cut from a hot-rolled ribbed bar, the projection and form of the rib being that of the finished head of the nail. The blank, when cold, is submitted to a rolling process, which begins at or near the base of the head, and continues with a gradually increasing compression to the point. By this operation the rigidity of the body of the nail is left nearly uniform throughout its whole

length, since its cross-section diminishes in area from head to point in about the same ratio as the metal becomes harder under the increasing pressure. A nail is thus formed with the head sufficiently soft to yield under the hammer and imbed in the groove of the horse-shoe, with the shank near the head hard enough to keep from bending, but not so hard as to prevent it from conforming readily to the nail hole, and with the point end so rigid as to retain its form and direction in driving. The single claim of the patent is this:

"A nail made by punching or cutting from hot-rolled ribbed bars of metal a headed blank, substantially as described, and by elongating, hardening, and compressing the shanks of such blanks by cold-rolling from the head to the point, thereby giving to all parts of the nail so produced the peculiar qualities specified."

The nail manufactured by the defendant is made in the same manner, and is in all respects the same as the Polsey nail, except that in the case of the former the head is cold-rolled with diminishing hardness from the top to the base, and the cold-rolling of the body commences a short distance below the base of the head, thus leaving a small part of the shank next the head, described as about one-tenth of the length of the blank, unrolled. The position of the defendant is that these alterations in structure take its nail out of the claim of the patent. But we are unable to give to them this effect. The leaving unrolled a small portion of the shank next the head, where in the patent the metal is left comparatively soft, so as to easily conform to the irregularities of the nail-hole, is manifestly only a trivial and unsubstantial variation from the Polsey nail. The same may be said of the added hardening of the head. An attempt is made to show that by making the shank soft near the head the nail will drive and fit the nail-hole more readily, and that hardening the upper part of the head renders it better capable of resisting the wear of the pavement, and thus a more serviceable nail is produced. We think the evidence fails to prove this. But, if true, the new elements must be regarded as additions to the Polsey nail, and not as rendering the nail a substantially different article. A nail so constructed still possesses all the essential qualities of the Polsey nail. It is a nail made by cutting a headed blank from a hot-rolled ribbed bar, and then elongating, hardening, and compressing the shank by cold-rolling, substantially from head to point, which is the invention described in the specification and claim of the patent.

The defendant further insists that the Polsey method is shown in the Whipple patents, No. 41,881 and No. 41,955, both anterior to the Polsey patent. The former is for a blank for horse-shoe nails, with the head of the form of the frustra of two pyramids having a common base, and the shank tapering therefrom to the point, the blank to be afterwards drawn out and flattened into a nail by a suitable machine or by hand. The latter is for a machine to produce such blanks by swaging, and to flatten and finish them into nails by rolling. We

have examined these patents with care, but find nothing in them resembling the Polsey invention. Whether the operations described for forming the blanks and nails are performed when the metal is hot or cold is not stated. But in either case the nail is left with an equal hardness throughout the head and shank, and thus differs wholly from the Polsey invention.

In the second case the plaintiff sues for the infringement of reissue patent No. 5,207 dated December 31, 1872, and granted to the plaintiff, as assignee of S. E. Chase, for an improvement in finishing nails. The original of this patent was No. 78,644, dated June 6, 1868. The invention is described in substantially the same terms in the specifications of the original and the reissue. It relates to a method of finishing horse-shoe nails, and giving them the desirable curvature throughout the body and a beveled and pointed form at the end by means of mechanism. The method described consists of two successive operations. In the first the nail, when nearly finished, is submitted to the action of a die, which, by compression, gives to it the proper curvature flatwise and forms a bevel at the point, the superfluous metal being spread out by the pressure on each side and beyond the point end. In the second the nail is again subjected to the action of a die which forces it through an orifice in a bed, the die and orifice having corresponding outlines and the requisite dimensions and contour. The die and orifice together operate as shears to shear off and remove the superfluous metal spread out on the sides and point in the first operation, and to cut and trim the nail at its point to the exact form of the finished nail. In the first operation the nail receives its longitudinal curvature and its bevel at the point and is finished flatwise; and in the second the point is formed and the nail straightened and finished sidewise.

The original patent contained a single claim, as follows:

"I claim in finishing nails the process of curving their bodies and beveling their points, and afterwards forcing them through an open die to shear off superfluous metal, substantially as and for the purpose specified."

The reissue contains two claims, the second of which is thus stated:

"(2) The process of curving the bodies of nails and beveling their points by spreading the metal laterally, and afterwards forcing them through an open die to shear off superfluous metal, substantially as and for the purpose specified."

We are unable to perceive any essential difference between the two claims. It is true the second claim of the reissue contains the expression, "by spreading the metal laterally," which is not found in terms in the original claim. But the original claim, construed in the light of the description of the invention given in the specification, clearly implies that the lateral spreading of the metal in the die is the necessary result of the compression given in the first operation of the finishing. The two claims are therefore, in substance, the same, and the reissue is not invalid, at least in its second claim, as being a

departure from the original, within the rule established by the recent decisions of the supreme court.

The defendant does not claim that its manufacture differs from the Chase method, except in the following particulars: The beveling die and the groove in the roll are so constructed that the bevel is stamped or impressed in the metal; and the metal displaced by the operation, instead of being spread laterally, is forced partly upwards on each side and partly forward of the point. The superfluous metal is afterwards sheared off as in the Chase method. The nail is also formed without longitudinal curvature. We doubt if, in practice, the defendant has succeeded in effecting either of these variations. The samples of its finished nails in the case show a decided curvature lengthwise, and in many of the exhibits of its nails which have passed through the beveling operation only, inspection plainly indicates a lateral spreading of the metal about the point. It is also obvious that it is mechanically impossible to impress the nail with the beveling die without at the same time spreading the metal under and on each side of it, to a greater or less extent, laterally. It is likewise true that the beveling, no less than the curving, operation of the Chase method is included in and secured by the patent. We are of opinion that the defendant's method of beveling the point is a substantial equivalent of the same operation in the Chase method. Exactly the same result is produced in both cases. The defendant's nail, when finished, cannot be distinguished in any of its features from the Chase nail. The slight difference in the process is immaterial. The two are in substance identical.

Other defenses are that the Chase invention was anticipated in the Gooding patent, No. 5,489, dated March 28, 1848, and in the Polsey patent, No. 62,682, dated March 5, 1867. These inventions were among the first rude attempts in the art of producing horse-shoe nails by machinery. The evidence shows that they were never of any real utility, and were never put to any practical use in making nails. In the specifications of the Chase patent the inventor refers to the Polsey patent, No. 62,682, and carefully distinguishes his invention from its scope. It is sufficient to remark that we find nothing in either of these patents which describes the simple and effective processes of the Chase invention.

The entry in each case will be decree for the complainant.

DAVIS v. SMITH.

(*Circuit Court, D. Massachusetts.* March 18, 1884.)

PATENTS FOR INVENTORS—EXPIRATION OF PATENT—DEMURRER.

Demurrer to bill for profits and damages, filed against an infringer one day before the patent expired, sustained, and bill dismissed, with costs; following *Root* v. *Ry. Co.* 105 U. S. 189, and *Burdell* v. *Comstock*, 15 FED. REP. 395.

Demurrer to Bill.

Coburn & Thacher, for complainant.

Geo. L. Roberts & Bros., for defendant.

LOWELL, J. This bill, for profits and damages against an infringer of the plaintiff's patent, was filed one day before the patent expired. The defendant demurs for want of equity; and his demurrer must be sustained. No equitable discovery or relief is sought by the bill beyond or different from that which is usual in ordinary patent causes. The plaintiff could not expect the court to grant a restraining order, which must expire before it could, by reasonable diligence, be served, nor was one prayed for. An injunction was impossible for want of time to notify the defendant. The case, therefore, comes within *Root* v. *Ry. Co.* 105 U. S. 189; *Burdell* v. *Comstock*, 15 FED. REP. 395; *Betts* v. *Gallais*, L. R. 10 Eq. 392.

Demurrer sustained. Bill dismissed, with costs.

MATTHEWS v. SPANGENBERG and another.

(*Circuit Court, S. D. New York.* April 25, 1882.)

1. PATENTS FOR INVENTIONS—EVIDENCE—MOTION TO SUPPRESS.

Where evidence has been taken and filed out of time, but no motion to suppress has been filed, it may be considered.

2. SAME—REISSUE NO. 9,028—CLAIMS 5 AND 7 VOID.

Claims 5 and 7 of reissued letters patent No. 9,028, granted January 6, 1880, to John Matthews, for soda-water apparatus, are anticipated by letters patent No. 44,645, granted to A. J. Morse, October 11, 1864, for a syrup fountain.

3. SAME—CLAIMS 4, 6, 8, AND 9 VALID—INFRINGEMENT—DISCLAIMER.

As the parts of the thing patented in the fourth, sixth, eighth, and ninth claims, which have been infringed, are definitely distinguishable from the parts claimed in the fifth and seventh claims, and the latter claims were made by mistake, without any willful default, or intent to defraud or mislead the public, and complainant has not been unreasonably negligent in not entering a disclaimer as to such parts, he may, on entering a disclaimer, maintain a suit for infringement, but without costs

In Equity.

Arthur v. Briesen, for plaintiff.

Philip Hathaway, for defendants.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,028, dated January 6, 1880, granted to the orator upon the surrender of original letters patent No. 50,255, dated October 3, 1865, for soda-water apparatus. The defense relied upon is that the defendants purchased the apparatus used by them of William Gee, who afterwards settled with the orator; that the patent is void for want of novelty; and that they do not infringe. The original patent is not in evidence.

Some of the defendants' evidence was taken and filed out of time. No motion to suppress it has been filed. The orator objects to its consideration; and the defendants ask that it be considered, or the time extended to cover its taking. As no motion to suppress has been filed, it is allowed to stand and is considered. *Wooster* v. *Clark*, 9 FED. REP. 854, is relied upon by the orator on this point, but in that case there was a motion to suppress.

The case does not show that the defendants purchased their apparatus of Gee before he settled with the orator, and therefore entirely fails to show that he settled with the orator for the sales to the defendants. They stand by themselves, independently of Gee. *Steam Stone-cutter Co.* v. *Windsor Manuf'g Co.* 17 Blatchf. C. C. 24. That defense fails for want of proof.

The patent has nine claims. The second and third are not in controversy. Upon all the evidence, it is found that the first claim is not infringed; that the fifth and seventh are anticipated by letters patent No. 44,645, dated October 11, 1864, granted to A. J. Morse, for a syrup fountain; and that the fourth, sixth, eighth, and ninth are not anticipated and have been infringed by the defendants.

The parts of the thing patented in the fourth, sixth, eighth, and ninth claims are definitely distinguishable from the parts claimed in the fifth and seventh claims; and the orator appears to have made the latter claims by mistake, supposing himself to be the original and first inventor of the parts claimed in them, without any willful default, or intent to defraud or mislead the public, and not to have unreasonably neglected to enter a disclaimer of those parts, thus far. Therefore he is entitled to maintain this suit, but without costs, on entering the proper disclaimer. Rev. St. § 4922; *Burdett* v. *Estey*, 15 Blatchf. C. C. 349.

On filing a certified copy from the patent-office of the record of a disclaimer by the orator of what is claimed in the fifth and seventh claims, let a decree be entered that the fourth, sixth, eighth, and ninth claims of the patent are valid, that the defendants have infringed, and for an injunction and an account, without costs.

SMITH v. STANDARD LAUNDRY MACHINERY CO. and others.

(*Circuit Court, S. D. New York.* February 22, 1882.)

PATENT—INFRINGEMENT—BREACH OF CONTRACT OF LICENSE—JURISDICTION OF CIRCUIT COURT.

Where the owner of a patent grants an exclusive license to a corporation to make and sell the article patented during the term of the patent, requiring sales to be returned monthly and license fees to be paid monthly, and retains the right to terminate by written notice the license, on failure to make returns and payments for three consecutive months, after due service of notice of the termination of the license for failure to make returns, an action for infringement, in which the corporation sets up in its answer that the license was not lawfully terminated, and that it had not sold any of the patented articles, and was not making and selling them, involves a question of infringement, and is cognizable in a federal court, although the parties are citizens of the same state. *Wilson* v. *Sanford*, 10 How. 99, and *Hartell* v. *Tilghman*, 99 U. S. 547, distinguished.

In Equity.

H. G. Atwater, for plaintiff.

J. Palmer, for defendants.

WHEELER, J. There are two of these cases, brought upon numerous patents described in the respective bills of complaint, and they have been heard together upon the bills, answers, replications, and plaintiff's proofs. The plaintiff, by written agreement, dated July 1, 1874, granted an exclusive license to the Standard Laundry Machinery Company, alone and singly, to manufacture and sell laundry machinery embodying the improvements patented, to the end of the terms of the patents, the company to make return to the plaintiff of all sales made during each month, on the first of the following month, and to pay, as a license fee, on or before the tenth of the following month, a sum equal to 8 per cent. of the gross sales of power machinery, and 4 per cent. of the gross sales of hand machinery, so sold. There was a clause in the agreement providing that the plaintiff might terminate the license by serving a written notice upon the company, on failure to make the returns and payments for three consecutive months. May 13, 1879, the plaintiff served notice of termination of the license. The defendants continued to use the patented inventions, and the plaintiff brought these suits for infringements after the notice. The parties are citizens of the same state, so that this court has no jurisdiction except under the patent laws. The defendants insist that those laws give no jurisdiction to decide upon the construction or continuance of the agreement for a license, and that the question of infringement depends wholly upon the agreement, and rest the case here wholly upon this question of jurisdiction. The contract of license itself provides a mode for its own termination; and the plaintiff's case shows that it was terminated in that mode. The defendants do not rest their cases upon the question whether the contract was terminated or not, but, while they insist

that it was not lawfully terminated, answer "that they have not sold any machines embodying the invention for which the complainant has obtained letters patent, as alleged in the complaint, and that defendants are not now manufacturing and selling the said machines." This raises a question of infringement, arising solely under the patent laws of the United States, of which the United States courts alone have jurisdiction, without reference to citizenship. The decision of the question of the termination of the license might obviate this question of infringement, and it might not; or, rather, it might furnish a mode of determining whether there was any infringement, and it might leave that question to be determined otherwise. If the license was not ended, the acts charged, if done, would not constitute an infringement; if ended, the question would remain whether the acts were done. The question of infringement would always be in the case until decision. This is different from *Wilson* v. *Sandford*, 10 How. 99, and *Hartell* v. *Tilghman*, 99 U. S. 547, relied upon by defendants. In each of those cases, as treated by the court, there was but one question made between the parties to be decided at all, and that was a question of contract. Neither of those cases seems to control this, and this does seem to involve a controversy of which this court has jurisdiction.

Let there be a decree for an injunction and an account, according to the prayer of the bill, with costs.

SMITH *v.* STANDARD LAUNDRY MACHINERY CO.

(*Circuit Court, S. D. New York.* January 1, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT BY CORPORATION—PERSONAL LIABILITY OF PRESIDENT WHO SWEARS TO ANSWER—WANT OF SERVICE.

Where, in an action against a corporation for the infringement of a patent, the president, who is named as one of the defendants, but not personally served, owns all the stock, and swears to and signs the answer, a general appearance being entered in the suit for the defendants without naming them, he is personally liable.

On Exceptions to the Master's Report. The facts appear in the opinion.

H. G. Atwater, for complainant.

Justus Palmer, for defendant.

WHEELER, J. This cause has now been heard upon the exceptions to the master's report. These exceptions relate principally to the liability of the defendant Lewis at all personally. The grounds of the exception to his liability at all are that he was not so made a party individually that any decree for relief could be made against him, and that the allegations of the bill were not sufficient to be the foun-

dation for charging him personally. The bill was brought upon several patents. In the statements of parties the defendants are described as the "Standard Laundry Machinery Company," a corporation; William G. Lewis, president of said company; and Channing W. Littlefield, secretary of said company. A subpœna was prayed, directed to the Standard Laundry Machinery Company, William G. Lewis, and Channing W. Littlefield, defendants. A subpœna was so issued, but was not served upon Lewis. A solicitor of the court appeared for the defendants without naming them. An answer was filed, stated to be the answer of the defendants, without naming them, and was signed by the solicitor as solicitor and counsel for the defendants, without naming them. The answer was sworn to by Lewis as one of the defendants, the affidavit at the foot stated that he was one of the defendants, and he signed it by his individual name.

The appearance of the solicitor for the defendants would of itself alone be an appearance only for defendants who had in some manner been served with process. They only were at the time, in fact, defendants. On that appearance the bill could not have been taken *pro confesso* as against Lewis. The subpœna, if it had been served, however, would only have required him to appear and answer the bill. An answer to a bill is made in person. When Lewis answered this bill he became personally, by his own act, a party to the cause made by the bill. He then became a defendant in court. The appearance for the defendants stood as an appearance for him as one of them, and he was before the court as a party. The bill, after stating the patents, and the exclusive rights of the oratrix to the inventions therein described, alleged that the defendant the Standard Laundry Machinery Company had and the defendants William G. Lewis and Channing W. Littlefield, as the agents and officers of said company, had, with full knowledge of the rights of the oratrix, made and vended machines embodying the invention.

One interrogatory, which Lewis, by note at the foot of the bill, was required to answer, asked how many machines embodying the invention had been sold by the defendants or any of them, and the prayer was that the defendants might answer the premises and be decreed to account for and pay over all profits, and damages in addition. That Lewis was an officer or agent of a corporation would give him no right to infringe the oratrix's patents, or to withhold the fruits of infringement from her, and the statement of that relation in connection with the charge of infringement would not, in legal effect, qualify the charge. Under that allegation, and an interrogatory pointing to him as a defendant charged by it, and required to answer in respect to the charge, and a prayer for relief on account of it, he was not only bound to answer as a party, but as a party from whom relief was sought by decree against him personally. His own testimony before the master shows that he owned the whole capital stock of the defendant corporation; and the report of the master shows

that he has used the corporation solely for himself, for the purpose of appearing to be an officer of it, and that its property has been, in fact, his.

The correctness of this finding has been questioned; but as there was testimony tending to establish it, and as it was involved with the question of the liability of the respective defendants in the accounting sent to the master, and he does not appear to have acted in any manner improperly or unfairly, his finding cannot, with propriety, be disturbed here. *Bridges* v. *Sheldon*, 18 Blatchf. C. C. 295, 507; S. C. 7 FED. REP. 34. On this finding, Lewis, if an officer or agent, was such for himself, and all he received in such pretended capacity he received for himself. An infringer is liable to account for the profits of the infringement to the owner of the patent, because they are the avails of the property of the owner in the hands of the infringer, which he has no right to detain from the owner. Lewis, and he alone, has these profits, which are avails of the property of the oratrix in his hands, and which he has no right to detain from her. The pretext of doing business in the name of the corporation is too flimsy to shield him from accounting for them. During a part of the time for which the account has been taken he did this business in the name of an individual, for the reason that the corporation had been enjoined. This was equally unavailing to protect him from liability.

Exceptions overruled.

COLGATE *v.* WESTERN UNION TEL. CO.

(*Circuit Court, S. D. New York.* April 4, 1884.)

APPLICATION FOR A REHEARING—LACHES OF APPLICANT.

An application for a rehearing, based on alleged newly-discovered evidence, must be denied when it appears that the existence of such evidence was known to the applicant or his counsel at the time of the former trial, and that the evidence was not then produced.

Motion for Rehearing.

Betts, Atterbury & Betts, for complainant; *Wm. D. Shipman* and *Frederick H. Betts*, of counsel.

Porter, Lowrey, Soren & Stone, for defendant; *Geo. Gifford* and *Wm. C. Witter*, of counsel.

WALLACE, J. This is an application by the defendant for a rehearing in a cause heard in November, 1878, and in which an interlocutory decree was entered in December, 1878, adjudging the validity of the complainant's letters patent, and the infringement thereof by the defendant, and that complainant recover the profits of the defendant derived by such infringement. In January, 1879, the complain-

ant applied for a final injunction against the defendant to enjoin the infringement, which was granted as to any further use of the invention, but as to certain uses to which it had already been applied the question of issuing a perpetual injunction was postponed, to await an accounting and application for a final decree. Thereafter the parties entered into negotiations which resulted in defendant's taking a license of complainant and paying $100,000 for a release. The application is made on the ground of newly-discovered evidence, which shows the withdrawal of an application for a patent. At the hearing of the cause the defense of abandonment of the invention was relied on by the defendant, and was considered in the opinion delivered by the court, and overruled in part upon the view that the application for a patent had never been withdrawn by the inventor.

Upon the hearing it was stated by counsel for the complainant that a letter had shortly before been found by him, in looking over the files of the patent-office, written by the inventor, formally withdrawing the application, and this fact was fully brought to the attention of the defendant's counsel. Whether it was assumed by defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the court as a conceded fact, is not material, in view of the decision and opinion of the court rendered within a few days after the hearing, by which it was plainly indicated that the fact was a material one, and was not in the proofs. If under these circumstances an application had been promptly made for leave to reopen the proofs, and for a rehearing, it would have been incumbent upon the defendant to satisfy the court that the evidence could not have been obtained by the exercise of reasonable diligence, and introduced before the hearing. *Baker* v. *Whiting*, 1 Story, 218; *Jenkins* v. *Eldridge*, 3 Story, 299. It is not necessary to search for authorities outside the decisions of this court maintaining the rule that a rehearing will be denied if the non-production of the evidence is attributable to the laches of the party or his counsel. *Ruggles* v. *Eddy*, 11 Blatchf. 524, 529; *India-rubber Co.* v. *Phelps*, 8 Blatchf. 85; *Hitchcock* v. *Tremaine*, 9 Blatchf. 550; *Page* v. *Holmes Burglar Alarm Co.* 18 Blatchf. 118; S. C. 2 FED. REP. 330. But, after the expiration of over three years since the discovery of the evidence, whatever might have been the result of an application if it had then been made, it would have appealed much more forcibly to the judicial discretion than can be expected now, after more than three years have elapsed, after a further hearing has been had, and a perpetual injunction ordered against the defendant, and after the defendant has recognized the complainant's rights by compromising for past use, and taking a license for the future use of the invention, and for a considerable period has been enjoying the use of the invention under the license.

The law of laches, as applied to motions for new trials or rehearings, is founded on a salutary policy. It is for the interest of the

public, as well as of litigants, that there should be an end of litigation, and that efforts to reopen controversies by unsuccessful parties, after they have had a full opportunity to be heard, and a careful hearing and consideration, should be discouraged.

A rehearing is denied.

WESTCOTT and others *v.* RUDE and others.

(*Circuit Court, D. Indiana.* April 1, 1884.)

1. PATENTS FOR INVENTIONS—ACCOUNTING BEFORE MASTER—EVIDENCE.
   In an account before a master, evidence of payments for past infringement, for the purpose of ascertaining the amount which should be paid by the defendant, is incompetent. To admit it is contrary to the maxim, *Inter alios acta*, etc.
2. SAME—SALE OF LICENSES—MEASURE OF DAMAGES.
   When the sale of licenses by the patentee has been sufficient to establish a price for such licenses, that price should be the measure of his damages against an infringer; but a royalty or license fee, to be binding on a stranger to the licenses which established it, must be uniform.
3. SAME—SINGLE LICENSE—MARKET PRICE.
   Proof of a single license is not sufficient to establish a market price.
4. SAME—SEVERAL CLAIMS—ROYALTY.
   In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value, any more than, in mathematics, a part can equal the whole. A licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention.

Exceptions to Master's Report.

H. C. Fox and *Wood & Boyd*, for complainants.

Stem & Peck, for defendants.

WOODS, J. The exceptions filed are numerous, but, passing by others, the court will consider only those which bring into question the measure of the damages assessed. Upon this point the master says: "Plaintiffs waive all claims for profits, and rely upon the proofs produced as establishing a fixed license or royalty as the measure of damages;" and, after giving an abstract of the testimony of the four witnesses who were examined on the subject, the report proceeds to say:

"It is very difficult to determine from this evidence whether it makes proof of such an established royalty or license fee as furnishes a criterion upon which to estimate complainant's damages. The owner of a patent is granted a monopoly. He may choose to reserve the right to use his invention exclusively to himself, and to make and sell machines, keeping all other manufacturers out of competition. He may enjoin infringers. He has the right to fix a reasonable license fee or royalty to be paid by manufacturers who use his invention in making machines. And if fixed and reasonable, and paid

by those who use the invention, such fee or royalty is a criterion upon which a computation or assessment of damages may be based. It is proved that the Wayne Agricultural Company paid the royalty of $1 for one-horse machines, and $2 for two-horse machines, for four years; a sum which, in the absence of evidence to the contrary, may be regarded as reasonable. Mast & Co. paid between $2,000 and $3,000 in cash, and conceded privileges, which Westcott estimates to have been worth as much more, for infringement. It is true, Westcott threatened suit, and, when money is paid under threat of suit merely as the price of peace, it furnishes no evidence of the amount or value of the real claim in dispute, but the settlement made shows that Westcott was paid something substantial for the infringement, and that the fear of litigation was a small element of the settlement itself. Westcott says that he arrived at the amount by his estimate of the number of the machines made by Mast & Co., and other considerations which are explained in Mast's deposition. Mast says no estimate was made of the number of machines. Westcott says he gave licenses, like the one attached to his deposition, to Mast & Co. and to English & Over. Mast was examined, but not interrogated on that point. Mr. English, the active man in the firm of English & Over, says he does not recollect whether they took a license or not.

"It is with considerable reluctance that I have come to the conclusion that the evidence furnishes proof of a license fee, which may be taken as a basis for damages. The defendants have undoubtedly infringed complainants' invention; and the machines made by them, which are mentioned in the evidence, were all made after this suit was brought. As to the point made, that the evidence does not show how many of the machines made by defendants infringed one and how many infringed both claims of plaintiff, the master is of the opinion that the terms of the license were the same in either case, and the same fee was charged whether one or more claims were infringed. I therefore report and find that the defendants have made and sold 800 infringing one-horse machines, and that plaintiff's damages on that account are $800, and that defendants have made and sold 800 infringing two-horse machines, and that plaintiff's damages on that account are $1,600, making $2,400, his damages in full."

The clause in the license referred to by the master is of the following tenor:

"*Third.* The party of the second part agrees to pay two dollars as a license fee upon every two-horse drill or seeder, and the sum of one dollar on every one-horse drill or seeder, manufactured by said party of the second part, containing any of the patented improvements; provided, that if the said fee be paid upon the days provided herein for semi-annual returns, or within ten days thereafter, a discount of fifty per cent. shall be made from said fee for prompt payment."

There is probably no reason to question the general principles enunciated by the master in respect to the rights of patentees in their inventions; but the court does not concur, in all respects, with the master's application of them in this case, nor with the conclusion reached. Some of the facts found are not, in the judgment of the court, supported by the evidence. Some items of evidence were considered by the master, which, in the opinion of the court, were not admissible, and which, therefore, should have been allowed no weight whatever.

In respect to the royalty paid by the Wayne Agricultural Company, Westcott, the only witness to the point, testified this:

"The licensees to whom these licenses were given paid the fees as stipulated. The Wayne Agricultural Company paid for four years, since which time they have paid nothing, their excuse being that they claimed to have bought an interest in the patent. We sued them in this court, and the court decided that they had no title to the patent, and then they agreed to arbitrate with us and the suit was dismissed."

This evidence does not show the payment of fees as stated by the master. It is left uncertain whether or not the fees paid "for four years" were at the rate of one and two dollars for a machine, or 50 per cent. of those sums. The fair inference, perhaps, is that the Wayne Agricultural Company did for four years manufacture drills under the license, though it is not entirely clear that the license was not issued after or near the close of that period, so as to make the transaction in reality a settlement for infringements. This is certainly so in respect to the other parties named, who, if they received licenses at all, which is doubtful, received them as evidence of settlements, and these settlements, it is shown, were made either under express threats, or the fear, of suits for infringement. If for a time the Wayne Agricultural Company made the drills under a license, the manufacture was afterwards continued under a different claim of right, and when that claim had been overruled by the court, instead of settling for the infringement on the terms of the license, the company obtained an arbitration, the result of which has not been shown.

The first inquiry is, whether or not the proof in respect to payments for infringements was admissible, and ought to have been considered by the master at all. I know of no case in which it has been decided that such evidence is competent, and, upon principle, am not able to see how it can be; on the contrary, it seems to me clear that it ought not to be received. Proof of license fees, charged and paid before use for the right to use an invention, is admissible upon the same theory that proof of sales in open market of any marketable commodity is competent; because it shows, or tends to show, a market price. But settlements for past use of an invention cannot be brought within the rule, because inconsistent with the principle on which the rule rests. The infringer, or one who is accused of infringement, is, from the necessity of the situation, under compulsion to make compensation as demanded, or to take the risk of a suit; and how much his action, in a particular case of settlement, may have been influenced by this or other special considerations, it is impossible for the master or the court to determine, and therefore the inquiry should not be entered upon. The only way to escape the inquiry is to exclude the evidence. To admit it is contrary to the maxim, *Inter alios acta*, etc. It involves an attempt to resolve one doubt or difficulty by another. *Litem lite solvit.* There are doubtless reported cases in which it appears that such evidence was received and considered, but generally this has been done without objection, and uniformly (so far as I know) without a judicial declaration

or decision that it was proper. In the opinion of the supreme court in *Packet Co* v. *Sickles*, 19 Wall. 611, the rule is reaffirmed as laid down in *Seymour* v *McCormick*, 16 How. 480, "that in suits at law for infringement of patents, when the sale of licenses by the patentee had been sufficient to establish a price for such licenses, that price should be taken as the measure of his damages against the infringer." "The rule thus declared," it is added, "has remained the established criterion of damages in cases to which it was applicable ever since;" and further on in the opinion it is said, and it affords a clear interpretation of the rule in respect to the point now mooted: "In such a case nothing is more reasonable than that the price fixed by the patentee for the use of his invention, in his dealings with others, and submitted to by them before using it, should govern." This, it is true, is the rule at law, but the complainants, waiving their right in equity to claim an account of profits, have invoked the same rule here, and must abide by it as it is. See, also, *Black* v. *Munson*, 14 Blatchf. 268; *Greenleaf* v. *Yale Lock Manuf'g Co.* 17 Blatchf. 253; 3 Suth. Dam. 601–607; 1 Greenl. Ev. § 174; Whart. Ev. 1199; Abb. Tr. Ev. 188, 189; *Matthews* v. *Spangenberg*, 14 FED. REP. 350. It follows that the proof of damages made in this case, excepting that in reference to the license granted to the Wayne Agricultural Company, must be rejected, and should have been disregarded by the master; and, this being done, does there remain evidence sufficient to support the master's conclusion? It seems probable that the master himself would have thought not; since, as it was, he came to that conclusion "with considerable reluctance."

The rule, as already stated, requires "a sale of licenses" "sufficient to establish a price for such licenses." "A royalty, in order to be binding on a stranger to the licenses which established it, must be a uniform royalty." Walk. Pat. 390. These and the like expressions and definitions found in the cases and text-books, imply that proof of a single license is not sufficient; and if under some circumstances such proof might be deemed adequate, that in this instance is not of such clear and unequivocal character as to give it such weight. *Proctor* v. *Brill*, 4 FED. REP. 415; *Judson* v. *Bradford*, 3 Ban. & A. 539; *Black* v. *Munson*, 2 Ban. & A. 623. It is true, in a sense, doubtless, that the owner of an invention has a right to fix his price upon it; but to constitute evidence against an infringer he must have done it "in his dealings with others," and not merely in a form of license which he was willing to grant. It is, as it appears to me, entirely inadmissible, at law or in equity, that a patentee may, by inserting in his licenses a stipulation for a certain royalty, with a proviso that half that sum shall be received in full, in case of prompt payment, acquire a right to demand the entire sum of an infringer. If he can arbitrarily make such a discrimination, he may as well make the ratio three to one, or in any other proportion. The question is, what is a reasonable royalty? The laws of the land fix the rates of interest for

the forbearance of money, and if it be possible to make a discrimination against infringers of patents over prompt-paying licensees greater than lawful interest, (except as may be done by the courts under the statutory provision for treble damages,) it must be done, as it seems to me, upon some competent evidence, other than an arbitrary clause in a license or licenses, however many of them may have been issued.

The same may be said in reference to the clause in the license which requires that the specified royalty shall be paid for every drill "containing any of the patented improvements." This, as it seems to me, affords no proof, certainly not conclusive proof, against an infringer that he should pay the entire royalty named in the license for infringing only one of two or more claims of a patent, unless the one infringed be shown to be the only claim which has or had any value, or unless the different claims be substantially the same.

In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value any more than in mathematics a part can equal the whole. The licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention. This view is in accordance with authority.

In *Birdsall* v. *Coolidge*, 93 U. S. 64, it appears that the alleged infringement was of one only of three claims in the letters patent, and the court says: "Still it is obvious that there cannot be any one rule of damages prescribed which will apply in all cases, even when it is conceded that the finding must be limited to actual damages. * * * Where the patented improvement has been used only to a limited extent and for a short time, * * * the jury should find less than the amount of the license fee." See, also, *Proctor* v. *Brill, supra; Wooster* v. *Simonson*, 16 FED. REP. 680; *Ruggles* v. *Eddy*, 2 Ban. & A. 627.

Without further evidence, the plaintiff is entitled to nominal damages only; but, that there may not be a failure of justice, the case is remanded to the master, with direction to admit further evidence by each party, if offered, and to report the same and his conclusions.

FIELD v. IRELAND and others.

(Circuit Court, N. D. New York. April 5, 1884.)

PATENT—INFRINGEMENT—GLOVE-FASTENERS.

The case of *Field* v. *Comeau*, 17 O. G. 568, followed; holding that the complainant's patent for a glove-fastener, consisting of an automatic wire spring, is not infringed by a device consisting of stiff arms pivoted at one end.

In Equity.

Eugene N. Elliot, for complainant.

James M. Dudley, for defendants.

COXE, J. The complainant has a patent for an improvement in glove-fastenings. The claim is in the following words: "The combination, substantially as described, of a spring, A, with the split portion, B, of a glove, for the purpose specified." In *Field* v. *Comeau*, 17 O. G. 568, Judge WHEELER restricted this claim to the particular style of spring described in the specification and drawings. That decision is controlling. No broader construction can now be given to the patent. The question of infringement, therefore, alone remains to be considered.

The complainant's spring is made of a single piece of wire and is automatic and continuous in its operation. When the spring is in repose the arms are together and overlap. When drawn apart they will immediately fly back if released. The defendants' device, on the contrary, is composed of two stiff arms pivoted at one end. A spring is riveted to one arm which connects, at its free end, with a link fastened to the end of the other. When the arms are open, and by pressure upon them the link is brought above the pivot, the spring acts, and the arms come together. At right angles the arms remain open and the spring does not begin to operate in closing them until they have been brought to an angle of about 45 degrees. The points of difference between the two devices are many and radical. But the reasoning of the *Comeau Case* seems conclusive upon this question also. The spring which was there held not to infringe is almost the exact counterpart of the defendants' spring. They differ only in minute and unimportant particulars. The one operates on a cam, the other on a link; with this exception they are alike. In speaking of the defendants' spring in that case the learned judge uses language which would be equally applicable here. He says:

"The form of the defendants' spring is different from the orator's, its mode of operation is different, and the result of its operation is somewhat different. It cannot be said to be the same as the orator's, or to be substantially like the orator's. Each got the idea of closing the wrists of gloves by means of springs from others. The orator carries out the idea in his mode, and the defendants in theirs, and, as neither has control of anything but the particular mode, neither can justly say that the other uses his mode."

The two cases cannot be successfully distinguished.

There should be a decree for the defendants, with costs.

The Worthington and Davis.

(*District Court, E. D. Michigan.* April 30, 1883.)

1. Collision—Running into Vessel at Anchor—Presumption of Fault.
   The presumtion of fault arising from running into a vessel at anchor may be rebutted by showing that the moving vessel exercised all reasonable care upon her part, and that the collision was an inevitable accident; or by showing that the fault is with the anchored vessel in failing to use proper precautions.
2. Same—Anchorage in St. Clair River—Duty of Vessel.
   Anchorage in St. Clair river is not necessarily improper because the channel is comparatively narrow, and vessels are frequently passing and repassing, if room be left for vessels and tows to pass in safety. A vessel so anchored, however, is bound to keep a watch, and not to allow her sails to obstruct or obscure the view of her anchor light.
3. Same—Inscrutable Fault—Libel Dismissed.
   In cases of inscrutable fault the libel should be dismissed.

In Admiralty.

This was a libel for a collision between the schooner Gladstone and the schooner Davis, in tow of the propeller Worthington, which occurred on the night of July 26, 1881, on the St. Clair river, near Herson's island. The Gladstone was bound on a voyage from Detroit to the port of Golden Valley, Ontario. She left Detroit in the afternoon, under sail, reached the St. Clair river, and sailed up to a point a little above the place of collision. The wind, which had been light from the west or north-west during the afternoon and evening, about 9 o'clock failed altogether. The schooner, being unable to proceed further, came to anchor in the channel of the St. Clair river, somewhat upon the Canadian side. After coming to anchor, her riding lights were taken in, and a bright anchor light placed in her port fore-rigging, about 20 feet from the deck. For all that appears, this light was burning brightly up to the time of the collision. A lookout was also stationed upon the deck to watch approaching vessels. The night was clear, and lights could easily be seen at the usual distance. Some time after 10 o'clock the schooner Davis, which was the last of three vessels in tow of the propeller Worthington, bound down the river, came into collision with the Gladstone, breaking her jib-boom, bowsprit, and cat-head, and damaging her port bow.

Moore & Canfield, for libelant.

H. D. Goulder, for claimant.

Brown, J. It is charged in the libel that the propeller was in fault in running too close to the Gladstone, and that the schooner Davis was in fault in not keeping a sharp lookout, and in not porting her wheel sufficiently to keep in the wake of the propeller, and thus avoid coming in contact with the Gladstone. Separate answers were filed on the part of the propeller and the Davis, the same counsel representing both vessels. Upon the hearing, however, there was no evidence showing the Davis to be in fault, as she appeared to have done the best she could in following the Worthington. The case against

her was practically abandoned. The answer on the part of the propeller avers that the wind was blowing a stiff breeze from the westward; that the Gladstone had her foresail and mainsail set, and was lying athwart the channel; denies that the schooner had a proper anchor watch; and avers that if she had any light it was so placed as to be obscured by the sails from the view of the vessels coming down the river. It was claimed, furthermore, that before discovering the Gladstone another propeller, the Oneida, had just passed the Worthington, and was ahead upon the same course and in the channel; and that the officers in charge of the Worthington, before discovering any light upon the Gladstone, saw the Oneida suddenly sheer to the westward, whereupon the Worthington put her wheel hard a-port, and changed her course as much to starboard as it safely could be; and that it was only when they had approached within about 200 or 300 feet that her officers and crew for the first time saw the light of the Gladstone. It was also averred that when the Worthington ported she gave the proper signal to the tow, and that the first vessel passed clear, the second within a few feet of the Gladstone's jib-boom, and the third vessel, the Davis, struck and did some injury to the Gladstone.

There can be no doubt of the proposition that, as the collision occurred with an anchored vessel, the burden of proof is upon the Worthington to show herself guiltless of fault. She may do this by showing that she exercised all reasonable care upon her part, and that the collision was the result of an inevitable accident, or, as is done in this case, by showing that the fault is with the schooner in herself failing to observe the proper precautions. The first fault charged against the Gladstone is that she was lying in an improper, unusual, and unsafe place. In this connection I can do little more than repeat what was said by Judge LONGYEAR in the case of *The Masters and Raynor*, 1 Brown, Adm. 342, that anchorage in the St. Clair river is not necessarily improper because the channel is comparatively narrow, and vessels are frequently passing and repassing, if room be left for vessels and tows to pass in safety. It always has been the custom for sailing vessels, navigating the Detroit and St. Clair rivers, to come to anchor in the channel, and I am not disposed to say such custom is unreasonable, though collisions are not infrequently occasioned thereby; and in the increasing magnitude of commerce we may be ultimately compelled to adopt a different rule; but I think it much more prudent for vessels to anchor as near the shore as the water will permit. Sometimes, however,—and that is claimed in this case,—the wind falls so suddenly that the vessel has no option but to drop her anchor where the wind leaves her. It would seem, however, that even in such a case something might be done, with the aid of the current and her rudders, to get the vessel closer into shore; but as there was undoubtedly sufficient room left for tows to pass the Gladstone upon the American side, I am not disposed to criticise her anchorage at this spot.

But, whether anchoring there from necessity or choice, I have no doubt that she is bound to exercise a greater degree of care and diligence in respect to her light and her anchor watch than would be requisite in case she were anchored out of the usual path of vessels. I am not disposed to say that she was in fault for having her sails up, if she had otherwise complied with the statute in having a light which could be readily seen by vessels coming up and down the river. The labor of getting a vessel under way would undoubtedly be much lessened by having her sails already hoisted, in case a favorable wind should spring up, and if the light be properly displayed I do not see that the liability to collision would be thereby enhanced. This was the opinion of Judge WILKINS in the case of *The Planet*, 1 Brown, Adm. 124. In this case I cannot see that the furling of the sails would have assisted the schooner any in enabling her to give way to the descending tow.

The difficulty in the case turns upon the question whether the Gladstone displayed a proper anchor light to approaching vessels. There seems to be no question that she did display a bright light about 20 feet from her deck, and it appears to have been set in her port fore-rigging, but it certainly did not comply with rule 10, Rev. St. § 4233, which requires that all vessels, when at anchor in roadsteads or fair-ways, shall exhibit, where it can best be seen, a white light, so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon. Now, this light, while complying with the law in other respects, clearly was not visible to a person approaching from the starboard side of the vessel back of the foremast, and in that respect there can be no question that the schooner was in fault, and the only remaining inquiry is whether such fault contributed to this collision. Upon the part of the schooner it is averred that the wind was north-west, and that she was heading a little toward the Canada shore, and hence that her light could be clearly visible to all vessels coming down the stream. Upon the other hand there is a large amount of testimony tending to show that there was a brisk wind from the south-west, and that the vessel was lying with her head canting towards the American shore, in a position which *might* at least have obscured her light to a propeller coming down the stream. This testimony is corroborated by that of the witness Kirby, who swears that the injury was done by the wrenching of her jib-boom and her bowsprit from starboard to port. If her hull was struck at all it would appear to have been a mere glancing blow, and that the principal injury was done by the jib-boom catching the mast of the Davis and breaking it off. This, with the wrenching of the bowsprit, inflicted the only serious damage to the schooner. It seems, too, that the Oneida, which preceded the Worthington down the river a very short distance, did not observe her light until she was very near to her, and that her attention was first called to her, not by seeing the light directly, but by seeing the loom of the light upon her sails. The men upon the Worthington also swore that they did not see her light, and ported only be-

cause the Oneida ported, and that the light was first revealed when they had approached very near to the schooner. Had the Worthington seen this light at a greater distance, it would undoubtedly have been her duty to port sooner; but if we are to believe the testimony of her officers and crew, and those of her tow, the Gladstone's light must have been concealed either by the Oneida (in which case the accident as to the propeller would have been inevitable) or by the sails of the Gladstone. In my opinion the propeller has rebutted the presumption of fault which attached to her colliding with a vessel at anchor, and put it upon the Gladstone, although the case is an exceedingly close one.

If the case be not one of fault on the part of the Gladstone, it is, to my mind at least, a case of inscrutable fault, and the question remains to be considered what is the measure of liability in respect to collisions of this character. Cases of inscrutable fault are those wherein the court can see that a fault has been committed, but is unable, from the conflict of testimony, or otherwise, to locate it. Since the introduction of colored lights and fog signals these cases are of rare occurrence, and the measure of liability is still an unsettled question. At common law the plaintiff is bound to make out his case by a preponderance of testimony, and if the question of fault is left in doubt the defendant is entitled to a verdict, and the loss rests where it falls. This is also the rule in the English admiralty and vice-admiralty courts. *The Catherine of Dover*, 2 Hagg. 154; *The Maid of Auckland*, 6 Notes Cas. 240; *The Rockaway*, 2 Stew. Vice Adm. 129; *The City of London*, Swab. 300, 302. The laws of Oleron, of Wisbuy, and the Marine Ordinance of Louis XVI., made no distinction between cases of mutual fault, inscrutable fault, and inevitable accident, but divided the damages in every case where the collision was not the fault of one party only. This rule was probably adopted on account of the difficulty of determining to which vessel the fault was imputable. It has received the sanction of Emerigon, Valin, Pothier, Grotius, and most, if not all, of the continental authors upon the subject. It has been incorporated into the French Commercial Code, but in the German Code no allusion whatever is made to this class of cases. The question has never been definitely settled by the supreme court of the United States, although in the opinion of Mr. Justice SWAYNE, in the case of *The Grace Girdler*, 7 Wall. 196, there is a *dictum* to the effect that "where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen;" citing *The Catherine of Dover*, 2 Hagg. 154. The point does not seem to have been argued by counsel, and the case was disposed of as one of inevitable accident. The district courts are about equally divided in opinion *The Scioto*, Davies, 359; *The John Henry*, 3 Ware, 264; *The David Dows*, 16 FED. REP. 154. *Contra*, *The Kallisto*, 2 Hughes, 128; *The Breeze*, 6 Ben. 14; *The Summit*, 2 Curt. 150; *The Cherokee*, 15 FED. REP.

119; *The Amanda Powell*, 14 FED. REP. 486. Although I know of one reported case in which the rule was actually applied, (*Lucas* v. *The Thomas Swan*, Newb. 158,) it has apparently met with the approval of Mr. Justice STORY in his work upon Bailments, (sections 608, 609,) Chancellor KENT, (3 Kent, Comm. 231,) Judge CONKLING, (1 Conk. Adm. 378,) and most of the American elementary writers, though none of them pronounce a decided opinion of their own. Fland. Mar. Law. §§ 357, 358; Bouv. Law Dict. tit. "Collision." The question received, however, its most elaborate discussion by Judge HALL, of the Northern district of New York, in the case of *The Comet*, 9 Blatchf. 323 and the continental rule was adopted without hesitation.

These authorities are undoubtedly entitled to great respect, but it will be observed that in most of them there is no discussion of the question as an original proposition, and the rule is apparently adopted in deference to the continental doctrine. Conceding that the maritime law of continental Europe favors a division of damages, does it necessarily follow that the law as administered in this country should be the same? I think not. While the maritime Codes of the different countries have undoubtedly many features in common, there are probably no two exactly alike. A reference to the provisions upon the subject of collision will show that the German law differs in many particulars, notably in regard to the division of damages, from the French, and that again from the Dutch and Russian. Indeed, the ancient Codes and writers, cited by the learned judge in the case of *The Comet*, declared that in cases of inevitable accident the damages shall be divided; yet nothing is better settled in the maritime law of England and America, than that in such case the loss shall rest where it falls. Uniformity, at least, does not require us to adopt the rule of division in cases of inscrutable fault. In short, the maritime law is not international, except in a limited sense. It inevitably takes on a local coloring conformable to the habits and traditions of the different countries in which it is administered.

There are certain fundamental principles of justice adopted by the English and American courts which have become maxims of jurisprudence, and are equally binding in cases of common law, equity, and admiralty jurisdiction. Among these is that which prohibits a person being deprived of his liberty or property without being proved guilty of some fault or dereliction. Under the terms "due process of law" or "law of the land" provisions of similar import are inserted in all our constitutions. "By the law of the land," said Mr. Webster, in the *Dartmouth College Case*, 4 Wheat. 518, "is most clearly intended the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society." Every person is presumed innocent, even of fault, and is entitled to rest

upon that presumption until shown to be guilty; and the whole object of our judicial machinery is to determine by competent proofs who has committed a crime, perpetrated a wrong, or broken a contract. If charged with a crime, the accused must be proven guilty beyond a reasonable doubt. If damages are sought, the plaintiff, the *actor*, must always make out his case by at least a preponderance of evidence. If the evidence is clearly balanced, it is the duty of the court to dismiss the proceedings. I know of no reason why this same rule should not obtain in collision cases. The difficulty of proof is usually not greater; the injustice of a false step is no less. Indeed, they are peculiarly cases wherein fault should be established and located, since the loss, in a large majority of cases, falls upon persons guiltless of all personal blame. So strongly has this consideration appealed to the good sense of the mercantile world, that, by the laws of most civilized countries, the liability of an innocent owner is limited to the value of his interest in the offending ship and her freight. The doctrine of division in cases of mutual fault, though an infringement upon the common law, is not an exception, and hardly a qualification, of the rule requiring the libelant to establish his case. It is only a simplification of the doctrine of contributory negligence,—a measure of damages rather than a method of proof, and the only practicable mode of doing justice in cases of mutual fault. For these reasons my own opinion is decidedly in favor of the English rule adopted by Mr. Justice SWAYNE in *The Grace Girdler*.

The libel will be dismissed, but, as the case is one of very grave doubt, no costs will be awarded to either party.

THE SOUTHFIELD.[1]

(*District Court, E. D. New York.* January 29, 1884.)

DAMAGE TO CANAL-BOAT BY SUCTION AND SURGE CAUSED BY PASSING FERRY-BOAT—EVIDENCE.

In an action against the ferry-boat S., to recover damages for injuries caused by the suction and surge produced by the passing ferry-boat to a canal-boat moored in a proper place at a bulk-head at Staten island, *held*, that, upon the evidence, the injuries were caused by the ferry-boat's passing at an unnecessary rate of speed, and that the ferry-boat was liable for the damage sustained.

In Admiralty.

E. G. Davis, for libelant.

Macfarland, Reynolds & Lowrey, for claimants.

BENEDICT, J. This action is brought by the owners of the canal-boat Annie C. Haeger, to recover for injuries caused to that boat by

[1]Reported by R. D. & Wyllys Benedict, of the New York bar.

the suction and surge made by the ferry-boat Southfield, in passing the canal-boat on the morning of the eighth of May, 1882. The canal-boat was moored at the bulk-head, between Stapleton and the Wrecker's pier, on Staten island, and was there discharging a cargo of malt. She lay with her bow to the northward, with her stern some 25 feet from the line of the north side of the Wrecker's pier, and was made fast to the bulk-head by a four-inch bow-line, a four-inch stern-line, and a three-inch breast-line, all sound and strong. The Southfield was engaged in making regular trips upon the Staten island ferry, and on the trip in question went, according to the answer, from New York direct to Clifton, but according to her proof, from New York to Tompkinsville and then to Clifton, without stopping at Stapleton. As she passed the place where the libelant's boat was moored she created a suction and surge of the water which broke the stern-line and the breast-line of the canal-boat, carried the boat herself out some 25 feet from the bulk-head, and then cast her back with such violence as to throw down persons upon her deck, and do considerable injury to the boat. The place where the canal-boat was moored is a place in common use for discharging of boats, where boats like the libelant's can lie without injury, provided the ferry-boats use moderate speed when passing at low tide. Upon the evidence it is impossible to attribute the injury of the canal-boat to any neglect on her part, either in selecting an improper place to discharge or in omitting reasonable caution in respect to her mooring. It is also beyond dispute that the immediate cause of the injury was the suction and surge created by the Southfield as she passed down to Clifton on the 6 o'clock morning trip from New York, the tide being then low. The inquiry, therefore, is whether this suction and surge is attributable to any neglect of duty on the part of the Southfield. The law applicable in cases of this description is not in doubt. It is thus stated in the case of *The Morrisania*, 13 Blatchf. 512:

"The undoubted right of the steam-boat to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid."

By the law, it was the duty of the Southfield, in passing the libelant's boat, to avoid endangering that boat by her suction, provided that could be done by the exercise of reasonable care in respect to speed. The ferry-boat had the right to pass from Tompkinsville to Clifton at low as well as at high water, and she had the right to select such a course, and to move with such speed, between these points, as would enable her to make the landing at Clifton in safety. But in view of the situation of the canal-boat, she owed a duty to the libelant to pass the canal-boat at as low a rate of speed as was consistent with her safe navigation to the Clifton landing. This obligation is acknowledged in the answer, when it is averred that the ferry-boat passed without causing or creating any unnecessary or unusual disturbance in, or suction of, the water about the said bulk-head, and

employing only such speed as was actually necessary to enable her to make her said docks in safety. The answer also indicates, with sufficient accuracy, what speed was actually necessary to the safe navigation of the ferry-boat at this time and place, for it avers that the engine of the ferry-boat was slowed abreast of the Stapleton pier, and with the aid of wind and tide the ferry-boat floated past under moderate steerage way and careful handling.

The decision of the case turns, then, upon a question of fact, namely, whether the ferry-boat passed the libelant's boat as described in the answer, or at unnecessary speed, as charged in the libel. Upon this question the weight of the evidence is with the libelant. The libelant, who was on the deck of his boat, and watching the ferry-boat, testifies that the ferry-boat did not check her speed until after she passed the Wrecker's pier. He also testifies that his attention was called to the ferry-boat by his deck-hand. That he said to the deck-hand, "Is she going to check down?" and the deck-hand replied, "I guess not, by the looks." This conversation had at the time, with the ferry-boat in view and under attention, strongly confirms the master's statement that the ferry-boat did not check her speed until after she had passed his boat.

In opposition to this statement of the libelant, the claimants produce the testimony of the pilot and wheelsman of the ferry-boat. The testimony of the pilot, which, it will be observed, is not strictly in accordance with the statement of the answer, is this: "When we left Quarantine dock we hooked the boat up, and when I got within 200 feet of the Club House dock, I shut her off with one bell, and from there to Clifton I ran shut off." Elsewhere he says that he rang the one bell because he could not manage the boat at full speed. But he makes no claim to have navigated the ferry-boat with any reference to the effect of her navigation upon the boats lying at the bulkhead, nor did he know of the damage done until his return from New York on the next trip, and his testimony, taken together, is calculated to raise a doubt as to his having any distinct recollection of the place where he slowed his boat on this particular trip. Certainly, it is not sufficient to outweigh the testimony of the libelant, whose attention was called to the speed of the ferry-boot by the danger of his boat, and whose statement is confirmed by the conversation had at the time. No support to the pilot's testimony is derived from the testimony of the wheelsman, who manifestly has little, if any, recollection respecting this particular trip. Moreover, the libelant's testimony in regard to the speed of the ferry-boat is in harmony with the result, while that of the ferry-boat pilot is not. That the passing of the ferry-boat was followed by an unusual suction is proved, and not denied. It is also shown by the movements of the canal-boat. This unusual suction is accounted for by unnecessary speed on the part of the ferry-boat, and the evidence discloses nothing else to which it can be attributed. Probability seems, also, on the side of the libelant's state-

ment that the ferry-boat passed him without checking. The ferry-boat omitted the Stapleton landing, and this indicates that the boat was short of time, as, according to the superintendent, she some times was on the morning trip from New York. Being short of time, it is by no means improbable that she ran longer than usual before checking her speed. My conclusion, therefore, is that the damage sued for was caused by a neglect of duty on the part of the ferry-boat in this, that she passed the libelant's boat at an unnecessary rate of speed.

A decree must be entered in favor of the libelant, with an order of reference to ascertain the amount.

THE CHAS. E. SOPER.[1]

THE OSSEO.[1]

(District Court, E. D. New York. November 16, 1883.)

1. COLLISION—STEAM-BOAT AND TUG—CROSSING COURSES—FAULT IN NOT HOLDING COURSE—FAULTY LOOKOUT.

A collision occurred between the tug S. and the steam-boat O., in the East river, in the day-time, in clear weather, under the following circumstances: The tide was flood. The O. had left Fulton market pier, where she had lain head down the river, and rounded out, bound up the river. The S. was coming down near midstream. Abreast, or nearly so, and between the S. and the New York shore, was a tug towing a schooner on a hawser down stream. Ahead of the S., coming up, was a tug with two barges along-side, and between this tow and the New York shore was another tug and schooner. The S. could not pass to port of the barges, owing to the closing up of the other vessels, and starboarded, and had just cleared the barges when she struck the O. on the port side. *Held*, that the S. was not in fault for sheering across the bows of the barges, nor for not stopping and backing when she found she could not pass the barges to port; nor was the collision caused by the S. being within 20 yards of the vessels going down, in violation of a state statute; that the omission of the S. to answer the O.'s whistle caused no change in the movements of either, and in no way conduced to the collision; that after the S. starboarded to pass the barges, the S. and the O. were on courses crossing, and the O. was in fault for straightening up the river and not holding her course, and for not seeing the S. as soon as she might have done; that the S. was also in fault for not keeping a good lookout, and seeing the O. before the S. sheered, it being highly probable that if the O. had been then seen the S. would have sheered more sharply, and removed from the O. the temptation to cross the S.'s bows. Both vessels being responsible for the collision, the damages must be apportioned.

2. SAME—CLAIM FOR SALVAGE BY VESSEL IN FAULT.

A claim for salvage, made by the S. for towing the O. to a place of safety, after she was disabled by the collision, was rejected because the collision that made the service necessary was in part caused by the fault of the S. herself.

In Admiralty.

Scudder & Carter, for the Osseo.

Edwin G. Davis, for the Soper.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

BENEDICT, J. These are cross actions arising out of a collision between the tug Charles E. Soper and the steam-boat Osseo, that occurred nearly under the Brooklyn bridge, in the East river, on the twenty-ninth day of May, 1882. The tide was flood. The Osseo had left her berth at the Fulton market pier, where she had lain head down the river, and was bound on her regular trip up the river. It was day-time, and the weather was clear. As the Osseo rounded out from her berth, the tug Soper was coming down the river, near the middle of the stream. Abreast, or nearly abreast, of the Soper, and between her and the New York shore, was a tug towing a three-masted schooner on a hawser, and also bound down the river. Ahead of the Soper, and coming up the river, was a tug with two lumber-barges along-side, and between this tug and the New York shore was another tug with a schooner in tow. As the Soper approached the lumber-barges, her intention was to pass to port of that tow, but this was rendered impossible by the closing up of the other vessels, whereupon she hove her wheel a-starboard and passed outside of the lumber-barges. When she had just cleared them she came in collision with the Osseo, striking her heavily in the port paddle-box. At the time of the blow the Soper was backing her engine and the Osseo was moving rapidly ahead. The libel of the Osseo charges that the collision was occasioned by the fault of the Soper, in that she did not keep out of the way of the Osseo, and in that she had no look-out, and did not see the Osseo in time to avoid her, and did not answer her whistle. The theory of the Osseo, put forth in her libel, is that she was about abreast of the lumber-barges and going in the same direction as they were, but faster, when the Soper changed her course to cross the bows of the lumber-barges, and, although the Osseo blew one whistle and ported, the Soper, without answering the whistle, kept on and ran into the Osseo. The answer of the Soper states that, as the Soper crossed the bows of the lumber-boats, the Osseo swung round the stern of the schooner that was towing up the river, and, when pointed to the starboard quarter of the starboard lumber-boat, attempted to cross the bows of the Soper on that course by putting on full speed, although she had half the river clear upon the Brooklyn side, and there was nothing to prevent her avoiding the Soper by stopping, or by going further towards the Brooklyn shore, instead of attempting to pass close to the lumber-boats, as she did.

Upon the argument it was earnestly contended in behalf of the Osseo that the Soper was in fault for sheering across the bows of the lumber-boats when she did. No such fault is charged in her libel, nor was the sheer a fault. That course was forced upon the Soper by the other vessels close to her, and was a proper course to pursue under the circumstances. It was also contended that the Soper was in fault for not stopping and backing when she found that she could not pass the lumber-boats to port. This fault is not charged in the libel, nor proved by the evidence. It was also contended that the

Soper was running in violation of the state law, because she was less than 20 yards from the tug and three-masted schooner towing down. The libel charges no such fault; nor was the collision caused by the Soper being within 20 yards of the vessels going in the same direction.

In regard to the faults that are charged in the libel it is my opinion that the omission of the Soper to answer the whistle of the Osseo caused no change in the movements of either boat, and in no way conduced to the collision. It is also my opinion that the Soper cannot be held in fault for not avoiding the Osseo. There was no danger of collision between the Soper and Osseo before the Soper sheered to cross the bows of the lumber-boats. The clear weight of evidence contradicts the statement of the Osseo's libel, that, when the Soper sheered, the Osseo was heading up the river abreast of the lumber barges, and shows that at that time the Osseo was astern of the lumber boats, heading towards Brooklyn. After the Soper altered her course, the Osseo straightened up in the river, and attempted to cross ahead of the Soper. If it be true that when the Soper altered her course she assumed the obligation to avoid the Osseo, because the vessels were then on courses crossing, and she had the Osseo on her starboard hand, by the same rule the Osseo became charged with the obligation to hold her course. This she did not do. On the contrary, she straightened up the river, and, as the libel admits, came parallel with the lumber barges. This fault of the Osseo plainly conduced to the collision, and is sufficient to render her responsible for the accident that ensued.

But the Soper is also in fault for not keeping a good lookout, as charged in the libel. The testimony shows that the Osseo was not seen by the Soper until after the Soper sheered and her bows had crossed the bows of the lumber-boats. There was nothing to prevent the Soper from seeing the Osseo; and before making the change of course that she did, it was her duty to observe the position of all vessels near her. And it is highly probable that if the Osseo had been seen by the Soper when the necessity for the sheer arose, the Soper would have been sheered more sharply than she was, and thereby all temptation to attempt to cross her bows removed from the Osseo. For this fault the Soper must be held to be also responsible for the accident that ensued. A similar fault is proved against the Osseo, for she did not see the Soper as soon as she might have done. Had the position of the Soper, when she altered her course, been observed by the Osseo, it is probable that the navigation of the Osseo would have been different from what it was. My conclusion, therefore, is that both vessels are responsible for the collision in question, and that the damages resulting must be apportioned between them.

In addition to the claim of damages made by the Soper, her cross-libel contains a claim for salvage services in towing the the Osseo to a place of safety after she was disabled by the collision in question,

and also a claim for compensation for towing the Osseo for several days after the collision, under a contract made in respect thereto. No objection is made to the joinder of these demands in an action like this, and they will therefore be disposed of on their merits. The claim for salvage must be rejected because the collision that made the service necessary was in part caused by the fault of the Soper herself.

As to the demand for towage services subsequently performed under a contract there is really no dispute between the parties. This demand is therefore allowed. If there be any controversy as to its amount, a reference may be had.

THE E. LUCKENBACK.[1]

District Court, E. D. New York. January 19, 1884.)

STENOGRAPHER'S FEES ON TRIAL—WHEN TAXED.

A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's fees to be taxed by the successful party.

Appeal from Taxation of Costs.

Goodrich, Deady & Platt, for the motion.

Butler, Stillman & Hubbard, opposed.

BENEDICT, J. The judge's notes of the trial of this cause contain the memorandum, "stenographer takes notes." This memorandum indicates a direction given at the time that the testimony given in court be taken down by a stenographer. A direction to that effect made in open court is sufficient. It was unnecessary to enter a formal order. The sum paid stenographer was therefore for services rendered in pursuance of a direction of the court, and, like the expenses of printing, (*Dennis* v. *Eddy,* 12 Blatchf. 195,) is taxable by the successful party.

[1]Reported by R. D. & Wyllys Benedict, of the New York bar.

WHITE *v.* TWO HUNDRED AND NINETY-TWO THOUSAND THREE HUNDRED DOLLARS, Proceeds of the Steam-Boats Americus, etc.[1]

(*District Court, E. D. New York.* December 28, 1883.)

1. SHIP'S HUSBAND—LIEN—PROCEEDS OF SALE OF VESSEL.
   There is no lien on moneys, the proceeds of the sale of steam-boats, in favor of one who acted in the capacity of ship's husband, for sums paid by him in satisfaction of demands claimed to be at the time subsisting maritime liens on the vessels, such proceeds not being in his hands.
2. SAME—EXCEPTION TO LIBEL.
   Exception to a libel claiming such a lien on proceeds of certain vessels was sustained and the libel dismissed.

In Admiralty.

D. & T. McMahon, for libelant.

Blair, Snow & Rudd, (*R. D. Benedict*, of counsel,) for respondent.

BENEDICT, J. This case comes before the court upon exception to the libel, upon the ground, among others, that the libel fails to state facts, showing the libelant, R. Cornell White, to have a lien upon the moneys proceeded against. These moneys, as the libel shows, are the proceeds of certain steam-boats, of which vessels the libelant was ship's husband. The claim sought to be enforced against these moneys consists of various sums paid from time to time by the libelant, while acting in the capacity of ship's husband, in satisfaction of certain demands, which were at the time, as the libelant claims, subsisting maritime liens upon the respective vessels. Upon this statement the libelant had no lien upon the vessels, and has none upon the proceeds, not being in his hands. The authorities are clear to the effect that a ship's husband has no lien upon the ship for sums paid by him in satisfaction of the ship's bills. *The Larch*, 2 Curt. C. C. 427; *The Sarah J. Weed*, 2 Low. 556; *The J. C. Williams*, 15 FED. REP. 558. These cases are decisive of the present case. If authority were wanting, my opinion would still be adverse to the libelant. The libelant cannot maintain this action if he could not maintain an action against the vessels themselves, and there are, in my opinion, strong considerations which should forbid a ship's husband to acquire, as against his principals, a lien upon their vessel for payments which he is employed to make for them, and which he makes for a compensation paid him.

This exception to the libel is therefore well taken, and the libel must be dismissed, with costs.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

MOSHER v. ST. LOUIS, I. M. & S. RY. CO.[1]

(Circuit Court, E. D. Missouri. March 24, 1884.)

REMOVAL OF CASES FROM STATE COURTS TO THE CIRCUIT COURT OF THE UNITED STATES.

Either party may remove into a circuit court of the United States any case where the controversy is between citizens of different states.

Motion to remand a case removed to this court from the circuit court of Jefferson county, Missouri, at the instance of the defendant who is a resident of Missouri.

William M. Eccles and *E. P. Johnson*, for plaintiff.

Bennett Pike, for defendant.

TREAT, J. The court is referred to sections of the Revised Statutes which embraced all statutes prior to December 1, 1873. Since then the act of March 3, 1875, has enlarged the jurisdiction of the federal courts, whereby either party may remove into a circuit court of the United States any case where the controversy is between citizens of different states.

The motion to remand is overruled.

ALBRIGHT and others v. OYSTER and others.[1]

(Circuit Court, E. D. Missouri. January 21, 1884.)

EQUITY—RESULTING TRUSTS—PARTIES.

A., B., C., and D. had an interest in certain lands. D. died, and E. qualified as his executrix, and in that capacity agreed with A., B., and C. that the land should be divided, and C.'s share conveyed to X. in trust for C.'s children. The division was made, and C.'s share was conveyed to X. under an oral agreement that he would hold it in trust for said children; but the deed was absolute on its face, and recited a consideration, though none was paid by X. X. afterwards, without consideration, made an absolute conveyance of said property to A. A. then brought suit in ejectment against C., who held possession of said property for his children, and recovered judgment. In a suit brought by C. and several of his children, in equity, to have said judgment at law restrained, and for other relief, *held:*

(1) That said conveyance to X., under said oral agreement, had caused a resulting trust to arise in favor of C.'s children, and that X. held subject thereto.

(2) That A. received the legal title to said property from X., subject to said trust.

(3) That E., as executrix of D., and B. were both proper parties.

In Equity. Demurrers and plea to the bill, and exceptions to answer.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The facts stated in the bill are, in substance, as follows:

Abraham Oyster died in 1882, testate and seized of certain lands situated in Missouri. He left four children, Margaret, George, David K., and Simon Oyster. Simon died, however, before his father's property was distributed. He left a will, of which he appointed his wife, Margaretta, executrix. After his death his wife, as his executrix, agreed with the three surviving children of Abraham Oyster to make a different division of Abraham Oyster's lands from the one provided for in his will. It was agreed between them that said lands should be sold by D. K. Oyster, who was his father's administrator, at public sale, and that certain specified tracts, and such other tracts as it seemed advisable to keep, should be bid in by the parties to the agreement, and that the lands so bid in should be appraised and divided between them without any payment of the amounts bid. The plan was carried out, and the lands in controversy fell to D. K. Oyster, but, pursuant to said agreement, were conveyed by him, as his father's administrator, to Simon K. Oyster, by a deed, absolute on its face, and which recited a consideration. No consideration was paid by said Simon K., however, and the conveyance was made under an oral agreement on his part to hold the property in trust for D. K. Oyster's children. Simon K. subsequently became very sick, and, while he was expecting to die, George Oyster persuaded him that it might create trouble if he died with said trust estate in his possession, and that he had better deed the land to him. And Simon K. accordingly executed a deed, reciting a consideration, and absolute on its face, conveying said lands to George Oyster. No consideration was in fact paid. Ever since the property in question was bought in and conveyed to Simon K. Oyster in the manner described, David K. has held possession of it for his children, who are minors. After getting the legal title into his hands, George Oyster brought suit in ejectment against David K. to get possession of said property, with intent to defraud said children out of it, and asked, also, for rents and profits. David K., having no legal defense, entered into a stipulation with George to let judgment go in consideration of an agreement on George's part that no execution should issue until May, 1884, in order that complainants might have time to file their bill here, and judgment went accordingly.

The prayer is that George Oyster be restrained from issuing an execution on the judgment in the ejectment suit, and from commencing or prosecuting any other proceeding at law against the complainants for recovering possession of said lands; for a decree to convey to Mollie N. Albright, William E. Oyster, and Iola E. Oyster, (children of David K. Oyster,) all the right, title, and interest in said lands which said George Oyster acquired from Simon K. Oyster, and for a discovery.

Margaretta Oyster, executrix of Simon, and Margaret Oyster, who are joined as parties defendant, demurred to the bill on the ground that it does not show that they have any interest, or claim any interest, in the lands mentioned in the bill, or have ever denied complainants' right to the relief demanded, and also because the bill does not state any case entitling complainants to any discovery or relief against her.

Simon K. Oyster filed a plea raising the question of whether or not the Missouri statute of frauds should be held to operate to prevent the granting of the relief asked in the bill. The section relied on is that "all declarations or creations of trust or confidence, of any lands,

tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void." That section is followed by another, however, (section 2512, Rev. St.,) providing that "resulting trusts shall be of like force as the same would have been if the act had not been made."

George Oyster filed an answer in which he set up the statute of frauds, and alleged, among other things, that David K. Oyster, as administrator of his father, was indebted, upon the basis of the contract upon which the division of Abraham's real estate was made, in the sum of $4,975 to him, and in the sum of $5,230 to Margaretta Oyster, at the time he made the deed to Simon K. Oyster, and still remains indebted to them for said sums, with interest, although payment had been frequently requested; and that the sureties on the bond given by David K., as administrator, as well as David K. himself, are insolvent, so that the only resource left his said creditors to get payment of what remains unpaid of the legacies is the lands in dispute, or the lien thereon for the unpaid purchase money.

The complainants excepted both to that part of the answer setting up the statute of frauds and the parts setting up the indebtedness of David K., as administrator, and his insolvency and the insolvency of his sureties.

George H. Shields and *James Carr*, for complainants.

Dryden & Dryden, for defendants.

TREAT, J. The demurrers to the bill are overruled. The demurrants are *proper*, and in certain aspects of the case may be *necessary* parties. Under the theory of the bill there was ample consideration for the conveyance to Simon K. Oyster, in trust, moving from David for his children. The averments are to the effect that the consideration named in the deed to Simon K. was merely for the purpose of equalizing the distribution of the estate, as had been agreed upon. If those averments are true, then Simon K. took the title clothed with the trust for David's children. It is admitted that George occupies no better position than Simon K., his grantor. Therefore the exceptions to the plea are sustained; also, for the same reasons, the first exception to the answer, to-wit, so much as sets up the statute of frauds. The other exception to the answer is overruled, for, if defendant's theory be correct, the matters involved in the second exception may become material.

CONTROL OF COURTS OF EQUITY OVER JUDGMENTS AT LAW—GENERAL PRINCIPLES. The leading American case on this subject is *Marine Ins. Co. of Alexandria* v. *Hodgson*,[1] in which the opinion of the court was delivered by Chief Justice MARSHALL. The statement made by him in that case, of the rules governing the action of courts of equity where relief is asked against judgments at law, is as follows: "Without attempting to draw any precise

[1] 7 Cranch, 332.

line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may, with equal safety, be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law."

In addition to the grounds for relief referred to by Chief Justice MARSHALL mistake and surprise may be mentioned.

DEFENSES AVAILABLE AT LAW. "Where," as Chancellor KENT said in deciding the case of *Simpson* v. *Hart*,[1] "courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the court of law in a similar case could re-examine a decree of a court of equity." When a defense is once fairly passed upon, the decision is final, no matter how inequitable it may appear.[2] And where a defense sought to be set up in equity, as a ground for relief against a judgment at law, might have been set up at law, but was not because of a lack of diligence on the complainant's part, equity will not interfere. The rule is inflexible.[3] So, even where a judgment has been obtained by fraud, accident, or mistake, if there is any adequate remedy at law, as by motion for a new trial, or appeal, equity requires the injured party to avail himself of that remedy, and if he fails to do so without good excuse, will grant no relief.[4] The fact that a defense is equitable is no excuse for not setting it up at law, if available at law under the Code practice.[5] Ignorance of a defense constitutes no ground for the interference of equity if there was negligence in remaining ignorant. Defendants are bound to use diligence in preparing themselves for trial. If they do not, they are left to bear the consequences.[6] Thus, if a defendant cannot appear and make his defense in person, it is his duty to employ an

[1] 1 Johns. Ch. 97.

[2] Bateman v. Willoe, 1 Sch. & Lef. (Eng.) 204; Emerson v. Udall, 13 Vt. 477; Agard v. Valencia, 39 Cal. 292; Duncan v. Lyons, 3 Johns. Ch. 356; Ry. Co. v. Neal, 1 Wood, 353; Hendrickson v. Hinckly, 58 U. S. 443; Truly v. Wanzer, 46 U. S. 141; Foster v. State Bank, 17 Ala. 672; Brush v. McCanby, 7 Gill, 189; Snyder v. Vannoy, 1 Or. 344; Yancey v. Downer, 5 Litt. 8; Sumner v. Whitley, 1 Mo. 708; Matson v. Field, 10 Mo. 100; Ritter v. Democratic Press Co. 68 Mo. 458.

[3] Foster v. Wood, 6 Johns. Ch. 86; Emerson v. Udall, 13 Vt. 477; Smith v. McIver, 22 U. S. 532; Lester v. Hoskins, 26 Ark. 63; Higgins v. Bullock, 73 Ill. 205; Smith v. Powell, 50 Ill. 21; Richmond Enquirer Co. v. Robinson, 24 Grat. 548; Kelly v. Hurt, 74 Mo. 561; Katz v. Moore, 13 Md. 566; Collier v. Easton, 2 Mo. 146; Jackson v. Patrick, 10 S. C. 207; Slack v. Wood, 9 Grat. 40; Marsh's Adm'r v. Bast, 41 Mo. 493; Prewitt v. Perry, 6 Tex. 260; Lyday v. Douple, 13 Md. 566; Selbina Hotel Ass'n v. Parker, 58 Mo. 327; Ewing v. Nickle, 45 Md. 413; Gaines v. Kennedy, 53 Miss. 103; Johnson v. Lyon, 14 Iowa, 431; Mills v. Van Voorhis, 10 Abb. Pr. 10; Coffee v. Ball, 49 Tex. 16; Andrews v. Fenter, 1 Ark. 186; Cummins v. Bentley, 5 Ark. 9; Bellany v. Woodson, 4 Ga. 175; Robuck v. Harkins, 38 Ga. 174; Norris v. Hume, 2 Leigh, (Va.) 334; Green v. Thomas, 17 Cal. 86; Marsh v. Edgerton, 1 Chand. (Wis.) 198; Tyler v. Hamersley, 44 Conn. 419; Phelps v. Peabody, 7 Cal. 50.

[4] Huston v. Ditto, 20 Md. 305; Bellows v. Stone, 14 N. H. 203; Reed's Adm'r v. Hansard, 37 Mo. 199; Nat. Bank v. Burnet Manuf'g Co. 33 N. J. 486; City of Muscatine v. M. & M. Ry. Co. 1 Dill. 536; Hudson v. Kline, 9 Grat. 379; Walker v. Robbins, 55 U. S. 584.

[5] Kelly v. Hurt, 74 Mo. 561; Winfield v. Bacon, 24 Barb. 154; Savage v. Allen, 54 N. Y. 458.

[6] Skinner v. Deming, 2 Ind. 558; McCown v. Macklin's Ex'r, 7 Bush, 308; Brown v. Swann, 35 U. S. 497; Thompson v. Berry, 3 Johns. Ch. 395; Tutt v. Ferguson, 13 Kan. 45; McCollum v. Prewitt, 37 Ala. 573; Garrett v. Lynch's Adm'r, 45 Ala. 204; Marine Ins. Co. v. Hodgson, 11 U. S. 333.

agent or attorney to act for him if the defense is of such a nature that it can be made in his absence. If it cannot, he should apply for a continuance. Where he fails to do either, and judgment goes against him by default, equity will not enjoin its execution.[1] The negligence of attorneys is considered the negligence of their clients, and equity will not interefere on behalf of a complainant whose attorney has negligently failed to make a defense to a suit at law and permitted judgment to go by default,[2] or has neglected to assign error on appeal,[3] or fraudulently caused his client to lose the benefit of an appeal,[4] even where the attorney is insolvent. But where the defendant has both a legal defense and an equitable defense, not available at law, a failure to use diligence in making his legal defense will not, it seems, prevent a court of equity from granting an injunction upon proof of the equitable defense, in case a judgment is rendered against him.[5]

DEFENSES NOT AVAILABLE AT LAW—NEWLY-DISCOVERED EVIDENCE. Equity will always restrain the execution of a judgment where it would be contrary to equity and good conscience to allow it to be executed, and where the facts which render it thus inequitable were either not available at law,[6] or were not discovered by the complainant, notwithstanding due diligence, until it was too late to set them up there.[7] In *Wynne* v. *Newman's Adm'r*, 75 Va. 816, BURKE, J., says that the circumstances under which equity will grant a new trial because of newly-discovered evidence "may be summed up thus: (1) The evidence must have been discovered since the trial. (2) It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral." The general rule governing this whole subject is that whenever a complainant can show a good defense which he has failed, without fault or negligence, to avail himself of at law, he may be relieved in chancery.[8]

WHERE THERE HAS BEEN NO SERVICE OF PROCESS, OR A DEFECTIVE SERVICE. Where an unjust judgment is obtained against a defendant over whom the court rendering the judgment has no jurisdiction,[9] or who has never been served with process, or received notice of the institution or pendency of the suit against him,[10] the execution will be enjoined, unless relief

[1] Duncan v. Gibson, 45 Mo. 352; George v. Tutt, 36 Mo. 141; Powell v. Cyfers, 1 Heisk. 526; McCollum v. Prewett, 37 Ala. 573; Crim v. Handley, 94 U. S. 652.

[2] Rogers v. Parker, 1 Hughes, 148; Kern v. Strausberger, 7 Ill. 413; Bowman v. Field, 9 Mo. App. 576; Winn v. Wilson, 1 Hemp. 698; Crim v. Handley, 94 U. S. 652.

[3] Miller v. Bernecker, 46 Mo. 194; Dinet v. Eigenmann, 96 Ill. 39.

[4] Dobbs v. St. Jo. F. & M. Ins. Co. 72 Mo. 189.

[5] Cornelius v. Thomas, 1 Tenn. Ch. 283; Winchester v. Gleaves, 3 Hay. 213.

[6] Clute v. Potter, 37 Barb. 199; Marine Ins. Co. v. Hodgson, 7 Cranch, 333; Foster v. Wood, 6 Johns. Ch. 86; Gaines v. Hale, 26 Ark. 168; Key v. Knott, 9 Gill & J. 342; Pollock v. Gilbert, 16 Ga. 398; Vather v. Zane, 6 Grat. 246; Rogers v. Cress, 3 Pin. (Wis.) 36; Dunham v. Downer, 31 Vt. 249; Weaver v. Poyer, 79 Ill. 417; Bank v. Ruse, 27 Ga. 391; Odell v. Reed, 54 Ga. 142.

[7] Iglehart v. Lee, 4 Md. Ch. 514; Foote v. Silsby, 1 Blatchf. 545; Taylor v. Sutton, 15 Ga. 103; Pearce v. Chastain, 3 Ga. 226; Mills v. Van Voorhis, 10 Abb. Pr. 10; Millick v. First Nat. Bank, 52 Iowa, 94.

[8] Sanders v. Jennings, 2 J. J. Marsh. 513; Barr v. Deniston, 19 N. H. 170; Watson v. Palmer, 5 Ark. 501; Bank v. Reese, 27 Ga. 391; Humphreys v. Legett, 50 U. S. 297; Legett v. Humphreys, 62 U. S. 66; Burem v. Foster, 6 Heisk. 333; Rice v. Bank, 7 Hum. 39; Clifton v. Livor, 24 Ga. 91.

[9] Grass v. Hess, 37 Ind. 193.

[10] Martin v. Parsons, 49 Cal. 94; Weaver v. Poyer, 79 Ill. 417; Wilday v. McConnel, 63 Ill. 278; Southern Exp. Co. v. Craft, 43 Miss. 508; Brooks v. Harrison, 2 Ala. 209; Dunklin v. Wilson, 64 Ala. 162; Crafts v. Dexter, 8 Ala. 767

can be obtained at law.[1] But no relief will be granted where the complainant has been properly served with process, and has failed to make a defense because he thought the suit was against another person.[2]

WHERE AN ATTEMPT IS MADE TO LEVY ON PROPERTY NOT BELONGING TO THE DEFENDANT. Equity will not permit a judgment to be executed by levying on property not belonging to the party against whom it was rendered;[3] and where a person is in quiet possession of real estate as owner, it will restrain others by injunction from dispossessing him by process growing out of litigation to which he was not a party.[4]

FRAUD, ACCIDENT, SURPRISE, AND MISTAKE. Equity will never permit an unjust judgment, obtained, without negligence on the defendant's part, by surprise, fraud, accident, or mistake, to be executed where there is no legal remedy.[5] Thus, where the plaintiff caused a false return to be made by the person deputed to serve the summons on the defendant, when he knew there had been no service, and recovered judgment by default, the judgment was annulled. So, relief was granted where the plaintiff had induced the defendants to withdraw an equitable plea they had filed in the case, by a promise that if such plea were withdrawn he would do the equity set up in the plea, and would enter into writing to that effect, but had failed to comply with his promise and taken judgment.[6] So, where a judgment is taken by default in violation of an agreement of compromise by which a defense is prevented, its execution will be restrained.[7] So, where the defendant is induced by false representations of the plaintiff[8] or his attorney[9] to believe that no further proceedings will be taken, and makes no defense, a judgment by default will not be permitted to be executed. So, where the defendant allows judgment to go against him in consideration of an agreement on the plaintiff's part that no money need be paid on it except upon the happening of a certain event, the plaintiff will not be permitted to exact payment in violation of the agreement.[10] So, where defendant's counsel is shown to have acted for both parties, and advised the defendant to confess judgment.[11] So, where a sheriff, whom the complainant had agreed to save harmless, fraudulently, in collusion with the plaintiff, allowed judgment to go against him when he had a good defense.[12] But he who comes into equity must do equity. If a party asks for relief against a judgment for more than is due, he must offer to pay what he admits is due.[13]

In *Cannon* v. *Reynolds*,[14] where a mistake was made in the defendant's favor in the statement of the account sued on, and the defendant, knowing of the mistake, allowed judgment to go by default, the judgment was set aside.

In another case, in which an appeal had been dismissed, because of a clerical mistake in making out the appeal bond, the judgment was enjoined.

In the case of *Bell* v. *Cunningham*[15] the defendants were non-resident foreigners. Their counsel went to trial upon the declaration as it stood, which was not supportable. New counts were filed by leave of court, which cov-

[1] Nat. Bank v. Burnet Manuf'g Co. 3 N. J. 486.
[2] Higgins v. Bullock, 73 Ill. 205.
[3] Givens v. Tidmore, 8 Ala. 745.
[4] Goodnough v. Sheppard, 28 Ill. 81; Stewart v. Pace, 30 Ark. 594.
[5] Carrington v. Holabird, 17 Conn. 530; Wingate v. Haywood, 40 N. H. 437; Currier v. Esty, 110 Mass. 536; Norris v. Hume, 2 Leigh, (Va.) 334; Brooks v. Harrison, 2 Ala. 209; Rogers v. Cross, 3 Pin. (Wis.) 36; Burem v. Foster, 6 Heisk. 333.
[6] Markham v. Angier, 57 Ga. 42.
[7] Nealis' Adm'r v. Dicks. 72 Ind. 374; Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556; Rogers v. Gwinn, 21 Iowa, 58; Hibbard v. Eastman, 47 N. H. 507; Kent v. Ricards, 3 Md. Ch. 392.
[8] Dobson v. Pearce, 12 N. Y, 156; Williams v. Fowler, 2 J. J. Marsh. 405.
[9] Pearce v. Olney, 20 Conn. 544; Holland v. Trotter, 22 Grat. 136.
[10] Moore v. Barclay, 16 Ala. 158.
[11] Molyneux v. Huey, 81 N. C. 107.
[12] Iglehart v. Lee, 4 Md. Ch. 514.
[13] Campbell v. Morrison, 7 Paige, 157.
[14] 5 El. & Bl. 300.
[15] 1 Sumn. 89.

ered a claim not before embraced in the declaration. The defendants had no notice of the change and no means of instructing their counsel on any point of defense. The trial immediately proceeded, and a verdict obtained which would not have been recovered if the defendants had had notice of the claim. Judge STORY delivered the opinion of the court, and held that an injunction should be granted *pro tanto* to the judgment, on the ground of surprise.

EQUITABLE REMEDIES—NEW TRIALS. In relieving against an unjust judgment recovered in a court of law, equity does not act upon the court of law, but upon the party who has recovered the judgment,—sometimes by simply enjoining him from attempting to collect it; sometimes by forcing him to agree to a new trial. The new trial should never be granted in terms.[1] In deciding the case of *C. & F. Ry. Co.* v. *Titus*, Chancellor RUNYON laid down the law as follows: "Originally chancery compelled new trials at law by perpetually enjoining the plaintiff in the judgment from enforcing it, unless he would consent to a new trial; the injunction being the means by which the plaintiff was constrained to do justice, and the practice of thus compelling new trials at law still exists. This court can, in any given case, itself give effect to the testimony, with respect to which a new trial may be ordered, and determine what difference it ought to have made in the result of the trial at law, if it had been introduced there. In such cases there will, in effect, be a new trial in this court, instead of at law. It is quite within the power of this court to order an issue at law where the facts are contradictory."[2]

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[1] Story, Eq. Jur. § 1571 et seq.; Yancey v. Downer, 5 Litt. 8; Bush v. Craig, 4 Bibb, 168; Floyd v. Jayne, 6 Johns. Ch. 479; Wynne v. Newman's Adm'r, 75 Va. 811. Contra, McConnell's Ex'r, 63 Ill. 280; Nealis' Adm'r v. Dicks, 72 Ind. 374; Collier v. Easton, 2 Mo. 146; Molyneux v. Huey, 81 N. C. 106; Carrington v. Holabird, 19 Conn. 84.

[2] Key v. Knot, 9 Gill & J. 342; Foote v. Silsby, 1 Blatchf. 545; Turney's Ex'r v. Young, 2 Tenn. 266.

NICHOLS *v.* JONES and another.[1]

(Circuit Court, N. D. Alabama. February, 1884.)

1. EQUITY JURISDICTION.
   Where the case shows that a multiplicity of suits at law will be necessary for the complainant to obtain at law an adequate remedy, a bill in equity will be maintained.
2. INJUNCTION.
   Injunctions are granted to prevent trespasses as well as to stay waste where the mischief would be irreparable and to prevent a multiplicity of suits.

In Equity. On motion for injunction.

The complainant's bill shows that on the seventh of May, 1873, Henry Clews being the owner and in possession of certain mineral lands in Calhoun county, in this state, sold and conveyed for value the same to John M. Guiteau, who afterwards, on the sixth of June, 1876, sold and conveyed to John P. McEwan, and that the latter, with

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

his wife, on the sixth of March, 1880, by proper deed, sold and conveyed the same to complainant, and that all of the said conveyances were properly acknowledged and recorded in the county of Calhoun prior to the year 1880, except the one last mentioned. Further, that the defendants claim title to the same premises by virtue of an attachment suit instituted in the circuit court of Calhoun county early in the year 1880, by defendant Jones against said Henry Clews, a citizen of New York, in which suit said lands were attached, a judgment recovered, and the lands sold by the sheriff of Calhoun county under execution to said Jones on May 31, 1880. Further, that at a former term of this court complainant had instituted a suit for the possession of said lands against one Ashley, a tenant of defendant Jones in possession of the same, and recovered a judgment, which was executed by the marshal, who, under a writ of *habere facias possessionem*, placed complainant in possession, and that complainant took possession and held the same by his agent and tenant, and that thereafter the defendant, with fraud and illegal influence over the said tenant, dispossessed complainant, possessed himself, and has ever since detained and now holds the same. Further, that complainant has instituted an action for damages against said Jones in the circuit court of Calhoun county, because of his said trespass, which action is now pending. The bill also alleges that the lands are valuable only as mineral lands; that defendants are mining and removing ore, and thereby inflicting irreparable damage; that defendant Jones is insolvent, and defendant Morgan has little, if any, means; and that only by a multiplicity of suits at law can complainant, if at all, protect his rights.

The defendants, by answer not sworn to, deny that complainant is owner of the lands described, and allege fraud and collusion in the conveyances from Clews to complainant's grantor, and the fraud and collusion of complainant and Ashley in obtaining the judgment in this court for possession, which judgment has been set aside and defendants admitted as parties, and that the suit is still pending; and they deny all fraud and illegal influence in obtaining possession from complainant's tenant as set forth in the bill; and all other matters charged in the bill are admitted, the defendants particularly claiming *bona fide* title under the attachment proceedings set forth in bill and answer.

An admission is now filed in the record that when the bill in this case was filed an action of ejectment by the complainant against the defendants for the land in controversy was pending in this court; that on November 5, 1883, the complainant dismissed his said action of ejectment, and that there is now no action of ejectment pending by the complainant for the land in controversy. An inspection of the record shows that the said action of ejectment was dismissed under an order of court rendered at last term compelling the complainant to elect between his action of ejectment and this equity action. At this time a motion, after due notice, is made for an injunction to restrain,

pendente lite, the defendants from wasting the lands in controversy by removing the mineral deposits therefrom. The defendants admitting the facts of removal of minerals, resist the motion on the two grounds —of want of equity in the bill, and of diligence on the part of complainant.

D. P. Lewis, for complainant.

Ward & Cabaniss and *J. D. Brandon*, for defendants.

PARDEE, J. It seems clear that if complainant has brought his case within our equity jurisdiction a proper and meritorious case for an injunction is shown. The admitted damages committed and being committed by defendants are irreparable, restitution being impossible, and the money value not being ascertainable, and the defendants are insolvent, or next door to insolvency. The defendants first urge that as no suit in ejectment is pending, and no specific fraud alleged in the bill, the action is one of ejectment in the form of a bill in chancery. Were this all of the case there would be nothing further to do than to refuse the motion and, *sua sponte*, direct the bill to be dismissed. *Lewis* v. *Cocks*, 23 Wall. 469. But the complainant shows one suit for damages now pending, the recovery of one judgment in ejectment, and possession obtained thereunder, which was lost by the fraud and illegal influences of the defendants, and the case shows that a multiplicity of suits at law will be necessary for the complainant to obtain at law an adequate remedy. Equity will entertain bill to prevent a multiplicity of suits. *Garrison* v. *Ins. Co.* 19 How. 312; Story, Eq. Jur. § 928. Injunctions are granted to prevent trespasses as well as to stay waste, where the mischief would be irreparable and to prevent a multiplicity of suits. *Livingston* v. *Livingston*, 6 Johns. Ch. 497; Story, Eq. Jur. §§ 928, 929. That the defendants deny complainant's title, and that no suit at law is pending to settle the question of title, is a very serious objection to the granting of the injunction asked; but it seems the effect of this is avoided from the following facts apparent on the record: (1) The defendants do not deny nor assert title under oath. *Griffin* v. *Bank*, 17 Ala. 258; *Rainey* v. *Rainey*, 35 Ala. 282. (2) The title claimed by defendant as defeating complainant's, appears to be one obtained by attachment against a bankrupt, issued long after the bankruptcy and seizing property sold by the bankrupt months before the bankruptcy, making a very doubtful pretense of title, nearly a sham on its face. Rev. St. §§ 5119, 5120; *Bank* v. *Buckner*, 20 How. 108. (3) The defendants compelled the complainant to elect between his bill in equity and his suit in ejectment, and now object to the state of litigation as forced by themselves.

In the case of *West Point Iron Co.* v. *Reymert* it was held that mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them, are, or may cause, irreparable damage, and with a view to prevent a multiplicity of suits; nor is it necessary that the plaintiff's right should be first established

in an action at law. 45 N. Y. (6 Hand.) 703. And in that case the court further said:

"It was a proper case for relief by injunction if the plaintiff's right to the mine was established, and it was not necessary that the right should be first established in an action at law. The injury complained of was not a mere fugitive and temporary trespass, for which adequate compensation could be obtained in an action at law, but was an injury to the *corpus* of the estate." Page 705.

See, also, *Thomas* v. *Oakley*, 18 Ves. 184; Story, Eq. Jur. 929; and see *McLaughlin* v. *Kelly*, 22 Cal. 211.

The want of diligence urged against the complainant is that, as the defendants filed their answer September 14, 1883, the complainant should have had his case ready for hearing at the October term following. The complainant had until the October rules to demur, or reply, and then he was entitled to three months to take testimony before he could be charged with want of diligence. Besides the October term seems to have been used up in determining whether complainant should elect between his action at law and his bill in equity, and from affidavit on file, it seems the chancery docket was not called from press of other business.

On the whole case, I do not see, in view of the insolvency of the defendants, rendering a multiplicity of suits necessary for the complainant to protect himself at law, and that the injuries complained of are to the body of the estate, and considering that this court has forbidden the complainant to prosecute his suit at law and his bill in equity at the same time, how, in equity, an injunction preserving the rights of the parties, pending the suit, can be refused.

The rights of the defendants will be saved by complainant's giving bond in the sum of $1,000.

NEWMAN, Receiver, *v.* MOODY.[1]

(*Circuit Court, N. D. Alabama.* February, 1884.)

1. DEMURRER.
   A demurrer filed without leave, and after answer and submission, comes too late; by answering, defendant waived all objections to the form and manner of proceeding.
2. REHEARING—EQUITY RULE 88.
   Where no appeal lies from the decree to the supreme court it was within the discretion of the court, under equity rule No. 88, to allow a rehearing before the end of the next term, even if the decree was final.
3. RECEIVER.
   Where an administrator comes into the possession of funds belonging to the estate of his decedent, and accounts therefor to the state court appointing him, long prior to notice from this court, he cannot be held to again account for or pay said money to a receiver subsequently appointed by this court.

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

At the October term, 1881, the following petition was filed:

"*To the Hon. John Bruce, presiding in the Circuit Court of the United States for the Northern District of Alabama:* In the case of W. H. Johnson and others against W. R. Alexander and others, pending in said court, your petitioner, W. P. Newman, is receiver, having been appointed as such at a former term thereof. Your said petitioner alleges that there is now in the hands of Amos L. Moody, of Franklin county, Alabama, within said Northern district, the sum of five hundred and forty-one 25-100 dollars belonging to the estate of Jacob V. Johnson, deceased. Your petitioner, therefore, prays for an order directing said Moody to appear at the next term of this court to show cause, if any he have, why a decree should not be rendered against him in favor of your petitioner for said money, and he will ever pray."

Thereupon the following order was entered:

"It is hereby ordered that notice be issued and served on Amos L. Moody, of Franklin county, Alabama, to appear at the next term of this court, and show cause, if any he have, why a decree should not be rendered against him in favor of the said W. P. Newman, receiver as aforesaid, for the sum of five hundred and forty-one 25-100 dollars, alleged to be in his hands, belonging to the estate of Jacob V. Johnson, deceased, of whose estate the said Newman is receiver.

"*This October* 25, 1881.

[Signed] "JOHN BRUCE, Judge."

At the following term, in April, 1882, the defendant Moody filed the following answer:

"In answer to the citation served on him in the above-styled cause, Amos L. Moody, as administrator *de bonis non* of the estate of Jacob V. Johnson, states that the only assets that have come into his hands as administrator were 85 shares of the M. &. C. R. R. stock, which was sold under the orders of the probate court of Franklin county, and from the sale thereof the sum of $541.25 was realized. The said sale was duly confirmed, and the proceeds thereof expended and disbursed in part payment of the cost of administration, all of which will be more fully seen by Exhibit A, showing the different payments made out of said fund, and Exhibit B, the decrees of the court thereon, and which are made as part of this answer. He further states that said fund was garnished in his hands by process of garnishment served on W. D. Bowen and respondent from the circuit court at Lauderdale county in favor of *W. A. Bassinger* v. *Reuben Copeland, Adm'r of said estate of Jacob B. Johnson, and W. D. Bowen and respondent Amos L. Moody*, long prior to issuance and service of said citation. Now, having fully answered, respondent prays to be hence dismissed with his reasonable costs in this behalf expended.

[Signed] "AMOS L. MOODY."

Thereupon the following was rendered:

"This cause is submitted on petition of William P. Newman, receiver, etc., for decree against Amos L. Moody, and it appearing to the satisfaction of the court that the said Moody received, on the eleventh day of June, 1880, five hundred and forty-one 25-100 dollars of moneys belonging to the estate of the said Jacob V. Johnson, deceased; and it further appearing to the satisfaction of the court that said Moody has disbursed the same without authority of law and contrary to the orders of this court: It is therefore ordered, adjudged, and decreed by the court that said Moody pay to said William P. Newman, as such receiver, the sum of six hundred and twenty dollars and seventy-four cents, that being the principal, with the interest added thereon to this date,

besides the costs of the proceedings upon this petition, for which let execution issue.

"*April* 14, 1882.

[Signed] "JOHN BRUCE, Judge."

At the succeeding term of court the following was entered:

"Come the parties by their solicitors, and, upon motion and showing deemed satisfactory to the court, it is ordered that the former submission of the particular matter of the petition of Wm. P. Newman, receiver, against A. L. Moody, and the answer of said Moody to said petition, be set aside and a new submission of said matter be granted, to be heard and decided in vacation, and that the counsel be allowed thirty days in which to file briefs; also that said A. L. Moody have leave to file an amended answer, and that he be allowed fifteen days within which to file said answer."

The defendant has filed a demurrer, and an amended answer and demurrer, and the cause has been submitted to the circuit judge on the record and briefs.

L. P. Walker & Betts, for receiver.

O'Neal & O'Neal, for defendant.

PARDEE, J. The demurrer filed by defendant contains 23 counts, but practically makes but three points: (1) That the receiver had not been previously authorized nor instructed by the court to institute the suit; (2) that the proceedings were summary, and not by regular bill and subpœna; and (3) the remedy should have been by action at law.

The amended answer states the same defense as the original, but more explicitly, and, unlike the original, is properly verified. The brief filed by defendant is devoted to sustaining the points made by demurrer, of which it is sufficient to say that the demurrer was filed too late, being filed without leave, and after answer and submission. By answering, defendant waived all objections to the form and modes of proceeding.

The sole point made by counsel for the receiver is that the decree was final with the April term, 1882, and beyond the power of the court to vacate at the subsequent term. If it was a final decree and appealable the point is well taken. *Cameron* v. *McRoberts*, 3 Wheat. 593; *McMicken* v. *Perin*, 18 How. 507. "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But, if no appeal lies, the petition may be admitted at any time before the next term of the court, in the discretion of the court." Equity rule 88. I doubt if the decree was a final decree. It in effect only changed the custody of the fund in controversy. It was yet to be disposed of by the court, and if it had been paid over to the receiver, could, if justice required, have been turned back to the defendant. As it was not paid over, it was within the discretion of the court to re-examine the question as to whether it should be paid over. But as no appeal lay from the decree to the supreme court, under the equity rule referred to, it was within the discretion of the court to allow a rehearing

before the end of the next term, even if the decree was final. On the merits of the case equity and justice are with the defendant.

Aside from the answers and exhibits attached, there is no evidence adduced. From the answers and exhibits it appears that the defendant, as administrator *de bonis non*, with the will annexed of Jacob V. Johnson, came into possession of the sum of $541.25, long prior to the appointment of plaintiff as receiver in the case of *W. H. Johnson* v. *W. R. Alexander*, by this court, and that prior to notice he (defendant) had fully disbursed the same under orders and judgments of the probate court of Franklin county, by which court he was appointed administrator, and with which court he has settled his accounts. On what equity he can be compelled to pay again has not been pointed out. The former decree was based on the ground "that said Moody has disbursed the same without authority of law, and contrary to the orders of this court." This does not appear at this time, but the contrary is fully established. Moody was not a party to the main case, and he disbursed the money under orders of the court which appointed him administrator long prior to notice from this court.

A decree will be entered at the next term, vacating the decree entered herein at the April term, 1882, and dismissing all proceedings against Amos L. Moody, with costs.

BLAIR *v.* ST. LOUIS, H. & K. R. CO.[1]

(Circuit Court, E. D. Missouri. March 24, 1884.)

1. LIENS UPON PROPERTY IN THE HANDS OF A RECEIVER.
   Where a railroad has been placed in the hands of a receiver by this court, persons claiming statutory liens may be permitted to file them here with the same force and effect as if filed respectively in the state courts.
2. SAME—STATUTORY AND EQUITABLE LIENS ON THE SAME FOOTING.
   Where like demands are presented from other states in which no statutory lien therefor exists, they will be entitled to the same *status* as statutory liens.

In Equity. Order.

Butler, Stilman & Hubbard, for complainant

William P. Harrison, for defendant.

TREAT J. Inasmuch as many intervening petitions have been filed in this case, and others may be, praying for orders on the receiver to pay the sums claimed out of the net income of the defendant corporation as operated by said receiver, and also out of the funds by him raised on his certificates issued, and to be issued, under the orders of this court, as a first lien on the property of said corporation, and on the property by him acquired under the orders of this court, in

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the course of his administration of his trust, and inasmuch as some of said petitions may rest on statutory liens, conditioned on the notice and proceedings required by statute,—

It is ordered that, to avoid expense and delay, all persons claiming statutory liens be permitted to file the same in this court, with the same force and effect as if filed, respectively, in the state courts.

It is further ordered that where like demands are presented from other states, in which no statutory lien therefor exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis.

Inasmuch as this court has heretofore settled the rules of law and equity by which all intervening claims in cases like this are to be adjudged, and the United States supreme court has more definitely and fully prescribed such rules, in *Fosdick* v. *Schall*, 99 U. S. 235; *Barton* v. *Barbour*, 104 U. S. 126; *Miltenberger* v. *Ry.* 106 U. S. 286; S. C. 1 Sup. Ct. Rep. 140; *Union Trust Co.* v. *Souther*, 107 U. S. 591; S. C. 2 Sup. Ct. Rep. 295; *Union Trust Co.* v. *Walker*, 107 U. S. 596; S. C. 2 Sup. Ct. Rep. 299.

It is ordered that all intervening claims filed, or that may hereafter be filed, in this case, be referred to the special master herein, for his report thereon, his reports to state distinctly whether the respective demands are such as should be paid by the receiver under the rulings of the United States supreme court, or are merely claims at large against the defendant corporation, devoid of a lien, statutory or equitable, prior in right to the lien of the mortgage sued on.

It is further ordered that when an intervening claim, so far as the facts on which it rests, fully appears from the books of the defendant to be correct, the master may proceed to pass thereon without further evidence, unless, in his opinion, further evidence is needed, or some person in interest appears to contest the same.

It is further ordered that the master give due notice to the respective claimants or their attorneys, also to the trustee and receiver or their attorneys, when and where he will proceed to consider and pass upon their demands.

The right of exception to proceedings before the master and to his reports is reserved. The receiver should, in all of these demands, have notice of the time and place of hearing the same before the master and in court; also the solicitor of the complainant, with leave to be heard in person or by attorney.

To avoid delay and expenses the receiver and complainant should have an attorney to attend to this business who is an officer of this court, and ready to conduct the business promptly and efficiently, and to accept service accordingly.[1]

[1] The same order was made in the case of *Central Trust Co.* v. *Texas & St. L. Ry. Co.*

DONAHUE and others v. ROBERTS and others.[1]

(Circuit Court, E. D. Missouri. March 21, 1884.)

1. DEPOSITIONS—CERTIFICATE.
   Where depositions are taken *de bene esse*, under section 865, Rev. St., before a notary, his certificate should state, among other things, (1) that he is not a party in interest; (2) that the depositions were reduced to writing in the deponent's presence; and (3) in what court it is to be used.
2. SAME—AMENDMENTS.
   Where a notary's certificate fails to comply with the requirements of law, leave may be given to amend it.

In Equity. Motion to suppress depositions.

The grounds of the motion sufficiently appear from the opinion of the court.

Walker & Walker, for complainants.

Lucien Eaton, for defendants.

TREAT, J., (*orally.*) The motion to suppress will be sustained for a number of reasons: *First*, the depositions are certified as taken in the wrong court; *second*, it is not stated that the notary taking them was not a party in interest; *third*, it is not stated that they were reduced to writing in the presence of the deponent,—all of which propositions have obtained ever since 1789. The motion to suppress will be sustained. These matters being, as held by the supreme court over and over again, in derogation of the common law, the party must conform to the requirements of the statute, otherwise the depositions will not be received.

Leave is given to withdraw the depositions in order that the notary's certificate may be amended.

WARING and another v. LOUISVILLE & NASHVILLE R. Co.[2]

(Circuit Court, S. D. Alabama. February, 1884.)

1. CONTRACTS.
   When writings which amount to a contract between the parties are not complete in themselves to show what the contract was, the court must look to the surrounding circumstances when the contract was made.
   Van Epps v. *Walshe*, 1 Woods, 598.
   The Orient, 4 Woods, 262; S. C. 16 FED. REP. 916.
2. LEASE.
   The implication of law, resulting from a payment of rent under a tenancy at will, that the tenancy becomes one from year to year, is not strong enough to overcome the fact that there was a distinct understanding between the parties as to the nature of the tenancy.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.
[2] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

This is an action of ejectment brought by the plaintiffs, Moses Waring and Virginia E. Mitchell, against the Louisville & Nashville Railroad Company, to recover the possession of a triangular lot of ground near the foot of Theatre street, in the city of Mobile, and damages for its detention. A jury has been waived by written stipulation, and the case submitted to the court.

From the evidence adduced on the trial of the case the court finds the following as the facts:

(1) That on the thirteenth day of March, 1877, the plaintiffs, Moses Waring and Virginia E. Mitchell, under a written lease to E. D. Morgan and James A. Raynor, as trustees and receivers, etc., of the property described in the pleadings, for the period of five years, commencing on the first day of April, 1877, and ending on the first day of April, 1882, for which the lessees were to pay as rent the sum of $400 per annum, in quarterly payments, viz., $50 to Waring on the twenty-fifth days of July, October, January, and April of each year, and the like sum of $50 to Mrs. Mitchell, on the same days of payment. That said lessees went into possession under said lease, and made said rent payments regularly, and continued to occupy the property under the lease until May, in the year 1880, when they assigned and transferred all their interest in the said lease and leased property to the defendant, the Louisville & Nashville Railroad Company, who thereupon entered, under the said lease, as tenants of said Waring and Mitchell, and paid the rent under said lease to said Waring and Mitchell until April 1, 1882, when said lease expired.

(2) That at the expiration of the said lease, the said Louisville & Nashville Railroad Company applied to said Waring, representing and acting for himself and Mrs. Mitchell, to have the lease renewed, but Mr. Waring declined to renew the lease or to make a new one of any sort, but at the same time told the agents of the defendants that the plaintiffs would not interfere with the defendants continuing to use the lot as it had previously done, until the plaintiffs should come to some definite conclusion as to what they would do about the lot, and the defendant continued in the possession and occupancy of the same.

(3) That negotiations were thereupon entered into between the parties, the plaintiffs desiring some qualification of the use of the premises, and also desiring to secure a side track connecting with the Mobile & Ohio Railroad, and the defendant desiring to purchase or secure a permanent lease.

(4) Pending the negotiations the following writings passed between the parties, to-wit:

"LOUISVILLE & NASHVILLE RAILROAD CO.

To Mrs. Virginia Mitchell, Dr.

1882. MOBILE.

August 2d. For rent of ground foot of Theatre street, Mobile, for tracks entering freight-yard, as per lease.

For quarter ending July 25, 1882, - - - - $50

(Fifty Dollars.)

Correct: Approved:

R. P. BROWN, Clerk. J. T. HARAHAN, Superintendent.

Audited:

D. W. C. ROWLAND, Gen. Supt. C. QUARRIER, Comptroller

Received, Fifty 00-100 Dollars.

Date 4th August, 1882. VIRGINIA E. MITCHELL,

Witness: By WM. BARNEWALL, Agent.

W. S. ARMOUR, Cashier.

"LOUISVILLE & NASHVILLE RAILROAD CO.

To Mr. Waring, Dr.

1882. MOBILE.

August 2d. For rent of ground foot of Theatre street, Mobile, for tracks entering freight-yard, as per lease, in hands of J. T. Harahan.

For quarter ending July 25, 1882, - - - - - - $50

(Fifty Dollars.)

Correct: Approved:

R. P. BROWN, Clerk. J. T. HARAHAN, Superintendent.

Audited:

D. W. C. ROWLAND, Gen. Supt. C. QUARRIER, Comptroller.

Received fifty dollars, due July 1, 1882.

Date August 4, 1882. M. WARING.

Witness:

W. S. ARMOUR, Cashier."

The words "fifty dollars, due July 1, 1882," were inserted by plaintiff Waring when the document was presented to him by the agent of the company.

On August 4, 1882, there was no lease in the hands of J. T. Harahan, except the old lease referred to in the first finding aforesaid.

(5) That thereafter negotiations looking to a permanent arrangement were carried on between the plaintiffs and the agents of defendant, at least so far as that plaintiff Waring wrote several letters, and received from J. T. Harahan, defendant's superintendent of division, the following reply:

"*Louisville & Nashville Railroad Company*, operating *New Orleans, Mobile & Texas Railroad*, as reorganized.

J. T. Harahan, Supt. OFFICE OF SUPERINTENDENT,
NEW ORLEANS, LA., Sept. 11, 1882.

M. Waring, Esq., Mobile, Ala.—DEAR SIR: I have been patiently waiting to hear from our folks in Louisville, but as most of them are absent in New York I cannot hear from them for a few days yet. Will let you hear about the lease soon as I can hear from them.

Yours, etc., J. T. HARAHAN, Supt."

And finally, prior to November 25, 1882, said Waring informed said defendant that the plaintiffs would make no arrangement for said Louisville & Nashville Railroad Company to continue to occupy the lot unless said railroad company would stop using it as a switching ground for their cars; that this the said Louisville & Nashville Railroad Company declined to agree to, and thereupon, on the twenty-fifth of November, 1882, a written notice to quit was signed by the plaintiffs and regularly served on the defendant, and on the first day of December another written paper signed by both of the plaintiffs demanding the possession of the property, which defendant never surrendered, but still holds.

(6) That the rental value of the property exceeded $400 per year.

Peter Hamilton and *Thomas A. Hamilton*, for plaintiffs.

Gaylord B. Clark, for defendant.

PARDEE, J. On the trial of the case, after the plaintiffs had closed and the two writings mentioned in finding "four" were offered, counsel for defendant moved to strike out all the parol evidence adduced by plaintiffs in the case which tended to vary the written receipt and contract and the implication of law arising from the acceptance of

rent, which would exclude all of plaintiffs' evidence, save the lease and notices to quit, aforesaid, on the ground that the said writings constituted a written contract between the parties, complete in all its parts as aided by implications of law, for the lease of the property in question, and that parol evidence is incompetent to vary the terms of such contract. This motion was reserved to be passed upon with the merits. The view that I take of the case is that after the expiration of the five years' lease, under the understanding and consent of the parties, the continued holding of the defendant was as a tenant at will. Either party could have ended the tenancy without consent of the other. See Bouv. Law Dict. *verbo*, "Tenant at Will." This was undoubtedly the case down to August 4, 1882, when a quarter's rent was paid and the writings purporting to be a charge for and a receipt of rent were given. And that this was the view taken of it by the parties is shown by the negotiations that were carried on with a view to obtain a lease for a fixed term. This simplifies materially the question of the force and effect to be given to the writings of August 4, 1882.

Conceding these writings to amount to a contract between the parties, they are not complete in themselves to show what the contract was. By themselves, they do not make a lease for a quarter, nor for a year, nor for the term of the old lease. We must look to the surrounding circumstances. "Another rule of law, just as well settled, is that the obligation of a contract is what the parties intended to mean when they entered into it. What they both understood to be the contract, that is the contract; and to arrive at the understanding of the parties, the courts are authorized to look at the circumstances which surrounded them when they made it." *Van Epps* v. *Walsh*, 1 Woods, 598; *The Orient*, 4 Woods, 262; S. C. 16 FED. REP. 916. In this case, what were the surrounding circumstances when the writings were made? The defendant was a tenant at will of the premises in question, desirous of purchasing or obtaining a permanent lease. The plaintiffs were not willing to sell, nor lease for a fixed time, unless with stipulations as to use, and they desired concessions as to a side track to connect with the Mobile & Ohio road. There was no lease, save the old and expired one, in the hands of Harahan. And negotiations were pending between the parties for a new lease. That the plaintiffs intended to grant a lease by the writings is negatived by all the circumstances. That the defendant intended by these writings or that its agents thought it had acquired a lease for any fixed period is negatived by all the circumstances, and by the letter of Harahan, superintendent, written a month afterwards. The legitimate construction of the writings, then, is that they were receipts for rent past due under a tenancy at will. The implication of law resulting from a payment of rent under a tenancy at will, that the tenancy becomes one from year to year, (see Bouv. Law Dict. *verbo*, "Tenant at Will," and cases there cited,) is not strong enough to overcome the

fact that there was a distinct understanding between the parties as to the nature of the tenancy. Woods, Landl. & Ten. 25, 60, 61, and cases cited; and see, also, *Crommelin* v. *Thiess*, 31 Ala. 418. Had the defendant held over after the expiration of the five-year lease, without any agreement on the part of the plaintiffs as to the character of such holding, the defendant would have been a tenant on sufferance, the plaintiffs having a right to elect whether to resume possession or to treat the defendant as a tenant from year to year. Had the defendant held over without any agreement with the plaintiffs, and had paid, and plaintiffs had received, rent, the law would have implied a contract of lease from year to year. Had the defendant held over without any agreement with the plaintiffs, and then the writings of August 4th had been passed between the parties, I am inclined to the opinion that the law would have implied a renewal of the five-year lease; and this by fair construction of the writings themselves, otherwise unexplained.

But the case made differs from all of these hypothetical cases. By understanding of the parties the defendant held over as a tenant at will, and thereafter the minds of the contracting parties did not meet, and although rent was paid and received on the terms of the old lease, the character of defendant's holding was not changed.

MARLOR *v.* TEXAS & P. RY. CO.[1]

(Circuit Court, S. D. New York. April 14, 1884.)

1. MORTGAGE BONDS OF RAILROAD—RIGHT OF ACTION FOR INTEREST.
   It matters not whether the bonds of a railroad are secured by a mortgage making the interest a lien upon the lands of the company or upon its net earnings, or upon both, or whether there is no mortgage at all. If there is an agreement to pay interest and it is not paid, there is a breach of the bond for which the holder can maintain an action.
2. SAME—IN CASE OF SCRIP TENDERED IN LIEU OF INTEREST.
   A railroad mortgage provides that in the event of a failure of net earnings sufficient to pay interest on the bonds secured by it, the company can, in its option, issue certain scrip in lieu thereof. In such a case the bondholder is not bound to accept the scrip unless the fact exists which authorizes the company to issue it, nor is the burden upon him to prove a negative. His right of action is *prima facie* perfect upon proof of non-payment of interest on the presentment of his bond at the time when and the place where the interest is made payable.

Motion to Strike out Part of Answer.

Dos Passos Bros., for complainant.

Dillon & Swayne and *W. S. Pierce, Jr.*, for defendant.

WALLACE, J. The only questions which seem to be involved in this case are (1) whether the mortgage bonds of the defendant contain a promise for the payment of interest annually on the first day of July

[1]Affirmed. See 8 Sup. Ct. Rep. 311.

in each year; and (2) whether defendant has exercised its option to issue scrip for the interest, convertible into capital stock of the company, and receivable at par for the purchase of the company's land at schedule prices.

The first question is one of law, to be solved by reading the bonds and mortgage; the second is one of fact.

1. The bond, so far as is relevant to the controversy, reads as follows:

"The Texas & Pacific Railway Company hereby acknowledges itself to be indebted to ———, of ———, or assigns, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the said ———, or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned. This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas & Pacific Railway Company by the state of Texas. This bond has also, as security for the interest, a mortgage lien upon the net income of the said the Texas & Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the state of Texas, after providing for the operating expenses, the current repairs, and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest, the same as money, in payment for any of the company's lands acquired as aforesaid in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100 or its multiple."

There seems to be nothing in the language of the mortgage to qualify the promise of the bond. It is quite immaterial whether the mortgage secures the interest of the bonds by a lien upon the lands of the company, or by a lien upon the earnings of the company, or by a lien upon both, or whether it is not secured at all by the mortgage. If there is an agreement to pay interest, and it is not paid, there is a breach of the bond for which the holder can maintain an action. Whether his interest can be collected through a foreclosure of the mortgage is a different inquiry, and not relevant now. It would have been simple enough to have made the interest payable only out of the net earnings of the company's railway by the terms of the bond, if that had been intended.

2. By the terms of the bond the defendant reserved the option, in case the net earnings of its railway were not sufficient in any year to enable it to pay the interest on its bonds, to issue scrip for the interest. The complainant avers that the defendant has neither paid the interest nor exercised the option. By its answer the de-

fendant denies that it has failed to exercise this option, and denies that the plaintiff has demanded payment of the interest. The fact, whether the net earnings of the defendant's railway are sufficient in any one year to pay the interest or not, is one peculiarly within its knowledge, and it is not incumbent upon a holder of the bond to assume the burden of proving the negative. He is not bound to accept the scrip unless the fact exists which authorizes the defendant to substitute scrip for money. His right of action is *prima facie* perfect upon proof of non-payment of the interest, on the presentment of his bond at the place where the interest is made payable. It then devolves upon the defendant to show the existence of the fact which authorizes it to tender scrip, and then the exercise of the option.

This general view of the questions at issue has been stated in order to indicate what issues are fairly presented by the pleadings, and what extraneous matter in the answer has no proper place there. The plaintiff's motion to strike out as irrelevant and redundant is granted, so far as it will eliminate from the answer any and all proceedings, resolutions, mortgages, constructions, understandings, and intentions of the defendant, which are not recited in the bonds in suit, or in the mortgage securing these bonds, because the plaintiff was not a party to them, and is not affected by them. This results in striking out nearly 40 folios of the answer,—a result which justifies this motion, although generally motions of this character are not to be encouraged. In view of the averments of the answer at folios 53 to 63, the plaintiff's motion to make another part of the answer more definite and certain is denied.

It is not intended by this decision to preclude the defendant from the benefit of anything contained in the mortgage which may be urged on the trial of the action as qualifying the promise set forth in the bonds. The bonds and mortgage are one obligation, and may be read and construed together. Neither is it intended to indicate what action on the part of the defendant is a due exercise of its option to pay interest in scrip.

HALL *v.* CITY OF NEW ORLEANS.[1]

(*Circuit Court, E. D. Louisiana.* February, 1884.)

1. ACT OF LOUISIANA, NO. 73 OF 1872.
   The act of the legislature of Louisiana, No. 73 of 1872, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premium bond act, March 6, 1876, (Sess. Acts 1876, p. 54.) By section 15 of the act of 1872 a sinking fund was created for certain bonds of the city of New Orleans, in which fund the bondholders interested were declared to have a vested interest. The taxes levied and collected under the act were insufficient to pay the coupons maturing while the law was in force. *Held*, that holders of coupons maturing after the repeal of the law acquired no right to the fund; holders of coupons maturing before the repeal of the law were entitled to the fund in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by him.
2. PRESCRIPTION—PLEDGE.
   As long as the debt secured remains unpaid and the pledge continues in existence, whatever be the time elapsed since maturity, the defense of prescription cannot be raised. *Forstall* v. *Consolidated Ass'n*, 34 La. Ann. 776. As to the coupons which fell due prior to the repeal of the act of 1872, prescription has been interrupted; those which fell due after the repeal, and more than five years prior to the institution of this suit, are prescribed.

At Law.

E. H. Farrar, for plaintiff.

Henry C. Miller and *Chas. F. Buck*, City Atty., for defendant.

PARDEE, J. Act No. 73, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premiun bond act, March 6, 1876. Under the provisions of section 15 of the said act of 1872 a sinking fund was created for all city bonds for which no other retiring provision existed by law, in which fund the bondholders interested were declared to have a vested interest. In pursuance of this section taxes were levied in 1873 and 1874, which were collected from time to time to this day, whereby a trust fund has been in the hands of the fiscal agent of the city, particularly so, until it was distributed by order of this court in the case of *Lauer* v. *The City* (not reported) in the year 1883.

The taxes so levied and collected have been insufficient to pay the coupons maturing while the law was in force. As the fund was insufficient to pay coupons maturing while the law was in force, holders of the coupons maturing after the repeal of the law acquired no right to the fund, for in no sense could it be said to be a trust fund for their benefit. The case is different with regard to the holders of coupons maturing before the repeal of the law. They were entitled to the funds in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by the agent.

In the case of *Forstall* v. *Consolidated Ass'n* the supreme court of Louisiana say:

"It is no objection that the object or thing pledged was not delivered to the creditor. Even in the absence of a *law contract*, it is lawful to stipulate that

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

the pledge may remain in trust in the hands of a third person, even in those of the debtor, provided it be held precariously. * * * As long as the debt thus secured remains unpaid and the pledge continues in existence, whatever be the time elapsed since maturity, the defense of prescription cannot be raised." See 34 La. Ann. 776, and cases there cited.

The coupons sued on in this case are from bonds within the provisions of section 15 of the act of 1872; those which fell due prior to the repeal of the act, March 6, 1876, have been secured by the fund pledged for their benefit, and prescription has been interrupted; those which fell due after the repeal of the said act, and more than five years prior to the institution of this suit, are prescribed. Judgment will be entered accordingly.

BILLINGS, J., concurs.

COLE *v.* CITY OF LA GRANGE.[1]

SANFORD *v.* SAME.[1]

(Circuit Court, E. D. Missouri. March 22, 1884.)

CONSTITUTIONAL LAW—TAXATION IN AID OF PRIVATE ENTERPRISES.

State legislatures have no authority to authorize taxation in aid of private enterprises or objects, even where there is no express constitutional prohibition.

Demurrers to the Answers.

These are suits upon interest coupons cut from bonds issued as a gift from the city of La Grange, Missouri, to the La Grange Iron & Steel Company, a private corporation, under an act of the legislature of Missouri. The answers set up as defenses, (1) general denials; and (2) that the issue of the bonds was *ultra vires*, and contrary to law.

Sanders & Haynes, for plaintiffs.

David Wagner, for defendant.

TREAT, J. These cases rest on the same facts and propositions of law. The purpose is to have the judgment of the court on the special defense set up; yet the demurrer is general, and each answer contains a general denial. That technical point seems to have been overlooked; but as the parties have presented the subject on special defenses, by mutual understanding, the court announces its views with respect thereto. It is not deemed necessary to travel over the ground, theoretical and elemental, on which the many cases cited rest; for the books and adjudged cases are full of the law-learning involved.

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The main proposition always is as to the authority of a county or town or city to incur the obligations sued on, whether evidenced by a bond or otherwise. In these cases the suits are on coupons detached from bonds issued by the defendant, pursuant to the required vote of the citizens, as a gift to a private manufacturing corporation. There was a legislative enactment, to-wit, the charter of the defendant, which in terms permitted the issue of the bonds, the proper vote etc., having been duly had. The state constitution contains this clause:

"The general assembly shall not authorize any city, county, or town to become the stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held thereon, shall assent thereto."

It is contended that as there is no specific prohibition in the constitution against the issue by a city of its bonds as a gift to a private enterprise, if a two-thirds majority of the citizens so vote, the bonds might be held valid in the hands of *bona fide* holders, and the property within the corporate limits remain subject to taxation to meet such alleged obligations. It is true the state constitution in express terms refers only to becoming a stockholder or loaning credit, and says nothing about *gifts*. Why not? Because it was considered by all familiar with the elemental principles of free governments that they were not founded and did not exist for the confiscation of private rights, or, through the exercise of the taxing power, appropriate one man's property for the private benefit of another.

The court, at the close of the argument, asked if it was contended that inasmuch as the constitution required a two-thirds vote only as to becoming a stockholder or loaning municipal credit, therefore, a city could, without vote, give away its corporate funds or revenues, or impose a tax to make good a promised gift. Inasmuch as it is beyond the legitimate sphere of municipalities to use their taxing or other functions for mere private interests; and inasmuch as it had been settled that they could, as stockholders or otherwise, aid public enterprises, there was need of restricting the latter by exacting a vote of the people, but no need of providing against the former. It is not a "*casus omissus*," nor an intentional license for indiscriminate squandering of revenues by way of donations. When the required vote is had for stock or loans it is supposed the city receives value or security therefor, and the constitution placed restrictions thereon. Is it to be asserted that because no such restrictions were placed on gifts, that, therefore, the two-thirds of the voters of a city could impose on all taxable property heavy taxes for years, to make good a mere gift to a private manufacturing corporation? The question answers itself. If such a course could be pursued for one private enterprise it could for all.

It is not necessary to review the many cases cited. A court cannot ignore that the federal and state constitutions—nay that all state constitutions—prohibit the taking of private property even for public

uses without just compensation. Is it to be argued, therefore, that private property can be taken for private uses, either with or without just compensation? The supreme court of the United States stated the elemental thought underlying American constitutional law when it declared that an attempt, through the guise of the taxing power, to take one man's property for the private benefit of another is void, an act of spoliation, and not a lawful use of legislative or municipal functions.

There have been so many well-considered cases in the United States courts and in the state courts on this subject that it would be a work of supererogation to repeat their arguments. It must suffice that the weight of authority and sound reason concur in holding bonds and coupons like those in question void *ab initio*. *Loan Ass'n* v. *Topeka*, 20 Wall. 665; *Com. Bank* v. *City of Iola*, 2 Dill. 353; *Parkersburg* v. *Brown*, 106 U. S. 487; S. C. 1 Sup. Ct. Rep. 442; *Allen* v. *Jay*, 12 (U. S.) Amer. Law Reg. 481, with notes; *State* v. *Curators State Univ.* 57 Mo. 178; *St. Louis Co. Ct.* v. *Griswold*, 58 Mo. 175; *Livingston Co.* v. *Darlington*, 101 U. S. 407.

In Cooley, Const. Lim. the subject is fully discussed, cases reviewed, and conclusions stated. Page 264 *et seq.*

Demurrers overruled.

In re LETCHWORTH and others, Bankrupts.

(*District Court, N. D. New York.* March, 1884.)

BANKRUPTCY—RENEWAL NOTE EXECUTED AFTER BANKRUPTCY.

Where a party previous to becoming a bankrupt was liable on a bond, by the terms of which he became a continuing guarantor of notes discounted by a certain bank for a company of which he was the president, and at the time of his bankruptcy the bank held a note so discounted, indorsed by him, the fact that a renewal note was given after the filing of his petition, will not prevent the debt from being proved as a claim against his estate.

In Bankruptcy.

Charles F. Durston, for assignee.

Theo. M. Pomeroy, for creditors.

COXE, J. At the time of the commencement of the proceedings in bankruptcy herein, William H. Seward, Jr., & Co., bankers, held the bond of the above-named bankrupt, by the terms of which he became a continuing guarantor for the payment of any notes which the said firm might discount, for a manufacturing company of which he was president. Demand and notice of non-payment were waived. When the petition was filed the manufacturing company was indebted to Seward & Co. in the sum of $2,500, for which they held the company's note indorsed by the bankrupt. This note was renewed from

time to time, the last renewal being after the adjucation in bankruptcy. The assignee insists that for this reason the debt is not provable. It is thought, however, that under the peculiar phraseology of the bond and in view of the obligation there created, it would be unjust to treat the liability of the bankrupt as that of an indorser simply. At the time of the bankruptcy he was clearly liable on the bond in the event of the failure of the makers of the note to pay. True, his liability had not then become absolute, but the debt existed and the obligation was created before the petition was filed. Legally and equitably the estate is bound by his contract.

The report of the register is confirmed and the proof permitted to remain on file.

In re MERRELL and others, Bankrupts.

(*District Court, N. D. New York.* March, 1884.)

BANKRUPTCY—DEBTS CONTRACTED BY BANKRUPT AFTER PROCEEDINGS COMMENCED.

A debt contracted by a bankrupt subsequently to the commencement of proceedings against him cannot be proved in bankruptcy.

This is an appeal from a decision of the register sustaining certain proofs of debt. The petition in bankruptcy was filed November 13, 1873. On the twenty-sixth of the same month the bankrupts contracted the indebtedness in question. The adjudication was dated February 27, 1874. The proofs of debt were made February 13, 1875. The creditors contend that their proofs should stand, for the reason that the indebtedness upon which they are founded was due and payable at the time of the adjudication. The assignee insists that they should be expunged because the indebtedness was contracted subsequently to the proceedings in bankruptcy.

Charles F. Durston, for assignee.

Theodore M. Pomeroy, for creditors.

COXE, J. Section 5067 of the Revised Statutes provides: "That all debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy * * * may be proved against the estate of the bankrupt." The proceedings are commenced (section 4991) when the petition is filed. These provisions were in force at the time the proofs in this matter were presented to the register. The indebtedness upon which the proofs are founded was not contracted until 13 days after the proceedings were commenced. The conclusion follows, therefore, that the proofs should not be permitted to stand. Even before the Revised Statutes, and before the substitution of the words "commencement of proceedings in bankruptcy" for the words "adjudication of bankruptcy" in section 19 of

the bankrupt law, the weight of authority favored a construction limiting the proof of debts to those existing at the time of filing the petition.

The proofs should be expunged.

THE ALINE.[1]

(*District Court, E. D. New York.* December 31, 1883.)

1. SHIPPING — DELIVERY — PERISHABLE CARGO — DISCHARGE IN FREEZING WEATHER—"ACT OF GOD."
   A steamship brought a consignment of oranges to New York, where she arrived on December 29th. The weather was so cold as to render it impossible to land oranges without freezing them, and continued below zero for several days. The oranges were landed in spite of the consignee's objection, and their value was for the most part destroyed. *Held*, that the act which destroyed the fruit was not the "act of God," but of man, in discharging the oranges at an unsuitable time.
2. SAME—EXCEPTIONS IN BILL OF LADING—VESSEL READY TO DISCHARGE.
   A vessel is not "ready to discharge," within the meaning of a provision in the bill of lading that all goods are "to be taken from along-side immediately the vessel is ready to discharge," when it is impossible for her to discharge without destroying the cargo.
3. SAME—"EFFECT OF CLIMATE."
   "Effect of climate," used in a bill of lading, does not apply to the effect of a temporary frost.
4. SAME—NEGLIGENCE.
   Where it was proved that there was no necessity to land the oranges at that time, either because other consignees had demanded their cargo, which could not be separated from the libelant's, or because of the engagements of the vessel, it was held to be negligence on the part of the vessel to discharge at that time, and a decree was ordered in favor of the libelant.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, (R. D. Benedict, of counsel,) for libelant.

McDaniel, Wheeler & Souther, for claimants.

BENEDICT, J. This action is brought to recover the value of a consignment of oranges shipped on board the steamship Aline, in Jamaica, to be delivered at New York. There is no substantial dispute in regard to the material facts. The oranges were shipped in good order, and arrived in New York in like order. The day on which the steamer arrived at New York, being Wednesday, December 29th, was so cold as to render it impossible to land oranges without freezing them. The weather continued cold, indeed below zero, until the following Monday. The steamer commenced to land oranges on the day of her arrival, and on that and the following Thursday and Friday landed the whole consignment. The necessary consequence was

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

that the libelant's oranges were frozen, and their value for the most part destroyed. Objection was made by the libelant to the landing of the oranges because of the unsuitable weather, and he now brings this action to recover his loss.

It is conceded in behalf of the steam-ship that her defense, if she has any, rests upon the exceptions mentioned in the bill of lading. One of the exceptions relied on is that of damage caused by "act of God." But the act which destroyed this fruit was not the act of God, but of man, in discharging the oranges at an unsuitable time.

Again, it is contended in behalf of the steamer that the bill of lading makes special provision for the landing of these oranges when they were landed, because it says, "all goods to be taken from alongside immediately the vessel is ready to discharge." But this provision cannot relieve the steamer, for she was not "ready to discharge," within the meaning of this provision, when it was impossible for her to discharge without destroying the cargo. Ready to discharge means ready to make a proper discharge. And a discharge of oranges when the weather is so cold as to freeze them before they can be removed from the wharf is not a proper discharge.

Next, it is contended that the steamer is freed from liability by the provision of the bill of lading, which declares that the ship shall not be liable for any injury to the goods occasioned by "* * * effect of climate or heat of holds." But it would, as it seems to me, be straining language to consider the word "climate," used in the bill of lading, as intended to apply to a temporary frost such as existed when the steamer arrived. Moreover, in my opinion, negligence is shown, if it be proved, as I think it has been proved, that there was no necessity to land the libelant's oranges at the time when they were landed. The claimants insist that the steamer was compelled to land the oranges when she did, because she was a general ship, and other consignees of oranges had demanded the immediate landing of their fruit, from which the libelant's fruit could not be separated in the ship. If such a demand on the part of other consignees of cargo can be said to have been proved, it created no duty on the part of the carrier to discharge immediately, when such discharge would necessarily involve the destruction of cargo belonging to others. Such a demand, to be effective, must be reasonable. It was unreasonable on the part of consignees of any cargo to ask the steamer to destroy the libelant's cargo in order to make immediate delivery of theirs. Nor was there any necessity for the immediate discharge of these oranges arising out of the engagements of the steam-ship. The question whether a steamer running in a regular line, and being under obligation to sail on an advertised day, has the right to discharge inward cargo regardless of results, when the discharge becomes necessary to enable her to sail on her appointed day, does not arise here. For here it is shown that the steamer did not sail on her appointed day, but remained over a day, merely for the sake of getting in more

cargo, and it also appears that there was time before she sailed to have landed all the oranges in suitable weather and taken in all the outward cargo that she had to take. In this instance, therefore, there was no necessity to discharge the oranges when she did, to enable the steam-ship to keep her appointment. The oranges in question were shipped under two bills of lading, differing from each other in some particulars, but, in the view I have taken of the case, they are alike in legal effect, so far as regards the libelant's demand, and under any aspect in which I have been able to consider them, they do not relieve the steam-ship from responsibility to the libelant for the destruction of his fruit. There must therefore be a decree in favor of the libelant. The amount of his damages will be ascertained by a reference.

Let a decree be entered accordingly.

THE GEISER.[1]

(*District Court, E. D. New York.* March 4, 1884.)

DAMAGE TO CARGO BY HEAT FROM STEAM-PIPES—BILL OF LADING—CONSIGNEE'S RIGHT OF ACTION—ADVANCES.

Where cabbages were stowed in the between-decks of a steam-ship, and were injured by heat from steam-pipes placed around the room where the cabbages were, for the purpose of warming the room when used, as it was intended, for steerage passengers, and it appeared that, the pipes being new and in some places obstructed, extra steam was put on in them to keep the chart-room warm, *held*, that the vessel was negligent and liable to the shipper for the damage done; that, though the shipper had expressed himself satisfied to have the cabbages stowed as they were, he could not be supposed to have assented to the pipes being unduly heated as they were; that the fact that the consignees who sued on the bill of lading had afterwards been paid their advances, did not destroy their right of action upon the contract.

In Admiralty. Action on bill of lading by consignee of cargo.

Clarence Cary, (*Alex. Cameron*, counsel,) for libelants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BENEDICT, J. This action is to recover for non-delivery in good order of a consignment of cabbages shipped in Copenhagen, on board the steam-ship Geiser, to be transported therein to the port of New York. The cabbages were stowed in the between-decks, and upon their arrival in New York a large portion of them were decayed, being then, according to the witnesses, about the consistency of soup. This condition of the cabbages was not owing to their condition when shipped. Then they were hard and sound. Nor was it owing to an unusually severe voyage. Quantities of cabbages in various vessels have endured a voyage of equal severity without decay or injury.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

What destroyed the cabbages in this instance was heat developed in steam-heating pipes which were placed around the room, in which the cabbages were stowed, for the purpose of warming the place when used, as it was intended to be used, for transporting steerage passengers. On this voyage these pipes were kept unduly heated, whereby the place was kept hot. I incline to the opinion that it was negligence on the part of the ship to have any steam in these pipes so long as the cabbages were stowed near there; but, however that may be, certainly it was negligence to heat the pipes as the proof shows they were heated on this occasion. The fact is that the steam-pipes of the ship, being new, were in some places obstructed, and in an effort to keep the chart-room warm by putting on extra steam, an extraordinary heat was developed in the pipes where they ran by the cabbages. And although the cabbages were nearly cooked by these pipes, and the ship filled with the odor, the presence of extraordinary heat in the pipes does not seem to have been discovered until the arrival of the vessel in New York. Ordinary diligence would have disclosed the fact that in the effort to keep the chart-room warm the pipes running by the cabbages were being unduly heated; and, under the circumstances, it was negligence to apply great heat to the cabbages, for which the ship is responsible.

There is nothing in the point that the shipper expressed himself satisfied to have the cabbages stowed as they were. He had, as I think, the right to suppose that the pipes would not be heated at all, so long as the room was used to stow cabbages. At any rate he cannot be supposed to have assented to the pipes being unduly heated as these pipes were.

The right of the libelants to maintain their action has not been successfully disputed. The contract sued on was made with them. The cabbages were consigned to them, and they had at that time an interest in them to the extent of their advances. The fact that since the contract was made they have been paid their advances does not destroy their right of action upon the contract made with them.

There must be a decree for the libelants, with an order of reference to ascertain the amount of the loss.

THE AMERICAN EAGLE.

(*District Court, N. D. Illinois.* March 3, 1884.)

MARITIME LIEN—ASSIGNMENT OF DEBT.
A maritime lien passes to an assignee of the debt.

In Admiralty.

W. G. Beale, for libelant.

Schuyler & Kremer, for respondent.

BLODGETT, J. This case comes before me at this time upon exceptions to the libel. The libel is filed by the assignee of the material-man who furnished the materials for repairing the tug, and who has assigned his claim to the libelant, who now seeks to enforce the lien of the material-man upon the tug. The exception to the libel is taken on the ground that the lien of the material-man does not accompany the claim into the hands of an assignee. It is conceded, for the purposes of this case, that the person who originally furnished the material had a statutory lien which he could have enforced in admiralty; but it is insisted that the transfer of the debt waived the lien, or, at least, that it does not inure to the benefit of the assignee to whom the debt is transferred. There is no doubt some seeming authority in support of the libelant's exception, but I think the more reliable and better considered cases are in favor of supporting the lien in behalf of the assignee, or giving him all the security which the original creditor had. In the case of *The Sarah J. Weed*, 2 Low. 555, this question is exhaustively discussed, and the authorities considered and analyzed by Judge LOWELL, who comes to the conclusion that all the rights of the original creditor come to the assignee; that the lien is a part of the indebtedness and goes with it into the hands of whoever the original creditor shall assign it to. After discussing the authorities, the judge says:

"The convincing reason is that given by Judge WARE in the case cited, that the debtor cannot be injured by an assignment, while the creditor will lose part of the benefit of his security if he cannot assign it."

The conclusion of this learned judge seems to me so satisfactory upon the question that I am content to accept his reasons without adding any of my own.

The exceptions to the libel are overruled, and the report of the commissioner confirmed.

BURNS *v.* THE SPAIN.[1]

(*District Court, E. D. New York.* March 14, 1884.)

COLLISION IN SLIP—CANAL-BOAT AND PROPELLER—CONTRADICTORY EVIDENCE.

A canal-boat, lying in the same slip with a steam-ship, fouled the screw of the steam-ship and received injuries which caused her to sink. On the part of the canal-boat it was alleged that the accident was due to the screw being put in motion before the steam-ship was unmoored, which created a current. The steam-ship denied that the screw had been put in motion, and claimed that the canal-boat had drifted with the tide against the screw. *Held*, the testimony being contradictory, that the case did not present such a preponderance of evidence in favor of the libelant as to allow it to be held that he had proven his case, and the libel was dismissed, without costs.

In Admiralty.

J. A. Hyland, for libelant.

John Chetwood, for claimants.

BENEDICT, J. The libelant's canal-boat, lying in the same slip with the steam-ship Spain, on the morning on which the steamer sailed, in May, 1882, fouled the screw of the steamer, and there received injuries which caused her to sink. The charge of the libelant is that before the steam-ship was unmoored her screw was put in motion in the slip, without notice or warning to the boats in the slip, and thereby a current created which forced the libelant's boat upon the screw while in motion. On the part of the steam-ship, it is averred that the screw of the steam-ship was not moved prior to the accident, but that the canal-boat, through negligence, drifted by the tide upon the screw, the same not being in motion, where she was injured by coming in contact with the screw at rest, and not by a blow from the screw in motion. The testimony upon the point of the inquiry, namely, whether the screw of the steam-ship was in motion on the morning in question before the canal-boat got foul of the screw, contains contradictions that I have not been able to reconcile. I am satisfied that there is misstatement or concealment on one side or the other, but the case does not present such a preponderance of evidence in favor of the libelant's account of the accident as will permit me to hold that he has proven his case. I must therefore dismiss the libel. I give no costs.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar

MacNaughton *v.* South Pac. C. R. Co.

(*Circuit Court, D. California.* March 24, 1884.)

1. Removal of Causes from State Court—Application must Specify when Ground Existed.
   In order to show jurisdiction in a federal court over a cause removed thither from a state court on the ground of the parties being residents of different states, it must appear in the application for removal that this ground subsisted at the time the suit was instituted in the state court.
2. Same—Amendment not a Right.
   The amending of an application so as to show jurisdiction is a matter within the discretion of the court, and cannot be claimed by a party litigant as a right.
3. Same—"Session" Equivalent to "Term" in Contemplation of Act of Congress.
   The word "session" in the present constitution of California, relative to the sittings of courts, is "term" within the contemplation of the act of congress.

Motion to Remand.

H. N. Clement, for plaintiff.

Gordon Blanding, for defendant.

Sawyer, J. This action was commenced in the Fourth district court of the state of California on August 1, 1879. Defendant demurred August 22, 1879, and the demurrer was overruled. Defendant having answered, plaintiff demurred to that part of the answer setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case went into the superior court, as successor to the state district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained, with leave to amend. An amended answer was filed April 1, 1880, which, under the Code of Civil Procedure, put the case at issue, and it was ready for trial. On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the plaintiff is a citizen of Missouri, and the defendant a citizen of California. The petition alleges that "there is in this action a controversy between citizens of different states, to-wit, a controversy between your petitioner, the defendant herein,—which said defendant was at the time of the commencement of this action, ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of California, and which said defendant is a citizen of the said state of California,—and the *plaintiff* herein, *who is* a citizen of the state of Missouri." The proper bond was filed, and a copy of the record obtained by petitioner and filed in the circuit court, February 7, 1884, the state court having made no order and taken no action upon the petition. The plaintiff moved to remand the case to the state court, on the grounds: (1) That it is not shown by the petition that plaintiff was a citizen of Missouri at the time of the com-

mencement of this suit; (2) that it appears from the record that the application was not made "before or at the first term at which it could have been tried," or within the time required by law; (3) that defendant has not used due diligence in making application for removal. The supreme court has repeatedly held that on a removal the record must show that the citizenship of the parties of different states must exist both at the time of the commencement of the suit and at the time of the application for removal. In this case it does not appear but that both plaintiff and defendant were citizens of California when the suit was commenced. It simply shows that plaintiff was a citizen of Missouri at the time of the application for removal, which is four years and nearly ten months after the commencement of the suit. Clearly, the record does not show jurisdiction in this court, or a proper case for removal on the ground of citizenship, and the case must be remanded on that ground.

The present constitution of California, which went into effect on January 1, 1880, five months after this suit was commenced, provides that the superior court "shall be always open, (legal holidays and non-judicial days excepted);" and the Code of Civil Procedure, (section 73,) adapted to the new constitution, provides that "the superior courts shall always be open, (legal holidays and non-judicial days excepted,) and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold *regular sessions*, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof: provided, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions." Under these provisions of the Code and Constitution it is insisted by defendant that there are no terms of court in California, and that the provision of the act of congress of 1875, that the application for removal must be made "before or at the term at which said cause could be first tried," can have no application in said state; that a removal from any state court of California, therefore, is in time if the application be made at any time before the trial, no matter how long it may have been ready, or in a condition for trial. I am unable to take this view. Congress undoubtedly intended to require prompt action, and to provide that unless the party avails himself of the right promptly, after a reasonable opportunity to try the case has been had, his right to remove shall be cut off or waived. In this district it has always been held by the circuit court that the respective separate general sessions of the courts to be held four times in each year, provided for by the statutes, are "terms," within the reason and meaning of the act of congress. There is no magic in the word "terms," or in the words, the courts "shall always be open." Courts of chancery, and some other courts, are always open for many purposes, though not always in session; yet they have regularly defined terms. The regu-

lar sessions of the superior courts, commencing at regularly appointed periods, are substantially terms. They are terms, at least, in my judgment, within the reason and meaning of the act of congress, and this construction will be adhered to in this circuit, until overruled by the supreme court. The cause must be remanded on this ground, also. In some of the counties, by rule of court, new calendars are made up for every month, and the calendar is called anew and trials thereon begun on the first Monday in each month. It is by no means certain that the special sessions provided for in the act, and in those cases where monthly calendars are provided for by rule, such special and monthly sessions would not, also, be held to be terms, within the meaning of the act of congress. However that may be, the regular sessions must certainly be regarded as terms for the purpose of the removal of causes.

At the argument of the motion to remand, the court declared that the petition for removal was insufficient, for the reason that it did not show that plaintiff was a citizen of a state other than the state of California at the time of the commencement of the suit, whereupon the counsel for petitioner stated that this jurisdictional fact existed, and asked leave to amend the petition so as to properly state the facts. Several cases from the circuit courts were cited, wherein it was held that the circuit court had authority to allow the substitution of a new bond, to cure defects in the bond filed in the state court, and also to allow the petition to be amended so as to show the proper jurisdictional facts, where not shown by the record brought from the state court and filed in the circuit court. The filing of a new bond is merely to correct an *irregularity* in the proceedings. It is not a jurisdictional fact in this court. Generally the main object of a bond has been accomplished by the filing of the record in the circuit court before the motion to remand has been made. I have heretofore thought it proper to allow an imperfect bond to be corrected in the circuit court, or any other matter of mere irregularity, not affecting the jurisdiction of the court. But, although aware that some circuit judges have adopted a different practice, I have never in this circuit allowed a petition which did not show the jurisdictional facts to be amended in such way as to show jurisdiction.

I am not prepared to say that the court has not power to allow such an amendment to be made; but if the power be conceded, it is not a matter which the party can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. It has been said by some judges that they saw no reason why an amendment, showing the jurisdictional facts, should not be allowed to the petition in the circuit court, that is not equally applicable to the case of a bill originally filed in the circuit court, which omits to properly state the jurisdictional facts depending upon citizenship or otherwise. In my judgment, there is a very important distinction, that does not appear to have attracted the attention of the courts in the cases hitherto

reported. Take the present case for example. The record in the state court shows a case over which that court has jurisdiction, and it does not show a proper case for removal, or any case of which this court has jurisdiction. The supreme court has decided that, whenever the proceedings in the state court have been perfected so as to show upon the record of that court that the petitioner is entitled to have his case removed, all jurisdiction of the state court ceases, and all subsequent proceedings in the case are illegal and void, even if it has refused to make any order for the removal; and that no order of removal is necessary. The jurisdiction of the state court is suspended, or superseded, the moment the proceedings showing a proper case for removal have been perfected. But the supreme court has also held the correlative proposition to be true, that the state court is not bound to renounce its jurisdiction, or let go its hold upon the case, until its record shows upon its face a proper case for removal, and that the jurisdiction of the United States court has attached; that the state court is authorized to proceed until its own record shows that it has lost jurisdiction, and the jurisdiction of the circuit court has attached. Now, in this case, the record of the state court shows jurisdiction in that court, and does not show jurisdiction in this court. The state court is, therefore, fully authorized to proceed to a final judgment, which will be valid. The record in this court does not show jurisdiction in this court, but if the petition be amended here, as desired, jurisdiction will be shown by the record in this court. Its jurisdiction appearing on the record, it can, also, regularly proceed to final judgment. Thus each court, proceeding on its own record, has jurisdiction, and the result may be, two final valid judgments, entirely different, or even opposite judgments, with no error in the record upon which either judgment or decree could be reversed on writ of error or appeal. That state courts may proceed when its record does not show a valid removal is evident from the fact that in a number of cases they have proceeded even after a valid removal; and their judgments in such cases have been reversed on that ground by the supreme court. In my judgment, in such cases as this the circuit court, in the exercise of a sound discretion, should not permit a case to be thus embarrassed by an amendment to the petition, so as to show a proper case for removal, and jurisdiction in the circuit court, when these conditions are not shown in the record of the state court. The law as to averments of citizenship has been laid down so often, and been so long settled, that those who fail to make the proper allegations are entitled to little indulgence on account of the oversight. Although there is no ground to suspect anything of the kind in this case, there is reason to believe that the right to remove is sometimes exercised, not for the purposes of justice, but just the opposite—to obtain delay, and to hinder and obstruct the administration of justice by the enormous expense and inconvenience of litigating five or six hundred miles, more or less, from home. In my judgment, in this

circuit, at least, a pretty strict rule should be adhered to, in requiring a clear case for removal to be made out in the first instance in the court where the suit is brought; and that the court to which a removal is made should not be lax in allowing defective records to be made good by amendment after removal. This is the principle heretofore acted upon in this court.

For the reasons indicated, leave to amend the petition so as to show jurisdiction is denied, and the cause remanded to the state court, with costs.

JUDGE and others *v.* ANDERSON.

(Circuit Court, D. Minnesota. April 24, 1884.

1. PRACTICE IN CASES REMOVED FROM STATE COURTS—WHEN JURISDICTION ATTACHES.
   The jurisdiction of the United States circuit court attaches in a case removable under the statute at the time when the petition and bond is filed in the state court.
2. SAME—WHEN ISSUE MAY BE JOINED.
   If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, the rule of the United States circuit court in this district gives until the fifth day of the term to make up the issue, and the case then stands for trial.

On April 9, 1884, the defendant filed a petition and bond for removal of the above-entitled cause to the circuit court of the United States for the district of Minnesota. The petition is in compliance with the statute for the removal of causes from the state to the federal court, and is accompanied by the bond required. An order was made for the removal by the state court, and on April 14th the *plaintiffs* procured and filed a transcript of the record of the cause in the clerk's office of the United States circuit court for the district of Minnesota. The term of that court as fixed by law commenced on the second Monday in December, A. D. 1883, and was still continuing when the transcript of the record was filed. The circuit court has a rule that when a cause is commenced in the state court, 30 days before the next term of the United States circuit court in the district convenes, if issue is not joined in the state court at the time of the removal, the cause shall stand for trial, and the issues shall be joined therein within five days from the first day of the said term. The defendant, by counsel, appears specially under protest, and objects to the jurisdiction of the court to proceed in the action and grant judgment for default according to the state statute, unless an answer is filed within a time to be fixed by the court.

Frackelton & Careins, for plaintiffs.

Warner & Stevens, for defendant.

NELSON, J. It has been decided by the supreme court of the United States that the jurisdiction of the United States circuit court attaches in a case removable, under the statute, at the time when the petition and bond is filed in the state court. The transfer of jurisdiction is then complete in advance of the entry of a transcript of the record in the clerk's office of the circuit court. *Duncan* v. *Gegan*, 101 U. S. 812; *Railroad Co.* v. *Koontz*, 104 U. S. 15; *Steam-ship Co.* v. *Tugman*, 106 U. S. 122; S. C. 1 Sup. Ct. Rep. 58; *St. Paul & C. Ry. Co.* v. *McLean*, 2 Sup. Ct. Rep. 499. The circuit court does not take the suit unless its jurisdiction appears of record; and if, before the statutory time when the removing party is required to enter a copy of the record and his appearance in the United States circuit court, either party procures a transcript and files it in the clerk's office, the jurisdiction then appears of record, and all proceedings necessary to prepare the cause for trial at the next session of the court can be taken by either party. The court then has jurisdiction of the cause as if it had been commenced there by original process.

In the case of *Kern* v. *Huidekoper*, 103 U. S. 487, the plaintiff applied for removal July 6th, and filed the transcript in the clerk's office of the United States circuit court on July 27th. The term of that court prescribed by law began on July 2d, before the petition for removal was filed in the state court. On November 14th, the July term still continuing, the circuit court made an order approving the filing of the record. The supreme court held that the filing of the record July 27th gave the circuit court the right to proceed with the cause; that is, as I understand the decision, to go on and perfect the issues, if necessary, and grant provisional remedies, but the removing party is not required to try the issues until the term next ensuing that of the state court when the cause was removed.

The rule cited by counsel does not prevent the court from entertaining motions to make up the issues when applied to by the parties. If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, this rule gives until the fifth day of the term to make up the issues, and the cause then stands for trial. It applies to all cases removed and docketed on the first day of the term, where neither party had previously applied to the court to proceed in the case.

The defendant will file his answer within five days from this day, to-wit, April 24, 1884; and it is so ordered.

MULVILLE, Trustee, *v.* ADAMS and others.

(*Circuit Court, N. D. New York.* March 4, 1884.)

1. FIRE INSURANCE — DESCRIPTION OF PREMISES — RESPONSIBILITY OF THE ASSURED FOR WARRANTIES AND REPRESENTATIONS.
   Where, in an application for insurance whereby the assured agrees that the application is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to him and are material to the risk, it is immaterial whether the statements are regarded as warranty or merely as representations of the truth of the statement, because the applicant only assumes responsibility for their truth so far as the facts are known to him and are material to his risk.
2. SAME—CONDITIONS WORKING FORFEITURE.
   Conditions that work a forfeiture are not to be extended by construction. Being put into the policy for the benefit of the insurer, they will be construed most liberally for the assured.
3. SAME—MATERIALITY A QUESTION OF FACT.
   The materiality of a representation is a question of fact. The test is the probable effect of the representation upon the judgment of the insurer.

In Equity.

Wm. W. Badger, for complainant.

Wetmore & Jenner, for defendants.

WALLACE, J. The complainant, as trustee for 21 insurance companies that had issued policies of fire insurance to the defendant Adams, took an assignment of a bond and mortgage executed by Adams to one Dodge, and has filed this bill to foreclose the mortgage and obtain a decree against Adams on the bond. The property of Adams insured by said policies had been burned, and suits had been brought, some by Adams and some by Dodge, against the several companies to recover the loss, when it was arranged between all the parties that Dodge should assign the bond and mortgage to the complainant, and the pending suits should be discontinued. The assignment contained the following clause:

"The said Mulville, in consideration of receiving said assignment and the discontinuance of such actions, agrees to and with the said Dodge that he will within thirty days commence a suit to foreclose the said mortgage, to which suit the said Adams shall be made a party, and a claim made against him for any deficiency, and that if any of the said policies of insurance were valid as to the interest of said Adams therein at the time of the fire, May 15, 1877, that then such of them as were then valid shall be deemed a good and sufficient defense to the extent that such policies may have been valid."

The property insured consisted of "a saw-mill building, a stone boiler-house attached thereto, and a brick chimney standing detached, all known as the Clinton Mills, together with the engines, boilers, machinery, tools, and all fixtures and appurtenances contained in the buildings." The total insurance was $20,500, of which $5,473.50 was upon the buildings and $15,026.50 was upon the personal property and fixtures.

The bill alleges generally that the several insurance policies issued by the companies to Adams were invalid and void on account of misrepresentations, concealment, and breach of warranty on the part of Adams. The specific allegations are that the insurance was made and issued upon a survey and written description of the property, and that by the terms of the policies such survey and description were to be taken and deemed a part of such policy and a warranty on the part of the assured; and that by other conditions of the policies any false representations by the assured of the condition, situation, or occupancy of the property, any omission to make known every fact material to the risk, any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, should render the policies void. The bill further alleges that in the said survey and description of the premises, among other things, the insured represented the premises described in said policies as being disconnected and detached from a building known and described as a lath and shingle mill; and further represented that there was no planer or planing machine on said premises, nor in the said adjoining building; that there was no woodland or woods within one quarter of a mile of said premises; and that there were no other buildings than those set forth in the application within 150 feet of the buildings insured,—all of which representations were false. The bill also alleges that the insured represented and warranted that there was no incumbrance or mortgage on the property insured, whereas there was in fact at the time of the application for insurance a mortgage thereon in favor of one Dodge. By an amendment to the bill it is alleged that by the terms of the several policies it was conditioned that if the property covered by the insurance should be sold, conveyed, or transferred, the policies should become void, and that they did become void because of a conveyance made by Adams to his son after procuring the insurance and before the fire.

The case turns upon the validity of the policies as affected by the misrepresentations and breaches thus set forth. If none of them are invalid because of these misrepresentations and breaches, they were valid at the time of the fire. The bill contains further allegations intended to show that a recovery could not have been had against the insurance companies upon the policies because of breaches of conditions which took place after the loss, such as failure of the assured to comply with the conditions respecting proofs of loss, failure to furnish certified copies of invoices of property destroyed, refusal of the assured to arbitrate, and overvaluation and false swearing in the proofs of loss. These allegations must be deemed irrelevant to the real controversy, because by the agreement under which the complainant acquired the mortgage the only question open to contestation is whether the policies were valid at the time of the fire. If they were then valid, they are a good defense to the mortgage. The language of the agreement does not permit the complainant to contest

generally the question whether the plaintiffs in the pending suits against the insurance companies were entitled to recover upon the policies.

The validity of the policies has been assailed in the arguments of counsel upon several grounds, which must be disregarded because the allegations of the bill do not present them. No overvaluation is alleged except in the proofs of loss, and no concealment, as distinct from misrepresentation, is alleged. The controversy is therefore narrowed to the specific issues of misrepresentation or breach of warranty as follows: That the insured premises were disconnected from the shingle mill; that there was no planing-machine in the saw-mill or shingle-mill; that there was no woods or woodlands within one quarter of a mile; that there were no other buildings, except those shown in the survey, within 150 feet of the insured premises; that there was no mortgage to Dodge upon the property; and whether there was a breach of condition whereby the policies are void because of the conveyance of Adams to his son.

There were no oral representations made by Adams, or in his behalf, as a basis for the insurance. The policies were obtained through one Moies, an insurance broker employed by Adams. Moies applied to one Woodward, an insurance agent, and produced to him a written application which had been used by Adams several years before for obtaining a policy on the same property from the Imperial Fire Insurance Company. There was a survey or diagram showing the ground plan of the saw-mill, the shingle-mill, and the chimney, annexed to the application. Woodward was agent for four insurance companies—the Farmville, the Humboldt, the Safeguard, and the Royal Canadian. He made a synopsis of the Imperial application, which is spoken of in the proofs as a "digest," annexing to it a copy of the diagram and a description of the property to be insured. This was shown by him to the officers or agents of some of the companies, and the policies issued by these companies were based upon it as the application for insurance. Every policy in suit was obtained upon this "digest," except the policies issued by the companies for which Woodward was agent and those issued by the Merchants Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The policies issued by the Farmville, the Humboldt, the Safeguard, the Royal Canadian, the Merchants, the St. Louis, and the American Central Companies were obtained upon the original or Imperial application.

1. There was no misrepresentation or breach of warranty which avoids the policies issued upon the basis of the "digest." Every representation contained in this application was a warranty by the terms of the policies, but none of the representations were untrue. By this application the assured represented that there was no planing-machine in the saw-mill building and no woodland within a quarter of a mile. Both of these representations were true. He did not represent,

however, that the saw-mill was disconnected from the shingle-mill, or that there were no other buildings within 150 feet of the property to be insured. The diagram purported to give only the ground plan of the buildings shown upon it. The shingle-mill was properly described as an "adjoining building."

2. There was no misrepresentation or breach of warranty which avoids the policies issued upon the basis of the "Imperial survey" except respecting the existence of a mortgage upon the property. This application consisted of a printed blank containing questions to be answered by the applicant, and an instruction to annex a diagram with a full explanation of the buildings to be insured, and of all buildings within 150 feet. The diagram annexed showed a ground plan of the saw-mill, boiler-room, lath and shingle mill, the side track of a railway, and the location of the water which supplied the mill. An important feature of the application consists in an agreement at the end whereby the applicant covenanted that the application was a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, "so far as the same were known to him, and were material to the risk." This agreement restricts the effect of the representations contained in the application. Whether they are treated as a warranty of their truth or as representations merely is not material, because, in either view, the applicant only undertook responsibility for the truth of the representations, so far as the facts were known to him and were material to the risk. *Houghton* v. *Manuf'rs' Ins. Co.* 8 Metc. 114. The application and the policies are to be read together, and it is a familiar rule in the interpretation of conditions which work a forfeiture that they are not to be extended by construction, and, being inserted for the benefit of the insurer, they are to be liberally construed in favor of the assured. No effect can be given to the covenant on the part of the applicant at the end of the application, unless it is construed as restricting his undertaking and holding him accountable for the accuracy of his statements, so far only as the facts stated are material to the risk. If every statement and the truth of every answer were to be treated as material, there would be nothing upon which the restriction could operate. In this application the assured represented by his answer to the eighteenth question that there was no planing-machine upon the premises, but the premises to which the question and answer refer are the insured premises, not the adjuncts or adjoining premises. *Northwestern Ins. Co.* v. *Germania Ins. Co.* 40 Wis. 446; *Carlin* v. *Western Assurance Co.* 57 Md. 515. There was therefore no misrepresentation.

If the first subdivision of the answer should be regarded as an answer to the first subdivision of the question, it is not responsive. When a question is not answered it is not to be inferred that there was nothing which required an answer, and in such case if the answer is not responsive or satisfactory the insurer waives a full answer. *Higgins*

v. *Phœnix Ins. Co.* 74 N. Y. 6; *Carson* v. *Jersey City Ins. Co.* 43 N. J. Law, 30; *Com.* v. *Hide & Leather Ins. Co.* 112 Mass. 136. A reference to the original application, however, shows that this subdivision of the answer was intended as a response to the last subdivision of question 17. The answer to the thirty-fourth question is to be regarded as making the diagram an exhibit and description of all buildings within 150 feet of the insured building, and is equivalent, therefore, to a representation that all such buildings were shown upon it. As it did not disclose the existence of certain buildings within that distance, the omission would be fatal to the validity of the policies were it not that the assured only undertook to be responsible for the truth of his representations, so far as the representations were material to the risk. The materiality of a representation is a question of fact; the test is the probable influence of the representation upon the judgment of the insurer. The testimony of the experts here is sufficient to indicate that the existence of buildings not within 100 feet of the insured property would not be deemed to increase the risk. The omission to describe those outside of that distance must, therefore, be held to be immaterial. This application also contained a representation that there was no mortgage or incumbrance upon the property to be insured. This representation was untrue.

3. Under the allegations of the bill, the only breach of warranty or misrepresentation concerning incumbrances or mortgages upon the insured property is such as arises from the existence of a mortgage to Dodge. At the time the application was originally prepared, there was no mortgage on the property, so far as appears by the proofs. While there is no reason to suppose that Adams intended to misrepresent the fact when the policies in suit were obtained, the inadvertent representation must, of course, be given full effect. The only policies issued upon this application were those of the Merchants' Insurance Company, the St. Louis Insurance Company, the American Central Insurance Company, The Farmville Insurance & Banking Company, the Humboldt Insurance Company, the Safeguard Fire Insurance Company, and the Royal Canadian Insurance Company. Woodward, who was the agent of four of these companies, (the Farmville, the Humboldt, the Safeguard, and the Royal Canadian,) knew of the existence of the mortgage to Dodge at the time the policies were issued. The policies issued by these companies are therefore not invalidated by reason of its existence. His knowledge is imputable to them, and no misrepresentation can be predicated of a fact of which the insurers were fully cognizant. Ang. Ins. § 324. This branch of the controversy is thus narrowed to the policies issued by the Merchants' Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The policy issued by the Merchants' Insurance Company may also be excluded because the evidence shows that the secretary of that company knew of the existence of the Dodge mortgage. The loss in that policy was

originally made payable to Dodge as mortgagee. The policies of the St. Louis Insurance Company and the American Central Insurance Company were obtained through Messrs. Monrose & Melville, the agents of those companies, and were issued by them upon the faith of the statements contained in the Imperial application. As to these policies it must be held that the misrepresentation was fatal to the insurance.

4. The only policies as to which a breach of the condition respecting a sale or conveyance of the property covered by the insurance can be alleged are those issued by the Franklin Insurance Company and the German-American Insurance Company, all the others having been made and delivered after the date of the conveyance by Adams to his son. The proofs show that while these policies were in force, and previous to the fire, Adams made and acknowledged a conveyance of the property to his son, and three days afterwards the son made and acknowledged a conveyance back to the father. The first deed was put on record shortly after the fire. Both the parties to the conveyance testify that it was never delivered, and the father testifies that he put it on record to prevent judgments which were about to be entered against him from becoming liens on the property. The theory of the non-delivery of the deed is so inconsistent with the execution and delivery of the reconveyance by the son that it should not be regarded as true. The act of the son in making a conveyance back, and of the father in accepting it, was an authentic declaration by both, made at a time when neither of them had any interest to subserve by a perversion of the facts, that the former had a title to transfer. These policies are therefore held to have become void. It follows that none of the policies are invalid upon the grounds alleged in the bill except those issued by the Franklin Insurance Company, the German-American Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The amount due upon the several policies is not in issue, because the bill does not charge that the loss was less than the insurance. The proofs, however, show that it was equal at least to the total insurance. Neither is there any issue as to the invalidity of Adams' discharge in bankruptcy which is set up in the answer as a defense to any decree against him upon his bond. The validity of the discharge is not put in issue by a replication. Story, Eq. Pl. § 878. It is needless to say that no facts are properly in issue unless charged in the bill; that every fact essential to obtain the relief desired must be alleged; and that no relief can be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence. Id. § 257.

A decree is directed for the complainant, with a reference to a master to ascertain the amount due upon the mortgage. In ascertaining this the master will apply the insurance moneys due upon all the policies, except the four declared void, as a payment upon the mortgage at the date of the assignment to complainant.

UNITED STATES *v.* AUFFMORDT and another.

(*District Court, S. D. New York.* March, 1884.)

1. PENALTIES AND FORFEITURES—MOIETY ACT OF JUNE 22, 1874—FRAUDS ON REVENUE.
   The moiety act passed June 22, 1874, was designed to cover the whole ground of frauds on the revenue in the entry of imported goods at the custom-house, embracing the punishment of offenders criminally, as well as indemnity to the government; and it therefore supersedes, by implication, the different provisions of sections 2839 and 2864 of the Revised Statutes on the same subject.
2. SAME—REV. ST. §§ 2839, 2864.
   The absolute forfeiture of goods fraudulently entered, which is prescribed by section 12 of the moiety act, is inconsistent with, and repugnant to, the forfeiture in the alternative only of either the goods or their value, as prescribed by sections 2839 and 2864. Under the former, the title of the goods vests in the United States from the moment when the fraud is committed, and prevails against *bona fide* purchasers before seizure; under the latter, the title of the government vests only from the time of its election to proceed against the goods, rather than for their value, and a *bona fide* sale in the mean time will pass a good title against the government. The absolute forfeiture under section 12 of the moiety act, and the alternative forfeiture under sections 2839 and 2864, for the same frauds, cannot co-exist; the alternative forfeiture of value under those sections is, therefore, within the repealing clause of the moiety act, which repeals all acts or parts of acts inconsistent therewith.
3. SAME — ACT OF FEBRUARY 18, 1875 — CONSTRUCTION — REPEAL — PROCEEDING AGAINST GOODS.
   The act of February 18, 1875, amending the Revised Statutes, was not designed as new legislation, but only to make the text of the Revised Statutes express truly the law as it existed on December 1, 1873. The amendment of section 2864 by that act is to be read and construed as though it were a part of the Revised Statutes, as originally enacted, and subject, therefore, to the provisions of sections 5596 and 5601. *Held, therefore*, that the amendment of section 2864, by the act of February 18, 1875, does not supersede the moiety act as subsequent legislation. *Held, accordingly*, that forfeitures of value for fraudulent undervaluations can no longer be enforced under sections 2839 and 2864; the remedy is confined to proceedings against the goods under section 12 of the moiety act.
4. SAME—SUIT IN PERSONAM.
   Whether the language of section 2864, prescribing forfeiture of "value" without saying, like section 2839, of whom to be recovered, is sufficient to authorize a suit *in personam*, *quære*.

The above suit was brought *in personam* to recover $321,519.29, the value of a large quantity of silk ribbons imported from Switzerland into the port of New York, during the years 1879, 1880, 1881, and 1882, and entered in the custom-house by the defendants, as it is alleged, by means of fraudulent undervaluations in the invoices as to the market value of the goods. The importations and entries are 91 in number. The declaration alleges that the value of such goods, by reason of such fraudulent undervaluations, became forfeited to the United States under sections 2864 and 2839, Rev. St. None of the goods were seized, nor were any proceedings ever taken to forfeit the goods.

By the plaintiff's bill of particulars the record shows that the goods were sent by the manufacturers in Switzerland to the defendants here for sale on commission, none of them being purchased goods. The

cause came on for trial on the thirteenth of February, 1884, before the district judge and a jury; and after the opening by the plaintiff's counsel, stating in substance the above matters, the defendant's counsel moved, upon the record and the facts stated in the opening, that a verdict be directed for the defendant, on the ground that forfeitures of value under section 2864 had been superseded by section 12 of the act of June 22, 1874, and that since that act the goods only, and not their value, could be forfeited. After elaborate argument, the court, on the next morning, granted the motion, upon the grounds stated in the following opinion:

Elihu Root and *John Proctor Clarke*, for the United States.

Tremain & Tyler and *Charles M. Da Costa*, for defendant.

BROWN, J. The claim of the plaintiff in this case is founded upon alleged fraudulent undervaluations of imported goods consigned to the defendants for sale by the manufacturers in Europe. Such frauds fall clearly within the provisions of section 12 of the act of June 22, 1874, which, for convenience sake, I shall call the moiety act. They also fall equally clearly within section 1 of the act of March 3, 1863, and section 2864, Rev. St., if the forfeitures of value provided by those sections are still in force. The latter prescribe a "forfeiture of the merchandise, or the value thereof;" and this suit is based upon that provision. The moiety act prescribes a forfeiture of the *goods* only.

The point raised by the motion does not appear to have been previously considered in any reported case. But few suits for the forfeiture of the *value* of goods, instituted since the passage of the moiety act, have been brought to trial within this district; and in none of them do I find that the attention of the court was called to the point now raised, namely, that the moiety act, by prescibing fine, imprisonment, and the absolute forfeiture of the goods, as the remedies of the government in cases of fraudulent undervaluation, omitting any forfeiture of value, has superseded and repealed section 1 of the act of March 3, 1863, (section 2864, Rev. St.,) which in similar cases prescribed only an alternative forfeiture of the goods *or* the value thereof.

Section 2839 provides for the forfeiture of merchandise or the value thereof, "to be recovered of the person making entry," where the goods are "not invoiced according to the actual cost thereof at the place of exportation, with the design to evade payment of duty." This section, taken from section 66 of the act of March 27, 1799, (1 St. at Large, 677,) is applicable only to goods purchased. *Alfonso* v. *U. S.* 2 Story, 421, 429, 432. Where goods are imported into this country by the manufacturer, the invoice is required to state, not the actual cost at the place of exportation, but the "true market value thereof." Sections 2841, 2845, 2854.

The only statute under which a forfeiture of value can be claimed in cases like the present, that is, of goods obtained otherwise than

by purchase, is section 2864, taken from section 1 of the act of March 3, 1863, (12 St. at Large, 763.) That section reads as follows:

"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise, or the value thereof, shall be forfeited."

As an original question, it might well be doubted whether the mere words of section 2864 and of section 1 of the act of 1863, declaring a forfeiture of the goods or the value thereof, would be sufficient to sustain a suit *in personam* against the importer for such value without any seizure of the goods. I do not know of any analogy supporting such penal actions *in personam* upon such loose statutory words. The section does not specify who is to be sued in person, or against whom any recovery is to be sought; whether against the owner of the goods, his agent, or against the person making the entry. Suppose the owner guilty of fraud, but the agent making the entry innocent, is the latter, after having sold the goods and turned over the proceeds to his principal, to be held liable to pay the value over again to the United States, without any more explicit language making him liable than simply that the value shall be forfeited, without saying from whom to be recovered?

The act of 1799, (section 2839,) after declaring a forfeiture of value, adds "to be recovered of the person making entry." By the omission of these, and any equivalent words, in the act of 1863, it might well be considered that the intention of the latter act was only to provide for the forfeiture of the value of the goods in those cases where the goods had been seized and allowed to be bonded under other provisions of law, a power concerning which some question has been repeatedly made. Though many suits for value have been brought since the act of 1863, I am not aware that the attention of the court has been called to this objection in any previous action. Omitting, therefore, any further reference to this question, I proceed to the main ground of the motion, assuming that section 2864, like section 2839, authorizes a suit for value, independent of any seizure of the goods.

Section 12 of the moiety act, passed June 22, 1874, (1 Sup. Rev. St. 79,) is as follows:

"Any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any

sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates. And anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be and the same is hereby repealed."

Section 13 provides that any merchandise entered by any person violating the preceding section, but not subject to forfeiture under the same section, may, "while owned by him, or while in his possession, to double the amount claimed, be taken by the collector and held as security for the payment of any fine incurred." Section 14 of the same act provides that the omission, without intent to defraud the revenue, or any of the various shipping charges, commissions, port duties, etc., which may be required by law, shall not be a cause of forfeiture of goods or their value; but requires that in such cases the collector shall add to such charges the further sum of 100 per cent., which addition shall constitute a part of the dutiable value. Section 16 permits no fine, penalty, or forfeiture in any case, existing or subsequent, unless the jury finds specially an actual intent to defraud. Section 22 provides that no suit to recover "any pecuniary penalty or forfeiture of property" under the revenue laws shall be instituted except within three years, etc. Section 26 repeals all acts and parts of acts inconsistent therewith. The section last cited does not in terms refer to sections 2839 and 2864, nor to the corresponding sections of the acts of 1799 and 1863, from which they were taken, but repeals whatever is inconsistent with it.

Although the moiety act was passed on the same day with the enactment of the Revision of the Statutes, the latter is only declaratory of the law as it existed on December 1, 1873, (section 5595;) and all acts of congress passed after the latter date are to be construed as subsequent enactments, and modify the Revised Statutes accordingly. Section 5601; *U. S.* v. *Bowen*, 100 U. S. 508, 513; *Brown* v. *Jefferson Co. Nat. Bank*, 9 FED. REP. 258–260; *In re Oregon, etc., Co.* 3 Sawy. 614, 617; *U. S.* v. *Bain*, 5 FED. REP. 192, 195. The single question, therefore, is, whether the forfeiture of the value of goods, by reason of fraudulent undervaluations on the entry thereof, has been repealed by the provisions of the moiety act. Such consideration as I have been able to give to the subject satisfies me that the forfeiture of value in such cases must be deemed superseded and repealed by that act,—*First*, because in the passage of the moiety act the whole subject of fraudulent importations, and the remedies and punishments to be enforced therefor, were evidently fully and deliberately considered; new and diffent fines, punishments, and remedies were thereby provided, which include both punishment of the offender and indemnity to the government; and these, by implication, supersede the former and dif-

ferent provisions on the same subject: *second*, because the absolute forfeiture of the goods denounced by the moiety act is clearly repugnant to the alternative forfeiture only "of the goods *or* the value thereof," as prescribed in the previous acts, so that both cannot possibly co-exist; and, *third*, upon the decisions of the supreme court in analogous cases.

The rule of construction where a subsequent statute covers the same ground as a former one has been frequently defined by the supreme court. Thus, in the case of *Norris* v. *Crocker*, 13 How. 429, 438, Mr. Justice CATRON, delivering the unanimous opinion of the court, said:

"As a general rule, it is not open to controversy that where a new statute covers the whole subject-matter of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication, as the provisions of both cannot stand together."

Mr. Justice FIELD, in *U. S.* v. *Tynen*, 11 Wall. 88, said, (p. 92:)

"It is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnance, as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

The same rule was reaffirmed and applied in the case of *King* v. *Cornell*, 106 U. S. 395, 396, S. C. 1 Sup. Ct. Rep. 312, in the case of *Pana* v. *Bowler*, 107 U. S. 529, 538, S. C. 2 Sup. Ct. Rep. 704, and in *Murdock* v. *City of Memphis*, 20 Wall. 590, 617. In the case last cited, Mr. Justice MILLER, in delivering the opinion of the court, says, (p. 617:)

"A careful comparison of these two sections can leave no doubt that it was the intention of congress, by the latter statute, to revise the entire matter to which they both had reference; to make such changes in the law as it stood as they thought best; and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law, as far as the present law differed from the former; and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it."

The language quoted from these cases seems to me to be specially applicable here. In scarcely any of the cases cited, where a later statute was held to repeal a former one by implication, was the evidence so clear, as it seems to me, both from the provisions of the statute itself and the history of its passage, that congress intended to deal with the whole subject, and to declare what in the future should be the whole law of remedy and punishment, as in the case of the moiety act, in its dealing with the subject of fraudulent importations, and the punishment and remedies of the government therefor.

The attention of congress had been called to the whole subject by what had been deemed to be crying abuses in the administration of

the former law. There were widespread complaints that the machinery of the law then existing was skillfully worked by agents and informers of the government for their own benefit, to extort large sums of money from the merchants for trifling and uncertain irregularities or violations of law. The chief means by which these extortions were alleged to be practiced were by the institution of suits for vast sums of money, alleged to have become due to the government through forfeitures of the value of goods entered during a series of years preceding. In such suits, by a preliminary seizure of the books and papers of the merchant and the detention of them in custody, and by reason of technical forfeitures unaccompanied by fraud, and of the forfeiture of whole invoices for irregularities in a single item, merchants, deprived of their books and uncertain of the precise facts, were often constrained, through their uncertainty as to the result, and the injury to their credit by the long pendency of suits for such large demands against them, to pay great sums in settlement, far beyond the bounds of reasonable forfeiture or of legitimate punishment.

The moiety act, passed under these circumstances, shows, by its own provisions, that it was designed to correct the evils complained of, by means of changes broad and radical: (1) By abolishing the moiety system entirely; (2) by prescribing more definite rules under which the books and papers of merchants might be seized and examined; (3) by preventing the forfeiture of a whole invoice when only a part of the cases or packages included in it might be affected by fraud, (section 12;) (4) by abolishing (section 16) all fines and forfeitures, except where a jury should find an actual intent to defraud; (5) by enacting, in cases of actual fraud, new and heavy punishments, by fine and imprisonment, (section 12;) (6) by enacting, also, in cases of actual fraud, the absolute forfeiture of the goods to which the fraud relates, in place of the former alternative of a forfeiture of the goods or their value, and thus disallowing civil suits for value merely, which had furnished the chief means of the previous abuses; (7) by providing security (section 13) for the collection of fines where the goods were not seized; (8) by limiting suits to three years, (section 22.)

This act, moreover, is more precise and definite in its provisions than are the former acts, in defining the frauds to be punished; it embraces every conceivable act of commission or of omission, accompanied by fraud. There are new conditions and qualifications applying to every part of the former law. As a condition of forfeiture, in every act of commission, the moiety act requires an actual intent to defraud; and in every act of omission, it adds, as a further condition, that the United States be thereby "deprived of its lawful duties," (section 12,) a qualification not existing under section 2864. But why should congress add such a qualification to acts of omission, if for precisely the same acts of omission a forfeiture was still to be incurred under section 2864 without any such qualification? The

two are inconsistent in intention, and the latter act therefore supersedes the former. The case of *Daviess* v. *Fairbairn*, 3 How. 636, is exactly analogous, where a new qualification upon the power of a justice of the peace to take acknowledgments, was held to repeal by implication a former statute without such qualification.

Section 12, moreover, creates a new criminal offense for the same frauds, punishable by heavy fine and imprisonment; and while, in its remedial parts, providing for the indemnity of the government, it limits the remedy by forfeiture to the goods only, it makes this forfeiture absolute, so that even *bona fide* purchasers get no title as against the government; and if this remedy be lost by a dispersion of the goods before seizure, it still provides additional means for indemnifying the government, not merely by the heavy fines which it imposes on conviction for the same acts, but by authorizing a seizure by the collector of any other imported goods of the same merchant, as security for the payment of any such fines as may be recovered. Section 13. These fines themselves would, as a general rule, furnish complete indemnity to the government for fraudulent importations. In the present case they would exceed by nearly one-half the entire amount claimed in this action, if the facts alleged were proved on indictment. There is no inadequacy in the law, therefore, as a means of indemnity to the government, through the repeal of forfeitures of value by civil action. The limitation of forfeiture to the goods themselves tends to promote vigilance in discovering fraud before the dispersion of the goods, and the trial of the questions in dispute while the transactions are recent. To the honest merchant, the restriction of suits based upon old transactions to criminal proceedings, operates as some check against abuses, because criminal proceedings are less likely to be instituted lightly upon trifling irregularities or small differences on estimated values, about which the opinion of experts might differ; while if fraud be proved, the court, through the discretion provided by the moiety act, can adjust the fines and the imprisonment, so as to bear some reasonable relation to the loss of the government and to legitimate punishment. The moiety act, therefore, as it seems to me, falls clearly within the general doctrine of the cases above cited. It covers the whole field of former acts; it creates new offenses and new punishments for the same subject-matter; it adds new and important qualifications to the former law; and it provides fully, though in a different way, for the indemnity of the government and for the punishment of offenders.

Again, it is to be noted that under the provisions forbidding any fine, forfeiture, or penalty, except in case of actual intent to defraud, and the prohibition of the forfeiture of any packages except those to which the fraud relates, not a single previous statute can be enforced in the shape in which it stands. Section 2864 contains no clause even which can be thus enforced just as it exists in the statute. All that could possibly be done with it would be to pick out portions of

it, and apply to them the provisions of the moiety act as modifications, and enforce them as thus modified. But the moiety act does not seek or profess to modify these former acts when inconsistent with it. It enacts its own remedies for the same subject-matter, and declares by section 26 that all acts and parts of acts "inconsistent with" itself are not modified accordingly, but repealed.

The debates in congress show clearly an intention to enact, not cumulative remedies, but a new system in place of the old.

Mr. Roberts, in reporting the bill to the house, said:

"We have endeavored to provide for adequate punishment in all cases of guilty intent to defraud, and to furnish relief in case of accident or mistake. We have sought to provide for penalties proportionate to the offenses proved which the present laws utterly ignore." Cong. Rec. 43d Cong. 1st Sess. vol. 2, pt. 5, p. 4039.

Senator Stewart, (page 4809,) in reference to the twelfth section, says, in opposition:

"I do not think they could have seen how far this section goes to break up all laws on the subject; for remember this is to take the place of other statutes, as I understand."

At page 4813, Senator Edmunds says:

"This bill is apparently a substitute for the provisions about frauds on the revenue which the act of 1799 and of 1830 and of 1832 and of 1866 contained."

Senator Conkling, (pages 4815, 4816,) in answer to the inquiry of Senator Thurman as to how far the twelfth section would affect existing laws, said:

"When you describe an offense and provide a punishment and repeal of other statutes, the general rule certainly is that you occupy the ground with the new statute, and you annul that which before operated upon the same subject in a different way. The senator will see, if he will read the whole of this twelfth section, that not in one respect alone, but with great particularity, in all respects of general scope, it covers the ground of the section to which he has referred."

From the clear expressions of the framers of the law, therefore, as well as from the provisions of the law itself, the intent to supersede former acts appears evident; and the forfeiture of value would be deemed repealed by implication, even if there were no special repugnancy to it in the new law. See, also, *Pana* v. *Bowler, supra; Cook Co. Bank* v. *U. S.* 107 U. S. 445, 451; S. C. 2 Sup. Ct. Rep. 561; *Bartlet* v. *King*, 12 Mass. 537; *Nichols* v. *Squires*, 5 Pick. 168.

2. But there is also a clear repugnancy between the provisions of the moiety act and those of section 2864. Section 12 of the moiety act, in cases like the present, declares an absolute forfeiture of the goods. Section 1 of the act of March 3, 1863, (section 2864, Rev. St.,) declares the alternative forfeiture of the goods *or* their value. Under the earlier law the forfeiture was not absolute, but only at the election of the government; under the moiety act there can be no

election in the government, for the forfeiture of the goods is made absolute. Under the former, the government might have either the goods or their value, but not both; and before it could have either it must elect which it would pursue. The old law not only permitted, but enforced, an election by the government. The moiety act permits no election, since, as I have said, the forfeiture of the goods is made absolute. These two provisions of the statute, therefore, cannot co-exist. There cannot be an election to have either the goods or their value, and, at the same moment, an absolute statutory forfeiture of the goods themselves. The two provisions are mutually exclusive.

The distinction between the two acts in this respect is of very great practical importance. Where the law makes the forfeiture absolute, as the moiety act makes it, the title of the goods is vested in the government at once, from the moment when the unlawful acts are committed; so that a sale of the goods by the importer, before seizure, to *bona fide* purchasers even, will not oust the title of the government. *Caldwell* v. *U. S.* 8 How. 366; *Henderson's Spirits*, 14 Wall. 44; *U. S.* v. *76,125 Cigars*, 18 FED. REP. 147. But where the forfeiture is only in the alternative of "the goods or their value," a sale to a *bona fide* purchaser, before the government has exercised its right of election to resort to the goods, will pass a good title, and prevail against any subsequent seizure by the government. *Caldwell* v. *U. S.*, *supra*; *U. S.* v. *York St. Flax Spinning Co.* 17 Blatchf. 138; *U. S.* v. *Four Cases of Lastings*, 10 Ben. 371. Where, as in section 2864, the forfeiture is in the alternative, the government's right of election to pursue the goods or their value, so long as the goods have not passed into *bona fide* hands, remains absolute. Though the goods be at hand and capable of immediate seizure, the government is not bound to resort to them; but, at its option, may pass them by and sue the importers for their value. This is expressly stated by the chief justice in the case of *U. S.* v. *York St. Flax Spinning Co.*, *supra*, where he says, (page 140:)

"Until the sale the government may seize the goods and realize their value by a sale; or it may pass by the goods and look directly to the wrong-doer for their value. The effect of a sale is to take away all right of proceeding against the goods, and leave the government to its original right of action against the fraudulent importer, for the value only."

But, under section 12 of the moiety act, no such election can possibly exist to pass by the goods and sue for their value. The act itself determines that election by decreeing the absolute forfeiture of the goods. The two sections are therefore clearly repugnant in this respect; and the earlier statute is, therefore, necessarily repealed *pro tanto*, and falls within the express language of the repealing clause. Section 26. No suit for value, therefore, can be maintained so long as section 12 of the moiety act is in force.

The repeal of the former forfeiture of value, through this repugnancy of section 12 of the moiety act, is so clear that no authorities

seem needed to sustain it. I cite, however, a few instances somewhat analogous.

In the case of *U. S.* v. *Tynen*, *supra*, the court held that there was a clear repugnance between the acts of 1813 and 1870 there referred to, because "the first act makes the punishment of the offense designated imprisonment or fine; it provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments, in the discretion of the court; it thus permits what the first law prohibits." There were similar differences also as respects the term of imprisonment, and the amount of fine; and the court adds:

"When repugnant provisions like these exist between two acts, the latter is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated."

So in *Com.* v. *Kimball*, 21 Pick, 373, the court (SHAW, C. J.) held that a former statute imposing a penalty of $20 for each offense was essentially and substantially inconsistent with a later statute which provided a penalty of not more than $20 nor less than $10 for the same offense; because the former was absolute and imperative, and the latter allowed a discretion.

In *Norris* v. *Crocker*, 13 How. 439, the prior statute of 1793, giving a penalty of $500, to be recovered by the claimants by civil action for harboring fugitive slaves, was held plainly repugnant to the act of 1850, which for the same offense imposed a fine not exceeding $1,000, and imprisonment not exceeding six months, on conviction by indictment.

On this ground alone, therefore, I should feel compelled to hold that the forefeiture of value provided by the act of 1863, and under section 2864, was repealed.

3. The recent decision of the supreme court, in the case of *U. S.* v. *Claflin*, 97 U. S. 546, affords so strong an analogy to the present, though without the absolute repugnancy last mentioned, as to be controlling in this case. That action was brought under the act of 1823, which declared that persons knowingly receiving smuggled goods should "forfeit and pay double their value." The act of July, 1866, for the same offense, imposed, like the moiety act, a forfeiture of the goods, and a fine, on conviction, not exceeding $5,000, nor less than $50, together with imprisonment, not exceeding two years, in the discretion of the court; but omitting any forfeiture of value. It did not repeal in express terms the act of 1823; but it did repeal "all other acts or parts of acts conflicting with or supplied by it." The court held that the later act would be deemed a repeal of the former by implication, even had it contained no repealing clause; that where the objects of two statutes are the same, whether by way of punishment for the offense or of indemnity for the loss, and the later act covers the same ground as the former, in that case the later statute must be

deemed not cumulative, but as a substitute for the earlier one. The decision in that case is the more noteworthy and emphatic, since it modified the view of the same statutes previously expressed in the case of *Stockwell* v. *U. S.* 13 Wall. 531, where the former statute was regarded as wholly remedial, and the latter as wholly punitive; and both were consequently held to be in force. In the *Case of Claflin*, the court say, (97 U. S. 552, 553:)

"If this were truly the purpose of those acts their objects would not have been the same, and therefore the second statute could not be regarded as repealing the former. But a renewed and more careful examination of the two statutes has convinced us that congress, in the act of 1866, had in view not only punishment of the offense described, but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offense. The later act denounces a forfeiture of the goods concealed, etc., no matter in whose hands they may be found. If the forfeiture of double the value of the goods denounced by the act of 1823 was designed to secure indemnity to the government for the wrong done, the *forfeiture of the goods themselves*, declared in the act of 1866, must have been intended for the same purpose, and the fine and imprisonment were superadded as a vindication of public justice. If this is so, as we now think it is, the act of 1866 supplied the provisions of the second section of the act of 1823, and consequently would have repealed them had it contained no repealing clause."

In the *Claflin Case*, it will be observed, there was no absolute repugnancy between the act of 1823 and that of 1866; the former forfeited double the value; the latter forfeited the goods themselves. A single statute, however, might have imposed both of those forfeitures, and the government would then have derived thrice the value of the goods—a measure of damages not unfamiliar in revenue legislation. That case, therefore, was not one of absolute repugnancy, but of substitution by implication. The later act, besides providing criminal punishments, also defined the indemnity of the government; and this, the supreme court held, must be deemed to be a substitute for the indemnity provided by the preceding act.

In the present case, in lieu of the alternative forfeiture of the goods or their value, under the act of 1863 and section 2864, the moiety act, for the indemnity of the government, denounces the absolute forfeiture of the goods, just as the act of 1866 did in the *Claflin Case;* and like that act, also, it superadds the same fine and imprisonment. In the *Claflin Case*, the later act provided a forfeiture of the goods, where the former act provided a forfeiture of double their value. In the present case the moiety act provides absolute forfeiture of the goods, where, for the same offense, the earlier act provides an alternative forfeiture of the goods or their value. The present case is as clearly one of substitution as that of *Claflin*. The principles upon which the *Case of Claflin* was decided apply, therefore, in full force to the present case; and, in addition, we have here a clear repugnancy between the later and the former acts, such as did not there exist.

4. A few other sections of the moiety act furnish some considerations bearing on the subject under discussion; but none of them, as

it seems to me, are very important or decisive. The only section in which any reference is made to forfeiture of value is section 14. That section provides that no omission to state in the entries any of the various small matters there referred to, "without intent to defraud the revenue," shall be a cause of forfeiture of goods or their value; but it requires the collector in such cases to add double the amount omitted. This, it may be said, is an implied recognition of the existence of some statute providing for the forfeiture of value on account of such omissions, and the continuance of such statutes in force, where there is intent to defraud. This section, however, applies to a very small and limited class of errors or omissions having nothing to do with the present case. There were pending suits to which the first part of this section was intended to apply, and that alone would be a sufficient reason for the reference to forfeitures of values. The inference sought to be drawn from it is of a negative character, and, as respects any subject clearly embraced in section 12, has no force as against the express provision of the latter section. The first part of section 14 is in reality surplusage, except as introduction to the last clause; since under section 16 no such forfeiture, either of goods or their value, in existing or subsequent suits, could be had without an actual intent to defraud. The essential part of the section is the latter half of it, which authorizes the collector to impose double the omitted amounts in cases free from fraud.

Section 22 assigns a limitation of three years for the recovery of any pecuniary penalty or forfeiture of property. This section could only apply to future suits. If forfeitures of value were supposed to be continued thereafter, no reason appears why suits for value should not have been included within the period of limitation, and the language have been made to read, "forfeiture of property or the value thereof." So, also, in the last paragraph of section 12, we find no recognition of any future forfeiture of value, such as would have been expected if such forfeiture was intended to remain as part of the existing law. This paragraph declares that "anything contained in any act which provides for the forfeiture or confiscation of the entire invoice in consequence of any item or items contained in the same being undervalued, be and the same is hereby repealed." The paragraph seems to have been inserted shortly before the passage of the bill, by amendment, out of abundant caution; and the same caution which dictated that would naturally have provided, not merely against a forfeiture or confiscation of all the goods invoiced, but also against forfeiture of the value thereof, if forfeitures of value had been supposed to be retained. On the whole, the other provisions of the moiety act seem to me to accord, rather than to disagree, with the construction I have given to section 12.

5. In what has been said, the subject has been considered as though sections 2864 had contained, when enacted on the twenty-second of June, 1874, a forfeiture of the goods or the value thereof,

like section 1 of the act of March 3, 1863, from which section 2864 was taken. In fact, however, in the Revised Statutes, as originally enacted, section 2864 did not contain the words "or the value thereof," but provided for the simple forfeiture of the goods. By the act of February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," this omission in section 2864 was corrected by restoring the words "or the value thereof," as they stood in section 1 of the act of March 3, 1863, and as section 2864 now stands in the second edition of the Revised Statutes.

On behalf of the government it is claimed that this act of 1875 has re-enacted forfeitures of value in the cases provided by section 2864, because it is an act later than the moiety act, and directs that section 2864 be amended by inserting the words "or the value thereof." If the act of 1875 had been designed as new legislation intended to change the law existing at the time of its passage, in spite of any statutes passed after December 1, 1873, it would undoubtedly have the effect claimed for it. A slight consideration, however, of the circumstances and of the enacting clause of the act itself, are sufficient to show that such was not the intent of the act of 1875, and that no such effect can be given to it. The sole purpose of that act was evidently to correct textual errors and omissions in the work of revising the statutes, and to make the printed volume called the Revised Statutes state truly and correctly what it was intended to state, namely, the statutory law as it existed on the first of December, 1873. That such only was the purpose of the act of 1875, is stated, as it seems to me, as clearly and emphatically as words can express, in the enacting clause of the act itself, which is as follows: "Be it enacted, etc., that for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873,' so as to make the same *truly* express *such laws*, the following amendments are hereby made therein:" Then follow 67 amendments. The thirty-third is the one here in question, amending section 2864 by inserting after the word "merchandise" the words "or value thereof." The enacting clause above quoted declares that this amendment to section 2864 "is hereby made" so as to make the same (section 2864) "truly express such law;" that is, the law on that subject in force on December 1, 1873. Necessarily, therefore, this amendment must be read, not as new legislation, or as a new law enacted on February 18, 1875, to take effect from that time, and to change intermediate legislation, but simply as a correction of the text of the Revised Statutes, so as to make section 2864 express what it was intended to express, namely, that by the law as it existed on the first day of December, 1873, for the causes there mentioned, the merchandise or its value should be forfeited.

In so far as the former law, by an unintentional omission, was unwittingly repealed by force of section 5596, the object of the act of 1875 was to restore the law as expressed in the Revised Statutes to what it actually was on December 1, 1873, and to what the revisors and congress intended to express in them. If there were no independent statutes in the mean time modifying the law as it existed on December 1, 1873, the effect of the act of 1875 was, indirectly, also to restore the law on and after February 18, 1875, to what it was on December 1, 1873, by doing away with the effect of the repealing clause of the Revised Statutes on that particular subject, (section 5596.) That, however, was the indirect result, not the direct object, of the law of 1875. The object was to make the Revised Statutes what they professed and were intended to be—a true statement of the law existing on December 1, 1873; and where there were other subsequent statutes designed to change the law existing on that date, the act of 1875 plainly had no reference to them, and no design to abrogate those changes. Such subsequent acts modify the Revised Statutes as amended by the act of 1875, because the amendments of 1875 were designed as corrections of, and as a part of, the Revised Statutes themselves, and not as new legislation on the topics to which they relate. The amendment must be treated, for all purposes, precisely as if it had been a part of section 2864 as originally enacted; and section 2864 is therefore subject, in its amended form, to the provisions of section 5601, declaring that all acts passed after December 1, 1873, in conflict with any provision contained in the Revised Statutes, shall have effect as subsequent statutes, and as repealing any portion of the Revision inconsistent therewith, and hence subject to the modifications of the moiety act as a subsequent statute. This intention, so plainly indicated by the enacting clause, is still further indicated from the last section of the act of 1875, namely, that the secretary of state is "directed, if practicable, to cause this to be printed and bound in the volume of the Revised Statutes of the United States."

This precise question, as to the construction of the act of February 18, 1875, arose in the court of claims, in *Ludington* v. *U. S.* 15 Court Cl. 453. In the opinion of the court, RICHARDSON, J., says:

"In our opinion this amendment (*i. e.*, under the act of 1875) was not in the nature of a new enactment; it is to be taken and construed as though the Revised Statutes had been originally adopted, with the alterations thus made incorporated into them in their proper place, as has been done in the second edition; and that they are all subject to the provisions of sections 5595 and 5601."

No case has been referred to intimating any different construction, and it seems to me entirely clear from the language of the act itself. See, also, *Wright's Case*, 15 Court Cl. 80.

A somewhat similar question arose in the case of *Reg.* v. *Overseers of St. Giles*, 3 El. & El. 223, in which the court of queen's bench held

that the act of 11 & 12 Vict. *c.* 111, correcting certain errors in the provisions of the act of 9 & 10 Vict. *c.* 66, must be considered and read as forming parts of the original act.

Prior to the enactment of the Revised Statutes there was no existing law which gave any color to the supposition that the alternative forfeiture of the goods or the value thereof, as provided by section 1 of the act of March 3, 1863, had been repealed. The omission, by the revisors, of the words "or the value thereof," in section 2864, was plainly an error. This appears conclusively on consulting their original report, title 36, entitled "collection of duties upon imports," in which section 2864 is embraced. That report is prefaced by the following note:

"N. B. In this pamphlet, words in the section printed in *italics* are new; those in brackets [thus] are found in the existing law, but are recommended to be omitted."

Section 2864, as contained in that report, has no words either in *italics* or in *brackets*. As it was not the duty of the revisors to change the law, but to consolidate it, and as they were authorized to omit only redundant or obsolete enactments, and to make such alterations as might be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text, (14 St. at Large, p. 74, § 2,) it is clear that the omission of the words "or the value thereof" in their report of section 2864, without reference to this omission, either in italics or in brackets, these words being a material part of the existing law, must have been accidental.

The debates in congress show most clearly that the intention of the act of 1875 was to correct errors, and not to enact new legislation to speak from that date. Mr. Poland, in introducing into the house the act of February, 1875, said that the object was simply to correct the errors of the revisors and to make it certain that the law is not changed. Mr. Hoar said:

"We did our very best that our Revision of the law should not change the existing law in any particular. It has been discovered that by misprints, by an occasional omission of a word, by perhaps some misapprehension by the revisors as to the effect of a phrase, the law, in our judgment has been changed in some particulars by the Revision. We have now introduced a bill simply to restore the law to what it was; and I think members of the house should not, because they think particular legislation desirable, endeavor to hold on to what was accidentally done, without its being understood by the house or the committee. I submit that we should pass this bill just as it is, and if a change of the law upon any point be desired, let it be done by affirmative legislation."

In the senate, Senator Conkling, in a striking passage too long to be quoted in full, said:

"Certain words which stood in the law, which are part of the law, which are operative words, which the commissioners originally, and all who followed them, including the two houses of congress, were directed to preserve and reproduce unimpaired, certain such words, it turns out, were dropped," (from the Revision.) "Now, what is the function of this bill? Simply to

put them back—simply to correct this deviation from the statutes. Therefore, it is a great deal more then the senator from California says. It is more than the case where in a single instance, by a simple act of legislation, the two houses of congress inadvertently fall into an error. It is a case where a whole course of legislation required one single thing, to-wit, a truthful and absolute reflex of the whole body of law as it stood; and in attempting to do that, all concerned, including the two houses of Congress, fell into an error. Now we come with this bill, the purpose of which is to correct that error; and what does the honorable senator from Connecticut propose? To hold up for examination the merits of the original provision; *and when we are attempting to verify and correct a purely ministerial proceeding of codifying the laws,* the senator wishes to go into the broad question of the merits of those laws which we proceeded to codify. * * * We are now simply engaged in making a truthful completion of that work in which commissioners, committees, and congress have been engaged, which has no more to do with the merits or the defects of the laws as they exist than the painting of the portrait truthfully has to do with the beauty or the deformity, the hue or the age, of the original from which it is painted. If this codification is true and honest, it is a reproduction of the laws as they stand, and not a production of the laws as the senator from Connecticut thinks they ought to stand, and as he is abundantly able to make them stand, when we are considering a bill appropriate for that purpose."

It is very clear, therefore, that nothing was further from the intention of congress in passing the act of February, 1875, than to enact new legislation, or to abrogate those changes in the law existing on December 1, 1873, which it had designedly made by other statutes passed since the latter date. Had such been the intent of the act of 1875, its passage would have involved a reconsideration and revision of every statute passed between December 1, 1873, and February 18, 1875.

6. It is urged, however, that if, by the moiety act, the forfeitures of value were already repealed, no reason remained why congress, in 1875, should pass the act to amend section 2864 of the revised statutes by inserting the words "or the value thereof," unless they intended to re-enact that provision of the law. What has been already said seems a sufficient answer to this objection. By the Revision congress had undertaken to declare what was the statutory law existing on December 1, 1873. The Revised Statutes as enacted purported and professed to state this law truly, (sections 5595, 5596,) but they did not do so. Section 2864, among others, was a false statement of the law as existing on December 1, 1873, in an important particular, through the omission of the words "or the value thereof." Historical truth, if nothing more, required the omission of these words to be supplied; otherwise, the statutes as enacted would remain a lasting monument of error. This alone, even if there were no practical reasons for correcting the error, would have been a sufficient reason for the amendment made by the act of 1875—an amendment which did not profess to be new legislation, but an amendment of the Revised Statutes only.

But there were reasons of a practical character, also, rendering it, if not essential, at least appropriate and desirable, that the correction should be made, notwithstanding the fact that forfeitures of value under section 2864 were already repealed by the moiety act. For the Revised Statutes, passed June 22, 1874, through the omission of the words "or the value thereof," seemed to declare that on December 1, 1873, and subsequent thereto, no law was in force authorizing a forfeiture of value for the causes stated in section 2864, (section 5596.) This was false and deceptive. The forfeiture of value had not been repealed by any existing law until the passage of the Revised Statutes and of the moiety act, on the same day, in June, 1874. Forfeitures of value might have been incurred upon entries made in the mean time, and suits therefor might have been then pending, in which the right of recovery would appear to be swept away, through the false declaration of the Revised Statutes, that on the first of December, 1873, notwithstanding the act of March 3, 1863, (section 2864,) only a proceeding for the forfeiture of the goods could be maintained. To prevent confusion and embarrassment in suits arising out of transactions occurring during the period from December 1, 1873, to June 22, 1874, it was desirable, if not necessary, that the correction of section 2864 should be made. The law forfeiting value was still in force during this period, notwithstanding the false declaration of section 2864, as originally enacted, and section 5596 to the contrary, (*U. S.* v. *Claflin*, 97 U. S. 548, 549;) but the false statement of what the law was on December 1, 1873, and afterwards, as presented by section 2864, as originally enacted, was calculated to create great practical embarrassment, and needed to be corrected accordingly.

For these reasons, I must treat the amendments made by the act of February 18, 1875, as parts of the Revised Statutes, and as though section 2864 had been originally enacted in its amended form. The moiety act, under section 5601, is to be regarded as subsequent legislation; and as section 12 of that act, both by implication and by clear repugnancy, repeals the pre-existing law authorizing the alternative forfeiture of the goods or their value in cases of fraudulent undervaluations, it follows that the plaintiff could not, upon any possible proof, recover; and a verdict must, therefore, be directed for the defendant.

This case was affirmed by WALLACE, J., on appeal to the circuit court, May 5, 1884. No opinion rendered.

UNITED STATES *v.* LANE.

(*Circuit Court, E. D. Wisconsin.* December 27, 1883.)

PUBLIC LAND—ENTRY—RIGHT TO CUT TIMBER.

One who has entered upon public land according to law for the purpose of claiming a homestead therein, and is residing thereon in good faith, and improving it for agricultural purposes, is entitled to cut so much timber from the land as is necessary for his actual improvements; but until he has received his patent he cannot cut timber for any other purposes nor under any other conditions.

At Law.

G. W. Hazelton, for the United States.

James Freeman, for defendant.

DYER, J., (*charging jury.*) This is an action of replevin to recover a quantity of timber claimed by the government to have been illegally cut by the defendant from certain lands in Langlade county in this state. The claim of the plaintiff is that the defendant cut 152 pine trees standing on this land amounting to 156,851 feet. It seems that in March, 1882, the defendant made an entry of the lands mentioned, being a quarter section, as and for a homestead under the laws of the United States, as every person who is the head of a family, and a citizen of the United States, is entitled to do. There is testimony tending to show that he went into occupancy of the premises, and it does not seem to be disputed that in the winter of 1882–83 he cut from the land a quantity of pine timber growing thereon. The controversy between the parties is concerning his right to cut this timber and the quantity he cut. It is permissible for any such land claimant, provided he is living on the land and improving it for agricultural purposes, to cut and remove from the portion thereof to be cleared for cultivation so much timber as is actually necessary for that purpose, or for buildings, fences, and other improvements on the land entered. This he has a lawful right to do. But where the person does not make the land his actual residence, and cultivate and improve it, or where the timber is not cut for the purpose of clearing and improving the land for agricultural purposes, or where the facts show that the entry was not made in good faith, but for the mere purpose of stripping the land of the valuable timber upon it, the case is one in which the cutting is unlawful. In clearing for cultivation, should there be a surplus of timber over what is needed for purposes of improvement, the claimant may lawfully sell or dispose of such surplus; but it is not lawful for him to strip the lands of its timber for the sole purpose of sale or speculation, until he has made final proof and acquired title.

These are the principles of law governing this case, and, as you perceive, the primary question here is, did the defendant cut this timber for agricultural purposes; that is, in good faith, for the pur-

pose of improving the land? What was his object? Was it to clear the land for cultivation? Was it in pursuance of a purpose to improve the land and to make it his home? Or was his purpose merely to cut the timber off without reference to immediate future use of the land, and to sell and make money out of the timber so cut? Incidental to these points of inquiry is the question whether or not he entered the land in good faith, intending to use and occupy it as a homestead. Indeed, as you see, the question involved is largely one of good faith, and, in determining whether the timber was cut for purposes of husbandry, or merely for purposes of sale and pecuniary profit, you will look into the circumstances under which the cutting was done, the manner in which the timber was cut with reference to localities on the land, and the kind and quantity of timber cut. You will consider what improvements there were upon the land, whether the defendant was living on the land; in short, whether he was dealing with it in good faith intending to cultivate and improve it for farming purposes.

You understand what the claims of the parties are. The defendant insists that he in good faith entered the land for a homestead; that he made improvements upon it; that he was making preparations for other improvements when notice was given him of the cancellation of his entry and claim; that he occupied and lived on the land; and that the timber in question was cut for the sole purpose of improving the land and devoting it to agricultural uses. If this be so, then the plaintiff is not entitled to recover. But the contrary of all this is claimed by the government, and its contention is that the land was not occupied by the defendant in good faith as and for a homestead; that this timber was cut with the primary purpose of selling it and making money out of it; that it was not the intention of the defendant in good faith to cultivate and improve the land; and that the cutting of the timber was not done for the purpose of clearing the land for agricultural uses. Various circumstances are relied on in support of this claim, and, if the government's contention is supported by the facts of the case, then the conclusion must be that the timber was illegally cut, and the plaintiff, in that state of the case, would be entitled to recover it in this action.

Verdict for plaintiff.

UNITED STATES *v.* EVANS.

(*District Court, D. California.* April 3, 1884.)

PROCURING THE COMMISSION OF PERJURY— ELEMENTS OF THE CRIME — KNOWLEDGE.

To constitute the crime of procuring perjury to be committed, it is not enough that both the accused and the false witness knew the falsity of the statements sworn to, but the accused must also have known that the witness knew the statements to be false.

Indictment for Subornation of Perjury. On demurrer.

S. G. Hilborn, U. S. Atty., and *Carroll Cook*, Asst. U. S. Atty., for the United States.

A. P. Van Duzer and *J. J. De Haven*, for defendant.

HOFFMAN, J. The indictment, after the usual formal allegations, which seem to be quite sufficient, charges in substance that the defendant procured one Burnett to commit the crime of perjury by swearing to certain allegations contained in an affidavit made and subscribed by him on an application for an entry of certain timber lands. It avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood. To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knows them to be false; for unless the witness has that knowledge the intent to swear falsely is wanting, and he commits no perjury. It is therefore essential that the indictment should aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him.

The allegations of the indictment in this case are consistent with a belief on the part of the defendant that the party alleged to have been suborned supposed the statements he was expected to make to be true. In that case he would not be guilty of perjury, nor could the defendant be adjudged guilty of procuring him to commit perjury.

Demurrer sustained.

See *U. S.* v. *Dennee*, 3 Woods, 39; *Com.* v. *Douglass*, 5 Metc. 244; 2 Archb. Crim. Pr. & Pl. Pom. Notes, 1750; 2 Whart. Crim. Law, (8th Ed.) 1329.

BRADLEY and others *v.* DULL and others.

(Circuit Court, W. D. Pennsylvania. March 24, 1884.)

1. PATENTS FOR INVENTIONS—DEATH OF PATENTEE—TITLE VESTS IN ADMINISTRATOR.
   Under the act of July 8, 1870, and the Revised Statutes, upon the death of a patentee intestate, the title to the patent vests in his administrator, and not in his heirs.
2. SAME—CONNSTRUCTION OF PATENT.
   In the interpretation of a patent, the court, proceeding in a liberal spirit, should sustain the construction claimed by the patentee himself, if this can be done consistently with the language he has employed.
3. SAME—PATENT NO. 121,746—INFRINGEMENT.
   Letters patent No. 121,746, for an apparatus for drying sand and gravel, granted to Allen H. Bauman, December 12, 1871, construed, and the defendants *held* to infringe.

In Equity.

Bakewell & Kerr, for complainants.

George H. Christy, for defendants.

ACHESON, J. The grounds of defense are—*First*, that the plaintiffs have not shown title to the patent sued on; and, *secondly*, that there has been no infringement by the defendants.

1. The patent was granted on December 12, 1871, to Allen H. Bauman. He subsequently died intestate, and letters of administration upon his estate were duly issued to Reuben F. Bauman, who as administrator sold and assigned the patent to the plaintiffs. The defendants controvert the title thus acquired, maintaining that upon the death of the patentee, intestate, the patent became vested in his heirs, and therefore that the administrator was without authority to make sale and assignment thereof. The argument is based on the change in the patent law made by the twenty-second section of the act of July 8, 1870, (reproduced in section 4884 of the Revised Statutes,) whereby it is enacted that the patent shall contain "a grant to the patentee, his *heirs* or assigns," the previous legislation having provided for a grant to the patentee, his heirs, *administrators*, *executors*, or assigns. This change, in connection with some other provisions of the existing law, it is contended indicates an intention on the part of congress to secure the benefits of the invention to the heirs of the deceased patentee, in case of intestacy, to the exclusion of the administrator. An impressive argument was made by counsel in support of this view. But the contrary has just been decided in the first circuit in the case of *Shaw Relief Valve Co.* v. *City of New Bedford*, 19 FED. REP. 753, in which was involved the identical question now before me. To the able opinion of Judge LOWELL in that case I can add nothing. Adopting his conclusion I must overrule this defense.

2. Whether or not the defendants infringe depends on the construction to be given to the claim. The subject-matter of the patent is a

machine for drying sand and gravel. The invention (so the specification declares) relates to the combination of iron or metal pipe or pipes, so constructed and arranged in parallel and longitudinal lines as to form a surface upon which the wet sand or gravel is placed to be dried by the application of fire or steam. The surface formed by the pipe or pipes forms the bottom of a box or frame which contains the wet sand or gravel. The pipe or pipes throughout the whole surface are heated by fire or steam passing through them, so as to dry the sand or gravel, which, when dried, slips and passes through the openings or spaces between the lines of pipe, the wet sand or gravel in the box or frame above drying gradually and passing through, ready for shipment and use. "AA is the box or frame in which the wet sand or gravel is placed preparatory to being dried. The bottom of this box or frame is formed by the sets of pipes shown by *cc*, etc. On the surface formed by these pipes the wet sand or gravel rests and adheres until it becomes dried, when it passes through the openings or spaces between the pipes." If fire is used, the pipes are heated from a fire-chamber at one end, the fire, heat, and smoke passing through the pipes into flues at the other end; but the arrangement described for heating the pipes is somewhat different when steam is employed.

In the body of the specification occurs the following passage:

"Immediately underneath the whole of the surface formed by the pipes is placed a wire sieve, FF, to prevent the sand or gravel from passing too rapidly through the spaces or openings between the pipes, and before the same is sufficiently dried; the sieve so used to be coarse or fine, according as the sand or gravel is coarse or fine."

There is but a single claim, which is in these words:

"The apparatus herein described for drying gravel or sand, consisting of the fire-chamber, flues, heating pipes, and case, all constructed and arranged substantially as set forth."

The word "case" does not appear in the descriptive part of the specification, and is used in the claim only. What does the term comprehend? The defendants insist that it includes the sieve, FF, as an essential constituent; and as they do not use a sieve or any substitute therefor, it is contended that they do not infringe. Webster defines "case" to be "a covering, box, or sheath; that which incloses or contains." Now, turning to the specification we discover that AA is a "box or frame" in which the wet sand or gravel is placed to be dried. What constitutes the bottom of this box? Is it the sieve? Certainly not, if the specification is to furnish the answer; for it distinctly asserts, not once only, but twice, that the bottom of the box or frame, AA, is composed of sets of pipes so constructed as to form a surface upon which the wet sand or gravel rests during the drying process. We have, therefore, the "case" complete in all its parts without the aid of the sieve, FF. In fact, it is not an essential part of the machine, for without its co-operation the apparatus successfully performs

its contemplated work. The truth seems to be that the sieve, under certain conditions, may be a serviceable addition to the machine, but is not an indispensable part. And as it is not mentioned in the claim, and is not necessary either to constitute the "case" or to the successful working of the apparatus, it would seem to be a fair conclusion that is not an element of the patented combination. This view but conforms to the spirit of the rule for the interpretation of patents authoritatively declared in *Klein* v. *Russell*, 19 Wall. 466, where it is said:

"The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language he has employed."

Let a decree be entered in favor of the plaintiffs.

LLOYD *v.* MILLER and others.

(*Circuit Court, W. D. Pennsylvania.* February 12, 1884.)

1. PATENTS FOR INVENTIONS—PUDDLING-FURNACE.
   Letters patent No. 135,650, granted February 11, 1873, to E. Lloyd, for an improvement in puddling-furnaces, construed, and *held*, not to be infringed by the defendants
2. SAME—INFRINGEMENT.
   The plaintiffs' invention, which secures protection from the intense heat to the walls of the chimney or stack of the puddling-furnace, by means of an opening into the stack at its base, whereby a current of air drawn from an air-conduit underneath the furnace-bed is permitted to enter the stack, *held* not to be infringed by a construction which secures such protection to said walls at the base of the stack by an external circulation of air.

In Equity.

D. F. Patterson and *E. E. Cotton*, for complainant.

Bakewell & Kerr and *George H. Christy*, for respondents.

ACHESON, J. The plaintiff's letters patent — No. 135,650, dated February 11, 1873—are for an improvment in furnaces for boiling, heating, and puddling iron. The objects to be attained thereby as stated in the specification, are the prevention of the rapid burning out of the hearth-plate and the base of the chimney or stack, and the facilitating of the combustion of the inflammable gases in the furnace by supplying air thereto, thereby utilizing fuel and preventing largely the escape of smoke. The furnace described in the specification and accompanying drawing—aside from the plaintiff's improvements—is a puddling furnace of the well-known kind, having the ordinary exit-flue leading into the high chimney or stack.

The invention is thus described:

"Beneath the hearth-plate, *c*, and a plate, *e*, [which is merely the continuation of the hearth-plate under the neck] is an air-conduit, G, which extends

from the ash-pit opening, E, to the back wall of the stack, C, *and communicates with this stack at its base by means of an opening, g.* This will allow [the specification proceeds to declare] a current of air induced by the draft of the stack, C, *to enter the stack* at its junction with the flue, *h.*"

The resulting advantages thereby secured (as is affirmed) are the following: *First,* the current of air so entering the stack will "violently turn back the flames rushing through the flue, *h,*" retard the escape of inflammable gases, and mixing therewith promote their combustion in the furnace. *Second,* the air in its passage through the conduit, G, will absorb heat from the hearth-plate and plate, *e,* and keeping down their temperature, preserve them. *Third,* "and as the air impinges on the walls of the chimney at its base, these walls will be protected from the intense heat to which they are subjected in other puddling furnaces."

The claim is in these words:

"The air-conduit, G, arranged beneath the hearth and communicating with the chimney or stack at the base thereof, for the purposes and in the manner substantially as described."

It was not a new thing to let air circulate underneath the hearth of a puddling furnace to cool and preserve it; and it is shown that for many years prior to the plaintiff's invention such furnaces were constructed with a passage-way or conduit for air beneath the hearth and extending from the ash-pit opening to the back-wall of the stack, with an aperture through that wall outwardly into the external air; so that this conduit was supplied with air from both ends, the fresh air coming in at the stack-end passing underneath the base of the stack on its way to the ash-pit. Nor was it new to promote combustion in the furnace by a supply of heated air drawn from underneath the puddling hearth. I incline, however, to think that the plaintiff's method of construction whereby communication is secured between the air conduit, G, and the base of the stack, by means of an opening into the stack, is new, at least in puddling furnaces. And, assuming that the defense of anticipation has not been made out successfully, I address myself to the inquiry whether the defendants infringe the plaintiff's patent.

The distinguishing feature of the plaintiff's invention is the opening, *g,* into the stack at its base, whereby a current of air, induced by the draft of the stack, is permitted "*to enter the stack.*" Great prominence is given to that opening in the specification and accompanying drawing, and, although not expressly mentioned in the claim, it is necessarily implied. It is indeed indispensable, for without the opening, *g,* there would be no communication whatever between the air-conduit, G, and the chimney or stack. Every advantage specified or contemplated is altogether due to that opening, which, in my judgment, is of the essence of the invention.

The alleged infringing furnaces were constructed by William Swindell under three patents for improvements in metallurgic furnaces

granted to him in the years 1875 and 1878. In the defendants' furnaces the gas from the producer—where the fuel is consumed—is admitted to the bed through a number of ports arranged below an equal number of hot air ports. A series of air-flues pass under the bed—but not in contact with the bottom—and over the crown or arch of the furnace to the end where the gas enters, and the gas and air there meeting, pass together into the combustion chamber, which contains the iron to be worked. The in-going air is heated, and becomes more and more heated, as it passes over the arch towards the discharge ports, by reason of the flues through which it courses being in contract with alternate flues which conduct the waste heat from the combustion chamber. Combustion begins when the gas from the producer meets the hot air, and uniting they enter the bed. The waste and heated products of combustion pass out of the opposite end of the bed into flues which extend over the crown or arch of the furnace and lead to the stack. No part of the air enters the waste-flues without first passing through the combustion chamber and it reaches the stack altogether through the waste-flues.

It cannot be pretended, and indeed it is not urged, that the method of construction found in the defendants' furnaces secures the first two above-enumerated advantages which appertain to the plaintiff's invention. Swindell's air-conduits have no tendency to cool the hearth-plate or bottom of the furnace, and he does not conduct into the stack a current of air to retard the escape of inflammable gases or promote their consumption in the furnace. There is indeed no connection or direct communication between his air-flues and the stack, the air as we have seen, reaching the stack through the waste-flues after it has fully served its purpose in the combustion chamber.

It is, however, earnestly contended that Swindell, by a mere structural or formal change has secured, and that the defendants enjoy the third advantage due to the plaintiff's invention, viz., protection to "the walls of the chimney at its base," from the intense heat to which they are subjected in other puddling furnaces. The plaintiff's theory is that the arched waste flues of the defendant's furnace are part of the chimney or stack, which, he insists, begins at the point where these flues leave the combustion chamber, and, as at that point the air passing in through the air flues absorbs heat from, and tends to preserve the walls of the waste flues, he maintains that there is an infringement of his patent. I have great difficulty in accepting the hypothesis that the arched waste flues are part of the chimney or stack within the meaning of the plaintiff's patent. It is plain to me that when his specification speaks of the chimney it means the high stack, the two words being used as equivalents. Now I do not see that the defendant's arched waste-flues are any more a part of the chimney or stack than is the flue, *h*, in the plaintiff's furnace. The function of each is to convey the waste heat, smoke, etc., from the combustion chamber to the stack. But if the arched waste-flues be

considered as part of the chimney or stack, the fact remains that there is no communication between the air-flues and waste-flues by means of an opening. In truth, there is no communication whatever between them. They alternate, and are built side by side, up, over, and around the arch of the furnace, but they are completely separated from each other by brick walls, four and one-half inches thick. It is also an assumption of the plaintiff that the defendant's arched air-flues are "compartments of the chimney." But surely they come not within his own counsel's definition of a chimney, viz., "the flue which leads from the combustion chamber to conduct waste heat and smoke away." They perform no such service. Their function is, to supply the working chamber with hot air to promote a vivid combustion. Incidentally the in-going air does absorb heat from the common division walls between the two sets of flues, and thus tends to the preservation of these walls, but this is not effected by any means disclosed by the plaintiff's patent, nor by any method analogous thereto, or suggested thereby. In no possible view of the case can the plaintiff's pretentions be sustained without holding that the opening, *g*, into the chimney or stack for the admission thereinto of a current of air is non-essential, and that *external contact* with the walls of the chimney or stack at its base is "communication" within the meaning of his specification. But such constructive expansion of the specification is, it seems to me, utterly inadmissible. Moreover a claim so comprehensive could scarcely stand, in view of the prior state of the art.

Let a decree be drawn, dismissing the bill, with costs.

THE DANIEL STEINMAN.[1]

(*District Court, E. D. New York.* March 29, 1884.)

SALVAGE SERVICE — AWARD — $25,000 ALLOWED ON VALUATION OF $252,500 — COSTS.

The steamship Daniel Steinman, 1,790 tons, on a voyage from Antwerp to New York, with general cargo and 335 steerage passengers, lost her propeller. She set all the sail she could, but made no headway. The same day the steamship R., of the White Star line, bound from Liverpool to New York with cargo and mails, and 697 passengers, came near, and the master of the S. applied to her to be towed to Halifax, 280 miles distant. This the R. was not willing to do, but was willing to attempt to tow her to New York, 630 miles distant. An agreement was made between the two masters, by which the R. was to receive £10,000 if she brought the S. to New York, which she proceeded to do, being detained some two days, of which 36 hours were occupied in towing, and bringing the S. to New York by the time the S. was due there. No damage of consequence was sustained by either, beyond the breaking of a hawser belonging to the R. The weather was fair and the sea smooth during all the time. The value of the S., cargo and freight, was $252,500; that of the R., cargo and freight, was $780,000. The owners of the S. were not satisfied to pay the

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

£10,000, but offered $7,500; the owners of the R. did not insist on the agreement, but considered $25,000 net to be their proper reward. *Held*, that an important salvage service was rendered by the R. in rescuing the S. and her passengers from a position of danger, and enabling her to reach her port of destination without loss of time, for which the R. should receive a salvage compensation of $25,000. Expenditures of the R., amounting to $2,800, were not allowed in addition, as these were taken into consideration in fixing the award; but it was directed that the owners be reimbursed out of the gross amount before its distribution. As no tender was made, costs were allowed libelants. Particular comparison of this case with the circumstances and the award of the English court in the case of *The Silesia and The Vaderland*, L. R. 5 Prob. Div. 177.

In Admiralty.

McDaniel, Wheeler & Souther, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BENEDICT, J. This action is to recover salvage compensation for services rendered by the steam-ship Republic to the steam-ship Daniel Steinman. In June, 1882, the steam-ship Daniel Steinman, while prosecuting a regular trip from Antwerp to New York, while in latitude 41 deg. 12 min., longitude 58 deg. 50 min., lost her propeller. Owing, as is supposed, to striking something in the water, the propeller shaft broke off just outside the hull, and the propeller dropped into the sea without injury being done to her hull. She was a steamer of 1,790 tons burden, built full forward. She had two masts, and was able to spread about 1,200 yards of canvas, which is not more than one-third the ordinary amount of canvas spread by a sailing vessel of equal size. Her crew consisted of fourteen men all told, so that with one man at the wheel and one man on the lookout she had only a boatswain and two seamen in each watch to handle the sails. She had a general cargo and 335 steerage passengers. Her provisions were sufficient for about four weeks. Upon losing her propeller she set all sail, but made no headway. Towards night of the same day the steam-ship Republic, bound from Liverpool to New York, was discovered approaching. When she came near, the chief officer and afterwards the master of the Daniel Steinman boarded her, and applied to be towed to Halifax, then some 280 miles distant to the northward. The master of the Republic was not willing to go to Halifax with the steamer, but was willing to attempt to tow her to New York. After some negotiation a written agreement was signed by the masters of the two steamers, whereby the Republic was to take the disabled steamer in tow, and in case she was brought to New York in safety the Republic was to receive £10,000 for the service. The agreement, however, contained a provision that in case the amount of £10,000 proved unsatisfactory to the owners of either vessel the case should be sent for settlement to the court of admiralty in London. Thereafter, and at about 9 P. M., the Republic began to tow the steamer towards New York. The weather continued fine, and although the Steinman steered badly the Republic took her along so fast that she was safely moored in the port of New York by the time she was there due, and

thus lost no time by the disaster. The Republic was detained some two days, thirty-six hours having been occupied in towing. No damage of any consequence was sustained by either vessel beyond the breaking of a hawser belonging to the Republic. A difference then arose in regard to the compensation to be paid the Republic for this service. The owners of the Daniel Steinman were not satisfied to pay the £10,000 named in the agreement made by the masters, and consider $7,500 a sufficient compensation. The owners of the Republic do not insist upon the agreement, and consider $25,000 net to be their proper reward.

Upon a full consideration of all the circumstances, I am of the opinion that an important salvage service was rendered by the Republic to the Steinman on the occasion in question, for which the Republic should receive a salvage compensation of $25,000. In reaching this conclusion I have taken into view the fact that a disabled steamer, having on board 335 passengers, was by the efforts of the Republic rescued from a position of danger, and enabled to make her port of destination without loss of time. It is no doubt true that the Steinman could have turned back, and by means of sails have regained her port of departure without assistance; and, unless the winds were unusually adverse, she could have done this before her provisions would have given out. But such a course would have been attended with some risk, and would have involved a large loss of money to her owners, besides the loss and suffering entailed upon the 335 passengers. It is probable, also, that the Steinman could have reached Halifax by means of her sails without assistance. This course would have subjected her owners to a large loss, and her passengers to no small loss and suffering, and it would have been attended with a very considerable risk. The coast of Nova Scotia is none too safe a place for steamers well equipped, and a disabled steamer cannot approach it without danger.[1] It is possible, also, that the Steinman might, by means of her sails, have reached New York, then 630 miles distant to westward, although upon this point the testimony discloses two opinions. With the wind as it was when she was taken in tow, the Steinman would never have reached New York. With the wind as she had it until her arrival in New York, she would never have reached New York. With some winds, she would have reached New York in the course of three or four weeks; but I recall no instance of a steamer situated as she was, and of her size and rig, making 600 miles to westward under sails alone. It seems, therefore, entirely proper to conclude that the efforts of the Republic relieved the Steinman from a position of danger. I have also taken into consideration the value of the property thus relieved,—the value of the Daniel Steinman, her cargo and freight, amounting in all to $252,500. I have also taken into consideration the fact that although the mas-

[1] Five days after this opinion was handed down, this very steamer went ashore on the coast of Nova Scotia, and became a total wreck, with a loss of 117 lives.

ter of the Steinman, according to his statement, was of the opinion that he was in the track of steamers, and could, therefore, have waited to be assisted by some other steamer than the Republic, and although he believed himself able to reach a port of safety without assistance, still he applied for the services of the Republic. In applying to the Republic he was calling no mean instrument of commerce to his aid. The Republic was a powerful steamer, able, loaded as she was with passengers and freight, to tow the Steinman for 600 miles at as great a rate of speed as the Steinman could steam by her own engines. She was one of the White Star steamers, running in a line where regularity of arrival and departure are considered of the greatest importance. These circumstances were known to the master of the Steinman, and when, having the option to await the coming of a different vessel, he applied for the services of the Republic, it must have been with the understanding that these circumstances would be taken into account in fixing the compensation for those services. This is shown by the fact that he was willing to submit to his owners for their consideration the sum of £10,000, as he did by the agreement. I have also considered the risk incurred by the Republic. It is true that the weather was fair and the sea smooth during the whole time that the Republic had the Steinman in tow, but it is also true that towing a disabled steamer of the size of the Steinman by a steamer of the size of the Republic is always attended with danger. In such a service care and watchfulness will not always prevent disaster. Says Sir ROBERT PHILLIMORE, in deciding the case of *The City of Chester*, 26 Mitch. Mar. Reg. 111:

"It is well known, and the Elder Brethren say, that in all these cases of large steam-ships rendering service to each other there is very great danger, and they will require skillful navigation to avoid it."

It is a service not deemed desirable by owners of steamers, and the increasing importance of encouraging it has called from this court expressions which need not be repeated here. *The Edam*, 13 FED. REP. 135. In *The Rio Lima*, 24 Mitch. Mar. Reg. 628, Sir ROBERT PHILLIMORE says:

"It has been impressed on the minds of the court that there seems to be a growing dislike on the part of owners of ships to allow their vessels to render assistance, even where no jeopardy of life is concerned. That must be met by a liberal allowance on the part of the court whose duty it is to consider all the circumstances of the case."

In this connection, the circumstance is worthy of attention that the agreement made by the masters of these two steamers provided for a submission of the case to an English court of admiralty in the event that their owners should not feel satisfied with the sum mentioned in the agreement. Such a provision can, of course, have no effect to render the decisions of the English admiralty authoritative here, but it may justify a somewhat particular comparison between the case at bar and one heretofore determined by an English court, where the

steam-ship Silesia, having broken her propeller shaft, was towed to a port of safety by the steam-ship Vaderland. L. R. 5 Prob. Div. 177. In that case, the salving vessel, the steam-ship Vaderland, was bound from Antwerp to Philadelphia with general cargo, 274 passengers, and mails. In the present case, the salving vessel was the steam-ship Republic, bound from Liverpool to New York with cargo, 697 passengers, and mails. The Vaderland's crew numbered 76, the Republic's, 135. The Vaderland's cargo and freight were valued at £72,000. The Republic's cargo and freight are valued at $780,000. The Silesia, towed by the Vaderland, was valued, cargo and freight, at £108,000. The Steinman, towed by the Republic, is valued, with cargo and freight, at $252,500. The Silesia was bound to Hamburg. The Steinman was bound to New York. The Silesia was towed 340 miles by the Vaderland. The Steinman was towed 630 miles by the Republic. The time occupied in towing the Silesia was three days. The time occupied in towing the Steinman was thirty-six hours. The Vaderland turned back from her voyage and went to Queenstown, and her loss of time by performing the service was six days. The Republic did not turn back, and by performing the service lost only two days. In the case of *The Silesia*, the masters made an agreement for a compensation of £15,000. In this case, the agreement provided for £10,000. In the case of *The Silesia*, the English court of admiralty awarded £7,000; and it would seem, from this comparison, that the English court of admiralty, in a case like the present, would give no smaller reward than $25,000.

In view of the considerations I have now alluded to, it seems to me proper to fix $25,000 as the proper salvage reward for the service in question. I have been urged in behalf of the libelant to allow, in addition, the cost of the provisions for the passengers on the Republic for two days, the cost of extra coal used, the cost of extra work, and the injury to the hawser, amounting in all, it is said, to $2,800. These expenditures I have taken into consideration in fixing the reward at $25,000. That sum I consider to be sufficient without further allowance; but, in the distribution of the salvage, the amount of money expended by the owners in performing the service may be shown, and they may be reimbursed for that expenditure out of the gross reward before distribution. As no tender was made, the libelants must recover their costs.

Let a decree be entered in accordance with this opinion.

THE LAHAINA.[1]

(*District Court, E. D. New York.* March 15, 1884.)

SALVAGE—AMOUNT—ALL THE CARGO AND HALF THE VESSEL ALLOWED.

The steam-ship C., valued at $180,000, the day after leaving New York, found the schooner L. in the trough of the sea, without steerage-way, a large hole in her side, and seriously damaged forward. The L.'s crew announced their intention to abandon her in case the C. declined to take her in tow The C. towed the L. back to New York, losing thereby three days' time, breaking a steel hawser, and paying pilotage and towage, amounting to $279. The schooner and cargo were sold, the net proceeds being $3,514.25. The proof showed that the cargo of the L., from its nature, would have been wholly lost if the L. had not been taken in tow by the C. No one appeared to claim the cargo. The court allowed the whole of the proceeds of the cargo—not a large sum—and one-half the net proceeds of the vessel, to be paid the salvors for salvage, and, in addition, the above expenses of the steamship and $200 for damages to hawsers, to be first deducted from the proceeds and also costs.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelants.

Goodrich, Deady & Platt, for claimants.

BENEDICT, J. This is an action for salvage services rendered by the steam-ship Caledonia to the schooner Lahaina and her cargo. The Caledonia was an iron steam-ship, engaged in the Mediterranean trade, and bound from New York to Glasgow with a general cargo, including 300 cattle. The day after leaving New York, when Shinnecock bore N. W. about 25 miles distant, she sighted the three-masted schooner Lahaina flying a signal of distress. The schooner was six to eight miles distant, some three points on the port bow. The steamer bore away for the schooner, and, coming along-side, found her in the trough of the sea, without steerage-way, a large hole in her side, and seriously damaged forward. The crew of the schooner asked to be taken to a harbor of safety, and announced their intention to abandon their vessel in case the steam-ship declined to take her in tow. The master of the steam-ship concluded to endeavor to take the schooner to New York, the nearest port of safety, and, having made fast to her by a four-inch steel hawser, started back for his port of departure. The swell was heavy, and the steel hawser parted. Then a thirteen-inch hemp hawser was put on, which held. The next morning they were off Sandy Hook, and that day the wreck was left safe in harbor at New York. The steam-ship lost three days' time, and she paid pilotage and tow-boat expenses amounting to $279. The value of the steam-ship was $180,000. The schooner and her cargo were sold in this proceeding, and the net proceeds, after paying all expenses, amount to $3,514.25. The proof shows that the cargo, from its nature, would have been wholly lost if the wreck had not been taken in tow by the Caledonia, and it seems to

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

have been supposed that, owing to the condition of the cargo, the proceeds would barely equal the duties upon it and the expenses of its sale. No one has appeared to claim the cargo, although considerable time has elapsed since the filing of the libel, and notice of the proceeding has been sent to the party in interest. So far as the cargo is concerned, therefore, the proceeding is by default.

Under such circumstances, I am justified in allowing the whole of the proceeds of the cargo in court, the same not amounting to a large sum, to be paid to the salvors, whose exertions saved the same from certain loss. In regard to the schooner, where an appearance has been entered for the owners, and they have been heard upon the question of the amount of salvage proper to be allowed out of the proceeds of the vessel, considering, in connection with the circumstances already mentioned, the small value of the property saved, the value of the salving ship, and the fact that, had not the schooner been taken in tow, she would have been abandoned, a water-logged wreck, in the track of vessels bound to New York, I am of the opinion that one-half the net proceeds of the schooner must be allowed to the salvors for salvage. In addition, the expenses paid out by the owners of the steam-ship, amounting to $279, and $200 for damages to the hawsers are, however, to be first deducted and paid to them. The libelants must also recover their costs.

The Belle of Oregon.[1]

(*District Court, E. D. New York.* March 8, 1884.)

Seamen—Contract to Send Them Home—Damages—Mitigation.

Where natives of the Philippine islands shipped as seaman on an American vessel at Iloilo for a voyage to New York, and the master bound himself to return them to their country at his expense, and the men left the vessel at New York without objection, no provision being made for their remaining on board, and afterwards the master offered to the boarding-house man at whose house the men were that the men should return to the vessel and go in her to Portland, Oregon, *held*, that on the proof the men did not desert the vessel at New York, and were not bound to remain on board her; that under the agreement the men were to be sent home direct, and not by way of Oregon, and that no offer had been shown to send them home, even via Oregon; that there had been, therefore, a violation of the contract on the part of the vessel, and the vessel was liable for the damages that the libelants might have sustained, to be ascertained by a reference. As a matter of protection to the foreign sailors, the vessel was allowed now to provide them with a passage home, and to show this in mitigation of damages.

In Admiralty.

Beebe & Wilcox, for libelants.

W. H. Field, for claimant.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

BENEDICT, J. On the twenty-seventh of August, 1883, at Iloilo in the Philippine islands, the libelants, "natives of these islands," shipped as seamen on board the American bark Belle of Oregon. A written agreement was entered into with them, in which, among other things, it was provided that "the contract of the sailors aforesaid is only for the voyage from this port to the port of New York;" and it was also provided that the master "further binds himself to return at his expense to their country the said sailors." Thereafter the bark proceeded to New York, and there safely arrived, the libelants having duly performed their duty during the voyage. After the vessel was in her berth, and the decks cleared up, all the crew left the vessel, including the libelants. No objection was made to the libelants leaving the vessel, nor was there any provision made for their remaining on board, or their return to their country. After some days it would seem that the master was willing that the men should return to the bark and was willing to take them in the bark to Portland, Oregon, to which port the bark was about to proceed from New York. It is not proved that this offer was brought home to the sailors, it apparently having been considered by the ship sufficient, as decidedly it was not, to make the offer to the boarding-house man, at whose house the men are boarding.

On the part of the ship it is contended that the men deserted in New York, and a consul's certificate to that effect is produced. But the proof is beyond dispute that the men left the bark without objection, if not by the direction of the master. Besides, they had the right to leave the ship when they did, for the voyage was ended. The covenant on the part of the master to return them to their country did not bind them to remain on board the vessel after the completion of the voyage.

Next, it is contended that the men have had the opportunity to return to their country in the same vessel, and have refused to do so. This defense is not proved. At the most, all that has been done is to offer to take the men in the bark to Portland, Oregon, whither, as it appears, the vessel proceeds from New York. The contract, as I incline to think, is a contract to send the men from New York to the Philippine islands direct; and an offer to take the men to the Philippine islands, via Portland, Oregon, would not, therefore, be a fulfillment of the agreement. The case contains nothing from which it can be inferred that any other voyage was contemplated at the time of hiring than a voyage from Iloilo to New York, and thence back direct. But if this be otherwise, and a voyage home by the way of Oregon be held to be within the meaning of the contract, then it is to be said that no offer to send the men home via Portland has been shown. There is no evidence that the bark intends to proceed from Oregon to the Philippine islands. All the offer made was to give the men a passage in the bark from New York to Oregon, with the chance of a passage thence to their country. Such an offer was no tender of

performance of the contract. The men are not bound to go to Oregon, and take the chance of being left there if the bark should go elsewhere than to the Philippine islands, as, for aught that appears, she will do. No other conclusion is therefore possible, upon this evidence, than that a violation of the contract on the part of the bark has been shown, because of the failure to provide the libelants with a passage to their native country, from which arises a liability to pay any damages that the libelants may have sustained thereby. What the amount of that damage is may be ascertained by a reference. But, as a matter of protection to to these foreign sailors, I will allow the ship, if it be so desired in her behalf, now to provide the men with a passage to the Philippine islands, and to show such provision made in mitigation of damages.

THE RHEOLA.

COUGHLIN *v.* THE RHEOLA and another.

(*Circuit Court, S. D. New York.* April 12, 1884.)

NEGLIGENCE—PRIVITY OF CONTRACT—RESPONSIBILITY.

A stevedore employed by another, who has contracted to unload a vessel, can recover for injuries sustained by the defective appliances furnished him by the vessel, upon the same evidence which would enable his employer to recover. Though there is no privity of contract between the ship-owners and him, they were under the same obligation to him as they were to his employer. What would be negligence to one would be negligence to the other.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

W. W. Goodrich, for claimants.

WALLACE, J. The libelant has appealed from a decree of the district court for the Southern district of New York dismissing the libel. The suit is *in rem*, and is brought to recover for personal injuries sustained by the libelant while unloading the Rheola, in July, 1879, when she was discharging cargo along-side a pier in the port of New York. The libelant was one of a number of laborers employed by one Hogan, a master stevedore, to discharge cargo, which consisted of tin in cases and iron ore in bulk. He and others, in all a gang of six men, were in the lower hold of the ship, filling the hoisting tubs with iron. He had hooked one of the tubs to the chain, and was in the act of filling another, when the chain broke while the tub was suspended over the hatchway, and the tub fell upon him. Three tubs were being used, and the work was done rapidly. The chain and hoisting apparatus were furnished by the steamer, under the bargain with the stevedore.

It is not suggested that the suit is not properly brought *in rem*, if the master, while acting within the scope of the authority conferred upon him by the owners, in the management of the vessel, was guilty of negligence towards the libelant. Negligence, when committed upon navigable waters, is a maritime tort which subjects the vessel to liability to an extent coincident with the liability of the owner. *Com'rs* v. *Lucas*, 93 U. S. 108. If the relations of the master of the steamer towards the libelant were such as to create a duty not to be negligent, the latter is entitled to recover if there was a breach of that duty. *Sherlock* v. *Alling*, 93 U. S. 99.

The learned judge in the court below was of the opinion that, as there was no privity of contract between the libelant and the owners of the steamer, they were not liable unless the thing by which he was injured was imminently dangerous; but he was also of opinion that if the degree of negligence which would make an employer liable to his employe were enough, such negligence was not established by the proofs. As the libelant was not directly employed by the master, and could only look to the master stevedore for his pay, there was no privity of contract between him and the ship-owners. Nor did the relation of master and servant, in its technical sense, exist between the libelant and the ship-owner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libelant, or the degree of care which it was incumbent upon him to exercise. The libelant was performing a service in which the ship-owners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger, that they were under to the master stevedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. *Coughtry* v. *Globe Co.* 56 N. Y. 124; *Mulchey* v. *Methodist Society*, 125 Mass. 487. The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that such instrumentalities are safe and suitable for the purpose. "It is the duty of an employer inviting employes to use his structures and machinery, to use proper care and diligence to make such structures and machinery fit for use." Whart. Neg. § 211. If he knows, or by the use of due care might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough* v. *Ry. Co.* 100 U. S. 220. Due care or ordinary care implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience. Applying this test here, where, if the appliances to be used were defective, serious casualties were to be apprehended, it

was the duty of the master of the steamer to exercise a corresponding vigilance to provide against them.

The proofs show that the average weight of the tubs which were being hoisted out of the hold was about 1,800 pounds; that on the day before one of the chains of the steamer, which was being used in the same work, broke; that both of these chains had been in use about two years; that the one that broke first had been used more than the other; and that such chains, when in proper condition, were sufficiently strong to sustain a hoisting weight of six or seven tons. Concededly the chain was defective, as it broke with a weight of 1,800 pounds, after it had only been used to hoist four or five tubs. It was rusted, and considerably worn in appearance. The breaking of the other chain was a circumstance to attract attention, and put the master of the steamer on inquiry. Under these circumstances it must be held that the casual examination of the chain which was given to it while it was being brought from the other hatch was not sufficient to exonerate the master from the charge of negligence. Before he permitted it to be employed in a use which was so hazardous to those who were to use it, he should have made a careful and thorough test or examination. Anything less than this was a failure to observe proper care.

The proofs do not justify the inference that the libelant was negligent. If he had had any reason to anticipate the accident he could undoubtedly have escaped; but this may be said in almost every conceivable case where an accident has happened. It was not indispensable for him to remain exposed under the hatchway while actually filling the tubs, but part of the time he and the other laborers were necessarily there, because they had to unhook the empty tubs, hook on the full ones, and steady them until they were hauled out of the hold. The work was being done with great dispatch; there were six men doing it, and a limited place in which to do it; the tubs, while being filled, stood near the hatchway and part of the time under it; and under all the circumstances it would seem that the libelant was as careful as in the hurry and excitement of the occasion could be reasonably expected of him, and should not be deemed in fault.

The proofs show that while the libelant sustained painful injuries they were not of a permanent character, nor did they incapacitate him long from doing his ordinary work. A decree for $750 will be a fair compensation to him, and is accordingly ordered.

END OF VOLUME 19.