ants to Pierce—is undoubtedly an injurious fraud upon the complainants, for which they are entitled to redress, or, so far as not consummated, to prevent. Permitting the proceeds of the sale of the goods to be paid to Sharpe on his executions, is simply to permit the consummation of that fraud, if one has been contemplated.

Into the inquiry as to the merits of the two sides of that controversy, it is not appropriate to enter now. Its adjudication must be postponed until the final hearing. As I have already said, in reference to the motion to dismiss the attachments, there is in my opinion reasonable ground shown in the affidavits for permitting the controversy to proceed to final determination, without prejudice from these preliminary proceedings.

The motion to dismiss the attachments, and that to dissolve the injunction or modify the previous order of the court in respect to the fund in the hands of the sheriff, are overruled.

WOOD v. THE PHŒNIX INS. CO.*

(*Circuit Court, E. D. Pennsylvania.* July 1, 1881.)

1. INSURANCE—GENERAL AVERAGE—DECK CARGO.
   Goods carried on deck are entitled to the benefit of general average, where they are so carried in pursuance of a general custom.
2. SAME—IRON PIPE.
   The evidence in this case held to establish such a general custom as to cargoes of iron pipe.
3. SAME.
   The opinion of the district court in this case, (1 FED. REP. 235,) as to the law of the case, concurred in, but the decision reversed upon additional testimony as to custom taken after the appeal.

Appeal from the Decree of the District Court.

This was a libel by the owner of a deck load of iron pipe, jettisoned, against the underwriter of the balance of the cargo, to recover contribution by general average. The court below decided that, as a general rule, goods carried on deck were not entitled to the benefit of general average; that to this rule there were several exceptions, among which was the case of goods carried on deck in pursuance of a general custom; that the burden of proving such custom was on libellant, and that his evidence had not been sufficient to establish it. (Reported 1 FED. REP. 235.) Libellant appealed, and in the circuit court took the testimony of five additional witnesses,

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

to the effect that iron pipe, being of light weight in proportion to its bulk, it is necessary to load part of the cargo on deck, in order to give the vessel her full cargo, and that there was a general custom so to load.

Henry G. Ward, for appellant.

Henry Flanders, for appellee.

McKENNAN, C. J. The learned judge of the district court, who decided this cause, so clearly and accurately stated the law which governs it, as I think it ought to be held to exist, that I do not propose to amplify or repeat his statement. I adopt it fully. As a general rule the jettison of a deck cargo would not entitle its owners to contribution in general average from the cargo stowed below deck. But where, in pursuance of a general custom of the trade to which the special kind of cargo belongs, the vessels engaged in its transportation are loaded partly on deck and partly under deck, and the deck cargo is necessarily sacrificed for the safety of the rest, the general cargo may be subjected to contribution to pay the loss.

In the court below the case turned upon the existence of such a custom, and was properly decided upon the insufficiency of the proof of it. Since the case came into this court further evidence has been taken, which shows it to be the custom, where a full cargo of gas pipe is shipped, that part of it is stowed above and part below deck. This is the uniform usage among manufacturers of gas pipe east of the Alleghanies, who employ water transportation, and for the reason that, on account of the light weight of the article compared with its bulk, the full capacity of the vessel cannot be made available without such distribution of the cargo. It is coeval with the manufacture and transportion of gas pipe on a large scale, and it is, therefore, shown to have been of such general prevalence and long continuance as to entitle it to be recognized as a general custom of the trade.

There must, then, be a decree for the libellant against the respondent for its contributory portion of the loss caused by the jettison. This is admitted to be $77.50, and for this sum, with interest from the date of filing the libel, and costs in this court alone, decree will be entered.

PEPPER v. LABROT and another.*

(*Circuit Court, D. Kentucky.* July, 1881.)

1. TRADE-MARK—"OLD OSCAR PEPPER DISTILLERY"—DESCRIPTIVE OF PLACE OF MANUFACTURE—SALE OF PREMISES—RIGHT OF PURCHASER TO TRADE-MARK.

The complainant, in 1874, was the owner by inheritance, of a tract of land on which his father, during his life-time, for many years had carried on a distillery, manufacturing whisky, which, from the name of the distiller, became known as "Old Crow Whisky," and the distillery as Oscar Pepper's Old Crow Distillery. The complainant erected a new distillery and manufactured whisky, branding on the heads of the barrels "Old Oscar Pepper Distillery; Hand-made Sour Mash; James E. Pepper, Proprietor, Woodford County, Ky.," and used the same as a trade-mark in circulars, bill-heads, letter-heads, etc. Subsequently the complainant became bankrupt, and his distillery premises, buildings, machinery, etc., were sold by his assignee under the name of the "Old Oscar Pepper Distillery," and became the property of the defendants, who operated the same by the manufacture of whisky, using the trade-mark adopted by the complainant, substituting their own names as proprietors. A bill was filed by complainant to enjoin the use of the trade-mark, the defendants filing a cross-bill asking to be protected in their claim to its exclusive use.

Held, (1) that the trade-mark was a description of the place of manufacture, and did not designate, either expressly or by association, the personal origin of the product.

(2) That the complainant, having ceased to be the owner of the distillery and proposing to use the name on whisky to be manufactured elsewhere, had no right to the exclusive use of the trade-mark as against the defendants, who could use it as a truthful description of their own production.

(3) That the complainant had no right to use it at all, because to do so would be to deceive and mislead the public by a false representation in respect to the place of the manufacture of his goods.

(4) That the defendants, by virtue of their ownership of the Old Oscar Pepper Distillery, succeeded to the exclusive right to use that name for their premises and place of manufacture, and to brand it on the packages of their merchandise for the purpose of truly indicating it as a product of a distillery well known by that name.

In Equity. Trade-mark. Bill for injunction and account, and cross-bill for injunction. Final hearing upon pleadings and proofs.

Barrett & Brown and *John Marshall*, for complainant.

1. Complainant's trade-mark embodied his family name, and was therefore peculiarly appropriate. See *Ainsworth* v. *Walmesly*, 44 L. J. 252. The right to use the name passed from father to son as a *personal* right, not as a chattel real. See *Dixon Crucible Co.* v. *Guggenheim*, Cox's Trade-mark Cas. 577.

2. Did the trade-mark pass to the assignee in bankruptcy and from him to defendants by their purchase? A general assignment under state laws does not carry a trade-mark. *Bradley* v. *Norton*, 33 Conn. 157. Vendee in bankruptcy acquires no right as against bankrupt to a trade-mark which he used to designate his own preparations. *Hembold* v. *Hembold Co.* 53 How. Pr. 453.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.