RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States, for the District of Delaware—October Term, A. D. 1857.

HENRY VIRDEN ET AL. *vs.* THE BRIG CAROLINE.

1. Where a steam tug is kept constantly employed during the winter, on a dangerous station, and at a heavy expense, for the express purpose of rendering salvage and towage service to vessels in distress, her owners are entitled to the full remuneration usually awarded to salvors who peril life and property, though the particular salvage service may not have been actually accompanied by much danger or labor.
2. A brig was caught and damaged in the ice in Delaware bay, and, from the nature of her injuries, could only be rescued by the removal of her forward cargo. This was done (and it was not otherwise possible) by and with the assistance of a steam tug stationed at the Breakwater. Part of the cargo thus removed was transhipped to the tug, and the brig afterwards towed by her into port. The court decreed to the owners of the tug, one-half the value of the cargo transhipped, and four per cent. of that of the vessel and remaining cargo.

This was a libel for salvage, by the owners of the steam tug America, and came up on an appeal from the decree of the District Court, awarding the sum of $650 to the libellants for salvage services to the brig Caroline and cargo, and from which decree the libellants appealed, upon the ground of inadequate remuneration.

The vessel salved was lying at the Breakwater, at the mouth of the Delaware bay, on the first day of February, A. D. 1857, and upon that day the services were performed. The day following, the steam tug was obliged to go to New York for fuel, and upon her return, a few days afterwards, completed the salvage by towing the brig to New Castle.

The vessel and cargo were valued at about twenty-one thousand dollars. The case was argued in the Circuit Court by

Rodney and *Bayard*, for the libellants, and
Bradford, for the claimants.

The facts of the case are fully disclosed in the opinion of the court, which was delivered by

TANEY, C. J.—This is a claim for salvage, and the testimony in the case clearly establishes that the brig was in great peril, and was rescued from danger by the libellants.

The only question open to dispute, is the amount of compensation to which the salvors are entitled. And this is one of those questions in which it is often so difficult to come to a satisfactory conclusion, and upon which different minds will often form different judgments.

There is no rule of law, nor any fixed rule of judicial discretion, by which the compensation can be exactly measured.

The principle is, that the salvor is entitled to an adequate reward, according to the circumstances of the case. But the material circumstances in every case will be found, in some respects, peculiar to itself, and to differ from all others. The peril in which the property is placed, its character and value, the danger and labors of the salvors, their expenses and skill, and sacrifices of time or money necessarily made, are all to be considered, and in no two cases are, perhaps, precisely the same. The sum allowed in one case can, therefore, furnish no precedent for a like allowance in another.

And we can gather nothing more upon this question, from the reported cases, than the general policy by which courts of admiralty have been governed, and that policy undoubtedly is to deal liberally with salvors, in order to encourage exertions and sacrifices to rescue life or property from the dangers to which it must always be liable in maritime pursuits.

In the case before the court, the brig was evidently in imminent peril, and required immediate aid. She was at the Breakwater, in the Delaware bay, on the 1st of February last, exposed to the heavy floating ice with which the river was then filled. Her starboard bow or lumber port had been stove in, at the latter end of the ebb tide, by the heavy ice that came down the river, and it was absolutely necessary, for the safety of the vessel, that it should be repaired and strengthened before the next ebb tide; for the pilot on board of her, (who is a witness called by the claimants,) states that, if it had not been so repaired, the ice would probably have

struck her bow port again on the next ebb tide, and sunk the vessel. The injuries it had already received made it incapable of resisting the blows and pressure of the heavy bodies of ice which came rapidly down the river when the tide was ebbing. The larger part of the injured port was under water, and the vessel was leaking from the injury, but not so badly as to cause any apprehension of immediate danger on that account. She was easily kept free by a single pump. But in order to repair the damage, and protect the vessel from the ice, it was necessary to raise her bow high enough to bring the whole port above water, and this could not be done without discharging a large part of her forward cargo.

As soon as the pilot in charge of the brig discovered the danger, he applied to a schooner anchored near him to come alongside, and take off so much of the cargo as it was necessary to remove. But the master of the schooner declined complying with the request, saying that his own vessel was leaking, and he had but one anchor. And, upon receiving this answer, he immediately hoisted a signal of distress; and the steam tug came to his assistance. She was alongside of the brig as soon as she could make her way though the floating ice; and upon learning from the pilot the situation of the brig, the captain of the steam tug immediately placed ten hands on board to assist in lightening her by discharging her forward cargo. Her deck load forward, consisting of heavy hogsheads, weighing 1600 or 1700 pounds, and imbedded in ice on the deck, and on that account requiring great force to move them, were thrown overboard. Coffee and other merchandise were taken from the hold and placed on board of the steam tug; and portions of the forward cargo moved aft. By these means, the bows of the brig were in two or three hours raised so high that the whole of the port was out of water, and was then repaired and made safe under the direction of the pilot—the steam tug laying by, at his request, until the work was completed, and the port made safe; and as soon as the river was in a condition to make it safe to do so, the brig was towed by the steam tug to New Castle in safety; and the portion of the cargo taken on board the steam tug at the Breakwater, and which had remained on board, was delivered to the agent of the claimants.

So far, then, as concerns the property saved, it was a case of imminent peril, in which a total loss of vessel and cargo would probably have occurred, with danger of life, but for the prompt assistance of the steamboat. And, judging from the whole evidence, the court is not satisfied that any part of the property rescued from danger would or could have been saved in any other way. It is true, the pilot of the brig says that, if he had received no assistance from any quarter, he could have saved the vessel and residue of the cargo, by throwing overboard, with his own crew, the deck load which was thrown over after the arrival of the steamboat, and also the goods and merchandise which were transferred to the steamboat; and that he would have done this with his own crew and boat, and then repaired the damaged port. But the weight of the testimony is adverse to the opinion of the pilot.

It evidently was essential to the safety of the vessel that the heavy hogsheads on the forward part of the deck, which contributed so much to press the bows of the vessel down in the water, should be removed.

Her head would not rise so as to reach the injured part until this was done. And it appears from the testimony, that those heavy hogsheads were so firmly fastened to the deck by the ice, that there was great difficulty in moving them, when ten men from the steam tug were added to the crew of the brig, and all were united in the effort.

The first attempt, even with all this force, failed, and they were obliged to resort to a different tackle from the one first tried, before the object could be accomplished.

No attempt had been made to move them, until the additional force from the steamboat was on board; and the court is satisfied from an attentive consideration of the whole testimony, that if the attempt had been made by the crew of the brig, without any other aid, it must have failed. The captain had left her five days before the disaster happened. There was no one on board but the pilot, mate, three seamen, and the cook; and if with this comparatively weak force they had attempted, by sawing down the bulwarks, to put these heavy hogsheads overboard, the attempt would most

probably have resulted in serious injury to the vessel, or to the persons engaged in the work.

It is possible, and barely possible, that hands might have been sent in boats from the other vessels if there had been no steamboat to assist her. But if this had been done, it must have been done obviously at great risk of life and property.

There were thirty-seven vessels in sight. They were all more or less in danger from the ice when the tide was running, and no one could foresee at what moment the danger would come upon them.

During the brief period of slack water, between the tides, there were occasionally times when boats from some of the vessels might safely come to the brig. But no one could foresee how soon the floating ice might prevent their return, or render it exceedingly hazardous. Besides, every vessel was necessarily constantly on its guard, and might at any moment need the presence of its whole crew to save itself, and the pilot of the brig himself states the difficulties and dangers which would have attended relief in this mode from other vessels, and says that "Every crew ought to be at home when the ice is running." The relief, therefore, if given by boats from other vessels, would have been at the hazard of the lives of those employed, and increased the risk of the vessels to which they belonged. No such relief was offered, nor is a single witness produced from any other vessel who says it could or would have been given.

And the captain of the Powhattan, who came on board after he saw the steam tug alongside, thought it prudent to engage the steam tug to take him back to his vessel, in case the floating ice should block up his return, or render it hazardous to his boat.

It is manifest, therefore, that if relief had come from boats dispatched from other vessels, the relief would have been afforded at such risk of life and property as would entitle the salvors to the most favorable consideration of the court in awarding them compensation.

And even with all this hazard and risk, the property transferred to the steam tug must have been thrown overboard and utterly lost. For it was clearly impossible for any other vessel to have

gone alongside of the brig. This fact is positively stated by the engineer of the steamboat, and he is fully confirmed by every witness examined from other vessels which were lying around her, and witnessed the whole scene.

It took the steam tug, with all her advantages, one hour to reach her, although the distance was only about five hundred yards, and she was occasionally obliged to back from the weight and pressure of the ice in her way.

It is urged, however, by the claimants, that the steamboat encountered no danger, and consumed but little time in rescuing the brig and cargo from the peril in which it was placed. This is true. But it must be remembered that the steam tug had by the prudent foresight of her owners, and at a heavy expense, been prepared to render such services promptly and without much danger to herself or her crew. She was strongly built, well manned, and placed at the breakwater in the Delaware, where it was well known many vessels must be detained at this inclement season, and would be constantly in danger from the winds and the ice. She was kept there at a heavy daily expense, and with her crew constantly exposed to severe weather, but yet always in readiness to go to the aid of a vessel in distress. It is the well-established policy of courts of admiralty to remunerate liberally salvors who risk life and property, or suffer hardships in rescuing a vessel or cargo when in danger of perishing. And I cannot perceive any reason why a salvor should be entitled to less, who expends his money in preparing a vessel by which the service can be rendered with less risk, and keeps her at the place where danger is anticipated, at a heavy daily expense, in order that assistance may be promptly rendered when the emergency shall arise.

The reason assigned for a liberal allowance in the one case, applies with equal force in the other. And, in my judgment, the salvors are entitled to the same measure of compensation that the court would have deemed just, if the vessel had been rescued by the boats of the surrounding ships, amid the hazards which such an enterprise on their part would evidently have brought with it. The situation of the America in this case was unlike that of a steamboat

her way for a short distance, and delays her voyage for a few hours, in order to afford the necessary relief. *Her* sacrifice of time and labor would be small. But here was a daily heavy expense, and she was always prepared, at the point of danger when assistance was needed.

Entertaining these views of the case, I think the sum awarded by the District Court is not an adequate compensation for the service rendered. I am aware, as I said before, that upon this question there is no certain and definite rule to guide the court, and different minds will unavoidably come to different conclusions.

It is, therefore, the practice of appellate courts, where its opinion approximates to the one entertained by the court below, not to disturb its judgment, although it may not fully concur in the propriety of the sum awarded.

But where it is otherwise, it is undoubtedly the duty of the appellate tribunal to decide the case upon its own judgment as to the rights and just claims of the parties. (19 How. 160.)

And dealing with the case according to the conclusions of fact which I have herein before stated, and the principles which admiralty courts have been accustomed to apply to such cases, I think that, for the portion of the cargo which was transferred to the steamboat, the salvors are entitled justly to one-half its value. This portion was destined to certain destruction, if the steam-tug had not been there, and come to the relief of the brig. For if she could have been saved by her own crew, or by boats from other ships, this part of her cargo must have been thrown overboard to lighten her near the bows, and it was evidently impracticable for any other vessel but a steamboat to come alongside and take it off.

In cases of derelict, where there has been any hazard in saving it, the one-half has been most commonly allowed. And in this case the property could not by any possibility have been saved if this steam-tug had not been placed at the breakwater, and kept there at the expense of the owners, ready to interpose the moment the brig hung out the signal of distress. It presents at least as strong a case for compensation as that of a vessel found

accidentally passing at the time of the disaster, which turns out of abandoned at sea, for without the aid of the steam-tug the loss was not merely highly probable, but absolutely certain and inevitable.

As relates to the vessel and the rest of the cargo, I feel more difficulty in coming to a conclusion. They were undoubtedly saved by the steam-tug, and upon the principles already stated she is entitled to as high a rate of compensation as would have been allowed to the boats of the other ships. And taking all the circumstances into consideration, and the towage of the vessel afterwards to a port of safety, it appears to me that about four per cent. of the value saved would not be more than a fair and adequate compensation. I do not mean to rest this part of the opinion upon any rule of percentage applicable to cases of this kind. I look rather at the sum which that percentage will produce, and compare it with the value of the services rendered. Nor shall I enter into any nice calculations as to the precise amount which these allowances will produce.

The judgment is necessarily founded upon estimates, and there can be no exact mathematical calculation fixing precisely the first amount. But looking to the whole case in all its circumstances, as it appears on the record, I am of opinion that the libellants are justly entitled to seventeen hundred dollars ($1700) as a compensation for the salvage services rendered to the brig, and shall decree accordingly.

In the District Court of the United States, for South Carolina, October, 1857.

M'CREADY, MOTTE & CO. *vs.* R. L. & W. E. HOLMES.

Though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt in his bill of lading, as to the quantity or amount of the goods shipped; yet, in an action for the freight, where the consignee has received the goods at the wharf, without qualification or reservation of the right to inspect,

weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burthen of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

Libel in admiralty, *in personam.*

The facts of the case will appear in the opinion of the court.

Edward McCready, Esq., for libellants.

C. H. Simonton, Esq., for respondents.

McGRATH, J.—The libel in this case, is filed to recover a balance of freight, for the transportation of one hundred tons of coal from Philadelphia to Charleston. The vessel arrived at Charleston, and the coal was delivered to the respondents, the consignees: who with their carts carried it to the office of the public weigher; and by his weight, it appeared there was a deficiency of several tons. The respondents claim a deduction from the freight, of so much as is alleged to be the value of the coal which has been lost. It is conceded that a certain percentage ($2\frac{1}{2}$) of loss, is usually allowed. The libellants concede this allowance, and charge freight for $97\frac{1}{2}$ tons; but insist that no other deduction should be made. The cartmen employed by the respondents depose that they carted to the public weigher all the coal they received: and the libellants prove that all the coal received in Philadelphia was brought to Charleston, and delivered to the respondents.

A carrier is responsible to the consignee for the safe delivery of property committed to his care. Ordinarily, the bill of lading determines the nature of his liability. When by the execution of that paper he has admitted his possession of the property of another, it is conclusive against him, unless upon proof of inadvertence, mistake, or deceit. That the carrier did not supervise the process by which the weight was ascertained; or that he signed a bill of lading upon a representation which he did not verify, are suggestions to which I would reluctantly listen, if offered to qualify a liability plainly expressed in the bill of lading. No sufficient reason in this case is presented to me for doubting the correctness of the weight

as ascertained in Philadelphia, and I hold the libellants concluded by it.

The libellants being thus liable for the safe delivery of the property subject to such exceptions, as by custom or contract qualify that liability, can discharge themselves by showing a performance of their undertaking. This they do, by proof that all the coal received at Philadelphia was duly cared for while being laden; that all precautions were taken to secure it from loss by theft or otherwise; and that all the coal in the vessel was delivered to the respondents.

The undertaking of a carrier is affected by the nature of the property he may have in his custody. If its value is determined by measure, weight, or any other test, his liability depends upon the result of an application of that test, at the port of delivery, under such circumstances as I shall notice. But the consignee may not require the test. He may be satisfied, and willing to receive his consignment without the delay, trouble, and expense of ascertaining whether it corresponds with fractional accuracy to that specified in the bill of lading. A delivery and acceptance of this kind would not conclude the consignee in case of loss or damage subsequently ascertained; but it would increase the difficulty of making a carrier liable for loss or damage, (as in this case by a diminution in quantity) ascertained after the carrier had parted with his possession; and by an examination made without his knowledge or presence. And if it should be, that after the carrier had parted with his possession of the property, it has been in the possession and control of other agents of the consignee; the reason for exonerating the carrier increases in proportion to the number of such agents, the length of time for which they were in possession; and the opportunities they enjoyed to diminish the quantity for which the carrier was liable.

In this case, the carrier received one hundred tons of coal, and became bound for its delivery. That delivery must be so made as to admit an ascertainment by the consignee, of the fidelity with which the contract of the carrier has been performed. It is not the duty of the carrier to weigh, measure, or inspect property,

before he delivers it to the consignee; but it is a right in the consignee to ascertain whether the quantity or quality of the property, which the carrier has had in his charge, has been lessened or impaired, while it was in the possession of the carrier, and by causes for which he is liable. The consignee may therefore qualify his acceptance, by notice to the carrier that he intends to weigh, measure, or by any other appropriate test, ascertain if what he has received, is that which the carrier admitted that he had received, and agreed to deliver. And such notice would bind the carrier so that he would be concluded by the examination made in pursuance of it, unless he was able to show its insufficiency. If upon that examination, it appeared that there was a deficieney in quantity or diminution in value, which would have justified the consignee in refusing to receive the property, if known to him before he had received it, he still would have that right. And if the carrier acquiesced in the examination, he would have a right to supervise the transportation to the place of, and to be present at the examination; and there to enforce his lien as perfectly as he could have done, while the property was in the hold of his vessel. In such a case, the delivery on the one side, and the acceptance on the other, would be qualified, operating as a special agreement, under which the lien of the carrier may be preserved, and all the rights of both parties secured. No wrongful act of the consignee or owner can divest the lien of the carrier. (Mont. 40; 3 McCord R. 120.) In England, if the goods are not to be landed at a particular wharf, the carrier may send them to a public wharf, and the possession of the wharfinger will support the lien of the carrier. Indeed, the corresponding rights of the carrier to his freight, secured by a lien on the cargo, and of the consignee to an inspection or examination of the property, have been understood and provided for, even in the earliest times. The Laws of Wisbuy, the Ordinance of Rotterdam, the Consolato del Mare, with some variations in the details, but an uniform recognition of the principle, make it the duty of the master not to detain the goods in the vessel, where they cannot be inspected, but to have them in some place where they may be examined. In England, it is said to be the practice, in cases where goods should be landed

and warehoused, that the master may secure his lien by entering them in his own name. And the Dock Act of 39 Geo. 3, ch. 69, and 45 Geo. 3, ch. 58, expressly reserve the lien of the master. (Chitty on Carriers, 312, and note.) It may not be uninstructive, at least in this court, that we should bear in mind that here, the lien of the carrier is not only referred to the common law, by the strict rule of which, possession must accompany the lien; but it is also, that hypothecation implied in maritime contracts, and to the enforcement of which possession is not essential.

As the carrier has no right which is affected by the right of the consignee to this examination or inspection, of course he cannot refuse the consignee the full benefit of it. He has no right to insist that the consignee shall receive his property in any manner by which his claim for loss or damage may be made more difficult or embarrassing. He cannot enforce a delivery of property at improper times, or in bad weather, if the property cannot be secured by the consignee, or is exposed to damage during its transfer to the store. The consignee is entitled to reasonable notice, if he is known, of the arrival of the property, and to a fair opportunity of providing suitable means to carry it away safely. Story Bail. sec. 509; Olcott's Rep. 47. But the consignee has not the right to accept a delivery of the goods, commit them to his agents, examine them without notice to the carrier, and charge the carrier with a loss alleged to have been thus subsequently ascertained, upon such proof as excludes all reasonable probability of the loss having happened except in the hands of the carrier.

By the French law, upon a delivery to the consignee, he must give a discharge to the carrier. 2 Boul. Paty, 318. If he refuses to receive the goods, or receives them and refuses to give a discharge, he renders himself liable in damages. If his refusal to receive the goods is upon the ground of damage, or other sufficient reason, by his application to the proper officer, qualified persons are named, who determine the sufficiency of the cause alleged for the refusal to receive. Code de Commerce, Art. 106; 2 Boul. Paty, 318. The depot and the transportation of the property are also ordered, and a sale, if necessary, to the amount of the freight due

to the carrier. The right of the consignee to an examination before he accepts the property, is necessary, because acceptance and payment of freight extinguish all claim against the carrier. Code de Commerce, Art. 105.

I have considered this question without reference to such modifications of the general principle as arise from general custom, local usage, or special contract. They afford the rule in all cases in which they occur. I have not any evidence of either of these existing here, and the rule, as I have stated it, is the general law, unaffected by such qualifications as exist in certain places or in certain cases.

Supposing, then, that the quantity of coal was correctly ascertained at Philadelphia, there is a deficiency as it is now in the hands of the consignee. But the evidence shows that the loss cannot be attributed to want of care, theft, or any other cause operating while in the vessel to diminish the quantity. There was some evidence of loss happening by the transfer of coal from the vessel to the wharf, but it was too indefinite to be the basis of any conclusion; nor, indeed, was it made to bear directly upon this case. It rather seemed to furnish the explanation of the usual allowance of $2\frac{1}{2}$ per cent. loss.

But the loss may have happened after the delivery to the consignee. The coal was carted, after it was landed, to some distance, and then weighed. The carts were under the control of the agents of the consignee. It is quite as reasonable to infer that the loss happened while the coal was under the care of the agents of the consignee, as while it was under the charge of the carrier. If the consignee had notified the carrier of his intention to have the coal weighed by a public weigher, it would have been proper in the carrier, affected as he would have been by all that was done under such a notice, to watch the transportation of the coal, and to be present when it was weighed. But, without such notice, the carrier had no reason to suppose that the coal was to be re-weighed to decide his liability, particularly when, according to the evidence of the public weigher, there is no uniformity in the practice, and that coal is often received by the consignees without this test.

The postponement of the ascertainment of the liability of the carrier, without prejudice to the consignee; and the preservation also of the rights of the carrier, are embraced in the rule that, "if a person is apprehensive of losing a right by any event, it may be advisable and necessary for him to protect himself, either by protesting against a prejudicial interpretation of the event, or by reserving his rights." (Lindley's Jurisp. 142.) And although not strictly analogous, yet the principle which by the custom of London applies to the vessel at quarantine, illustrates the preservation of the mutual rights of the carrier and consignee, although the carrier has parted with the property, and it is in the possession of the consignee. In the case of a vessel at quarantine at London, the consignee, at his own expense and risk, sends for the goods; and the packing and care of the goods in the transit to the wharf devolve upon the consignee. (Chitty on Carriers, 265.) The delivery does not determine the liability of the carrier altogether, nor will it divest his lien. But in the transportation from the only place where a delivery can be made, to the place in which an examination can be had, the risk of loss or damage is with the consignee. So in this case, the carrier has landed the coal; and at the wharf, made delivery of it to the consignee. The consignee intending to cart it elsewhere, and to weigh it, must do so at his own expense and risk. If loss or damage occurs in that transportation, the consignee must bear it.

I have sufficiently expressed the opinion, that although the mere transit was ended by delivery at the wharf, yet that acceptance there did not necessarily extinguish the liability of the carrier. The delivery must be such as enables the consignee to ascertain, if he desires, how far the contract of the carrier has been performed; it must be such as allows the consignee safely to receive and properly to examine what has been delivered. If the consignee, without notice or qualifying his acceptance, receives, as in this case, coal; commits it to his agents, in whose charge it may be lost, as well at least as while it was in the charge of the carrier; and rests the proof of loss by the carrier upon evidence which does not render it

more probable that the loss was chargeable to the carrier, than to his own agents; a case is presented in which I am not at liberty to make the carrier liable.

The decree will be entered in favor of the libellants for the freight unpaid, and the costs.

In the Supreme Court of Pennsylvania.

JACOB BORN ET AL. *vs.* LUCAS SHAW.

A sale of horses was made in the State of Virginia, within the jurisdiction of which both the parties and the property were at the time, but possession was retained by the vendor. The horses were subsequently sent into the State of Pennsylvania to be pastured, and there made the subject of an attachment by creditors of the vendor. It was *held* that the validity of the sale, and of the title of the vendee, was to be determined by the law of Virginia, so far as it differs from that of Pennsylvania on the subject of fraud in the sale of chattels.

Error to the Common Pleas of Green county.

LEWIS, C. J.—By the law of Pennsylvania a sale of personal property is not good, as against the creditors of the vendor, unless possession be delivered to the vendee in accordance with the sale.

Where possession is retained by the vendor, it is not only evidence of fraud, but fraud *per se*. There are some exceptional cases. Where, from the nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects intended to be effected by, and constituting the motive for entering into the contract, the case might be regarded as an exception to the rule. Yet where possession has been withheld from the vendee pursuant to the terms of the argument, some good reason for the arrangement, beyond the convenience of the parties, should appear. *Clow et al.* vs. *Woods*, 5 S. & R., 273.

But this rule does not appear to prevail in Virginia. *Davis* vs. *Turner*, 4 Grattan, 422.

In that State the rule is, that retention of possession of personal property by the vendors, after an absolute sale, is *prima facie* fraudulent, but the presumption may be rebutted by proof.

In this case the parties to the sale, and the property which was

the subject of it, were within the jurisdiction of Virginia when the sale was made, but the property, consisting of horses and mules, was subsequently sent over the State line into Pennsylvania to be pastured, and the question is whether, on an attachment in Pennsylvania by a creditor of the vendor, the validity of the sale shall be tested by the law of Virginia, or by that of Pennsylvania?

If there had been previous sale by the owners at their place of domicil, and the contest was between the prior and subsequent purchasers, a very different question would be presented: so if the property had been situated within the jurisdiction of Pennsylvania at the time of the sale in Virginia, the *lex rei sitæ* might be applied for the purpose of protecting the rights of our own citizens.

But where the property and the parties to the sale were within the jurisdiction of another State, when the contract was made and executed according to the laws of that State, the right vested *eo instanti* in the purchaser, and no subsequent removal of the property into Pennsylvania, for a lawful purpose, can divest it.

The subsequent removal of the horses and mules, for the purpose of pasturing them in Pennsylvania, was no violation of our policy, nor of the rights of our citizens. They had no claims upon it under our laws when the sale was made, because it was not in any respect subject to our jurisdiction.

Their claims upon it were under the laws of Virginia, and the court fell into error in holding that the validity of the sale was to be tested by the law of Pennsylvania. *Henret* vs. *Jackson*, 7 Martin, 318; *Scott* vs. *Duffy*, 2 Harris, 18; *Shelby* vs. *Guy*, 11 Wheaton, 361.

By the common law, a debtor has a right to prefer one class of creditors to another, and we think it was error to encourage the jury to take into consideration the exercise of this right as "a circumstance in deciding upon the fairness of the transfer."

The other errors are not sustained.

Judgment reversed, and *venire facias de novo* awarded.