But the question in that case was not as to the right of a Judgment creditor to compel the application of a trust fund, to the payment of the judgment in derogation of the rights of the *cestui que* trusts, but as to whether an antecedent lien, which had been released by executors, to whom the law gave the right to release it, could be set up by equity against a subsequent judgment, and for the benefit of legatees and not of creditors. The release of a debt stands on a very different footing from the conveyance of an estate, and legatees whose claims originate in the bounty of the testator, and derive their existence from his will, cannot be viewed in the same light with creditors whose demands are paramount to the will, as well as sanctioned by it. We therefore award the fund in Court to the creditors of James Duval, and direct that it be distributed among them *pro rata*.

Court of Appeals, Kentucky, October, 1852.

THOMAS POWELL *v.* THE FIREMEN'S INSURANCE COMPANY.

1. It is not necessary to sustain a bill in Equity for the correction of a mistake in a sealed instrument, that there should have been a previous application to, and refusal by the defendant to cure the defect.
2. Where a vessel has been stranded before the expiration of a policy of insurance on her, though the principal part of the damage, as the expense of getting her off, has been incurred subsequently thereto, the insured is entitled to recover for the whole loss suffered by him.
3. Negligence or unskilfulness in the master or crew, not amounting to barratry, will not avoid an insurance, where the loss has been immediately occasioned by a peril insured against.
4. Where a steamboat is insured for the navigation of a particular river, as the Mississippi, and not from port to port, the rules as to deviation do not apply; and therefore, that a loss has been incurred while the boat has been running in an unfrequented, though navigable channel of the river, will not affect the policy.
5. A surety in a forthcoming bond, given on the attachment of a vessel, in a suit between the owners, has an insurable interest in her.

Appeal from the Louisville Chancery Court, PIRTLE CH.

The following abstract of the facts and opinion of the Court in this important case, has been furnished by a competent authority.

The Steamboat Mohawk having been seized by virtue of an attachment, issued from the Louisville Chancery Court, at the suit of a part of the owners against the others, the defendants executed a bond in the penalty of $16,000, conditioned to have the boat forthcoming, to abide the decree that the Court might render in the cause, with Thomas Powell as one of their securities.

Powell obtained from the Insurance Company, a policy on the boat; having apprized the Company of his suretyship.

The boat was grounded in attempting to run a *chute* of the Mississippi river; and Powell, in order to have her got off, (for the water fell, and she had to be relaunched,) so that she could be forthcoming, according to his bond, incurred expenses amounting to several thousand dollars, including wages, board, &c., of persons superintending and laboring,

The suit was brought in Chancery on an alleged mistake in the policy. The mistake was acknowledged, but the jurisdiction was denied, because the Company said it was always ready to correct the mistake, and no application therefor had ever been made.

The Court sustained the jurisdiction, and decided that it was not necessary to transfer it from a court of law to a court of equity, that there should have been a refusal to correct the mistake.

The greater part of the outlay for the getting off of the boat from the grounding, was after the time of the policy had expired. But the Court held that the loss was within the policy, as the grounding happened before the time expired; and the grounding was within the policy; and the damage for it was not confined to the injury done to the boat itself.

It was contended that the boat had been run by negligence and unskilfulness, upon a bar in a *chute* of the river, where no prudent person would run a boat, and out of the usual place in navigating the Mississippi river.

The Court of Appeals found that it was negligence to some extent in the pilot, to run the boat in the *chute*—that the main channel was the ordinary place of running boats at that stage of water; but went on to make these remarks: "But if it be conceded that the grounding of the boat was occasioned by the negligence, or mis-

conduct of the master and crew, it would not follow that the loss is not covered by the policy. If the misconduct had been wilful and fraudulent, or the negligence so gross as to bear a fraudulent character, it would amount to barratry; and the insurers would not be responsible for the loss, unless the policy covered the risk of barratry. The assured is bound to provide, in the outset, a competent master and crew, but such master and crew, when once provided, are, to some extent, the agents of the underwriters as well as of the assured, in relation to their conduct in the navigation of the boat; and if a loss occur in consequence of their negligence, or other misconduct, which does not amount to barratry, the underwriters cannot impute the fault to the assured, who performed his duty in providing a competent master and crew in the first instance. The loss in this case was directly occasioned by one of the perils insured against. If its remote cause was the mistake, or imprudence of the pilot who had the management of the boat at the time, the fault is not attributable to the assured, and there is no good reason why it should not be covered by the policy. Barratry is itself regarded as a peril, and is not covered by a policy in which it is not expressly insured against. Not so, however, with respect to mere negligence, or misconduct, not amounting to barratry: and, therefore, the underwriters are liable for a loss by any of the perils in the policy, of which such negligence or misconduct may be the remote cause.

"Opposite opinions upon this point have been expressed by different Courts, and for a time it was regarded as a vexed question; but the weight of modern authority, as well as the force of argument, seems to us to sustain decidedly the position we have assumed. *Waters* v. *Merchants' Louisville Insurance Company*, 11 Peters, 213; *Perrin* v. *Protection Insurance Company*, 11 Ohio, 147; *Sadler* v. *Dixon*, 8 M. & Welsb. 895; *Shore* v. *Bentall*, 14 Serg. & Rawle, 130; *Bishop, &c.* v. *Pentland*, 7 B. & C. 219."

It was contended, also, that there was a deviation, and, in consequence, no liability. To which the Court replied: "The doctrine upon the subject of deviation has arisen and been generally applied, in cases where the insurance was on a particular voyage. Here the

insurance was not upon a voyage from one port to another, but upon the navigation of certain designated rivers, for a fixed period. The rules applicable in the former case, would seem to have but little application in the latter. But if an act can be committed in navigating the rivers covered by the policy, which by varying the risks insured against, would amount to a deviation, and discharge the underwriters from liability for a loss occasioned thereby, it would not consist merely, as in this case, in going out of the direct and usual channel of navigation, and attempting to pass over a less frequented, but nevertheless navigable part of the river. If a boat were to run into a part of the river known not to be navigable, and where boats never ventured, the risk incurred might be considered as one not contemplated by the parties, and the loss, if one happened, as one for which the underwriters were not liable. And if this act were done without any reasonable cause, or apparent necessity, it might amount to barratry, as it would furnish at least *prima facie* evidence of wilful and fraudulent misconduct on the part of the officers of the boat. But the act complained of here, consisted merely in taking the least frequented route, one, however, that the same pilot had passed safely along several times during the same season, and in which the grounding of the boat was entirely accidental, it being manifest from the proof that the boat could, in the then stage of the water, have passed the bar safely within a few yards of the place where she grounded. This act, therefore, did not amount to a deviation; and the loss was one for which the underwriters were accountable."

It was further contended that Powell was not legally one of the owners of the boat, and could not bring this suit against the Insurance Company, in his own name. To this the Court responded: "As he was bound for the forthcoming of the boat, he had an interest in its preservation; and although as one of the bondmen, he did not acquire by the assumption of that liability, any right of property in the boat, either legal or equitable, yet he had such an interest in its safety as authorized him to insure it against the perils of the river; and as he obtained the policy in his own name, having first disclosed to the insurers his relation to the boat, and his re-

sponsibility on account thereof, he clearly had a right to sue in his own name, upon a policy which he had taken in his own name and for his own benefit."

Decree affirmed.

NOTE.—Upon the points decided in this case, the following authorities may be referred to.

(1) With regard to the jurisdiction of equity to reform a mistake in a policy of insurance, even after a loss has occurred; see Delaware Insurance Co. *v.* Hogan, 2 W. C. C. R. 5; Lyman *v.* United Ins. Co., 2 Johns. Ch. 630; Andrews *v.* Ins. Co., 3 Mason, 10; Henkle *v.* Royal Ass. Co., 1 Ves. 317; Head *v.* Ins. Co., 2 Cranch, 419, 2 Phill. Ins. 583; Dela Vigne *v.* Ins. Co., 2 Caines, 243, Ewen *v.* Ins. Co., 16 Pick, 502.

(2) In a recent case in England, Knight *v.* Faith, 15 Q. B., 649, the same point as to the effect of damage after the expiration of a time policy, where the proximate cause, as stranding, was before, arose, and after a thorough discussion of the authorities, English and American, was determined in the same manner as in the principal case; see also on this point, Peters *v.* Phœnix Ins. Co. 3 S. & R. 25; Coit *v.* Smith, 3 John, Cas., 16; 1 Arnould, Ins. 410, &c.; Howell *v.* Ins. Co., 7 Ohio, 284.

(3) In addition to the cases cited in the text upon the question of negligence or barratry, see Ins. Co. *v.* Insley, 7 Barr, 233; Lawton *v.* Sun Ins. Co., 2 Cush. 500, *accord.*

(4) Upon the subject of deviation in a river, see Keeler *v.* Firemans' Co., 3 Hill, 250, *accord;* but *contra* Gazzam *v.* Ohio Ins. Co., Wright, 261; Jolly *v.* Ohio Ins. Co., Wright, 539.

(5) What risks are insurable, see 1 Arnould, 229; Hanlo *v.* Fishing Ins. Co., 3 Sumn. 132; Stainboule *v.* Fearing, 6 Eng. L. & E. 412; Venatta *v.* the Mutual Ins. Co., 2 Sandf., Sup. 490; Holbrook *v.* Ins. Co., *ante*, page 18.

RECENT ENGLISH DECISIONS.

Court of Common Pleas.—Easter Term, May, 1852.

AUSTIN *v.* THE MANCHESTER RAILWAY.[1]

In an Action on the Case the Declaration alleged that the Defendants were Proprietors of certain Railways, and possessed of certain Carriages for the

[1] Abridged from 16 Jur. 764.