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DECISION OF THE SUPREME COURT

THE RETURNING BOARD CONTROVERSY

THE COURT HAS JURISDICTION

Lynch, Bovee et als. Declared to be the Legal Returning Board.

Mr. Justice Howell pronounced the opinion of the court in this case:

State ex rel. Attorney General, and on the information of the returning officers of elections vs. Jack Wharton et als.—Appeal from the Superior District Court, parish of Orleans.

The petition of the State on the relation, etc., in this case, represents that H. C. Warmoth, F. J. Herron, John Lynch, James Longstreet and Jacob Hawkins constitute the legal board of returning officers, and are duly qualified as such, for making the returns of the elections held in this State on the fourth of November, 1872, and that Jack Wharton, F. H. Hatch and Durant DaPonte are pretending to be such officers, and are attempting to act as such, and are interfering with the above named parties in the discharge of their official duties. The petitioner prays that said Wharton, Hatch and DaPonte be cited and decreed to be intruders into and usurpers of the office of returning officers of elections, and that said Herron, Longstreet and Hawkins be decreed to be such officers. In a supplemental petition an injunction is asked for restraining and prohibiting the defendants from acting as such returning officers or interfering in any way with the legal board. On this petition a rule to show cause and a restraining order were granted.

To this rule the defendants made the following answer:

1. The petition discloses no cause of action of which this court has jurisdiction.

2. The said Wharton, as appears by the affidavits on file, was duly appointed to discharge the duties of the office of Secretary of State during the suspension of George E. Bovee, and he actually and peaceably in the discharge of such duties now, and was so at the time the petition and supplemental petition were filed.

3. That, as it appears by the affidavits on file, he and F. H. Hatch and Durant Da Ponte were duly summoned to sit as returning officers for the election held the first Monday of November, 1872, being the fourth day of said month, and qualified as such, and their election and appointment are valid.

After hearing evidence and argument on both sides, the judge (Dibble) delivered a written opinion, in which he held that the informants were the legal returning officers, and ordered that the injunction issue as prayed for.

Two days afterward, to wit: December 27, 1872, counsel for the defendants moved for a new trial in the case, on the grounds that the judgment rendered is contrary to law and evidence, and also because the plaintiff and relators have no standing in court, the law under which relators claim having been repealed.

This rule was fixed for trial on the twenty-fifth of the same month, on which day it appears that Judge Elmore presided, having been, in the meantime, inducted into the place of Judge Dibble; and on that day an exception was filed by defendants "to the petition of plaintiffs and their right to have and maintain the said suit, on the ground of and for the reason that the court has no jurisdiction of the subject matter thereof." The rule for new trial was continued to the second day of December, when, after hearing pleadings and counsel, it was taken under advisement, and on the next day (the third) the judge (Elmore) granted a new trial, giving as his reason that the act of the Legislature, approved on the twentieth of November, 1872, had repealed the act of 1870, creating a board of returning officers, and consequently no such board existed, and there was no one authorized to count the votes or make returns of the election of 1872, until new appointments should be made by proper authority. On the same day, as appears from the minutes of the court, a motion was made by defendant's counsel, and granted by the judge, dissolving the injunction issued in the case and dismissing the suit. From the transcript of appeal it appears that this judgment was not signed until the second of January, 1873, when the record of the suit having been transferred to the Superior District Court, and the judge thereof having recused, it was signed by Judge B. L. Lynch, of the Fourth District Court, who granted an appeal therefrom to A. P. Field, Attorney General, upon his allegation that he was aggrieved thereby, and his affidavit as to the amount of his interest involved.

The defendants have filed the following motion in this court:

"Now come the appellees and move to dismiss the appeal taken in this case on the following grounds:

1. The judgment was rendered by W. A. Elmore, judge of the Eighth District Court, on the third day of December, 1872, and was of a character that did not require signature, and no appeal could therefore be taken after the lapse of ten days from its rendition.

2. That no judgment rendered by the said judge of the Eighth District Court could be signed by the judge of the newly created Superior District Court.

3. That that portion of the act of the Legislature creating the Eighth District Court, which authorized the appointment of a judge, is unconstitutional, null and void, and therefore the said B. L. Lynch had no authority, acting in the place of Jacob Hawkins, recused, to sign said judgment.

4. That A. P. Field, the appellant, has no interest whatever in taking this appeal which this court can recognize.

5. That A. P. Field, the appellant, has no interest in the appeal taken by him, inasmuch as the plaintiff returning board has, in spite of the decision of the inferior court, exercised the authority it claims, canvassed and announced the result of the election as to the office of Attorney General, and therefore as to appellant and his rights, the said plaintiff returning board is *functus officio*, and no longer can exercise the functions it claims so far as said Field is concerned.

6. That said appeal is made returnable on the sixth of January, from a judgment signed on the second of January, 1873, the usual period of citation, ten days, not being allowed, and the law requiring the appeal to be returnable in ten days.

7. The judgment was not signed at the instance or on the motion of Semmes & Mott, of counsel for defendants, and if this fact is denied the case should be remanded to ascertain the truth, and the court had no right to sign a judgment unless applied to by the party in whose favor it was rendered."

We have thus detailed the proceedings, because the main objections of the defendants before us to an examination and decision of this cause are purely technical, and we must therefore be careful to confine our investigation to the matters only which are really and properly presented in the record. And in this connection we will premise that we can give no force or effect to the document filed here during the argument, which bears the signature of the judge who dismissed the case in the court a qua. It appears simply to be the original motion, in the handwriting of defendant's counsel, to dissolve the injunction and dismiss the suit filed on the third of December, and entered in the minutes of that date for the first and only time. There is no date to the act of signing, and nothing to show when it was signed. (See C. P. 543, 546.) It is not contained in the transcript in its present form, and is nowhere referred to in the pleadings of record in either the inferior or appellate court, and it is inconsistent with the grounds of the motion to dismiss the appeal. We therefore lay it out of view.

First—The first ground is untenable. The judgment is one dissolving the injunction and dismissing the suit. It is therefore a final judgment which must be signed, and no appeal could be taken from it until it was signed, which was done on the second of January, 1873, and the appeal was properly made returnable within ten days from that date. C. P. 546; 3 L. 430; 19 A. 290. Act No. 45 of 1870, section 7.

Second—The law creating the Superior District Court authorized the judge thereof to do in the cases transferred to it from the Eighth District Court, which was abolished, what the judge of the latter could have done. Act No. 2 of December 11, 1872.

Third—Whether or not the appointment by the Governor of the judge of the Eighth District Court or of the Superior District Court is unconstitutional, null and void, can not be determined in this collateral manner. He was or is acting under such color of authority that we can not, on a motion to dismiss, go behind it and declare it an absolute nullity. In the case of each of said courts the appointment of the judge was expressly authorized by the statute creating the court, as in the case of an original vacancy. Whether this might or might not be sustained as constitutional in a proper proceeding, it is clear that this is not the occasion to settle the question. The said judge was or is manifestly an officer *de facto* at least, and his acts must be recognized just as those of an officer *de jure*, until upon a regular trial he is declared not to be an officer. 13 A. 404; 16 Peters 194; 56 Penn. 436; 15 Mass. 180; 13 Wendell 491.

Fourth—The alleged want of interest in the appellant is the main ground relied on by the defendants. It was contended in argument that the district court was without jurisdiction, because the matter in dispute between the parties is too small, and hence this court has no jurisdiction.

This is met by the appellant with an affidavit of one of the members of the plaintiff board that his pecuniary interest in the suit exceeds $1000, and a reference to act No 72 of 1871 (p. 182) shows that an appropriation was made for the compensation of the same returning officers. This mode of establishing an appealable interest, under such circumstances, is fully sanctioned by our jurisprudence. See 21 A. 336, 418; 20 A. 575; 22 A. 602; 23 A. 580, 769. In addition to this, there can be no question as to the importance of the matters involved in this controversy. It affects, to a great extent, the whole political fabric of the State, and has even entered the departments of the federal government. Surely, a subject which has commanded such widespread interest, and has required an argument of three hours' length from such able counsel as represents the defendants, can not be designated as too insignificant to come within the consideration of the Eighth District Court of New Orleans, or of this court.

The object of the limitation in the constitution to the jurisdiction of this tribunal is simply to exclude from it such controversies between litigants as are of minor importance. This case is not of that class. Under every constitution of this State containing limitations of jurisdiction this court has entertained jurisdiction of suits of separation from bed and board, and of divorce when there was no appreciable money involved. See 19 La. 567. And so, too, of suits by slaves for their freedom, 13 A. 406. The interest of the State and of the people of the State in the correctness of the ruling of the Eighth District Court of New Orleans in this proceeding is of such magnitude that we would be derelict if we should, upon such bald technicality, refuse to entertain jurisdiction of the cause, even if there were no pecuniary interest shown, which, however, has been done.

The chief reliance, however, seems to be on the fact that A. P. Field, in whose name the appeal is taken, is a third person without interest, and the case of the State ex rel. Sullivan vs. Mount, 21 A. 755, is cited as conclusive against his right to appeal.

In that case this court said: "From his own statements we could not perceive that the appellant, a third party, had any interest whatever in the matter in dispute," and dismissed the appeal. Without questioning the conclusion arrived at, it does not, in our opinion, settle the point as to the appeal in this case, where the statements of the appellant do make his interest apparent. Every case must be determined upon its own facts and merits.

A reference to the plain provisions of the law on this subject will furnish a safe guide. Article 571, Code of Practice, says: "The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to such suit, when such third persons allege that they have been aggrieved by the judgment."

This seems to be unambiguous. It must be, of course, applied with reference to the constitutional jurisdiction of this court. If the matter in dispute, involved in the suit, is such as to demand or authorize the action of this court, the right to appeal is accorded by the above article to third persons who *allege* that they are aggrieved by the judgment rendered in a suit between other parties. The law does not say that such judgment shall be *res judicata* against the third persons to entitle them to appeal. It does not say that they shall have such right of action against one of the parties as to sustain an intervention in their suit and claim the very thing which one of the parties is claiming. The only condition is, they must make a reasonable showing that the judgment complained of is calculated in its effects to injure them. Now, in this case, A. P. Field has made the requisite allegation, supported by his affidavit, and he has made it apparent to our minds that he is aggrieved by the judgment appealed from, which annuls the authority by which he was declared to be elected Attorney General of the State, whose salary is $5000 per annum, and the return of the plaintiff board is the foundation of his title to his office. Under the law it is not necessary, in support of his right of appeal, that he should demand in this suit to be declared legally elected, nor that he should seek to regulate the judgment as between the parties to the suit, but simply to regulate it so far as it affects him. The difficulty of adjusting the rights involved in a litigation does not control the right of action. The cases in 20 A., 21 A., 22 A. and 23 A., above cited, support the right of the appellant to this appeal. That of the State ex rel. Byerly vs. Judge, 23 A. 768, was much less favorable to such right than this case is, and in that case we sustained Byerly's right as a third person to appeal.

But the interest of A. P. Field as the Attorney General of the State, by whom such actions as this may be brought, is such as to make it appropriate in him to ask a revision of the judgment rendered in the court of the first instance.

If, however, there should be a reasonable doubt as to the right of appeal now before us, under the well established jurisprudence of this court we would maintain it as a constitutional right.

Fifth—What is said above disposes practically of the ground that the appellant has no interest, because the plaintiff board has exercised its authority in his behalf and is now *functus officio*. His interest is in having the legality of said board established at the time it was exercising its functions. He does not pretend that said board shall again act in his behalf, but that it shall be decreed to have been the legal board of returning officers, when it declared his election.

Sixth—The objection that full ten days were not allowed to bring up the appeal is without force. The law directs that the appeal in such cases shall be returnable *within* ten days after the judgment of the lower court. The return day may be in less but not more than ten days.

Seventh—It is immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments. C. P. 546.

Our conclusion is that this appeal is properly taken and the motion to dismiss is refused.

The answer of the defendants to the rule which pleads no cause of action, and puts at issue the right of the respective parties to be declared the legal returning officers.

Upon the plea or exception thus made it was contended in argument that the board of returning officers is not an office within the contemplation of the law, and therefore the suit should not be brought under the intrusion act. The counsel could hardly be serious in this, as in another part of his argument he insisted that it was a court vested with powers to judge. Be that as it may, the members of the board are designated as *officers* in the act itself creating it. "An office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." An officer is one lawfully invested with an office." Bouvier, *verbo* office. The fact that no emoluments or fees are fixed in the law itself, does not necessarily imply that none will be given or that none are attached to the office. In this case the contrary appears to be true, and it comes clearly within the above definition.

It was also contended, somewhat vaguely it is true, that the matters at issue are not properly questions to be determined by the judiciary. We have heard no good reason to sustain this proposition, nor can we imagine any. It is not and can not be denied that we have a constitution, and laws made in conformity thereto, in this State; and it is the province of courts to decide on the rights which conflicting parties can legally set up under them. "Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them.

"When claims of individuals come in conflict under them, it is the true province of the judiciary to decide what they rightfully are under such constitution and laws, rather than to decide whether those constitutions and laws have been rightfully or wisely made. 7 How. 22. Two sets of individuals claim to be the legal board of returning officers. It is difficult to conceive why this is not a judicial question. It is the province of courts to say what the law is—*jus discre*. Because the law makes it the duty of the Governor to open, in the presence of the said returning officers, the statements of the supervisors of registration, it can not be inferred, as counsel intimate, that he is vested with the extraordinary discretion to determine who are the returning officers under the law. No such power or discretion is conferred on him.

The next objection is that the law signed by the Governor on November 20, 1872, relative to elections, repealed the election law of 1870, which created the board of returning officers, and thereby destroyed their office.

If this were so, the action of the judge of the Eighth District Court in granting a new trial and subsequently dissolving the injunction and dismissing the suit, were nullities, for want of parties to stand in judgment. But we are clearly of opinion that no such effect followed the passage of the said act. Both laws were enacted to regulate elections in this State; the one of the later date is but a revision and reenactment of the former, with such emendations as were deemed necessary. The new law, it is true, contains a repealing clause, but it could not have been the intention of the legislators to repeal or destroy what they had carefully guarded in the new law. The office of the board of returning officers is not abolished, but is preserved in the act signed on November 20, 1872. The mode of filling the office alone is changed. Under article one hundred and twenty-two of the constitution the old members continued in office to discharge the duties imposed on them by the law until their successors were inducted into office; and by the election law they were to continue in session until the returns are completed. Such is the doctrine enunciated in State ex rel. Holmes vs. Wiltz, 11 A., 439; State vs. Kreider, 21 A., 482, and State vs. Brewer, 22 A., 273. It is very clear that the provisions of the act of 1872 were intended to apply only to elections held under it after its passage, and by no correct or admissible rule of construction can its repealing clause be held to defeat an election had under the previous law, and the results thereof not yet ascertained. It would be worse than trifling with the right of suffrage thus to change laws regulating elections. The difficulty is not remedied by the theory suggested by counsel that after the approval of the new statute the Governor *ex necessitate rei* must or could appoint a new board to complete what, by his own act, the former board was rendered powerless to complete. Such a necessity could not be created by him for such a purpose. It is inconsistent with and opposed to our republican system of government. The Governor is not vested by the new law with authority to appoint the returning officers. They are to be elected by the Senate, and the Senate, as elected, had to be organized before it could elect, and its organization depended on the result of the said election.

On the merits of this case there is no serious difficulty.

By the act No. 100 of 1870, under which the election was held on the fourth of November, 1872, the Governor, the Lieutenant Governor, the Secretary of State and John Lynch and T. C. Anderson, or a majority of them, were the returning officers of said election, and a majority of such majority constituted a quorum. Two of them, the Lieutenant Governor and T. C. Anderson, were disqualified from acting because of being candidates. These officers were required to meet within ten days after the election to canvass and compile the statements of votes made by the supervisors of registration, and make returns of the election to the Secretary of State, and *to continue in session until the returns are completed*. Four of them, the Governor, Lieutenant Governor, the Secretary of State and John Lynch, met on the twelfth of November, and after selecting Governor H. C. Warmoth president and John Lynch secretary of the board, and discussing the question of the disqualification of two members, adjourned to meet on the next day. The minutes of these two meetings, as kept by the president and by the secretary of the board, are in the record, and they substantially correspond, up to a certain point of the proceedings, on the second day. We will adopt the minutes signed by H. C. Warmoth up to that point, to wit:

"The board met at eleven o'clock Tuesday, November 12, 1872, at the Governor's parlor in the State House.

Present—Messrs. Warmoth, Governor; Pinchback, Lieutenant Governor; Herron, *Secretary of State*, and John Lynch.

Mr. Herron raised the question of the qualification of Messrs. Pinchback and Anderson to act as members of the board.

Mr. Warmoth asked for time to examine the question, and for the presence of Mr. Anderson.

After much debate the board adjourned to meet at 12 M. November 13, at the Governor's office.

At 12 M. the board met pursuant to adjournment.

Present—Messrs. Warmoth, Lynch, Pinchback and Herron.

Chief Justice Ludeling appeared to swear in the members of the board, and each took the oath, with the exception of Mr. Pinchback.

On motion of Mr. Lynch, it was ordered that, by reason of ineligibility Messrs. Pinchback and Anderson be not permitted to act as members of the board.

Mr. Pinchback asked the opinion of the Chief Justice, who took the same view. Mr. Pinchback acquiesced in the action of the board and withdrew.

Mr. Jack Wharton then appeared and presented a commission from the Governor, as Secretary of State, exhibited his oath as Secretary of State," etc.

Just here the difference in the two accounts of the proceedings begins. Warmoth states that Wharton exhibited his oath as a member of the board and took his seat; that F. H. Hatch and DaPonte were elected by the votes of himself and Wharton (Lynch *not voting*) to fill the vacancies; that Hatch and DaPonte were then sworn by Judge Cooley, and took their seats; that at this point General Herron stated that the proceedings were irregular, and left the room, followed by Lynch.

Lynch, the regular secretary of the board, gives a somewhat different account, and shows that he and Herron voted, after formal nomination, for James Longstreet and Jacob Hawkins to fill the vacancies, and that he and Herron voted "No" upon the nomination of Hatch and DaPonte, made by Warmoth, after which he and Herron left the room.

We think there can be no doubt that the effort to make Wharton a member of the board was a total failure. Herron is described by Warmoth himself as Secretary of State and a member of the board, by virtue of such office, up to the appearing of Wharton during the proceedings on the second day of the meeting. The order suspending Bovee as Secretary of State and appointing Herron by the Governor on the twenty-ninth of August, 1871 (which was before us in the case of the State ex rel. Bovee vs. Herron), is in this record as a part of *Wharton's testimony*. This document, the above named suit and the published statutes of the State since August, 1871, show that Herron was de facto Secretary of State, and according to the opinion in the suit just named, and the constitution and laws of the State, the Governor was wholly without legal authority to suspend, remove or appoint said officer. The extrusion and exclusion of Bovee from the office by the Governor did not and could not vest in the Governor the control of the office, with the right to put in and put out the occupants thereof at his pleasure. His attempted appointment of Wharton was an absolute nullity, and gave Wharton no color of authority to act either as Secretary of State or member of the board of returning officers. Owing to the manner in which the case of the State ex rel. Bovee vs. Herron, decided finally about the time of the events above narrated, was managed, there was a final judgment of a court of competent jurisdiction decreeing the suspension of Bovee as Secretary of State and appointment of Herron to discharge the duties thereof, to be legal; and the effect of that judgment continued until the decision by this court (about the second of December, 1872), just referred to. Hence, as to the world, Herron was the acting Secretary of State at the above date, and it was not in the power of the Governor to remove him—the Governor having no control of said office. There was no vacancy in the office, Bovee being only suspended or excluded, and yet the commission of Wharton, dated thirteenth November, 1872, the day he claimed to be a member of the board, shows that he was appointed Secretary of State without reference to any removal or vacancy—a commission without any effect. There is no pretense that Wharton was *elected* a member of the board, and it is shown that he did not take the required oath as a member.

It follows that, as Wharton was without any official authority or standing, his pretended vote as a member of the board of returning officers on the nomination of Hatch and DaPonte, was equally without legal effect, and that the said Hatch and DaPonte were not elected members of said board, a majority not having voted for them; but that Longstreet and Hawkins, who received a legal majority of the votes, were duly elected, and they, with Warmoth, Herron and Lynch, constituted the legal board, a majority of whom could act. The law provides that, "in case of any vacancy by death, resignation or otherwise, by either of the board, then the vacancy shall be filled by the residue of the board of returning officers." Warmoth, Lynch and Herron were the residue, of whom two, Lynch and Herron, it is shown, voted for Longstreet and Hawkins, and Warmoth voted for Hatch and DaPonte.

It appears from the record that Bovee acted as assistant secretary of the said board until he was restored to his office under the decree of this court, after which he acted, it seems, as a member of the board.

Our conclusion is, that at the institution of this suit, Warmoth, Herron, Lynch, Longstreet and Hawkins were the legal board of returning officers, under the law of 1870 (No. 100), for the election on the fourth day of November, 1872; that the defendants, Wharton, Hatch and DaPonte, were intruders; that the injunction against them properly issued; that the act No. 89, of the twentieth of November, 1872, did not have the effect of abolishing the said board of returning officers, who met on the twelfth of November, 1872, and were, by the first mentioned law, required to "continue in session until" the returns of said election were completed, and that the judge of the Eighth District Court for the parish of Orleans erred in dissolving the said injunction and dismissing this suit.

It is therefore ordered and adjudged that the board of returning officers composed of H. C. Warmoth, F. J. Herron, John Lynch, James Longstreet and Jacob Hawkins was the legal board of returning officers of elections of the State of Louisiana, and it is decreed that the judgment of the court *a qua* be avoided and reversed so far as the appellant is concerned, and that the defendants, appellees, pay costs of this appeal.

Judges Wyly and Kennard delivered dissenting opinions in this case, basing their objections chiefly on want of jurisdiction.

THE COURTS.

United States Circuit Court.

At the opening of this court the death of Henry Raphael Denis, late a member of the bar, was brought to the notice of the court by H. C. Wyly, Esq.

His honor Judge Durell alluded in feeling terms to the high position of the deceased in his profession, and to his virtues as a citizen; whereupon, on motion of T. A. Clarke, seconded by J. R. Beckwith, Esq., it was ordered that in token of the respect for the memory of the deceased, his honor, the judge, the officers of this court and the members of this bar do wear the usual badge of mourning for thirty days, and that this motion be spread upon the minutes of this court.

The grand jury reported against J. Briddell, Otto Weber, James Johnson, Daniel Lee and Figgaro Garrett, of the parish of Iberia, charged with obstructing process of court, a true bill.

The grand jury was dismissed until Monday next, the twenty-seventh instant.

Supreme Court.

The anxiously expected decision of this court on the returning board case was delivered by Associate Justice Howell. It appears in full in another column.

The case entitled on the docket of this court, State of Louisiana ex rel. P. H. Morgan vs. J. H. Kennard, was filed Wednesday. This case involves the question of the right to the office of associate justice of the Supreme Court, and it is fixed for trial to morrow.

The country docket is very light this year, and the cases are generally disposed of without argument on the part of attorneys, for the most part of the cases are submitted upon the papers on file, and a delay to file briefs is allowed counsel.

Mr. Roselius announced the death of Henry Raphael Denis, and moved an adjournment of the court as a testimony of respect to the deceased member of the bar.

After a few appropriate remarks by Chief Justice Ludeling, the court adjourned.

See report elsewhere of decision by the Supreme Court in the returning board case.

Superior District Court.

In this court yesterday the intervention of the New Orleans, Mobile and Texas Railroad Company in the suit of the State of Louisiana vs. the Auditor and Treasurer was continued till to-morrow.

Hon. Christian Roselius then arose and said:

May it please the court, it becomes my painful duty to announce the death of Henry R. Denis, the oldest member of the bar of New Orleans. He was admitted to practice in 1806, and during seventy years almost he held a prominent position at this bar. He was a man of high culture, extensive legal attainments, of unswerving integrity and, although for the last ten years, perhaps a little longer, he was not in active practice of law, yet he was always considered by his brethren in the profession as a bright example of professional conduct to be followed by those who were his junior in years.

I therefore move, may it please the court, that as a token of respect to the memory of Mr. Denis, this court do now adjourn.

His funeral will take place this afternoon at four o'clock, and I trust the members of the bar in a body will join on that occasion.

Judge Hawkins then said: As a token of respect to the distinguished member of the bar, the deceased, this court will now adjourn.

Fourth District Court.

In the case of O. L. Blanchard vs. Maximilian Kennison, Judge Lynch rendered judgment yesterday morning in favor of plaintiff, and decreed that the reconventional demand of defendant be dismissed with costs.

The facts of the case are as follows: On the twenty-second day of February, 1870, by an act passed before a notary public, in this city, the defendant, Maximilian Kennison, through his agent, hired to plaintiff and Frank Dalferes, for the term of three months, from the eighteenth of February, 1870, the steamboat Annie Wagley, for $800 per month, payable in advance. In the latter part of the month of February the first month's hire of $800 was paid; and in a few days thereafter Blanchard purchased the interest of Dalferes, his copartner in the charter party, and some time in the month of March paid Kennison $800, a second month's hire of the said steamboat, in advance.

On the night of the first of May, 1870, the Annie Wagley, while on her way down the Bayou Lafourche, and opposite Labadieville, sprung a leak, careened to one side, and, by upsetting a lamp in her texas, caught fire and became almost a total loss. This took place seventeen days before the expiration of the second month's letting and hiring, for which Blanchard had paid in advance. The wreck was sold and brought $1800, which Kennison received.

This suit was instituted by plaintiff to cause defendant to refund $453 33½, being the proportion of the hire of the boat for the unexpired seventeen days of the second month.

The answer is a denial of indebtedness to the plaintiff, and a reconventional demand of $2000, claimed as to the value of the boat made less by $1800, realized from the sale of the wreck, the defendant alleging recklessness and want of care on the part of the plaintiff and his employes in managing the vessel, and attributing its loss to the improper management of the captain and those under him.

Judge Lynch, in passing upon the case, says:

In the charter party is the following clause: "The said steamboat shall be delivered to the owner in the same good order in which she is now received, accidents of whatever nature excepted."

Is the loss of the Annie Wagley an accident such as is contemplated in the above recited clause, or is her loss the effect of recklessness or a want of proper attention on the part of those who had her under control at the time of her loss? I can not, after the most careful examination of this case, regard the loss of the boat in question as any other than an accident incidental to river navigation. Entertaining this view, I see no liability attaching to Captain Blanchard, the charterer and plaintiff herein, and it becomes unnecessary, for this reason, to pass upon the plea of prescription set up against the reconventional demand of Kennison, and hence judgment as above stated.

Fifth District Court.

The case of Hallesley vs. Simeon Beiden was a suit by plaintiff on a promissory note for $1050. The defense was that the note was given without consideration to the knowledge of plaintiff, who is a holder, in bad faith. In passing on the question, Judge Cullom said the Code of Practice, article 607, says:

A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of the sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment.

An action to annul a judgment may be entertained as a general rule, if it be shown that the machinery of the court has been abused. In such case the court will prefer to excuse an inadvertence rather than to encourage fraud. 24 An. 48, J. O. Noyes vs. Sigmund Loeb. In Beauchamp vs. McMicken, 7 N. S. 607, Judge Martin said: "Truth must be the basis of all judgments, and where one is obtained on false documents made by the party in whose favor it is rendered, the detection of the falsity must entitle the opposite party to relief, even where there is no motive."

This case before the court has the appearance of being fully as strong in the circumstances that warrants a remedy as either of the two referred to. The article of the Code in saying "as he had obtained," etc., gives instances in which nullity may be sued for, but they are merely examples, and are not understood as being the only cases in which actions may be brought to annul judgments.

In this case it is possible that the machinery of the court has been abused, and should parties see proper to bring the matter before it, in a form to which it might give its sanction, I should feel that the requirements of legal justice and the sanctity of truth conspired to necessitate further investigation.

As the matter stands, I can find no authority, express or constructive, that would authorize the court to grant the present application for a new trial, and must therefore refuse it.

There are some other authorities which bear out the same principle. 7 New Series, 606; 2 Louisiana Reports, 139; 8 Louisiana Reports, 129; 11 Louisiana Reports, 130.

The ideas that permeate those decisions, and the theory upon which they are considered, is that there are cases in which the court will give relief in actions for nullity of judgment obtained by improper practices, or where the court has reason to believe that truth is not the basis of the judgment on which the action is brought.

Sixth District Court.

The case of Chaffraix & Agar vs. Price, Hine & Tupper was before the court. Messrs. Chaffraix & Agar claim the vendors' lien on certain molasses sold to Price, Hine & Tupper, and by them resold to Messrs. John B. Lafitte & Co. Counsel was engaged in examining the witnesses in the case during the whole of the forenoon, on the rule to bond. This is a case of considerable importance.

AMUSEMENTS.

St. Charles Theatre.

This evening Mr. and Mrs. William Horace Lingard will take a joint benefit at the St. Charles Theatre, on which occasion the charming comedy of "Naval Engagement" will be produced, to be followed by the Lingard sketches and the new comic opera of "Los Ladrones." To-morrow noon, last Lingard matinee. Sunday evening, "Frou-Frou." Next Monday evening the celebrated Irish comedian, Mr. John Collins, will commence an engagement.

Academy of Music.

Second benefit of Miss Lydia Thompson at the Academy of Music this evening, when the latest New York Thompson burlesque of "Robin Hood, or the Maid that was Arch and the Youth that was Archer," will constitute the chief entertainment. Grand matinee to-morrow noon. Next week, "Aladdin" and "Blue Beard." "Lurline" will follow for the week commencing February 3.

Varieties Theatre.

"Guy Mannering" will be produced this evening and for the matinee to-morrow, with Charlotte Cushman in her great impersonation of *Meg Merrilies*. Next Monday evening Mr. Lawrence Barrett will play *Macbeth* to the *Lady Macbeth* of Charlotte Cushman. Box sheets now open.

Opera House.

The first of the Rubinstein concerts will be given at the Opera House next Monday evening, the second on Wednesday evening, the third Friday evening, and the first and only grand gala Rubinstein matinee on Saturday afternoon of next week. Tickets for sale at the Opera House and at Grunewald's music store.

Meteorological and River Reports.

The signal service, United States army, reports, for the benefit of commerce, the meteorological record, and rise or fall of the rivers, at 3:43 P. M., local time, yesterday, as follows:

Place.	Ther.	Wind.	Weather.
Cairo	30	W.	Threatening.
Chicago	1[illegible]	S. E.	Heavy snow.
Cincinnati	44	S. W.	Light rain.
Davenport	14	S.	Light snow.
Galveston	5[illegible]	S. W.	Fair.
Indianola	55	S.	Fair.
Keokuk	1[illegible]	S.	Heavy snow.
Leavenworth	15	S.	Cloudy.
Louisville	4[illegible]	S. W.	Light rain.
Memphis	3[illegible]	S. W.	Threatening.
Nashville	41	S. W.	Cloudy.
New Orleans	5[illegible]	W.	Clear.
Omaha	1[illegible]	S.	Cloudy.
Pittsburg	34	S. E.	Cloudy.
Shreveport	[illegible]	S. W.	Cloudy.
St. Louis	2[illegible]	W.	Light snow.
Vicksburg	4[illegible]	W.	Cloudy.

THE RIVERS.

Stations.	Rise, inches.	Fall, inches.	Above low water mark, Ft.	In.
Davenport			[illegible]	11
Keokuk	River gorged			
Cairo		[illegible]	[illegible]	[illegible]
St. Louis			[illegible]	[illegible]
Pittsburg	[illegible]		[illegible]	[illegible]
Cincinnati	[illegible]	[illegible]	[illegible]	10
Louisville			[illegible]	[illegible]
Memphis	[illegible]		[illegible]	11
Vicksburg		[illegible]	[illegible]	[illegible]
Shreveport	[illegible]		[illegible]	[illegible]
Nashville		[illegible]	[illegible]	[illegible]

The river here is twelve feet below high water mark of 1871.

The jury have declared innocent, Jennie Droz, the Cleveland girl who shot Mayor Fisk two years ago. She has all along pleaded guilt, but what is a young girl supposed to know about such an important matter compared with the "twelve good men and true."—*Boston Post.*

LAWS OF THE STATE OF LOUISIANA

PUBLISHED BY AUTHORITY.

No. 14.

JOINT RESOLUTION

Requesting the Senators and members of the House of Representatives of the State of Louisiana to urge the passage of a civil rights bill, insuring the civil rights of all American citizens, through Congress.

Be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That the members of the House of Representatives and Senators of the State of Louisiana in Congress be requested to urge the passage through Congress of a civil rights bill that will insure all classes of citizens throughout the entire land.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 22, 1873.
(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
WILLIAM WEEKS,
Assistant Secretary of State.

No. 16.

JOINT RESOLUTION

Requesting the Senators and Representatives in Congress to obtain a United States judicial district in North Louisiana.

WHEREAS, That part of the State of Louisiana situated north of the mouth of Red river is upon an average five hundred miles from the city of New Orleans, where the United States District and Circuit Courts are held for the entire State, which makes it exceedingly expensive to those who have business in those courts who reside in North Louisiana, and operates as a virtual abandonment of the enforcement of the laws of the United States, civil or criminal, in that portion of the State; therefore, be it

Resolved, That our Senators and Representatives in Congress of the United States be requested to use their best efforts to obtain the creation of a United States judicial district in North Louisiana as a matter of great public interest to the United States and the citizens residing in that part of the State.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 22, 1873.
(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
WILLIAM WEEKS,
Assistant Secretary of State.

No. 13.

AN ACT

To amend an act making an appropriation to pay the mileage and per diem of the members, salaries of officers and employes and the contingent expenses of the extra session convened and commenced December 9, 1872, of the Third General Assembly of the State of Louisiana, by appropriating and providing for the sale of seventy-five thousand dollars of legislative warrants, and declaring the manner of disbursing the amount realized by the sale of said warrants or for their redemption, approved January 10, 1873.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That the term of ten days within which the Auditor of Public Accounts and the State Treasurer are to invite sealed proposals for the purchase of warrants issued under said act be extended to twenty days from the passage of said act, and that this act take effect from and after its passage.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 20, 1873.
(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
WILLIAM WEEKS,
Assistant Secretary of State.

No. 11.

AN ACT

To regulate proceedings in contestations between persons claiming a judicial office.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That in any case in which a person may have been appointed to the office of judge of any court in this State, and shall have been confirmed by the Senate and commissioned thereto, or shall have been elected, and in pursuance of such election shall have been commissioned, such commission shall be prima facie proof of the right of such persons to immediately hold and exercise such office.

SEC. 2. Be it further enacted, etc., That if any person being an incumbent of such office shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned, shall have the right to proceed by rule before the court of competent jurisdiction to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court, or that may be brought in such court, and the judgment thereon shall be signed the same day of rendition.

SEC. 3. Be it further enacted, etc., That either party to such rule may take an appeal from the judgment thereon, but such appeal shall be applied for within one legal day from the rendition of the judgment on such rule, and shall be made returnable to the Supreme Court within two days. The appeal shall be taken up by the Supreme Court by preference over all other cases, immediately on the application of either party, and the judgment thereon shall become final after the expiration of one legal day, whether judicial or not.

SEC. 4. Be it further enacted, etc., That all laws or parts of laws conflicting with this act shall be and are hereby repealed, so far as they conflict with this act, and this act shall take effect from and after its passage.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 15, 1873.
(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE, Secretary of State.

No. 3.

JOINT RESOLUTION

Extending the time of the extraordinary session of the General Assembly.

WHEREAS, The proclamation of his excellency the Governor of Louisiana, convening the General Assembly in extraordinary session December 9, 1872, limits the term thereof to the period of ten days; and

Whereas, Subjects referred to the General Assembly by the respective messages of Acting Governor P. B. S. Pinchback demand immediate attention and action, and for this and other necessary purposes arising from the revolutionary action of H. C. Warmoth and his abettors at Lyceum Hall, make an extension of the session beyond ten days necessary; therefore, be it

Resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the present session of the General Assembly be and is, according to the provisions of the law by which the same is convened, thereby extended to and including the first Monday in January, 1873, at twelve o'clock M., unless the business on hand being finished, said General Assembly should adjourn at an earlier day; and that this joint resolution shall take effect from and after the approval of the Governor.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) A. B. HARRIS,
Lieutenant Governor and President of the Senate.

Approved December 18, 1872.
(Signed) P. B. S. PINCHBACK,
Acting Governor of the State of Louisiana.

A true copy:
E. B. MENTZ,
Assistant Secretary of State.

OFFICIAL.

TREATIES AND PROCLAMATIONS.

Postal Convention between the United States of America and the Republic of Ecuador.

The undersigned, John A. J. Creswell, Postmaster General of the United States of America, in virtue of the powers vested in him by law, and Antonio Flores, minister of the Republic of Ecuador at Washington, in the name of his government, and by virtue of the powers which he has formally presented to this effect, have agreed upon the following articles, to wit:

ARTICLE I.

An exchange of mails shall hereafter take place between the United States of America and the Republic of Ecuador, by the ordinary means of communication via the Isthmus of Panama, the government of the United States to be at the expense of the transportation thereof between New York and Panama, San Francisco and Panama, so long as direct service by United States steamers, including the Isthmus transit, is maintained under existing conditions; and the government of Ecuador to be at the expense of the transportation thereof between Panama and Ecuador so long as the present or other similar arrangement for the ocean mail service between Panama and Ecuador is continued. The correspondence so exchanged shall comprise:

1. Letters and manuscripts subject by the laws of either country to letter rate of postage.

2. Newspapers and prints of all kinds, in sheets, in pamphlets, and in books, sheets of music, engravings, lithographs, photographs, drawings, maps and plans, and such correspondence may be exchanged, whether originating in either of said countries and destined for the other, or originating in or destined for foreign countries to which they may respectively serve as intermediaries.

ARTICLE II.

New York and San Francisco shall be the offices of exchange on the side of the United States, and Guayaquil and Manta shall be the offices of exchange on the side of Ecuador, for all mails transmitted between the two countries under this arrangement; and all mail matter transmitted in either direction between the respective offices of exchange shall be forwarded in closed bags or pouches, under seal, addressed to the corresponding exchange office, and the mails so dispatched from either country to the other shall be forwarded to the United States consul and resident mail agent at Panama, who is hereby designated as the agent of the two governments for receiving the bags or pouches at that port from either direction, and for dispatching the same to their respective ultimate destinations.

The two Post Departments may, at any time, discontinue either of said offices of exchange or establish others.

ARTICLE III.

The standard weight for the single rate of postage and rule of progression shall be:

1. For letters, or manuscripts subject by law to letter rate of postage, one-half ounce (avoirdupois).

2. For all other correspondence mentioned in the second paragraph of the first article, that which each country shall adopt for the mails which it dispatches to the other, adapted to the convenience and habits of its interior administration; but each country shall give notice to the other of the standard weight it adopts, and of any subsequent change thereof. The weight stated by the dispatching exchange office shall always be accepted, except in cases of manifest error.

ARTICLE IV.

No accounts shall be kept between the Postoffice Departments of the two countries on the international correspondence, written or printed, exchanged between them; but each country shall levy, collect and retain to its own use the following postal charges, viz:

1. The postage to be charged and collected in the United States on each letter, or manuscript, subject to letter postage, mailed in the United States, and addressed to any place in the Republic of Ecuador, shall be twenty cents, United States currency, per each weight of half an ounce or fraction of half an ounce; and the postage to be charged and collected in Ecuador on each letter, or manuscript subject to letter postage, mailed in Ecuador and addressed to any place in the United States of America, shall be two reals, or the fifth part of a dollar (hard), Ecuador currency, the same to be in each case in full of all charges whatever to the place of destination in either country. Either country, however, is at liberty to reduce this charge, but not to increase it without the previous assent of the other.

2. On all other correspondence mentioned in the second paragraph of the first article the Post Departments of the United States and Ecuador may respectively levy, collect, and retain to their separate and exclusive use such rates of postage adapted to their interior administration and to the cost of sea transportation as they shall deem advisable. But each office shall give notice to the other of the rates it adopts, and of any subsequent change thereof.

Newspapers and other correspondence of the class referred to in the preceding paragraph shall be sent in narrow bands or covers, open at the sides or ends, so that that they may be easily examined; and packages of such correspondence shall be subject to the laws and regulations of each country in regard to their liability to pay customs duty, if containing dutiable goods, or to be rated with letter postage, when containing written matter, or for any other cause specified in said laws and regulations.

ARTICLE V.

Letters, and other communications in manuscript, which, from any cause, can not be delivered to their address, after the expiration of a proper period to effect their delivery, shall be reciprocally returned every month, unopened and without charge, to the Postoffice Department of the dispatching country; but newspapers, and all other articles of printed matter, shall not be returned, but remain at the disposal of the receiving office.

Letters erroneously transmitted, or wrongly addressed, shall be promptly returned to the dispatching office without charge.

ARTICLE VI.

The Post Department of the United States shall establish, in conformity with the arrangements in force at the time, the conditions upon which the Post Department of Ecuador may exchange, in open mails, the correspondence originating in Ecuador and destined for countries to which the United States may serve as an intermediary; but such correspondence shall only be charged with the international postage established by this convention, augmented by the postage rates in force between the United States and the country of destination, and any other tax for exterior service.

The Post Department of the United States shall furnish the Post Department of Ecuador with a list stating the foreign countries to which the foreign postage and the amounts thereof must be absolutely prepaid, or can be left unpaid, and shall modify such list from time to time, as the exigencies of its foreign postal service may require.

In conformity to the requirements of the preceding paragraph, a table marked A is hereunto annexed, enumerating the countries with which, and specifying the terms and conditions on which, Ecuador may exchange correspondence by way of the United States.

Correspondence of this class must be accompanied by a letter bill from the dispatching exchange office of Ecuador, specifying the amount due thereon to the United States, and the receiving exchange office of the United States shall return by next post to such dispatching exchange office an acknowledgment of receipt and verification thereof, which letter-bills and acknowledgments of receipt shall be in conformity to the models B and C, hereunto annexed, and shall serve as vouchers in the settlement of the accounts.

The accounts to be kept between the two Post Departments upon this class of correspondence shall be stated quarterly, transmitted and verified as speedily as practicable, and the amounts found due shall be paid promptly to the United States office, under such regulations as the respective Post Departments may from time to time prescribe. Such quarterly statement shall be prepared by the United States office, and shall follow the form D, hereunto annexed.

ARTICLE VII.

Letters originating in foreign countries