his testimony, that he had made one at Martinico. His not having done so, subjects him to the just presumption of having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds.

Again, although it is said, that orders were sent by the claimant to the house of Waldron & Co., in Charleston, yet neither these orders, nor those to the master, both of which must be presumed to be in writing, are produced. Their suppression (to say the least) is a circumstance of some sus-
*76] picion. It may also be asked, why, *if the danger was so pressing, and the vessel nearly on her beam ends, was not relief sought by throwing over the deck-load, or a part of it? The court does not mean to say, that it was the master's duty to sacrifice the cargo, rather than go to a foreign port; but from his not disembarrassing himself of an incumbrance, which must have been so much in his way, it may well be doubted, whether the situation of the brig were as perilous as is now represented, or the lives of the crew exposed to the dangers we now hear of.

From the declarations of the claimant, as to his intentions, previous to the voyage, an argument was drawn in his favor. It is sufficient to say, that such declarations are not evidence, and if they were, might, in a case otherwise mysterious, rather increase than lull suspicion. As little dependence is to be placed on the fact, that for a foreign voyage, higher wages would have been demanded than for one to Charleston. Although the original agreement with the mariners may have been, and probably was, for Charleston, there can be no doubt, that the owner would have an interest, in a case of this kind, to raise them full as high as seamen would have a right to expect, if the vessel were carried, and especially, without a palpable necessity, to an interdicted foreign port.

Considering then, the suspicious source from which the testimony is derived, and the unfavorable and unexplained circumstances which have been stated, the court is unanimously of opinion, that the sentence of the circuit court must be affirmed.

Sentence affirmed.

Randolph *v.* Donaldson. (*a*)

Escape.

If a debtor, committed to the state jail, under process from a court of the United States, escape, the marshal is not liable.

Error to the Circuit Court for the district of Virginia, in an action of debt, brought by Donaldson against Randolph, late marshal of that district,
*77] for the *escape of one Baine, who, being taken in execution by the deputy marshal, had been delivered over to the jailer of the state prison of Botetourt county, from whose custody he escaped.

The action was in the common form, and the defendant pleaded *nil debet*, upon which issue was joined. Upon the trial, the defendant below took two bills of exception.

The first bill of exception set forth the judgment and execution of Don-

(*a*) February 16th, 1815. Absent, Marshall, Ch. J., and Todd, Justice.

aldson against Baine, and the marshal's return of the execution in these words "Executed, and the defendant imprisoned in the jail of Botetourt, the 13th of November 1797, as per the jailer's receipt in my possession: Samuel Holt, D. M., for David M. Randolph, M. V. D." It further set forth the evidence of the fact, that the original debtor, Baine, was seen at large; "whereupon, the counsel for the plaintiff prayed the court to instruct the jury, that although the marshal, the defendant, by his deputy, had delivered the said original debtor, Baine, to the jailer of Botetourt county, where he was committed to jail, yet that the defendant was liable to the plaintiff for an escape, upon the discharge of the debtor by the said jailer, unless an escape-warrant has been taken out, as the law directs: whereupon, the court instructed the jury, that in law the marshal would be liable to the plaintiff, if the said Baine escaped out of the said jail, with the consent, or through the negligence of the said jailer; as the act of the jailer was, in that respect, the act of the marshal. The court also instructed the jury, that if the escape of the said Baine from the jail of the said county of Botetourt, had taken place after the expiration of the time when the said David Meade Randolph was marshal of the Virginia district, he would be liable for such escape, unless he shall prove that he had assigned over the said Baine to his successor in office by a deed of assignment; or by an entry on the records of this court, that he had made such assignment according to an act of assembly of the commonwealth of Virginia upon that subject, entitled 'an act to reduce into one all acts and parts of acts relating to the appointment *and duties of sheriffs;' the section of which act referred to in the instruction is in the following words: '§ 21. And for removing all [*78 controversies touching the manner of turning over prisoners upon a sheriff's quitting his office, be it further enacted, that the delivery of prisoners by indenture, between the old sheriff and the new, or the entering upon record, in the county court, the names of the several prisoners and causes of their commitment, delivered over to the new sheriff, shall be sufficient to discharge the late sheriff from all suits or actions for any escape that shall happen afterwards.' To which opinion and instructions, the defendant excepted."

The 2d bill of exception stated, that "the defendant offered evidence of the insolvency of Baine, at the time of his imprisonment and discharge, and moved the court to instruct the jury, that if they were satisfied of the insolvency of Baine, and that Donaldson neither resided himself, nor had any known agent, in the county of Botetourt, at the time of Baine's imprisonment and discharge, to whom notice might be given that he was insolvent and that security for the prison-fees was required, that in these circumstances, the jailer was legally justified in discharging him, under the act of the general assembly of Virginia in such case made and provided. But the court was of opinion, that in the application of this act of assembly to the case of a marshal, the whole district of Virginia was to be considered as his county, and it was sufficient, if the said Donaldson had any such known agent in the district of Virginia; and so instructed the jury; to which opinion and instruction, the defendant excepted."

The jury found a verdict in the following words: "We of the jury find that the said Alexander Baine in the declaration mentioned did escape from the jail in the county of Botetourt, with the consent of the defendant, the

then marshal of the Virginia district, as in the declaration is set forth; and therefore, we find for the plaintiff the debt in the declaration mentioned
*79] and assess his damages to one thousand dollars." *Upon this verdict, judgment was rendered for the plaintiff, and the defendant took his writ of error.

C. Lee, for the plaintiff in error.—By the law of Virginia, it is necessary that the jury should state, in their verdict, that the escape was with the consent of the sheriff. The verdict in the present case states the consent of the marshal; but the jury found the fact, in consequence of the instruction of the court.

1. The first opinion to which an exception was, taken was, that the marshal was liable for the negligence of the jailer. The jailer was not the deputy nor the officer of the marshal, but the deputy of the sheriff of Botetourt county. He was not an officer of the United States, but an officer of the commonwealth of Virginia. He was not appointed by, nor under the control of, nor responsible to the marshal. By the judiciary act of the United States § 28 (1 U. S. Stat. 87), the marshal is expressly made liable for his deputies, "and shall be held answerable for the delivery, to his successor, of all prisoners which may be in his custody, at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed and qualified as the law directs."

On the 23d of September 1789 (1 U. S. Stat. 96), congress resolved "that it be recommended to the legislatures of the several states to pass laws making it expressly the duty of the keepers of their jails to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively; the United States to pay for the use and keeping of such jails, at the rate of fifty cents per month for each
*80] prisoner that shall, under their authority, be committed *thereto, during the time such prisoners shall be therein confined; and also to support such of said prisoners as shall be committed for offences."

In consequence of this recommendation, the legislature of Virginia passed "an act for the safe keeping of prisoners committed, under the authority of the United States into any of the jails in this commonwealth" (P. P. New Rev. Code, vol. 1, p. 43), by which it was enacted, "that it shall be the duty of the keeper of the jail in every district, county or corporation within this commonwealth, to receive into his custody any prisoner or prisoners, who may be, from time to time, committed to his charge, under the authority of the United States, and to safe keep every such prisoner or prisoners, according to the warrant or precept of commitment, until he shall be discharged by the due course of the laws of the United States." § 2. "And that the keeper of every jail aforesaid shall be subject to the same pains and penalties for any neglect or failure of duty herein, as he would be subject to, by the laws of this commonwealth, for a like neglect or failure, in the case of a prisoner committed under the authority of the said laws."

The keeper of the jail is directly liable to the party. It was not intended that he should have a double remedy, viz., against the keeper of the jail and

the marshal. Nothing could be more unreasonable, than to make the marshal liable for the conduct of a person not appointed by him, over whom he has no control, and against whom he has no remedy. When the marshal had delivered the prisoner to the keeper of the jail he had discharged his duty and was no longer liable. The prisoner was no longer in the custody of the marshal, but of the jailer.

2. The second opinion of the court, to which an exception was taken was, that if the escape was after the defendant had ceased to be marshal, still he was liable, unless he had assigned over Baine as a prisoner to his successor, in manner provided by the law of Virginia. The observations already made are an answer to this *opinion. The marshal was bound by the law [*81
of the United States to deliver to his successor only such prisoners as were in his custody. Baine was not in his custody, and therefore, he was not bound to deliver him over—and if not bound to deliver him over, he could not be liable for his escape.

The opinion was objectionable also on another ground. By the law of Virginia, the delivery over of prisoners by indenture, and the record of the names of the prisoners delivered over, is not the only evidence which a sheriff may produce of the fact of the delivery. The statute is cumulative only. It describes a mode by which he may certainly exonerate himself, and the kind of evidence which would be conclusive, but does not deprive him of the right of proving the delivery over of the prisoners by other means. The act of congress says nothing of the mode of delivery nor of the mode of proof.

The marshal was not bound to take out an escape warrant as required by the law of Virginia (1 P. P. 118), because the prisoner was in the custody of the jailer, and not of the marshal. Besides, the marshal must of necessity reside at a great distance from many of the jails, and it would be unreasonable to oblige him to superintend them all.

3. The third opinion objected to at the trial was, that in applying the Virginia law of sheriffs to the marshal, the whole district was to be considered as his county; and therefore, if the plaintiff had an agent in any county it was sufficient to prevent his discharge without notice. The words of the act of assembly relative to the residence of the creditor or his agent, ought to be taken strictly. The laws of the state are to be taken as rules of decision where they apply. But in this case, they were not applicable.

R. I. Taylor, contrà.—If doubts exist as to the construction of a law, the argument *ab inconvenienti* has great weight. If the jailer is not liable to the marshal, the United States are not able to enforce their judgments The jailer of a *county is the officer of the sheriff, who may or may [*82
not require security. A district jailer gives security only in the sum of $1500. It is not very important, whether the jailer is liable, as the remedy would generally be of little value. But if he is liable, it does not follow, that the marshal is not.

Under the resolution of congress, and the act of Virginia, the jailer is only liable to the same "pains and penalties," strictly and technically considered, as if, &c. That is, he is only liable criminally, and not civilly; he is liable to punishment for a voluntary escape, but not to a civil remedy. It cannot reasonably be presumed, that the legislature meant to confide the

revenue, the debts of individuals and the execution of the criminal laws of the United States to the responsibility of a county jailer.

It is not unreasonable, to charge the marshal, for he has by law all the power necessary for the safe-keeping of his prisoners. (1 U. S. Stat. 87.) He may call out guards, or he may have an officer on purpose to keep his prisoners. He is bound to deliver over all his prisoners to his successor, and if bound to deliver over, he is bound to safe keep them. If those who are confined in the county jails are not in his custody, there are none in his custody. Who is to produce them on *habeas corpus?* In case of epidemic disease, who is to remove them? Who is to bring them into court for trial? Who is to receive the money upon execution. If the legislature of the United States meant thus to hazard the revenue, the criminal jurisprudence, and the property of individuals, they would not have left it to inference, but have been more explicit.

2. As to the second opinion; it was right, if the first was right. There is no other mode by which a sheriff quitting his office can relieve himself from responsibility. But there was no evidence in the record that the escape was after the defendant ceased to be marshal, and therefore, the
*83] opinion was inapplicable to the case—*and if so, could not injure the defendant. The bill of exception is always supposed to contain the whole evidence in the cause. 3 Dall. 38.

3. As to the third opinion. There was no evidence in the case, that the prisoner was discharged, because there was no agent of the creditor to pay his jail-fees; and therefore, this opinion also was inapplicable to the case, and could not hurt the plaintiff in error. But if the law as to sheriffs in their counties is to be applied to the marshal of the district, then the whole district must be considered as his county. A creditor would have to keep an agent in each county to receive notices, for it would be impossible for him to know in which county the marshal would imprison his debtor.

C. Lee, in reply.—It is unreasonable, that the marshal should be responsible for all the jailers in the state, over whom he has no control. The sheriff is bound to commit a prisoner to the jail of that county, in which he is arrested; and so is the marshal. If the jail is bad, the justices of the county are responsible. If the prisoner escape, through the negligence or by the consent of the jailer, the sheriff is liable, because the jailer is his deputy. In Virginia, if a sheriff commit a prisoner to the district jail, he is not liable, because the district jailer is not his deputy. A *habeas corpus* would be directed to the jailer and not the marshal. As to the risk of the revenue, the United States must suffer as others do; they have thought proper to trust it to such keepers, and if they suffer, the remedy is in their own hands.

2. As to the second opinion; if there was no evidence to justify it, that is another ground of error. But it appeared in the bill of exceptions, that the witness was uncertain whether it was before or after the defendant ceased to be marshal, that he saw the prisoner at large. The opinion, therefore, was prejudicial to the defendant.

3. As to the third opinion. The law of Virginia (1 P. P. 306, § 52),
*84] declares it to be unreasonable, that a *sheriff should be obliged to go out of his county to give notice to creditors at whose suit any person

may be in his custody, or to pay money levied on execution, and enacts, that where an execution shall be delivered to the sheriff of any other county than that in which the creditor shall reside, such creditor shall name an agent in the county where the execution is to be served, for the purpose of receiving notices and money; and if the creditor fail to appoint such agent, the sheriff is not bound to give notice, previous to a discharge of such prisoner for want of security for his prison-fees. The jailer was liable only in the same manner and to the same extent as he would have been if the prisoner had been committed under the state authority. If committed under the state authority, he would have had a right to discharge the prisoner for want of security for his fees, without notice to the creditor. The court, therefore, erred in giving an opposite opinion.

February 21st, 1815. (Absent, Marshall, Ch. J., and Todd, J.) STORY, J., delivered the opinion of the court, as follows :—This is an action of debt, brought against the former marshal of Virginia, for an alleged wilful and negligent escape of a judgment-debtor. At the trial of the cause in the circuit court of Virginia, several exceptions were taken by the plaintiff in error to the opinions of the district judge, who alone sat in the cause ; and the validity of these exceptions is now to be considered by this court.

The first exception presents the question, whether an escape of a judgment-debtor, after a regular commitment, under process of the United States courts, to a state jail, be an escape for which the marshal of the United States for the district is responsible?

Congress, by a resolution passed the 23d September 1789 (1 U. S. Stat. 96), recommended to the several states to pass laws making it the duty of the keepers of their jails to receive and safe keep prisoners committed under the authority of the United States, under like *penalties as in the case of prisoners committed under the authority of such states [*85 respectively ; and, by another resolution of 3d of March 1791 (1 U. S. Stat. 225), authorized the marshals, in the meantime, to hire temporary jails. In pursuance of the former recommendation, the legislature of Virginia, by the act of 12th November 1789, ch. 41 (Revised Code 43), made it the duty of the keepers of the jails within the state, to receive and keep prisoners arrested under the process of the United States, and for any neglect or failure of duty, subjected them to like pains and penalties as in cases of prisoners committed under process of the state.

The act of congress of 24th September 1789, ch. 20, §§ 27, 28, authorizes the marshals of the several districts of the United States to appoint deputies, and declares them responsible for the defaults and misfeasances in office of such deputies. But there is no provision in any act of congress, declaring the keepers of state jails, *quoad* prisoners in custody under process of the United States, to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasance of the former. If, therefore, the marshals be so liable, it is an inference from the general powers and duties annexed to their office.

It is argued, that the marshals are so liable, because in intendment of law, prisoners committed to state jails are still deemed to be in their custody ; and in support of this argument, is cited the provision in the act of congress which makes the marshal, on the removal from or the expiration of his

office, responsible for the delivery to his successor of all prisoners in his custody; and authorizes him, for that purpose, to retain such prisoners in his custody, until his successor is appointed. And this argument is further supported, by its analogy to the case of sheriffs, and by the extreme inconvenience which, it is asserted, would arise from a contrary doctrine.

The argument is not without weight; but upon mature consideration, we are of opinion, that it cannot prevail. The act of congress has limited the responsibility of the marshal to his own acts, and the acts of his deputies.

*86] *The keeper of a state jail is neither in fact, nor in law, the deputy of the marshal. He is not appointed by, nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail, by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper, in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself by misconduct to the "pains and penalties" of the law. For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States. But this would no more make the marshal liable for his acts, than for the acts of any other officer of the United States, whose appointment is altogether independent. And in these respects, there is a manifest difference between the case of a marshal and a sheriff. The sheriff is, in law, the keeper of the county jail, and the jailer is his deputy, appointed and removable at his pleasure. He has the supervision and control of all the prisoners within the jail; and therefore, is justly made responsible by law for all escapes occasioned by the negligence or wilful misconduct of his underkeeper.

On the whole, as neither the act of congress nor the doctrine of the common law applicable to the case of principal and agent, affect the marshal with responsibility for the escape of a prisoner, regularly committed to the custody of the keeper of a state jail, we are all of opinion, that the decision of the circuit court upon this point was erroneous, and that the judgment must be reversed. This decision renders it unnecessary to consider the other points raised in the bills of exception.

Judgment reversed.