REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 104.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1881.

REPORTED BY

WILLIAM T. OTTO.

VOL. XIV.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1882.

UNIVERSITY PRESS :
JOHN WILSON AND SON, CAMBRIDGE.

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. SAMUEL F. MILLER.
HON. JOSEPH P. BRADLEY.
HON. JOHN M. HARLAN.
HON. STANLEY MATTHEWS.
HON. STEPHEN J. FIELD.
HON. WARD HUNT.
HON. WILLIAM B. WOODS.
HON. HORACE GRAY.

ATTORNEYS-GENERAL.

HON. WAYNE MACVEAGH.
HON. BENJAMIN HARRIS BREWSTER.[1]

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

[1] The commission of Mr. BREWSTER bears date Dec. 19, 1881.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE JAN. 30, 1882.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1881.
HON. HORACE GRAY, Massachusetts.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Dec. 20. PRESIDENT ARTHUR.
	SECOND.	1863.
HON. S. J. FIELD, California.	NEW YORK, VERMONT, AND CONNECTICUT.	March 10. PRESIDENT LINCOLN.
	THIRD.	1870.
HON. J. P. BRADLEY, New Jersey.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	March 21. PRESIDENT GRANT.
	FIFTH.	1880.
HON. WM. B. WOODS, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	Dec. 21. PRESIDENT HAYES.
	SIXTH.	1881.
HON. STANLEY MATTHEWS, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	May. 12. PRESIDENT GARFIELD.
	SEVENTH.	1877.
HON. J. M. HARLAN, Kentucky.	INDIANA, ILLINOIS, AND WISCONSIN.	Nov. 29. PRESIDENT HAYES.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, NEBRASKA, AND COLORADO.	July 16. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

MR. JUSTICE FIELD *took no part in deciding the cases reported in this volume which precede Wood* v. *Railroad Company, p.* 329.

MR. JUSTICE HUNT, *by reason of sickness, took no part in deciding the cases reported in this volume.*

THE HON. HORACE GRAY, *whose commission as an Associate Justice of this Court bears date Dec.* 19, 1881, *took the oath of office in open court, Jan.* 9, 1882. *He took no part in deciding the cases reported in this volume which precede United States* v. *McBratney, p.* 621, *except Huntington* v. *Palmer, p.* 482, *Ex parte Cockcroft, p.* 578, *and Ex parte Rowland, p.* 604.

ADDITIONAL GENERAL RULE.

Rule 32.

Writs of Error and Appeals under Section 5 of the Act of March 3, 1875.

1. Writs of error and citations under section 5 of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," for the review of orders of the circuit courts dismissing suits, or remanding suits to a State court, must be made returnable within thirty days after date, and be served before the return day.

2. In all cases where a writ of error or an appeal is brought to this court under the provisions of such act, it shall be the duty of the plaintiff in error or the appellant to docket the cause and file the record in this court within thirty-six days after the date of the writ, or the taking of the appeal, if there shall be a term of the court pending at that time; and, if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. As soon as such a case is docketed the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

4. All such cases will be advanced on motion, and heard under the rules applicable to motions to dismiss.

5. When a writ of error or an appeal has already been brought, or may hereafter be brought before this rule takes effect, the defendant in error or the appellee may docket the cause and file the record without waiting for the return day, and move under this rule.

6. In all cases where a period of thirty days is included in the times fixed by this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, and Nevada.

7. This rule shall take effect from and after the first day of May next.

[Promulgated Jan. 16, 1882.]

ADDITIONAL RULE OF PRACTICE IN EQUITY.

94.

Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation

that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

[Promulgated Jan. 23, 1882.]

MEMORANDA.

THE BAR OF THE SUPREME COURT OF THE UNITED STATES met in the court-room, in the Capitol, Washington, on Monday morning, October 18, 1881, at 10½ o'clock, to pay respect to the memory of the late MR. JUSTICE CLIFFORD.

On Motion, MR. DAVID DAVIS was appointed Chairman, and MR. JAMES H. MCKENNEY, Secretary.

MR. PHILIP PHILLIPS moved that a committee be appointed to draft resolutions expressive of the respect of the members of this bar for the memory of the deceased.

The chair appointed MR. PHILIP PHILLIPS, MR. MONTGOMERY BLAIR, MR. J. HUBLEY ASHTON, MR. WALTER D. DAVIDGE, MR. S. W. KELLOGG, MR. RICHARD T. MERRICK, MR. THOMAS J. DURANT, MR. ALBERT G. RIDDLE, and MR. CHARLES CASE, the committee; who reported, through MR. PHILLIPS, the following resolutions for adoption: —

The members of the Bar and officers of the Supreme Court of the United States have come together to express their profound sorrow for the death of the venerable senior Justice of the Court, NATHAN CLIFFORD.

As a slight tribute to his memory they desire to place on some permanent record the expression of their admiration of his civic virtues, and their appreciation of the integrity and great ability with which for near a quarter of a century he discharged the arduous duties of his high office. Therefore, —

Resolved, That they are duly penetrated by a sense of the calamity which they in common with the rest of the people of the United States have sustained in the death of the Honorable NATHAN CLIFFORD; and that they will ever cherish his memory, which is endeared to them no less by many personal attractions and associations than by his eminent ability and wisdom.

Resolved, That the members of the Bar and officers of the Court will wear the usual badge of mourning during the term.

Resolved, That the Attorney-General be desired to present these proceedings to the Court with the request that they be entered on its minutes.

Resolved, That the same be published in the journals of the city, and that a copy thereof be forwarded to the family of the deceased, with the respectful assurance of the sympathy of this meeting.

The resolutions were unanimously adopted, and the meeting, on motion of Mr. Merrick, adjourned.

On October 24 Mr. Attorney-General MacVeagh addressed the Court as follows: —

May it please your Honors: —

In obedience to the instructions with which I have been honored by the members of the Bar, I desire to present the resolutions adopted by them in commemoration of the loss the Court and the Bar have alike sustained in the death of Mr. Justice Clifford.

Judge Clifford's entire career was eminently American. We live too near them to appreciate the true heroism of such lives, and we anticipate the familiar story before it is told. Born to honorable poverty, he succeeded in securing an education mainly by his own efforts, teaching school when he was not attending it. Then came the hard dry study of the law, broken also by the recurring need of teaching; and at last he stands on the threshold of the new life, well equipped for its struggles and resolute to win its prizes. In May, 1827, he was admitted to practise law by the Supreme Court of New Hampshire; and in July, 1881, he died senior Justice of the Supreme Court of the United States.

The long interval was filled with as varied, as useful, and as honorable experiences as man's heart could desire; for he was permitted to enrich by his industry, to adorn with his learning, and to honor by his integrity each of the three great departments of the Government. He was for several years a member and more than once Speaker of the House of Representatives of his adopted State of Maine, where he won golden opinions, even from his political opponents, by his ability, his fairness, and his courtesy. He was a member of Congress for four years, and the record of its discussions attests his eminent fitness to deal with grave questions of political debate. He was Attorney-General of Maine, when his duties included the prosecution of all crimes against the State, and he was Attorney-General of the United States. He was commissioner to negotiate a treaty of peace with Mexico, and afterwards Envoy Extraordinary and Minister Plenipotentiary to that country. He had subsequently been engaged for several years in the active practice of his profession when he was called to a seat upon this Bench.

It may no longer be necessary for good judges to amplify their jurisdiction; but it is certainly desirable that your Honors should not fail to recognize the vastness and the dignity of your authority. Since men have lived together in civil society, they have committed to their fellows no nobler functions than those committed to this Court, — to construe constitutions and statutes, to determine weighty and far-reaching controversies, to declare the law to thirty-eight great States and to fifty millions of intelligent freemen. No happier fortune could therefore be wished for any good man and good lawyer than that which befell Mr. Justice Clifford, to be permitted, after more than thirty years passed in the strifes of the bar and the forum, to share for more than twenty years with most honorable distinction the arduous labors, the grave responsibilities, and the lofty privileges of this august tribunal. The end crowns the work. It only remains for me to ask that the resolutions I present shall be entered upon the minutes of the court.

After the reading of the resolutions, Mr. Chief Justice Waite said: —

We are glad to receive from the Bar this expression of their high regard for our deceased brother. The records of the Court contain abundant evidence of the truth of the most that has been said of him. His opinions are to be found in forty-two volumes of our reports, and every one was unmistakably the result of his honest convictions and patient investigations. Very many of them have received, as they deserved, marked attention; none more so, perhaps, than his first, which was delivered in *Goodman* v. *Simonds*, a case that was argued in 1858, only a few days after he took his seat on the Bench. He was never disloyal to the high position he occupied, and never unmindful of the oath he had taken to "administer justice without regard to persons, and to do equal right to the rich and to the poor." From the beginning to the end of his long judicial career he was an upright, conscientious, and painstaking judge. No labor was too great for him if his duty required it, and his delight was to search diligently for the right, and when found declare it.

It would be difficult to overestimate his loss. He was the last of the connecting links between the long past of the Court and the present. His knowledge of what had been done, whether shown by the records or tradition, was extensive and accurate. He was always ready, in consultation or elsewhere, to give his brethren the full benefit of what he knew, and nothing grieved him more than to feel that what had once been deliberately done was to be undone. The Court and the Bar have abundant reason to regret that his usefulness has become a thing of the past. He died full of years and full of honors.

I may, perhaps, be permitted here a word for myself. When I came to the place I now occupy he was the Senior Associate. For months he had presided over the deliberations of the Court with all the dignity and ability which were due to the position. We were strangers to each other. He had never seen me to know me before; but time will never efface from my memory his cordial and affectionate greeting. He was a man of kindly nature, and was never consciously guilty of a wrong.

The resolutions of the Bar and the remarks of the Attorney-General in presenting them will be entered on our records, and we will now adjourn out of respect to the memory of him that is gone.

TABLE OF CASES.

TABLE OF CASES

CITED BY THE COURT.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

Railroad Company *v.* Hamersley.

1. The provision of the act of the General Assembly of Connecticut, 1866 (*infra*, p. 2), relative to the abandonment of railroad stations, whilst it authorizes the railroad commissioners to consent, or to refuse to consent, to the abandonment of an existing station, confers upon them no authority to bind the State by contract not to exercise its legislative power touching the establishment of such stations.
2. The act entitled "An Act establishing a depot at Plantsville," approved July 15, 1875 (*infra*, p. 3), does not impair the obligation of any contract between that State and the New Haven and Northampton Company.

Error to the Supreme Court of the State of Connecticut.

The facts are stated in the opinion of the court.

Mr. R. D. Hubbard and *Mr. C. E. Perkins* for the plaintiff in error.

Mr. William Hamersley and *Mr. John R. Buck*, *contra.*

Mr. Chief Justice Waite delivered the opinion of the court.

The New Haven and Northampton Company is a Connecticut corporation, authorized to construct and operate a railroad from New Haven, through the town of Southington, to the Massachusetts State line. It has full power to erect and maintain toll-houses and other buildings for the accommodation of its concerns, as it may deem suitable for its interest; but its

charter may "be altered, amended, or repealed at the pleasure of the General Assembly." In 1848, after the road was built, three stations were established in the town of Southington, named respectively Southington, Plantsville, and Hitchcock's, at which trains stopped for freight and passengers.

In 1866, the General Assembly of the State passed a statute which contained the following provision in respect to the abandonment of railroad stations: —

"No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval of the railroad commissioners, given after a public hearing held at such station, notice of which shall be posted conspicuously in said station for one month prior to the hearing."

In November, 1873, the company became desirous of abandoning one or more of its stations in Southington, and for that purpose presented a petition to the railroad commissioners, representing that two stations properly located would be ample for the public convenience, and asking that the matter might be inquired into, and that the Southington or Plantsville station, or both, might be discontinued, and two stations, and only two, located in the town, where the common good of all parties in interest would be most promoted. The requisite notice was given, and the commissioners having heard the application, on the 3d of February, 1874, made the following order: —

"After a careful and full examination of the locality and business surroundings of the present located stations, and an extended hearing of all the appearing parties in interest, with their evidence and arguments of counsel, the railroad commissioners do find and approve, and do hereby order, that the New Haven and Northampton Company may discontinue and abandon the present stations of Southington and Plantsville, as at present located, under and by complying with the following provisions and conditions, viz.: —

"The New Haven and Northampton Company shall provide and erect a passenger station house near their new freight depot, as shown on the map exhibited and submitted, and after and in compliance with the plans and profiles also submitted for said passenger station building, and provide suitable and

convenient approaches thereto; also suitable, convenient, and easy approaches to their new freight depot; all of which shall be done to the acceptance of the railroad commissioners. Said company shall also continue the same facilities for receiving and shipping freight by the car-load and unbroken, as at present enjoyed, to each and all of the parties who patronize their railroad by receiving and shipping freight thereby."

Before this time the company had bought the ground and erected buildings adapted to freight business at the place indicated in the order. It afterwards, at an expense of $10,000, put up a building for passenger purposes, as required by the commissioners. This being acceptable to the commissioners, the stations of Southington and Plantsville were abandoned by the company, and both passenger and freight trains stopped at the new place only.

The succeeding legislature passed an act, approved July 15, 1875, "establishing a depot at Plantsville." It is as follows:—

"SECT. 1. That if, at any time within six months after the passage of this act, any of the petitioners and others who may act with them for that purpose shall erect at Plantsville, contiguous to the railroad, a depot building, and convey the same, with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to the New Haven and Northampton Company, to be used for railroad purposes, it shall thereupon become the duty of said company, and it is hereby ordered, to stop at such depot thereafter its regular passenger and freight trains passing over said railroad, for the purpose of receiving and discharging passengers and freight. And all the provisions of the Revised Statutes applicable to railroad depots and stations shall be applicable to said depot in the same manner as though said depot had been erected and established by said company.

"SECT. 2. Said order may be enforced by *mandamus* by the attorney for the State for the county of Hartford, or at the relation of any inhabitant of the town of Southington, in said county, and the charter of the New Haven and Northampton Company is hereby amended according to the provisions of this act."

The petitioners named complied with the provisions of the act, and, having tendered the company a conveyance of suitable depot grounds and buildings at Plantsville, demanded that

the regular passenger and freight trains running on the road be stopped there. This the company refused to do, and the attorney for the State for the county of Hartford now seeks by *mandamus* to enforce the law. The court below gave judgment against the company, holding, among other things, that the act of 1875 did not impair the obligation of any contract rights which the company had acquired from the State. Upon this ground the case has been brought here by writ of error.

It was conceded in the argument that there is nothing in the charter to prevent the State from passing the law complained of. Confessedly the power of amendment which was reserved meets this part of the case; but it is claimed that by the action of the railroad commissioners the State has become bound by a contract not to exercise its legislative power so as to require the establishment of a depot at Plantsville.

As it seems to us, the court of errors of the State took the right view of the statute under which the commissioners acted, when they said, in *State of Connecticut* v. *New Haven & Northampton Co.* (37 Conn. 153, 163), that its object was "to prevent railroad companies from arbitrarily changing their places of business on the road, to the prejudice of those who, relying on the permanency of such places, shape their business accordingly." The powers of the commissioners, as agents of the State, in this particular, are confined to such as are necessary for the accomplishment of that object. They may, after a public hearing, approve of, that is to say, give the assent of the State to, the abandonment of a station which has been established twelve months or more; and that is all they can do. They may, as was held in *State* v. *New Haven & Northampton Co.* (42 id. 56), direct that their approval take effect only when the company shall have provided suitable accommodations for the public at some other place; but that is only a conditional approval of the abandonment. When the new accommodations have been provided and the old station abandoned, nothing more has been accomplished, so far as the company is concerned, than a lawful abandonment of an old place of business. The powers of the State over the charter remain just as they were before. Until the act of 1866 the company could abandon its stations at will, and the State by charter amendment, or even

by a general law, might require their restoration. After that act the power of abandonment by the company was restricted, but the State retained all its old authority. The commissioners were given no power to contract for the State or the public. All they could do was to say yes or no to a simple request by the company for leave to abandon an old station. If they said yes, the abandonment might be made; if no, the station must be continued. In this case the commissioners said, "Yes, when the new accommodations are furnished." The new accommodations were furnished, and the station was abandoned accordingly. Such, in the case last cited, was the view which the court of errors took of what had been done, and we think it is correct. The commissioners entered into no agreement with the company. They simply said, complete your proposed accommodations at the new station, and we, for the State, will assent to your abandonment of the old one. It follows that the new law impaired no contract obligation of the State, and the judgment of the court of errors is consequently *Affirmed.*

RAILROAD COMPANY *v.* KOONTZ.

RAILROAD COMPANY *v.* FUNKHOUSER.

1. A., a corporation of Maryland, having assumed the right to take, and B., a corporation of Virginia, the right to grant, a lease of the railroad and franchises of the latter in Virginia, A., with the implied assent of both States, took possession, and is in the actual use of the road and franchises. *Held*, that A. did not thereby forfeit or surrender its right to remove into the Circuit Court a suit instituted against it in a court of Virginia by a citizen of that State.
2. When the petitioner presents to the State court a sufficient case for removal it is the duty of that court to proceed no further in the suit. The jurisdiction of the Circuit Court then attaches, and is not lost by his failure to enter the record and docket the cause on the first day of the next term. Upon good cause being shown, the entry at a subsequent day may be permitted.
3. Good cause for such entry is presented where the petition for removal having been overruled by the State court, and the petitioner there forced to trial upon the merits, he, in the regular course of procedure, obtains a reversal of the judgment and an order for the allowance of the removal.
4. Where the removal is denied, the petitioner loses no right by contesting in the State court the suit on its merits.

ERROR to the Supreme Court of Appeals of the State of Virginia.

These cases are substantially alike, and present the following facts: —

The Baltimore and Ohio Railroad Company was incorporated by the State of Maryland on the 28th of February, 1827, to build and operate a railroad from Baltimore, in Maryland, to some suitable point on the Ohio River. By the terms of the charter the annual elections of directors were to be held in Baltimore. On the 2d of March following, the State of Virginia granted the company the same rights and privileges in Virginia that had been granted to it in Maryland, except that no lateral road could be built in Virginia without the consent of the legislature, and the road was not to strike the Ohio at a point lower than the mouth of the Little Kanawha. Under this authority from the two States a road was built from Baltimore to Wheeling, in Virginia. When the State of West Virginia was formed, it took from Virginia all the territory occupied by the road in that State, and from that time no part of the original line has been within the present State of Virginia.

On the 20th of August, 1873, under a lease from the Washington City, Virginia Midland, and Great Southern Railroad Company, a Virginia corporation, of all its railroad lying between Strasburg and Harrisonburg, in Virginia, the Baltimore and Ohio company took the exclusive possession of and operated the leased property, using for that purpose the powers and franchises of the Virginia corporation. While so operating the leased road an accident happened to one of the passenger trains, which resulted in the death of several persons, whose administrators, the defendants in error, each of whom was a citizen of Virginia, thereupon brought in a State court of that State, under her statute, these suits to recover of the company damages for such death.

On the 2d of September, 1876, which is conceded to have been in time, the company filed its petitions in the State court for the removal of the cases to the proper Circuit Court of the United States, on the ground that the company was a citizen of Maryland and the several plaintiffs citizens of Virginia.

The plaintiffs answered the petition in each case, denying that the company was a citizen of Maryland, and claiming that for all the purposes of these suits it was a citizen of Virginia. After hearing, the court refused to recognize the removal, because, as was held, by leasing and operating the road of the Virginia corporation under the Virginia charter, the company became, for all the purposes of that business, a citizen of Virginia. To this ruling exceptions were taken in due form and made part of the several records.

It nowhere appears that copies of the records of the State court were ever entered in the Circuit Court; but on the 19th of December, 1876, the company asked and obtained from the State court leave to plead, and in due time thereafter pleas of not guilty were put in. One case was tried in the State court on the 6th of April, 1877, another on the 10th of April, 1878, and the other on the 9th of December afterwards. Judgment was given in each case for the plaintiff. The company was represented at the trials, and exceptions of various kinds were taken. The causes were all carried to the Supreme Court of Appeals of the State, where the judgments were affirmed. The record in each case shows distinctly that errors were assigned on the ruling upon the petition for removal, and that the decision was adverse to the company. The cases are now here on writs of error.

Mr. Hugh W. Sheffey and *Mr. E. J. D. Cross* for the plaintiffs in error.

For the purpose of suing and being sued, a corporation is a citizen of the State which created it, and it has no legal existence beyond her bounds. The presumption of law is that its members are all citizens of that State, and a suit by or against it is conclusively presumed to be by or against such citizens. No averment or evidence to the contrary is, therefore, admissible in order to defeat the jurisdiction of a court of the United States. It follows that a suit by or against the Baltimore and Ohio Railroad Company must, so far as the question of jurisdiction is involved, be considered as a suit by or against citizens of the State of Maryland. *The Louisville, Cincinnati, & Charleston Railroad Co.* v. *Letson*, 2 How. 497; *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 id. 314; *Ohio*

& Mississippi Railroad Co. v. *Wheeler*, 1 Black, 286; *Railroad Company* v. *Harris*, 12 Wall. 65; *Railway Company* v. *Whitton*, 13 id. 270. That company, by leasing and operating the road of a company incorporated by Virginia, did not become a citizen of that State. *Baltimore & Ohio Railroad Co.* v. *Cary*, 28 Ohio St. 208. Its right of removing a suit brought against it cannot be defeated by State enactments nor waived by implication, nor was it in this instance forfeited by the imputed laches of the company in regard to the filing in the Circuit Court of copies of the record. The laches of which the defendants in error complain are the result of their efforts to defeat the acceptance by the State court of the petitions for removal. Their position is, therefore, inconsistent with their own acts.

A party entitled to removal who, notwithstanding his protests and exceptions, is held for the trial of his case in the State court loses none of his rights by his defence upon the merits. *Gordon* v. *Longest*, 16 Pet. 97; *Kanouse* v. *Martin*, 15 How. 198; *Insurance Company* v. *Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Railroad Company* v. *Mississippi*, 102 id. 135; *Kern* v. *Huidekoper*, 103 id. 485.

Mr. John Randolph Tucker and *Mr. Moses Walton*, *contra.*

The prayer for the removal of these actions was properly denied. The plaintiff in error, by leasing and operating the road and exercising the franchises of a Virginia corporation, became a corporation of that State so far as the duties and responsibilities of the lessor and its liability to suit are concerned. *Baltimore & Ohio Railroad Co.* v. *Gallahue's Adm'rs*, 12 Gratt. (Va.) 655.

The doctrine of license and comity places a foreign corporation enjoying the license in a particular State upon substantially the same ground as if it were actually and originally created by such State, and determines its citizenship in respect to its right of removal of a suit pending against it. *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *State* v. *Northern Central Railway Co.*, 18 Md. 193; *Sprague* v. *Hartford, &c. Railroad Co.*, 5 R. I. 233; *Pomeroy* v. *New York & New Haven Railroad Co.*, 4 Blatchf. 120; *Continental Insurance Co.* v. *Kasey*, 27 Gratt. (Va.) 216.

The right to remove these cases, if it ever existed, was lost by the failure of the company to file in the Circuit Court, on the "first day of its then next session," a copy of the records. *Cobb* v. *Globe Mutual Insurance Co.*, 3 Hughes, 452; *Removal Cases*, 100 U. S. 457; *Kern* v. *Huidekoper*, 103 id. 485; Dillon, Removal of Causes, pp. 102–105.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

The questions presented for our consideration are: 1. Whether a case for removal was made by the company; and, 2, if it was, whether, as it does not appear affirmatively that copies of the records have been entered in the Circuit Court, the company has lost its right to have the judgments reversed for the original errors in that behalf.

The Court of Appeals in Virginia held, as early as 1855, in *Baltimore & Ohio Railroad Co.* v. *Gallahue's Adm'rs* (12 Gratt. (Va.) 655), that the Baltimore and Ohio company could be sued in Virginia, and in the course of the opinion said that the effect of the Enabling Act of Virginia was to make the company a Virginia corporation as to its road within the territory of Virginia. Afterwards, in 1870, this court decided, in *Railroad Company* v. *Harris* (12 Wall. 65), that the company could be sued in the District of Columbia, into which a lateral road had been built with the consent of Congress, given through an enabling act much like that of Virginia. In that case we held the company to be a Maryland corporation only, and that no new corporation had been created by the Enabling Act either of Virginia or the District of Columbia. The ruling in the Virginia case was followed by the Supreme Court of Appeals of West Virginia in *Goshorn* v. *Supervisors* (1 W. Va. 308) and *Baltimore & Ohio Railroad Co.* v. *Supervisors* (3 id. 319), both of which cases were decided before *Railroad Company* v. *Harris*, in this court. That question is, however, unimportant here, as it is conceded that the part of the road originally in Virginia is now in West Virginia, and that the company no longer uses in Virginia any of the franchises conferred by the Enabling Act of that State. Neither the Court of Appeals nor counsel here make any claim on account of that legislation.

Even conceding that the company was once a Virginia corporation, so far as its original road in that State was concerned, the most that can be said of it now is, that, in common with all citizens of the old State residing on the ceded territory, its citizenship was transferred by the organization of West Virginia from the old State to the new. Consequently, if it was once a corporation of Maryland and Virginia, it is now a corporation of Maryland and West Virginia. Any citizenship it may have had in Virginia has been lost.

It is not contended that this Enabling Act gave the company a right to lease another Virginia road and operate it as a lateral road, nor that in running the leased road the company uses any of the franchises conferred by the original grant. The present claim is that, by using the franchises of another Virginia corporation to run its leased road, it made itself a corporation of Virginia for all the purposes of that business, just as the lessor was and is.

It is well settled that a corporation of one State doing business in another is suable where its business is done, if the laws make provision to that effect. We have so held many times. *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, *supra*; *Ex parte Schollenberger*, 96 U. S. 369. This company concedes that it was properly sued in Virginia. What it asks is, that, being sued there, it may avail itself of the privilege it has under an act of Congress, as a corporation of Maryland, and remove into the proper court of the United States exercising jurisdiction within Virginia a suit which has been instituted against it by a citizen of the latter State. The litigation is not to be taken out of Virginia, but only from one court to another within that State. So that the single question presented is, whether, by taking a lease of the road of a Virginia corporation, the Maryland corporation made itself also a corporation of Virginia, for all purposes connected with the use of the leased property.

It is not denied that the Maryland company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation; nor that, in respect of the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia; but that

does not, in our opinion, make it a corporation of Virginia. It may be sued in Virginia, because with the implied assent of that State it does business there; but, as we said substantially in Schollenberger's case, the question of suability and jurisdiction is not so much one of citizenship as of *finding*. If a citizen of one State is *found*, for the purposes of the lawful service of judicial process, in another, he may ordinarily be sued there. A citizen of Maine may be sued in California, if he happens to be there in person, and the proper officer serves him personally with the lawful process of a California court. He is still a citizen of Maine, although, in the exercise of one of the privileges of a citizen of the United States, he has been found in California. An individual may, without asking permission of State authorities, do business where he pleases, and, if a citizen of one State, he is entitled to all the privileges and immunities of citizens of the several States. Const., art. 4, sect. 2. Not so with corporations. Their rights outside the State, under the authority of which they were created, depend primarily on their charters. If the charter allows it, they may exercise their chartered privileges and carry on their chartered business in any other State which, by express grant or by implication, permits them to do so. They have no absolute right of recognition in any other State than their own. *Paul* v. *Virginia*, 8 Wall. 168. And the State which recognizes them can impose such conditions on its recognition as it chooses, not inconsistent with the Constitution and laws of the United States. If they are recognized and permitted to do business without limitation, express or implied, they carry with them wherever they go all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence, and are taken wherever they go. By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad.

In this case, a Maryland corporation leased the railroad and the franchises of a Virginia corporation. Neither State legislature acted specially on the subject, so far as the record discloses. The Maryland corporation assumed the right to take,

and the Virginia corporation to grant, the lease which lies at the foundation of the rights of the parties. Under this lease possession was given and taken without objection from the authorities of either State, and the Maryland corporation actually uses the franchises of that of Virginia. The question, therefore, presented to us is not one of *ultra vires*. No complaint is made that Maryland has never given its corporation the right to go to Virginia and take a lease, nor that Virginia has never authorized its corporation to grant such a lease. For all the purposes of these cases, we must assume that the Maryland corporation is rightfully using the leased road, and with the consent of both States.

We can hardly believe if an individual, a citizen of a State other than Virginia, went into that State and leased the property of a Virginia corporation, to use as the corporation did, it would be claimed that he made himself thereby a citizen of Virginia, within the meaning of the Constitution and laws of the United States. Citizenship in this connection has a special signification. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. Amend. 14, sect. 1. A corporation may for the purposes of suit be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State, possessing all the rights and having all the powers its charter confers. It cannot migrate nor change its residence without the consent, express or implied, of its State; but it may transact business wherever its charter allows, unless prohibited by local laws. Such has been for a long time the settled doctrine of this court. "It must dwell in the place of its creation, and cannot migrate to another sovereignty;" "but its residence in one State creates no insuperable objection to its contracting in another." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 520. With a long line of authorities in this court to the same effect before us, we cannot hesitate to say, with all

due respect for the Court of Appeals of Virginia, that the Maryland corporation, by taking from the Virginia corporation, with the unconditional assent of Virginia, a lease of a railroad which could only be operated by the use in Virginia of the corporate franchises of the lessor, did not make itself a corporation of Virginia, or part with any of the rights it had under the Constitution and laws of the United States as a corporation of Maryland. The State of Virginia has not granted to it any special powers or privileges, beyond allowing it to transact its corporate business in Virginia. Its powers within the State come from its Maryland charter and the Virginia corporation. That corporation had certain franchises and privileges which it held by grant from its State. These franchises and privileges were a species of property which, we must presume for all the purposes of this case, it had the right to allow the corporation of another State to use. The Virginia authorities have impliedly assented to all that has been done. This assent having been given and the contract entered into between the companies, all Virginia can now require is that the Maryland company, in carrying on its business under the contract and using the franchises of the Virginia company, shall be subject to all obligations which the charter imposes on that corporation. The Maryland corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own State and of that of the State in which its business is done. For these reasons we must hold that the Court of Appeals erred in deciding that the removal of the suit to the Circuit Court was properly refused, because the company, by taking the lease and using the road in Virginia, became, for all the purposes of that lease, a corporation of Virginia.

The only remaining question is whether the company can now claim a reversal of the judgments below on account of this error, since it does not appear that copies of the records in the State court have been entered in the Circuit Court. The State court of original jurisdiction directly decided, in accordance with the claims of the several defendants in error, that upon the showing made the company was not entitled to a removal, but must remain and defend the suits in that court.

It was conceded on the argument that if the judgment had been rendered before the first day of the next term of the Circuit Court of the United States, there could be a reversal if the case was in fact removable. The position of the defendants in error seems to be, that as the company appeared and went on with the causes in the State court after the next term in the Circuit Court, without showing that the copies of the records had been entered in that court, it in effect waived its right to a removal and submitted itself again voluntarily to the jurisdiction of the State court.

We have uniformly held that if a State court wrongfully refuses to give up its jurisdiction on a petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. *Insurance Company* v. *Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Railroad Company* v. *Mississippi*, 102 id. 135. It is also a well-settled rule of decision in this court, that, when a sufficient case for removal is made in the State court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored. *Gordon* v. *Longest*, 16 Pet. 97; *Kanouse* v. *Martin*, 15 How. 198; *Insurance Company* v. *Dunn*, *supra*; *Railroad Company* v. *Mississippi*, *supra*. The entering of the copy of the record in the Circuit Court is necessary to enable that court to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the State court to "proceed no further." The provision of the act of 1875 is in this respect substantially the same as that of the twelfth section of the Judiciary Act of 1789, and requires the State court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the Circuit Court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed when the removal is demanded in proper form and a case for removal made. Proceedings in the Circuit Court may begin when the copy is entered. Such is clearly the effect of the cases of *Gordon* v. *Longest* and *Kanouse* v. *Martin*, where it does not appear that the record was ever entered in the Circuit Court. In *Insurance Com-*

pany v. *Dunn* and *Railroad Company* v. *Mississippi*, the records were entered, but no point was made of this in the opinions. We are aware that in *Removal Cases* (*supra*) and *Kern* v. *Huidekoper* (103 U. S. 485) it is said, in substance, that after the petition for removal and the entering of the record the jurisdiction of the Circuit Court is complete; but this evidently refers to the right of the Circuit Court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction. The State court must stop when the petition and security are presented, and the Circuit Court go on when the record is entered there, which is in effect docketing the cause. The question then is, whether, if the State court refuses to let go its jurisdiction and forces the petitioning party to trial, he must, in order to prevent his appearance from operating as a waiver, show to the State court that he is not in default in respect to entering the record and docketing the cause in the Circuit Court on the first day of the next term following the removal.

As has just been seen, when the State court has once lost its jurisdiction it is prohibited from proceeding until in some way jurisdiction has been restored. The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the State court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the State court, with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in *Gordon* v. *Longest*, *supra*. The petitioning party has the right to remain in the State court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the State court is going on. This was actually done in *Removal Cases*. When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on

the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the State court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbitt* v. *Clark*, 103 U. S. 606. If, in such a case, we reverse the order of the Circuit Court to remand, our instructions to that court are, as in *Relfe* v. *Rundle* (id. 222), to proceed according to law, as with a pending suit within its jurisdiction by removal. Should the petitioning party neglect to enter the record and docket the cause in the Circuit Court in time, we see no reason why his adversary may not go into the Circuit Court and have the cause remanded on that account. This being done, and no writ of error or appeal to this court taken, the jurisdiction of the State court is restored, and it may rightfully proceed as though no removal had ever been attempted.

It is contended, however, that if the petitioner fails to enter the record and docket the cause in the Circuit Court on the first day of the next term, the jurisdiction of that court is lost, and there can be no entry on a subsequent day. Such we do not understand to be the law. The petitioner must give security that he will enter the record on that day, but there is nothing in the act of Congress which prohibits the court from allowing it to be entered on a subsequent day, if good cause is shown. In *Removal Cases* (*supra*) we used this language: "While the act of Congress requires security that the transcript shall be filed on the first day of the next term, it nowhere appears that the Circuit Court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the Circuit Court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected." This was as far as it was necessary to go in that case, and in entering, as we did then, on the

construction of the act of 1875, it was deemed advisable to confine our decision to the facts we had then before us. Now the question arises whether, if the petitioning party is kept by his adversary, and against his will, in the State court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter the cause in the Circuit Court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered. We have no hesitation in saying that in our opinion he can. As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the State court. The entering of the record in the Circuit Court after that was mere procedure, and in its nature not unlike the pleadings which follow service of process, the filing of which is ordinarily regulated by statute or rules of practice. The failure to file pleadings in time does not deprive the court of the jurisdiction it got though the service of process, but inexcusable delay may be good ground for dismissing the cause for want of prosecution. So here, if the petitioning party, without sufficient cause, fails to enter the record and docket the cause, the suit may be properly remanded for want of due prosecution under the removal; but if sufficient cause is shown for the delay, there is nothing in the statute to prevent the court from taking the case after the first day of the term and exercising its jurisdiction. Clearly it is within the judicial discretion of every court, on good cause shown, to set aside a default in filing pleadings on a statutory rule-day, and allow the omission to be supplied. This case seems to be analogous to that. Undoubtedly promptness should be insisted on by the courts of the United States, and no excuse should be accepted for delay in entering a record after removal, unless it amounts to a clear justification or a waiver by the opposite party. It seems to us manifest that if the petitioning party is forced by his adversary to remain in the State court until he can, in a proper way, secure a reversal of the order which keeps him there, the requirement of the law for entering the record in the Circuit Court at any time before the reversal

actually takes place must be deemed to have been waived, and that for all the purposes of procedure in that court the time when the State court lets go its jurisdiction may be taken as the time according to which the docketing of the cause is to take place. Certainly the petitioning party ought not to be required to carry on his litigation in two courts at the same time. He may do so if he chooses; but if he elects to go on in the State court after his petition for removal is disregarded, and take his chances of obtaining a reversal of any judgment that may be obtained against him because he was wrongfully kept there, he ought not to be deprived of a trial in the proper jurisdiction because of the unwarranted act of his adversary, or of the State court.

The judgment of the Court of Appeals in each of these cases will be reversed, and the causes remanded to the Supreme Court of Appeals of Virginia with directions to reverse the judgments of the Circuit Court of the county, and transmit the cases to that court with instructions to vacate all orders and judgments made or entered subsequently to the filing of the several petitions for removal and approval of the bonds, and proceed no further therein unless its jurisdiction be restored by the action of the Circuit Court of the United States or this court.

So ordered.

SHANKS *v.* KLEIN.

1. Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and adjust the equities of the partners.
2. For this purpose, in case of the death of such partner, the survivor can sell the real estate; and, though he cannot transfer the legal title which passed to the heirs or the devisees of the deceased, the sale vests the equitable ownership, and the purchaser can, in a court of equity, compel them to convey that title.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. William B. Pittman and *Mr. J. Z. George* for the appellant.

Mr. Edward D. Clark, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a bill in chancery filed by John A. Klein and others against David C. Shanks, executor of the last will and testament of Joseph H. Johnston.

The substance of the bill is, that in the lifetime of Johnston there existed between him and Shepperd Brown a partnership, the style of which was Brown & Johnston; that their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking-house; that they had branches and connections with other men in business at other places, among which was New Orleans; that they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war; that this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business; and that early in the war, namely, in 1863, Johnston died in the State of Virginia, where he then resided, leaving a will by which all his property, including his interest in the partnership, became vested in Shanks, who was appointed his executor.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war, — the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. Finding that suits had been commenced by creditors of the firm against him as surviving partner, and, in some instances, attachments levied, he became satisfied that unless he adopted some mode of disposing of the partnership property and applying its proceeds to the payment of the debts in their just order, the whole would be wasted or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he executed a deed conveying all the prop-

erty of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, and providing that the surplus, if any, should be for the use of the partners and their heirs or devisees. Klein accepted the trust, and pursuant thereto paid debts with the lands, or with the proceeds of the sale of them.

There is an allegation that Shanks, while acting as executor, and about the time the deed of trust was made, had an interview with Brown, and, being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case the record establishes that Brown acted in good faith, and did the best that could be done for the creditors of the partnership and for those interested in its property.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted actions of ejectment against them. They thereupon filed this bill to enjoin him from further prosecuting the actions, and compel him to convey the legal title to the real estate which came to him by the will of his testator. A decree was rendered in conformity with the prayer of the bill, and Shanks appealed.

Being satisfied, as already stated, of the fairness and honesty of the proceedings of Brown and Klein and of the purchasers from them, and waiving as of no consequence, in regard to the principal point in the case, the allegation of Shanks's concurrence in or ratification of Brown's action, we proceed to consider the question as to the power or authority of Brown, the surviving partner, to bind Shanks by the conveyance to Klein, and by the sales thereunder made.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant that the equity of the creditors of the partnership to have

their debts paid out of this property is superior to that of the devisee of Johnston. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of that title.

Counsel for the appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, had, for the purpose of paying the debts of the partnership, power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, that the trust deed which he made to Klein was effectual for that purpose, and that by Klein's sales to the other appellees they became invested with this equitable title and the right to compel Shanks to convey the legal title.

One of the learned counsel for the appellant concedes that at the present day the doctrine of the English Court of Chancery "extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partnership real estate is in fact in all cases, and to all intents and purposes, personalty." He maintains, however, that the principle has not been carried so far in the courts of America; that the extent of the doctrine is that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions; and that the right of the surviving partner, and of the creditors through him, is no *more than a lien*, which cannot be asserted by a sale, as if the property were personal, but to the enforcement of which a resort to a court of equity is necessary.

We think that the error which lies at the foundation of this

argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word, for if it be a lien in any sense it is also something more.

It is an equitable *right* accompanied *by an equitable title.* It is an *interest in the property* which courts of chancery will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court of Chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American courts is on the same side of the question.

In the case of *Dyer* v. *Clark* (5 Metc. (Mass.) 562), that eminent jurist, Chief Justice Shaw, while using the word "lien" in reference to the rights now in controversy, asks, "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest indirectly in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq., sect. 1253), upon the property itself; but on the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly

diverted to the private use of the parties. Suppose this trust is not implied, what would be the condition of the parties?" &c. "But treating it as a trust, the rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien.

In *Delmonico* v. *Guillaume* (2 Sandf. (N. Y.) Ch. 366), where the precise question arose which we have in the present case, the Vice-Chancellor held that "Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate."

In so deciding he followed the English authorities, and cited *Fereday* v. *Wightwick*, 1 Russ. & M. 45; *Phillips* v. *Phillips*, 1 Myl. & K. 649; *Brown* v. *Brown*, 3 id. 443; *Cookson* v. *Cookson*, 8 Sim. 529; *Townshend* v. *Devaynes*, 11 id. 498, note.

In *Andrews's Heirs* v. *Brown's Adm'r* (21 Ala. 437), the Supreme Court said that, "inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying the debts and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts and the survivor is charged with this duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it."

In *Dupuy* v. *Leavenworth* (17 Cal. 262), Chief Justice Field, in the name of the court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands, — whether in the individual name of the copartner, or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed

among the copartners according to their respective rights. The possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be held to be one which should be governed by the decisions of the courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit nor deny, the result would still be the same.

In one of the earliest cases on that subject in the High Court of Errors and Appeals of that State, *Markham* v. *Merritt* (8 Miss. 437), Chief Justice Sharkey, in delivering the opinion of the court, concurs in the general doctrine that "when land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, or in denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston.

Decree affirmed.

SMITH *v.* MCCULLOUGH.

A mortgage executed by a railroad company upon its then and thereafter to be acquired "property" contains a specific description of the different kinds of such property. *Held*, that certain municipal bonds, issued to aid in building the road, which are not embraced by such description, do not pass by the use of the general word "property."

APPEAL from the Circuit Court of the United States for the Western District of Missouri.

The case here presented is an outgrowth of a suit instituted in the court below for the foreclosure of a mortgage executed on the first day of April, 1872, to the Farmers' Loan and Trust Company, by the Burlington and Southwestern Railway Company, to secure the payment of certain bonds issued by the latter. A decree of foreclosure having passed, Elijah Smith, the receiver in that suit, filed his petition therein (to which Warren McCullough and other persons were made defendants), asserting his right, as such receiver, to certain county bonds of the par value of $40,000 (or their proceeds), constituting the last instalment of an issue of $200,000 by Sullivan County, Missouri, in payment of its subscription made in 1871 in aid of the construction of the Linneus Branch of the Burlington and Southwestern Railway. The entire issue, conformably to the contract of subscription, was originally deposited in the hands of McCullough, as trustee for the county and the railway company, with authority to deliver them in instalments of $40,000, as the work of construction progressed. By the terms of that contract the railway company was entitled to receive the last instalment when the branch road, with the iron and rolling-stock thereon, was completed and paid for by the company. Prior to Smith's appointment as receiver, all the bonds had been delivered except $40,000, which the railway company had not earned, and which, by reason of its insolvency, it had, as is now claimed, become unable to earn.

It appears that in the year 1874 sundry creditors of the railway company, in order to recover the amount of their respective claims, commenced actions against it in the courts of the State, and sued out attachments, which were served

upon McCullough, who was summoned in each action as a garnishee. The attaching creditors, in 1876, obtained final judgments for the sale of those bonds, and for the application of the proceeds to satisfy their respective judgments. In some of the cases the garnishee proceedings were brought to a conclusion the day before Smith filed his petition in the foreclosure suit asserting a claim to the bonds as against the creditors of the company. And it may be remarked as to all of those actions that he, although not made a party thereto, was informed of the proceedings by garnishment. But he did not appear in the State courts, although the order appointing him receiver authorized him "to prosecute and defend all suits, in law or in equity, in which the interests of the property or parties were involved."

The case made in his pleadings and proofs proceeds mainly upon these grounds: 1. That the mortgage of the railroad company embraced the bonds in question, and that consequently the claims of the creditors of the mortgagor were subordinate to the rights of the mortgagee. 2. That after the railway company had forfeited all right to the remaining bonds, by reason of its failure to complete the branch road within the time prescribed by the contract of subscription, he made an arrangement with the County Court of Sullivan County, whereby, in consideration of the completion by him of the branch road, he, as receiver, became entitled to the $40,000 of bonds remaining in the hands of McCullough. 3. That all the proceedings in the courts of the State under which the bonds were sold were without validity or binding force as against him.

Smith's bill was dismissed, and he thereupon appealed.

Mr. L. T. Hatfield for the appellant.

Mr. John P. Butler and *Mr. A. W. Mullins*, *contra.*

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

Waiving any inquiry as to whether such property as that in question could have been conveyed by mortgage in any other way than by estoppel against the mortgagor, we will consider whether the bonds issued by Sullivan County are embraced, or

were intended to be embraced, by the mortgage to the Farmers' Loan and Trust Company. That question is within a very narrow compass. It must be solved so as to give effect to the intention of the parties, to be collected as well from the words of the instrument as from the circumstances attending its execution.

The contention of the appellant is that the bonds in question are embraced by the following language, describing the premises and property conveyed: "All the present and in future to be acquired property of, or in any manner pertaining to, the Linneus Branch of the Burlington and Southwestern Railway Company, and all the right, title, and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, *that is to say*, all the branch railroad, including the premises leased as aforesaid of the Lexington, Lake, and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the county of Putnam, in the State of Missouri, by way of, &c., including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber, and materials and property, purchased or to be purchased, or otherwise acquired, for the construction and maintenance of said branch railroad, and all the engines, tenders, cars, and machinery, and all kinds of rolling-stock, now owned or hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus Branch, and all the rights, privileges, and franchises relating thereto, and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine-shops, tools, implements, and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said party of the first part by virtue of said lease of said Lexington, Lake, and Gulf Railroad," &c.

It is quite true, as argued by learned counsel for appellant, that the word "property" is sufficiently broad and comprehensive to include every kind of possession or right. In its literal

acceptation it might include such rights, whether legal or equitable, absolute or contingent, as the railway company acquired, under or by virtue of the subscription made by Sullivan County, to the bonds placed in the hands of McCullough. But we are all of opinion that such a construction of the mortgage is not imperatively demanded by the terms employed in describing the property mortgaged, nor would it, we think, be consistent with the intention of the parties. Had the draughtsman of the instrument stopped in his description of the mortgaged property with the general words, "all the present and in future to be acquired property of, or in any manner pertaining to, the Linneus Branch, . . . and all the right, title, and interest . . . therein," there would be more force in the position taken by the appellant. But the rules established for the interpretation of written instruments will not justify us in detaching these general words from those of an explanatory character which immediately follow in the same sentence. The subsequent phrase, "that is to say," followed by a detailed description of the different kinds of property which are embraced by the general words quoted, indicates that the mortgage was not intended to embrace every conceivable possession and right belonging to the railway company, but only the road and its adjuncts and appurtenances. It specifies different kinds of property, some of which would enter into the construction of the branch road, and some of which would necessarily be employed in its maintenance after completion. The "rights, privileges, and franchises" mortgaged were, it seems to us, only such as had direct connection with the management and operation of the road after it was constructed and put in use as a public highway. There was no purpose, we think, to pass to the mortgagee any interest whatever in municipal subscriptions which had been previously obtained and accepted by the company for the purpose of raising money to build the road. The bonds which Sullivan County placed in the hands of McCullough for delivery to the company as the work progressed were certainly more valuable, and could have been more readily utilized for purposes of construction, than a like number of bonds issued by the railway company. We ought not to presume, from the general

language used, that the railway company intended to cripple itself in the use of salable municipal securities in order to place upon the market its own bonds of less value. Our conclusion is that the mortgage was not intended to deprive the mortgagor of the privilege of using, in any way it desired, bonds or other securities to which it had an absolute or contingent right, and which it had obtained for the purpose of being used in building and equipping the road.

What has been said renders it unnecessary to consider the claim of the appellant based upon the alleged arrangement with the county court, further than to say that his action, in that regard, was outside of his functions as receiver. Notwithstanding the broad terms of the order appointing him, we are satisfied that the court had no purpose to appoint him receiver of any property except that covered by the mortgage. He was given express authority to borrow the sum of $200,000 upon receiver's certificates of indebtedness, to be expended under the directions of the court, or of a special master, in building, completing, and equipping the unfinished portion of the Linneus Branch. But he obtained no authority from the court appointing him to contract for municipal aid in the construction by him, as receiver, of the unfinished portion of the branch road. His action, in that regard, was never approved or ratified by the court from which he derived his authority. He can, therefore, take nothing by his unauthorized contract with the county court.

But there is another view, of some force, upon this branch of the case. The original contract of subscription by the county prescribes, as one of the conditions precedent to the delivery of the bonds, that the work of construction shall have been paid for. The arrangement which the receiver made with the county was, by its terms, subject to the terms and conditions of that contract. It is not, therefore, at all clear that the equities of the case are with the receiver as against the judgment creditors whose debts were for the construction of the road.

Nor, in view of the construction which we have placed upon the mortgage, is it at all essential, on this appeal, to examine into the regularity or validity, as to the receiver, of the pro-

ceedings in the State courts. If, as we have ruled, the mortgage did not cover the bonds in question, it is of no interest to the receiver, in this case and upon the issues made by him, to inquire whether the State courts transcended their jurisdiction by subjecting the bonds in the hands of McCullough to the satisfaction of the judgment creditors of the railway company.

In one of the printed briefs before us some argument is made to show that the county of Sullivan has been injuriously affected by the decree below, but inasmuch as the county has not appealed therefrom, we need not consider any suggestion made in its behalf.

Decree affirmed.

MARTIN v. COLE.

1. In an action against a party upon his indorsement in blank of a negotiable promissory note, evidence of a contemporaneous parol agreement that the indorsement was without recourse is inadmissible.
2. The ruling in *Wills* v. *Claflin* (92 U. S. 135), construing a statute which requires the assignee of a promissory note to exhaust his remedy against the maker before proceeding against the assignor, reaffirmed.
3. In this case, the question whether an execution, sued out on a judgment recovered by the assignee against the maker of the note, would have been unavailing, is, for the purpose of fixing the liability of the assignor, determined by the finding below that the maker was insolvent.

ERROR to the Supreme Court of the Territory of Colorado.

The facts are stated in the opinion of the court.

Mr. Henry M. Teller for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The defendant in error was plaintiff below, and brought his action of assumpsit against the plaintiff in error, as indorser of a promissory note, in the District Court of the First Judicial District of Colorado Territory, for the county of Arapahoe, the plaintiff below being the immediate indorsee.

A copy of the note sued on, with the indorsements, filed with the declaration, is as follows: —

"$1,414.15. GEORGETOWN, C. T., July 17, 1868.

"On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen $\frac{15}{100}$ dollars, for value received, at George I. Clark & Co.'s bank at Georgetown, with interest at the rate of three per cent per month from date until paid.

(Signed) "JOHN WEBB."

[Indorsed on back.]

"Pay to the order of Luther A. Cole. Value received.

(Signed) "JOHN H. MARTIN."

The declaration, besides the common money counts, contained five special counts.

In the first of them it is averred that the note sued on being unpaid, on Feb. 5, 1870, the plaintiff instituted suit thereon against the maker, at the first term of the court in the county of his residence after the maturity thereof, and at the same term, on April 7, 1870, recovered judgment thereon against him for $2,284, together with costs; that upon said judgment he afterwards, on May 9, 1870, caused to be issued, and placed in the hands of the sheriff, an execution, which, on June 6, 1870, he made return of, showing that on May 9, 1870, he had levied the same on certain mining claims of the defendant, which, on June 1, 1870, he had sold according to law for the sum of $5, besides the costs of the suit, amounting to $45.75; and it is also in the same count further averred that, from the time of the rendition of the judgment against Webb, the maker of the note, he had no other property, either real or personal, subject to execution, out of which the balance of the judgment or any part of it could have been made, and that the keeping of the execution in the hands of the sheriff for the period of ninety days from its date, or the issuing of a pluries or other execution to collect the balance of said judgment, would have been wholly unavailing. There is also the further averment in the same count that the plaintiff used all due diligence to collect said note from the maker.

The second count of the declaration contains the averment that "at the time the said note became due and payable, and from that time up to the time of the commencement of this suit, and up to the present time, the said John Webb ever has

been, and still is, insolvent and unable to pay said note, and that the institution of a suit against the said John Webb at the time the said note became due, or at any time from the maturity of the said note until the present time, would have been, and was, and would be, entirely unavailing," &c.

These averments appear to have been made with a view to meet the requirements of sect. 7 of an act, then in force, of the Territory of Colorado, relating to bonds, bills, and promissory notes, which is referred to in the brief of one of the counsel as found on page 85 of the Revised Statutes of Colorado of 1868, but which, in disregard of the rules of this court, is not set out either in the record of the case or in the brief of counsel. The volume referred to not being accessible, we find what we assume to be a republication of the same provision in the General Laws of the State of Colorado, published by authority in the year 1877. It is as follows: —

"SECT. 7. Every assignor, or his heirs, executors, or administrators, of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have acted with diligence, by the institution and prosecution of a suit against the maker of such assigned note, bond, bill, or other instrument of writing, or against his heirs, executors, or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof: *Provided*, that if the institution of such suit would have been unavailing, or if the maker had absconded or left the State, when such assigned note, bond, bill, or other instrument in writing became due, such assignee, or his executors or administrators, may recover against the assignor, or against his executors or administrators, as if due diligence by suit had been used."

The plaintiff in error, in addition to the general issue, filed a special plea to the first and second counts of the declaration, the substance of which is as follows: —

"And the said defendant avers that he made the said indorsement when it was so made, in blank, that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so

as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary. And this defendant avers that, relying upon the assurance of the said plaintiff that his indorsement should not be filled up so as to render him liable as indorsee thereon, he signed his name upon the back of said note, which without said assurance he would not have done."

To this plea there was filed a general demurrer, which was sustained.

Afterwards, on June 6, 1874, the cause was submitted, by consent of parties, without the intervention of a jury, when the court found the issues in favor of the plaintiff, and rendered judgment against the defendant for $2,478.17 damages and costs.

A bill of exceptions was taken, which sets out all the evidence given and offered in the trial of the case. From that it appears that the defendant below, Martin, being on the stand as a witness in his own behalf, was asked to state under what circumstances the note in suit was transferred by him to the plaintiff, Cole. Objection being interposed, the defendant then stated to the court that he offered to prove in defence a parol promise contemporaneous with the indorsement of the note; that he proposed to prove by the witness that the parol agreement set forth and stated in the defendant's second plea was made by the parties. The court sustained the objection, and the defendant excepted.

Thereupon the defendant offered to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that Martin should indorse his name on the note in blank to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note; to which offer an objection, interposed by the plaintiff, was sustained, and the defendant excepted.

The defendant had previously testified that his name on the back of the note was written by him, but that the words "Pay

to the order of Luther A. Cole, value rec'd," were not written at the time of the indorsement and delivery of the note, nor by him at any time.

The plaintiff below read in evidence the depositions of William L. Campbell, Levi H. Shepperd, and John T. Harris, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity. Objections were made to their depositions, and overruled; to which an exception was taken. The objections, however, do not appear to be of sufficient importance to require further notice.

The plaintiff also read in evidence the transcript of the record, judgment, and proceedings in the action of Luther A. Cole against John Webb, the maker of the note, together with the execution, levy, and return, being the same referred to in the first count of the declaration. From that it appears that the execution was issued on May 9, 1870, returnable in ninety days from date, and actually returned on June 7, 1870, showing the levy and sale referred to in the pleadings.

There was other testimony, also, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity, and at the time of the bringing of this action.

An appeal was taken from the judgment of the District Court of the First Judicial District of the County of Arapahoe to the Supreme Court of Colorado Territory, in which, at the February Term, 1875, errors were assigned, and the judgment was affirmed in that court on March 28, 1876.

To reverse that judgment is the object of the present writ of error.

The agreement set out and relied on in the plea was that "the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary." And the defendant averred that "he, relying upon the assurance of the said plaintiff that his indorsement would not be filled up so as to render him liable as indorser thereon, signed his name upon the back of said note, which without said assurance he would not have done." As the indorsement in blank, admitted by the defendant to have been made by him, without being

filled up by the plaintiff at all, rendered him liable for the payment of the note as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential, and could not, in law, result in any actionable injury; for filling up the blank indorsement in the manner in which it was done neither added to nor subtracted from the liability which the defendant assumed by merely writing his name on the back of the note.

The defendant below, however, further offered at the trial to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof under a plea of the general issue; and waiving any objection on that account, the rejection by the court below of this offer fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove, as a defence, that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

It has never been contended that such a defence, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper, acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is of the essence of the policy of the law merchant, and inheres in the very definition of negotiability. Hence, in that case, a collateral but contemporaneous written agreement between two prior parties to a bill or note would not affect its validity in the hands of the holder, more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and

determine their rights and obligations, as was decided by this court in *Davis v. Brown*, 94 U. S. 427. The question is between them alone; and is, whether the same effect will be given to such an agreement, not reduced to writing.

The ground of decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper.

Accordingly, Mr. Justice Washington, in *Susquehanna Bridge & Bank Co.* v. *Evans* (4 Wash. 480), after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said, in his charge to the jury: —

"The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was, therefore, properly admitted."

It is upon this distinction between contracts express and implied that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the Supreme Court of Pennsylvania, in *Ross* v. *Espy* (66 Pa. St. 481, 483), that "the contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement."

So in an early case in New Jersey, *Johnson* v. *Martinus* (9 N. J. L. 144), it was held by the Supreme Court of that State that parol evidence was competent to overcome the implied contract which results from a blank indorsement, on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection, or immunity.

This case, however, was expressly overruled by the same court in *Chaddock* v. *Vanness* (35 id. 517), in which it is plainly indicated that the distinction attempted to be made,

in some of the cases, between indorsements in full and those which are in blank, is untenable.

The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full.

It is spoken of by Wharton (Law of Evidence, &c., sect. 1059) as a contract *at short-hand.* The same view is taken in Daniels on Negotiable Instruments, sect. 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that, "in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him." If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it, in the relation of the parties to each other in the two cases.

The rule is tersely stated in Benjamin's Chalmer's Digest of the Law of Bills of Exchange, &c., art. 56, p. 63.

"The contracts on a bill, as interpreted by the law merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect." Citing *Abrey* v. *Crux*, 5 Law Rep. C. P. 37.

The rule as declared by Mr. Justice Washington in the case

cited was expressly rejected by this court in *Bank of the United States* v. *Dunn* (6 Pet. 51), one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement; citing the language of the court in *Renner* v. *Bank of Columbia*, 9 Wheat. 581, 587: "For there is no rule of law better settled or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary *the legal import* of a written agreement."

The authority of this case on this point has never been questioned in this court, the explanation and qualification in *Davis* v. *Brown* (*supra*) having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted because it was in writing and part of the transaction.

The case of *Bank of the United States* v. *Dunn* (*supra*) is cited as an authority upon the point in *Phillips* v. *Preston* (5 How. 278, 291), "because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports."

It is also referred to in terms and followed in *Brown* v. *Wiley*, 20 id. 442. In delivering the opinion of the court in that case Mr. Justice Grier used this language: —

"When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncer-

tain, or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See *Thompson* v. *Ketchum*, 8 Johns. 192."

The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law, as constituting the operation and effect of the contract.

In *Specht* v. *Howard* (16 Wall. 564), Mr. Justice Swayne, delivering the opinion of the court, quotes from Parsons on Notes and Bills, 501, that "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the written contract."

The same quotation forms part of the opinion in *Forsythe* v. *Kimball* (91 U. S. 291), with the addition that, in the absence of fraud, accident, or mistake, the rule is the same in equity as at law.

The same principle, upon the authority of these cases, was affirmed by this court in *Brown* v. *Spofford* (95 id. 474), and is assumed to be the law in *Cox* v. *National Bank* (100 id. 704), and *Brent's Ex'rs* v. *Bank of the Metropolis*, 1 Pet. 89.

In view of this line of decisions, the question, as it arises in this case, cannot now be considered an open one in this court.

It coincides with the rule adopted and applied in most of the States, but the cases are too numerous for citation. They will be found collected, however, in Bigelow, Bills and Notes, 168; Byles, Bills (6th Am. ed.), Sharswood's note, 157; 1 Daniel, Negotiable Instruments, sects. 80, 717 *et seq.*; 2 Wharton, Evidence, sect. 1058 *et seq.*; Benjamin's Chalmer's Digest of the Law of Bills of Exchange, art. 56, p. 63.

Of course there are many distinctions which, upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here, further than to say that

the limitations of the rule are perfectly consistent with it, and its application in this, as in other proper cases, will not be considered as encroaching upon them.

The opinion of the Supreme Court of Colorado Territory, affirming the judgment of the District Court, expressly declines to pass upon the question whether the evidence showed that the property of Webb, the maker of the note, was exhausted or not, because no exception was taken to the finding and judgment of the court. Our attention is called by counsel to a stipulation, filed in the Supreme Court of Colorado, by which the omission to insert the exception agreed to have been taken at the time, in the bill of exceptions, was intended to be cured; which, it seems, could not have come to the knowledge of that court. But the consideration of the exception does not avail the plaintiff in error. The record shows abundant evidence to sustain the finding complained of. Even if the point made were well taken, that where, under the statute of Colorado requiring a prosecution of the maker to the end of an execution, it is necessary that the execution should be kept in force for the full period given by law for its return, in order to establish due diligence, nevertheless, in the present record, there is shown, in our opinion, evidence to justify a finding in favor of the plaintiff below, even although no execution had been issued against the maker of the note. It clearly appears that it would have been unavailing on account of his insolvency. In *Wills* v. *Claflin* (92 U. S. 135), under a statute of Illinois, containing a provision identical with that in the Colorado statute, from which, indeed, the latter is said to have been copied, it was held that if the maker of the note was insolvent, so that a suit against him would be unavailing, the failure to institute it would furnish no defence to the indorser. That, indeed, is the plain language of the law itself.

We find no error in the record.

Judgment affirmed.

UNITED STATES *v.* JACKSON.

1. This court will take judicial notice that, by law, the territory of the United States is, for internal revenue purposes, divided into collection districts, with defined geographical boundaries.
2. Suit on a bond reciting that the President hath, pursuant to law, appointed A. "collector of taxes, under an act entitled 'An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,'" and conditioned that he "shall truly and faithfully execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States . . . all public moneys which may come into his hands or possession." *Held*, that the bond is binding on the parties thereto, but that the declaration is bad on demurrer, inasmuch as it does not aver A.'s appointment to the collectorship of any particular district.
3. *Semble*, that the bond with A.'s commission, or the public record thereof, would be sufficient proof of such appointment, had the fact been averred.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

The action in this case was brought by the United States against Jackson and the other defendants, on a bond in which he was principal, and they were his sureties. Judgment was rendered for the defendants on a demurrer to the declaration, which sets out the substance of the obligatory part of the bond, namely, the acknowledgment of an indebtedness to the United States in the sum of $50,000; to which it adds, there was annexed the following condition: "Whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes, under an act entitled 'An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes:'

"Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said

office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall remain and abide in full force and virtue."

The Circuit Court was of opinion that the bond was absolutely void, because it did not state for what particular collection district Jackson was collector of taxes, and for the proper discharge of the duties of which the defendants undertook to be responsible.

It is a matter of which this court will take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes, and in some States there are several of these districts, with defined geographical boundaries. A collector is appointed for each district, and his duties relate to the collection of internal revenue within it. Because, therefore, the bond did not bind the parties on its face for Jackson's performance of the duties of any particular district, the Circuit Court was of opinion that it was void.

But it does bind the signers for the faithful performance of the duties of collector of taxes by George W. Jackson, according to law, and it avers that he had been duly appointed collector of taxes under the internal revenue act. The duties for the performance of which these parties bound themselves were well defined. The person who was to perform them, and for whose default they consented to become liable, was named in the obligation, and the only matter of importance omitted was the place or district within which those duties were to be performed. He was collector for but one district. It is fairly to be presumed that the obligors knew for what district he had been appointed, since they say he had already been appointed by the President when they signed the bond.

This appointment was a matter of public record. The evidence of it was the commission of Jackson signed by the President and duly sealed. The district, therefore, for which he

was appointed was known to the obligors, and was a matter of public record, and we do not see how such a bond can be held to be void. In any issue that could arise as to the district for which Jackson was appointed, and for the duties of which they became liable, it could be made certain by the production of his commission or the record of it in the proper department.

It would not depend on any parol proof. The production of the bond and commission makes complete the obligation of the defendants. That is certain in law which can be rendered certain.

If, therefore, there had been an averment in the declaration of the district for which Jackson was appointed, we do not see why the declaration and the bond, taken together, would not have been good, when it was further averred that, in regard to the duties of that district, he had been guilty of a default covered by the terms of the bond. If to such a declaration *non est factum* or *nil debet* had been pleaded, the production of the bond and commission would have been a sufficient answer, because the commission would have shown by matter of record that Jackson had been appointed internal revenue collector for that district, and the undertaking of the defendants in his behalf would have been held to apply to his duties under that commission.

But there is no averment in the declaration anywhere that he was or had ever been appointed collector of any particular district. There is, therefore, no foundation for proof of that fact by the production of the commission or by any other evidence. On a judgment by default no such commission could be introduced, nor proof of non-performance in any district. No issue could be taken on the declaration as to his appointment or his obligation to perform the duties of any district, because there is no averment of any such obligation. The declaration affords no opportunity to render more specific the obligation of defendants by introducing the commission. It does not aver that this obligation for Jackson as revenue collector related to the duties of any particular district, so as to enable the court to apply the covenant of the defendants to those duties.

We are of opinion, therefore, that, regarding the demurrer (as we must) as referring to the declaration and to the bond set out on oyer, it was well decided that they were insufficient to sustain the action.

Judgment affirmed.

KING *v.* WORTHINGTON.

1. A cause pending on appeal in the Supreme Court of a State at the date of the passage of the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), was remanded for a rehearing, the decree below having been reversed solely upon the ground of the admission of the evidence of incompetent witnesses. The transcript was filed in the court of original jurisdiction at a term thereof which was within the time prescribed by the State statute. *Held*, that a petition for the removal of the cause to the Circuit Court of the United States filed at the same term and before such rehearing was filed in due season.
2. Where, touching the competency of witnesses, there is a conflict between the law of a State and an act of Congress, the latter must govern the courts of the United States.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Horace F. Waite for the appellants.

Mr. Henry G. Miller, *contra.*

MR. JUSTICE WOODS delivered the opinion of the court.

This was a suit in equity, brought originally in the Superior Court of Cook County, in the State of Illinois, on July 22, 1870, by George W. Worthington and John T. Avery, citizens of the State of Ohio, against Emily A. King, widow of John B. King, deceased, and Vere Bates King, his only child, a minor, and the said Emily A. King as guardian of said minor, the said defendants being citizens of the State of Illinois. During the progress of the case George W. Worthington died, and his legal representatives, who were also citizens of Ohio, were made parties complainant in his stead. The purpose of the bill was to remove a cloud from the title to certain real estate in that county, of which the original complainants alleged

themselves to be the owners in fee, by a decree setting aside and avoiding a deed therefor, made to the said John B. King in his lifetime by one Heman Scott.

The bill averred that on and prior to June 1, 1843, Scott was the owner in fee of the lands in question, to wit, the west half of the southwest quarter of section 20, township 38, range 13, and that he conveyed them by deed of that date to one Isaac Bishop.

The bill then traced the title by successive conveyances from Bishop through Porter L. Hinckley, John R. Bartholomew, Corydon Weeks, and others, to the original complainants, and averred that, long before the commencement of the suit, they, by means of said conveyances, became and still were seised in fee — the said Avery of the north, and the said Worthington of the south half — of the lands in question.

The bill further averred that on June 21, 1861, Scott executed and delivered to the said John B. King a quitclaim deed purporting to convey to him all the right and title which Scott then had in any lands in Cook County, Illinois, which by its terms included the lands above mentioned.

It was further averred that on Oct. 2, 1864, said John B. King died, leaving the defendant Emily A. King, his widow, and the defendant Vere Bates King, who was a minor, his only child, of whom the said Emily had become the duly appointed guardian, and that the deed executed to John B. King by Scott had created a cloud upon complainant's title, in consequence of which they were unable to sell or dispose of said land.

The answer of Emily A. King, in her own right and as guardian, consisted of a general denial of the allegations of the bill, excepting the allegation of the conveyance from Scott to John B. King.

Among others, the depositions of Scott, Bartholomew, Hinckley, and Weeks were taken. These witnesses severally testified to their ownership of the property in dispute, and to the execution of the deeds of conveyance charged in the bill to have been executed by them respectively, and that all of said deeds contained full covenants of warranty.

Upon final hearing a decree was made by the Superior Court

of Cook County in favor of the complainants. The defendants took the case by appeal to the Supreme Court of the State. The decree was reversed, because the testimony of Weeks, Hinckley, and Bartholomew had been received by the Superior Court against the objection of defendants.

This decision was based on a construction of the statute of Illinois, which declares: "No person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise." The exception is as follows: "No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or on his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as . . . heir . . . of any deceased person, or as guardian . . . of any such heir."

The Supreme Court held that by reason of the fact that Scott, Weeks, Hinckley, and Bartholomew had each conveyed the lands in question with covenants of warranty, they were interested in the event of the suit, and as it was defended both by the heir and his guardian, the persons above named were incompetent to testify in the case.

The opinion of the Supreme Court was filed, and its decree remanding the cause was made, Oct. 11, 1875.

Sects. 84 and 85, c. 110, of the Revised Statutes of Illinois provide, that "when a cause or proceeding is remanded by the Supreme Court or Appellate Court, upon a transcript of the order of the court remanding the same being filed in the court from which the cause or proceeding was removed, or in which the cause originated, as the case may require, and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated therein.

"If neither party shall file such transcript within two years from the time of making the final order of the Supreme Court or Appellate Court, as the case may be, reversing any judgment or proceeding, the cause shall be considered as abandoned, and no further action shall be had therein."

In this case the mandate of the Supreme Court was filed in

the Superior Court, Nov. 11, 1875, and the cause was re-docketed in the latter court, Nov. 23, 1875. The statute of Illinois (Hurd, p. 331, sect. 54) prescribes that the terms of the Superior Court of Cook County shall begin on the first Monday of every month.

On Dec. 4, 1875, the last day of the November Term, a petition and bond for the removal of the cause to the Circuit Court of the United States for the Northern District of Illinois were filed in the Superior Court by the complainants. The petition alleged that the then current term of the court was the first term at which said cause could have been tried since the date of docketing said cause in the Superior Court, as aforesaid, and since the passage of the act of Congress under which the petition was filed.

On December 14, against the objection of defendants, an order was made for the removal of the cause. The record was filed in the United States Circuit Court, Dec. 20, 1875.

Upon the final hearing of the case in the Circuit Court, among others, the depositions of Scott, Weeks, Hinckley, and Bartholomew, who had been declared by the Supreme Court incompetent witnesses under the State law above recited, were admitted in evidence, and the Circuit Court made a final decree in favor of complainants, in accordance with the prayer of their bill.

The act of Congress regulating the competency of witnesses, by virtue of which the Circuit Court admitted the depositions of the persons above named, is as follows: —

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." Rev. Stat., sect. 858.

The defendants in the Circuit Court have appealed from the decree of that court, and as appellants in this court have assigned the following errors: —

First, That the cause was not removable under the act of Congress. The petition was not filed at the term at which said cause could be first tried, and before the trial thereof, and the petition is insufficient for its removal.

Second, That the court erred in deciding that Heman Scott, Corydon Weeks, John R. Bartholomew, and Robert Hinckley were competent to testify in this case; also, in deciding that the decision of the Supreme Court of the State of Illinois holding them incompetent was not *res judicata;* also, in admitting improper evidence on the hearing.

The act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), under which the appellees claim that the cause was removed to the Federal court, declares that the petition for removal must be filed "before or at the term at which said cause could be first tried and before the trial thereof."

At the date of the passage of the act this suit was pending in the Supreme Court of Illinois. The decree was subsequently reversed and the cause remanded. This court has construed the clause of the act of 1875, just quoted, to allow the removal of a cause pending at the date of the passage of the act, if the application therefor was made before trial and at the term of the court, after the passage of the act, at which the cause could be first tried (*Removal Cases*, 100 U. S. 457); in other words, that the fact that the first term of the court in which the cause could have been first tried had already passed when the act went into effect, was not of itself an obstacle to the removal.

In the case just cited, it was further held that the fact that a final decree upon the default of defendants had been entered in the cause before the passage of the act of 1875, did not prevent a removal of the cause under the act, after such decree had been set aside and a rehearing granted.

In this case the parties complainant and defendant were citizens of different States. The petition and bond for removal were in due form, and the bond was sufficient.

The only ground, therefore, on which it can be urged that

the attempt to remove the cause to the Circuit Court was unwarranted by law, and, therefore, ineffectual, is that the petition therefor was not filed before or at the term, after the passage of the act of 1875, at which the cause could be first tried.

The appellee asserts that the decision of the Supreme Court of Illinois, reversing the decree of the Superior Court, having been made on October 11, while the October Term of the Superior Court was current, the cause might have been re-docketed and tried during that term of the Superior Court, and that the re-docketing of the cause at the following November Term, and the filing of the petition for its removal during that term, came too late.

The answer to this position is obvious. The cause could not have been tried in the Superior Court until the transcript of the order of the Supreme Court remanding it had been filed therein.

Under the statute of Illinois both parties were allowed two years within which to file the transcript. Either party might file it, and no laches or default could be charged against either, if it were filed within two years. It follows that when the appellees delayed the filing of the transcript from October 11 until November 23 they were exercising a privilege which the law gave them, and lost none of their rights thereby.

Therefore, where the transcript of the Supreme Court was filed within two years after the order remanding the case had been made, a petition for removal filed at the same term must be held to have been filed at the term at which the cause could have been first tried, and to have been filed in due season.

If the decision of the State Supreme Court had finally disposed of the case, there could, of course, have been no removal of the cause to the Federal court after such decision.

But according to the practice and jurisprudence of the State of Illinois, where the decision of the Supreme Court, reversing and remanding a cause in equity, does not involve the merits, the case, upon the filing of the transcript in the court below, stands for rehearing in that court. *Chickering* v. *Failes*, 26 Ill. 508; s. c. 29 id. 294; *Wadhams* v. *Gay*, 73 id. 415; s. c. 83 id. 250; *Pettilon* v. *Noble*, 7 Biss. 450.

This cause was reversed by the State Supreme Court solely on the ground of the error of the Superior Court in admitting incompetent evidence. When, therefore, the cause was remanded, it stood for rehearing as soon as it was re-docketed in the Superior Court.

We are of opinion, therefore, that the case was properly removed from the Superior Court of Cook County to the Circuit Court of the United States.

The next ground of error assigned is that the Circuit Court admitted in evidence the depositions of Scott, Weeks, Bartholomew, and Hinckley.

It is perfectly clear that, under the act of Congress (Rev. Stat., sect. 858), the persons named were competent witnesses in that court. This point has been expressly ruled by this court in the case of *Potter* v. *National Bank* (102 U. S. 163), brought up on error from the Northern District of Illinois. It was also held, in the same case, that, where there was a conflict between the act of Congress and the law of the State in regard to the competency of witnesses, the United States court was bound to follow the act of Congress. The question is, therefore, reduced to this: Does the fact, that while the case was pending in the State court these witnesses were held by that court to be incompetent under the State law, preclude them from testifying in the case after its removal to the United States court? We think this question must be answered in the negative.

The Federal court was bound to administer the law of evidence as prescribed by act of Congress, unless what had transpired in the State court presented an insuperable obstacle to that course. This the appellants claim was the fact. They say that the transfer of a case from the State to a Federal court does not vacate what has been done in the State court previously to removal; that what has been decided in the State court is *res judicata* and cannot be re-examined. In support of this position *Duncan* v. *Gegan* (101 U. S. 810) and other cases are cited. The law as settled by this court is correctly stated by appellants.

But the rulings of the Circuit Court in the progress of the cause after its removal did not reverse or vacate anything which

had previously been adjudicated by the State court. The decision of the latter court was that, under the State law, certain witnesses were incompetent in the State court. The Federal court decided that, under the laws of the United States, the same witnesses were competent when offered in a United States court. Here is no conflict of opinion, and no unsettling of any matter which had been adjudged by the State court. The Federal court was bound to deal with the case according to the rules of practice and evidence prescribed by the acts of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal court give him.

In this instance the court below followed the law of evidence as prescribed by Congress. In doing so it did not reverse any ruling of the State court, and, we think, committed no error.

No other evidence admitted by the Circuit Court is complained of by the appellants as incompetent.

The counsel of both parties have discussed in their briefs the question whether the evidence set out in the record is sufficient to support the decree of the Circuit Court. No error has been assigned on the ground that the testimony was insufficient. It is, therefore, unnecessary to discuss this point. We may remark, however, that in our opinion the evidence amply justifies the decree.

There is no error in the record.

Decree affirmed.

DRIESBACH *v.* NATIONAL BANK.

STARK *v.* NATIONAL BANK.

1. Usurious interest *paid* a national bank on renewing a series of notes cannot, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt.
2. *Barnet* v. *National Bank* (98 U. S. 555) reaffirmed.

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

The first of these actions was brought by the Second National Bank of Wilkes Barre, Pennsylvania, against Driesbach, upon two promissory notes, of which the following are copies: —

"$8,000.] WILKES BARRE, PA., Aug. 11, 1877.

"Ninety days after date I promise to pay to the order of J. B. Stark eight thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation. Value received.

"D. G. DRIESBACH.

(On the back of which is indorsed:) "J. B. STARK, D. G. DRIESBACH."

"$5,000.] WILKES BARRE, PA., Sept. 6, 1877.

"Ninety days after date I promise to pay to the order of J. B. Stark five thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation. Value received.

"D. G. DRIESBACH.

(On the back of which is indorsed:) "J. B. STARK, D. G. DRIESBACH."

The second action is by the bank against Stark, the indorser.

On the 20th of April, 1871, a note for $5,000 was, by the bank, discounted for Driesbach, and it was renewed every ninety days thereafter until the 24th of October, 1872, when $1,000 having been paid, it was renewed for $4,000. Jan. 25, 1873, $1,000 was paid, and the note renewed for $3,000. Subsequently it was renewed every ninety days for $3,000 until May 12, 1877, when it was again renewed.

The bank discounted, Sept. 12, 1872, for Driesbach another note, indorsed by Stark, for $5,000, at ninety days. This note was in like manner renewed from time to time until July 11, 1877, when it was paid by the check of one Nesbit, who discounted a note of Driesbach for $5,000, at thirty days. This note matured at the same time as the $3,000 note of May 12, and on the 11th of August the two notes were consolidated into the one at ninety days, for $8,000, discounted by the bank, and now in suit.

There was also another note of Driesbach, of Aug. 16, 1871, for $5,000, at ninety days, indorsed by Stark, which the bank discounted, and which was also renewed every ninety days for the same amount, ending in the note of Sept. 6, 1877, for $5,000, at ninety days, the second note in suit.

The original loans were made under an agreement for a line of discount upon renewable notes. Driesbach was to pay and did pay a portion of the time interest at the rate of ten per cent per annum, a portion of the time at nine, and a portion of the time at eight.

The amount charged on the first discount of the three several notes was deducted from their face, and the net proceeds were passed to the credit of the maker, but the interest on the subsequent notes was paid when they were renewed.

The defendants pleaded the general issue, and a special plea, that the interest charged by and paid to the bank was usurious, and received in violation of sects. 5197 and 5198 of the Revised Statutes. They therefore claimed the right to set off against the face of the notes sued on the whole amount of interest so paid.

There was a judgment in each case for the plaintiff, whereupon the defendants sued out writs of error.

Mr. James O. Parker for the plaintiffs in error.
Mr. W. H. Armstrong, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The object of the plaintiffs in error in these suits is to have usurious interest *paid* a national bank on renewing a series of notes, of which those now in suit are the last, applied in satis-

faction of the principal of the debt. The claim is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been *paid* as interest to the discharge of principal. This we held in *Barnet* v. *National Bank* (98 U. S. 555) could not be done; and in *First National Bank of Clarion* v. *Gruber* (8 Weekly Notes of Cases, 119), and *National Bank of Fayette County* v. *Dushane* (9 id. 472), the Supreme Court of Pennsylvania followed that case, overruling its former decisions on the same question in *Lucas* v. *Government National Bank* (78 Pa. St. 228) and *Oberholt* v. *National Bank of Mt. Pleasant*, 82 id. 490. If, therefore, we reverse the judgments for the specific errors now complained of, it would serve no useful purpose, for on the facts admitted the same general result must follow another trial. Without, therefore, considering at all the question on which the cases seem to have turned below, the judgments are

Affirmed.

NATIONAL BANK *v.* INSURANCE COMPANY.

1. Although the relation between a bank and its depositor is that merely of debtor and creditor, the money which he deposits, if held by him in a fiduciary capacity, does not change its character by being placed to his credit in his bank account.
2. The bank contracts that it will pay the money on his checks, and, when they are drawn in proper form, it is bound to presume, in case the account is kept with him as a trustee, or as acting in some other fiduciary character, that he is in the course of lawfully performing his duty, and to honor them accordingly; but when against such an account it seeks to assert its lien for an obligation which it knows was incurred for his private benefit, it must be held as having notice that the fund is not his individual property, if it is shown to consist, in whole or in part, of money which he held in a trust relation.
3. As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property.

4. A banker's lien on the securities and money deposited in the usual course of business, for advances which are supposed to be made upon their credit, ordinarily attaches not only against the customer, but against the unknown equities of all others in interest, unless it be modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion; but it cannot prevail against the equity of the beneficial owner, of which the banker has either actual or constructive notice.
5. When a bank account was opened in the name of a depositor, as general agent, and it was known to the bank that he was the agent of an insurance company; that conducting its agency was his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums on policies collected by him for the company, and of making payment to it by checks, — the bank is chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use. The company may enforce, by bill in equity, its beneficial ownership therein against the bank, claiming a lien thereon for a debt due to it, which he contracted for his individual use.
6. A national bank, in voluntary liquidation under sect. 5220 of the Revised Statutes, is not thereby dissolved as a corporation, but may sue and be sued, by name, for the purpose of winding up its business; and it is no defence to a suit upon a disputed claim that, under sect. 2 of the act of June 30, 1876, c. 156 (19 Stat. 63), the plaintiff has also filed a creditor's bill to enforce the individual liability of the shareholders.
7. A plea in equity may be disregarded, if it alleges mere conclusions of law, or lacks the affidavit and certificate required by the thirty-first equity rule.
8. When an equity cause was heard upon bill, answer, and proofs, the want of a formal replication cannot, on appeal, be assigned for error.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The Connecticut Mutual Life Insurance Company of Hartford, in the year 1864, appointed A. H. Dillon, Jr., its general agent for the territory consisting of the States of Maryland, Delaware, West Virginia, and the District of Columbia. He opened an office at No. 8 South Street, Baltimore, conspicuously designated by signs as his place of business as general agent of the Connecticut Mutual Life Insurance Company. It was his duty, among others, to collect and receive premiums on policies issued by the company, from persons residing within his territory, and remit the same to the company at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank to the order of the secretary

of the company. To this end he at first opened an account with John S. Gittings & Co., transferred afterwards to the Chesapeake Bank, and on April 1, 1871, to the appellant, a national bank, then recently organized, whose banking-house was across the street from his office. The account was designated on its books as follows: "Dr. Central National Bank in account with A. H. Dillon, Jr., gen'l ag't. Cr." To the credit of this account he deposited from time to time premiums collected for the insurance company, and remitted twice a month his checks, signed by him as general agent, and payable to the order of Jacob L. Greene, secretary of the appellee. When the premiums were paid by the checks of others, they were indorsed by him as general agent, and deposited to the credit of this account. In such instances an indorsement in this form was required by the bank. Dillon also deposited to the credit of this account, from time to time, various amounts of money received by him from other sources than from premiums belonging to the appellee, and drew upon this account checks for money applied and paid to his own use. The aggregate of the deposits made, as shown in this account, from the beginning till it was closed, amount to $470,753.05. There were drawn against it, in all, four hundred and eleven checks, of which sixty-eight were on their face payable to the order of Greene as secretary of the appellee, representing, however, much the larger part of the gross sum of the deposits.

On June 12, 1874, this account was finally closed, with a balance, as between deposits and checks, of $11,000.86. At that date Dillon owed an amount larger than this to the insurance company, and the proof is clear that the whole balance then shown by the account, as above stated, was the proceeds of collections of premiums made by him as its agent.

His current deposits of premiums in this account included his own commissions as agent.

Before opening this account with the Central National Bank, on March 9, 1871, Dillon had opened another account with it, in the name of his wife, Mrs. A. P. Dillon. This account was kept open until May 1, 1873, which is the date

of the last entries, when it was balanced and closed. The deposits to the credit of this account were made by Dillon, and the checks were drawn by him in his wife's name. All the transactions represented in it were for his individual account. On both these accounts Dillon was, by agreement with the bank, allowed interest, which he collected for his individual use.

On March 14, 1872, Dillon was in distress for money to make good his margins on some speculations in stock, and applied to O'Connor, the president of the bank, for a loan. He explained the nature, extent, and cause of his necessity to O'Connor, who, indeed, was already aware that he was in the practice of stock speculation, having been interested with him in some ventures of that character. O'Connor testifies that he declined making the loan without security, when Dillon proposed his wife as security for the amount required, not to exceed $12,000, to be drawn upon checks in her name, which, if not made good in a few days, were to be taken up by a note signed by her, assuring O'Connor that certain real estate owned by her where they resided in Baltimore, with its furniture, was worth at least $15,000 or $20,000. He also urged, says O'Connor, that he kept a valuable account with the bank, and as he had never asked before for any loan, he thought he was entitled to it. The reference, doubtless, was to his agency account.

The loan was made, the money being paid by the bank on checks drawn in the name of Alice P. Dillon, to the amount of $13,000, on March 14, 15, and 16, 1872. These checks were debited to the bank account in her name, and constituted an overdraft of $12,067.14. On April 2, 1872, the bank discounted Mrs. Dillon's note for $12,000, and carried the proceeds to the credit of this account, in order to change the form of the debt. This note was renewed from time to time, the interest being paid in some instances by Dillon's check as general agent, charged to the account kept by him in that name. It was reduced at one time by a payment of $2,000, paid in money. It was then carried in the same way until Dec. 11, 1873, when the note of Mrs. Dillon for $10,000 was given, dated Nov. 29, 1873, at six months, falling due June 1, 1874. This note was

signed by Dillon and his wife, in their own handwriting, both as makers and indorsers. The discount upon it, and the interest accrued on the prior note, overdue for some time, of which it was the renewal, making in all $333.34, was paid to the bank by Dillon's check as general agent. The account in the name of Mrs. Dillon was balanced on May 1, 1873, by two entries of $12,000 each, representing the debt as it then stood; and that account was closed. The note thereafter appeared only in the discount ledger, until it was charged up, as hereafter stated. It was expressed to be payable at the Central National Bank of Baltimore. The same day this note was given, Nov. 29, 1873, an agreement was made in writing between the bank, by resolution of the directors, and Dillon and his wife, "that in consideration of Alice P. Dillon being a stockholder in this bank, and of A. H. Dillon, Jr., being a customer of the bank, their note for $10,000, dated November 29th, 1873, at six months, be discounted at 6 per c. per annum, provided only that it be agreed in writing between the makers and indorsers of said note and the bank, that at the maturity of the note $5,000 must be paid, and a new note at 6 months, to be discounted at 6 per c., which at its maturity must be paid in full, being in full payment of the loan."

In addition to these two accounts there was a third, entitled on the books of the bank, "A. H. Dillon, Jr.," spoken of in the testimony as his individual account. The first entry is dated Oct. 15, 1873, the last, Dec. 11, 1873. There are eight items on each side, amounting to $28,337.50. In the first three items it is testified that Dillon had no interest at all. They represent transactions made by him for the bank itself. The last item in the account is $10,000, being proceeds of his note discounted, which were used to take up a prior one, then matured.

On June 1, 1874, the note given by Dillon and his wife for $10,000, dated Nov. 29, 1873, at six months, became due and was not paid. By order of the bank it was that day charged to Dillon in his account as general agent. In ignorance of that fact, he continued to make deposits in that account and draw checks upon it till June 12, 1874, when it was closed, showing

a credit balance at that date, if the note of $10,000 was not properly chargeable, of $11,000.86.

On June 10, 1874, Dillon drew his check as general agent on the bank for $8,000 to the order of Greene, the secretary of the insurance company, and remitted it to him at Hartford. On June 13 it was presented to the bank for payment, and payment refused, on the ground that there were not funds to the credit of the drawee sufficient to pay it.

In the settlement of his agency accounts with the company for May and June, 1874, he was allowed a credit for the amount of this balance in the Central Bank, $11,000.86, and paid in addition, in full of his account to June 30, $4,550.66.

On June 11 the directors of the bank, by resolution, recite the agreement made in respect to the $10,000 note, on Nov. 29, 1873, when it was discounted; that it had not been complied with; that the note was made payable at the bank; and declare that "this board approve of the act of the acting cashier in charging said note in full to the account and funds of A. H. Dillon, Jr., general agent," &c.

On July 18, 1874, the insurance company filed a bill in equity in the Circuit Court of Baltimore City against the bank to recover the balance, which it alleged remained in the account of A. H. Dillon, Jr., general agent, $11,000.86, claiming it to be a fund, received by him in his fiduciary character, as its agent, which they had a right to follow and reclaim as against the bank.

To this bill the bank appeared and answered, denying its equity.

The insurance company filed an amended bill on March 4, 1875, in which it repeated the allegations of the original bill, and further averred that the defendant bank had taken proceedings under the National Bank Act to wind up its business and cease to act as a national bank in the city of Baltimore, and that if it be permitted to do so, distributing its assets among its stockholders, the complainant will have no remedy except by a multiplicity of suits against individual stockholders, many of whom are not within the jurisdiction. It therefore prays, in addition to an account and a declaration that the

fund in question is a trust fund, of which the complainant is beneficial owner, that an injunction may be granted restraining the bank from paying to its stockholders its assets without retaining a sufficient amount to satisfy the complainant's demand.

To the amended bill the defendant filed what are designated as pleas, as follows: —

1. That the plaintiff is not in any sense a creditor of the defendant.

2. That there never was nor is any privity between the plaintiff and the defendant as to the various matters alleged in the bill.

3. That the court had no jurisdiction as to the matters alleged, the remedy, if any, being complete and adequate at law.

And afterwards an additional plea: —

4. That under the provisions of the acts of Congress, in reference to national banks, it is exempted from the process of injunction as prayed for.

By the amended bill A. H. Dillon, Jr., was made a party defendant. He appeared and filed his answer to the original and amended bill; but, having been lost or mislaid, it is not contained in the transcript of the record.

Subsequently, on April 10, 1877, the cause was removed from the State court to the Circuit Court of the United States, on the petition of the defendant, the Central National Bank.

The bank, on May 23, 1878, filed a motion to dismiss the bill, on the grounds: —

1. That the bank, by a vote of its shareholders, owning two thirds of its stock, taken July 15, 1874, had gone into liquidation, in pursuance of sects. 5220, 5221, and 5222 of the Revised Statutes, and had thereby become dissolved.

2. And that the complainant, on June 8, 1878, had filed in the Circuit Court of the United States its bill of complaint, by virtue of sect. 2, c. 156, of an act of Congress approved June 30, 1876, entitled "An Act authorizing the appointment of receivers of national banks, and for other purposes," praying process against said bank and against the persons who

were shareholders thereof at the time the same went into voluntary liquidation, and seeking the enforcement of the same demand sought to be enforced in this case, which is still pending.

This motion was overruled. The cause having been set down for hearing, the complainant moved for leave to file a general replication to the original answer, *nunc pro tunc*, and also to file a replication to defendant's first plea, which motions were granted; and to deny the legal sufficiency of the defendant's 2d and 3d pleas, setting the said two pleas for argument, which was overruled.

The motion to dismiss the bill, on the ground that the bank had gone into liquidation and was thereby dissolved, was renewed on June 10, 1878, with the additional averment, that in the mean time all its property and assets had been distributed among its shareholders, and that the bank was wholly and finally closed, and had ceased to have a corporate existence. This motion was overruled as having been filed after the cause had been argued and submitted, and after the court had orally pronounced its opinion.

And on the same day a decree was passed reciting that the cause standing ready for hearing, and having been argued, and submitted upon the bill, answer, pleadings, and other proceedings and evidence in the cause, and decreeing payment by the bank to the complainant of the amount of the fund claimed, with interest.

From this decree the bank prosecutes this appeal.

Mr. Arthur W. Machen for the appellant.
Mr. John Carson, contra.

MR. JUSTICE MATTHEWS, after making the foregoing statement of facts, delivered the opinion of the court.

The contention of the appellant, in opposition to the decree below, upon the merits, is that the account of A. H. Dillon, Jr., general agent, with the bank was an individual account with him as a depositor, which created the relation of debtor and creditor between them, and to which no other party was or could be privy; that the style in which it was kept, of general agent, was merely a *descriptio personæ*, and furnished no

indication that the money deposited belonged to the depositor in any fiduciary capacity; that it described merely the business in which he was engaged, as that of a general agency, for whomsoever might employ him; that in point of fact the account embraced deposits from various sources, and was used as a medium for payments of every description, according to the will of the depositor; that the bank had no notice of any equitable claim of the complainant, nor of the facts on which its claim rests; that, consequently, it had the right to treat the account as a dealing with Dillon individually, in which, so far as the bank was concerned, no one else had any interest, legally or equitably, and subject to its lien as a banker, for any overdue obligation of the depositor.

It is claimed further, in support of the bank's position, that the discount of the note afterwards charged to this account was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. There was a considerable balance to the credit of this account when the original debt was contracted, and at each time when it was renewed; but at no time does it appear that the suggestion was made that it should be applied, in whole or in part, to pay or reduce the indebtedness. The debt was first charged in the account kept in the name of Mrs. Dillon, and never appeared in the other, till it was finally charged up for payment. In the original conversation that resulted in the agreement for the loan, O'Connor, the president of the bank, demanded security, and was satisfied with the responsibility of Mrs. Dillon, as the supposed owner of their residence in Baltimore, and it was not until after O'Connor learned that this had been conveyed to another that he conceived the idea of charging the note, when it should become due, if it remained unpaid, to the account of Dillon, as general agent. The existence of this account as a profitable one to the bank was alleged as a reason by Dillon why he should have the accommodation; but it was not pledged for the payment of the loan, either in express terms, or by any acts or conduct from which such an intention can be inferred. And no such claim is made by the directors of the bank, either in their resolution of Nov. 29,

1873, authorizing the discount of the last six-months note, or that of June 11, 1874, justifying the act of the cashier in finally charging it up to the account of Dillon, as general agent.

We find it also to be fully proven that the bank knew that Dillon was the agent for the insurance company; that it was his business and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account in his name as general agent was opened in that way to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted by checks on that account, and that they constituted much the larger part of the fund which entered into it.

It will be observed that the question arising here is not what the rights of the parties would be if the note had been taken up by Dillon's check upon that account, the bank having no knowledge of its character, except what might be inferred from the use of the words "general agent" at its head. Here the attempt is made, with the actual knowledge which we find imputable to the bank, and without Dillon's assent, to pay itself his overdue note out of a fund for which, as agent of the insurance company, he was bound to account to it. In the case of *Duncan* v. *Jaudon* (15 Wall. 165), this court decided that a banker lending money to a person, for his private use, on the security of stocks, the certificates of which showed that he held them as trustee for another, was chargeable, as a party to the breach of trust, for the value of the trust property converted, and cited with approbation the similar decision in *Shaw* v. *Spencer* (100 Mass. 382), where the certificates were in the name of "A. B., trustee," without naming a *cestui que trust*. In that case it was held that the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril.

A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor *as trustee*, differs from other trust funds which are permanently invested in the name of trustees for the sake of being

held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

In such circumstances it is merely an application of the principle of set-off, and is illustrated by the case of *Bailey* v. *Finch*, Law Rep. 7 Q. B. 34. There the plaintiff, as trustee of a bankrupt banking firm, sought to recover a balance of a banking account which had been overdrawn. The defendant sought to set off a balance due to him as executor of A., in which name he had another account, and proved that as residuary legatee he was beneficially entitled to this balance, the legatees being otherwise satisfied. It was held that the effect of the account being in the name of the executor was to affect the bank with notice, if there were any equities attaching to the fund, but that under the circumstances there were no such equities as to prevent the defendant from treating the balance as a fund to which he was beneficially as well as legally entitled, and that consequently he was entitled to set it against the plaintiff's claim. Cockburn, C. J., said: "There can be no doubt that in point of law the estate and effects of the deceased testatrix passed to the defendant as executor. And although it may be for his convenience to open an account in his own name as executor instead of in his own name as private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it were one in which

their customer, the defendant, were beneficially interested, absolutely without reference to any trust or beneficial interest to which it was subject." In the same case, Blackburn, J., said, that opening the account as executor operated "as a notice to them, as a statement to the bank — 'This account which I am opening is not my own unlimited property, but it is money which belongs to the estate which I am administering as executor; consequently there may be persons who have equitable claims upon it.' The bank would have been bound by any equity which did exist, of which they had notice at the time the bank became bankrupt."

In the case of *Pannell* v. *Hurley* (2 Col. C. C. 241), the depositor, having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker. The Vice-Chancellor, Knight Bruce, put the case thus: —

"Money is due from A. to B., in trust for C. B. is indebted to A. on his own account. A., with knowledge of the trust, concurs with B. in setting one debt against the other, which is done without C.'s consent. Can it be a question in equity whether such a transaction stand?"

In *Bodenham* v. *Hoskyns* (2 De G., M. & G. 903), the principle was stated to be one, acted upon daily by courts of equity, "according to which a person who knows another to have in his hands or under his control moneys belonging to a third person, cannot deal with those moneys for his own private benefit when the effect of that transaction is the commission of a fraud upon the owner."

In the case of *Ex parte Kingston*, *In re Gross* (Law Rep. 6 Ch. App. 632), a county treasurer had two bank accounts, one headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood that he had been in the habit

of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrates could recover the balance standing to the credit of the police account. Sir W. M. James, L. J., said: "In my mind this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on cheques drawn by the customers; and if a banker receives from a customer holding a trust account a cheque drawn on that account, he is not in general bound to inquire whether that cheque was properly drawn. Here the customer has drawn no cheque, and the bankers are seeking to set off the balance on his private account against the balance in his favor on what they knew to be a trust account."

It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by this court in *National Bank* v. *Insurance Company*, 103 U. S. 783; and, conversely, for the balance due from the bank, no action at law upon the account could be maintained by the insurance company.

But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, To whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

In the case of *Pennell* v. *Deffell* (4 De G., M. & G. 372, 388), Lord Justice Turner said: "It is, I apprehend, an un-

doubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." In the same case, Lord Justice Knight Bruce said (p. 383): "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other." He added (p. 384): "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own."

Vice-Chancellor Sir W. Page Wood, in *Frith* v. *Cartland* (2 Hem. & M. 417, 420), said that *Pennell* v. *Deffell* rested upon and illustrated two established doctrines. One was that "so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust;" the second is, "that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."

The case of *Pennell* v. *Deffell* (*supra*) was the subject of comment by Fry, J., in *In re West of England & South Wales District Bank, Ex parte Dale & Co.*, 11 Ch. D. 772. Strongly approving the decision in principle, he felt bound nevertheless, by what he considered the weight of authority, not to apply it, in the circumstances of the case before him, where there had been a mingling of trust money with individual money. He

said, however: "Does it make any difference that, instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own."

The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case of *Knatchbull* v. *Hallett*, *In re Hallett's Estate*, 13 Ch. D. 696. It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in *Ex parte Dale & Co.*, *supra*. It was also held that the rule in *Clayton's Case* (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular *Pennell* v. *Deffell* was not followed. The Master of the Rolls, Sir George Jessel, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of Lord Ellenborough's state-

ment in *Taylor* v. *Plumer* (3 M. & S. 562), that "it makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman* (Willes, 400), or into other merchandise, as in *Whitecomb* v. *Jacob* (1 Salk. 161); for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." But he dissents from the application of the rule made by Lord Ellenborough, when the latter added, "which is the case when the subject is turned into money and confounded in a general mass of the same description;" for equity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no ear-mark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of *Birt* v. *Burt*, reported in a note to *Ex parte Dale & Co.*, 11 Ch. D. 773.

The principle is illustrated by many cases in this country. In *Farmers' & Mechanics' National Bank* v. *King* (57 Pa. St. 202), a collector of rents deposited moneys of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership was given by the principal. It was held that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could. The law of the case was stated by Judge Strong in the following language: "It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability extinguished, in the absence of interference

by his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to the agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor."

The same doctrine was strongly maintained by the New York Court of Appeals in the case of *Van Alen* v. *American National Bank*, 52 N. Y. 1. In that case it was decided that when an agent deposits in a bank to his own account the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In the course of the opinion, Church, C. J., said: "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff; but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court. *Oliver* v. *Piatt*, 3 How. 333; *May* v. *LeClaire*, 11 Wall. 217; *Duncan* v. *Jaudon*, 15 id. 165; *Bayne* v. *United States*, 93 U. S. 642; *United States* v. *State Bank*, 96 id. 30.

The relation of Dillon to the insurance company was one of confidence and trust. He was its agent for the collection of premiums, which belonged to it no less when in his hands than

before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the company. *Foley* v. *Hill*, 2 H. of L. Cas. 28. In a direct suit between them, *Dillon* v. *Connecticut Mutual Life Insurance Co.* (44 Md. 386), it was so expressly ruled, the Maryland Court of Appeals saying: "Dillon not only held the fiduciary relation to the company of its agent, but was acting in respect to this and all the money he collected while such agent, under specific directions as to what he should do with it, directions which the company had the right, for its own protection and that of its policy-holders, to have specifically performed. . . . He must, we think, be regarded and treated as a trustee, and the fund thus in his hands must be considered as so far impressed with a trust as to give a court of equity jurisdiction of the case on that ground, if on no other."

Evidently the bank has no better right than Dillon, unless it can obtain it through its banker's lien. Ordinarily that attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive.

In the present case, in addition to the circumstance that the account was opened and kept by Dillon in his name as general agent, and all the presumptions properly arising upon it, we have found that other facts proven on the hearing justify and require the conclusion that the bank had full knowledge of the sources of the deposits made by Dillon in this account, and of his duty to remit and account for them as agent of the insurance company. It is, consequently, chargeable with notice of the equities of the appellee.

In our opinion the equity of the case, upon the merits, was

manifestly with the appellee. But the appellant has assigned other errors upon the decree which remain to be considered.

It is claimed that the suit while in the Circuit Court abated by reason of the dissolution of the defendant below as a corporate body.

The Central National Bank was organized Jan. 16, 1871, under the act of June 3, 1864, c. 106 (13 Stat. 99), and the amendments thereto. Its articles of association provided that "this association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the act."

On July 15, 1874, three days before the complainant's bill was filed, at a meeting of the stockholders of the bank held pursuant to law, "it was voted by the stockholders of said association owning more than two-thirds of its stock, that said association go into liquidation and be closed."

It is certified by the Comptroller of the Currency "that the Central National Bank of Baltimore went into voluntary liquidation on July 15, 1874, under sections 5220 and 5221 of the Revised Statutes of the United States, and on Jan. 8, 1875, deposited legal-tender notes with the treasurer of the United States for the full amount of its outstanding circulation, as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department."

It further appears that the bank ceased to do any new banking business after resolving to go into liquidation; paid its depositors and other creditors, so far as their claims were admitted; reduced its assets to cash, and distributed the money among the shareholders, paying them back their capital in full with an accumulation of two per cent premium. The bank's lease of its banking-house expired March 1, 1875, when its doors were closed, its clerks discharged, and afterwards its furniture removed and disposed of and its signs taken down.

On Feb. 1, 1875, a special authority was issued by the board of directors, authorizing the president and acting cashier to act for and do all legal acts that might become necessary in the liquidation of the business of the bank.

It is claimed that these facts show a dissolution of the corporation.

It is provided by sect. 5136 of the Revised Statutes that every national bank, duly incorporated, shall "have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law."

By sect. 5220 it is also provided that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Sect. 5221 requires that whenever a vote is taken to go into liquidation, notice of the fact shall be given to the Comptroller of the Currency, and publication made in newspapers, that the association is closing up its affairs, and notifying its creditors to present their claims for payment.

Six months thereafter is given by sect. 5222, in which the association is required to deposit with the treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation.

Sect. 5224 further provides that when that deposit has been made, the bonds deposited to secure payment of its notes shall be reassigned to it. "And thereafter the association and its shareholders shall stand discharged from all liabilities upon its circulating notes, and their notes shall be redeemed at the treasury of the United States."

In connection with the provision of the articles of association of the Central National Bank, already noticed, these are all the provisions of law that are supposed to affect the question.

It is to be observed that the sections under which the proceedings took place which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is

used here as a defence. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for is to pay the debts of the corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business.

In the case of *Bank of Bethel* v. *Pahquioque Bank* (14 Wall. 383), the same question was made in reference to a national bank which, having become insolvent, by a refusal to pay its circulating notes, was put into liquidation by the Comptroller of the Currency, by the appointment of a receiver under other provisions of the bank act. It was there claimed, for the purpose of defeating a suit brought against the bank by name, that the appointment of the receiver, who had refused to admit and pay the plaintiff's claim, was a dissolution of the corporation. Mr. Justice Clifford, delivering the opinion of the court, recited the provisions of the law upon the subject, and said:

"None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives." p. 398.

"Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly, if not entirely, upon the construction of the act of Congress; and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs, under the provisions of the act which authorized its formation." p. 400.

In that case it was argued, as in this, that as the only constitutional warrant for the existence of a national bank was its connection with the government as a fiscal agent, the severance of that connection *ipso facto* deprived it of vitality. The same argument would render it incapable of returning to its stockholders their capital and accumulated profits. If it was a reasonable incident to its living that it should contract debts, it is equally a reasonable incident to its dissolution that it should pay them. We see no constitutional impediment that prevents it.

The same conclusion was reached by the Court of Appeals of Maryland in the case of *Ordway* v. *Central National Bank*, 47 Md. 217.

The second section of the act of June 30, 1876, c. 156, authorizing the appointment of receivers of national banks, and for other purposes (19 Stat. 63), provides that when any national banking association shall have gone into liquidation under the provisions of sect. 5220 of the Revised Statutes, the individual liability of the stockholders, provided for by sect. 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in

any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

It appears that the appellee filed, Jan. 8, 1878, in the Circuit Court of the United States for the District of Maryland, its bill of complaint against the appellant and the persons who were shareholders in the bank at the time it resolved to go into liquidation, under the provisions of that section.

It is urged that the act of 1876 is itself evidence that the bank was dissolved as a corporation by the proceedings in liquidation, and that the pendency of the bill authorized by it was a bar to any further proceeding in the present suit.

We see nothing in the act inconsistent with the continued existence of the bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have in the mean time been otherwise applied or shown to have been insufficient. It is a cumulative remedy and against other persons, and cannot be considered as an objection to the rendition of the present decree.

It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the thirty-eighth equity rule; but the pleas in this case were irregularly filed and defective, under the thirty-first rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account. Besides, the second and third pleas were such only in form, as they merely alleged matters of law and not of fact.

"The office of a plea," said Lord Eldon, in *Rowe* v. *Teed* (15 Ves. Jr. 372), "generally, is not to deny the equity, but to bring forward a fact which, if true, displaces it." The first plea is open to the same objection; for, although it appears to negative the averment of a matter of fact essential to the complainant's case, — that he was a creditor of the defendant, — yet really it merely denies the conclusion of law, to be drawn from

the whole of the case as stated in the bill. Every matter, therefore, covered by the pleas was necessarily embraced in the hearing upon the bill, answer, and proofs. There was no issue tendered on matter of fact that was left undecided, and no matter of law affecting the merits that was not adjudged.

It is also assigned for error that the complainant failed to file a replication to the answer. Leave to do so was granted by the court, on the complainant's motion; and although the transcript does not show that it was done, the parties went to the hearing as if it had been done, submitting the case upon the proofs which had been taken, as though a formal issue had been perfected.

The same objection was made in the cases of *Clements* v. *Moore* (6 Wall. 299) and *Laber* v. *Cooper* (7 id. 565), under circumstances not distinguishable from the present, and for the reasons there stated it is overruled.

The absence of an answer by Dillon, and the want of an issue upon it, is also assigned for error. The transcript shows that an answer had been filed by Dillon, but had been lost or mislaid. This fact having been called to the attention of the court below, before the hearing, the circuit judge announced that he would not proceed with the hearing without the answer, if the respondent's solicitor, then present, objected to the hearing for that reason. No objection was made, and the hearing properly proceeded. For aught that appears, Dillon's answer may have been a confession of the truth of the allegations of the bill.

We find no error in the record.

Decree affirmed.

KELLY *v.* PITTSBURGH.

1. Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes, which is established in this country, is, within the meaning of the Constitution, due process of law.
2. A State has the power to determine what portions of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such portions shall be assessed.
3. A party is not deprived of his property without due process of law by the enforced collection of taxes merely, because they, in individual cases, work hardships or impose unequal burdens.

ERROR to the Supreme Court of the State of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Daniel Agnew and *Mr. Albert N. Sutton* for the plaintiff in error.

Mr. George Shiras, Jr., contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, James Kelly, is the owner of eighty acres of land, which, prior to the year 1867, was a part of the township of Collins, in the county of Alleghany and State of Pennsylvania. In that year the legislature passed an act by virtue of which, and the subsequent proceedings under it, this township became a part of the city of Pittsburgh. The authorities of the city assessed the land for the taxes of the year 1874 at a sum which he asserts is enormously beyond its value, and almost destructive of his interest in the property. They are divisible into two classes; namely, those assessed for State and county purposes by the county of Alleghany, within which Pittsburgh is situated, and those assessed by the city for city purposes.

Kelly took an appeal, allowed by the laws of Pennsylvania, from the original assessment of taxes to a board of revision, but with what success does not distinctly appear. The result, however, was unsatisfactory to him, and he brought suit in the Court of Common Pleas to restrain the city from collecting the tax. That court dismissed the bill, and the decree having been

affirmed on appeal by the Supreme Court, he sued out this writ of error.

The transcript of the record is accompanied by seven assignments of error. All of them except two have reference to matters of which this court has no jurisdiction. Those two, however, assail the decree on the ground that it violates rights guaranteed by the Constitution of the United States. As the same points were relied on in the Supreme Court of the State, it becomes our duty to inquire whether they are well founded. They are as follows: —

First, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by article 5 of amendments to the Constitution of the United States.

Second, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by art. 14, sect. 1, of the amendments to the Constitution of the United States.

As regards the effect of the fifth amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal government, and to have no reference to the exercise of such powers by the State governments. See *Withers* v. *Buckley*, 20 How. 84; *Davidson* v. *New Orleans*, 96 U. S. 97. We need, therefore, give the first assignment no further consideration. But this is not material, as the provision of sect. 1, art. 14, of the amendments relied on in the second assignment contains a prohibition on the power of the States in language almost identical with that of the fifth amendment. That language is that "no State shall . . . deprive any person of life, liberty, or property without due process of law."

The main argument for the plaintiff in error — the only one to which we can listen — is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

It is not asserted that in the methods by which the value of

his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law.

The tax in question was assessed, and the proper officers were proceeding to collect it in this way.

The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. *State Railroad Tax Cases*, 92 U. S. 575; *Kennard* v. *Louisiana*, id. 480; *Davidson* v. *New Orleans*, 96 id. 97; *Kirtland* v. *Hotchkiss*, 100 id. 491; *Missouri* v. *Lewis*, 101 id. 22; *National Bank* v. *Kimball*, 103 id. 732.

But, passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is, that in the matter already mentioned the law itself is in conflict with the Constitution.

It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall

be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of State legislation.

It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city, — the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes.

It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of *Loan Association* v. *Topeka* (20 Wall. 655), which asserts the doctrine that taxation, though sanctioned by State statutes, if it be for a public use, is an unauthorized taking of private property.

We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for water-works, are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed.

There are items styled city tax and city buildings, which, in

the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against the plaintiff in error is pointed out as intended for any other than a public use.

It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a State is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court-house and police-station than some others?

Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden,

that the tax collected for such purposes is taking the property of the taxpayer without due process of law.

These views have heretofore been announced by this court in the cases which we have cited, and in *McMillen* v. *Anderson*, 95 U. S. 37.

In *Davidson* v. *New Orleans* (*supra*) the whole of this subject was very fully considered, and we think it is decisive of the one before us.

Judgment affirmed.

DAVIS *v.* SPEIDEN.

1. The rule is administrative rather than jurisdictional, that no bill of review shall be admitted unless the party first obeys and performs the decree, and "enters into a recognizance, with sureties, to satisfy the costs and damages for the delay if it be found against him."
2. No special license of the court is required to file a bill of review for the correction of errors on the face of the record.
3. A., without performing a decree rendered against him, filed, in the Supreme Court of the District of Columbia, such a bill of review. A demurrer thereto was, at a special term, overruled and an appeal taken. *Held*, that the court *in banc* erred in requiring him to perform the decree or submit to the dismissal of his bill, as, by his uncontradicted affidavit, he had brought himself within the operation of that exception to the rule which, in case of poverty, want of assets, or other inability, dispenses with performance.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Job Barnard and *Mr. James S. Edwards* for the appellant.

Mr. William F. Mattingly, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a bill of review for error apparent on the face of the record, and we think with the court below that on the merits it presents a case for reversal, because the averments in the original bill were not sufficiently precise and definite to warrant a decree such as was rendered, without proof. The only

question, therefore, is whether the court was right in dismissing the bill because the decree had not been performed.

One of Lord Bacon's ordinances "for the better and more regular administration of justice in chancery, to be daily observed, saving the prerogative of the court," was that "no bill of review shall be admitted, or other new bill to change matter decreed, except that the decree be first obeyed and performed," save only where the act decreed to be done would extinguish a party's right at common law. Bacon's Law Tracts, 280. This ordinance is the foundation of the practice not to entertain bills of review until the decree to be reviewed has been performed, or its performance excused; the object being, as was said by Chancellor Kent, in *Wiser* v. *Blachly* (2 Johns. (N. Y.) Ch. 290), "to prevent abuse in the administration of justice, by the filing of bills of review for delay and vexation, or otherwise protracting the litigation to the discouragement and distress of the adverse party." That this ordinance was intended for the regulation of procedure rather than to limit the jurisdiction of the court, seems to us apparent, because not only on its face the "prerogative of the court is saved," but as early as 1632, in *Cock* v. *Hobb* (5 Russ. 235), a bill of review having been filed without performance of the decree, the cause was permitted to proceed on giving security for the debt which was decreed to be paid. Afterwards, in 1674, in *Savill* v. *Darrey* (1 Ch. Cas. 42), where to a bill for the review of a decree for a large sum of money the rule was pleaded "that the defendant ought first to pay the money, before the bill should be brought into court," the Lord Chancellor said, "Let him give good security for the money, and we will dispense with the rule." Again, in 1682, in *Williams* v. *Mellish* (1 Vern. 117), where a motion was made that proceedings on a decree be stayed until a bill of review could be heard, it was ordered that the decree should be performed before any bill of review would be allowed, "unless the plaintiff . . . will swear himself not able to perform the decree, and will surrender himself to the Fleet, to lie in prison until the matter be determined on the bill of review." Afterwards, during the year 1684, in *Fitton* v. *Macclesfield* (1 id. 264), on a motion that a bill of review might be admitted without the

payment of costs in a former suit, amounting to £150, the plaintiff having made oath that he was not worth £40 besides the matter in dispute, leave was granted him to bring in the bill without the payment; and although, when the bill of review came on for hearing, it was insisted that the order dispensing with the payment of the costs ought to have been set forth in the bill, and it had not been done, the court passed by the objection without notice, and dismissed the case on its merits. So in 1685, in *Palmes* v. *Danby* (5 Russ. 239), Danby, the defendant to a bill for the review of a decree for the payment of money, put in a plea and demurrer, and among other causes of demurrer assigned that "the decree had not been performed by the complainants in review, as ought to have been done by the rules and practice of this honorable court before they can be permitted to bring a bill of review;" but, notwithstanding this, the court finally heard the cause and made a decree on the whole matter. These cases clearly show that from the beginning the ordinance was treated as a rule of practice, and questions touching obedience to its requirements were not considered as matters of strict right, but as governed by a sound discretion. *Taylor* v. *Person*, 2 Hawks (N. C.), 298.

Another of the ordinances of Lord Bacon, promulgated at the same time, provided "that no bill of review shall be put in, except the party that prefers it enters into a recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him." Bacon's Law Tracts, *supra*. This is of the same general character with the other. That provides that a bill of review shall not be *admitted*, that is to say, received, until the decree has been performed; and this, that such a bill shall not be *put in* until the prescribed security is given. Both are administrative rather than jurisdictional. The order for security was as imperative as that for performance, but we think it would not be seriously claimed that a bill which could be filed as a matter of right, was, while that rule was in force, subject to demurrer if it failed to set forth that a recognizance had been entered into. Undoubtedly a court would strike a bill from the files if it got there, without a performance of the decree, or the security required, unless

good cause was shown why it had not been done. That would be a far different thing from dismissing a bill on demurrer for like cause.

We are aware that under another ordinance of Lord Bacon in respect to bills of review for newly discovered matter, and which provides that such a bill "may be grounded by special license of the court, and not otherwise" (Bacon's Law Tracts, *supra*), it was held by the Master of the Rolls, in *Bainbridge* v. *Baddeley* (9 Beav. 538), that a demurrer must be allowed unless such special license is averred, and that this case was followed hesitatingly by the Vice-Chancellor in *Henderson* v. *Cook* (4 Drew. 306), because Lord Redesdale had said (Mit. Pl. by Jer. 89) it *seemed* necessary to state in the bill the leave obtained to file it. Whatever may be said in such cases, which are really only bills in the nature of bills of review, and which can *only* be filed on special license, we think it clear that as to bills which relate to errors on the face of the decree alone, and which may be filed without leave, no such rule prevails. The filing without performance is in the nature of privilege, not jurisdiction. The courts of some of the States have so treated it (*Forman* v. *Stickney*, 77 Ill. 575), and we are clearly of the opinion that such is the better practice and fully recognized by all the early English cases. Performance does not establish the error, but only makes it the duty of the courts, when called on in a proper way, to inquire as to any errors that may have been committed. Whether the courts will enter on such an inquiry without performance depends upon the exercise of a sound judicial discretion applied to the facts of the particular case.

This brings us to the facts as presented by this record. The bill of review does not aver a performance of the decree or give any excuse for non-performance. It was demurred to, among other things, on this ground. The court below at special term, notwithstanding the demurrer, reversed and vacated the decree in the original cause, and gave the complainant in the bill of review leave to answer *instanter*, and for that purpose to withdraw the answer filed as an exhibit to the present bill, leaving a copy with the papers. Speiden was also enjoined from prosecuting his suit at law until the final hear-

ing of the original cause. On appeal to the general term it was ordered that Davis be permitted, by a day named, to pay into court the amount due on the decree against him, and if he did, that the decree of the special term be affirmed; but if he did not, that such decree be reversed and the bill of review dismissed. At the appointed time Davis appeared, and by affidavit showed to the court that he was utterly unable to comply with the decree at the general term; that he had no means and no possible way by or from which he could raise the money to bring into court, and this because of the great financial embarrassment under which he was then laboring. He consequently asked that the order as entered be modified so as to allow him to amend his bill, or, if that could not be done, that his bill be dismissed without prejudice. This was refused, and, consequently, the decree of the special term was reversed and the bill of review dismissed. In this we think there was error. The injustice of the decree as it stood was manifest on the face of the record, and the showing by the affidavit, which was uncontradicted, clearly brought the complainant in review within the operation of the exception to the rule dispensing with performance in case of "poverty, want of assets, or other inability to do it." *Wiser* v. *Blachly*, *supra*.

The decree of the Supreme Court of the District in general term will be reversed and the cause remanded, with instructions to affirm the decree at special term and proceed accordingly; and it is

So ordered.

KLEIN *v.* INSURANCE COMPANY.

1. Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory.
2. A condition in a policy of life insurance, that if the stipulated premium shall not be paid on or before a certain day the policy shall cease and determine, is of the very essence and substance of the contract. Against a forfeiture caused by failure so to pay, a court of equity cannot relieve.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Hiram Barber, Jr., for the appellant.

Mr. Francis H. Kales, contra.

MR. JUSTICE WOODS delivered the opinion of the court.

On Sept. 1, 1866, a policy of insurance was issued by the New York Life Insurance Company upon the life of Frederick W. Klein, in the sum of $5,000, payable to his wife, Caroline Klein, within sixty days after his death and due notice and proof thereof.

The policy is in the usual form. The consideration for its issue was the payment to the company by Caroline Klein of an annual premium of $173, in semi-annual instalments of $86.50 each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein.

The policy contains the following provision: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that . . . in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof, with any interest that may be due thereon, then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual

instalment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871.

The agent of the company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept any sum less than the amount of the insurance, and on the company then insisting upon the absolute forfeiture of the policy, according to its terms, she filed this bill.

She therein alleges as the ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness of which he died; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that she failed to pay it because she was ignorant of the existence of the policy and of its terms.

The prayer of the bill is as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Frederick W. Klein in the non-payment of said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of $5,000," &c.

The answer of the company denies its liability upon the policy of insurance, and insists that the contract ceased and determined by reason of the non-payment of the premium due March 1, 1871, and denies the equity of the bill.

The bill was dismissed upon final hearing. The cause was then brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill is sustained by the evidence, the question is presented

whether, upon the facts, the appellant was entitled to the relief prayed for.

In *New York Life Insurance Co.* v. *Statham* (93 U. S. 24) it was held by this court, Mr. Justice Bradley delivering its opinion, that a life insurance policy "is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

But, in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.

We cannot accede to the view of the appellant. Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. *Sloman* v. *Walter*, 1 Bro. Ch. 418; *Sanders* v. *Pope*, 12 Ves. Jr. 282; *Davis* v. *West*, id. 475; *Skinner* v. *Dayton*, 2 Johns. (N. Y.) Ch. 526.

But in every such case the test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made.

In *Rose* v. *Rose* (Amb. 331, 332), Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a day certain; against forfeitures of copyholds: but they are all cases where the court can do it with safety to the other party; for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve."

A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day cer-

tain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.

Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons.

It was said in *New York Life Insurance Co.* v. *Statham* (*supra*), that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company."

If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. *Wheeler* v. *Connecticut Mutual Life Insurance Co.*, 82 N. Y. 543. See also the opinion of Judge Gholson in *Robert* v. *New England Life Insurance Co.*, 1 Disney (Ohio), 355.

It might as well undertake to release the assured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and assured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium.

The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. He also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the assured has from loss consequent on the risks assumed by him.

Neither has any such right.

The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the insurance company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by her to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the Circuit Court is right, and should be

Affirmed.

METCALF *v.* WILLIAMS.

1. The non-joinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement.
2. Where a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief.
3. Where a person acts merely as agent of another, and as such signs papers, an express disclosure of his principal's name on their face or in the signature is not essential to protect him from personal liability to a party having full knowledge of the facts.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the court.

Mr. C. S. Bundy and *Mr. W. Willoughby* for the appellants.

Mr. James G. Field, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was a bill in equity filed for setting aside a judgment at law, the rendering and entry of which, as alleged, were a surprise upon the complainant, who was misled by certain proceedings which took place in the court. The complainant was sued personally upon a check drawn by him, as he contends, officially, as the vice-president of the Montpelier Female Humane Association of Orange County, Virginia, an incorporated association of that State, having its office in the city of Alexandria. The check was in these words, to wit: —

"No. .] ALEXANDRIA, VA., Oct. 2, 1875.

"The First National Bank of Alexandria, Va., pay to the order of A. E. & C. E. Tilton seven thousand $\frac{5}{100}$ dollars.

"E. P. AISTROP, *Sec'y.* W. G. WILLIAMS, *V. Pres't.*"

The action was brought in the Circuit Court of the United States in the name of Charles E. Tilton, as surviving partner of himself and Alfred E. Tilton [the payees of the check], for the use and benefit of Ferdinand Metcalf. The writ was returnable on the first Monday of July, 1877, declaration filed at that time, and judgment ordered unless defendant should appear and plead to issue at the next rules, namely, first Mon-

day of August, 1877. At the latter day the rule was confirmed, and on the 17th of October, 1877, during the sitting of the court at Richmond, final judgment was moved and entered. The circumstances on which the bill relies for setting aside this judgment are, that the complainant does not owe the money, and made arrangement to have the claim properly litigated; that in September, 1877, he employed counsel to appear and plead to the action; that the said counsel, appearing at the clerk's office, was informed by the clerk that it was usual to file the pleas in open court; that when the court came on in October, and before the judgment was entered, the said counsel called the attention of the judge to the case, and stated that he desired to have entered the plea of *nil debet*, and to call the attention of the court to some preliminary questions which would have to be settled before a trial could be had on the merits: that the judge informed him that he had ordered all cases against persons living in the congressional district in which defendant resided to be tried in Alexandria; and that the counsel for plaintiffs were residents of Alexandria and were not then in court, and probably kept away from the knowledge of the fact that this suit under the rule would be tried there: that thereupon the counsel said he would not press the matter further, but would wait until the court commenced its term in Alexandria to have said preliminary questions disposed of; that he supposed that the formal plea of *nil debet* had been noted by the clerk, it not being usual in the State courts to write out the plea of the general issue, but simply for the clerk to note it on the record. The judgment was afterwards entered without the knowledge of complainant or his counsel. When the court came on at Alexandria, in January following, the complainant's counsel attended for the purpose of trying the cause, and was informed that no plea had been entered on the record at Richmond, and the case was not on the docket for trial. Being taken by surprise, he moved the court to reinstate the cause upon the docket; but the judge, doubting his authority to do this, refused the motion. By an amendment to the bill, the complainant states that the check sued on was not his check, but the check of the Montpelier Female Humane Association, the corporation before referred to, of which Met-

calf, for whose use the action was brought, was general agent in the city of New York, and of which the complainant was vice-president, and E. P. Aistrop was secretary, — which association was doing business as a public corporation, and all persons dealing with it dealt with it as such; that the check was signed by complainant and by Aistrop in their official characters, of which Metcalf was fully cognizant, and knew that the check was not the individual paper of complainant. Letters of Metcalf, dated in December, 1875, are annexed to the bill, showing that he recognized and treated the check as the check of the association. Tilton, the nominal plaintiff in the action at law, and Metcalf, for whose use it was prosecuted, were made defendants to the bill, and filed a demurrer thereto. Upon the argument, the demurrer was overruled, and thereupon it was agreed by the counsel of both parties that the court should finally dispose of the case upon the merits, and a decree was rendered for the complainant on two grounds: first, that he was not personally bound by the check, — in other words, that it was not his check, but the check of the corporation; and, secondly, that Aistrop was not joined in the action. The latter ground is untenable, because non-joinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement. But, upon the other ground, we think that the decree was correct.

First, however, it is proper to inquire whether sufficient cause was shown in the bill for setting aside the judgment. It is manifest that the judgment was a surprise upon complainant. After what passed in the court at Richmond, his counsel had a right to suppose that the cause would be tried in the ensuing term at Alexandria. The practice in Virginia as to entering pleas of general issue on the record sufficiently accounts for the omission to file a formal plea. Had not the term passed by, the district judge would undoubtedly have set aside the judgment, and reinstated the cause on the docket for trial. If, as he supposed, the passage of the term deprived him of power to do this, it became a proper case for equitable interference by bill. When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief. Perhaps, in view of the equitable

control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion, rendered the resort to a bill necessary and proper. Formerly bills in equity were constantly filed to obtain new trials in actions at law, a practice which still obtains in Kentucky, and perhaps in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in another, has caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident, or mistake.

As to the merits of the case, we agree with the court below in holding that, according to the showing of the bill, and as between the parties, the check sued on was the check of the Montpelier Female Humane Association, and not the individual check of the defendant. There is nothing on its face to preclude this construction. The bank was requested by two persons, who sign themselves as officers, one as vice-president and the other as secretary, to pay a certain sum. Whether they made this request as officers or as individuals is ambiguous, to say the least. It is evident that an inquiry into the circumstances of the case might render it certain which was intended; as, if the bank had an account with a corporation, of which these persons were the officers designated; if they had been in the habit of checking on that account in that form, with the knowledge and consent of the corporation, and the bank had been in the habit of answering such checks accordingly; and if all this were known to the party taking the checks, — it would be a construction contrary to truth to hold them to be personal checks of the individuals, and not the checks of the corporation. The bill states as facts, that the check in question was the check of the association; that the defendant and Aistrop acted as officers only in drawing the check; and that Metcalf, for whose use the suit was brought, was the general agent of the association, and knew and understood the facts, and treated the checks as the checks of the association. Under

these circumstances it would be unjust, as between these common agents of the same corporation, to hold the complainant and Aistrop personally responsible on the check. Where a person acts merely as agent of another, and signs papers in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility.

It is unnecessary to determine whether the form of the document in this case was sufficient to charge innocent holders of the check with notice of its character. The fact that it bore two official signatures, that of the complainant as vice-president and of Aistrop as secretary, is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character. But, in the present case, the party claiming to have the beneficial interest in the check was a fellow-agent of the company on whose account it was drawn, actually knew its origin, and cannot pretend that he took it for anything else than a check of the corporation. The plea that the name of the principal was not disclosed on the face of the paper cannot be made by him, for he knew all about it.

The remarks of Mr. Justice Johnson, in delivering the opinion of this court, in the case of *Mechanics' Bank* v. *Bank of Columbia* (5 Wheat. 326), are apposite to this case. There the cashier of the bank drew a check and signed it with his individual name without any official designation; but the name of the bank was printed as part of the date. The justice said: "The question is whether a certain act, done by the cashier of a bank, was done in his official or individual capacity. Had the draft, signed by Paton, borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable." Again, in reference to the ambiguity raised on the face of the check as to whether it was personal or official, the justice

said: "It is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz. that this was the appropriate form of an official check; that it was in fact cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction."

In *Brockway* v. *Allen* (17 Wend. (N. Y.) 40), where the makers of a note appended to their signatures the words "Trustees of the Baptist Society," the Supreme Court of New York held that they were entitled to show by proof that there was a corporation called The Trustees of the First Baptist Society of the village of Brockport; that they were its trustees; that the note was given by them in their official capacity; and that the plaintiff, the payee, knew this fact.

In *Kean* v. *Davis* (21 N. J. L. 683), the bill was signed "John Kean, President Elizabeth & Somerville R. R. Co." The Court of Errors and Appeals of New Jersey, in an elaborate opinion by Chief Justice Green, decided that parol proof was admissible to show that the bill was the bill of the company, and not of the defendant individually; and held that, although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to to show what was the real intention of the parties; yet, that in cases of ambiguity on the face of the instrument, as in that case, it might be introduced to explain which of two doubtful constructions was the intent of the parties.

The ordinary rule undoubtedly is, that if a person merely adds to the signature of his name the word "agent," "trustee," "treasurer," &c., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be

in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties.

It is hardly necessary to review the long catena of decisions on this subject. They are very numerous, and somewhat conflicting, but we do not think that there is any preponderating authority which prevents us from giving to the instrument in question that construction and effect which was given to it by the parties themselves.

Decree affirmed.

DUDLEY *v.* EASTON.

1. Except so far as they may directly or indirectly affect the fund to which an assignee in bankruptcy is entitled for distribution under the law, he has no interest in the controversies among secured creditors, nor can he enforce contracts between the bankrupt's creditors.
2. It is not his duty to protect the dower rights of the bankrupt's wife against the consequences of her own acts prior to the bankruptcy, or to inquire whether homestead rights can be claimed as against incumbrancers whose title is superior to his own.
3. *McHenry* v. *La Société Française* (95 U. S. 58) approved.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. John D. S. Dryden for appellant.

Mr. J. M. Krum and *Mr. C. H. Krum, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal from a decree dismissing on demurrer a bill filed by Dudley, the assignee in bankruptcy of William P. Bush. The case stated in the last amended bill is substantially as follows: —

On the 10th of October, 1873, Easton and Stillwell severally

sued Bush in the Circuit Court of Monroe County, Missouri, — Easton on a note for $3,000, and Stillwell on one for $5,000. In due course of proceeding, judgments by default could be taken in each of the suits on the 30th of October. Bush was at the time laboring under great financial embarrassment, although, as he thought, actually possessed of lands and other property greatly in excess of his debts. On the 24th of October, after service of process upon him in the suits, he met a portion of his creditors, including Easton and Stillwell, and made known to them his embarrassed condition, and the pendency of the suits. He also stated that Easton and Stillwell would, by obtaining judgments, secure an advantage over his other creditors, and he was desirous that all should share equally in his property. He thereupon proposed that all the creditors present should accept in satisfaction of their respective debts his notes, payable in equal instalments in one, two, three, and four years from date, with interest at the rate of ten per cent, secured by a mortgage executed by himself and wife, to a trustee to be selected by the parties, on all his real estate, and that Easton and Stillwell should dismiss their suits and not take judgment against him. It is then averred that all the creditors present, including Easton and Stillwell, agreed with each other and with him to accept the notes and security as proposed, and extend the time, and that he agreed to give the notes and make the mortgage. As part of the agreement thus entered into, Easton and Stillwell were to dismiss their suits.

Relying on this agreement, Bush set about the preparation of his notes and mortgage, and paid no attention to the suits. He did not appear in court, or make any defence, as he otherwise would have done, by setting up the agreement for an extension. Consequently, at the proper time, October 30, judgments were taken against him by default, of which it is averred he had no actual notice until November 3, after the term of the court had closed.

Without any unnecessary delay, Bush executed his notes and a mortgage to the defendant Logan as trustee, in accordance with the agreement which had been made. They were all dated October 29, but the mortgage did not take effect

until after the judgments were rendered. For this reason, the lien of the judgments was prior to that of the mortgage. All the creditors represented at the meeting, except Easton and Stillwell, accepted the notes, and now retain them. They are not parties to this suit, unless they are represented by the assignee. Easton and Stillwell refused to carry out their agreement, and they rely on their judgments and the priority of lien thereby acquired.

On the 28th of February, 1874, proceedings in bankruptcy were begun against Bush by some of his creditors, which resulted in an adjudication of bankruptcy and the appointment of Dudley as assignee, to whom, on the 24th of March, the general assignment was made under the law. This bill was subsequently filed against Easton, Stillwell, Logan, the trustee under the mortgage, and Bush and wife. It sets forth the foregoing facts in detail, and then avers: —

"Your orator further says that at the time of the making of said agreement of extension and of said deed of trust said Bush had a large amount of property, not included or intended to be included in said deed, sufficient in value to satisfy all the debts owing by said Bush to his other creditors, who were not parties to said agreement; that said deed was not made, nor was said agreement entered into, by said Bush with any intent to give a preference thereby to the parties to said agreement or any of them over his other creditors, or with the intent thereby to convey his said property or any of it in fraud of the provisions of said act of Congress or the acts amendatory thereof, but solely under the belief on the part of said Bush that by obtaining such extension of time of payment as aforesaid he would be enabled to pay all his creditors their debts in full, together with interest at the rate of ten per cent per annum; that the entire indebtedness secured by said deed of trust, including that to said Stillwell and Easton, amounted to $40,394.70, and that all the lands mentioned in said deed were then thought to be worth, and in fact were worth, the sum of $50,000, especially if a reasonable time could be obtained to negotiate a sale of the same; that among the property described in said deed of trust was that occupied by said Bush and his family as a homestead, out of which he was entitled to

have set apart to him as exempt from levy and sale under execution a homestead of the value of $1,500 under the laws of this State; that because of the release of the dower interest of the defendant, Emma C. Bush, wife of said bankrupt, in all of his lands described in said deed, and the waiver and conveyance of all his right to exemption of a homestead given and made by said deed, and for other good and sufficient reasons, it is to the interest of all of the creditors of said bankrupt's estate, save only said Easton and Stillwell, that the said deed of trust should be recognized, confirmed, and enforced by your orator as assignee as aforesaid, and in fact this bill is filed by your orator at the request and by the direction and on the behalf of all the creditors of said Bush, whether secured or unsecured, excepting only said Easton and Stillwell."

The prayer of the bill is as follows: —

"Wherefore your orator prays that a decree may be made by your honorable court requiring the said defendants, Easton and Stillwell, on their part respectively to execute and perform said agreement, to accept said notes, and the benefit of said trust mortgage respectively, in satisfaction of the demands which they respectively had against said William P. Bush on the 29th of October, 1873, and then sued for in the said Monroe Circuit Court, and severally to execute to your orator a release of all lien and claim upon any real estate which was of said Bush at the time of the commencement of said proceedings in bankruptcy against said Bush, which they respectively may have under or by virtue of said several judgments of said Monroe Circuit Court, or under or by virtue of the levy of any execution issued thereon, and that said judgments as to said Bush may be set aside and for naught held and esteemed respectively, and that the said defendants, Easton and Stillwell, may by said decree be forever enjoined and restrained from enforcing said judgments respectively, or from claiming any benefit or lien thereof as against any property which belonged to said Bush at the time of the rendition thereof, and that he may have all such other and further relief as to equity belongs and the circumstances of his case may require."

The first question to be settled is, whether an assignee in bankruptcy can sue for the relief which is asked. The inquiry

is not whether the creditors who accepted the notes and mortgage can compel Easton and Stillwell to give up their judgment liens and come in equally with them under the mortgage, nor whether the bankrupt or his wife can be relieved against their mortgage of their homestead or dower rights, but whether the assignee in bankruptcy stands in such a relation to the alleged agreement and the parties that he can require the agreement to be carried into effect, if called upon for that purpose by all the creditors.

An assignee in bankruptcy represents the general or unsecured creditors, and his duties relate chiefly to their interests. He is in no respect the agent or representative of secured creditors, who do not prove their claims. He need not take measures for the sale of incumbered property, unless the value of the property is greater than the incumbrance. He has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security. *McHenry* v. *La Société Française*, 95 U. S. 58. He cannot enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law. Neither is it any part of his duty to protect the dower rights of the wife of the bankrupt against the consequences of her own acts before the bankruptcy, or to inquire whether the bankrupt or his wife can claim homestead rights as against incumbrancers whose title is superior to his own. As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, he takes by his assignment, as a purchaser from the bankrupt, with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for the general creditors he may do, but nothing more, except that he may sue for and recover that which was conveyed in fraud of the rights of creditors, and set aside all fraudulent preferences. As to such preferences and conveyances he has all the rights of a judgment creditor, as well as the powers specifically conferred by the bankrupt law.

It may be for the interest of the creditors who carried out

the agreement now under consideration for an extension of time, and received notes under the mortgage, that Easton and Stillwell should vacate their judgment liens and forego the preference they thereby acquired; but we are unable to discover from anything stated in the bill how the interests which the assignee represents would be specially benefited by making Easton and Stillwell share equally with the other creditors rather than maintain their preference. The object of the bill is not to set aside any fraudulent preference which has been obtained over the general creditors of the estate, but to settle the rights of secured creditors as between themselves. In no event is the property to be relieved from any part of the present incumbrance. The only question is how, as between the several incumbrancers, it shall be appropriated. From anything which appears in the bill, we cannot say that the overplus of the property, after the debts are paid, will be more, whether the distribution is made in one way or the other. If there should be a deficiency, and some part of the secured debt be proved up against the general estate, it is not material to the general creditors whether the unpaid part of the debt belongs to all the secured creditors, including Easton and Stillwell, equally, or to the others alone. In either event, the amount chargeable on the general fund will be the same.

We have not overlooked the fact that in the bill it is averred that when the mortgage was made the lands included were thought to be worth, and in fact were worth, the sum of $50,000, especially if a reasonable time could be obtained to negotiate a sale, and also that "it is to the interest of all the creditors of said bankrupt's estate, save only Easton and Stillwell, that the said deed of trust (mortgage) should be recognized, confirmed, and enforced by your orator as aforesaid;" but this, in our opinion, is not enough. The way in which the interests of the general creditors would be injuriously affected by enforcing the judgment liens rather than the mortgage should have been stated, so that the court can see whether it is sufficient to entitle the assignee to the relief he asks. The request of all the creditors, that the assignee institute and carry on the suit, amounts to nothing, unless the interests which he in law represents are such as to make it his duty to do what is wanted.

It may, perhaps, be fairly inferred from what is stated in the bill, that the bankruptcy of Bush was brought about by the failure of Easton and Stillwell to carry out their agreement. Because he could not get the time he wanted he subjected himself to the proceedings which were instituted against him, but that furnishes no ground for the relief which is now asked. If Easton and Stillwell are compelled to give up their judgment liens and take under the mortgage, neither the adjudication in bankruptcy nor the assignment under it will be vacated. The assignee will be compelled to go on with the administration of his trust, whether he succeeds in this suit or not, and he has not shown to us in any precise or definite way that the relief he asks will change in any material respects the result which will otherwise flow from the conversion of the assets as they now stand into money for the purpose of distribution under the law. So far as we can discover, the only object of the assignee is to compel Easton and Stillwell to share equally with the other secured creditors in the proceeds of the mortgaged property, instead of retaining their present preference, and this, too, without showing that the fund he is to gather in for distribution will be in any manner affected thereby. Clearly he has no interest in saving the dower rights of Mrs. Bush, or in protecting the homestead of the family from sale under the mortgage which has been executed. A fraud may have been perpetrated on the bankrupt and his wife, but it is not one which the assignee has any official interest in redressing.

As what we have said is decisive of the case, without considering any of the other questions discussed in the briefs, we affirm the decree below.

Decree affirmed.

KOON *v.* INSURANCE COMPANY.

1. A stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, is equivalent to an agreement that the court may open the sealed verdict in their absence, and, if necessary, reduce it to proper form.
2. It is also a waiver of the right to poll the jury if they be not in court.
3. The entry of the verdict in the proper form is allowed by sect. 954 of the Revised Statutes of the United States and by the Practice Act of Illinois.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of debt brought by the Phœnix Mutual Life Insurance Company against Henry H. Koon as principal, and the other defendants as sureties, on a bond in the penal sum of $10,000, conditioned for the faithful performance of his duties as agent of the company. The defendants pleaded *nil debet*.

It appears from the bill of exceptions that upon the retirement of the jury "it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse."

The jury, having agreed upon their verdict when the court was not in session, signed, sealed, and delivered it to the officer in charge, who returned it into court, where it was ordered to be opened and read. It was in the following words and figures, to wit: "We, the jury, find for the plaintiffs, and fix the sum due on the bond at $7,500, and damages at one cent." The envelope in which it was enclosed also contained another paper, on which was the following writing: "The undersigned jury signed the enclosed verdict as a compromise, being the largest amount we can get;" signed by five of the jurors.

Thereupon the court directed the clerk to put the verdict in the following form: "We, the jury, find the issue for the plaintiff, and find the debt ten thousand dollars, and assess the damages at seven thousand five hundred dollars; the said debt to be discharged on payment of said damages."

To which action, in ordering the verdict to be opened and read in the absence of the jury and in changing its form, the

defendants excepted, and moved the court to correct the entry so as to make it conform to the verdict as returned. The motion was overruled, and judgment rendered on the verdict as recorded. The defendants sued out this writ of error.

Mr. Robert G. Ingersoll for the plaintiff in error.
Mr. Lewis H. Boutell, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The stipulation "that the jury might, when they had agreed on their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was equivalent to an agreement by both parties, on the retirement of the jury, that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form, if necessary. The stipulation was also a waiver of the right to poll the jury if they should not be in court.

The issue to be tried was on a plea of *nil debet*. This admitted the execution of the bond, and required the jury only to find the amount due. If anything was found to be due, the law fixed the form of the verdict and judgment. The jury found there was $7,500 due on the debt and one cent damages for the detention. That finding, reduced to proper form, was in favor of the plaintiff for the penalty of the bond, to be discharged on payment of $7,500. All the court did was to enter the verdict in that form. In doing so it only gave legal effect to what the jury unmistakably found. This was allowable, both under sect. 954 of the Revised Statutes and the Practice Act of Illinois.

Judgment affirmed.

JONES v. RANDOLPH.

An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Walter D. Davidge for the plaintiffs in error.

Mr. John Selden, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was an action of ejectment, and the defendants below, plaintiffs in error here, set up title under a deed of trust made by William O'Neale, Nov. 12, 1820, to William A. Bradley, cashier of the Bank of Washington, to secure a debt to that bank. On the 31st of December, 1839, at the request of the father of Margaret R. Timberlake, a minor, French S. Evans, her guardian, paid to the bank with her moneys in his hands the amount of the debt. The note which evidenced it was assigned to him in proper form, and from that time he was allowed to collect the rents of the property covered by the trust deed. The amount he paid was $1,072.41, which, it is conceded, was the actual sum then due the bank. His guardianship terminated in July, 1843. He then settled his accounts with the proper court, and filed in court the note he had got from the bank. After that, in 1845, proceedings were instituted under the trust deed to sell the property to pay the balance due on the debt. At the sale the plaintiffs in error claim to have become purchasers and to have acquired title, under which they took the possession they now hold.

On the trial it became a material question whether the debt secured by the trust deed had been paid before the attempted sale. The evidence was that the guardian, between the time he got the note and the time he went out of office, had collected only about six hundred dollars of rents. These were credited by him in his accounts with his ward, but there was nowhere in the testimony anything tending to show that any other per-

son representing the owners of the debt ever had the possession of the property or had ever actually collected any more of the rents. The rights of the parties at the trial in reference to this part of the case, so far as the record shows, depended upon the actual collection of rents, and not upon the value of the use and occupation of the property, while the creditor assumed the right to collect the rents as they accrued and appropriate them to the discharge of the debt.

Such being the condition of the evidence on this branch of the case, all of which was embodied in the bill of exceptions, the court charged the jury as follows: —

"If the jury find from the evidence that William O'Neale died on Oct. 24, 1837, having by his last will and testament, and the codicil thereto, disposed of his estate as set out in the paper hereunto annexed and marked A, and that after his death, and down to Dec. 31, 1839, the said Rhoda O'Neale collected the rents and profits of the two brick houses mentioned in the said codicil, and was in possession of the same, under color of authority derived from the said last will and testament; that on the day and year last aforesaid the last renewal of the note mentioned in the deed of trust executed by the said William O'Neale was in part unpaid and outstanding in the hands of the Bank of Washington, mentioned in the said deed of trust; that on that date one French S. Evans, while guardian of one Miss Margaret R. Timberlake, then eleven years of age, and daughter, by a former husband, of the said Mrs. Margaret L. Eaton, mentioned in the said last will and testament, from and with the means of his said ward paid unto the said bank the whole amount then due on the said note, and the same, with the security created by the said deed of trust, caused to be assigned to himself as such guardian; and if the jury further find that thereafter and between the said thirty-first day of December, 1839, and the twenty-ninth day of July, 1843, the said Evans, as guardian aforesaid, of the rents and profits of the estate so as aforesaid disposed of by the said last will and testament, and with the consent of the said Rhoda O'Neale, made collections from time to time, and applied them to the said note, until the same, both as to principal and interest, was fully paid, and that on the said twenty-ninth

day of July, 1843, the said Evans, in the Orphans' Court of this District, closed his account as such guardian, then the jury are instructed, as matter of law, that the said note, on or before the twenty-ninth day of July, 1843, became extinguished, and that no valid sale could be made of the property in question under the said deed of trust, in the year 1845.

"If the jury find that the note in question was paid on or before July 29, 1843, or at any time prior to 1845, out of the proceeds or income of the estate of William O'Neale, deceased, under the direction or consent of his widow, the deed of trust became thereby extinguished."

Inasmuch as the evidence did not tend to show that more than about six hundred dollars had been actually collected from the rents by Evans or any other person for the account of the holder of the note, we cannot but think this charge was misleading. It assumed that the jury might find that full payment had been made in that way, when there was no evidence whatever to support such a verdict. It is possible that the guardian, or some other person who for the time being properly represented the ward, while permitted to collect the rents, ought to have collected more, and was on that account chargeable with more than he actually got, or that the debt had been otherwise paid; but that was not the question submitted to the jury. Under the instructions the jury were to inquire only whether there had been a satisfaction of the debt through actual collection of rents.

As this leads to a reversal of the judgment, we deem it unnecessary to consider any of the other errors assigned, and especially whether the instruction requested by the defendants was properly modified. The same questions may not arise on a second trial.

The judgment will be reversed and the cause remanded with directions to grant a new trial and proceed accordingly.

So ordered.

NEVADA BANK *v.* SEDGWICK.

Part of the capital of a State bank was invested in foreign countries. *Held*, that it was subject to the tax imposed by sect. 3408 of the Revised Statutes, it not appearing in what manner the investments were made.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. John E. Ward for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This suit was brought by a bank incorporated under the laws of, and having its principal place of business in, California, against a collector of the internal revenue of the United States, to recover taxes alleged to have been illegally exacted under the second clause of sect. 3408 of the Revised Statutes. That clause provides for the levy and collection of "a tax of one twenty-fourth of one per centum each month upon the capital of any bank, association, company, corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds." A part of the capital of this bank was, as is alleged, "invested abroad and in foreign countries," and in assessing the taxes this was included as capital with the rest. The case stands on demurrer to the complaint, and the single question we are asked to consider is, whether the capital of a State bank "invested abroad and in foreign countries" can be taxed by the United States. In what manner the investments were made does not appear. The averment in the complaint is in the general language we have quoted.

As long ago as 1819 it was said by this court, speaking through Mr. Chief Justice Marshall, in *McCulloch* v. *State of Maryland* (4 Wheat. 316), that all subjects over which the sovereign power of a State extends are objects of taxation. Acting on this principle, we held recently, in *Kirtland* v. *Hotchkiss* (100 U. S. 491), that a State might tax her resident citizens for debts held by them against non-residents,

and secured by mortgage on property in another State. That seems to us conclusive of this case. The Nevada Bank was incorporated and organized under the laws of one of the States of the Union, and it had its principal place of business within the United States. It was, therefore, subject to the sovereign power of the United States, and a proper object of taxation. The investments abroad are still the property of the bank and part of its capital. In the absence of any averments to the contrary, we must presume they were such as banks usually make in doing a banking business, and that their legal *situs* was at the home office of the corporation. We need not consider, therefore, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply. As the case is presented, it comes clearly within the principle which was applied in *Kirtland* v. *Hotchkiss*, *supra*.

Judgment affirmed.

RAILROAD COMPANY *v.* MELLON.

1. The scope of letters-patent must be limited to the invention covered by "the claim," and the latter cannot be enlarged by the language used in other parts of the specification.
2. So limited, the invention for which letters-patent No. 58,447 were granted, Oct. 2, 1866, to Edward Mellon, for an improvement in the mode of attaching tires to the wheels of locomotives, consists simply in rounding off that corner of the inner side of the tire which fits into the re-entrant corner made by the flange upon the rim of the wheel-centre, so as to prevent the corner of the tire from indenting and sinking into the periphery of the wheel-centre.
3. Said letters are, therefore, not infringed by the use of an angular flange upon the wheel-centre, that being expressly excluded by the claim.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On Oct. 2, 1866, letters-patent No. 58,447 were granted to Edward Mellon for an improvement in the mode of attaching tires to the wheels of locomotives. For the purpose of illustration, three figures, numbered respectively 1, 2, and 3, were appended to the specification on which the application for the letters was based. The specification is as follows: —

"Figures 1 and 2 are central sections of a locomotive wheel having a tire applied to it according to my invention. Figure 3, a section of a portion of a locomotive wheel having its tire affected by wear, drawn with a view of showing the advantage of one feature of my invention. Similar letters of reference indicate like parts.

"This invention has for its object the securing of tires on the wheels of locomotives without the aid of bolts, and in such a manner that the tire, in case of becoming loose, cannot casually slip off from the wheel.

"The invention consists in having the wheel, or the tire which is to be fitted on the same, provided with a single flange, arranged in such a manner that said flange, in connection with the usual flange on the tire, will keep the latter on the wheel. The invention also consists in constructing the tire with a rounded edge at one side of its inner surface in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire becoming stretched by use.

"A represents a locomotive wheel which may be constructed in the usual or any proper manner, and B is the tire fitted thereon. The periphery of the wheel A is provided at the inner edge with a flange *a*, as shown in Figures 1 and 2.

"The tire B is shrunk on the periphery of the wheel A, as usual, and it will be seen that the flange *a* prevents the tire, should it become loose on the wheel A, from slipping off at the inner side of the wheel, and the flange *b* of the tire will of course prevent the latter from slipping off at the outer side of the wheel.

"By this arrangement no bolts or set screws are required to aid in fastening the tire on the wheel, for it is impossible for the tire to leave the wheel either at the right or left side thereof.

"The same result may be attained by having the surface of the tire at its outer edge provided with a flange, *a'*, as shown at the upper part of Figure 2.

"The inner surface of the tire at its inner edge is rounded, as shown at *c*, in all the figures, in order to prevent said edge from indenting or sinking into the periphery of the wheel. The tires of locomotive wheels are, under the jars, concussions, and wear to which they are subjected, considerably stretched, and they invariably become concave at their inner surface (see Figure 3), the edges spreading over the sides of the wheel, and forming in a lock, in some cases, so as to render the cutting of the tire necessary, in order to detach it from the wheel. With my improvement the

flange *a* would cause the inner edge of the inner surface of the tire to indent the periphery of the wheel, or form a crease in it if the edge *c* were not rounded.

"The great feature in this invention is that I retain the tire on the wheel without the employment of bolts, rivets, keys, or other like attachments. I heat my tire until it has expanded sufficiently to be slipped over the periphery of the wheel; it then cools and contracts, and holds or binds the wheel firmly.

"After the wheel, as completed, has been in use a certain length of time, the tire will stretch and thus become loose on the wheel; then the pressure of the resistance against the rail will bear or force the tire inward against the flange *a* of the wheel.

"Now, it is not intended to run the engine unnecessarily with a loose tire, but should this tire become loose while on the road, there is sufficient safety in running the engine until the depot is reached, or until it will be convenient to repair or replace it by a new one.

"The tire can be readily slipped off, there being no rivets or other fastenings to undo, and the convenience and utility of my improvement is apparent.

"I am aware of the invention described in patent to N. Hodge, Nov. 18, 1851, but I wish it to be understood that I do not claim the invention therein described, viz. the angular flange upon the inner edge of the wheel and the flange upon the outer edge of the wheel, but I do claim as my invention the wheel with the curved flange upon the inner edge in combination with a tire with a rounded corner to fit said curved flange, as set forth."

The application for letters-patent, as is shown by the file-wrapper, was made Oct. 6, 1865. It was twice rejected; the last time on April 23, 1866.

The bill in this case charged that the letters-patent had been infringed by the Lehigh Valley Railroad Company, the defendant, and it prayed for an injunction and an account of profits.

The answer of the company denied that Mellon was the first inventor of the mode of attaching tires to wheels of locomotives, described in his letters-patent, and it also set up former letters-patent and publications, bearing date many years before his alleged invention, and showing, as was claimed, tires and wheels such as the company use.

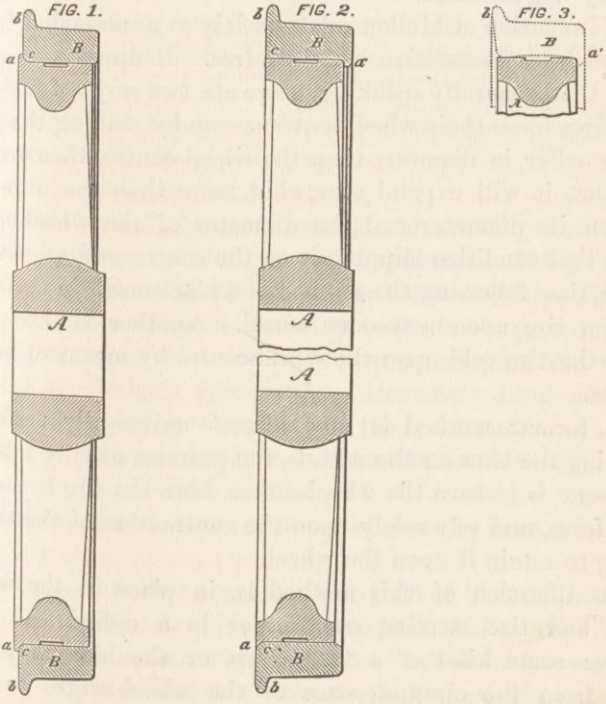
Among them are letters-patent No. 8526, granted to Nehemiah Hodge, Nov. 18, 1851, for a new and useful improvement in railroad car wheels. One of the drawings (that designated as Figure 2) annexed to his specification on which the letters-patent were granted shows a flange or shoulder from the rim of the wheel-centre projecting over and overlapping the tire.

The answer, by way of further defence, denied infringement.

The Circuit Court upon final hearing found against the company upon both issues made by the answer, perpetually enjoined it from further infringement, and directed an account of profits to be taken. Upon the coming in of the master's report a decree was rendered in favor of Mellon for the sum of $3,018.

This appeal was thereupon taken by the company.

Figures 1, 2, and 3 appended to Mellon's specification are as follows: —



The following represents Figure 2 of the drawings annexed to the specification of Hodge.

Mr. Alexander D. Campbell and *Mr. Edward N. Dickerson* for the appellant.

Mr. Furman Sheppard, contra.

MR. JUSTICE WOODS, after making the foregoing statement of facts, delivered the opinion of the court.

It appears from the evidence that railroad locomotive wheels are composed of two parts, — the body of the wheel, called the wheel-centre, and a tire which surrounds it, substantially in the same manner in which the tire surrounds the felloes of an ordinary wagon wheel.

The invention of Mellon relates solely to a method of fastening tires upon locomotive wheel-centres. It appears from the record that, generally speaking, there are two ways of fastening these tires upon their wheel-centres; one by making the tire a little smaller in diameter than the wheel-centre, then heating it so that it will expand somewhat more than the difference between its diameter and the diameter of the wheel-centre, and in that condition slipping it on the centre and allowing it to cool, thus following the method of a blacksmith in shrinking a wagon tire upon a wooden wheel. Another method is to fasten the tire cold upon the wheel-centre by means of screws or bolts.

The former method is now almost universally used. In shrinking the tires on the wheels, the practice usually followed at present is to turn the wheel-centre, bore the tire in a cylindrical form, and rely solely upon the contraction of the tire by cooling to retain it upon the wheel.

A modification of this method is, in place of the wheel-centre and tire meeting each other in a cylindrical joint, to have some kind of a flange, lip, or shoulder to project either from the circumference of the wheel-centre or from

the bore of the tire, to fill a corresponding groove or recess in the opposite part, so that when the tire has been shrunk on the wheel-centre it cannot be driven sideways off the wheel against the resistance of this flange. The wheels exhibited in the drawings of Mellon's patent belong to this latter class.

The right of Mellon to the relief prayed for in the bill depends in part upon the construction to be placed on his letters-patent.

His counsel contends that they cover two things, which, it is claimed, are in substance set forth in his specification as follows: —

First, In having the wheel, or the tire which is to be fitted on the same, provided with a single flange arranged in such a manner that said flange, in connection with the ordinary flange on the tire, will keep the latter on the wheel.

Second, In constructing the tire with a rounded edge at one side of its inner surface, in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire being stretched by use.

Conceding that the patent is to be construed according to the contention of the appellee, we are of opinion that he has not shown himself entitled to relief.

An inspection of the specification and drawings which accompany the letters-patent granted to Nehemiah Hodge under date of Nov. 18, 1851, shows precisely the contrivance first described in the specification of the appellee's patent. The drawing, representing a central cross-section of a car-wheel, appended to Hodge's specification, accurately illustrates the first alleged invention described in the specification of appellee's patent. His patent cannot, therefore, be held to include that contrivance. So far as that part of his alleged invention is concerned, the defence of want of novelty is conclusively established.

But there is another answer to this part of his case.

The act of July 4, 1836, c. 357 (5 Stat. 117), under which this patent was issued, requires that an applicant for a patent shall not only "deliver a written description of his invention

or discovery," but "shall also particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." This provision is substantially re-enacted in the act of July 8, 1870, c. 230 (16 Stat. 198), Rev. Stat., sect. 4888, and remains in force.

As a rule, therefore, the specification filed with the application for letters-patent contains a general description of the invention sought to be patented, which is followed by what is technically called the "claim." In reference to this latter part of the specification this court, speaking by Mr. Justice Bradley, has said: "It is well known that the terms of the claim in letters-patent are carefully scrutinized in the Patent Office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous intentions and the state of the art, determines the applicant is entitled to." *Burns* v. *Meyer*, 100 U. S. 671. See also *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 id. 274, 278.

In view, therefore, of the statute, the practice of the Patent Office, and the decisions of this court, we think that the scope of letters-patent should be limited to the invention covered by the claim, and that though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification.

We are, therefore, justified in looking at the "claim" with which the specification of the appellee's invention concludes, to determine what is covered by his letters-patent.

The claim, so far from covering an angular flange upon the wheel, expressly excludes such a flange, and embraces only a flange with a curved or rounded corner.

In this case the description of the appellee's invention is much broader than his claim. It seems quite clear from the present form of his specification, and from the fact that his application for a patent was twice rejected, that he was compelled by the Patent Office to narrow his claim to its present limits before the commissioner would grant him a patent. In doing this he neglected to amend the descriptive part of his specification. He cannot go beyond what he has claimed and insist that his patent covers something not claimed, merely

because it is to be found in the descriptive part of the specification.

The appellee is, therefore, precluded from claiming relief against the appellant for the use of a flange with a square corner. He is, consequently, driven to the second branch of his alleged invention, as set out in his bill of complaint, as the basis of any relief against appellant.

This, as is clear from his claim, consists simply in rounding off that corner of the inner side of the tire which fits into the re-entrant corner made by the flange upon the rim of the wheel-centre, so as to prevent the corner of the tire from indenting and sinking into the periphery of the wheel-centre.

The charge in the bill of infringement of this part of appellee's alleged invention is not sustained by the proof. The answer, which is under oath, denies infringement. Infringement must, therefore, be shown by satisfactory proof; it cannot be presumed. The evidence for the appellee entirely fails to establish this part of his case. On the contrary, the proof adduced by the appellant is not only persuasive, but conclusive to show that it never made or used the flange with the rounded corner.

We are of opinion, therefore, that the record discloses no case against the appellant. The decree of the Circuit Court must, therefore, be reversed, and the cause remanded with instructions to dismiss the bill; and it is

So ordered.

CHICAGO *v.* TEBBETTS.

1. A., to secure an indebtedness to B., conveyed to C., in trust, certain lands in the city of Chicago, which were subsequently condemned for a street. B. permitted the city to take possession of them and make the improvements, but with the express reservation and condition that he thereby waived no right against A. or the city. The city paid A. his proportion of the award, and issued to him a voucher showing the amount awarded, the payment made, and the balance still due. A. delivered to C. this voucher, and indorsed thereon an order to pay the balance to him, as trustee for B., in full of principal due for lien on the land. The city paid C. but a part of the sum due on the voucher, and C., pursuant to a power contained in the deed of trust, sold the lands at public auction to B., who conveyed them to D. The voucher was thereupon assigned to D., it being agreed that he should have all the rights therein of B. and C. *Held*, that D. is entitled to a decree against the city for the balance remaining unpaid on the voucher, with interest thereon from the time it became due.
2. A party guilty of unreasonable and vexatious delay in making payment of a just claim cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

James D. Bruner, the owner of certain premises in the city of Chicago, conveyed them by two deeds of trust bearing date July 10, 1866, and June 12, 1867, respectively, to Levi D. Boone, as trustee, to secure to the Union Mutual Life Insurance Company the payment of two notes, one for $10,000 and one for $8,000. On Sept. 9, 1867, Bruner conveyed the premises to Charles A. Gregory, subject to the outstanding indebtedness. Dec. 12, 1867, $2,000 with interest was paid on the $8,000 note.

The city council having, May 25, 1868, passed an ordinance for the extension of Dearborn Street, it became necessary to take the premises for that purpose. Condemnation proceedings were had accordingly, and the damages assessed at $36,000. The city paid Gregory, March 22, 1869, $20,000, and on the early part of the following May issued to him a voucher for $16,000, which he, on the eighteenth day of that month, assigned to Boone as trustee and general agent of the company, as collateral security for the payment of the notes.

Certain property-holders who had a large pecuniary interest

in the opening of the street stipulated, in writing, that if Boone would take no steps to prevent the city from immediately occupying the land and defer enforcing the collection of the notes, they would pay the company interest semi-annually on the said sum of $16,000, or on so much thereof as should remain unpaid. It was stipulated that Boone and the company did not thereby "waive or abandon any right they might have on said notes against the maker thereof, or any right of suit against the said city for the recovery of said money, or any right of entry or possession of said land."

On June 1, 1869, the city, with the consent of the company, entered upon the land, and has since that date kept and used it for a public street. On June 5 the city paid Boone $6,000, which, with the $2,000 before referred to, paid the $8,000 note.

It is admitted by stipulation that the city, after the execution of the agreement, had knowledge thereof, and, but for such knowledge, would not then have taken possession of the premises; also, that it had only paid $26,000 on account of the damages awarded.

Neither the balance due on the voucher nor the $10,000 note having been paid, Boone, as trustee, pursuant to the power of sale contained in the deed of trust, sold the premises at public auction to the insurance company, and executed to it a conveyance therefor. The company conveyed, Dec. 27, 1872, to William C. Tebbetts, a citizen of Massachusetts, the premises, together with any claim which it had either against the city or Bruner. At the same time Boone, as trustee and general agent of the company, indorsed and delivered to him the voucher of the city. Failing to obtain payment thereof, Tebbetts, in November, 1873, brought ejectment against the city, but dismissed his action before judgment.

In June, 1877, Tebbetts filed his bill against the city to compel the payment of the balance due on the voucher.

The court below decreed in his favor for the $10,000 due on the voucher, together with interest at six per cent per annum from Jan. 1, 1870.

The city thereupon appealed to this court.

Mr. William C. Goudy for the appellant.

Mr. W. B. Wilson and *Mr. George Payson, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The decree in this case must be affirmed. The grounds taken by the appellant for resisting payment of the $10,000 due on the note given by Bruner to the insurance company, and secured by the trust deed given to Boone, are quite remarkable. It is conceded that the land embraced in the deed was regularly condemned for a street in 1868, and assessed at $36,000, without any deduction for benefits; and that no one was interested in it except Gregory, the owner of the fee, and Boone, as trustee for the insurance company, who held two deeds of trust thereon to secure two several notes for money loaned, — one for $10,000, before referred to, and one for a balance of $6,000. On March 22, 1869, the city paid Gregory, the owner of the equity of redemption, his proportion of the award, namely, $20,000, and on the 14th of May following the board of public works of the city gave him a voucher, showing the amount of the award, the payment made to him, and the balance still due, namely, $16,000, being the amount due to the insurance company and secured by the deeds of trust. This voucher Gregory indorsed with an order to pay the said balance to Boone as trustee of the insurance company in full of principal due said company for lien on the land, and delivered the same to him. Boone thereupon made demand on the city for this balance. On May 21, 1869, the city authorities gave notice that the assessments had been collected, and that the money was ready in the hands of the city treasurer to be paid over to the parties entitled; and on the 5th of June they paid to Boone, the trustee, $6,000, which he applied to the note on which that amount was due, which was sufficient to cancel the same. The balance of $10,000, though frequently demanded, was never paid, and this suit was brought by the appellee as assignee of the company, to recover the money or the land.

That it was the intent of the parties that Gregory should, and that they supposed he did, transfer to the company all claim to the balance of the award made for the land, over and above the $20,000 received by himself as owner of the equity of redemption, there cannot be the slightest doubt. The mortgagee was entitled to it, and it was the owner's duty to make

the assignment, if any assignment was necessary; and it was, in fact, made, or supposed to be made, by the indorsement of the voucher to the trustee. It was sufficiently made to vest in the company, or its trustee, the entire equitable interest in the money and in such security for its payment as yet remained; and it was manifestly the duty of the city to pay it accordingly.

But, notwithstanding the notice to that effect, it seems that the city did not, at the time, have in hand the requisite funds to pay the last $10,000. The company, however, on receiving guaranties from other parties, who were interested in the street, that the interest should be paid at all events (there being some doubt whether the city would be liable for interest), consented to let the city take possession and go on with the improvement; but with the express reservation and condition that such consent was not to be a waiver or abandonment of any right against the debtor, or any right of suit against the city for the recovery of the money or the land. This indulgence on the part of the insurance company has been the prime cause of all the trouble experienced by it and its assignee (the present appellee) in collecting the said $10,000. It is conceded that he has never received his money; that the city has the land, and claims the right to keep it for the purposes of the street; that the assessed value was sufficient to pay this claim over and above what was due to others; and that the company was entitled to the money in 1869. Payment, however, is resisted, so far as we can understand the defence, on the ground that the company, being unable to get its money, treated the land as still subject to its claim, and directed its trustee to advertise and sell the same by way of foreclosure, and bid it in at such sale for the amount of the demand. This, the appellant contends, satisfied the debt. But the city still claimed the land, and resisted every attempt of the company to get possession of it. Actions of ejectment were brought, but were strenuously defended, and the company was forced to abandon them. The counsel for the city contended then, as they contend now, that by virtue of the condemnation proceedings all interests and titles in the land were condemned, as well that of the trustee under the trust

deeds, as that of the owner of the fee. Hence their argument on this branch of the case is, that the proceedings for foreclosing the trust deed were illusory and vain. Therefore the company acquired no title by the foreclosure and sale, and its assignee, the appellee, has none.

It is thus supposed to be conclusively reasoned out, upon the soundest principles of logic, first, that the debt is satisfied by the foreclosure and purchase of the land; and, secondly, that all claim to the land was extinguished by the proceedings for condemnation. If this argument is sound, the appellee certainly has not a particle of ground to stand on. His debt is gone because he has got the security; and the security is gone because it was taken for the street; and yet the company, or its assignee, has not received a cent of money, nor any other consideration whatever.

When, by a train of abstract reasoning, we are brought to an absurd conclusion, it behooves us carefully to reconsider the steps by which we have been led up to it. If the last conclusion of the appellant is well founded, namely, that there was nothing left for the deed of trust to operate upon, and that the proceedings in foreclosure were indeed illusory and vain, the first conclusion, that the debt was satisfied by the form of sale which was gone through in such proceedings, cannot be true.

It is admitted on all hands that the proceedings for condemning the land for a street were duly and properly pursued, and that the company waived its right to oppose the taking possession thereof by the city before payment of the assessment. The courts were probably right in holding, in the actions of ejectment which have been referred to, that the city could not be dispossessed. But as the company, when permitting the possession to be taken, reserved all its rights for the recovery of the money yet due, and as it is conceded that the city has not paid that money, it is surely against good conscience and every principle of equity to refuse to pay it. We think, therefore, that the company, or its assignee, standing in the position of mortgagee of the land, or, which is the same thing, as *cestui que trust* under the trust deed, and afterwards as assignee of the balance due on the award, had a clear

ground of equity for filing the bill in this cause, and is entitled to a decree.

The question of interest has been largely discussed by counsel. But in our view of the matter it needs but little consideration. It has been the express statute law of Illinois, at least ever since 1845, that interest at the rate of six per cent per annum shall be allowed "on money withheld by an unreasonable and vexatious delay of payment." We have no hesitation in declaring that this is such a case. It is now more than twelve years since the property was condemned. The money has been due, and ought to have been paid long ago. It was the duty of the city to provide for its payment. Instead of that, it has litigated and contested the demand year after year, and in court after court.

It is unnecessary to make a minute examination of the statute law for ascertaining the days and times when, in the due course of proceeding, the money might have been collected from the owners of property benefited by the street. It is manifest that it might have been collected long before the commencement of this suit. But a party guilty of unreasonable and vexatious delay in making payment of a just claim cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. If he is guilty of such delay, he is chargeable with interest on the debt from the time it became due as upon other debts enumerated in the law. We see nothing to criticise in the amount of interest allowed by the court below.

Decree affirmed.

BARTON *v.* BARBOUR.

1. The rule that a receiver cannot be sued without leave of the court of equity which appointed him applies to suits against him on a money demand, or for damages, as well as to those the object of which is to recover property which he holds by order of that court.
2. The fact that, by such order, he is in possession of a railroad, and engaged in the business of a common carrier thereon, does not so take his case out of the rule, as that an action will lie against him for an injury caused by his negligence or that of his servants in conducting that business.
3. If the adjustment of a demand against him involves disputed facts, that court may, in a proper case, either of its own motion or on the prayer of the parties injured, allow him to be sued in a court of law, or direct the trial of a feigned issue to settle the facts.
4. The determination by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury.
5. In view of the public and private interests involved, a court of equity, having in its possession for administration as trust assets a railroad or other property, may authorize the receiver to keep it in repair, and manage and use it in the ordinary way, until it can be sold to the best advantage of all interested therein. Without leave of that court, a court of another State has, under such circumstances, no jurisdiction to entertain suits against him for causes of action arising in the State wherein he was appointed and the property is situated, which are based on his negligence or that of his servants in the performance of their duty in respect to the property.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Saul S. Henkle for the plaintiff in error.

Mr. Linden Kent, contra.

MR. JUSTICE WOODS delivered the opinion of the court.

This was a suit brought by Frances H. Barton, the plaintiff in error, against John S. Barbour, the defendant in error, as receiver of the Washington City, Virginia Midland, and Great Southern Railroad Company.

The declaration was as follows: "The plaintiff, Frances H. Barton, sues the defendant, John S. Barbour, as receiver of the Washington City, Virginia Midland, and Great Southern Railroad Company, a corporation organized under a law of the State of Virginia, and doing business and having an office

in the District of Columbia, for that the defendant, on the eleventh day of January, 1877, was running and operating a railroad through the State of Virginia, and upon said railroad the defendant was a common carrier of freight and passengers for hire. That, on the day and year aforesaid, the plaintiff was a passenger in a sleeping-car upon said railroad, and by reason of a defective and insufficient rail upon the track of said railroad the car in which the plaintiff was a passenger was thrown from the track and turned over down an embankment, and she was greatly hurt and injured, and her bodily health permanently injured; that the defendant did not use due care in relation to said defective rail, and the injury to the plaintiff was occasioned by the negligence and carelessness of the defendant, but the plaintiff used due care. The plaintiff claims $5,000 damages."

To this declaration the defendant below filed a plea to the jurisdiction, in which he alleged that at the time of service of process on him he was the receiver of all the property, rights, and franchises of said railroad company, by virtue of a decree made by the Circuit Court for the city of Alexandria, in the State of Virginia, on July 13, 1876, in a cause depending on the equity side of said court, wherein John C. Graham, who sued for himself and others, was complainant, and said railroad company and others were defendants; that said decree authorized him to defend all actions brought against him as such receiver, by the leave of said court, and declared that he should not in any case incur any personal or individual liability in conducting the business of said railroad, by reason of any act done by him or his servants, he acting in good faith and in the exercise of his best discretion, but that the property in his hands as such receiver should nevertheless be chargeable with any claim which might be established in any action brought against him as such receiver under leave of the court first had and obtained.

The plea then averred that the plaintiff had not obtained leave of said court to bring and maintain said suit. Wherefore the defendant prayed judgment whether the court could or would take further cognizance of said action.

The plaintiff filed the general demurrer to the plea.

The court below gave judgment overruling the demurrer, and against the plaintiff for costs. She prosecutes this writ of error to reverse that judgment.

The question presented by the record is the sufficiency of the plea to the jurisdiction of the court.

The defendant insists that the Supreme Court of the District of Columbia had no jurisdiction to entertain the suit without leave of the court by which he was appointed receiver.

It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained. *Davis* v. *Gray*, 16 Wall. 203, and the cases there cited. But the learned counsel for the plaintiff in error strenuously contends that the only consequence resulting from prosecuting the suit without such leave is that the plaintiff may be restrained by injunction or attached for contempt, and that the rule applies only to cases where the suit is brought to take from the receiver property whereof he is in possession by order of the court. We conceive that the rule is not so limited.

The evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. *Hall* v. *Smith*, 2 Bing. 156; *Camp* v. *Barney*, 4 Hun (N. Y.), 373; *Commonwealth* v. *Runk*, 26 Pa. St. 235; *Thompson* v. *Scott*, 4 Dill. 508.

If he has the right, in a distinct suit, to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust, of any attempt to enforce satisfaction of his judgment, would be precisely the same as if his suit had been brought for the purpose of taking prop-

erty from the possession of the receiver. A suit therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.

And it has been so held in effect by this court. In *Wiswall* v. *Sampson* (14 How. 52), this court said: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

So in *Ames* v. *Trustees of Birkenhead Docks* (20 Beav. 332), Lord Romilly, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference with property in the course of administration in the Court of Chancery, only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents, and tolls, which the receiver was appointed to receive.

It is next asserted by the plaintiff that the fact that the receiver in this case is in possession of, and is conducting the business of, a railroad as a common carrier, takes his case out

of the rule that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. Her contention is that parties who deal with such a receiver, either as freighters or passengers upon his railroad, may for any injury suffered, either in person or property, sue him without leave of the court by which he was appointed.

We do not perceive how the fact that the receiver, under the orders of the court, is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey* v. *Galveston, &c. Railroad Co.* (93 U. S. 352), that "the allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." This puts claims against the receiver, in his capacity as a common carrier, on the same footing precisely as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver, can, without leave, sue him to recover his damages, then every conductor, engineer, brakeman, or track-hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled by other courts, at the instance of impatient suitors, without regard to the equities of other claimants, and to permit the trust property to be wasted in the costs of unnecessary litigation.

Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a

proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts.

The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while travelling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way.

We, therefore, think that the demand of the plaintiff is not of such a nature that it may be prosecuted by suit without leave of the court.

The plaintiff lastly contends that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt, or to be enjoined from its further prosecution. In other words, she says that leave to prosecute the suit is not a jurisdictional fact, and that, therefore, the plea to the jurisdiction should not have been sustained.

Our decision upon this question will be limited to the facts of this case, which are that the receiver was appointed by a court of the State of Virginia, and the property in course of administration was in that State; the suit was brought in a court of the District of Columbia, a foreign jurisdiction, and the cause of action was an injury received by plaintiff in the State of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed. No leave was obtained to bring the suit, and it does not appear that any application was made, either to the receiver or to the court by which he was appointed, to allow and pay the demand of the plaintiff.

Upon these facts we are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit.

This point has been substantially settled by this court in the case of *Peale* v. *Phipps*, 14 How. 368.

In that case it appeared that, under a law of the State of

Mississippi, by the decree of the Circuit Court of Adams County in that State, the charter of the Agricultural Bank at Natchez was declared forfeited and the corporation dissolved, and Peale, the plaintiff in error, appointed trustee and assignee of its assets, and was the sole legal representative of the corporation; that he became legally liable to the creditors of the bank to the extent of the assets, and that he had assets in his possession sufficient to pay all the debts of the corporation. The defendants in error claimed that there was due them from the bank a large sum of money on account of mesne profits, &c., of certain real estate in Natchez, from which they had been unlawfully expelled by the bank, and the possession of which they had recovered from the bank in an action of ejectment. The defendants in error presented their claim to Peale, the receiver, for allowance as a valid claim against the bank, who refused to admit or allow it, or any part of it.

Thereupon the defendant in error brought suit against Peale in the United States Circuit Court for the Eastern District of Louisiana, to recover said mesne profits, and effected service upon him in that district. Peale, among other defences, filed an exception, in which he denied the jurisdiction of the court. This was overruled and judgment was rendered against him for $20,058, to be satisfied out of the assets of the bank in the hands of Peale as trustee. The case having been brought on error to this court, the judgment was reversed. The court, Mr. Chief Justice Taney delivering its opinion, said: "As we think this exception," the one just mentioned, "decisive against the jurisdiction of the Circuit Court of Louisiana, it is unnecessary to set out the other exceptions. We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams County and subject to its order, and was not authorized to dispose of any assets or pay any debts due from the bank, except by order of the court. He had given bond for the performance of his duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an

officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it and wrest it from the hands of its agent and thereby put it out of his power to perform his duty." And the court declared that the facts stated in the petition showed "that the Circuit Court of Louisiana had no jurisdiction" of the case.

That case differs from the one now under consideration only in this, that it was a suit to recover a judgment against the trustee and receiver upon a demand due from the bank before his appointment; while the present case seeks to establish a demand against the receiver for a claim which, according to the decision of this court (*Cowdrey* v. *Galveston, &c. Railroad Co.*, *supra*), forms a part of the charges and expenses of executing that trust. Such charges are specially subject to the control and allowance of the court which is administering the trust property.

We think, therefore, that the case just cited is decisive of this.

The argument is much pressed, that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or the receiver, will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. To support this view the following cases are cited: *Palys* v. *Jewett*, New Jersey Court of Error and Appeals, Am. Law Reg., Sept., 1880, 553; *Kinney* v. *Crocker*, 18 Wis. 74; *Allen* v. *Central Railroad of Iowa*, 42 Iowa, 683.

But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.

Thus, upon a bill filed for an injunction to restrain the infringement of letters-patent, and for an account of profits for past infringement, it is now the constant practice of courts of

equity to try without a jury issues of fact relating to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment, and assignment of the invention patented. The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken. *Rubber Company* v. *Goodyear*, 9 Wall. 788; *Cawood Patent*, 94 U. S. 695; *Marsh* v. *Seymour*, 97 id. 348.

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrong-doer in an action at law for its recovery.

Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. But if, by mistake or wrongfully, the receiver takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting *ultra vires*. *Parker* v. *Browning*, 8 Paige (N. Y.), 388; *Paige* v. *Smith*, 99 Mass. 395; *Hills* v. *Parker*, 111 id. 508. So far the case seems plain. But if claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress. The new and changed condition of things which is presented by the

insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets. Two very different courses of proceeding are presented for adoption. One is the old method, usually applied to banking, insurance, and manufacturing companies, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all parties having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim.

It is evident that the first method would often be highly injurious, and result in a total sacrifice of the property. Besides, the cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the Commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchises. And in most cases the creditors cannot complain, because their interest as well as that of the public is promoted by prevent-

ing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user.

As a choice, then, of least evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may, and in most cases ought to, authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in *Wallace* v. *Loomis*, 97 U. S. 146.

But here arises a dilemma. If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has, therefore, been found necessary, and has become a common practice for a court of equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the court by which he was appointed.

If the court below had entertained jurisdiction of this suit, it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession, and to enforce the payment of such charges and expenses out of the trust property without the leave of the court which was administering it, and without consideration of the rights and equities of other claimants thereto. It would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities.

We therefore declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested

therein, a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.

Judgment affirmed.

MR. JUSTICE MILLER dissenting.

The rapid absorption of the business of the country of every character by corporations, while productive of much good to the public, is beginning also to develop many evils, not the least of which arises from their failure to pay debts and perform the duties which by the terms of their organization they assumed. One of the most efficient remedies for the failure to pay, when it arises from inability, is to place the corporation in the hands of a receiver, that its affairs may be wound up, its debts discharged, and the remaining assets, if any there be, distributed among its stockholders. Of the beneficial results of this remedy there can be little doubt. When it is applied with despatch, and the effects of the insolvent corporation are faithfully used to meet its liabilities and its dead body is buried out of sight as soon as possible, no objection can be made to the procedure, and all courts and good citizens should contribute, as far as they may, to this desirable object.

In regard, however, to a certain class of corporations, — a class whose operations are as important to the interests of the community and as intimately connected with its business and social habits as any other, — the appointment of receivers, as well as the power conferred on them, and the duration of their office, has made a progress which, since it is wholly the work of courts of chancery and not of legislatures, may well suggest a pause for consideration. It will not be necessary to any observing mind to say that I allude to railroad corporations. Of the fifty or more who own or have owned the many thousand miles of railway in my judicial circuit, I think I speak within limits in saying that hardly half a

dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the roads, collect the means of the companies, and pay their debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the property out of the hands of its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debts of the corporation, but quite as often adds to them, and injures prior creditors by creating a new and superior lien on the property pledged to them.

During all this time he is in the use of the road and rolling-stock, and performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform.

The decision which has just been announced declares that for these failures he cannot be sued in a court of law; that by virtue of his receivership, he and all his acts, and the business of the road, are exempted from the operation of the common law, and that all parties deal with him on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed him.

When a receiver appointed to wind up a defunct corporation has no power to make new contracts, — when his sole duty is to convert the property into a fund for the payment of debts, and for distribution among those who are entitled to it, — a very strong reason exists why the court which appointed him should alone control him in the performance of his duty. In such cases, the Court of Chancery has the undoubted right to protect him by injunction against parties suing him in another court, and to punish them for contempt.

Wiswall v. *Sampson* (14 How. 52) and *Peale* v. *Phipps* (id. 368) recognize this principle. In the former case the court decided that a sale of property under a judgment of one court, which was in the actual possession of a receiver appointed by

another court, did not confer a valid title as against the sale of the same property subsequently made under an order of the court whose receiver had held possession all the time. The court did not decide that he could not be sued at law for any tort committed by him as receiver.

Peale v. *Phipps* carries the doctrine to an extent to which it had not been carried before, but it was based upon the proposition that Peale, as the trustee under the law of Mississippi, appointed by a court of that State to close out and distribute the assets of a broken bank, could not, as such trustee, be made amenable to the jurisdiction of a court of Louisiana. The reason being that the fund, out of which alone the plaintiffs could be satisfied, was in the control of the court in Mississippi. The debt sued for was created by the bank before it was placed in the hands of the receiver. When he was appointed, the bank in effect ceased to exist, and could neither do business nor contract debts. There remained solely the duty of realizing its assets and paying its debts.

In the case before us the plaintiff sues to recover damages for a personal injury, caused by an act done by the receiver or his agents in the transaction of business as a common carrier, in which he was largely and continuously engaged. Why should the receiver not be sued like any one else on such a cause of action in any court of competent jurisdiction?

The reply is, because he is a receiver of the road on which the plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts having cognizance of such matters, and all the disputes arising out of these vast transactions must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the constitutions of the several States and of the United States, is denied to the person injured, and though his case has no element of equitable jurisdiction he is compelled to submit it to a court of chancery or to one of the masters of such a court.

In an action for a personal injury, which has always been considered as eminently fitted for a jury, especially in the assessment of damages, this constitutional right is denied, because the receiver of a railroad and not its owners committed the wrong.

Before I can give my assent to such a doctrine I must be well assured that the law as heretofore expounded demands it.

So far from entertaining such a conviction, I think that the doctrine is at variance with the principles which govern the relations of common-law courts and courts of equity where, as in the courts of the United States, these jurisdictions have been kept separate.

In England, in the contests between these courts it was never claimed that the court of chancery could act directly upon the court of law, or that the latter was bound in any way to follow the decisions of the former. Nor could the Chancellor direct his writ to the common-law court or its officers; but if it was determined to give any equitable relief in the matter pending before the law court, the injunction or other chancery process was directed to the suitor. Upon him alone was the power of the court exercised. In such a case as this, if the Court of Chancery was of opinion that the plaintiff was improperly interfering with the functions of the receiver, it could restrain him by injunction or punish him by attachment for contempt. If, however, the plaintiff could not be reached by that court, it is no more than the evil of many other cases where a defendant cannot be found when he is wanted in a court of justice.

But I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within the jurisdiction, is bound or is even at liberty to deny the plaintiff his lawful right to a trial because the defendant is a receiver appointed by some other court, and to leave the suitor to that court for remedy, where it is known that some of the most important guaranties of the trial to which he is entitled, and which are appropriate to the nature of his case, will be denied him.

Whatever courts of equity may have done to protect their

receivers, or the fund in their hands, it is no part of the duty of courts of law to deny to suitors properly before them the trial of their rights, which justice requires and the Constitution and the law guarantee.

These views are well sustained by the authorities collected in the brief of the plaintiff's counsel, especially in *Angel* v. *Smith*, 9 Ves. Jr. 335; *Hill* v. *Parker*, 111 Mass. 508; *Chautauque County Bank* v. *Risley*, 19 N. Y. 369; *Camp* v. *Barney*, 4 Hun (N. Y.), 373; *Sprague* v. *Smith*, 29 Vt. 421.

The doctrine is stated with admirable precision by the Supreme Court of Wisconsin in the case of *Kinney* v. *Crocker* (18 Wis. 74), in the following language: "But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under such circumstances and itself dispose of the matter involved. It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law, and no defence to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the Court of Chancery, but only an attempt to obtain a judgment at law in a claim for damages."

It is asserted by counsel, whose brief shows the extent of his research, that no case can be found where such a plea has been sustained in an English court. I regret to say that in my opinion the judgment just rendered is unsupported by authority and unsound in principle.

FORT *v.* ROUSH.

1. At a sale of mortgaged lands in Montana Territory, pursuant to a decree of foreclosure in a proceeding wherein A. was complainant, he became the purchaser of a part of them; but, on account of his fraudulent conduct, the sale to him was set aside. B., the mortgagor, now seeks to charge him with the value of the use and occupation of such part while it was in his possession under his purchase, and with damages for waste. *Held*, 1. That the satisfaction of the decree caused by the sale was vacated when that sale was set aside. 2. That a judgment should be rendered against A. for only so much of the sum found to be due for such value and damages as exceeds the amount necessary to satisfy the decree.
2. *Quære*, if the sum so found is insufficient to satisfy the decree, will A., in order to secure an execution against B., be compelled to proceed under sect. 286 of the Revised Statutes of the Territory for the revival of the decree.

APPEAL from the Supreme Court of the Territory of Montana.

The facts are stated in the opinion of the court.

Mr. John F. Phillips, *Mr. Thomas W. Bartley*, and *Mr. M. I. Southard* for the appellant.

No counsel appeared for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This record shows that, in 1871, Fort, the appellant, sued the appellees in the District Court of Lewis and Clarke County, Montana Territory, to foreclose a mortgage executed by them to him, and obtained a decree finding that there was due on the mortgage debt $2,895, and ordering a sale of the property. Under this decree an order of sale was issued and the property sold, part to Isaac W. Stoner, part to Frederick Reece, and the remainder to Fort himself. After this sale the appellees filed the present bill in the same court to set aside the sales on account of alleged fraudulent conduct of Fort. Under this bill the sales to Stoner and Reece were in all respects confirmed, but that to Fort set aside. Roush and wife then filed an amended and supplemental bill, in which they sought to charge Fort with the value of the use and occupation of the property whereof he was in possession under his purchase, and

with alleged damages for waste. In this bill the claim is stated as follows : —

"And the said plaintiffs say that by reason of the premises the said Fort is chargeable with the damage done to said premises, with the value of the foregoing use and occupation, and the amount of said rents and profits, and that the same should be set off against any balance that may be due upon the said decree."

Fort in his answer set forth the amount he claimed to be due on his decree after the amount paid by Stoner and Reece had been credited thereon, and asked that, as the sale to him had been set aside, he might have a revival of his decree for the balance that should be found his due. On motion of Roush and wife, this part of the answer was stricken out, and leave was refused Fort to make such amendments as seemed to be necessary to meet that part of his case. The case was then sent to a referee to ascertain and report the amount for which Fort was chargeable on account of his use and occupation, and for damages by waste while in possession. His request to have the referee directed to ascertain the amount due him on his decree was refused. The referee reported, and exceptions were taken by Fort. These exceptions were in part sustained and in part overruled, the result being a personal judgment against Fort and in favor of the appellees for $1,836,31, with interest from June 30, 1877. The case was then taken to the Supreme Court of the Territory on appeal, where the judgment of the District Court was modified by striking therefrom the sum of $618.51, but in all other respects affirmed. From this action of the Supreme Court the present appeal has been taken.

The amount with which Fort was charged by the Supreme Court was exclusively for the value of the use and occupation of the property purchased by him while he was in possession under the sale, and a small amount for damages done to the freehold. While the amount charged seems to us to be somewhat large, we have on the whole concluded not to disturb the judgment on that account. Another reference might reduce the amount somewhat, but the error in that particular is not so manifest as to make it proper for us to interfere with what has been done by two courts below.

The refusal of the court, however, to apply the amount found due towards the satisfaction of the mortgage debt, we think, was erroneous. The very object of the bill of Roush and wife, as amended, was to have that done. If we understand correctly the position of the court below upon this part of the case, it is that, as Fort had not proceeded under sect. 286 of the Codified Statutes of Montana, and caused his decree to be revived after the sale to him had been set aside, the satisfaction growing out of the sale still remained in force, and there was no outstanding mortgage debt on which the application could be made. This we do not think is the law. The statute referred to is as follows: —

"SECT. 286. If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt: *Provided*, that no property of such debtor sold *bona fide* before the filing of such petition shall be subject to lien of said judgment: *And provided further*, that notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest."

The question here is not whether Fort shall have execution of his decree by a resale of the property bought by him, but

whether the mortgage debt, as a debt, still remains satisfied by reason of the former sale. When the sale was set aside and Roush and wife got back their land, the satisfaction of the debt caused by the sale was vacated. Fort received no money on account of his purchase. He simply took the land as and for money. So long as he kept the land the satisfaction was effectual, but when the sale was set aside and he was compelled to give back the land, the case stood, in respect to the satisfaction of the debt, precisely as it would if Roush had demanded back money he had once handed Fort to be applied on the debt, and Fort had acceded to his request. We do not decide whether, if Fort asks execution of his decree for any balance that may remain his due, he may not be compelled to proceed under the statute, and get his decree revived, but we are clearly of the opinion that, for all the purposes of this suit, the satisfaction of the mortgage debt, brought about by the sale to Fort, was vacated when the sale was set aside, and that Roush and wife cannot in this suit have a personal judgment against Fort, except for any balance that may be found due them for rents, &c., after the mortgage debt has been satisfied.

We are unable to determine from this record what amount is actually due on the original decree. The personal judgment against Fort will, therefore, be set aside and reversed, and the cause remanded with instructions to take an account of the amount due Fort on his original decree, and apply the amount which has been ascertained to be due from him for rents, profits, and damages towards the satisfaction thereof, rendering a personal judgment against him only for any balance of the ascertained rents that may remain after the mortgage debt and costs in the original suit for foreclosure have been actually satisfied.

So ordered.

INSURANCE COMPANY *v.* RAILROAD COMPANY.

A contract between A., a despatch company, and B., a railroad company, whose road, in connection with those of other companies, forms a continuous line, stipulated that B. should "receive, load and unload, deliver and way-bill," all freight sent to it by A. at such rates for transportation as may be established by the railroad companies, and should, while assuming all the risks of a common carrier, pay for all damage to or loss of property while on its road or in its possession. A similar contract was entered in by A. with each of the other companies, between which there was an arrangement that the amount charged for the through freight should be divided between them according to the length of their respective roads; that each company should pay for losses occurring on its road; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first. Settlements were made by the railroad companies periodically upon accountings between them, and each settled separately with A. *Held*, 1. That B., by its agreement with A., incurred neither an obligation to carry freight beyond its own road nor a liability for the negligence of either of the other companies. 2. That the arrangement between the railroad companies did not make them partners *inter sese* or as to third persons.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. John G. Chandler for the plaintiff in error.

Mr. John G. Williams, *contra*.

MR. JUSTICE HARLAN delivered the opinion of the court.

The cotton, for the recovery of the value of which this action was brought against the St. Louis, Vandalia, Terre Haute, and Indianapolis Railroad Company, the defendant in error, was, at the time of shipment, owned by Adolphus Meir & Co., of St. Louis, who, for a valuable consideration, have assigned to the St. Louis Insurance Company, the plaintiff in error, all their claim on account of the said loss. The parties having, by proper written stipulation, waived a jury, the case was tried by the court, and judgment given for the railroad company.

The facts set forth in a special finding, covering many pages of the printed transcript, so far as they are deemed essential to a clear understanding of the case, are as follows: —

The Erie and Pacific Despatch Company, a Kansas corporation, having agencies in different cities of the Union, and whose business it was to solicit and forward freights over trunk railroad lines between St. Louis and New York, received the cotton in question from Meir & Co., under agreements for its transportation to Liverpool, for a through rate, expressed in English money. No direction was given as to the route over which it should be carried to the seaboard, nor were any bills of lading then executed.

The St. Louis Transfer Company, having received from the despatch company the warehouse receipts, and having been engaged by it for that purpose, hauled the cotton to East St. Louis, and there delivered it, on account of that company, to the defendant, taking receipts therefor. By the dray tickets of the transfer company the cotton was consigned by the despatch company to C. G. Meir & Co., London. The defendant had not, on previous occasions, issued bills of lading for freight shipped over its line by the despatch company, nor did it do so for any part of these shipments. But, in accordance with its custom, it made a way-bill for the cotton to Indianapolis. The cotton was carried safely over the defendant's road from East St. Louis to Indianapolis; thence, pursuant to directions of the despatch company, and without change of cars, over the Pittsburg, Cincinnati, and St. Louis Railroad to Urbana, Ohio, where it was put into other cars suitable to the change of gauge at that point; and thence over the Atlantic and Great Western Railroad and the Erie Railway to Jersey City.

The cotton was destroyed by an accidental fire which occurred in Jersey City on the 21st of March, 1873.

Within the usual time after the respective shipments from East St. Louis the despatch company executed and delivered to Meir & Co., of St. Louis, bills of lading for the cotton. Each bill disclosed the quantity of cotton, its destination, the names of the consignors and consignees, the agreed rates in English money, and purported to be the "Through bill of lading of the Erie and Pacific Despatch, and the Oceanic Steam Navigation Co. from St. Louis to Liverpool, calling at Queenstown." With the last-named company, known as the White Star Line,

the despatch company had an arrangement by which it could contract for shipments from New York to Liverpool at rates given by the steamship line, the latter agreeing to receive the goods at its dock in Jersey City, and transport them to Liverpool. But the despatch company had no power to bind the steamship line for any risks incurred in the inland transportation, nor did it receive from the line any commission or other compensation. Its remuneration came exclusively from certain arrangements with railroad companies, to which we shall presently refer.

The bills of lading delivered to Meir & Co. contained, among other provisions, the following: —

"That the said Erie and Pacific Despatch and its connections which receive said property shall not be liable . . . for loss or damage by . . . fire . . . nor for damage to perishable property of any kind occasioned by delays from any cause; . . . nor for loss or damage on any article of property whatever by fire or other casualty while in transit, or while in deposit or in places of transshipment or at depots or landings at all points of delivery. . . .

"It is further agreed that said Erie and Pacific Despatch and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which the bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

"It is further stipulated and agreed, that in case of any loss, detriment, or damage done to, or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"And it is further agreed, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

"This contract is executed and accomplished, and the liability

of the Erie and Pacific Despatch as common carriers thereunder terminates, on the delivery of the goods or property to the steamship at White Star wharf, Jersey City, when the liability of the steamship company commences, and not before.

* * * * * * *

"NOTICE. — In accepting this bill of lading the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions."

The right of recovery in this case against the defendant is rested by the plaintiff in error in part, if not altogether, upon certain business relations existing at and before the time of these shipments, as well between the despatch company and the railroad companies over whose lines the cotton was carried, as between the railroad companies themselves. It is necessary, therefore, to ascertain what were the precise relations held by these several corporations to each other.

During the period covered by these transactions, and for some time prior thereto, the Erie and Pacific Despatch Company had arrangements with sundry railroads having connections terminating in New York, under which it was empowered to contract for the transportation of goods according to the tariff rates, or any special rates furnished by the respective railroad companies. It had a separate agreement with each of the railroad companies already named, in some cases oral, in others written. The agreement with the Erie Railway Company was in writing, and, among other things, provided that the despatch company should establish and maintain, at its own expense, independent and efficient agencies for soliciting and procuring freight, in the cities of New York and Boston, and in other cities, east and west, as the parties might deem necessary; that the railway company should transport all through freight secured by the despatch company, either eastward or westward bound, passing between Philadelphia, New York, Jersey City, Albany, Boston, and common or competing points in New England, and common or competing points on the line of the Erie Railway, except that on east bound freight the despatch company should not receive any commission on shipments from any station on the line of that railway; that the despatch company should issue its own bills of lading to ship-

pers, subject, as to rates, to the current through rates of the railway company, which should at all times be as low as the rates furnished to any other party or parties; that the railway company should receive, load and unload, deliver and way-bill, and furnish daily an impression copy of each way-bill, of both eastward and westward bound freight, free of charge, to the despatch company; that the railway company agreed to assume "all the risks of common carriers, and to pay all damage to or loss of property while on their line of road or in their possession," and in case property was lost or damaged, and the loss and damage could not be definitely located, the railway company should pay said loss in proportion to what was received for transporting the same, subject, however, to the liability limitations contained in the bills of lading of the despatch company; that the railway company should transport all freight known as first-class freight on the fastest freight trains running over its road, and so run the same and all through freight trains so as to enable the despatch company to deliver freight between competing points, in the east or west, as quickly as it was done by any other competing line or road; that the despatch company should maintain the authorized rates of the railway company, and be governed, in the transportation of through business, by any obligations entered into by the railway company with their competing lines for the maintenance of rates; and that the railway company should give to the despatch company at all times as low rates as were given to any other line running over the road of the former, and would prorate any rate on east bound freight, made by authority of the road leading from the point, provided that road was authorized to make through rates over the Erie Railway; and that they would prorate all losses, damages, and rebates that were prorated with any other line running over that railway.

It was further stipulated in that agreement that, in consideration of the mutual benefits to be derived by the parties, the railway company should pay to the despatch company a commission on west bound freight of fifteen per cent of their gross earnings, as per their way-bills, on first, second, and third class freight, and ten per cent on their gross earnings, as per their way-bills, on fourth and special class freight from

certain points to certain other designated points. On East bound freight the despatch company was to receive from the railway company ten per cent of their gross earnings, as per their way-bills, on first, second, and third class freight, and eight per cent of their gross earnings, as per their way-bills, on fourth-class freight, from certain named places, and on freight from certain places, competing points on the Atlantic and Great Western Railroad, provided such freight originated from points off of said line; it being understood that no commission should be paid on freight originating at such stations.

With the defendant the despatch company had a parol agreement, which was the same in substance as the written one with the Erie Railway Company. It had no power, however, to contract for or fix any rate on the carriage of goods over the road of the defendant, except as authorized by the latter.

In all cases of freight, ocean bound, from the West, over the Erie Railway, shipped by or consigned to the care of the despatch company, the latter was treated as the consignee in New York, and the freight was held subject to its order. The railway company was ready to deliver the Meir cotton as it arrived in Jersey City, and as directed by the despatch company.

What were the relations which the railroad companies sustained towards each other during the same period? In the year 1873, and prior thereto, the companies owning or operating the various railroad trunk lines between St. Louis and New York had an arrangement between themselves, whereby the general freight agents of the roads terminating at St. Louis made what was called a joint tariff to New York, fixing through rates, which were divided among the several roads constituting a through line. According to an estimate of distances the goods were to be carried by each road upon the basis of the shortest line. Losses occurring on through shipments, if not located, were prorated as between the companies themselves, in the same ratio as the freight moneys; but if located, were, as between the railroad companies, to be paid by the one on whose road the losses occurred. The joint tariff was published and put into the hands of railroad agents for their guidance in making contracts, and was also distributed to shippers and to the public generally. The titlepage of that tariff was: "Joint

rates of transportation from St. Louis *via* Toledo, Wabash, and Western; Ohio and Mississippi; Chicago and St. Louis; St. Louis, Vandalia, Terre Haute, and Indianapolis; Indianapolis and St. Louis; St. Louis and Southeastern; and St. Louis, Bellville, and Southern Illinois Railroads." In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. The railroad companies collected the freight from the consignees, divided it among themselves, and paid to the Erie and Pacific Despatch Company for its services so much per cent on the gross freights for pound freight, and sixty cents a bale on cotton, each road settling separately with that company for its dues.

It is further stated, in the special finding, that on all shipments from St. Louis to New York by the railroad companies over which the Meir cotton was carried, the defendant paid the transfer charges from St. Louis to East St. Louis, and the Erie Railway paid the lighterage at Jersey City, whether the goods were to go to New York proper, or were foreign bound. These transfer and lighterage charges were included in the through rate named by the defendant. On shipments by that route from New York to St. Louis the defendant collected the freight money from consignees, and, retaining its proportion, accounted for the residue to the next road in the line, which in like manner deducted its share and accounted in the same way to the next, and so on to the beginning of the line. On shipments from St. Louis to New York City proper the Erie Railway collected the freights from the consignees, and in like manner settled with the next preceding carrier, and so on, in the inverse order of the transportation, to the first carrier. These settlements between the roads were made periodically upon accountings between them. Upon shipments to foreign ports, the despatch company collected from the ocean steamer the full amount of the inland freight, and paid the same to the Erie Railway Company, which settled with the preceding carriers.

The general question presented by this case, as will have been observed, relates to the liability of the defendant in error for the value of certain cotton, part of shipments made in January and February, 1873, at St. Louis for Liverpool, and which

having passed over its road, thence over the lines of other railroad companies, was destroyed by an accidental fire in Jersey City, while in the custody of the Erie Railway Company for delivery to an ocean steamer for further transportation.

The positions taken on behalf of the plaintiff in error are in substance these: —

That the original contracts of transportation between Meir & Co. and the despatch company were in parol, became complete when the parol agreements were made, and, consequently, for the ascertainment of the rights of the parties, reference cannot be made to bills of lading subsequently issued;

That in no event can Meir & Co. be held bound by the special conditions in the bills of lading, whereby not only the despatch company and its "connections" were relieved from liability for loss of the cotton by fire, but all legal responsibility was limited to that company in whose actual custody it was when a loss occurred;

That the defendant, with the other companies, over whose roads the cotton passed, jointly formed a continuous and connected line, and constituted a partnership of common carriers for the route between St. Louis and Jersey City;

That the despatch company, by virtue of its relations with the railroad companies, including the defendant, was the agent of that partnership of carriers, and of each constituent member thereof, in all contracts by it made for the transportation of freight over their line, and that the delivery to it of the cotton was, in law, a delivery to that line of carriers and to each company of which it was composed;

That, consequently, the defendant was liable for the destruction of the cotton by fire while in the custody of the Erie Railway Company, one of the corporations alleged to constitute the partnership, — such liability to be determined not by the before-mentioned special conditions contained in the bills of lading, but by the general doctrines which obtain at common law, in reference to public carriers not operating under a special contract, limiting their liability; and, lastly,

That the cotton was held for an unreasonable length of time in Jersey City, without delivery to the Oceanic Steam Transportation Company for further transportation; in conse-

quence of which delay, it is contended, the cotton was lost by the fire mentioned; in other words, had the cotton, after reaching Jersey City, been promptly delivered to the ocean steamer, it would not have been within reach of the fire that destroyed it. It is not claimed that there was negligence in any other respect.

The first question pressed upon our attention relates to the bills of lading. It appears from the special finding that, at the time the cotton was delivered to the despatch company, there was an understanding that bills of lading should be given to Meir & Co. The latter had been, prior to 1873, large shippers of cotton by that company, and had received from it numerous bills of lading. Whether they contained any special conditions whatever is not found. Nor does it appear whether the bills of lading for the shipments of 1873 were to contain special conditions relieving the despatch company and its connections from the duties and responsibilities, or any of them, annexed by law to their employment, nor whether the bills for those shipments were similar to those given in previous years. So far as disclosed by the finding, Meir & Co. when receiving the bills in question were silent as to their provisions. Neither when they received the bills of lading issued prior to 1873, nor those issued on the shipments in question, was attention called to their provisions. Nothing was said by the despatch company on either occasion, about special exemptions or exceptions for the benefit of the carriers. In fact Meir & Co., although having abundant opportunity to do so, never read any of the despatch company's bills of lading further than to see that they correctly described the cotton and accurately stated the rate, designation, and names of consignors and consignees. They were not aware, until after the loss complained of, that the bills of lading contained the special provisions under examination. And it is expressly stated in the special finding that they never "assented to said special provisions."

If the bill of lading constituted, as the Circuit Court held that it did, the contract of transportation with the owners of the cotton, and if the defendant is to be regarded as one of the "connections" of the despatch company, then, manifestly, the law would be for the defendant; for the bills of lading ex-

pressly limit responsibility for loss or damage to that carrier in whose actual custody the cotton might be when lost or destroyed. But, as we have seen, the plaintiff contends that Meir & Co. were not bound by those special conditions, for the reason that the bills of lading were not delivered until after the cotton was surrendered to the despatch company for transportation, and because, also, it is expressly stated in the finding that they never assented to those special provisions. Plaintiff insists that it is the settled doctrine of this court, as announced in *New Jersey Steam Navigation Co.* v. *Merchants' Bank* (6 How. 344), *Railroad Company* v. *Manufacturing Company* (16 Wall. 318), *York Company* v. *Central Railroad* (3 id. 107), and in other cases, that a common carrier cannot resort to implication or inference, founded on doubtful and conflicting evidence, or on the silence of the shipper when receiving either a bill of lading or a notice with special conditions annexed; that the carrier, in order to obtain exemption from any of the duties imposed upon it by law, must show an express stipulation, in parol or in writing, upon the part of the shipper, assenting to such exemption; and that, in the nature of things, Meir & Co. cannot be held to have expressly stipulated for exemptions to which, the court finds, they never assented.

To this it is replied that Meir & Co. expressly stipulated for bills of lading to be given them, had abundant opportunity to examine all the provisions of those subsequently delivered, and did in fact read some portion of each one; that their failure to read all the provisions was their own fault; and, since the bill of lading contains an express notice that "in accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions," the law will not now permit Meir & Co. to plead their own negligence, or to say that its provisions were not binding upon them.

Whether the one or the other of these positions is correct it is not necessary to determine, since there are other controlling questions, touching which there is entire unanimity in the court, and upon the determination of which our decision may rest.

Waiving, therefore, any expression of opinion as to whether,

upon the findings in this case, the bills of lading expressed the contract between Meir & Co. and the despatch company, or as to whether the railroad company can take shelter under the special provisions, to which reference has been made, and assuming, for the purposes of our decision, — as the plaintiff in error insists we must do, — that the defendant cannot claim the benefit of those provisions, we proceed to an examination of other grounds upon which it is sought to hold the defendant liable for the value of the cotton burned in Jersey City.

The main proposition advanced upon this branch of the case by the plaintiff's counsel is that, in these transactions, the despatch company was the agent of the defendant and of the other railroad companies over whose lines the cotton was carried. If by this is meant that the despatch company was an agent of the defendant, with general authority to bind the latter by contracts for transportation, it is sufficient to say that there is no justification in the findings for any such position. It nowhere appears that the despatch company assumed to have, or that the defendant recognized it as having, any such unlimited authority. The despatch company and the defendant had, it is true, certain business relations; but those relations did not necessarily involve an agency upon the part of the former for the latter in the making of contracts for transportation. The agreement between those companies only bound the railroad company to "receive, load and unload, deliver and way-bill," such freight as was sent to it by the despatch company; and at the rates established, not by the latter, but by the defendant and other railroad companies. The despatch company could not itself make a contract, or fix any rate for the carriage of goods over the defendant's road, except as authorized by the defendant. It is expressly so stated in the special finding. So far from the despatch company being authorized to impose upon the defendant obligations for the safe carriage of goods over the lines of other carriers, the agreement of the defendant with that company was, while assuming all the risks of common carriers, "to pay all damages to or loss of property, while on their line of road or in their possession." The contract obligation of the defendant to receive and trans-

port the freight of the despatch company, at the established rates, did not impose upon the former an obligation to carry beyond its terminus, or subject it to liability for the negligence of other carriers. Whether the defendant should undertake for the safe transportation of goods beyond its own line was not a matter left, in any degree, for the determination of the despatch company, and was not within any authority it had. The liability of the defendant for the safe carriage of the cotton, after its delivery to the next succeeding carrier on the prescribed route to New York, must, therefore, depend upon the inquiry whether the defendant, in any form, assumed, or held itself out to the public as assuming, any such responsibility. The legal proposition involved in this inquiry was considered by this court in *Railroad Company* v. *Manufacturing Company*, *supra*. Speaking by Mr. Justice Davis, we there gave our sanction to the rule, adopted in most of the courts of this country, that the carrier, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route This principle was subsequently recognized in *Railroad Company* v. *Pratt* (22 Wall. 123), although in that case the way-bill or receipt of the carrier was held to import an undertaking for the safe carriage of the goods as well over its own line as over the lines of other carriers. Was there, we then inquire, in the present case, a special contract or undertaking by the defendant to carry beyond its route? A careful consideration of the facts set out in the finding satisfies us that there was no such contract or undertaking. The defendant received the cotton without executing bills of lading therefor. It had never given bills of lading for goods shipped by the Erie and Pacific Despatch Company. Its custom was to make a way-bill only over its own road. That course was pursued in this case, and defendant only collected and received pay for carrying to Indianapolis. It is true the way-bills, upon their face, indicated that the cotton was consigned to C. G. Meir & Co., London. But that circumstance is not, of itself, controlling or conclusive. The reference in the way-bill to the consignees was mere description to show the ultimate destination of the

cotton. Each way-bill, executed by the defendant, purported to be nothing more than a "manifest of freight from St. Louis to Indianapolis," and fails to show an undertaking by it to transport beyond the latter city.

A special undertaking to carry beyond its terminus cannot be implied, against the defendant, from the arrangement already referred to, between the despatch company and sundry railroad companies whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies.

Such an arrangement did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons. Each company bore the general expenses of its own route and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies gave each one no greater amount than perhaps it would have earned had the despatch company contracted with each, separately, for the transportation of the cotton. The arrangement in question was one simply of convenience both for the shipper and carrier. Under it Meir & Co. were enabled to contract, at St. Louis, for a through rate for the transportation of the cotton by the despatch company. The latter, in order to meet its obligations to the owners of the cotton, used the road of the defendant, receiving from the latter nothing more than its way-bill to Indianapolis, which showed upon its face the proportion of the aggregate pay to which the defendant would be entitled. The defendant received compensation only for transportation over its road, and settled separately with the despatch company. It undertook, and was only bound, to transport over its own line and deliver to the succeeding carrier. That duty was discharged, and the loss occurred while the cotton was held by another carrier. The mere fact that it joined with other companies in establishing a through rate from St. Louis to New York, to be divided between themselves, upon the basis, not of expenses incurred, or investment made, but of distance simply, although compe-

tent as evidence, does not, of itself, imply an undertaking to transport beyond its line, or to become bound for any default or negligence of other carriers.

In view of the conclusion thus indicated, it is unnecessary to determine the rights of the plaintiff in error as against the despatch company, or to inquire whether the detention of the cotton in Jersey City, under the circumstances disclosed in the record, was negligence upon the part either of the despatch company or of the Erie Railway Company, or of both. Nor need we inquire whether the destruction of the cotton, by an accidental fire, was, in a legal sense, the result of its detention, in Jersey City, for an unreasonable length of time without delivery to the ocean steamship. Those questions are not material upon the present issues.

Upon the whole case the law is for the defendant.

Judgment affirmed.

DAVIS *v.* WELLS.

1. The rule, requiring notice by the guarantee of his acceptance of a guaranty and his intention to act under it, applies only where, the instrument being, in legal effect, merely an offer or proposal, such acceptance is necessary to that mutual assent, without which there can be no contract.
2. If made at the request of the guarantee, the guaranty becomes the answer of the guarantor to a proposal, and its delivery to the guarantee or for his use completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty and constitutes its consideration. It must be so wherever there is a valuable consideration other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor; and equally so where the instrument is in the form of a bilateral contract, which binds the guarantee to make the contemplated advances, or otherwise creates by its recitals a privity between him and the guarantor. In each of these cases, their mutual assent is either expressed or necessarily implied.
3. A guaranty, if expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, is not an unaccepted proposal, but is, without notice of acceptance, binding on delivery.
4. Where a guaranty declares that the guarantor thereby guaranties unto the guarantee, unconditionally at all times, any advances, &c., to a third per-

son, notice of demand of payment and of the default of the debtor, as well as notice of the amount of the advances when made, is waived, although either or both would otherwise be required.

5. But a failure or a delay in giving such notice, if required, is no defence to an action upon the guaranty, unless the guarantor has thereby sustained loss or damage, and then only to the extent thereof.
6. The contract of guaranty, although that of a surety, is to be construed liberally and in furtherance of its spirit, to promote the use and convenience of commercial intercourse.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. James M. Woolworth for the plaintiffs in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, *contra.*

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The action below was brought by Wells, Fargo, & Co., against the plaintiffs in error, upon a guaranty, in the following words: —

"For and in consideration of one dollar to us in hand paid by Wells, Fargo, & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo, & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo, & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [SEAL.]
"J. N. H. PATRICK. [SEAL.]

"Witness: J. GORDON."

The answer set up, by way of defence, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon &

Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence, that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo, & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo, & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo, & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo, & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third, and fifth: —

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo, & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it; and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo, & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the

amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of said delivery of said guaranty, and since, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever over-

draft, if any, not exceeding $10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and, further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams* v. *Jones* (12 Pet. 207, 213), Mr. Justice Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell* v. *Clarke*, 7 Cranch, 69; *Edmonston* v. *Drake*, 5 Peters' Rep. 624; *Douglass* v. *Reynolds*, 7 Peters' Rep. 113; *Lee* v. *Dick*, 10 Peters, 482; and again recognized at the present term in the case of *Reynolds* v. *Douglass*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him

from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached; and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds* v. *Douglass* (12 Pet. 497, 504), decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted;" and he added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formerly declared to be so by

Mr. Justice Nelson, speaking for the court in delivering its opinion in *Louisville Manufacturing Co.* v. *Welch* (10 How. 461, 475), where he uses this language: "He [the guarantor] has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in *Wildes* v. *Savage* (1 Story, 22) Mr. Justice Story, who had delivered the opinion in *Douglass* v. *Reynolds* (7 Pet. 113), after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration

is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell's Cases on Contracts, 987), "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes* v. *Savage* (*supra*), where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice,

but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality: the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action — "we hereby guarantee unto them, the said Wells, Fargo, & Co., *unconditionally, at all times*," &c. — cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo, & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, "for and in consideration of one dollar to us paid by Wells, Fargo, & Co., the receipt of which is hereby acknowledged, we hereby guarantee," &c. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo, & Co., communicated to the guarantors? Wells, Fargo, & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence* v. *McCalmont* (2 How. 426, 452), and was overruled. Mr. Justice Story said: "The

guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Tooth* (5 Bingham's New Cases, 577), where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety, and cannot be separated into distinct parts. The covenant is single, and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice

should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "guarantee unto them, the said Wells, Fargo, & Co., *unconditionally*, *at all times*, any indebtedness of Gordon & Co., &c., to the extent and not exceeding the sum of ten thousand dollars, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo, & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo, & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions, —

1. That if Wells, Fargo, & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and,

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants

of the default, the plaintiffs could not recover upon the guaranty.

For if the necessity in either or both of these contingencies existed to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions were waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defence.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision in *Louisville Manufacturing Co.* v. *Welch*, *supra*. An unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty. It was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record.

Judgment affirmed.

PORTER *v.* GRAVES.

1. The declaration in an action against A., B., and C., to recover the price of a saw-mill sold to them, alleges that they were, at the time of the sale, partners in the business of sawing and manufacturing lumber and timber, and of procuring, owning, and operating a saw-mill for that purpose at a designated place. B., who alone appeared or was served with process, admitted in his answer that he and A. and C. were interested together in the business of sawing and manufacturing lumber at the time mentioned, and "contemplated and intended to procure by lease or purchase, or erect, a saw-mill" at said place. It was proved that the mill at the time of the sale was in their possession. *Held*, that an instruction to the jury that the partnership was conceded was not erroneous.
2. *Quære*, Can a party who buys property at a public sale, to perfect his previous private purchase thereof, have the sale vacated on the ground that it was contrary to law and public policy; or, after having received and used the property, can he, when sued for the purchase-money, set up such a defence.
3. The court in this case properly left it to the jury to determine whether the defendant had possession of the property pursuant to the sale.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. Henry J. Scudder for the plaintiff in error.

Mr. Francis Kernan, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This action was commenced by Jennie L. Graves in the Supreme Court of New York, and was, on the application of Porter, removed into the Circuit Court of the United States.

It was brought to recover the purchase price of a portable saw-mill, which she, acting as administratrix of Cyrus Graves, deceased, alleged she had sold to J. Morton Poole, William T. Porter, and W. G. Norwood, who were at the time partners in the business of sawing and manufacturing lumber and timber, and of procuring, owning, and operating a saw-mill for that purpose, at or near Homerville, Ga. Though all the partners were sued, Porter only appeared or was served. His answer raised several issues, which were submitted to a jury under the charge of the court. The exceptions to this charge, and to the refusal to grant the instructions prayed by

his counsel, with some exceptions in regard to evidence, constitute the errors on which he relies to reverse the judgment in favor of the plaintiff.

The evidence tended to show that the plaintiff, who resided in New York, made a visit to Georgia, and while there had negotiations with Norwood concerning the sale of the saw-mill; that her right to sell without an order of the probate court of the proper county being considered doubtful, Norwood said that if she would get the necessary authority to sell he would, for the firm of J. Morton Poole & Co., give $5,000 for the mill; that, having been duly appointed administratrix of the estate of the deceased by the surrogate of Cortland County, New York, she procured an order of sale from the probate judge of the county of Georgia, in which the mill was situated; and that after a due advertisement the mill was sold to Norwood, as one of the partners of J. Morton Poole & Co., for $5,000.

The first point we shall examine relates to the existence of this partnership. The judge, in his charge to the jury, said that this was conceded by the parties. To this an exception was taken at the time.

We have already given the language of the declaration alleging the existence of this partnership. The answer of Porter on that subject is as follows: "And defendant admits that he and the defendants Poole and Norwood were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure by lease or purchase, or erect, a saw-mill in the neighborhood of Homerville, aforesaid; but said defendant denies that the defendants or either of them applied to the plaintiff to purchase the saw-mill described in the complaint, and alleged to have been the personal property of said Cyrus Graves in his lifetime, or to buy any personal property."

We think this is a concession or admission of the alleged partnership; and when it is further proved without contradiction that the mill, at the time of sale, was in the possession and use of those gentlemen, the instruction of the court was justified.

Poole and Porter resided in Delaware, and Norwood was a

citizen of North Carolina. In a letter dated Wilmington, Delaware, and signed J. Morton Poole & Co., written to Mrs. Graves, in Cortland County, before she went to Georgia, in which the subject of the purchase and price of the mill and her power to sell it are considered, it is said: "We do not think your price is unreasonable, and though Mr. Norwood is a partner and must be consulted, we say now, as Mr. Pusey said to you personally, that we are the responsible parties in the concern and control all the decisions." This is relied on to show the error of the court in the statement that the existence of the partnership was conceded. But as the statement of this letter is positive that Norwood was a partner, and as the partnership was then negotiating for the purchase of this mill, we are of opinion that it proves the soundness of the charge on that point. The effect of private arrangements between the partners as to the relative influence and responsibility of each in deciding questions arising in the course of their business is a very different thing from disproving the existence of the partnership.

Another point on which error is assigned arises out of instructions asked by the defendant as to the validity of the sale.

It was in evidence that, by correspondence and otherwise between Mrs. Graves and the defendants, she had agreed that she would sell the mill to them for $5,000, which they did not think too much. But it was found necessary that she should proceed in the sale according to the laws of Georgia, and she accordingly went there and obtained from the probate court an order of sale. While this was going on she had several interviews with Norwood, who was then running the mill under some arrangement with parties who had leased it from her intestate. The advertisement states that the mill was to be sold to perfect a contract for sale to J. Morton Poole & Co., and it was so announced at the time of sale by the auctioneer. On this evidence the defendant prayed the court to instruct the jury as follows: —

"That the attempted sale at public outcry to perfect a previous private sale is contrary to the law and public policy of the State of Georgia, and therefore void.

"That the private sale of the property in question being illegal, no concerted attempt by the parties thereto to validate it by the forms of a public sale under an order of the ordinary can be effectual.

"No agreement of the parties or united request on their part to secure a formal compliance with the law in aid of a previous illegal private sale will render the latter valid.

"The formal public sale of the mill made expressly to perfect a title to the same to the defendants, in accordance with the terms of a private sale made of said property to them, is a mere form and an evasion of the statute, and hence illegal."

All these requests were refused.

That they were founded on a sound general principle is undeniable. When the law requires a sale of property, real or personal, to be made at public auction, after due notice, it is for the purpose of inviting competition among bidders that the highest price may be obtained for what is sold. To make a private bargain beforehand between the party who wishes to buy and the person authorized to sell, as to the price and other incidents of the contract, and then invoke the forms of a public sale with competition to give effect to the private bargain is a course of procedure well calculated to defeat the purpose for which the public sale is required. There can be no doubt that, at the instance of the heirs, devisees, or creditors interested in having the property bring its full value, such a sale would be set aside, either by a court of chancery, if it were real estate, or by the probate court having jurisdiction.

But it may be doubted whether this may be done at the instance of one who was purchaser at both the public and private sale. And it is still more questionable whether such purchaser, after having received and used the personal property for a long time, can set up such a defence to a suit for the purchase-money.

Such was the case here. As it is not clear from the evidence that there was a private contract of sale, and as the defendants bid what the jury have found to be a fair price, took the mill and used it afterwards as long as its use was profitable, and have never returned it to the plaintiff, we think

the court was justified in refusing the instructions asked by them on this point. See *Nutting* v. *Thomason*, 46 Ga. 34.

Another point raised by Porter is, that the sale was void under the Statute of Frauds, because no memorandum in writing was signed by the party charged.

To this it is answered that the defendants took possession of the mill under the sale, and thus brought the case within the exception of the statute. This is denied, and the possession of the defendants is alleged to be a mere continuation of that which they had at the time of the sale under the former lessee.

But the sale took place at the mill. Norwood, the man who bid it off, was then in possession. It nowhere appears that after this he paid any money or acknowledged any relation to the former lessee. The court left it to the jury to say whether he had possession under the sale, and we think this was right.

It is insisted that the mill was real estate, and no title passed to defendants by the sale, as no deed was made, and no title was in the plaintiff to the land on which it was situated. It was what is known as a portable saw-mill, capable, as the name implies, of being removed from one locality to another, as the exhaustion of the timber by use of the mill required. It was properly left to the jury, under sound instructions, to say what the character of the mill in that respect was, and of this plaintiff here cannot complain.

Several errors are assigned on exceptions to the ruling of the court in regard to the admission of evidence. We have examined these carefully, and find no error in them. We cannot, in the pressure of the business of the court, give our reasons for this in detail.

Judgment affirmed.

MINING COMPANY *v.* CULLINS.

A person hired by the owners of a mine in Utah to oversee the miners, and generally to control and direct its working and development, did, in the performance of his duties, some manual labor. *Held*, that for the wages due to him he is entitled to the lien conferred by sect. 1221 of the Compiled Laws of that Territory.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. Walter H. Smith for the plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, *contra.*

MR. JUSTICE WOODS delivered the opinion of the court.

Cullins brought suit against the Flagstaff Silver Mining Company of Utah, in a district court of the Territory of Utah, to recover wages alleged to be due to him from the company for services rendered, and to subject its property to a lien therefor which he claimed attached by virtue of the statute of the Territory. The statute declared as follows:—

"Any person or persons who shall perform any work or labor upon any mine or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine or of any interest therein, shall be entitled to a miner's lien for the payment thereof upon all the interest, right, and property in such mine by the person or persons contracting for such labor or materials at the time of making such contract. Said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah." Compiled Laws of Utah, sect. 1221.

The answer of the company denied that anything save a small balance was due, and that the statute gave him a lien on its property therefor.

The case was submitted to the court upon the issues of fact as well as of law.

The court found that the company, a corporation organized under the laws of Great Britain, was, at the time the services were rendered, the owner of and engaged in working a mine

called the Flagstaff Mine, situate in that Territory, and that one J. N. H. Patrick was the general agent and manager of the company's mining and smelting business in America; "that on or about the fourteenth day of December, 1873, the said company, by said J. N. H. Patrick, its agent, for that purpose duly authorized, employed the plaintiff for an indefinite time thereafter to direct the *work* in its said mine, and with authority to employ and discharge miners, and procure and purchase supplies for working said mine; that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee, and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine; that the plaintiff, while in the employment of said company, performed said duties, and in the performance thereof did some manual labor;" and that, at the commencement of the suit, there was due to the plaintiff from the mining company $1,530 for wages earned by him under said employment. The court gave judgment for that sum, and declared it to be a lien upon the mine.

From this judgment an appeal was taken to the Supreme Court of the Territory, by which it was affirmed.

The company prosecutes this writ of error, and alleges that the courts below erred in declaring the judgment in favor of Cullins to be a lien on the mine. The precise question presented is, whether his services for the company were such "work and labor" as under the statute entitled him to a lien therefor upon the mine.

Statutes giving liens to laborers and mechanics for their work and labor are to be liberally construed. *Davis* v. *Alvord*, 94 U. S. 545. The finding of the District Court makes clear the character of the services rendered by the defendant in error. He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. His services were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to

those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor, and that the District Court rightfully declared the person who performed them entitled to a lien under the law of the Territory.

We have examined all the cases cited by the plaintiff in error. None of them seem to be inconsistent with the views we have expressed. They decide that an architect and superintendent of a building; that a person employed to cook for men engaged in constructing a reservoir; that a contractor for the building of a railroad or the erection of a house; that the assistant chief engineer of a railroad company; that agents employed to disburse money and pay off the hands who are building a house, — are not, under laws similar to the statute of Utah, entitled to a lien for their services. *Foushee* v. *Grigsby*, 12 Ky. 75; *McCormack* v. *Los Angelos Water Co.*, 40 Cal. 185; *Aikin* v. *Wasson*, 24 N. Y. 482; *Blakey* v. *Blakey*, 27 Mo. 39; *Caldwell* v. *Bower*, 17 id. 564; *Brockway* v. *Innes*, 39 Mich. 47; *Peck* v. *Miller*, id. 594.

The case which comes nearer supporting the contention of the plaintiff in error than any other is *Smallhouse* v. *Kentucky, &c. Co.*, 2 Mon. T. 443. But in that case the court says, that "from the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the

place named." That case is fairly distinguishable from the one now under consideration; but even if it fully supported the contention of the plaintiff in error, it is entitled to no more weight than the decision of the Supreme Court of Utah in the present case.

Views similar to those we have expressed were declared by Williams, C. J., in *Willamette Falls Transportation & Milling Co.* v. *Remick* (1 Oreg. 169), and by the Supreme Court of Nevada in *Capron* v. *Strout*, 11 Nev. 304.

It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor. *Stryker* v. *Cassidy*, 76 N. Y. 50; *Mutual Benefit Life Insurance Co.* v. *Rowand*, 26 N. J. Eq. 389; *Jones* v. *Shawhan*, 4 Watts & S. (Pa.) 257; *Bank of Pennsylvania* v. *Gries*, 35 Pa. St. 423; *Knight* v. *Morris*, 13 Minn. 473.

It is not necessary in this case to go so far as these decisions would warrant. But we are clearly of opinion that, upon the facts found by the District Court, the defendant in error, under the statute of Utah, was entitled to a lien upon the mine to which his services were applied. The judgment of the Supreme Court of Utah must, therefore, be

Affirmed.

THE "WOODLAND."

Drafts on the owner of a vessel do not bind her, unless the debt for which they were given by her master is a lien on her, although they express on their face that they are "recoverable against the vessel, freight, and cargo."

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. James Ridgway and *Mr. William R. Beebe* for the appellants.

Mr. Henry J. Scudder, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit in admiralty to recover of the bark "Woodland" and her freight the amount of two drafts drawn by the master of the vessel at St. Thomas, W. I., on her owners, one for the payment of $2,000, and the other for the payment of $2,606.40, in New York, to the order of J. Niles & Co., merchants in St. Thomas, ten days after sight. The facts found by the Circuit Court, which, in our opinion, are conclusive of the case, are as follows: —

The "Woodland" was a British bark owned by the claimants, residents of St. John, New Brunswick. In November, 1870, while on a voyage from Montevideo to New York with a cargo, being in distress, she put into the Danish port of St. Thomas for repairs, which were necessary before she could safely proceed on her voyage. J. Niles, who carried on business under the name of J. Niles & Co., attended to the affairs of the vessel at St. Thomas, landed the cargo, and sold a portion of it, on which he received an amount sufficient to reimburse all the moneys expended; but he charged for commissions and insurance $6,875. As to the insurance, none was actually effected, and the commissions were on an excessive valuation. The master approved all the bills, and drew drafts on his owners for a balance of $6,106.24, which expressed on their face that they were "recoverable against the vessel, freight,

and cargo." Two of these drafts the libellants discounted, and this suit was brought for their recovery. The third, for $1,500, was given by Niles to the master upon a corrupt understanding that it was to be his share. The two drafts have not been accepted or paid, and the libellants are the owners thereof, having advanced money upon them in good faith and without any knowledge of the fraudulent acts of Niles and the master.

The drafts did not themselves create a lien on the vessel. Unless the debt for which they were given bound the vessel, the drafts, notwithstanding what is expressed on their face, did not. If the owners owed Niles nothing under his contract with the master for the repairs and supplies which had been furnished, he had no lien on the vessel, which he or any one else could enforce in admiralty. For the purposes of this suit the libellants occupy no better position than Niles; and if he could not recover, they cannot. Having advanced their money in good faith, they may not be affected, so far as their remedies against the parties to the drafts are concerned, by the fraudulent character of the transactions between Niles and the master; but if the vessel owed Niles nothing, it does not owe them.

Now, we think it clear that if Niles were here as appellant instead of these libellants, he would not be entitled to the reversal of this decree upon the findings as they stand. The findings sent here under the act of 1875 furnish the only evidence of the facts which we can consider. It is incumbent on the libellants to prove a debt from the vessel to Niles, and its amount. Until this proof is made they cannot recover. If the settlement between the master and Niles had not been impeached, that would have been enough, for the master is the agent of the owner for all such purposes. But it has been impeached. The court has expressly found that, although insurance was charged for and allowed, none was ever effected, and that the commissions were calculated on an excessive valuation. It has also found that there was a corrupt understanding between the master and Niles, under which the master was given one of the drafts which he drew on his owners, as "his share." Under these circumstances it is clear that the approval of the

accounts by the master amounts to nothing as evidence of what was actually due, and without that there is nothing to show that Niles is entitled to anything. His advances were all paid by sales of the damaged cargo, and while there was $6,875 allowed him for commissions and insurance, the balance due to him on the accounts as stated was only $6,106.24. Thus it appears that in addition to his expenditures he must have received $768.76 on account of commissions. In the absence of anything to show what his services were reasonably worth, we cannot say from the findings that anything is honestly due Niles on his accounts.

It is insisted, however, that there was no evidence in the case to establish the corrupt understanding between Niles and the master, because a deposition bearing on that subject was ruled out in the Circuit Court.

It is true such a deposition was excluded, but without it there is abundant evidence in the testimony of Niles tending at least to support the finding. His account as stated by himself can be properly abstracted as follows: —

Bill of supplies		$216 27
Labor, loading and unloading cargo, wharfage, &c.		1,832 38
Paid captain for himself and crew		768 14
Sundry bills for repairs		2,582 93
Total expenditures		5,399 72
Receipts from sale of damaged cargo		7,035 50
Receipts over actual expenditures		$1,635 78
Com's charged on bills of supplies	$10 81	
" " " labor, &c.	91 63	
" " payments to master	38 41	
" " bills for repairs	129 15	
" " sale of cargo	352 78	
" 2½ per cent on receiving, storing, and shipping cargo	3,125 00	
Storage, 2 per cent on valuation of cargo	2,500 00	
Insurance, 1 per cent on valuation	1,250 00	
Paid 2½ per cent discount on drafts	152 65	
Com's for indorsing and negotiating	91 59	
		7,742 02
Balance		$6,106 24

The same witness also testified that the drafts were all drawn in the same form by the master on the owners to the order of Niles & Co., payable in New York at ten days' sight, and that the draft for $1,500 was indorsed by Niles & Co. and delivered to the master. The cargo consisted of hides, sheep-skins, kip-skins, horse and cow hair, and shin-bones, and the vessel was detained in St. Thomas about two months.

Without considering any of the other important and interesting questions which have been urged on our attention in the argument, we affirm the decree.

Decree affirmed.

THE "S. S. OSBORNE."

In order to justify this court in returning a cause in admiralty to the Circuit Court, for the finding of facts which is required by the act of Feb. 16, 1875, c. 77 (18 Stat., pt. 3, p. 315), it must appear that the omission to make such finding is attributable to the court, and not to the parties.

MOTION for a writ of *certiorari* to the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Albert G. Riddle in support of the motion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal from a decree in admiralty on the instance side of the court. There is nowhere in the record a statement of facts and conclusions of law such as is required by the act of Feb. 16, 1875, c. 77, 18 Stat., pt. 3, p. 315. The case was heard on its merits in the Circuit Court at the April Term, 1878, and decided September 24. On the 19th of September a bill of exceptions was signed and filed to put on record the objections of the present appellants to the rulings of the court on their motion to dismiss the appeal from the District to the Circuit Court. When the case was decided on its merits a reference was made to a commissioner to ascertain and report

the amount of damages. A report was filed Jan. 3, 1879, to which exceptions were taken. These exceptions were heard and a final decree rendered March 15. An appeal was allowed in open court the same day, and the cause docketed here September 13. We cannot find from the record that the court was ever asked to state its findings specially, and it is conceded that in fact no such statement was ever made. The appellants now move for a writ of *certiorari* to the Circuit Court to certify up its findings.

We suppose the real object of this motion is to have the cause remanded to the Circuit Court, so that findings may be now stated and put into the record, as was done in *The Abbotsford*, 98 U. S. 440. That was an exceptional case depending on its own peculiar facts, and furnishes no precedent for what we are now asked to do. The hearing was had in this case, and the interlocutory decree which settled the merits rendered, more than three years after the act of 1875 took effect. The provisions of that act must have been in the minds of the counsel for the appellants, because a bill of exceptions was signed at their instance and filed just before the decree was entered, which could not have been done but for the change in the practice brought about by this legislation. The final decree was not rendered until six months afterwards, and special findings seem not to have been desired by either party. They are only important in case of an appeal, and may certainly be waived by the losing party. Under the circumstances of this case, the court might reasonably infer that the appellants intended to rest their appeal on their bill of exceptions, being satisfied that upon the findings, which would be stated if required, the decree must necessarily be sustained. To send the case back would be unjust to the court as well as the parties, for a special statement of the facts now would involve a rehearing. To justify us in returning a cause for such a purpose, it must clearly appear that the omission was attributable to the fault or neglect of the court and not to the parties.

Motion denied.

THE "ANNIE LINDSLEY."

1. Under the act of Feb. 16, 1875, c. 77 (18 Stat., pt. 3, p. 315), the finding of facts by the Circuit Court in admiralty cases is conclusive.
2. A brig and a schooner were approaching each other nearly end on, on courses involving risk of collision. The schooner put her helm to port. The brig put her helm to starboard, thereby violating rule 16 prescribed by sect. 4233 of the Revised Statutes, and causing a collision. *Held*, that the brig was liable.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On the night of May 7, 1869, a collision which occurred in Long Island Sound between the brig "Annie Lindsley" and the schooner "Sallie Smith" resulted in the sinking and total loss of the schooner and her cargo. The owners of the schooner brought suit against the brig to recover the damages sustained by them in consequence of the collision, and the District Court having rendered a decree in their favor, the claimant of the brig appealed to the Circuit Court, by which, on July 10, 1878, the decree was affirmed. The claimant then appealed to this court.

The Circuit Court made the following finding of facts: —

"1. About half-past eight o'clock on the evening of May 7, 1869, the brig 'Annie Lindsley' collided with and sunk the schooner 'Sallie Smith,' in Long Island Sound, between two and three miles north and east of Eaton's Neck. The sky was overcast and there was a little rain, but no mist or fog, though it was quite dark. The wind was fresh and east of south. Its precise direction is not satisfactorily shown. The water was not rough.

"2. The schooner, of 96 tons new measurement and 106 old, was bound from Connecticut River to New York, with a cargo of brown stone and scrap iron. When the brig was first discovered by those on board the schooner she (the schooner) was heading on her regular course through the Sound, which was W. by S., and had her port tacks aboard. Her regulation lights were set and burning brightly. Her mate was at the wheel, and a competent lookout at his post on deck forward of the windlass.

"3. The 'Annie Lindsley,' a brigantine of 220 tons British measurement, was bound east from New York to Hillsborough, New Brunswick, in ballast. She was steering by the wind and not by the compass, and was heading as near on her course through the Sound as the wind would permit. Her general direction was about E. N. E., which was a little to the northward of her regular course. Her master was on deck, the second mate at the wheel, and one man forward, properly stationed as a lookout. Her regulation lights were set, and she had her starboard tacks aboard.

"4. Both vessels were sailing under full canvas.

"5. When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, and on courses involving the risk of collision. The brig was close-hauled. The schooner had the wind a little free.

"6. A short time before the collision the lookout on the schooner discovered the brig about dead ahead. He saw no lights, but made out the vessel and her sails coming, as he judged, from an opposite direction. He at once reported to the man at the wheel, who put the wheel to port and bore off, until he opened the red light on the brig.

"7. The schooner was not discovered from the brig until after the brig was discovered from the schooner. The lookout was the first to see the schooner from the brig, and he called out 'Light right ahead.' Almost at the same moment a hail was heard from the schooner. The brig's wheel was then put to starboard, and she swung off one point. As soon as this movement could be discovered, another hail came from the schooner to luff, and the wheel was put to port, but before it could materially affect the course of the brig the two vessels came together, the brig striking the schooner on the port quarter, the jib-boom of the brig passing through the mainsail of the schooner. The schooner sank in a very few minutes with her cargo, and was a total loss.

"8. The starboarding of the brig was the direct cause of the collision.

"9. The value of the schooner at the time she was lost was five thousand dollars."

And, as conclusions of law from the findings of fact, the court declared that, —

1. The brig was in fault for putting her wheel to starboard, and this was the cause of the collision.

2. The libellants are entitled to a decree for the value of the schooner, cargo, and freight, as reported by the commissioner, with interest at six per cent from May 7, 1869, the date of the loss.

A decree was entered accordingly.

Upon the trial the claimant asked the court to make thirteen findings of fact, and to deduce therefrom certain conclusions of law.

The court declined to find the facts and conclusions of law as requested by claimant.

Mr. Robert D. Benedict for the appellant.

Mr. Wilhelmus Mynderse, *contra.*

MR. JUSTICE WOODS, after stating the case, delivered the opinion of the court.

The assignments of error, which are sixteen in number, may be fairly condensed as follows: —

1. The court erred in refusing to find the facts as requested by the claimant.

2. The court erred in refusing to find the conclusions of law as requested by the claimant.

3. The court erred in certain of its findings of fact.

4. The court erred in finding as matter of law that the brig was in fault for putting her wheel to starboard.

5. The court erred in finding as matter of law that the libellants were entitled to a decree.

The first and third assignments are disposed of by *The Abbotsford* (98 U. S. 440), and *The Benefactor*, 102 id. 214. In these cases it was held that, under the act of Feb. 16, 1875, c. 77, entitled "An Act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes" (18 Stat., pt. 3, p. 315), the finding of facts by the Circuit Court in admiralty is conclusive. Upon an appeal from a decree in admiralty rendered since May 1, 1875, when the act went into effect, we cannot look into the evidence, or the

opinion of the court, to ascertain the facts. The evidence is not properly in the record, and, by an amendment to rule 8, promulgated May 2, 1881, it is excluded from the transcript. *The Adriatic*, 103 U. S. 730. Where the Circuit Court has passed on all the issues, we cannot listen to complaints that it has refused to find certain facts which it was asked to find, or has found certain other facts which the weight of the testimony did not warrant.

This disposes, also, of the second ground of error, as the conclusions of law which the court was asked to declare were based on the findings of fact proposed by the claimant, which the Circuit Court refused to adopt.

The question, and the only question which we can consider, is, whether the facts found support the conclusions of law and the decree, and it is raised by the fourth and fifth assignments.

The Circuit Court finds, in its conclusions of fact and of law, that putting the brig's helm to starboard was the cause of the collision. It also finds, as a conclusion of law, that the brig was in fault for putting her wheel to starboard.

We are required, therefore, to consider whether the brig, under the facts found, was so in fault.

From the findings it appears that the wind was east of south; that the schooner, just before the collision, was heading west by south, bound from the Connecticut River to New York, and had her port tacks on board. The brig was bound east from New York to New Brunswick. She was steering by the wind; her general direction was east-northeast. Both vessels were sailing under full canvas, and both had their regulation lights set.

Immediately before the collision the brig was sailing close-hauled to the wind, the schooner had the wind a little free. When the brig was discovered from the schooner, the two vessels were approaching each other end on, or nearly end on, so as to involve the risk of collision. A short time before the collision the lookout on the schooner discovered the brig dead ahead. Her wheel was at once put to port, and she bore off. The schooner was not discovered by the brig until the brig had been discovered by the schooner. The lookout was the first to see the schooner from the brig, and called out "Light right

ahead." The brig's wheel was then put to starboard, and she swung off one point. On being hailed from the schooner and told to luff, the wheel was put to port; but before it could materially affect the course of the brig, the two vessels came together.

The duty of the vessels in the emergency preceding the collision is plainly prescribed by the sixteenth rule for the prevention of collisions on water, which is as follows: "If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Rev. Stat., sect. 4233.

We have seen that the vessels were approaching each other end on, or nearly end on, so as to involve risk of collision. The rule under such circumstances required them to port their wheels, and pass each other on the port side. The brig, in violation of the rule, instead of porting her helm, put it to starboard. The court found as a matter of fact that this was the direct cause of the collision, and as a conclusion of law, that she was in fault for so doing. We think that from the finding the conclusion inevitably follows.

The counsel for the appellant, however, insists that the conclusion amounts to laying down this rule: that a vessel close-hauled on the starboard tack seeing a light right ahead is in fault if she starboards; and he argues that the rule thus stated is too broad, and that whether a vessel is in fault for starboarding on seeing a light right ahead depends upon what the light is, that is to say, whether it is green or red. He insists that if the light seen by the brig upon the schooner just before the collision was green, that this fact made it the duty of the brig to starboard and not to port her helm. In support of this view he cites Jenkins's Rule of the Road at Sea, pp. 44, 124, 125, 127, 129, 135, 208, and other authorities.

He then goes on to argue from the testimony that the light seen by the brig was green. As we have already shown, we have nothing to do with the testimony. We are limited strictly to the findings of fact, so that the point presented by his contention is whether, upon the facts found, the rule of navigation was too broadly stated by the court. The answer

is, therefore, plain. The court did not find that the light seen by the brig was a green light, and did find that the vessels were approaching each other end on, or nearly end on, so as to involve the risk of a collision. The situation as found by the court was, therefore, precisely the one provided for in the sixteenth rule, which it was the duty of the brig to obey by putting her helm to port. The rule to be deduced from the conclusion of law drawn by the court from the facts found is not a whit broader than the sixteenth rule itself, and is really only a repetition of that rule.

The effort of the appellant seems to be to bring the case within the provision of the twenty-fourth sailing rule, which declares that, "in construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." Rev. Stat., sect. 4233.

The findings, however, having brought the case clearly within the sixteenth rule, if there were any additional facts which took it out of that rule and brought it within the operation of the twenty-fourth rule, it was incumbent on the appellant to establish them and have them incorporated with the findings. The burden of proof was on him to show some special circumstances which made his case an exception to the sixteenth rule.

But there is no finding that the light seen on the schooner by the brig just before the collision was a green light.

On the contrary, the record shows that the court, although explicitly asked by the appellant to find that the light seen was a green light, refused to make such finding. Nor is there any finding from which it can be fairly inferred that both of the schooner's lights were not seen by the brig just before the collision. The appellant has, therefore, failed to show any fact which takes his case out of the operation of the sixteenth rule, and makes the twenty-fourth rule applicable.

The appellant next contends that the findings of the Circuit Court do not show that the schooner kept a good and proper lookout. The court found that she had a competent lookout at his post, on deck, forward of the windlass, but the appellant

says that the fact that the lookout did not discover the lights of the brig until just before the collision shows that he was not vigilant in the performance of his duty.

It would seem that the finding of the court in reference to the lookout did not leave any ground for the appellant to stand on. If the lookout was competent, and at his proper post, the presumption of law that he did his duty, is not, we think, overcome by the fact that he did not see the lights of the brig until just before the collision. The brig also, according to the findings, had a man forward, properly stationed as a lookout, and he did not see the lights of the schooner until the collision was imminent. The fact that the lookout on each vessel failed to see the lights of the other shows that the state of the weather, or some other obstacle, prevented them from being seen at the usual distance. But the court distinctly found that the cause of the collision was the fault of the brig in putting her helm to starboard. That fully accounts for the disaster. Neglect of the lookout does not appear from the findings to have had any part in bringing it about. It would be against all reason to hold that the owners of a vessel whose lookout was shown to be negligent should be made liable for the consequences of a collision, when his neglect had nothing to do in causing it. *The Farragut*, 10 Wall. 334, *The Fannie*, 11 id. 238.

So far as the findings in regard to the lookout are concerned, there is nothing in them to show that the decree of the Circuit Court is not just.

The appellant has raised other points resting wholly or in part upon a denial of the truth of the facts found, or upon alleged facts not found, but which he claims the evidence establishes. It is, therefore, not necessary to consider them. Our duty is to decide whether the findings, actually made by the court, support its conclusions of law and the decree, and there our duty ends.

Decree affirmed.

MINING COMPANY v. ANGLO-CALIFORNIAN BANK.

1. The laws of California, under which a mining company was organized, empower it "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes for which it was created," and make it the duty of its board of directors to exert its corporate powers and to conduct and control its business and property. *Held*, 1. That, as incident to the general powers of the company, its board may borrow money for its purposes, and invest certain of its officers with authority to negotiate loans, execute notes, and sign checks drawn against its bank account. 2. That the fact that the board has invested them with such authority may be shown otherwise than by the official record of its proceedings.
2. Where, therefore, without objection by the board, checks so drawn have, for a long period, been signed by the president and secretary of the company, the bank has the right to assume that those officers are invested with authority to sign them.
3. On the day when the decision, in a suit then pending, declaring that certain persons acting as such board, pursuant to an election theretofore held, should be removed from office, was announced, they, at a later hour, met as the board, and adopted a resolution, pursuant to which the president and secretary executed, on behalf of the company, and in settlement of its overdrawn bank account, a note bearing interest at a rate allowed by the laws of the State only when the contract therefor is in writing. On the next day, that judgment was filed with, and recorded by, the clerk of the court. *Held*, that, the persons being *de facto* directors, the note so executed is binding on the company.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. J. Hubley Ashton for the plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Theodore Sutro*, *contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, a mining corporation, was organized under the laws of California on the twenty-second day of December, 1873. From that date until the 21st of June, 1877, its treasurer was the defendant in error, a banking corporation created under the laws of Great Britain, and doing business in the city of San Francisco. During that period the moneys of the mining company were, from time to time, deposited with its treasurer, and paid out upon checks signed by the president and secretary of the company. In addition, the

bank allowed the account of the company to be overdrawn upon like checks. Such overdraft, including proper allowance for interest, amounted, on the 21st of June, 1877, to $6,319.59.

On the day last named, at 11 o'clock A.M., in an action then pending in the District Court of the Nineteenth Judicial District of California, in and for the city and county of San Francisco, wherein certain stockholders of the mining company were plaintiffs, and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Otto Esche, F. N. Benjamin, and the mining company were defendants, — which action had been brought to remove those persons from office as directors of the mining company, — the court decided that the election under which they acted as directors was invalid and void, and that they should be ousted and removed. When that decision was announced, the findings of fact by the court, as well as its judgment in conformity with the decision, were reduced to writing and dated of that day. They were, however, not filed with the clerk of the court until June 22, 1877, upon which day he recorded the judgment.

In the afternoon of June 21, 1877, after the announcement of the decision, the individuals above named met as a board of directors of the mining company, when its president informed them that the account of the company with the bank, its treasurer, was overdrawn to the amount of $6,319.59, gold coin of the United States, and that the manager of the bank requested either the money or the note of the company. A resolution was thereupon adopted authorizing the president and secretary to execute, and they then did execute, in behalf of the company, a note for $7,500, payable in coin, and with interest thereon at the rate of one and a half per cent per month until paid. The note was intended to cover as well the amount overdrawn as anticipated advances. But no such advances were afterwards made.

When the foregoing resolution was passed, the persons participating in its adoption had notice of the decision announced by the court in manner and form as stated.

The present action is to recover from the company the amount of its overdraft. The complaint, framed in accordance

with the Code of Procedure of California, contains two paragraphs or counts: one, for $6,351.72 gold coin, on an account, as of June 26, 1877, for money lent by the bank to the company, and for money paid, laid out, and expended by the former to and for the use of the latter; the other, for a like amount, with interest, being the balance alleged to be due upon the note referred to, after deducting all just offsets, which note, it is averred, was given in consideration of the amount due the bank upon an account stated between the parties on the 21st of June, 1877.

The court gave judgment against the company for the amount of the overdraft, with interest at the rate specified in the note. And from that judgment the present writ of error is prosecuted.

We are all of opinion that the bank is entitled to recover the amount of the overdraft as shown by the checks signed by the president and secretary of the mining company.

Upon the board of directors of the mining company was imposed, by the laws of California (Civil Code, sect. 305), the duty of exerting its corporate powers, and of conducting and controlling its business and property. Among the powers which the company had (Civil Code, sect. 354) was the power "to enter into any obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created." Necessarily, therefore, the board had authority not only to designate the banking institution in which the money of the company should be deposited, but to prescribe the mode in which, and the officers by whom, it should be withdrawn, from time to time, for the use of the company. It is equally clear that the board had, as incident to the general powers conferred by law upon the company, power to borrow money for the purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account. And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties them-

selves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation. Since checks against the account of the mining company must, in the ordinary course of its banking business, have been signed by some officer or officers designated for that purpose, the bank had the right, in view of the long period during which the checks of that company were signed by its president and secretary, — without objection, so far as the record shows, upon the part of the company's board, — to assume that those officers had been invested, by the board, with authority to sign all checks drawn against the company's bank account. So long, therefore, as the mining company had money to its credit on the books of the bank, the latter, in the absence of notice that the president and secretary of the former had no authority to sign checks, was justified in honoring all checks signed by those officers. This much we do not understand counsel to dispute. Their contention, upon this branch of the case, relates mainly to the liability of the mining company for the amount of any overdraft checks signed by its president and secretary.

Touching that liability, we have to say that since the mining company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make over-

draft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. The finding is entirely silent as to whether the company did not receive and use the money. And the finding that "no resolution or special authority of the defendant was shown authorizing its president and secretary, or either of them, to overdraw its account in bank," fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that a resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meagre evidence upon which, according to the special finding, the case was tried below, is, we think, insufficient to overturn the presumptions which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company.

This conclusion would render it unnecessary to consider any other question in the case, did not the judgment of the court give interest upon the amount due the bank at the rate stipulated in the note. By the laws of California, unless there be an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him. The majority of the court are of opinion that the judgment for the amount of the overdraft, with interest at the agreed rate, must stand; this, because the decree of ouster against the persons who passed the resolution of June 21, 1877, did not take effect until the succeeding day when it was actually filed with the clerk and entered on the record; and because, in the language of Mr. Justice Field, who tried the case, the "parties ousted were officers *de facto*, holding under color of an election, having charge of the affairs of the company, and capable of binding it in all matters legitimately devolving upon directors of the company." *Anglo-Californian Bank* v. *Mahoney Mining Co.*, 5 Sawyer, 255, 258.

Judgment affirmed.

INSURANCE COMPANY *v.* TREFZ.

1. It is not error for the judge, in his instructions, to comment upon the evidence, if he does not take from the jury the right to weigh the evidence and determine the disputed facts.
2. To a question whether he had ever been subject to or affected by certain disorders, including "diseases of the brain," enumerated in an application for an insurance upon his life, which stipulated that the policy should be void in case any statement or declaration in such application was untrue, A., a German, unfamiliar with the English language, — in which the question was put, — answered, "Never sick." In an action on the policy, — *Held*, 1. That the court properly charged that the jury might consider that the answer was made by a man ignorant of the language, who did not on that account understand, and consequently did not intend, its literal scope. 2. That the answer must be taken to mean only that A. had never had any of the enumerated diseases so as to constitute an attack of sickness.
3. Evidence of A.'s admission that he had been sunstruck having been introduced, the court submitted it to the jury to find whether the affection so admitted by him was or was not a case of true sunstroke, and whether the affection which he did have was a disease of the brain. *Held*, that the action of the court was not erroneous.

ERROR to the Circuit Court of the United States for the District of New Jersey.

The facts are stated in the opinion of the court.

Mr. A. Q. Keasbey for the plaintiff in error.

Mr. Joseph Coult, *contra*.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought by Christina Trefz against the Knickerbocker Life Insurance Company upon two policies of insurance issued to her upon the life of her husband, Christoph Trefz, both dated Sept. 6, 1873, one for $2,500, the other for $8,500. It resulted in a verdict and judgment in her favor. The company sued out this writ of error.

Each of the policies contained the declaration that it was "issued and accepted by the assured upon the following express conditions and agreements," and among others, these: that if the death of the person whose life was thereby insured should be caused by the habitual use of intoxicating drinks, "or if any of the statements or declarations made in or accom-

panying the application for this policy, and upon the faith of which the same is issued, shall be found in any respects untrue, then, and in every such case, this policy shall be null and void."

The company pleaded *non assumpsit*, and specially that the death of the said Christoph Trefz was caused by the habitual use of intoxicating drinks whereby the policy was made void, and issue was taken thereon. No evidence was offered to support the special plea.

It was proved on the trial that on May 25, 1867, a policy had been issued by the defendant in favor of the plaintiff on the life of her husband for $3,000, and another on March 18, 1868, for $10,000, both of which were surrendered on Aug. 30, 1873, on which day two agreements in writing were entered into between the parties, each referring to the number and amount of the corresponding policy, and of one of which the following is a copy: —

"The undersigned, owner of policy No. 16,772 on the life of Christopher Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for two thousand five hundred dollars, with insurance payable annually, and in consideration thereof I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made, and are hereby made the basis of the contract between myself and the said company for the new policy hereby solicited."

The other agreement was in the same form, and asks for a policy of $8,500, and both are signed by Christina and Christoph Trefz.

The application for the original policy for $10,000 was in the English language, the fifth question in which was, —

"Whether now or formerly, when and how long, and to what degree, subject to or at all affected by any of the following diseases and infirmities."

(Here follows a long list, in alphabetical order, of disorders, beginning with "apoplexy" and ending with "yellow fever," and including "diseases of the brain, disease of the heart.")

The answer was, "Never sick."

The application for the original policy for $3,000 was in the German language. It contained a similar question, including diseases of the brain and heart, and to this the answer was "No."

Both of these applications contained this stipulation: "That if any fraudulent or untrue allegation, misrepresentation, or concealment as to my health or habits be contained in this proposal, all moneys which shall or may be paid on account of such assurance or dividends due me shall be forfeited to the said company and the policy be void."

One of them is signed Christina Trefz, by Christoph Trefz, and the one in German by Christina Trefz.

It is stated in the bill of exceptions that the defendant offered evidence tending to prove that the answers of Trefz to these interrogatories were, at the time of such applications, untrue; and the evidence itself bearing on that point is set out in full.

It appears therefrom that the intention with which the testimony was offered was to establish the fact that in the year 1866 Trefz had a sunstroke. One of the witnesses called by the defence to this point was named Schimper, who was in Trefz's employ from the summer of 1866 until 1875. He knew nothing personally about it, but testified that he had heard Trefz say that he had had a sunstroke, and that he had known him to wear a cabbage-leaf in his hat to prevent its recurrence; that in March, 1871, the witness having neglected to pay a premium falling due on one of the original policies, being charged as Trefz's book-keeper with the duty of payment, went with Trefz to the office of the company in New York to tender it, where he was required to submit to a medical examination, to enable the company to determine whether it would accept the premium and restore the lapsed policy. The witness further testified as follows: "The doctor asked me whether Mr. Trefz had sunstroke; I said, No. Mr. Trefz said, Yes; he was sunstruck on the farm once; he had a farm, and was at the farm taking in hay, and was sunstruck." In reply to the question, what suggested to the doctor the fact of sunstroke, the witness said: "I asked the same question of the doctor, whether he could see it. He said, 'I could see it by his queer action

with his elbow, and so I could see that the man had something.' That was the doctor's answer since to me; and he asked me whether he had sunstroke, and Mr. Trefz told he was working on the farm once and was overcome by the heat. He said that did not matter; that did not make any difference; he said, have you felt anything since; and he said, No. Was you sick any time, taken sick by the heat again afterwards? No. That is all right. He gave him a certificate." And the premium was paid and the lapsed policy restored.

In another part of his examination the witness, repeating the statement, said that Trefz told the doctor "he had a sunstroke once when he was working on the farm; he was then working, and he fell down and did not know anything about himself any more: that was his talk to the doctor." The witness was then asked to state what Trefz said. He replied, "That is as near as I can give it. Mr. Trefz spoke very bad English; that was the reason the doctor asked me first whether Trefz had sunstroke, because he did not understand him so well; so Trefz told he was overcome by the heat; he said that half English and half German."

The plaintiff, Mrs. Trefz, testified that on the occasion referred to as that of the sunstroke Trefz came home, saying he was overcome by work and the heat. She offered him his dinner, to which he said he did not care for anything to eat. After a while he ate his dinner and went off to his work again the same day, and then for two days he said he did not feel right well; after that he went about his business as usual.

There was some testimony about his going to Sharon Springs that summer, which is entirely consistent with the supposition that he went upon business as much as for his health; and some evidence, not only that he wore cabbage-leaves in his own hat as a protection against heat, but that he insisted that the drivers of his beer wagons (he was a brewer) should do the same for their own protection.

There was evidence also that Trefz frequently spoke of having had a sunstroke, and there was testimony from two or three physicians on the subject of the characteristics and consequences of sunstroke. One of them spoke of it as a brain disease, and said that whether it was a serious or dangerous thing

depended upon the kind of sunstroke, and that there were degrees in its forms, the severer being frequently fatal, and diminishing down to a mere sense of fulness in the head; and that he considered it more an accident than a disease.

The charge of the court, which was at length, is given in the bill of exceptions in full. To specified parts of it exceptions were taken by the company, and they form the basis of the assignment of errors now to be considered.

It is first alleged that the court erred in charging the jury as follows: "In considering whether the reply 'never sick' was an untruth of such a character as to avoid the policy, the jury had the right and ought to remember that the applicant was not a native-born citizen, and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him."

This exception may properly be considered in connection with the sixth assignment of error, as follows: —

"That the court, on request, erroneously refused to charge the jury as follows: 'That if the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even although the answer may have been true in the sense in which he understood the question;' but on the contrary charged the jury as follows: 'It seems to me that in endeavoring to ascertain the truth or falsity of the answer we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses.'"

It is objected that the court erred in mistaking the answers referred to, as made by the husband, instead of the wife, who was in fact the applicant, whose answers they were, and that there was no proof that she was not a native citizen, and fully acquainted with the English language.

It is perhaps a palliation of this error, if it be one, that the counsel who makes the objection himself fell into it, in the very request which the court refused, and which speaks of the answer as that of the husband. And practically it was, and was so considered and treated by all parties to the insurance.

The applicant, it is true, was the wife, and it is her agreement that the answers shall be true; but it is manifest that the party interrogated, and whose answers are relied on, are those of the person whose life is the subject of the insurance.

Indeed, the original applications themselves speak of the allegations, misrepresentations, or concealments, if any, contained in the proposal, the existence of which will avoid the policy, as pertaining to "my health or habits," as though the person whose life was the subject of the insurance was himself the applicant.

The whole trial proceeded upon the idea that the question at issue was the truthfulness of the husband's answers, and upon that ground the company gave evidence of his statements made at other times and places to contradict him.

It is insisted, however, in argument, that there is substantial error in the above charges and refusal to charge, reversing the rule of interpreting contracts according to the ordinary sense of the language employed, and subverting the principle, for which *Ætna Life Insurance Co.* v. *France* (91 U. S. 510) and *Jeffries* v. *Life Insurance Company* (22 Wall. 47) are authorities that in such a case as the present the right of the plaintiff to recover is defeated, upon proof that an answer to any of the questions in the application is untrue, without regard to the materiality of the question or the good faith of the answer. It is unquestionable law, that in such a case as the present the answer must be true, to justify a recovery, without regard to these considerations; and for a lack of substantial truth, it is no valid excuse that the party giving the answers did not understand, from ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury. The language used was, "But if you believe from the testimony that the insured, whether wilfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the husband and wife entered into, on the ground that it would be a hardship to the widow." And in another part of the charge the court said, "If they are in any respect untrue, they avoid the contract and prevent a recovery upon the policies."

The question, then, for the jury was this: Was the answer of Trefz to the question whether he had ever had any of the enumerated diseases — "never sick" — true or untrue? And undoubtedly it was material and even necessary to inquire what was the meaning of that answer. And to ascertain its meaning, — the meaning the law will affix to it, — it is perfectly proper to determine the sense in which the words were used by the speaker; the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by Mr. Justice Swayne, in *Insurance Company* v. *Gridley* (100 U. S. 614), "The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive."

The nature of this written instrument, as affected by its form, must be considered in every question of its interpretation. It is not a formal instrument, employing technical language with well-ascertained legal effect, like a deed or a bill of lading, or framed with precision and nicety as to the choice of phrases to express a certain and definite covenant which the parties, duly advised, have entered into with deliberation and in solemn form. It is, on the contrary, a conversation reduced to writing, and the writing done by one only of the parties. The language is colloquial, and in the form of a dialogue; of question and answer. It is in the shape of a deposition, where the party interrogated is giving his testimony, and where the meaning of his statements must be ascertained from his own peculiar use of language. If he is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used.

In the present instance, the apparent purpose of the charge asked by the counsel for the defendant below and refused by the court, was to charge as a matter of law that the answer of Trefz — never sick — was to be taken as meaning — as it literally does, standing by itself — that he had never during his life had any sickness whatever, and thence to draw the necessary inference that it was untrue in that sense, as it no doubt was, and that, for that reason, the plaintiff's recovery was made legally impossible.

In that view it became the duty of the court to say to the jury, that in determining whether that statement was true or untrue, in view of the terms of the policy, they might properly consider that it was the expression of a man ignorant of the language, who did not on that account understand, and consequently did not intend, the literal scope of the expression. And whatever sense the jury, as reasonable men, in the light of that circumstance, would put upon it, might well be taken as the sense in which it was understood by the company, to whose agent it was personally spoken, for that would be the sense in which it would be understood commonly by reasonable men in similar circumstances.

Indeed, the court might well have gone further, for it is matter of law that the answer "never sick," in the connection in which it was used in the application, must be taken to mean, not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true.

It is next assigned for error that the court erred in charging the jury in reference to the testimony relating to the transaction with the company's physician, in March, 1871, as to the renewal of one of the policies, as follows: "When this testimony was given, I presume that every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the company regarded the attack when he was told of it as of too little consequence to hinder the renewal of the forfeited policies, it was now too late for them to come forward and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words, that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it and take the money of the insured for a renewal of the policies, and after his death to avoid the payment of the loss on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply 'never sick.'"

This charge was given in connection with a statement of the testimony of Schimper as to the conversation that took place with Dr. Derby, the medical examiner of the company, in March, 1871, at the time of the examination of Trefz for the restoration of his lapsed policy.

It is not objected to this charge that it instructed the jury as a matter of law that the company was estopped by the restoration of that policy, after the information it had then acquired respecting Trefz having had a sunstroke, from making its defence on that ground to the present action. It is not claimed that that is the meaning of the charge, or that it was so understood by the jury.

It is criticised, however, for inaccuracy in referring to the renewal of the forfeited policies as if both had lapsed, instead of but one, as the fact was; but that inaccuracy could not have misled the jury, as there was no question about the fact; and, so far as the charge had any bearing upon the question at issue, its effect would not be different whether one or both policies had lapsed and had been restored.

The charge in question was merely a suggestion addressed to the jury, perfectly legitimate in itself, but which they might adopt or reject as they saw fit. The court expressly disclaimed any right to influence them as to any matter of fact, and instructed the jury accordingly.

It is argued that the charge assumes from the testimony that the sunstroke spoken of occurred before the date of the original policies, when in the conversation with Dr. Derby, no date being given, he might well have inferred that it was subsequent to that date. But it is entirely immaterial, for however it may weaken the force of the suggestion upon the question of fact, it does not show that it contained any error in law. The force of the suggestion was to be judged by the jury upon their own finding as to the facts.

It is next assigned for error that the court gave to the jury the following charge: "It is for you to determine the extent of the injury received by Mr. Trefz, and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence, in regard to the extent, nature, and kind of sickness,

whether the attack which the insured suffered from was of a character to make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The company sets up the defence, and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

This is to be considered in connection with the refusal of the court to give the following charge, which is also assigned for error: "That if within one or two years the insured had such disease (sunstroke), his answer 'never sick' was untrue, although he had entirely recovered from it long before his death or even at the time of his application;" and also in connection with the refusal to charge the following, also assigned for error: "That it is proved by witnesses unimpeached and uncontradicted, that the insured frequently stated that he had had sunstroke in the summer of 1866, and guarded carefully against its recurrence long after the insurance was effected; and that, unless you can find something in the case which renders these statements incredible, the jury are bound to treat the facts as established in the cause, and to find for the defendants on the principle asserted by the court."

The propositions included in these requests, and maintained on behalf of the plaintiff in error, may be stated thus: If Trefz frequently said that he had had sunstroke, it is to be taken as the fact, although the jury might be satisfied from the evidence that what he supposed to be such was not so in reality; and that if he had ever had sunstroke, his answer to the interrogatory is untrue, although the list of diseases therein enumerated does not contain that of sunstroke, and although it does not appear that whatever affection in fact he had was one of the diseases enumerated. In other words, that it is matter of law that if Trefz said he had sunstroke, that he did have it; and that it is matter of law that sunstroke, of whatever character or degree in fact, is a disease of the brain, that being the disease in respect to which it is claimed the answer was untrue.

On the other hand, the proposition of the court, as submitted to the jury, was that they must determine from the whole evidence as matters of fact whether or not Trefz ever had had

sunstroke properly so called; and whether the attack which he did have, whether it could properly be called sunstroke or not, was a disease of the brain.

It is not difficult to decide that in this respect the court below committed no error.

The interrogatory propounded in the application, to which the answer in question was made, did not include sunstroke in the list of enumerated diseases. It did include diseases of the brain. The answer, it is conceded, was not untrue, unless Trefz had had a disease of the brain. To establish this it was necessary to prove something more than that he had what he called sunstroke. It was essential to show that he had sunstroke in fact, and that it was such as to constitute disease of the brain.

The medical authority cited in argument by the counsel for the plaintiff in error, Dr. H. C. Wood, Jr. (Thermic Fever or Sunstroke, Boylston Prize Essay, p. 7), shows that what is popularly called sunstroke is not always the true disease known to the profession as such. He says: —

"There can be no doubt that under the name of sunstroke, or *coup de soleil*, sudden cases of severe illness of very different natures have been described by authors. Such of these cases as have really been dependent upon exposure to excessive heat can be classified under two, or perhaps three heads, to which the names of *acute meningitis* or *phrenitis*, *heat exhaustion*, and *thermic fever* or *true sunstroke* may be respectively applied, as more or less expressive of the pathological conditions existing.

"Acute meningitis or phrenitis, due to exposure to the sun and the direct action of its rays upon the head, must be a very rare affection. In fact, I have no positive evidence to offer of its existence in nature, having never seen or read an unequivocal record of such a case, and, therefore, will pass this theoretical class by without further allusion.

"Simple exhaustion due to excessive labor in a heated atmosphere is an affection so very distinct from true sunstroke that it is strange it should ever have been confounded with the latter. It does not differ in its pathology or symptoms from other forms of acute exhaustion, offering like them, as its chief features, a cool, moist skin, and a rapid, feeble pulse,

associated with great muscular weakness and a tendency to syncope. . . .

"As there is nothing peculiar in these cases, I do not think that they should have any special name. The term 'heat-exhaustion' might be applied to them had it not been used to signify true sunstroke. The main point to be borne in mind is, however, that such cases should not be called sunstroke, as they have not the slightest affinity with that disorder."

From this authority, then, it sufficiently appears that a man working in the heat of summer in a hay-field, exposed to the rays of the sun, may be overcome by the heat to the point of exhaustion, so as to be prostrated with weakness, and even fall into insensibility and unconsciousness, without having sunstroke in its technical sense. And thus that it might well be that Trefz, notwithstanding his attack of what he ignorantly called sunstroke, might truthfully answer that he had never been sick of any disease of the brain.

It was undoubtedly, therefore, the principal question for the jury, in order to find whether Trefz's answer that he had never been sick of brain disease was true or untrue, to ascertain and determine whether the affection which he declared he at one time had was or was not a case of true sunstroke, and whether, if so, it was a disease of the brain. That question was fairly submitted to them by the court upon the charges which we have reviewed, and for the reasons assigned we find no error in them.

Judgment affirmed.

WILLIAMS *v.* NOTTAWA.

1. Under the fifth section of the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), it is the duty of the Circuit Court to dismiss a suit when it appears that the parties thereto have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act.
2. A., a citizen of Indiana, sued in the Circuit Court a township of Michigan upon certain bonds issued by it and payable to bearer. He owned some of them, and the others were transferred to him by citizens of Michigan solely for the purpose of collection. Judgment was rendered in favor of the township on the bonds so transferred, and in his favor for the residue. This court, on his removing the case here, reverses the judgment, and directs, as the court below should on its own motion have done, that the suit be dismissed at his costs.
3. *Quære*, Could the defendant, not a party to such collusion, take advantage, for the first time, on appeal or writ of error, of such objection.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Messrs. Hughes, O'Brien, & Smiley* for the plaintiff in error, and by *Mr. Charles Upson* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This suit was brought by Williams, a citizen of Indiana, against the township of Nottawa, a municipal corporation of Michigan, to recover the amount alleged to be due on certain of its bonds, negotiable by the law merchant, and payable to Samuel Kline, or bearer. A trial was had by a jury, which resulted in a verdict, by the direction of the court, in favor of Williams for six of the bonds, and in favor of the township for the remainder. This writ of error has been brought by Williams to reverse the judgment against him; and, as the court directed the verdict which was rendered, the whole of the evidence has been embodied in the bill of exceptions, and is properly before us for consideration.

From the testimony of Williams himself, it distinctly appears he was personally the owner of only three of the bonds

sued on of $100 each. One Bracey Tobey was the owner of three others of the same amount. The judgment in favor of Williams was upon these six bonds, and for $994.57 only. All the other bonds, being those on which the judgment was rendered in favor of the township, were owned by Samuel Kline and William Connor, both of whom were residents of the township and citizens of Michigan when the bonds were issued. There is no evidence of any change of citizenship by Kline since the bonds were delivered, and Connor, who was a witness at the trial, testified that he continued to be a citizen of Michigan. The bonds were transferred by Kline and Connor to Williams simply for the purpose of collection with his own. The same is true of those belonging to Tobey, but there is nothing in the evidence to show of what State he was a citizen, though he testified that he bought his bonds in Michigan.

By sect. 11 of the Judiciary Act of Sept. 24, 1789, c. 20 (1 Stat. 78), it was expressly provided that the District and Circuit Courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." By sect. 1 of the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), this provision was so far modified as to extend the exception to "promissory notes negotiable by the law merchant and bills of exchange," but in sect. 5 it was expressly enacted "that if in any suit commenced in a Circuit Court . . . it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought, . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable . . . under this act; the said Circuit Court shall proceed no further therein, but shall dismiss the suit, . . . and shall make such order as to costs as shall be just."

This case, so far as the bonds owned by Kline and Connor

are concerned, comes clearly within this prohibition. As the actual owners of the bonds were citizens of Michigan, they could not sue in the courts of the United States, and Williams distinctly testifies that he received and held their bonds solely for the purpose of collection with his own, and for their account. It cannot for a moment be doubted that this was done "for the purpose of creating a case" for Kline and Connor cognizable in the courts of the United States. That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds, and proceed no further; for as to them the controversy was clearly between citizens of the same State, Kline and Connor being the real plaintiffs. The transfer to Williams was colorable only, and never intended to change the ownership. This both Williams and Kline and Connor knew. Under the act of 1789, it was held in *Smith* v. *Kernochan* (7 How. 198) that this objection was one which could only be taken by plea in abatement; but in *Barney* v. *Baltimore* (6 Wall. 280) there was no such plea, and the bill was dismissed in this court without prejudice, because it appeared in evidence that certain conveyances, by means of which the citizenship of the parties was changed so as to give the courts of the United States jurisdiction, did not transfer the real interest of the grantors. But whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney* v. *Baltimore* (*supra*), such transfers for such purposes are frauds upon the court, and nothing more.

It is clearly shown, also, that Williams and Tobey were collusively joined as plaintiffs, to create a case cognizable in the Circuit Court; for when the suit was begun the amount

due them respectively was less than $500. Neither one of them could then have sued alone in the courts of the United States, because the value of the matter in dispute was not sufficient.

Since the judgment below was rendered, the amount due Williams and Tobey respectively has, by reason of the accumulation of interest, exceeded $500. The citizenship of Tobey is not disclosed by the record. Whether he can sue in the courts of the United States we do not know. Williams can sue at this time if he still continues to be a citizen of some State other than Michigan, but without a false averment in his pleadings he could not have done so when this suit was begun. If he had in his pleadings falsely overstated the amount of his claim, he could not, when his judgment was obtained, have recovered costs, and at the discretion of the court might have been adjudged to pay costs. *Gordon* v. *Longest*, 16 Pet. 97. He was as much guilty of collusion as the other parties, and is no more entitled to consideration here than they are.

Inasmuch, therefore, as it was the duty of the Circuit Court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to stop all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that court, leaving the parties in interest to such remedies as they may each be entitled to for the recovery of any amount that may be due them respectively on the bonds they severally own. In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the Circuit Courts to exercise their power under it in proper cases. If they improperly dismiss a cause, their action in that behalf is expressly made reviewable here. Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide. That would be a different case from this. Here the party guilty of the collusion asks relief from a judgment against

himself. In such a case we deem it our duty to stop the suit just where it should have been stopped in the court below, and remit the parties to their original rights.

Judgment reversed.

MORRISON *v.* STALNAKER.

On Jan. 18, 1871, A., a pre-emptor, settled upon part of an even-numbered section of land, which, although previously offered at public sale, was at that date withdrawn from private entry, it being within the grant to the Burlington and Missouri River Railroad Company. *Held*, that, under the second section of the act of July 14, 1870, c. 272 (16 Stat. 279), he was entitled to the period of eighteen months from the time limited for filing his declaratory statement, within which to make payment and proof.

ERROR to the Supreme Court of the State of Nebraska.

This was an action brought in the District Court of Cass County, Nebraska, by Morrison, to recover the possession of a tract of eighty acres, being part of an even-numbered section of land situate in that county.

Morrison claimed under a patent from the United States dated May 10, 1873, conveying to him the demanded premises.

Stalnaker, the defendant, settled upon them, they being public land, Jan. 18, 1871. On the sixteenth day of the following month his declaratory statement required by the pre-emption law was filed in the proper office, and he continuously thereafter resided upon them. They had, prior to those dates, been offered at public sale, and are within the limits of the lands which, under the act of July 1, 1862, c. 120 (12 Stat. 489), and the acts amendatory thereof, the Land Department withdrew from market to cover the grant made to the Burlington and Missouri River Railroad Company.

The act of March 6, 1868, c. 20 (15 Stat. 39), provides that nothing in those acts shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even-numbered

sections along the routes of the several roads therein mentioned which have been or may be hereafter located, provided that such sections shall be subject only to entry under those laws. The Secretary of the Interior was thereby authorized and directed to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even-numbered sections of land belonging to the government and then withdrawn from market on both sides of the Pacific Railroad and branches, wherever they had been definitely located.

Stalnaker, about June 1, 1872, appeared with his witnesses at the local land-office, and offered to prove all the facts necessary to entitle him to enter the premises. He at the same time tendered the requisite sum of money. His offer and tender were refused, upon the ground that, by reason of his failure to make the proofs within one year from the date of settlement, he had forfeited his right of pre-emption.

Stalnaker's answer to Morrison's petition is in the nature of a bill in chancery, and sets up that, in fraud of his pre-emption rights, and by mistake of the Land Department in regard to them, a patent of the United States for the land was issued to the plaintiff. Judgment was rendered in the court of original jurisdiction in favor of Morrison. It was reversed on appeal to the Supreme Court, and he sued out this writ of error.

Mr. Willis Drummond and *Mr. Robert H. Bradford* for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE MILLER, after stating the facts, delivered the opinion of the court.

The errors assigned here may be divided into two, substantially.

The first is that the court erred in refusing to hold that Stalnaker, after having in due time filed his declaratory statement, did not, in making his application to the register and receiver of the land-office to enter the land, offer to prove his citizenship, and the other facts necessary to establish his right of pre-emption. To this the only answer necessary is that the officers declined to receive from him any proofs or money,

because they decided that he came too late, and was not, for that reason, entitled to enter the land, although his proofs in other respects might be perfect.

The second assignment is that the court erred in deciding that he had the right to perfect his claim by proofs twelve months after the date of his settlement.

The land was not subject to private entry when Stalnaker settled upon it and filed his declaratory statement.

The argument of counsel for plaintiff in error is that the case does not come within sect. 2267 of the Revised Statutes, because the land was surveyed and had once been proclaimed for sale. Sects. 2265 and 2266 prescribe rules of pre-emption for lands surveyed but not proclaimed, and for unsurveyed lands; and sect. 2267 declares that all claimants of pre-emption rights under these two sections shall, when no shorter period is prescribed, make their proofs within thirty months after the date prescribed for filing the declaratory statement. As this land had been surveyed and at one time proclaimed, the argument is that the time for making proof is not governed by sect. 2267, but by sect. 2264, which requires the person asserting a pre-emption right to land subject at the time to private entry, to make the proof within one year after the date of his settlement. But this land, at the date of Stalnaker's settlement, was not subject to private entry.

We find, however, that at that time sect. 2 of the act of July 14, 1870, c. 272 (16 Stat. 279), was in force. The first section of that act extends certain laws for the sale and survey of public lands to the Territory of Colorado. The second section, however, is more general, and, among other things relating to settlers on lands reserved for railroad purposes, enacts that "all claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

All Stalnaker's proceedings took place while this law was in force. It gave him eighteen months from the time limited for his declaratory statement, namely, from the eighteenth day of April, 1871, to make payment and proof.

He offered his money and his proof several months within the time which this statute allowed.

The Supreme Court of Nebraska, therefore, did not err in refusing to hold that his right expired within one year from the date of his settlement.

Judgment affirmed.

UNITED STATES *v.* TAYLOR.

1. So much of the act of Congress of Aug. 5, 1861, c. 45 (12 Stat. 282), as provides that the surplus of the proceeds of the sale of real estate sold for a direct tax due to the United States shall, after satisfying the tax, costs, charges, and commissions, be deposited in the treasury, to be there held for the use of the owner of the property, was not repealed by the act of June 7, 1862, c. 98, id. 422.
2. Prior to his application to the Secretary of the Treasury for that surplus, such owner has no claim thereto which can be enforced by suit against the United States.
3. The Statute of Limitations runs from the date of his application.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor-General and *Mr. John S. Blair* for the appellant.

Mr. Albert Pike and *Mr. Luther H. Pike*, *contra.*

MR. JUSTICE WOODS delivered the opinion of the court.

This was an action brought against the United States for the recovery of the proceeds of a tax sale of certain land in the State of Arkansas, of which it is alleged that Irene M. Taylor, deceased, the intestate of the appellee, was in her lifetime the owner.

The Court of Claims found as matter of fact that block 37, in Little Rock, Arkansas, was, on May 4, 1865, subject under the provisions of law to a direct tax of $37, which was assessed thereon to Matilda Johnson; that this tax was so assessed to Matilda Johnson, notwithstanding the fact that on May 4, 1865, Irene M. Jordan was, and ever since March 4,

1863, had been, the owner of said block by purchase from said Matilda Johnson; that the assessment was made against Mrs. Johnson because she appeared by the records to be the owner of the block, her deed to Mrs. Jordan not having been recorded until Aug. 25, 1866; that the board of direct tax commissioners for the district in which the block was situate sold it, May 4, 1865, to one Meservey, because of the non-payment of said tax, for the consideration of $3,000, of which sum the United States was entitled to $70.50, on account of the tax and the costs and charges and commissions of sale; that in 1865 Mrs. Jordan became the owner of the tax-sale title by purchase for a valuable consideration from Meservey's assignee; that on Dec. 10, 1873, Mrs. Johnson, the former owner, by her formal instrument of writing of that date, recognized Mrs. Jordan, who before that date had intermarried with Charles M. Taylor, as the rightful owner of said block, and of the money in the treasury realized from the tax sale thereof; and that on Jan. 15, 1874, Taylor and wife made application to the Secretary of the Treasury for the residue of the $3,000, the proceeds of said tax sale, after deducting therefrom the tax, penalty, costs, &c. This application was rejected on the 17th of that month.

On Dec. 8, 1875, this suit was brought in the Court of Claims, and on May 19, 1879, judgment recovered for $2,929.50, the amount of said surplus.

The United States has brought the case by appeal to this court for its consideration.

Two questions are raised, the first of which is, whether, under the legislation of Congress, the surplus of the proceeds of lands sold should be returned to the owner.

The act of Aug. 5, 1861, c. 45 (12 Stat. 292), declared that a direct tax of $20,000,000 should be annually laid upon the United States, and the same was apportioned among the several States respectively.

The thirty-sixth section of the act provided for the sale of real estate when personal property could not be found sufficient to satisfy the tax and costs. It concludes as follows: "But in all cases where the property liable to a direct tax under this act may not be divisible, so as to enable the collector by a sale of part thereof to raise the whole amount of the tax, with all

costs, charges, and commissions, the whole of such property shall be sold, and the surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives, or, if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the treasury, cause the same to be paid to the applicant."

It was further provided, that, if no one should bid the amount of the tax and twenty per cent additional thereon, the collector should be required to purchase the land in behalf of the United States, and in that case the owner was allowed to redeem on certain terms within two years.

It is not disputed that under these provisions, if they still remain in force, the appellee would be entitled to the surplus money sought to be recovered in this suit. So that the question presented under this branch of the case is, whether they have been repealed or annulled.

The appellant contends that this has been done by the act of June 7, 1862, c. 98 (12 Stat. 422), "for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and later acts.

Neither that nor any subsequent act directly repeals these provisions. If repealed at all, they must, therefore, be by implication. In other words, the subsequent legislation must be so inconsistent with them, that both cannot stand. *McCool* v. *Smith*, 1 Black, 459.

We have been unable to find any such incongruity. The act of 1862 and its amendments make no mention of the right of the owner of the lands to receive the surplus proceeds of their sale. But the absence of such a provision is not sufficient to repeal the positive enactment of 1861. On the contrary, it strengthens the presumption that it was the purpose of Congress to allow that provision to stand.

The act of 1862 provided that, in States where insurrection existed, the entire tax for a State should be apportioned and

levied upon its lands, which should become charged with their respective shares of the tax, which, with a penalty of fifty per cent, should be a lien thereon.

The owner could relieve his lands of the tax by paying it within sixty days after the commissioners had fixed its amount. If he did not pay within that time, the title to the lands became forfeited to the United States; and upon a sale of them, as provided for in the act, it vested in the United States, or the purchaser, in fee-simple, free and discharged of all prior liens, incumbrances, right, title, and claim whatsoever.

The commissioners, in case of the non-payment of the tax, penalty, and charges, were required to sell the lands at public sale to the highest bidder, for a sum not less than the amount of the tax, penalty, &c., and, if no person bid more, then to strike off and sell them to the United States for that sum.

In case the United States became the buyer, there was, of course, no surplus. But if any one purchased for a sum greater than the tax, penalty, &c., the commissioners were to give him a certificate of purchase, which should be evidence of title; and the owner, or any person loyal to the United States having a lien thereon, upon taking an oath to support the Constitution of the United States, was allowed to redeem the lands sold. This court held, in *Bennett* v. *Hunter* (9 Wall. 326), that the primary object of the acts of Aug. 5, 1861, and of June 7, 1862, being the raising of revenue, they must be construed together. In other words, they are to be construed as if passed at the same time, and effect must be given to all the provisions of the first act not in conflict with the later one.

In the same case it was held that the forfeiture declared by the fourth section of the act of 1862 does not operate of its own force to vest the title to the land forfeited in the United States upon the non-payment of the tax, but that a sale as prescribed by the act was necessary to transfer the title.

We find nothing in the provisions of the act of 1862, above recited, which takes from the owner the right accorded him by the act of 1861, of applying for and receiving from the treasury the surplus proceeds of the sale of his lands, nor anything inconsistent with that right.

But it is insisted by the appellant that sect. 12 of the act of

1862 makes a disposition of the surplus proceeds of lands sold for taxes inconsistent with the right thereto claimed by the appellee.

That section declares that "the proceeds of said leases and sales shall be paid into the treasury of the United States, one-fourth of which shall be paid over to the governor of said State wherein said lands are situated, . . . when such insurrection shall be put down, . . . for the purpose of reimbursing the loyal citizens of said State, or such other purposes as the State may direct, and one-fourth shall be paid over to said State as a fund to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom."

On recurring to the preceding sections to ascertain what is meant by the words "said leases and sales," the proceeds of which are to be so disposed of, we find that the first eight sections provide for the assessment of the direct tax upon the lands of the States in insurrection; for their forfeiture for non-payment of the tax; for their sale at auction; for their purchase by the United States, if no bid greater than the amount of the taxes, charges, &c., is received; and for their redemption by the owner.

The act, beginning with sect. 9, then takes up a new subject, which is continued through sects. 10 and 11. They relate exclusively to the disposition to be made of the lands bought by the United States at the tax sales. They authorize the commissioners, under certain circumstances, to lease them, or, under the direction of the President, instead of leasing, to cause them to be subdivided into parcels not to exceed three hundred and twenty acres, and sold. Sect. 12, which provides that the proceeds of "said leases and sales" shall be paid into the treasury, &c., must, we think, be limited to the proceeds of the leases and sales authorized in the three next preceding sections. Such is not only the natural and obvious, but also the grammatical, construction of the act.

That act provided for the collection of direct taxes in insurrectionary districts. It was not a confiscation act. It allowed the owner to redeem his lands within sixty days after the sale of them for taxes, and, while more stringent in its provisions,

was not antagonistic to the previous legislation on the same subject.

Our opinion is, therefore, that the clause of the act of 1861, which allowed the owner of lands sold for taxes to apply for and receive the surplus proceeds remaining after payment of the taxes and charges, is not repealed by the act of 1862.

The second question raised by the appeal is whether the Court of Claims had jurisdiction of a suit for such proceeds, when the application to the Secretary of the Treasury, and the bringing of the suit therefor, were both more than six years after the sale.

Sect. 1069 of the Revised Statutes provides that every claim against the United States cognizable by the Court of Claims shall be for ever barred, unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues.

The thirty-sixth section of the act of 1861 required, as we have seen, the surplus proceeds of the sale of land for taxes to be deposited in the treasury, to be there held for the use of the owner or his legal representatives until he or they should make application therefor to the Secretary of the Treasury, who, upon such application, should, by warrant on the treasury, cause the same to be paid to the applicant.

This section limits no time within which application must be made for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the treasury

for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before. *Merriam* v. *Hassam*, 14 Allen (Mass.), 516; *Baker* v. *Whiting*, 3 Sumn. 486; *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Attorney-General* v. *Proprietors of the Meeting-House in Federal Street in Boston*, 3 Gray (Mass.), 1; *Bright* v. *Segerton*, 2 De G., F. & J. 606; *Wedderburn* v. *Wedderburn*, 2 Keen, 722.

In analogy to this rule the right of the owner of the land to recover the money which the government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of demand, it falls within the terms of the section giving jurisdiction to the Court of Claims, and is not cut off by the lapse of time.

Our opinion is that the appellee was entitled, under the acts of Congress, to the fund in controversy, and that the petition therefor was filed in the court below within six years after the claim first accrued.

Judgment affirmed.

LORING *v.* FRUE.

1. Judgment upon nonsuit was rendered, with leave to move to set it aside. More than two years thereafter, the court heard the respective parties and granted the motion. *Held*, that the action of the court presented no question upon which a jury could pass, and that no exception thereto having been taken it cannot be reviewed here.
2. Certain shares of stock were sold by the agent of a corporation, and the moneys derived therefrom forwarded to its treasurer, who, in his official capacity, received and applied them to its uses. The agent subsequently claimed that a part of the shares was his individual property. *Held*, that, if he is entitled to recover therefor, his remedy is against the corporation.
3. The treasurer to whom a stock subscription is paid is not bound to issue the requisite certificates, nor is he personally liable to the party who, for the money so paid, is entitled to them.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. C. I. Walker and *Mr. George F. Edmunds* for the plaintiff in error.

Mr. Samuel T. Douglass and *Mr. John H. Bissell* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The declaration in this case contains only the common counts. The plea was the general issue, which a jury was sworn to try. After evidence had been offered by Frue, the plaintiff below, he elected to take a nonsuit, whereupon the following order was made, June 11, 1874: "It is therefore ordered judgment of nonsuit, and that the defendant recover of the said plaintiff his costs of this suit to be taxed, and leave is granted to said plaintiff to move to set aside this judgment."

Oct. 31, 1876, the court made an order in the following terms: "The motion to set aside the nonsuit heretofore entered in this cause again coming on to be heard, the same having been heard in part on the thirtieth day of October, instant, the arguments of counsel for the respective parties are concluded and the matter submitted, and the same having been duly considered by the court, it is now ordered that said nonsuit be, and the same is hereby, set aside, with leave to put

the case on the docket for trial at the next ensuing November term of this court."

On the 26th of December thereafter there appears an entry of an order overruling, after argument of counsel on both sides, a motion to set aside the order last cited. The case then went to trial, and the defendant again sought, by way of a prayer for instructions, to raise the question of the validity of the order setting aside the nonsuit.

The same point is much urged here by Loring, the defendant below, against whom judgment was given, and he assigns for error the action of the court in that respect.

It is quite obvious that no such question could be submitted to the jury, and that a prayer for instructions thereon was properly overruled.

Whether the court had the power to set aside this nonsuit more than two years after the judgment had been rendered is a very interesting question, the determination of which would depend somewhat on facts that are not in this record. Although counsel was present during the entire proceedings, no bill of exceptions was taken, so as to bring before us the grounds of either motion or the facts on which it was supported.

When a case is heard in an appellate court on a writ of error, it is a principle equally well settled in law and necessary in the administration of justice, that only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court.

It is not inconsistent with anything in this record that at the term when the nonsuit was granted the motion to set it aside was made, and then continued by regular orders from term to term until it was decided. In such case there can be no question of the power of the court to make the order. So it may have been stipulated that, until the chancery suit between the same parties which is found in the record should be decided, the action was to remain in court, and then come up on the motion to set aside the nonsuit. This also would have given the court the right to set it aside.

As the plaintiff in error, although present by counsel when

the objectionable order was made, and the subsequent motion to set it aside was heard, took no bill of exceptions to negative the presumptions we have mentioned, as well as others which might be suggested, we must presume that the action of the court was in accordance with law. The assignments of error based on the order setting aside the nonsuit are not well taken.

The record contains a very full bill of exceptions professing to embody all the evidence submitted on the trial. The errors assigned relate to the instructions of the court, and to its refusal to grant the prayer of the plaintiff in error for instructions.

The evidence consisted wholly of that of the plaintiff and his agent, Palmer, and some letters and correspondence which they introduced.

It appears that the transactions on which the claim is founded originated in the purchase of mineral lands in Michigan, the organization of two joint-stock companies as owners of them, and in speculations in the sale of the shares of these corporations. Frue resided in that State, and, having been engaged in mining there, was supposed to be skilled in the discovery of its mineral products. Palmer and Loring lived in Boston. He, they, and one or two other persons determined, after some preliminary negotiations, to purchase lands which they supposed contained mineral, and to organize two or more corporations. They accordingly made the purchase and organized two corporations, — one called the Ossipee and the other the Kearsarge. The usual process of a large capital stock divided into a great many shares was resorted to, and then the sale of them was in order.

The testimony tends to prove that, in some connection with the business of these companies, Loring, who was the president, treasurer, and active managing agent of them in Boston, received from Frue about $114,000, and the controversy turns upon the question whether he, in his official capacity, received it as Frue's share of the money necessary to pay for the lands, or whether it was money sent to purchase stock for a failure to deliver which he would be liable for money had and received to Frue's use.

The first item to which attention is called is one of $73,000. Frue, in his testimony, states that it was determined by the

original promoters of the venture to sell a large amount of stock, and that he accordingly sold two thousand shares of the Ossipee at $11.50 per share, amounting to $23,000, and five thousand shares of the Kearsarge at $10 per share, making $50,000, which sums he forwarded to Loring. Before the jury he claimed to recover $9,276, on the ground that of the stock sold by him that amount belonged to him personally.

It is not easy to see by what process of reasoning this result is arrived at. But it is clear that in forwarding the stock to Frue, which he sold for $73,000, Loring was acting as president and treasurer of the associations, whether it was before or after their organization. His own evidence on that subject is, that he received the stock from Loring, and accounted therefor with him as president. When asked why he sent forward all the money instead of retaining what he now claims was his individual property, Frue said that he wanted to keep Loring in ample funds. Palmer also testified that Loring was president, director, and financial manager of the companies, and as such paid for the lands out of the funds placed in his hands, and that the lands were conveyed to the corporations.

We are of opinion that the plaintiff himself makes out beyond dispute that he received these shares of stock from Loring as president of the associations, to be sold on their account; that he so sold them, and remitted the money to Loring as treasurer. It is clear that Loring is not personally liable therefor, and that if Frue has the right to recover part of this $73,000, it is by action against the corporations. The refusal of the court to so instruct the jury was error.

The next item which Frue claims is $15,889.32, which he says in his testimony was sent to Loring to pay for stock at prices per share which had been previously fixed by the members of the companies; and he insists that this being a transaction between him and Loring, the latter, having failed to deliver the stock, is personally liable for the money.

But it is quite clear from the evidence that this sum was part of the capital stock of the companies for which Frue was liable, either by the original terms of their organization, or by reason of assessments made on him as a stockholder. He was certainly entitled to his certificates of shares, if he never

received them. And if the corporations or their officers had otherwise disposed of them, so that they could not be issued to him, the corporations, and perhaps the officers, would in a proper action be liable for conversion. But the money sent to Loring in these cases was sent to the corporations. It came to him properly as their treasurer, and they, not he, incurred the obligation to issue and deliver the certificates. It is true the court told the jury that if they believed this, they must find for the defendant. But this was misleading, for while Frue thought that by sending the money he had a personal claim on Loring for the shares, and swore to this belief, the facts to which he testified showed that he had no such claim. The jury should have been told so, instead of being left to act on his sworn opinion of the legal result of the transaction.

The remaining item of $25,401.08 is made up of drafts sent by Frue, Dec. 31, 1866, to Palmer, his agent at Boston, payable to his order, with instructions to apply it on the purchase of Sections 24 and Penn. Palmer testifies that he indorsed and delivered the drafts to Loring, and that the money was used for other purposes by Palmer and Loring, though afterwards the same amount was invested for Frue in Torch Lake, which was the same as Penn and Section 24.

We are not prepared to say that the court was in error in refusing the instructions prayed by Loring's counsel on this point, or that there was any manifest error of law in the charge of the court on that matter.

But we are of opinion that the whole charge was vague and misleading in this matter as in others, as it made on the jury the impression that the opinions of Frue and Palmer, in their mode of looking at these transactions, were competent evidence, and it failed to give due effect to the simple and undoubted facts of the case. For these reasons there was no fair trial. The judgment of the Circuit Court must be reversed, with directions to set aside the verdict of the jury and grant a new trial; and it is

So ordered.

CONNER v. LONG.

1. The title to the goods of a party who is subsequently declared a bankrupt, which vests in his assignee when the assignment for which the statute provides is made, relates back to the date of filing the petition in bankruptcy, although they are then held under an attachment levied upon them within four months preceding that date.
2. When, prior to such filing, the goods so levied upon were sold under the writ and the proceeds remain in the hands of the sheriff, or are thereafter, and before the assignment, paid by him to the attaching creditor, the title to the goods is not transferred to the assignee, but his right to the proceeds inures, and he may maintain an action therefor against the sheriff, if that officer retains them, or against the creditor, if they have been paid to him. When the goods are sold subsequently to such filing, no title passes to the purchaser, they then being the property of the assignee.
3. A., a sheriff, in obedience to an order of court, commanding him to sell certain specified goods whereon he had levied a writ of attachment issued against B., sold them, and paid the proceeds to the creditor. At the time of the order, sale, and payment, proceedings were pending wherein B. was declared a bankrupt. They had, within a few days after the levy, been commenced in another State. A. had no notice of them until after he had so paid the proceeds. *Held*, that A. is not liable to B.'s assignee for the wrongful conversion of the goods.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Robert S. Green for the plaintiff in error.

Mr. William B. Hornblower and *Mr. Daniel H. Chamberlain*, *contra.*

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The facts out of which this case has grown are undisputed. They are as follows: —

On July 20, 1875, a warrant of attachment was duly issued in an action commenced on that day in the Supreme Court of the State of New York, by Dickerson against Spaulding, a non-resident. William C. Conner, sheriff of the city and county of New York, to whom the warrant was directed, levied it, the same day, on the straw goods in controversy in this action which were at the time the property of Spaulding. On the ground that they were perishable, an order was on the 27th

of that month made in the cause, directing the sheriff to sell them. Pursuant to that order, they were sold August 1 for the sum of $1,156.50. Judgment was entered in the action September 15, in favor of the plaintiff, for $2,175.85. An execution issued thereon was received by the sheriff on that day. He returned it five days thereafter, showing that the amount made, being the proceeds of the sale less expenses, had been paid by him to the attorney of the plaintiff.

Spaulding was a resident of Massachusetts. On July 23, 1875, a petition in bankruptcy was filed against him by creditors in the District Court of the United States for the District of Massachusetts, and he was adjudged a bankrupt on the fourth day of the following September. The deed of assignment was executed by the register in bankruptcy to William H. Long, the appointed assignee, on the 21st of that month.

On Jan. 21, 1876, Long, as assignee, commenced in the Superior Court of the city of New York the present action, against Conner, the sheriff, to recover the value of the goods, on the ground that the sale so made was a wrongful conversion of property, the title to and right of possession in which had at the time, by the operation of the Bankrupt Act, become vested in him as assignee of Spaulding.

This action was removed by the plaintiff therein to the Circuit Court of the United States. The answer of Conner denied "that he knew or in any way had any notice or intimation of said alleged proceedings in bankruptcy until subsequently to such sale, and until after the payment over by this defendant of the money so received by him upon such sale, as hereinafter set forth." Upon the trial the judge instructed the jury that upon these admitted facts the sheriff was guilty of a conversion of the property in question Aug. 1, 1875, in selling it under the order of the Supreme Court of New York; that he was consequently liable to pay to the plaintiff the market value thereof on that date, with interest; and that the only question submitted for their determination was the amount of damages.

The trial resulted in a judgment for $1,186.43 in favor of the plaintiff, to reverse which this writ of error is prosecuted.

The form of the charge assumed the truth of the foregoing allegation in the defendant's answer, as to his want of actual notice of the proceedings in bankruptcy.

The question now to be considered and determined is, whether there is error in this charge.

The solution of this question depends upon the force to be given to the fourteenth section of the act of March 2, 1867, c. 176, now sect. 5044 of the Revised Statutes, which reads as follows: —

"As soon as an assignee is appointed and qualified, the judge, or when there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

In *Hampton* v. *Rouse* (22 Wall. 263, 275), it was declared by Mr. Justice Clifford, delivering the opinion of the court, that the plain meaning of this section was, that, "until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it may be, remains in the bankrupt." It is equally plain that, when the assignment is made, it operates retrospectively. The title of the bankrupt in the interval is defeasible, and, when the assignment is made, is divested as of the date when the petition was filed. All titles derived under or through him, originating subsequently to that date, are, by force of law and without regard to the knowledge or the motives of the claimant, overreached and defeated. *Bank* v. *Sherman*, 101 U. S. 403. The statute declares that the title of the assignee shall thus vest by relation to the commencement of the proceedings in bankruptcy, although the property is then attached on mesne process as the property of the debtor.

It is urged in argument on behalf of the plaintiff in error

that the act divests the title of property held by virtue of an attachment only when it is so held at the date of the execution and delivery of the assignment, and not at the time of filing the petition in bankruptcy; and that, consequently, when, as in the present case, the attachment proceedings had resulted in a disposition of the goods, prior to the actual conveyance to the assignee, the title to them would not pass to him. To hold otherwise, it is said, would, in opposition to the plain provisions of the law, defeat the legitimate operation of an attachment, which had been commenced more than four months prior to the inception of the bankruptcy proceedings; for it might well be that under such a writ property might be held undisposed of at the date of filing the petition in bankruptcy. But it is equally true that property so held might remain subject to the attachment at the date of the conveyance to the assignee, and the supposed difficulty is not removed by the suggested construction of the act. It is removed, however, by considering the whole section, from which it appears that it is the title to property, subject to an attachment, only when levied within four months next preceding the commencement of the bankruptcy proceedings, which becomes vested in the assignee by relation, the same attachment being thereby dissolved as of that date.

One consequence is, that if property of the debtor levied on under such an attachment has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the sheriff, or before the assignment have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold; for the latter not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not thereby transferred to the assignee; but the attachment being dissolved upon that event, the right to the proceeds of the sale passes under the assignment, released from the claims of all parties to the attachment suit, as of the date of the commencement of the proceedings in bankruptcy. And in such a case the plaintiff in the attachment suit, having received the proceeds of the sale on his judgment, would be liable to an action by the assignee

for that sum of money had and received to his use; or, if it remained in the hands of the sheriff, the assignee might become a party to the action, and obtain an order of the court requiring the amount to be paid directly to himself.

Another result is, that if the property has been sold under the attachment after the commencement of the bankruptcy proceedings, no title passes by the sale, for the property ceased, at that time, to be the property of the bankrupt, and became the property of the assignee, a stranger to the action and not affected by it; and both the plaintiff in the attachment and the purchaser at the sheriff's sale would be liable to the assignee for a conversion of his property, — the one for having caused its sale, the other for having taken possession of it as owner.

Upon this point there can scarcely be any diversity of opinion, for it would be difficult to give to this feature of the bankrupt law any less effect without depriving it of all substantial operation, and defeating its obvious policy. It was, undoubtedly, deemed an essential element in any efficient system, the main purpose of which was to secure to all the creditors of the bankrupt an equal participation in his effects, not only as against his fraudulent and collusive dispositions, but also as against the zealous competition among creditors, in their heedless race of diligence, to obtain priority. For this reason every title to property sought to be acquired by a seizure and sale under an attachment, belonging to one subsequently declared to be a bankrupt, is defeated, if the attachment be levied within four months next previous to the institution of the bankruptcy proceeding; and the creditor, at whose instance and for whose benefit the sale was made, and the purchaser who, having acquired possession of the property, asserts a claim of ownership, are each liable for a tortious conversion of the property of the assignee, unless, as before stated, the property has been sold under the attachment before the filing of the petition in bankruptcy, in which case the title of the assignee vests in the proceeds of sale.

In *Duffield* v. *Horton* (73 N. Y. 218), it was decided that a debtor of the bankrupt, whose obligation had been subjected to an attachment, levied within four months next preceding

the bankruptcy proceedings, was liable to the assignee, notwithstanding he, without actual knowledge of the bankruptcy, had previously paid it to the sheriff, upon a judgment rendered against the bankrupt in the attachment proceedings. In that case the court say: "The payment by the defendants to the sheriff of the debt due Yerkes was without authority, and did not discharge the obligation either to Yerkes or the plaintiffs. The lien of the sheriff was discharged and the payment was voluntary. There was no process against the defendants or their property, neither was there any judgment or order of any court, in obedience to which the money was paid. The judgment and execution was a general judgment and execution against Yerkes, and not a judgment specifically subjecting the debt to the payment of the judgment and requiring the defendants to pay it or the sheriff to collect and apply it."

In the course of the same decision the New York Court of Appeals intimates an opinion that "the sheriff could not probably be sued, being an officer of the court, and receiving the money as such;" and cites in support of it the cases of *Johnson* v. *Bishop*, 1 Woolw. 324, and *Bradley* v. *Frost*, 3 Dill. 457.

The former of these cases — *Johnson* v. *Bishop* (*supra*) — was an action of detinue, brought by the assignee of Loeb, a bankrupt, to recover possession of goods attached and held by the sheriff as the property of Loeb & Co., of which firm Loeb was the sole member. The attachment suit had been brought in a State court of Iowa, and the action of the assignee in the District Court of the United States for that district. The District Court had dismissed the cause for want of jurisdiction, and the assignee prosecuted a writ of error to the Circuit Court. It was admitted in the opinion of that court, delivered by Mr. Justice Miller, that, on the facts alleged, the title to the goods vested in the assignee as soon as the assignment was executed, and with that title he acquired a right of immediate possession; but it was held that he must apply to the State court for the recognition and enforcement of his rights, or, waiting till the sheriff had parted with the possession, prosecute a party who could not shelter himself behind the jurisdiction of a court of law, and that he could not maintain an action against the sheriff for the recovery of the possession of the property, and

damages for its detention. "The property," it was said, "is held by the sheriff under writs rightfully issued, and his possession is the possession of the court by the command of whose writ he seizes it. And so long as the proceedings in virtue of which it was taken are pending, that possession will not be interfered with by any other court."

In answer to the argument that the bankruptcy proceedings operated to discharge the attachment at once, without any order in that behalf, so that the sheriff was left without any authority to hold the property, the opinion proceeds as follows: "It may be true that the attachments have ceased to have any binding force. But whether they have or not is the question; and this question depends, not only upon a proposition of law here urged upon us, but also upon two questions of fact: that is, whether Loeb has been adjudicated a bankrupt, and whether he was the only member of the firm of Loeb & Company. Of the principle of law the State court is bound to take judicial notice; but of the two facts stated, it is not bound to take such notice. No court is bound to take judicial notice of the proceedings of another court. If material to a controversy before it, it must be informed thereof by the pleadings; and if the allegations are denied, they must be proven by the record. The State court can have no knowledge or even notice of the proceedings in the Federal court, by which its right to possess and adjudicate the property in question is affected. It should be informed in a proper way of those proceedings, before its possession is interfered with or assailed." p. 328. And in support of this conclusion reliance was had upon the cases of *Hagan* v. *Lucas*, 10 Pet. 400; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Carryl*, 20 id. 583; *Freeman* v. *Howe*, 24 id. 450; *Ex parte Dorr*, 3 id. 103; and *Buck* v. *Colbath*, 3 Wall. 334.

The principle of this decision was expressed in the opinion of the court in the case of *Doe* v. *Childress* (21 Wall. 642), in which Mr. Justice Hunt said: "Where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction;" and adding: "This rule gains, whether

the four months' principle is applicable, or whether it is not applicable."

The case of *Johnson* v. *Bishop* (*supra*), however, does not decide the question now before us, whether, after the State court has exhausted its jurisdiction over the attached property, the sheriff, as well as the plaintiff and the purchaser, may not be proceeded against for a conversion of the property at the suit of the assignee, who at the time of the sale had become in law its owner.

Bradley v. *Frost* (*supra*) was such an action, not distinguishable in its circumstances from the present; and in that the circuit judge, upon the principle decided in *Johnson* v. *Bishop*, held that the sheriff was not liable, but not without expressing doubt of the correctness of his decision. The ground of his judgment was, that the property levied on under the attachment was at the time the acknowledged property of the debtor, and thereby came into the lawful possession of the court, was held by the sheriff as its officer, and sold by him in obedience to a command directing him to sell, not generally, as in case of an ordinary execution upon a personal judgment, the property of the judgment debtor, but specifically, the very property in the custody of the court, and upon which it acted *in rem*.

The case is thus brought within the terms of the first of the two classes of legal process described in *Buck* v. *Colbath* (*supra*), "those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property," — the sale being substituted for the seizure, — in respect to which, it is said, "he has no discretion to use, no judgment to exercise, no duty to perform, but to seize the property described;" and from which, it is added, it follows, "as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that in the execution of such process he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts." p. 343.

On the other hand, in the case of those writs "in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken," it is declared, in the same opinion (p. 344), that "the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; *secondly*, that it is property which by law is subject to be taken under the writ; and, *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure." And "the court can afford him no protection against the parties so injured; for the court is in nowise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else."

It is manifest that the act of the sheriff, for which he is sought to be charged in the present action, is not within the rule established as to the latter class of cases; for he neither had nor exercised any discretion in making the sale, and, doing only what he was specifically and in terms commanded to do by the order of the court, the court is responsible for his obedience.

It is argued, however, that the proceedings in bankruptcy, prior to the sale, had the effect of ousting the jurisdiction of the State court in the attachment suit, so that thereafter its order to sell was a nullity, incapable in law of any effect, and, therefore, incompetent to protect the officer against the consequences of executing it. But if the jurisdiction of the court became vacated, in the sense that after the assignment in bankruptcy its action was void, in respect of all persons and for all purposes, then it also follows that it thereby lost the legal custody of the attached property, and the sheriff held it afterwards, not officially, but merely as a private person; and he could not, consequently, defend against an action of

replevin, brought by the assignee to recover possession of the specific property. This conclusion, upon the principles and authorities already referred to, we have already excluded; but the same reasoning would support the defence of the officer, in an action for a conversion of the property sold in obedience to the order of the court, and, therefore, not by him, but by the court itself. Otherwise, the judge who made the order would be equally liable for the tort with the sheriff who executed it.

It is true, ordinarily, and in the case of private persons acting voluntarily, that in case of a conversion of the goods of another, in which both principal and agent are concerned, both are severally liable, and the servant cannot justify under orders from a master; for, as was said by Lord Ellenborough in *Stephens* v. *Elwall* (4 Mau. & Sel. 259), "a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

But this rule has its limitations, and does not apply even in cases of private persons exercising a public employment, when the act complained of is in the discharge of a duty to the public incident thereto: as in *Greenway* v. *Fisher* (1 Car. & P. 190), where the defence was that the defendant, who was a common carrier, had merely shipped the goods in the ordinary course of business, Abbott, C. J., said: "The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and a refusal, trover will lie; but while he is the mere conduit-pipe in the course of trade, I think he is not liable."

And such undoubtedly is the law. The reason and policy of it apply with even greater force to a person acting in an official capacity, such as a sheriff, where the act, for the consequences of which it is sought to make him liable, is the direct and express command of a court, whose precepts he is under the highest obligation to obey without question and without hesitation.

The rule of duty and of liability is thus stated with admira-

ble force by Hosmer, C. J., in *Watson* v. *Watson* (9 Conn. 140, 146): "Obedience to all precepts committed to him to be served is the first, second, and third part of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command." The action in that case was replevin, and the following extract from the same opinion is pertinent to the present inquiry. The learned judge said: "It was said in the argument of this case, that no difference exists, as to the proceedings of an officer, if the plaintiff has no property in the goods to be replevied, between the taking of property on a replevin, and the taking of the goods of *A.*, upon a process commanding him to take the goods of *B.*; that is, the caption in both cases is equally a trespass. No remark can be more unfounded, for the difference is immense and distinctly marked. *In the case of the replevin, the officer does what by legal authority he is commanded to do; and in the other case, he does what he was not commanded to do.* In replevin, the property is identified and described, and the command is, *Take this specific property.* In the case of a process commanding the taking of the goods of *A.*, without any identification or description, the command is, *Take the goods of A., if any such there are, but not the goods of any other person.* From the nature of the case last put, the officer must act on his own inquiry, and is bound to all the responsibility of his action." p. 147.

So, in *Savacool* v. *Boughton* (5 Wend. (N. Y.) 170), the rule was, as we think, correctly stated by Marcy, J., that if the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction arising from some other cause, for example, as to the person or place, the officer who executes process issued on such suit is no trespasser, unless the want of jurisdiction appears by such process.

The same rule was sustained by Nelson, C. J., in *Webber* v. *Gay*, 24 id. 485. In *Wilmarth* v. *Burt* (7 Metc. (Mass.) 257, 259), Shaw, C. J., said: "As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case he is justified

in obeying his precept, and it is highly necessary to the due, prompt, and energetic execution of the commands of the law that he should be so."

To the same effect are *Twitchell* v. *Shaw* (10 Cush. (Mass.) 46), and *Clarke* v. *May*, 2 Gray (Mass.), 410. The same principle was applied to the proceedings of a court-martial, by this court, in *Dynes* v. *Hoover*, 20 How. 65.

In the present case it is admitted that the State court had full and perfect jurisdiction, in all respects, until it was terminated by the proceedings in bankruptcy. But the fact that put an end to its jurisdiction did not appear by its own record, and consequently was one of which the sheriff could not, by legal possibility, have official notice; and without that, he was bound to obey the order of that court, to whom he was responsible, directing the sale of the property, which, so far as he was concerned, at the time it was made, was an exercise of jurisdiction as legitimate as the issuing of the original attachment under which the property had been lawfully taken and held. Indeed, the general rule is, that where an attachment has been dissolved, no action can be maintained against the sheriff for a return of the property, until he have notice by the record of the fact; or if it has taken place, by the act of the parties, *dehors* the record, then not until notice of the extrinsic facts, which have satisfied it, has been brought home to him. Drake, Attachments, sect. 426; *Livingston* v. *Smith*, 5 Pet. 90.

These considerations, leading to the exoneration of the sheriff from the responsibility sought to be imposed upon him in such cases, derive additional force from the circumstance that the transaction which is supposed to entail liability upon him not only operates retrospectively, but occurred in a different jurisdiction, to which he was not responsible. The proceedings in bankruptcy were had in a court of the United States sitting in the district of Massachusetts. The defendant below was sheriff of a court of the State of New York. It is entirely true that the act of Congress prescribing a uniform rule as to bankruptcies, passed in pursuance of an express grant of power in the Constitution of the United States, is the paramount law throughout the territorial jurisdiction of the national govern-

ment. It is as truly the law of each State, as it is, and because it is, a law of the United States. The assignment in bankruptcy made in one district, so far as its operation is matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the bankrupt wherever it is situate, so as to preserve it, according to the provisions of the act, for distribution under it, and so that the title shall pass, as it requires, without regard to any dealing with it, which it forbids. Whatever hardship, if any, may follow to private persons who sell or buy it, and attempt to divert it to their own use, falls upon them, as in other cases, where titles fail, even in the hands of innocent, because ignorant, purchasers. But they are volunteers, seeking only their private interests, and take the chances of all the consequences of their conduct. The maxim to which they are subject is "*caveat emptor.*" It is not so with the sheriff, who, as a public officer of the court, obeys its precepts, regular on their face, without notice of any want or failure of jurisdiction; who is not at liberty to exercise any discretion, and has no choice but to obey. The language of Mr. Justice Miller in delivering the opinion of this court in *Eyster* v. *Gaff* (91 U. S. 521, 524), though spoken in reference to a different state of facts, is applicable to the present case. "It is a mistake," he said, "to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. . . . It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of the parties to the suit already pending."

There is no language in the Bankrupt Act that, either expressly or by any necessary implication, requires us to hold the officer liable in such circumstances; nor is its policy defeated or thwarted by refusing to do so. The opposite conclusion is based upon an inference from the doctrines relating to the conversion of personal property, and, in our opinion, is the result of a misapplication of the principle invoked.

The court below took a different view of the law, following a prior decision in the same circuit in *Miller* v. *O'Brien* (9 Blatchf. 270), in which the circuit judge, Woodruff, said: "It accords with our sense of justice to say that they [sheriffs] ought not to be held liable for their acts in the execution of process, done in good faith, without actual notice of any proceedings in bankruptcy against the debtor." He nevertheless felt constrained to adopt "the reasoning and the principles upon which the same question was settled in England under the bankrupt law of that country," referring to *Balme* v. *Hutton* (9 Bing. 471), and *Garland* v. *Carlisle*, 4 Cl. & Fin. 693.

And these cases have been pressed upon us in this argument as authorities entitled to be followed. They are entitled, certainly, to very respectful examination.

The principal case in England is that of *Cooper* v. *Chitty* (1 Burr. 20), decided by Lord Mansfield in 1756. It arose, as did all the subsequent cases, under the Bankrupt Act of 13 Eliz., c. 7, which, after authorizing the appointment of commissioners for managing and disposing of the bankrupt's estate, enacted that every direction, order, bargain, sale, and other thing done by the persons so authorized, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, &c., and *against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts had, made, or done after any such persons shall become bankrupt.* The action was trover against the sheriffs of London by the assignees of a bankrupt to recover the value of goods levied on and sold under an execution upon a judgment recovered against the bankrupt, the goods having been seized after an act of bankruptcy, and sold after the assignment was executed. The officers were adjudged liable for a conversion. It appears from the report of the arguments and judgment that in no prior case had the sheriff been held liable in such circumstances, and several were cited to the contrary. These Lord Mansfield either distinguished from the case before him, or overruled as without authority; and, in answer to the argument of hardship to the officers, laid stress upon the fact, that in the case before him the sheriffs knew of the bankruptcy before they sold the goods.

Lord Mansfield's decision in that case controlled the course of judicial opinion upon the question until *Balme* v. *Hutton* (2 Cromp. & J. 19) was decided in the Court of Exchequer in 1831. In the course of his opinion in that case, Lord Lyndhurst said: "The sheriff does not act of his own accord or for his own benefit; he acts as a ministerial officer in execution of the command he receives from a court of justice in the King's name; and if what he does is, *at the time he does it*, in strict obedience to that command; if it be what the court itself, if it could itself have acted, would have done; and if it be *at that time* justifiable by the writ under which he acts, — it is a strong measure to say that subsequent events shall make that a wrongful act in the sheriff which, at the time he did it, was rightful, and shall make him answerable as a *wrong-doer* for what, at the time he did it, it was *his duty to do*." He also showed, by an elaborate review of the earlier authorities, that in such a case the sheriff had been uniformly protected by his process, and concluded that *Cooper* v. *Chitty* decided only that a sale by the sheriff, *with notice of the bankruptcy*, was a wrongful conversion by the sheriff, and a sufficient foundation for an action of trover; but that it left the case of the sheriff, upon a sale *without notice*, as much protected as before. He then proceeded to show that the subsequent decisions had overlooked the distinction on which *Cooper* v. *Chitty* was founded, and were a departure from the true rule as established by the earlier authorities, and gave judgment for the defendant. But this judgment was reversed in 1833 by the Court of Exchequer Chamber. *Balme* v. *Hutton*, 1 Cromp. & M. 262.

The question came finally before the House of Lords in the year 1837, in the case of *Garland* v. *Carlisle* (4 Cl. & Fin. 693), where it was settled by a decision against the sheriff, who, before the passing of the 6 Geo. IV., c. 16, having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *fi. fa.*, but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy, and it was held that the assignees might maintain trover

against the sheriff for the goods seized, the receipt of poundage being considered evidence of a conversion by the sheriff. The judges were called upon for their opinions, and the majority, who gave opinions against the sheriff, relied largely upon the language of 13 Eliz., c. 7, and upon the settled course of decision, which it was thought to be inexpedient to reverse.

Mr. Justice Vaughan, one of the minority judges, in stating the ground of his opinion, said (p. 771): "Being, therefore, of opinion that there is no legislative enactment by which the sheriff is rendered expressly liable, but assuming, for the sake of argument, that the general terms in which the clauses to which I have referred are expressed, may be thought so large as to be of *universal* application, and consequently to comprehend the sheriff, I think, for the reasons I have stated, that the law would imply an exception in his favor, arising out of his official character and duty, being an officer of justice *compelled* by stern necessity to execute the King's writ, '*Necessitas, quidquid coegit defendit.*'"

The final judgment was given against the sheriff. Great stress was put upon the long-established series of decisions to that effect. Lord Brougham, although concurring, said: "I may say, however, that I agree particularly with one of the learned judges, Mr. Justice Coltman, in his expression of opinion, that had the case been an entirely new case, and now to be decided for the first time, I might have come to a different conclusion upon it; but that as it is, a whole current of decision unbroken for so many years, from 1756 to 1831, has disposed of the question, and we are not now left at liberty to form an opinion upon it. I do not, however, think that *Cooper* v. *Chitty* absolutely decided this question, though it certainly decided the principle. The more that case is examined, the less, as it appears to me, will it be found to have decided the question, if, indeed, it does not rather operate as an argument against the side for which it is now quoted." Lord Denman dissented.

The question is now a new one in this court, and we are not fettered by an inveterate course of decisions upon it. We are at liberty, in view of all appropriate considerations, to decide it upon reason and not by precedent. And we are satisfied,

upon grounds already stated, that in doing so we shall reach conclusions entirely satisfactory, and supported, as we believe, by recognized principles of law. It is a sufficient reason, in our judgment, for not following the English decisions, that in 1839, shortly after the House of Lords had declared its inability to disregard the course of previous decision, Parliament, recognizing the injustice and inexpediency of the rule thus finally established judicially, interposed by the act of 2 & 3 Vict., c. 29, and by several successive acts, which had the effect to protect the sheriff in the performance of his official duty against such actions as the present. Indeed, some relief had been introduced by the Bankrupt Act of 6 Geo. IV., c. 16, passed in 1825. *Edwards* v. *Scarsbrook*, 3 B. & S. 280; *Slater* v. *Pinder*, Law Rep. 6 Ex. 228. This legislation we regard as evidence of the highest character that the rule in question ought never to have been judicially established. Its effect was not so much to change as to restore the law. It was in fact a legislative reversal of the judgment of the House of Lords. It cannot be assumed that Congress intended, in the Bankrupt Act of 1867, to restore a rule of liability which had become obsolete in England nearly thirty years before.

In our opinion, the judgment below should have been for the plaintiff in error; and it is, therefore, reversed.

The cause will be remanded, with instructions to grant a new trial; and it is

So ordered.

WALKER *v.* POWERS.

1. A judgment is satisfied when, under proceedings ordered by the proper court, the lands of the defendant are seized, sold, and conveyed by the sheriff to the plaintiff, he bidding for them the amount of the judgment, interest, and costs.
2. The assignee of a judgment founded on a contract cannot maintain a suit thereon in a court of the United States, unless such a suit might be there prosecuted had the assignment not been made.
3. A bill is subject to demurrer for multifariousness, if one of the two complainants has no standing in court, or where they set up antagonistic causes of action, or the relief for which they respectively pray in regard to a portion of the property sought to be reached involves totally distinct questions, requiring different evidence and leading to different decrees.
4. Where real estate is alleged to have been conveyed in fraud of the grantor's creditors, and they, after his death, file their bill to subject it to the payment of their debts, — *Quære*, Are his heirs or devisees necessary parties.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Joseph P. Whittemore* for the appellants, and by *Mr. William F. Cogswell* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a suit in chancery by Walker and Whittemore, the general purpose of which is to declare null and void certain sales and conveyances of real estate in New York, owned by Nelson P. Stewart, and to subject it to the payment of his debts. At the time of the transactions mentioned in the bill he was a citizen of Michigan. He died there in the year 1863, and George K. Johnson was appointed administrator of his estate in 1874. No letters of administration were issued in New York.

The debt on which Walker counts was a simple-contract debt, which was allowed by the probate judge in Michigan. The foundation of Whittemore's claim for relief is two judgments. One was recovered by him against Stewart in a court of New York on the 20th of August, 1862, and docketed on the 28th of that month in Monroe County, where the land in controversy is situated; the other was rendered in favor of

Elisha W. Chester, docketed about the same time, and assigned to Whittemore in 1872.

As regards the judgment in favor of Whittemore, the bill alleges that he, after the death of Stewart, instituted a proceeding in the nature of a *scire facias* against the terre-tenant in the proper court, and obtained an order under which the property so frequently mentioned in the bill as "Congress Hall," a hotel in the city of Rochester, was sold to him on a bid amounting to the debt, interest, and costs, and that he received the sheriff's deed for the property, on which he brought an action of ejectment, which is now pending.

The bill then charges a variety of transactions connected with the sale of this and other real estate under judicial proceedings against Stewart in his lifetime, and with conveyances made by him of the same, all of which are said to be fraudulent, and in pursuance of a conspiracy on the part of Stewart, the purchasers and others, to hinder and delay his creditors, and defeat them in the collection of their debts. The bill alleges that other large debts are held by numerous creditors, in behalf of whom, as well as of the complainants, the bill purports to be brought. Some of the real estate is alleged to be in the hands of innocent purchasers for value. Most of those charged with conspiracy are dead. The heirs or devisees of Stewart, though named, are not parties to the bill; nor, indeed, can they be made defendants, because they and the complainants are citizens of Michigan. The administrator lives in that State, and though a creditor, as the bill alleges, to the amount of $80,000, is not made a party, nor is any reason given why he did not take out administration in New York, as it would have been eminently proper for him to do.

The bill was dismissed on demurrer, and this appeal is taken by the complainants.

It will be perceived that Whittemore, the principal complainant, founds his right to relief on two totally distinct causes of action. In one he asserts that, by virtue of a judicial sale, he is the owner of Congress Hall, and has a complete legal title thereto, on which he is prosecuting an action of ejectment. The bill shows that, by the sale under which he became such owner, his judgment against Stewart was satis-

fied; and as the execution must be presumed to have been returned to the proper office with the sheriff's proceeding indorsed, the judgment stands satisfied by the record of the court in which it was rendered. He has made no attempt to set aside this satisfaction, but, on the contrary, he is by this bill insisting on the fruit of that satisfaction, by endeavoring to remove the cloud on his title, created by the fraudulent proceedings of which he complains. In reference to that judgment he is no longer a creditor of Stewart, nor has he any debt chargeable on or provable against Stewart's estate. What interest founded on this judgment has he, then, in any other property which Stewart held in his lifetime, or in the administration of the assets of his estate? How can he, on the foundation of that judgment, inquire into frauds in regard to other property than that which he bought? What interest apart from the judgment in favor of Chester has he in common with other creditors of Stewart, and how can he maintain any joint suit with them?

So far from being able to do this, or having any common interest with them, he asserts a right in conflict with their interests. If the claim of the defendants who are in possession of Congress Hall, the only property of much value mentioned in the bill, should be declared void as against Stewart's creditors, then, while it is their interest to subject it to the general administration among all the creditors, we have Whittemore asserting that this result inures to his sole benefit, as he has already taken steps by which he has become the exclusive owner when the frauds are swept out of the way.

It is impossible to see, therefore, what interest founded on that judgment Whittemore has in a general administration of the assets of Stewart, or that he has any interest in common with Walker or the other creditors, or a right to call upon the defendants other than those setting up claim to Congress Hall.

This view involves no hardship on Whittemore. He has satisfied his debt against Stewart's estate by the purchase of that property. The matters he now sets up can be litigated with the adverse claimants in a separate suit, which would concern him and them alone.

In reference to the judgment in favor of Chester, on which, as his assignee, Whittemore asks relief, it is urged as ground of demurrer, that Chester being a citizen of the same State with Stewart, his assignee is incapable of prosecuting this suit in a Federal court. It was brought in 1876, and the question here raised must be decided by a construction of the act of March 3, 1875, c. 137. 18 Stat., pt. 3, p. 470.

The first section of that act, after declaring in terms intended to be exhaustive, the jurisdiction of the Circuit Courts of the United States, and certain limitations on that jurisdiction, as to residence and service of process on defendants, adds this further restriction: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

Since Whittemore cannot sustain this suit on the ground of his own judgment against Stewart, because that is satisfied by the sale of property, the only other ground on which he can succeed is as the owner of this judgment in favor of Chester. That judgment is, then, the foundation of his suit in the Circuit Court. It is a cause of action which he holds by assignment from a party who cannot sue in that court. Without this cause of action he has no standing in court, and has no right to ask the court to inquire into the other matters alleged in the bill. It is as much the foundation of his right to bring the present suit as if it were a bond and mortgage on which he was asking a decree of foreclosure. See *Sheldon* v. *Sill*, 8 How. 441.

If, then, the judgment is a contract, it gives Whittemore no right to sue in the courts of the United States for New York. There is some conflict in the authorities as to whether a judgment *eo nomine* is a contract. In 1 Story on Contracts, sect. 2, they are divided into three classes, in the first of which judgments are mentioned with recognizances, statutes staple, &c. It is, however, permissible in all cases, where justice requires it, to inquire into the nature of the demand on which the judgment was rendered. If rendered on a contract, the judgment

is a contract, the nature and extent of the liability having been thereby judicially ascertained.

The bill in this case alleges that "the debt on which this judgment was recovered accrued in the year 1858." It was, therefore, recovered on a contract, and the present suit is a suit to give a remedy on that contract, and any decree rendered in favor of the complainant would be intended to enable him to recover the money due on the contract.

The Circuit Court, if the judgment of Chester had been there recovered, might have jurisdiction of the case to remove obstructions to the enforcement of its own judgment, no matter who for the time being was its owner. But where a party comes for the first time in a court of the United States to obtain its aid in enforcing the judgment of a State court, he must have a case of which the former court can entertain original jurisdiction. *Christmas* v. *Russell*, 5 Wall. 290.

It remains to be seen whether the suit can be prosecuted further on the part of Walker.

A very learned argument, with a review of the authorities, is made by counsel for the appellants to show that it is not essential to the relief sought that there should be a judgment and an execution returned *nulla bona*.

We do not think it necessary to enter upon the consideration of that question as the case is presented to us.

If what we have already said of the standing of Whittemore is sound, the bill is liable to the objection of multifariousness — one of the points specified in the demurrer — on almost every ground on which that objection may be taken to a bill in chancery.

1. There is a misjoinder of parties complainant.

There are but two complainants. Whittemore, as we have seen, has no standing in the court, and is, therefore, improperly joined with Walker, if Walker has such a standing; and the defendants cannot be required, in litigating with Walker any right he may have against them, to contest with Whittemore, who on his own showing has no right in that court. It is true the difficulty could have been removed if Whittemore had by an amendment been dismissed from the case. This might have been done after the demurrer was sustained. But

no such leave was asked, and the bill, as it originally stood, was dismissed.

2. The causes of action and the relief sought in regard to Congress Hall and the other property are distinct, in some respects antagonistic, and such as cannot properly be joined in the same suit. Whittemore seeks to have his title established in regard to Congress Hall, and the cloud on it created by the fraudulent sales and conveyances removed, so that he may be declared to be the owner of that property. In this matter no one is interested but himself and one of the defendants. The prayer of the bill is that the other property may be subjected to the payment of Stewart's debts; and in this Walker and all the other creditors of Stewart are interested, and Ten Eyck also as defendant.

A case bearing a strong analogy to the one before us is *Emans* v. *Emans*, 14 N. J. Eq. 114.

After a partition of real estate among part owners, a controversy arose as to its fairness, which was submitted to arbitrators. They awarded that the defendant should convey to the complainant 23.30 acres to equalize the partition. The bill prayed that the defendant might be decreed specifically to perform the award; if not, that the court should declare how much more and what lands he should convey to make the partition equal; and, lastly, for general relief. On demurrer for multifariousness the court says: "The leading object of this bill is to enforce specific performance of an award of arbitrators. The submission to arbitration related to the fraud or unfairness of a partition of certain lands devised to the parties, and included the power of making a just partition. A new partition was in fact made. If the award cannot be enforced, the bill further asks that the court will relieve against the unfairness or fraud of the partition. Now, it is apparent that these are matters of a distinct character. The one relates to the validity of the submission and award and the power and propriety of enforcing a specific performance, and the other to the equity and fairness of the partition. The matters involve totally distinct questions, requiring different evidence, and leading to different decrees."

Another analogous case is *Sawyer* v. *Noble and Randall*, 55 Me. 227.

Sawyer and Noble were partners. The bill charges Noble with many improper transactions justifying a dissolution of the partnership, and, among others, a fraudulent and pretended sale of the stock in trade and the good-will of the business to Randall, his co-defendant. It prays that this sale may be set aside and the partnership dissolved, and an account and settlement be had between the complainant and Noble. The court says: "It is obvious that Randall is in no way interested in the partnership affairs of Sawyer, and that the settlement of the affairs of the firm and the rescission of a fraudulent sale are distinct and unconnected matters, and properly to be determined in separate suits."

By multifariousness "is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story, Eq. Pl., sect. 271. In Daniell's Chancery Practice, 335, it is said in explanation of this that "it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

3. It seems to us, also, though of that we are not quite so sure, that if this real estate is to be subjected to the payment of Stewart's debts, Frederick S. Stewart, Helen W. McConnell, and Adeline M. Johnson, who are alleged to be his only heirs and the devisees in his unprobated will, should be parties to the bill. The mere allowance of the debt of Walker by the Probate Court is not conclusive evidence against them in a suit to reach the real estate of their ancestor and devisor.

The State where the lands sought to be reached are situate has, by statute, enabled her courts to entertain jurisdiction of necessary parties not within reach of process, and greatly modified the rules of practice and pleading. It is possible that this bill, or some part of it, might, by making additional parties, be sustained in one of her courts. But we are satis-

fied that the effort to prosecute it in the Circuit Court of the United States, with the misjoinder of some parties and the non-joinder of others, — with the connection of matters totally distinct in the right asserted and the relief sought, — and with the principal party complainant entitled to no relief there, is attended with insuperable difficulties, and that the bill was properly dismissed.

Decree affirmed.

THOMPSON v. INSURANCE COMPANY.

1. The payment of the annual premium upon a policy of life insurance is a condition subsequent, the non-performance of which may or may not, according to circumstances, work a forfeiture of the policy.
2. Where the policy provides that it shall be forfeited upon the failure of the assured to pay the annual premium *ad diem*, or to pay at maturity his promissory note therefor, the acceptance by the company of the note, although a waiver of such payment of the premium, brings into operation so much of the condition as relates to the note.
3. The omission of the company to give notice, according to its usage, of the day upon which the note will be due is not an excuse for non-payment. *Insurance Company* v. *Eggleston* (96 U. S. 572) distinguished.
4. A parol agreement entered into at the time of giving and accepting such note cannot be set up to contradict the terms of the note and policy.
5. The failure to pay or tender the amount due on the note held in this case to be fatal to a recovery on the policy.

ERROR to the Circuit Court of the United States for the Southern District of Alabama.

This was an action on a policy of insurance for $5,000, issued by the Knickerbocker Life Insurance Company, the defendant in error, on the life of John Y. Thompson, for the benefit of his wife, Ruth E. Thompson, the plaintiff in error. The policy bore date Jan. 24, 1870, and was to continue during his life, in consideration of an annual premium of $410.20, payable on or before the twenty-fourth day of January in every year. He died Nov. 3, 1874. The complaint was in the usual form, setting forth the contract contained in the policy, his death, and the performance of the conditions of the policy by him and the plaintiff. The company pleaded the

general issue, and two special pleas, which set up in substance the same defence. The second plea, after setting forth the provisions of the policy for the payment of the annual premium, proceeds as follows: —

"Under said policy an annual credit or loan of a portion of said premium was provided for, and said policy also contained a condition or proviso that the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or that the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein.

"The defendant further says that the said annual premium was not paid on or before the twenty-fourth day of January, A. D. 1874, and thereupon the defendant did give time for the payment of said premium upon the condition named in the note hereinafter mentioned, and for the payment of said premium did take certain promissory notes of said Thompson, one of which was as follows: —

"$109.] NEW YORK, Jan'y 24th, 1874.

"Nine months after date, without grace, I promise to pay to the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

"No. 2334 was an error, No. 2331 being intended."

It then avers that the note was not paid when it became due, Oct. 24, 1874, and that by reason thereof the policy became void and of no effect before the death of the assured.

To these pleas four replications were filed, numbered 2, 3, 4, and 5, as follows: —

"2d, That the said policy of insurance was renewed by said defendant on the twenty-fourth day of January, 1874, and continued in force until Jan. 24, 1875. That the payment of said note at maturity was not a condition precedent as alleged. That the said Thompson had the money in hand, was ready

and willing and intended to pay said note, but that before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died on the third day of November, 1874; that during all this time he was mentally and physically incapable of attending to his business, or knowing of and performing his obligations, and was *non compos mentis;* that the existence of said note was not known to the plaintiff.

"3d, That it was, and had been for many years before, and on the day said note fell due, the uniform usage and custom of said defendant in such cases to give notice of the day of payment to its policy-holders; such is and was the uniform usage and custom with all insurance companies, and the said defendant had in all cases adopted and acted on said usage, and in all its dealings with said Thompson had adhered to said usage, and gave notice of the day when such payments fell due; yet said defendant in this case failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the city of Mobile, and was sick. Plaintiff avers that said Thompson was ready and willing to pay, had said notice been served as in previous cases, but acting on said usage he was deceived by want of said notice, and that the plaintiff had no notice of the existence of said note, or when the same fell due, wherefore and whereby said note was not paid.

"4th, That on the twenty-fourth day of January, 1874, said policy was renewed and entered in full force for one year, to wit, until Jan. 24, 1875. That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out on said note; that by said agreement said policy was not to become void on the non-payment of the note alone at maturity as alleged in said plea, but was to become void at the instance and election of said defendant, and plaintiff avers that said defendant did not elect to cancel said policy or take any steps to avoid it or give any notice of such intention during the life of said John Y. Thompson, or since, and still holds said note against said estate of said Thompson.

"5th, And for further replication to the first and second special pleas by said defendant pleaded, plaintiff says that it was the general usage and custom adopted by said defendants, and practised by them before and after the making of said note, not to demand punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit, for thirty days thereafter, and the said defendants had repeatedly so done with said Thompson and others, and they led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived, and said note not paid, and he did rely on them for such notice."

Demurrers to these replications were sustained by the court. The case was then tried upon the plea of the general issue. On the rejection of evidence at the trial, the same questions presented by the replications were raised. Exceptions were taken in due form and preserved on the record.

There was a judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Mr. J. Hubley Ashton and *Mr. Thomas N. McCartney* for the plaintiff in error.

The policy having been renewed and continued in force by the company for a year on Jan. 24, 1874, when the note in question was given, the payment of that note, if a condition at all, was a condition subsequent operating by way of defeasance, and mere non-payment *ad diem* was not alone sufficient to effect an absolute forfeiture of the insurance. *Insurance Company* v. *French*, 30 Ohio St. 240.

The whole contract evidenced by the policy and the note, taken together, means, that, after the renewal receipt was given, the policy was voidable at the option of the company, and unless a forfeiture should be asserted and declared, at the proper time, the insurance remained. The case is essentially different from a purely unilateral contract, where the risk has not fully attached for the particular year in which the death occurred, and is like a release which is subject to be avoided by the happening of a condition subsequent, as, for example, the non-payment of a composition. The release is good and operative, unless itself subsequently avoided. *Newington* v. *Levy*, Law Rep. 5 C. P. 607.

The distinction between a precedent and a subsequent condition is as well marked in this contract as in others. *Giddings* v. *Insurance Company*, 102 U. S. 108; 2 Langdell, Cases on Contracts, p. 1009. There are no technical words whereby such conditions are distinguished. The governing rule is the fair intention of the parties to be collected from the transaction. *Porter* v. *Shepard*, 6 T. R. 668; *Finlay* v. *King's Lessee*, 3 Pet. 346; *Nicoll* v. *New York & Erie Railroad Co.*, 12 N. Y. 121.

In the present case it cannot be supposed that it was intended that the mere non-payment of a fractional part of the premium *ad diem* should operate as the non-performance of a condition precedent. It would be unconscionable and oppressive to give the contract that effect. *Pordage* v. *Cole*, 1 Wms. Saund. 320 *b*; *Campbell* v. *Jones*, 6 T. R. 570; *Boone* v. *Eyre*, 1 H. Bl. 273, note; 2 W. Bl. 1312; *Graves* v. *Legg*, 9 Ex. 709; *Ellen* v. *Topp*, 6 id. 424.

The condition in question being at most a condition subsequent operating by way of defeasance, its performance was excused by the inevitable accident alleged by the plaintiff, and the liability of the company became absolute, in accordance with settled principles of jurisprudence. *People* v. *Bartlett*, 3 Hill (N. Y.), 570; *People* v. *Manning*, 8 Cow. (N. Y.) 297; *Carpenter* v. *Stevens*, 12 Wend. (N. Y.) 589; *Wolfe* v. *Howes*, 20 N. Y. 197; *Baldwin* v. *New York Life Insurance Co.*, 3 Bosw. (N. Y.) 530; *Davis* v. *Gray*, 16 Wall. 203.

The court erred in not overruling the defendant's demurrers. *Insurance Company* v. *Eggleston*, 96 U. S. 572; *Helme* v. *Philadelphia Life Insurance Co.*, 61 Pa. St. 107; *Insurance Company* v. *French*, 30 Ohio St. 240; *Mayer* v. *Mutual Life Insurance Co.*, 38 Iowa, 304; *Hanley* v. *Life Association of America*, 69 Mo. 380; *Leslie* v. *Knickerbocker Life Insurance Co.*, 63 N. Y. 27; *Nicoll* v. *New York & Erie Railroad Co.*, *supra*; *Newington* v. *Levy*, *supra*; *Teutonia Life Insurance Co.* v. *Anderson*, 77 Ill. 384; *Howell* v. *Knickerbocker Life Insurance Co.*, 44 N. Y. 276; *Mutual Benefit Life Insurance Co.* v. *Hillyard*, 37 N. J. L. 444; *Martine* v. *Insurance Company*, 53 N. Y. 339; Code of Alabama, sect. 3001.

Mr. Fletcher P. Cuppy and *Mr. Thomas H. Herndon*, *contra.*

MR. JUSTICE BRADLEY, after stating the facts, delivered the opinion of the court.

The questions presented for review in this case arise on the rulings of the court below on the demurrers of the defendant.

It appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity.

The replications do not pretend that the note given for premium, which became due on the twenty-fourth day of October, 1874, was ever paid, or that payment thereof was ever tendered, either during the life of Thompson or after his death; but it is contended that such payment was not necessary in order to avoid the forfeiture claimed by the defendant.

First, it is contended that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture; and for this reference is made to the case of *Insurance Company* v. *French*, 30 Ohio St. 240. But, in that case, no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity.

Beside this general answer the plaintiff set up, in her replications, various excuses for not paying the note in question, which are relied on for avoiding the forfeiture of the policy.

In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the third day of November, 1874, and that the plaintiff was igno-

rant of the outstanding note. We have lately held, in the case of *Klein* v. *Insurance Company* (*supra*, p. 88), that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all.

The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. *Insurance Company* v. *Eggleston* (96 U. S. 572) is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; but they are not obliged to

give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

The fourth replication sets up a parol agreement of defendant made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void. We did hold, in Eggleston's case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

The last replication sets up and declares that it was the usage and custom of the defendants, practised by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of "leniency." It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing

to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public.

But a fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all.

Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come up to the line of any of the previous cases referred to, in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver

of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely.

Judgment affirmed.

HALE v. FINCH.

1. A person not notified of an action nor a party thereto, and who had no opportunity or right to control the defence, introduce or cross-examine witnesses, or to prosecute a writ of error, is not bound by the judgment therein rendered.
2. Although words of proviso and condition may be construed as words of covenant, if such be the apparent intent and meaning of the parties, covenant will not arise unless it can be collected from the whole instrument that there was on the part of the person sought to be charged an agreement, or an engagement, to do or not to do some act.
3. Certain language in a bill of sale construed to be a condition and not a covenant.

ERROR to the Supreme Court of the Territory of Washington.

The facts are stated in the opinion of the court.

Mr. John H. Mitchell for the plaintiffs in error.

Mr. Elbridge G. Lapham, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the first day of May, 1864, the Oregon Steam Navigation Company, then engaged in the transportation, for hire, of freight and passengers on the Columbia River and its tributaries, purchased a steamboat, called the "New World," from the California Steam Navigation Company, then engaged in like business upon the rivers, bays, and waters of the State of California.

The terms of the sale are embodied in a written agreement, from which it appears that the consideration was $75,000, and the covenant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the

said steamboat 'New World' upon any of the routes of travel upon the rivers, bays, and waters of the State of California for the period of ten years from the first day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel, or craft upon any of the routes of travel, or on the rivers, bays, or waters of" that State for that period. The Oregon Steam Navigation Company, in that agreement, further stipulated, that, in case of any breach of their covenant and agreement, they would pay the California Steam Navigation Company the sum of $75,000 in gold coin of the United States "as actual liquidated damages,"—such stipulation, however, not to have the effect to prevent the latter from taking such other remedy, by injunction or otherwise, as they might be advised.

On the 18th of February, 1867, the Oregon Steam Navigation Company sold the "New World" to Henry Winsor, Clanrick Crosby, N. Crosby, Jr., and Calvin H. Hale, and executed to Winsor a bill of sale stating the consideration to be $75,000. That instrument, after setting out the covenant of the vendors to warrant and defend the steamboat and all its appurtenances against all persons whomsoever, recited that "it was understood and agreed" that the sale was "upon the express condition" that the steamboat should not run, nor its machinery be used in running, any other steamboat, vessel, or craft, within ten years from the first day of May, 1867, on any of the routes of travel on the rivers, bays, or waters of the State of California, or on the Columbia River and its tributaries.

At the time of the making of that bill of sale Winsor and his associates, with L. D. Howe and A. R. Elder as their sureties, executed an additional writing, similar in all respects to that before mentioned as having been executed by the Oregon Steam Navigation Company on the 1st of May, 1864, except that Winsor and his associates, in the paper by them signed, covenanted and agreed that the "New World" should not, for the period of ten years from May 1, 1867, be run, or suffered to be run or employed, nor its machinery used in any other steamboat on the rivers, bays, or waters of the State of California, or on the Columbia River and its tributaries.

On the 5th of March, 1867, Winsor executed to Hale a bill of

sale of the "New World," reciting a consideration of $75,000, and by the terms of which the former, for himself, his heirs, executors, and administrators, promised, covenanted, and agreed to and with Hale to warrant and defend the title to the steamboat, her boilers, engines, machinery, tackle, apparel, &c.

On the 23d of November, 1867, Hale executed to Finch, the defendant in error, a bill of sale, reciting a consideration of $50,000, and containing among others the following clauses: —

"And I, the said Calvin H. Hale, have, and by these presents do promise, covenant, and agree, for myself, my heirs, executors, and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators, and assigns, to warrant and defend the whole of said steamboat 'New World,' her engines, boilers, machinery, and all the other before-mentioned appurtenances, against all and every person and persons whomsoever.

"And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries."

At the same time a separate written agreement was entered into between Finch and Hale, from which it appears that the former, in terms, covenanted and agreed to do various things which have no connection with this case, and need not, therefore, be here specified. It is only important to observe, as to that separate agreement, that it did not embrace any covenant or agreement whatever on the part of Finch against the use of the steamboat "New World," or of its machinery, upon the waters of California, or upon the Columbia River or its tributaries.

The present action was brought against Finch by Hale and those associated with him in the purchase from the Oregon Steam Navigation Company.

The complaint avers that, in all of said transactions, Winsor, as the defendant well knew, represented his co-plaintiffs as well as himself; that the defendant, in violation of his promise and agreement, made at the time he purchased the steamboat, caused, suffered, and permitted the same to be taken to San Francisco, on or about the first day of October, 1868, and from that date up to May 1, 1874, caused, suffered, and permitted it to be run upon the routes of travel on the rivers, bays, and waters of California; that on Oct. 5, 1869, the Oregon Steam Navigation Company sued the plaintiffs and their sureties, Howe and Elder, to recover the sum of $75,000, fixed as liquidated damages for the breach of the covenants and agreements contained in the within memorandum of Feb. 18, 1867,— the ground of said action being that the defendants therein had run the steamboat "New World," or suffered and permitted it to be run, on the rivers, bays, and waters of California, after Nov. 1, 1868, and prior to May 1, 1874, which acts, it is averred, are the same now complained of as constituting a breach of the defendant's alleged agreement of Nov. 23, 1867 (20 Wall. 64); and that, in said action, the Oregon Steam Navigation Company recovered a judgment against the present plaintiffs for $75,000, which sum, with $4,000 expended in defending the suit, they had been compelled to pay.

Judgment is asked against Finch for $79,000 in damages, for the violation of his alleged agreement and promise.

The answer puts in issue all the material allegations of the complaint, except the fact that the steamboat, subsequently to the purchase by Finch, was used upon the waters of the State of California during the period charged.

The defendant, in addition, pleads: 1. That the alleged agreement was void under the Statute of Frauds and Perjuries of the Territory, in that it was not, and is not, to be performed in one year from the making thereof, and was not, nor was any note or memorandum thereof, in writing, signed by the defendant, according to the provision of the statute; 2. That the steamboat was taken to California, and run upon the waters and bays of that State, by the leave and license of the plaintiff, given to the defendant on the first day of July, 1868; 3. That the action

is barred by the limitations of three and six years, prescribed by the statute of the Territory.

There was a verdict for the defendant, in obedience to a peremptory instruction by the court, and the judgment rendered thereon was affirmed by the Supreme Court of the Territory. From that judgment of affirmance this writ of error is prosecuted.

Upon the filing in the Supreme Court of the Territory, of the judgment and mandate of this court, in *Oregon Steam Navigation Co.* v. *Winsor* (20 Wall. 64), that cause was remitted to the court of original jurisdiction, for further proceedings according to law. The defendants therein obtained leave to withdraw, and did withdraw, their answers. Judgment by default was thereupon entered against them for the sum of $75,000, the amount fixed as actual liquidated damages, with interest and costs. Satisfaction thereof was entered at the same term of the court. That judgment, it is contended, by the present defendant, was obtained by collusion between the parties to that action. It is further claimed that it has never, in fact, been satisfied. Whether these charges are true, we need not here inquire. And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, nor notified of its pendency. He had no opportunity or right, in that case, to controvert the claim of the Oregon Steam Navigation Company, to control the defence, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. *Railroad Company* v. *National Bank*, 102 U. S. 14. Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Navigation Company, while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the *Oregon Steam Navigation Co.* v. *Winsor*, &c., is competent evidence in this action, for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained, by reason of the "New World" being run on the waters of California after Finch became owner.

But the liability of those parties for such damages arose out

of the covenant and agreement which they made with the Oregon Steam Navigation Company. With that transaction, however, Finch had no connection, and unless he made a similar covenant and agreement with those from whom he purchased, — thereby becoming interested in keeping the covenant and agreement made with that company by Winsor and his associates, — he cannot be affected by the judgment obtained against the latter.

This brings us to the main contention on behalf of the plaintiffs in error; viz., that the language of the bill of sale from Hale to Finch, if interpreted in the light of all the circumstances attending its execution, imports a *covenant* upon the part of the latter that he would not use or permit the use by others, of the steamboat or its machinery, within a prescribed period, either upon the waters, rivers, and bays of California, or upon the Columbia River and its tributaries. If, however, the language, properly interpreted, imports only a *condition*, for breach of which the vendor had no remedy other than by suit to recover the property sold, then it is, as indeed it must be, conceded, that the judgment below is right.

We are of opinion that the latter construction is the proper one.

If we look both at the circumstances preceding, and at those immediately attending, the purchase by Finch, and if we even impute to him full knowledge of everything that occurred, as well when the Oregon Steam Navigation Company made its original purchase, as when it subsequently sold to Winsor and his associates, — all which counsel for plaintiffs contends we are bound, by the settled rules of law, to do, — what do we find?

The written memorandum between that company and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement, upon the part of the former, that neither the "New World" nor its machinery should be used on the waters of California within ten years from May 1, 1864, and also that a certain sum, as actual liquidated damages, should be paid for any breach of such covenant and agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates does not contain any words of covenant or agreement. But

that company, in view of its express covenants to the California Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed is the bill of sale from Winsor to Hale. It shows nothing more than a covenant to warrant the title to the steamboat, and makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance, and, in language, almost identical with that given by the Oregon Steam Navigation to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steamboat, its machinery, &c., against all persons whomsoever. But each recites, let it be observed, only an agreement that the *sale* is upon the *express condition* that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties, knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as is found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the "New World," the absence, as well from the bill of sale accepted by him, as from the written agreement of the

same date, signed by him and Hale, of any *covenant* or *agreement* that he would not use that vessel, or permit it to be used, on the prohibited waters within the period prescribed, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

It thus appears that the circumstances, separately considered, militate against the construction for which plaintiff contends.

But if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, is necessary in order to charge a party with covenant. 1 Roll. Abr. 518; *Sant* v. *Norris*, 1 Burr. 287; *Williamson* v. *Codrington*, 1 Ves. 511, 516; *Courtney* v. *Taylor*, 7 Scott, N. R. 749. "The law," says Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." Bac. Abr., Covenant, A. So in Sheppard's Touchstone, 161, 162, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement." Mr. Parsons says, "Words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties." 2 Parsons, Contracts, 23. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. *Farrall* v. *Hilditch*, 5 C. B. N. S. 840; *Great Northern Railway Co.* v. *Harrison*, 12 C. B. 576; *Severn and Clerk's Case*, 1 Leon. 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as, "If a man by indenture letteth lands for years,

provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien." It was adjudged that this was "a condition by force of the proviso, and a covenant by force of the other words." Co. Litt. 203 *b*.

But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A, 2), says that "any words in a deed which show an agreement to do a thing, make a covenant." "But," says the same author, "where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses." Comyns, Dig., Covenant, A, 3. The language last quoted is found also in Platt's Treatise on the Law of Covenants. Law Library, vol. iii. p. 17. It there appears in connection with his reference to the case where A. leased to B. for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them. In such case, the author remarks, the lessee was held liable to an action for omitting to leave the houses in good plight, "for here an agreement was implied."

Applying these doctrines to the case before us, its solution is not difficult. Without stopping to consider whether a covenant upon the part of Finch could arise out of a bill of sale which he did not sign, but merely accepted from his vendor (Platt, Covenants, ch. 1), it is sufficient to say that the instrument contains no agreement or engagement or promise by him that he would or would not do anything. There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement that the *sale* was upon the *express condition* that neither the boat nor its machinery should be used within a prescribed time upon certain waters. It is the case of a bare, naked condition, un-

accompanied by words implying an agreement, engagement, or promise by the vendee that he would personally perform, or become personally responsible for its performance. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition specified. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction and against the apparent intention of the parties, into a covenant involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition, — stated in such form as to preclude the idea of personal responsibility upon the part of the vendee, — we should give effect to their intention, thus distinctly declared.

This conclusion disposes of the case, and relieves us of the necessity of considering other questions of an interesting nature which counsel have discussed.

Judgment affirmed.

NATIONAL BANK *v.* JOHNSON.

1. The sole particular, so far as loans and discounts are concerned, in which sect. 5197 of the Revised Statutes places a national bank upon an equality with natural persons, is in permitting it to charge a rate of interest allowed to them which is prescribed and limited by the laws of the State, Territory, or district where the bank is located.
2. Although under those laws a contract between natural persons to reserve and pay upon the discount of business paper any stipulated rate of interest may be valid, such a contract, if a national bank be a party thereto, and the paper be in pursuance thereof transferred to it, is in violation of that section when such rate is in excess of seven per cent per annum.
3. A national bank in New York discounted for the payee, at the rate of twelve per cent per annum, certain promissory notes, which he then indorsed to it, and whereon he, against prior parties thereto, could have maintained an action. They were paid at maturity. He brought suit in due time against the bank for twice the amount of interest reserved and paid in excess of seven per cent per annnm. *Held*, that he was entitled to recover.

ERROR to the Supreme Court of the State of New York.

This action was brought in the Supreme Court of the State of New York by Johnson, to recover of the National Bank of Gloversville penalties alleged to have been incurred by it under sects. 5197 and 5198 of the Revised Statutes of the United States.

These sections are as follows: —

"SECT. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or Territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"SECT. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

The facts are undisputed. The defendant, a national banking association, doing business at Gloversville, New York, from Nov. 10, 1874, to Feb. 7, 1876, discounted for the plaintiff, at the rate of twelve per cent per annum, commercial paper and promissory notes amounting to $158,003. The amount of interest thereon which he paid, and the bank knowingly charged and received, was $6,564.88, being an excess of $2,735.36 beyond the rate allowed by the general laws of the State. The paper discounted was mostly business paper, that is, negotiable promissory notes, which he held and owned, and on which he could have maintained actions against the prior parties. A small portion was accommodation paper, but not known by the bank to be such, and nothing upon its face indicated that to be its character. All the paper was paid to the bank at maturity, or before the present action was brought. He indorsed all the notes at the times when they were discounted, and the proceeds were entered to his credit in his bank account.

Upon these facts judgment was rendered in his favor for $5,470.72, twice the amount of the interest paid in excess of seven per cent per annum, to reverse which this writ of error is prosecuted by the bank.

Mr. Francis Kernan for the plaintiff in error.

Johnson was not entitled to recover. By the long-settled law

of New York it is neither usurious nor unlawful for persons or copartnerships to do precisely what the bank did in regard to this business paper.

The transaction was not a loan of money, but a purchase of the paper, and it is immaterial whether Johnson indorsed it or guaranteed its payment or not. 3 Rev. Stat. N. Y. (5th ed.) p. 72, &c.; *Munn* v. *Commission Company*, 15 Johns. (N. Y.) 44; *Cram* v. *Hendricks*, 7 Wend. (N. Y.) 569; *Cobb* v. *Titus*, 10 N. Y. 198; *Rapelye* v. *Anderson*, 4 Hill (N. Y.), 472.

Corporations organized under the act of Congress of June 3, 1864, c. 106, are upon the same footing as a natural person in the State where they are located, so far as relates to the rate of interest on a loan, and to the amount of discount at which they may become the owners of commercial business paper. Rev. Stat. U. S., sects. 5197, 5198; *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122; *Hintermister* v. *National Bank*, 64 N. Y. 212.

A large portion of the banking transactions in that State consists of acquiring business paper at a stipulated rate of discount. It would be contrary to the policy and spirit of the act, and seriously detrimental to those institutions, if they are to be liable to a heavy penalty for taking such paper at the same rate of discount at which it may be lawfully purchased by a natural person. *Tiffany* v. *National Bank of Missouri*, *supra*.

The provisions of the act were intended to prevent national banks from violating the usury laws of the State. In New York, where this transaction took place, it was usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent per annum; but it was not usurious or illegal to acquire, at an agreed discount exceeding that rate, business paper, that is to say, paper valid in his hands and whereon he could, against the prior parties thereto, maintain an action.

Penal provisions should not be extended to a case not clearly within their intent and meaning. Here full effect is given to them by applying the statute only to transactions which are

usurious by the laws of New York. If this transaction was not usurious by them, then the bank did not incur any penalty. Rev. Stat. U. S., sect. 5198.

If the bank had not authority to become the owner of commercial paper by purchase, it did not become liable to the plaintiff, nor could he successfully raise the question as to its want of power. *National Bank* v. *Whitney*, 103 U. S. 99.

Mr. Clayton M. Parke, contra.

MR. JUSTICE MATTHEWS, after stating the case, delivered the opinion of the court.

It is contended, on behalf of the plaintiff in error, that the sections of the Revised Statutes in question were intended only to prevent national banks from violating the usury laws of the State in which they were severally organized and established; and that while, by the law of New York, it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent per annum, it is not usurious or illegal in that State for natural persons to acquire business paper, that is, paper valid in the hands of the holder, so that he might maintain an action thereon against the prior parties, at any rate of discount agreed upon between the parties to the negotiation, without limit in excess of seven per cent per annum.

It is assigned for error that the Court of Appeals negatived this proposition.

The rate of interest upon the loan or forbearance of money, established and in force by the laws of New York, was, at the time of the transactions in question, seven per cent per annum. Pt. 2, c. 4, tit. 3, 3 Rev. Stat. N. Y. 72, sect. 1.

By sect. 5 of the same act it is provided that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatever (except bottomry and respondentia bonds and contracts), &c., whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of money, &c., than is above prescribed, shall be void.

It is, and long has been, the law in New York, as decided in

Cram v. *Hendricks* (7 Wend. (N. Y.) 569), that the transfer by the payee of a valid available note, upon which when due he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not an usurious transaction, although the payee on such transfer indorses the note; and on non-payment by the maker the indorsee may maintain an action against the indorser; but the sum which the indorsee in such case is entitled to recover of the indorser is the amount of the advance made by him, together with the interest thereon at the legal rate; while in an action against the maker the indorsee is entitled to the whole amount of the note.

This proceeds upon the idea that the original note is founded upon a valid consideration, free from usury in its inception; and that the indorsement and delivery contains two contracts: one, executed, which transferred the title, as upon a sale, as if indorsed without recourse; the other, executory, upon which the indorser is liable to the indorsee, to pay upon the default of the maker, after demand, and due notice thereof; although in the latter case, it will be observed, the recovery is limited by the New York decisions to the actual consideration paid, with lawful interest thereon.

The transaction is treated as a sale of the note, and no limits are fixed by law upon the price of the article sold; but so far as the liability of the vendor is concerned, in order to avoid the consequences of treating the advance of money, which constituted the consideration, as a loan, it is limited to a return thereof, with lawful interest.

The question we have now to determine is, whether, in transactions of this description, in which a national banking association is the transferee, the same view can be taken of the relations and rights of the parties, in the present case the Court of Appeals having decided that the same rule does not apply. *Johnson* v. *National Bank of Gloversville*, 74 N. Y. 329.

The very point had been previously raised and decided by that court in *Nash* v. *White's Bank of Buffalo* (68 id. 396), which was an action to recover penalties under the State law of 1870, in reference to banking institutions, for discounting paper

at a greater rate of interest than seven per cent per annum. That act, being chapter 163 of the Laws of New York of 1870, corresponds almost exactly with sects. 5197, 5198, of the Revised Statutes of the United States, now under consideration, and its declared intent is to place the banking associations of the State on an equality, in the particulars specified, with national banks under the sections referred to. It was held that the fact that the paper discounted was business paper, purchased by the defendant, did not constitute a defence; for the question was not whether it was an illegal transaction under the general statutes against usury, but whether it was within the terms of the prohibition which forbade banks from charging on any discount a rate greater than seven per cent per annum.

And in *Atlantic State Bank* v. *Savery* (82 N. Y. 291) it was decided that the purchase of a promissory note for a sum less than its face is a discount thereof, within the meaning of the provision of the banking act of that State (sect. 18, c. 260, Laws of 1838) which authorizes associations organized under it to discount bills and notes. And in support of that definition of the terms, the court cites the authority of MacLeod on Banking, 43, where the author says, "The difference between the price of the debt and the amount of the debt is called discount," and "to buy or purchase a debt is always in commerce termed to discount it."

In *Fleckner* v. *Bank of the United States* (8 Wheat. 338, 350), Mr. Justice Story said: "Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank;" and he added, that if the transaction could properly be called a sale, "it is a purchase by way of discount."

Discount, as we have seen, is the difference between the price and the amount of the debt, the evidence of which is transferred. That difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance, therefore, upon every note dis-

counted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money.

The specific power given to national banks (Rev. Stat., sect. 5136) is "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms "loans" and "discounts" are synonyms. It was so said in *Talmage* v. *Pell* (7 N. Y. 328); and in *Niagara County Bank* v. *Baker* (15 Ohio St. 68) the very point decided was that "to discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance."

But whether loans and discounts are identical, in the sense of sect. 5197, or not, is quite immaterial, for both are expressly made subject to the same rate of interest. And unquestionably the transfer of the notes, which forms the basis of this controversy, if not a loan, was a discount.

The contention of the plaintiff in error, that under this section whatever by the law of the State is lawful to natural persons in acquiring title to negotiable paper by discount is lawful for national banks, cannot be sustained, and derives no countenance, as is argued, from the decision in *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409. All that was said in that case related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a State in which a national bank was located one-rate rate of interest was lawful for natural persons and a different one to State banks, the national bank was authorized to charge on its loans the higher of the two. The sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them. It is not intimated or implied that if, in any State, a natural person may discount paper, without

regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the State law.

If it be said that the rate is allowed by the law of the State, when it permits the parties to reserve and receive whatever they may agree upon, then the section furnishes the conclusive answer, that "when no rate is fixed by the laws of the State, &c., the bank may take, receive, reserve, or charge a rate not exceeding seven per centum." So that the transaction in question, in either aspect, is within the prohibition of the statute, and subjects the bank to the penalties sued for.

The conclusion is confirmed by the provision which declares that "the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." Here the purchase, discount, and sale of bills of exchange are classed as one, and subject to the same rule and rate of interest. In sect. 5198, the forbidden transaction for which the penalties are prescribed is spoken of as usurious; but this reference is to the prohibitions of the preceding section, and not to the laws of the State.

In the present case, the paper was transferred by an indorsement, imposing the ordinary liability upon the indorser. It may, perhaps, be distinguished from cases where the title to the paper is transferred by an indorsement without recourse, or by mere delivery. The advance in such cases, to the previous holder, of the agreed consideration can hardly be considered a loan, for the relation of debtor and creditor as between them is not created by the transaction, if made, as supposed, in good faith, and not as a cover for usury. Whether it be a discount, within the meaning of the sections we have considered, and therefore subject to the same rule as to the rate of interest at which it may be discounted, which we have decided to be applicable to the transactions described in the present case; and if not, but is to be treated as a purchase of the paper, lawful at any proportion which the price paid bears to the amount

ultimately payable by the parties to it, whether, in that case, national banks are authorized by the law of their organization to acquire title to it in that way, are questions which do not arise in this case, and upon which we express no opinion.

Judgment affirmed.

BELK *v.* MEAGHER.

1. By the act of May 10, 1872, c. 152 (17 Stat. 91), and the acts amendatory thereof, the rights of the original locator of a mining claim or of his assignee, which was located prior to that date, were continued until Jan. 1, 1875, although no work had been done thereon, provided that no relocation thereof had been made; and they were thereafter extended, if within the year 1875, and before another party relocated the claim, work was resumed thereon to the extent required by law. When, therefore, work was so resumed, the claim was not open to relocation before Jan. 1, 1877, although no work had been done upon it during the year 1876.
2. Actual possession of the claim is not essential to the validity of the title obtained by a valid location; and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof.
3. A. entered, Dec. 19, 1876, upon a claim not then in the actual possession of any one, but covered by a valid and subsisting location which did not expire until the first day of January thereafter. Between the date of his entry and Feb. 21, 1877, he made no improvements or enclosure, and did a very small amount of work, but had no other title than such as arose from his attempted location of the claim and his occasional labor upon it. On the last-mentioned date B. entered upon the property peaceably and in good faith, and did all that was required to protect his right to the exclusive possession thereof. A. brought ejectment, Oct. 25, 1877. *Held*, that A.'s entry and labor did not entitle him to a patent under sect. 2332, Rev. Stat., nor prevent B.'s acquisition of title to the claim, and that the Statute of Limitations of Montana of Jan. 11, 1872, had no application thereto.
4. A matter occurring during the progress of the trial which was not brought to the attention of the court below, nor decided by it, will not be considered here.
5. Where specific objections are made to the admission of evidence, all others are waived.
6. Where, under the supervision of the proper officer, the records of a county were transcribed from a temporary book, wherein they had been originally recorded, into another, which was thereafter recognized as a part of the public records, and it was shown that the original book had been lost or destroyed, *held*, that the other book was properly admitted in evidence.

ERROR to the Supreme Court of the Territory of Montana.

The facts are stated in the opinion of the court.

Mr. Samuel Shellabarger and *Mr. E. W. Toole* for the plaintiff in error.

Mr. J. C. Robinson and *Mr. Richard T. Merrick*, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz-lode mining claim, being, as is stated in the complaint, "a relocation of a part of what is known as the old original lode claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows: —

In July or August, 1864, George O. Humphreys and William Allison located the discovery claim on the original lode and claims one and two west of discovery. These locations were valid and subsisting on the 10th of May, 1872, and no claim adverse to them then existed. No work was done on them between that date and June, 1875. During the month of June, 1875, and before any relocation had been made, the original locators, or their grantees, resumed work upon the claims, and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterwards done on the property by the original locators, or any one claiming under them; and it does not appear that they were in the actual possession of the claims, or any part thereof, on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the act of Congress in such cases.

On the 19th of December, 1876, Belk made the relocation under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim which did not occupy more than two days of his time,

and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st of February, 1877, the defendants entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were at the time open to them. The possession they had when this suit was begun was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are, —

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until Jan. 1, 1877.

2. Whether, if it was, a valid relocation of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceable and without force.

3. Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and,

4. Whether, even if the relocation of Belk was invalid, the defendants could, after the 1st of January, 1877, make a relocation which would give them as against him an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force.

By sect. 3 of the act of May 10, 1872, c. 152 (17 Stat. 91), entitled "An Act to promote the development of the mining resources of the United States," it was provided that the locators of all mining locations theretofore made, or which should thereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim then existed, should have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they complied with the laws of the United States, and with State, territorial, and local regulations, not in conflict with the laws of the United States, governing their possessory title. The fifth section further provided that on all claims located prior to the passage of the act, ten dollars'

worth of work should be performed or improvements made each year for each one hundred feet in length along the vein, until a patent should have issued therefor; and upon a failure to comply with this condition, the claim or mine on which the failure occurred should be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns, or legal representatives had not resumed work on the claim after the failure and before the relocation. By the act of March 1, 1873, c. 214 (17 Stat. 483), the time for making the first annual expenditure, under the act of 1872, was extended to June 10, 1874; and by the act of June 6, 1874, c. 220 (18 Stat. 61), to Jan. 1, 1875. The exact language of this last act is as follows: "That the provisions of the fifth section of the act . . . passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, 1875."

For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until Jan. 1, 1875, and afterwards if, before another entered on his possession and relocated the claim,

he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new.

From what has thus been said, it is apparent that as work was done in the present case during the year 1875, before any relocation was made, the original claim was continued in force and made operative until there could be another forfeiture by reason of the failure of the owners to do the necessary annual work. The year in which the work was done began on the 1st of January, 1875, and ended on the 31st of December. The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until Dec. 31, 1876; and the work, if completed on that day, would be just as effectual for the protection of the claim as if it had been done on the 1st of January previous. It follows that on the 19th of December, 1876, the owners of the original location had, under the act of Congress, the exclusive right to the possession and enjoyment of the property in dispute.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Forbes* v. *Gracey*, 94 U. S. 762. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this

policy it was enacted by sect. 9 of the act of Feb. 27, 1865, c. 64 (13 Stat. 441, Rev. Stat., sect. 910), that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid at the time it was made, and continued to be so until Jan. 1, 1877.

The next inquiry is, whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the

possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so that he may take what the United States has, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here Congress has said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired, and it is difficult to see why, if Belk could make his relocation on the 19th of December, he might not on the 19th of January before. *Lansdale* v. *Daniels*, 100 U. S. 113, 116. The original locators and their grantees had precisely the same rights after each date, the only difference being in duration. To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands which would almost necessarily be followed by breaches of the peace.

This brings us to the inquiry whether the possession of Belk, after the 1st of January, was such as to prevent the defendants from making a valid relocation and acquiring title under it. The position taken in his behalf is, that even if the original locators, or their grantees, had, under the act of Congress, a right to the possession of their claim until January 1, a statute of limitations in Montana would bar their action against him for its recovery, because they had not been in actual possession within a year previous to his entry, and consequently his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for

a year, would entitle him to a patent under the provisions of sect. 2332 of the Revised Statutes. The statute of Montana relied on is as follows: "No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interests therein or possession thereof, unless the same be held under patent from the government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff, or his assigns, or predecessor in interest, were in the actual seisin or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action." Laws of Montana, 1872, p. 591.

And sect. 2332 of the Revised Statutes is as follows: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of an adverse claim."

The Montana statute was passed Jan. 11, 1872, and the act of Congress, under which both parties claim, on the 10th of May thereafter. Under the act of Congress, as has just been seen, the original locators, or their grantees, had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1. The Montana statute, if in any respect repugnant to this, was repealed to the extent of such repugnancy by the act of Congress. As between possessors, having no other title than such as is derived from mere occupancy, an action would undoubtedly be barred by the Montana statute. Whether that would be so in a case where an actual right of possession had been acquired under the act of Congress is a question we need not consider, as here the controversy is not between Belk and the prior locators. It is clear that, whether in Montana an action could be maintained against him or not, his right of location depended entirely on the act of Congress, and under it, as has already been seen, what he did had no effect to secure to him the grant of any rights. All he got or could get by his

entry was possession, and that, to be of any avail, must be actual.

Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in *Atherton* v. *Fowler* (96 U. S. 513) to the contrary of this. In that case it was held a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and enclosed the property. Upon that proposition the court was unanimous. We also all agree that if a peaceable entry had been made on lands which had not been enclosed or improved, a good right might have been secured. The only difference of opinion we had was as to whether the entry in that case was by force or peaceably. A majority of the court thought it was forcible, while the minority considered that the case had been fairly put to the jury on the question of forcible or peaceable entry, and the effect of the verdict was that it had been peaceable.

This brings us to the facts of the present case. No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no enclosure, and he had made no improvements. He apparently exercised no

other acts of ownership, after January 1, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days' work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid relocation after January 1. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title.

It is contended, however, that the court erred in its charge to the jury, because it assumed that the defendants' relocation was good if that of Belk was bad. The notice of the relocation of the defendants was proved by the introduction of the county records, and if we understand correctly the position which is now taken, it is that this notice was defective because of an insufficient affidavit. We cannot find that this precise objection was taken below. When the record was first offered in evidence it seems to have been objected to generally, but afterwards, on a motion to strike it out, the reasons assigned were: 1, that the original was not shown to have been out of the possession or under the control of the defendants; and, 2, that the record did not give a sufficient description of the location. As the affidavit to the notice of the relocation of Belk was identical in form with that of the defendants, it is possible such

an objection as is now made was not then desirable; but however that may be, we are clearly of the opinion it cannot be made for the first time in this court. The trial below was conducted entirely on the theory that Belk had the better right, because the defendants could not in law make a relocation at the time they did. The court had the right to understand that it was conceded the defendants had perfected their title if it could be done under the circumstances, and the special objections made to the evidence that was introduced should not be sustained. Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. Consequently, when the specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded.

This disposes of all the questions raised on the instructions to the jury. It remains to consider the various exceptions taken to the admission and rejection of testimony. These are: —

1. As to the admission of the book from the office of the recorder of Deer Lodge County to prove the record of the location of the original lode claims by Humphrey and Allison.

2. As to the admission of the books of record from the same office to prove certain deeds by which it was claimed the title of Humphrey and Allison to the original lode claims was transmitted, in whole or in part, to one Murphy; and,

3. The rejection of the testimony of one McFarland, a witness produced at the trial.

1. As to the proof of the record of the location of the original lode claim.

As Belk sets up title only as a relocator of part of the original lode claim, he impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphrey and Allison

were the locators and owners of the claim originally. The proof by the record was, therefore, probably unnecessary; but if not, it seems to us the book offered was sufficiently authenticated. It was one of the books of record kept in the proper office, and transmitted as such from one officer to another. The original recording appears to have been in a temporary book, and, at a very early date in the history of the county, transcribed by the deputy recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county almost from the time of the organization of civil government in the Territory, it would be dangerous to exclude it now without any proof of fraud or mistake.

2. As to the deeds. In the view we take of the case, it is entirely unimportant whether the original lode claim had been transferred or not. The work was done in 1875 by Humphrey, one of the original locators, for the express purpose of resuming the claim. He says it was done under an arrangement which he made to that effect with Thornton, who, according to the deeds put in evidence, was the owner of three-fourths of the property, Humphrey himself owning the rest. It is a matter of no importance to Belk whether the work that was done inured to the benefit of Humphrey alone or to him with others. Without, therefore, considering any of the questions presented in the argument as to the competency of the evidence, or the proper execution of the deeds, we are clearly of the opinion that there is nothing in the assignments of error affecting this branch of the case which requires a reversal of the judgment.

3. As to the testimony of McFarland. He was in effect asked whether any one had that day pointed out to him the line between the National Mining and Exploring Company's ground and the defendants'; and, if so, whom; and if he knew where the line was. There was but one question, and the objection was made to the question. It was entirely immaterial, so far as anything appears in the record, whether any one pointed

out the line to the witness or not, unless it was some one connected with the suit of the parties. It is true, if he knew of his own knowledge where the line was, he might tell, but in the form the question was put he could well think he would be permitted to tell where it was as it had been pointed out to him. The question was clearly too general, and on that account objectionable. It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put removed.

Upon a careful consideration of the whole case we find no error.

Judgment affirmed.

GILES *v.* LITTLE.

A.'s last will and testament provides as follows: "To my beloved wife E. I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." A.'s children and E. survived him. She conveyed the real estate to B. in fee, and subsequently married. *Held*, that B.'s estate determined on E.'s marriage.

ERROR to the Circuit Court of the United States for the District of Nebraska.

This was an action for the recovery of lot No. 6, in block 54, in the city of Lincoln, Nebraska.

The following are the material averments of the petition: —

"On June 10, 1869, and thence up to his death, Jacob Dawson was seised and possessed of divers real and personal estates of great value, and had a wife named Edith J., and six children who were on said day minors, and some very young, and all without any property whatever, his wife being seised and possessed in her own right of real and personal estates of the value of ten thousand dollars and over.

"On said day the said Jacob made his last will and testament, which contained the following sole bequest: After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To my beloved wife Edith J. Dawson I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right, and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute, and appoint my said wife Edith J. to be executrix of this my last will and testament.

"On the twenty-second day of June, 1869, the said Jacob died at Lancaster County in this district, leaving him surviving his said wife and six children. The said will was duly proved and admitted to probate in the proper court of said county, and letters testamentary thereon were issued out of said court to the said Edith J., who took upon her the execution of said trust.

"The personal property, whereof the said Jacob died possessed, was duly inventoried and appraised at $958; and among the real estates whereof, at his death, the said Jacob was seised, was that certain piece or parcel of land known and described as follows: Lot number 6, in block 54, in the city of Lincoln, in said Lancaster County, except six inches off the entire east line of said lot, which supports the east party-wall of said lot; which lot is of the value of $5,000 and over.

"On the twenty-seventh day of April, 1870, the said Edith J., by her certain deed of conveyance, dated on said day, and duly executed and acknowledged, conveyed the said premises to one Cody, by warranty deed, which contained no reference to nor recited the power in said will, and by divers mesne conveyances from said Cody, the said defendant Little claims and pretends that he is seised in fee of said premises; and

he is now in possession thereof by the defendant May, as his tenant.

"On or about the fifteenth day of November, 1879, the said Edith J. intermarried with one Pickering.

"One of the said children of the said Jacob died intestate without issue, and the survivors being in indigent circumstances have joined in a conveyance of the said premises, bearing date Sept. 15, 1869, and duly executed and acknowledged, whereby they conveyed the same in fee to one Burr and one Wheeler, who by their deed have duly conveyed the same to the plaintiff. And by reason of the premises the said plaintiff has become and is seised in fee of said premises above described, and is entitled to the immediate possession thereof; the defendant Little, under the alleged title derived to him as aforesaid, unlawfully keeps the said plaintiff out of possession thereof."

There was a general demurrer to this petition, which the Circuit Court sustained, and gave judgment for the defendants.

This action of the court is assigned for error.

Mr. James M. Woolworth for the plaintiff in error.
Mr. T. M. Marquett, contra.

MR. JUSTICE WOODS, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is, that Edith J. Dawson took, under the will of her deceased husband, Jacob Dawson, an estate for life, subject to be determined in case she contracted another marriage, with remainder to the heirs of Jacob Dawson; and that the power of disposal conferred on her by the will was only coextensive with the estate which she took under the will, — that is to say, the power was granted her to dispose of her life-estate, and, consequently, that the estate conveyed by her deed to Cody determined upon her marriage with Pickering.

It was said by this court in *Clarke* v. *Boorman's Executors* (18 Wall. 493), Mr. Justice Miller delivering its opinion, that "of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of

legal technical terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

If we apply the methods thus indicated to the construction of the will of Jacob Dawson, there can, it seems to us, be no serious doubt about its meaning.

According to the averments of the petition, it appears that twelve days before his death Dawson executed his last will. At that time he was the owner of some real estate, and of personal property of the value of $958. He was the father of six living children, all of whom were minors, some of them very young, and all without any property in their own right. His wife, Edith J. Dawson, was the owner of real and personal property to the amount of $10,000 or more.

The promptings of natural affection would lead a testator so situated to provide in his will not only for his wife, but also for his infant children.

The disposition of his property is made by a single sentence in his will. It seems clear that his purpose was to give to his wife an estate for life in his property, subject to be divested on her contracting a second marriage, and on the determination of her interest, either by her death or marriage, then an estate in fee to his children. No man unversed in technical rules of construction can, it seems to us, read this will without coming to this conclusion. To hold otherwise would be to suppose the testator, in drafting his will, was governed by abstruse rules of law in regard to the effect of his expressions, of which, it is probable, he never heard, and had not the slightest conception.

The clause of the will which disposes of the testator's entire estate provides first for the payment of his lawful debts. The residue of his estate (after payment of debts) is then disposed

of as follows: "To my beloved wife Edith J. Dawson I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow." This part of the disposing clause of the will is not open to doubt. The phrase, "so long as she shall remain my widow," refers to and qualifies the estate granted, as well as the power of disposition. The clear and undoubted meaning of the sentence is, that as long as the devisee remains the widow of the testator, his property, real and personal, shall remain and be hers, with full power to dispose of the same. This construction, so far as it concerns the estate granted, is so obvious that no discussion can make it any plainer. How large an estate the widow was empowered to dispose of will be considered hereafter.

But the testator, not satisfied with this unequivocal declaration of his purpose, and to leave no doubt of his intention, and to give direction to his property when the estate of his wife therein should determine, proceeds to add: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should [shall] go to my surviving children, share and share alike."

It would be hard to express more clearly the purpose of the testator to devise to his wife an estate during her widowhood, and on its determination a remainder in fee to his children.

The contention, however, of the defendants in error is, that the testator by this will gave to his wife an absolute estate in fee-simple, with power, so long as she remained his widow, to dispose of it absolutely.

We find no warrant for this construction of the will, either in its terms or in the circumstances which surrounded the testator. The language is plain that the devisee was to take a life-estate, subject to be determined on her second marriage, with a limitation over to the children of the testator. His purpose was clearly expressed, to provide for his children as well as his widow, to give the latter all his estate as long as she remained his widow, but to put it out of her power to disinherit his children. According to the construction of the

defendants in error, the will gave her the power of absolute disposition during her widowhood, so that she could by her conveyance entirely divert the estate from his children; and, having done this, could contract a second marriage without the loss of any interest in the proceeds of the property devised to her by the testator.

We think it was not the purpose of the testator to devise an estate in fee to his wife. As already remarked, the devise is limited by the words "so long as she shall remain my widow." But even if these words were wanting, the limitation over to his children in case she should marry again would control and restrict the preceding words by which the estate was granted.

Smith v. *Bell* (6 Pet. 68) is in point. The will construed in that case declares: "I give to my wife Elizabeth Goodwin all my personal estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use of said Jesse Goodwin," son of the testator; "and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament."

The court held that this was a devise to the testator's wife for life, with remainder to Jesse Goodwin. Mr. Chief Justice Marshall, in delivering its opinion, said: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: 'The remainder of said estate to be for the use of the said Jesse Goodwin.' These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. . . . The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

This case establishes conclusively the contention of plaintiff in error, that the words of the will under consideration, granting an estate to the wife, grant only an estate for life, and not an estate in fee-simple.

But it is contended by defendants in error that there are words in the last clause of the will which imply an absolute power of disposition, and give to the children only what may remain undisposed of in the wife's hands at the termination of her estate. The clause is, "If she should marry again, then it is my will that all the estates herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." The contention rests upon the words, "or whatever may remain," and is, that they imply that a part or all of the estate might be absolutely disposed of by the wife during her widowhood.

If the purpose of the testator in the disposition of his property is what the other parts of his will clearly indicate, then these words cannot be construed to change that purpose. They can have operation without giving them that effect. He was seised of real estate and possessed of personal property. Both were included in the devise to the wife, and she was to have the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to his children a remainder in the real estate, and whatever of the personalty was not consumed by the widow during her widowhood.

This construction is warranted by the language of this court in *Smith* v. *Bell* (*supra*), which was as follows: "This suit is brought for slaves, a species of property not consumed by the use and in which a remainder may be limited after a life-estate. They composed a part, and probably the most important part, of the personal estate given to the wife, 'to and for her own use and benefit and disposal absolutely.' But in this personal estate, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as stock on a farm, household furniture, the crop of the year, which would be consumed in the use, and over which the

exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator when he employed the strong words of the bequest to her."

This passage shows that, in order to carry out the evident purpose of the testator, general words which are applicable to property of different kinds may be restricted to property of a particular kind. For instance, that the phrase "or whatever may remain," in the will under consideration, may be limited to personal property only, though used in a sentence which applies to both real and personal estate.

On this subject *Green* v. *Hewett*, decided by the Supreme Court of Illinois (12 Cent. Law Jour. 58), is precisely in point. The will in that case provided as follows: "*Second.* After payment of such debts and funeral expenses, I give and bequeath to my beloved wife the farm on which we now reside; also all my personal property of every description, so long as she remains my widow, at the expiration of that time the whole, or whatsoever remains, to descend to my daughter, M. T."

The court held that under this devise the widow did not take a fee, and said: "The use of that expression [whatsoever remains] is of no vital significance, and cannot be permitted to override the clearly expressed intention that the widow should take a life-estate only."

The next position of the defendants in error is, that even conceding that the will gives the widow of testator an estate for life, yet it conferred on her during her widowhood the power to convey the entire estate in fee, and she having so conveyed, the defendants in error who claim under her have a good title.

But the authorities are adverse, and show that when a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended.

Thus, in *Brant* v. *Virginia Coal & Iron Co.* (93 U. S. 326), the words of the will were: "I give and bequeath to my beloved wife Nancy Sinclair all my estate, both real and personal; that is to say, all my lands, cattle, horses, sheep, farming

utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death."

By virtue of this power the widow undertook to convey the fee of the land. But this court, speaking by Mr. Justice Field, said: "The interest conveyed by the devise to the widow was only a life-estate. The language admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. The words used in connection with a conveyance of a leasehold estate would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected." See also *Bradley* v. *Wescott*, 13 Ves. Jr. 445; *Smith* v. *Bell*, *supra*; *Boyd* v. *Strahan*, 36 Ill. 355.

It is next insisted by the defendants in error that the statute of Nebraska, according to which the will must be construed, favors the construction contended for by them. The statute declares, "every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate." General Statutes of Nebraska, sect. 124, c. 17. We are at a loss to see how the statute supports the view of one party to this suit more than the other. According to the construction of the plaintiff in error, the devise vested in the widow of the devisor a life-estate, remainder in fee to his children; according to the construction of defendants in error, it vested the fee in the widow. By either construction, the devise conveyed all the estate of the devisor in the property devised. This is all the statute demands.

Lastly, it is claimed by defendants in error that it is the settled rule that where a devisee, whose estate is undefined, is directed to pay debts, the devisee takes an estate in fee.

The rule has no application here, for, as we have seen, the estate of the devisee and executrix is clearly defined. A direc-

tion to pay debts cannot enlarge it. The case of *Smith* v. *Bell* (*supra*) is precisely in point against the application of the rule to this case.

We have no doubt about the true construction of this will. Edith J. Dawson took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life-estate only. Her estate in the land and that of her grantees determined on her marriage with Pickering.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded to that court, with directions to proceed in the case in conformity with this opinion; and it is

So ordered.

EX PARTE WOOLLEN.

The Circuit Court was authorized to dismiss an appeal thereto, which, at a term thereof then holding, was not entered therein within ten days after it had been taken from a decision of the District Court sitting in bankruptcy.

PETITION for a writ of *mandamus*.

The facts are stated in the opinion of the court.

Mr. Philip Phillips, *Mr. Joseph E. McDonald*, and *Mr. John M. Butler* in support of the petition.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The petition in this case shows that a claim against a bankrupt estate was rejected by the District Court for the District of Indiana on the 19th of December, 1879, and that on the same day the creditor took an appeal to the Circuit Court under sect. 4980 of the Revised Statutes. When the appeal was taken the Circuit Court was in session. The term began on the first Tuesday of the preceding November, and continued without a final adjournment until late in April, 1880. The next

term did not begin until the first Tuesday in May. On the 28th of March the assignee moved the Circuit Court to dismiss the appeal because it had not been entered in that court. This motion was resisted by the creditor on the ground that he had until the next term to enter the case. The court, after hearing, granted the motion, and we are now asked to require, by *mandamus*, a reinstatement of the appeal.

Many objections are made to this application, but as it is conceded that if the question which lies at the foundation of the whole proceeding is decided adversely to the petitioners the writ must be denied, we pass everything else by and proceed at once to the consideration of that question, which is, whether, under the law, the creditor had until the May Term, 1880, to enter his appeal in the Circuit Court.

The eighth section of the original bankrupt law of March 2, 1867, c. 176, required the appeal to "be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same." 14 Stat. 520. The tenth section provided (id. p. 521) that the justices of this court should, subject to the provisions of the act, frame "general orders," among other things, "for regulating the practice and procedure upon appeals." Under this authority, the justices could not by their orders alter or amend the law, but they could prescribe rules and regulations to aid in carrying it into effect. Anything not inconsistent with it might be ordered for the despatch of business. It was not in so many words provided that appeals might be entered in the Circuit Court at the first term which began its session after the expiration of ten days from the time they were claimed, and so the justices, in framing their orders at the December Term, 1866 (May 16, 1867), provided (No. 26) that appeals by a creditor from a decision of the District Court rejecting his claim should be filed in the clerk's office of the Circuit Court within ten days after they were taken. As this was evidently done to promote the speedy settlement of bankrupt estates, which we have often said was the obvious policy of the law (*Bailey* v. *Glover*, 21 Wall. 342; *Wiswall* v. *Campbell*, 93 U. S. 347), there would, in our opinion, be no difficulty in sustaining the regulation if the mat-

ter stood as it was originally. The law and the regulation are perfectly consistent with each other. In effect it was judicially determined that sect. 8 required appeals to be filed during the first term which happened to be in session after the expiration of the ten days, and the regulation simply fixed the time in that term when the filing must be done. Undoubtedly the provisions of the regulation were directory rather than mandatory. If the entry of the cause was not made in the Circuit Court within the prescribed time, it would be within the power of that court, in the exercise of its discretion, to allow it to be done afterwards, but after the time had gone by the assignee could appear and ask to have the appeal dismissed.

But whatever may have been the condition of the law in this particular originally, there can be no doubt what it has been since the Revised Statutes, sect. 4990 of which is as follows: "The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this title; and the justices may, from time to time, subject to the provisions of this title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders for the following purposes: . . . *Fourth.* For regulating the practice and procedure upon appeals."

Order No. 26 was then in force, and there was in this section a distinct legislative recognition of its validity. In sect. 4982 the word "first," where it occurs in that part of sect. 8 of the original act quoted above, was omitted, so that the provision in the Revised Statutes is that "such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same." By this change the original meaning was not materially altered; but if it had been, the result would be the same, so far as the question now under consideration is concerned, because in so many words it was provided (sect. 4990) that the old orders as they stood should be applicable to the revision. In amending the general orders at the October Term, 1874, the justices continued No. 26 in the same form it was originally adopted.

Such being the condition of the law when the proceedings now complained of were had in the Circuit Court, we think it was clearly in the power of that court to dismiss the appeal because it had not been entered in time.

Petition denied.

LIBBY *v.* HOPKINS.

1. "Mutual debts" and "mutual credits," where they occur in sect. 20 of the act of March 2, 1867, c. 176 (14 Stat. 517), and sect. 5013 of the Revised Statutes, are correlative. Credits do not include a trust, and in case of bankruptcy only such credits as must in their nature terminate merely in debts are the subject-matter of set-off.
2. A. being indebted to B. by note secured by mortgage, and on an account, sent him money with instructions to credit it on the note. A. was shortly thereafter adjudged to be a bankrupt. *Held*, that the money was received by B. in trust to apply it pursuant to instructions, and, having refused to conform to them, he cannot set off against it the account, but is liable therefor to A.'s assignee in bankruptcy.

ERROR to the Supreme Court of the State of Ohio.

The suit was brought in the Superior Court of Cincinnati by A. T. Stewart & Co., of which firm the plaintiffs in error are the survivors, against Lewis C. Hopkins and wife, and Isaac M. Jordan, trustee in bankruptcy of Hopkins.

It appears from the record that A. T. Stewart & Co., merchants, of the city of New York, loaned, June 6, 1866, Hopkins, a merchant of Cincinnati, Ohio, $100,000, and took his promissory note of that date therefor, payable on demand with interest from date, to secure the payment of which he executed and delivered to them several mortgages on real estate in Cincinnati and its vicinity. Both before and after that date he bought of them large quantities of goods, and as a matter of convenience kept with them two accounts, — one a cash and the other a merchandise account. They were his bankers. All his remittances were sent to them and credited to him in the cash account. By drafts thereon he paid his debts for merchandise to them and other New York merchants, and in order to replenish it he borrowed the $100,000 above

mentioned, and it was carried to his credit in that account. On May 4, 1867, he paid on his note $25,000. On Nov. 12, 1867, he remitted to Stewart & Co. $10,000, on Dec. 27, 1867, $17,000, on the 28th of the same month, $10,000, and on the 30th, $48,025. He directed these remittances to be applied to the payment of his note, and to be credited thereon. It is now no longer disputed that the first three of these remittances were so applied. The last two, with the interest thereon, constitute the sum now in controversy.

On Jan. 1, 1868, Hopkins suspended business, insolvent. At that time he owed A. T. Stewart & Co. $231,515 on account, and unsecured. His liabilities to others amounted to more than $500,000. A petition in bankruptcy was filed against him February 29. He was adjudicated a bankrupt March 30. On April 30 Jordan was appointed trustee.

As to the foregoing facts there is no dispute.

In August, 1868, on what day the record does not show, Stewart & Co. commenced this suit for the foreclosure of the mortgages, claiming as due the full amount of the note, less the payment of $25,000.

The answer, besides other defences not pertinent to any contention now raised, averred that Hopkins had paid on the note, not only the said sum of $25,000, but also the remittances above mentioned, making the total amount paid thereon $110,025; and, after alleging that said payments were made in fraud of the Bankrupt Act, demanded, by way of counterclaim, a judgment against Stewart & Co. therefor.

The reply admitted that Hopkins requested Stewart & Co. to credit the remittances on his mortgage debt, and averred that they were held subject to his order, and continued to be so held, up to the time when the rights of Jordan, trustee, attached, subject to such law of set-off as is provided in the Bankrupt Act. It nowhere appeared in the pleadings that Hopkins was indebted to the plaintiffs on any unsecured claim, or in any other way, except upon the note for $100,000. No unsecured debt of Hopkins was pleaded as a set-off or otherwise.

The Superior Court found that the mortgages were valid, and the first lien on the premises therein described, and that

there was due thereon, including interest, the sum of $75,957.06. It rendered a final decree that unless that sum with interest be paid within one hundred and eighty days therefrom to Stewart & Co., the mortgaged premises should be sold.

The court further found that when Hopkins made the last two remittances, of $10,000 and $48,025, respectively, it was with the intent and the express instruction in writing to Stewart & Co. to apply them in discharging the mortgage claim; that Stewart & Co. refused to do so, but assumed, without his authority or consent, to apply and did apply them to his credit on the general account against him for merchandise; that Stewart & Co. had no right to make such application; and that the remittances remained in their hands as his moneys from the several days of their payment until Feb. 29, 1868, when the title of Jordan as trustee attached thereto. It also found that the said two several sums were not subject to any claim of set-off or cross-demand, or of mutual debts or credits, on the part of Stewart & Co., under sect. 20 of the Bankrupt Act, or otherwise.

The court, therefore, rendered a decree in favor of Jordan, trustee, against Stewart & Co. for $58,025, the aggregate of the last two remittances, with interest, amounting in all to $75,981.36.

The case was carried, by the petition in error of Stewart & Co., and the cross-petition in error of Jordan, trustee, to the Supreme Court of Ohio, by which the decree of the Superior Court was affirmed.

Stewart & Co. thereupon brought the case here by writ of error. Some of the members of the firm have died, and Libby and another are its surviving members.

Mr. Aaron F. Perry for the plaintiffs in error.

Mr. Jackson A. Jordan and *Mr. Isaac Dayton*, *contra*.

MR. JUSTICE WOODS, after stating the facts, delivered the opinion of the court.

The only question to which our attention is directed by the plaintiffs is that of set-off under the twentieth section of the act of March 2, 1867, c. 176 (14 Stat. 517), which is as follows: "In all cases of mutual debts or mutual credits

between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition." This provision was in force at the time of the trial, and is now substantially incorporated in sect. 5073 of the Revised Statutes.

The contention of the plaintiffs is that they were entitled under this section to set off an unsecured account due them from Hopkins against the $58,025 remitted to them by him with directions to credit it on his mortgage debt, and which they refused so to apply.

Waiving the difficulty that they have not pleaded that account as a set-off, we shall consider the question made by them. That account is a claim provable against the bankrupt estate, and it was not purchased by or transferred to them after the filing of the petition in bankruptcy. The controversy is, therefore, reduced to this issue: Were that account and the money transmitted by Hopkins to them, and held and not applied by them to the mortgage debt, mutual credits, or mutual debts which could be set off against each other under the twentieth section of the Bankrupt Act?

The plaintiffs insist that the term "mutual credits" is more comprehensive than the term "mutual debts" in the statutes relating to set-off; that credit is synonymous with trust, and the trust or credit need not be money on both sides; that where there is a deposit of property on one side without authority to turn it into money, no debt can arise out of it; but where there are directions to turn it into money it may become a debt, the reason being that when turned into money it becomes like any other mutual debt. They say that the first of the two remittances under consideration is not proved to have been other than money, but as it was only $10,000 its application to the note could not be required. The larger remittance was in drafts, and their application could not be required. But there was authority to turn them into money, and that to get the money on them it was necessary that the

drafts should be indorsed by the plaintiffs, and that the indorsement to and collection by them put the money received in the same plight as if the drafts had been sent to them for collection. We cannot assent to these views, and they receive but little support from the adjudged cases.

Ex parte Deeze (1 Atk. 228) arose under the twenty-eighth section of the statute 5 Geo. II. c. 30, which provides that "when it shall appear to the said commissioners [in bankruptcy] or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt shall be set against another, and what shall appear to be due on either side on the balance of said account, and on setting such debts against one another, and no more shall be claimed on either side respectively." In that case, a packer claimed to retain goods not only for the price of packing them, but for a sum of £500 lent to the bankrupt on his note. Lord Hardwicke determined that he had such right on the ground of mutual credits, holding that the words "mutual credits" have a larger effect than "mutual debts," and that under them many cross-claims might be allowed in cases of bankruptcy, which in common cases would be rejected.

But this ruling was subsequently made narrower by Lord Hardwicke himself, in *Ex parte Ockenden* (id. 235), and was in effect overruled in *Rose* v. *Hart*, 8 Taunt. 499. In that case trover was brought for cloths deposited by the bankrupt previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed. It was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy, for there was no mutual credit within that section. And the court declared that the term "mutual credits" in the act meant only such as must in their nature terminate in debts.

The rule established in this case, as to the nature of the credits which can be the subject of set-off, has been declared in

other cases. *Smith* v. *Hodson*, 4 T. R. 211; *Easum* v. *Cato*, 5 Barn. & Ald. 861. The effect of the authorities is, that the term "mutual credits" includes only such, where a debt may have been within the contemplation of the parties.

These authorities make it clear that, even under the Bankrupt Act of 5 Geo. II., the plaintiffs would have no right to the set-off claimed by them. And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.

Whether or not he had the right to direct the application, is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.

They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.

Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. *Winslow* v. *Bliss* (3 Lans. (N. Y.) 220) and *Scammon* v. *Kimball* (92 U. S. 362), cited by the plaintiffs to support their contention, are cases where a bank or banker was allowed to set off the money of a depositor against a debt due from him to the bank. The answer to these authorities is that the relation between a bank and its general depositor is that of debtor and creditor. When he deposits moneys with the bank, it becomes his debtor to the amount of them. *Foley* v. *Hill*, 2 H. L. Cas. 28; *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Bullard* v. *Randall*, 1 Gray (Mass.),

605. When, therefore, he becomes indebted to the bank, it is a case of mutual debt and mutual credit, which may well be set off against each other.

But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting.

Another answer to the contention of the plaintiffs is found in the language of the twentieth section of the Bankrupt Act of March 2, 1867, c. 176, which differs materially from that of the twenty-eighth section of 5 Geo. II. c. 30. In our act the terms "credits" and "debts" are used as correlative. What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." We find no warrant in the language of the section or its context for extending the term "credits" so as to include trusts. Generally we know that "credit" and "trust" are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the twentieth section of the Bankrupt Act.

To authorize a set-off there must be mutual credits or mutual debts. The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees. So that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs owed him nothing. They held his money in trust to apply it as directed by him.

They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached, and until he sought to recover it by his counter-claim filed in this case.

The only contention of the plaintiffs set up in this court is that the Supreme Court of Ohio approved of the action of the Superior Court of Cincinnati, in refusing to allow the plaintiffs

to set off the unsecured debt due to them by Hopkins against funds intrusted to them by him for an entirely different purpose. We are of opinion that the decision of the Superior Court was correct. The judgment of the Supreme Court of Ohio must, therefore, be

Affirmed.

PICKERING *v.* MCCULLOUGH.

1. Reissued letters-patent No. 6166, granted Dec. 8, 1874, to George Nimmo, for "an improvement in moulding crucibles" are void, the invention therein described being neither patentable nor novel.
2. A combination of old elements is not patentable unless they all so enter into it as that each qualifies every other. It must either form a new machine of distinct character and function, or produce a result which is not the mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. James E. Maynadier for the appellants.

Mr. William Bakewell, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a bill in equity, filed by the appellants, to restrain the appellees from infringing reissued letters-patent No. 6166, dated Dec. 8, 1874, to George Nimmo, for an improvement in moulding crucibles, and for an account, the patent having been reissued to the complainants as assignees of Nimmo, the inventor and original patentee.

The original patent, No. 49,140, granted to him, bears date Aug. 1, 1865.

The subject of the alleged invention is an improvement in the manufacture of moulding crucibles and pots, made of a plastic material, composed of plumbago, or so-called black-lead and fire-clay, used principally in the manufacture of steel. They were formerly made by hand, on a common potter's

wheel, the hand and eye of the skilled workman building them up in the desired shape, as the material revolved upon the wheel. It is recited in the original patent to Nimmo that they had also been made in a mould, by a pressing instrument, for which reference is made to letters-patent, granted Oct. 26, 1852, to John Akrill. It is stated also by Nimmo, in the specification to his original patent, that "difficulty has heretofore been experienced in removing the crucibles from the mould, in consequence of the adhesive nature of the black-lead compound or mixture employed for such crucibles. The amount of water, also, that is required to make the mixture sufficiently plastic causes the material frequently to crack and break in shrinking as it dries."

The following is the description of the invention, as contained in the specification, referring to the drawing accompanying it: —

"The nature of my said invention consists in the manufacture of crucibles in a plaster mould, which gives shape to the pot externally and absorbs the moisture from the pot, causing it to dry uniformly and at the same time shrink away from the mould, preventing the air acting on the outside of the pot until after the moisture has been mostly absorbed, and prevents the pot from splitting or cracking from unequal contraction in drying. I mount my plaster mould in a revolving chuck, and employ a rib attached to a lever for spreading the plastic crucible material on the inside of the mould, and at the same time hardening, consolidating, and polishing the crucible on the inside by means of said rib.

"In the drawings is a bed carrying the vertical spindle, on the upper end of which is the hollow chuck, into which the plaster mould fits, and these parts are revolved by a belt to a wheel and crank, or by any other competent means. Near the chuck is an upright frame, with rollers over which the chain or rope passes, on one end of which is the counter-weight, and on the other the lever, having a handle at one end and carrying the rib. This lever is guided by the upright frame, and when not in use is drawn up by the weight. The crucible material is placed in the plaster mould, and partially spread by hand or by a conical muller. The back end of the lever is then brought beneath the stop or fulcrum, and pressed down until the lever takes a stop. The rib on the lever smooths, compresses, hardens, and polishes the interior of the

mould, forming a perfect crucible, possessing great strength and beauty. At the same time there is great uniformity in the crucibles made in this manner. The crucible and mould are to be lifted off the chuck, and another mould introduced in the chuck, and the operation repeated.

"The crucible and mould are set aside. When the plaster of the mould has absorbed the moisture from the crucible, and the crucible has contracted away from the mould, and become sufficiently dry to be exposed to the air without risk of cracking, the crucible is to be removed and dried in any usual manner, and may be baked or burned."

The claims are as follows: —

"What I claim and desire to secure by letters-patent is, —

"1. Manufacturing crucibles in a plaster mould, in the manner and for the purposes specified.

"2. Lever *l* and rib *n*, applied in the manner specified to form the interior of a crucible contained within a revolving mould, as set forth.

"3. The combination of the revolving chuck *c*, plaster mould *d*, lever *l*, and rib *n*, as and for the purposes specified.

"4. Mounting the lever *l* and rib *n* in the frame *g* in the manner specified, in combination with the counterpoise *k*, fulcrum *o*, and stop *p*, for determining the size of the interior of the crucible, as specified."

It is conceded by counsel for the appellants that the claims in this patent were invalid, as being too broad, and that it was for this reason, and for a more definite and limited description of the real invention intended to be claimed, that it was surrendered and reissued.

The state of the art, at the date of his original patent, is described by Nimmo in the reissue, as follows: —

"Long prior to said Nimmo's invention the mode of manufacturing certain articles of pottery by means of a rib or former to give the desired shape to the inside of the article, and a revolving plaster vessel to properly present the 'ball' (as the lump of tempered clay is called) to and support it under the action of the rib, was well known; but this mode of manufacture was not applicable in the manufacture of crucibles, because the apparatus was such that the crucible would be injured or destroyed in removing the rib, by

the end of the rib striking the upper part of the crucible, as will be plain to all skilled in the art of crucible-making, and acquainted with the mode of manufacture above referred to.

"Another mode of manufacturing certain articles of pottery-ware by means of a rib or former for the inside of the article, and a revolving table (a common potter's wheel) which partially presented the ball to and supported it under the action of the rib, the workman using his hands to aid in presenting the ball to and supporting it under the action of the rib, is described in a French work published in 1857, entitled 'Leçons de Céramique,' par M. A. Salvetat, volume second, pages 121–2. This last-named mode of manufacture was applicable to the manufacture of crucibles, the apparatus being such that the rib was guided so as to cause it to approach the axis of the pot, where it was necessary that it should do so in order to prevent injury to the pot; but, even if useful at all in that manufacture, it is without doubt very much inferior to the mode of manufacture invented by Nimmo, and hereinafter described, the distinguishing difference between them being that the ball is presented to the rib and supported under its action, not by a flat revolving metal disk, but by a vessel made of plaster, which takes the place of both the flat revolving disk and the workman's hands, performing all the functions performed by this disk and the hands of the workman, but in a much more perfect manner and in less time.

"The invention of said Nimmo is, in fact, an improvement on the mode of manufacture, as well as on the apparatus, described in Salvetat's work, the improvement consisting in the different mode of presenting and supporting the ball; but we do not wish to be understood as claiming this mode of presenting and supporting the ball as the invention of said Nimmo, as his improved mode of manufacture is new solely because it is, as a whole, substantially different from the mode described by Salvetat, and from the mode first above referred to; indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat, so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to, so far as presenting the ball to and supporting it under the action of the rib is concerned. By Nimmo's improved mode of manufacture much labor and expense are saved, and, what is still more important, crucibles are produced which are superior to those made by any practical mode known prior to said Nimmo's invention, in many very important respects."

The drawings are the same in both the original and reissued patent, but in the description of the machine, with reference to the drawing contained in the reissue, prominence is given to the mode of operating the rib, after the crucible is formed, by which it can be withdrawn without striking and injuring the crucible, as to which no allusion was made in the original patent. It is admitted, however, that this mechanism is substantially the same as that described by Salvetat in the publication referred to.

The reissue expressly disclaims as the invention of Nimmo both the modes and both the apparatus above mentioned, that is, the use of a rib or former to give the desired shape to the inside of the article, and the revolving plaster vessel or mould; and the mode and apparatus described by Salvetat, that is, the use of a rib or former, the apparatus being such that the rib is guided so as to cause it to approach the axis of the crucible, when it was necessary that it should do so in order to prevent injury to it.

The importance of this feature in any apparatus of the kind becomes manifest from the fact that crucibles of the character of those intended to be made by this process usually have what is termed "a bilge," that is, are smaller in circumference at the mouth or top than at some other point; so that if the rib or former were lifted out perpendicularly from the position it occupies while in operation, it would necessarily strike against the interior surface of the crucible as it rose. To avoid this, it has to be withdrawn from the position it occupies while in the act of forming the internal surface of the crucible, to one nearer to the axis of rotation, so that being lifted, it may pass upward through the mouth of the crucible without striking against the sides. And considering how characteristic is this feature of the apparatus, and how essential it is to its profitable use, it is worthy of note that Nimmo, in his original patent, does not allude to it, although his claim for managing his rib includes it; and equally so, that it does not seem to have suggested to him, at that time, its utility in connection with the manufacture of crucibles with a bilge, for his description does not distinguish between those which have and those which have not a bilge, and his drawing is that of a mould with a

flaring mouth, for the making of which such a motion of the former, in withdrawing it, is not necessary. In addition the mould itself, made of plaster, for vessels having a bilge, is required to be in two parts, in order that it may be removed from the crucible after the operation is complete, — an adaptation which does not appear either in Nimmo's specifications or drawing.

Nimmo's actual claim, as made in the reissue, is as follows: —

"The improved apparatus above described, having the specific character, objects, and functions above explained, and consisting of the rib, the revolving mould, and the mechanism by which the rib is guided toward the axis of revolution of the mould as it is withdrawn, as set forth, these elements being claimed only in combination each with all the others, and no claim is made to any combination of any of them less than the whole."

It is admitted in argument by counsel for the appellants that the mould is old and the rib is old, but it is claimed that prior to Nimmo's invention the mechanism for combining the rib and mould into one machine was such that the rib could not be moved bodily towards the axis of the mould or away from that axis.

Besides a denial of the alleged infringement, the appellees maintained several defences. They claimed that the reissued patent is void: because the claim is too broad; because there is no coactive combination between the elements of the claim; because the state of the art, as set forth in the specification, shows that there is no novelty in the alleged combination; because the reissue is for a different invention from that described in the original patent; and because the alleged invention of Nimmo had been fully anticipated. The anticipations set out in the answer and relied on were: —

1. By the Salvetat publication.

2. By the Wise patent, being a patent granted to Jacob Wise and Freeman Wise, dated Nov. 30, 1852, No. 9437, for an "improvement in the manufacture of stone and earthen ware."

3. By the Smith patent, being a patent granted to William

Smith, dated Nov. 3, 1863, No. 40,506, for apparatus for making plumbago crucibles.

4. By prior knowledge and use of the alleged invention at Kier's works in Pittsburgh.

The decree below dismissed the bill, to reverse which this appeal is prosecuted.

The account given in the specification of the reissued patent, of the state of the art at the date of the alleged invention, and the reference to Salvetat's publication, describing the method and apparatus referred to, and a comparison of that with the claims and disclaimers of the appellants, require a more particular examination of Salvetat's description of the device and its mode of operation, as contained in his publication. It will be observed that the reissue represents Salvetat as having fully described the rib or former, and the mechanism which guides it so that it can be withdrawn from the crucible, when completed, without injury, even when it has a bilge; but as omitting in connection with it any use of a mould. The statement of the reissue is, that while Salvetat described the use of the rib for forming the interior of the vessel, its external form was moulded by the unassisted hand of the workman, manipulating the ball while revolving on the flat disc of the common potter's wheel. And the alleged invention of Nimmo consists merely in adding a mould to the apparatus described by Salvetat to form the combination which he claims as his invention.

An examination of the extract from Salvetat's publication, descriptive of this apparatus and method, which is contained in the record, makes it doubtful whether the account of it given in the specification of the reissued patent is not a misconception. The drawings illustrating it, it is true, do not show a mould, and the text in referring to them says the vessel is supported by the wheel. But this, perhaps, is explained by the statement that it is intended to show merely how Messrs. Bourgon and Chalot, the originators of it, have arranged the rib in a very ingenious manner for hollowing out hollow-ware with the rib itself. The whole article or chapter is entitled, "Hollow-ware pressing in plaster moulds;" and its very purpose seems to be to explain the use and utility of moulds in shaping

the forms of pottery by pressing, and all the other processes and devices mentioned certainly refer to moulds as used. If the rule "*noscitur a sociis*" applies, there would be little room to doubt that the one in question also contemplated their use, and it seems difficult to understand how the vessel can be shaped externally unless the mould is implied.

But we assume, for the purposes of this case, that the account, as contained in the reissued patent, of this method and apparatus is correct, and that Salvetat does not describe the use of a mould in combination with the rib. There is, however, no doubt whatever that Salvetat describes the operation of a rib, by means of a mechanism which directs it in the formation of the interior of a vessel, while in motion on a revolving wheel, and guides it when the vessel is formed, even when it has a bilge, so that, by bringing it into a proper relation with the axis of revolution, it can be withdrawn from the side of the vessel which it has shaped, and lifted through its mouth or top, without touching and injuring its sides. This is conceded by the appellants, and is admitted in the patent itself. It is also confessed that the use of the mould for supporting the ball, while the rib or former presses it on the inside, and thus shapes its corresponding outside, is old, and is not of itself claimed as the invention of Nimmo. The alleged invention, then, consists merely in supplying to the apparatus described by Salvetat a mould for supporting the ball and giving shape externally to the crucible.

We are clearly of opinion that this is not patentable. It comes plainly within the rule, as stated by Mr. Justice Strong, in *Hailes* v. *Van Wormer* (20 Wall. 353, 368), where he said: "All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result

obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention."

"The combination, to be patentable," said Mr. Justice Hunt, in *Reckendorfer* v. *Faber* (92 U. S. 347, 357), "must produce a different force or effect, or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union: if not so, it is only an aggregation of separate elements."

In Nimmo's apparatus, it is perfectly clear that all the elements of the combination are old, and that each operates only in the old way. Beyond the separate and well-known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seised each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union.

In the case of this apparatus the mould was known, and a rib or former was known, and their use in combination was known. Salvetat described a rib, so arranged that, after it had performed its function in shaping the interior of the vessel, it could be withdrawn, through the top of the vessel, so as not to produce injury by striking against its side. This rib Nimmo substituted for the old one in the same combination. And this is the whole of the invention. Upon the principle stated, there is no invention in it.

We are also of opinion that the invention claimed for

Nimmo, as described in the reissued patent, is covered by the prior patents to Wise and to Smith.

Undoubtedly they both embody the principle of a former used in combination with a mould, for the purpose of manufacturing crucibles, connected so that the former can be withdrawn in the case of vessels having a bilge, without injury.

It is objected, however, that the machines described in these patents are mere paper machines, not capable of successful practical working. But on examination it sufficiently appears, we think, that the objections can be sustained only as to minor matters of detail in construction, not affecting the substance of the invention claimed, and could be removed by mere mechanical skill, without the exercise of the faculty of invention. In this view, the Wise and Smith patents are not rendered inefficient as defences in this suit, by reason of the alleged imperfections of the machines described in them.

The bill of the appellants was dismissed by the court below, on the ground of the prior knowledge and use of the alleged invention at Kier's works in Pittsburgh. We are of opinion that the testimony sustains that finding.

Decree affirmed.

SAGE *v.* WYNCOOP.

1. Upon consideration of the proofs, the court affirms the decree below, declaring invalid a lien acquired by the levy of an execution upon the goods of a party who was immediately thereafter adjudged to be a bankrupt.
2. *Wilson* v. *City Bank* (17 Wall. 473) approved.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

This was a bill filed by Sage against Wyncoop, Cossitt, and Fowler, to compel the application of a fund in the custody of the District Court of the United States for the Northern District of New York, to the payment of two judgments which he had recovered against Fowler in the Supreme Court of the

State of New York, May 19 and June 2, 1875. It appears that executions, forthwith sued out upon the judgments, were by Cossitt, as sheriff, levied upon goods belonging to Fowler. On the 3d of June and after the levy, Fowler filed his petition in bankruptcy. On the 7th of that month he was adjudged a bankrupt, and on the 9th Cossitt was, by order of the District Court, restrained from proceeding to enforce by sale the collection of the judgments. Wyncoop was appointed in July, 1875, assignee in bankruptcy of Fowler. On the 17th of the following month the District Court made an order authorizing him to sell the goods and deposit the proceeds in court, and declaring that the lien of Sage and of the sheriff, by virtue of the executions and levies, if it was valid, be transferred to so much of such proceeds as would be sufficient to pay them. The sale was accordingly made and the money deposited. The bill prayed for the application of the fund above mentioned.

Wyncoop alone answered, admitting the material facts alleged in the petition, and setting up, among other things, that Fowler, being wholly insolvent, did, immediately before the filing of his petition in bankruptcy, procure or suffer his goods to be seized on the executions, and that the writs were sued out on judgments which he procured or suffered to be taken against him, with the fraudulent intent to thereby give Sage an unlawful preference, contrary to the provisions of the bankrupt law, Sage having reasonable cause to believe Fowler to be insolvent, and knowing that such seizure was made in fraud of his other creditors.

The court dismissed on final hearing the bill, and Sage appealed. The remaining facts are stated in the opinion of the court.

The case was argued by *Mr. Aaron J. Vanderpoel* for the appellant, and by *Mr. George N. Kennedy* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

There are two questions in this case: 1. Whether the preference which the appellant claims to have secured by his judgments and levies was obtained with the active assistance of the

bankrupt; and, 2. Whether the appellant is chargeable with notice of the insolvency of the bankrupt.

We said, in *Wilson* v. *City Bank* (17 Wall. 473, 487), "very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to such preference, might be sufficient to invalidate the whole transaction." This case seems to us full of such evidence. The bankrupt was largely insolvent, and we cannot but believe his son, who was the agent of the appellant, knew it, in a legal sense, when, as he was leaving for Europe, he said to the attorney in whose hands he put the claim for collection, "If you can assist him [the bankrupt] in any way I want you to do it; but Gardner Sage is my client; this is his money, and I want him protected at all hazards." One of the suits was begun on the same day, and, as we think, with the help, if not by the procurement, of the bankrupt. Before the property was taken into the actual possession of the sheriff under any levy, the papers in voluntary bankruptcy were prepared and sent to the clerk of the bankrupt court, with instructions not to file until directed to do so by telegraph; and as soon as the sheriff had perfected his last levy and was in actual possession of the goods, the proceeds of which are now in controversy, the necessary despatch was sent and the proceedings begun. Four days afterwards an adjudication of bankruptcy was secured. We deem it unnecessary to go over the evidence in detail. It is sufficient to say we are satisfied with the conclusions reached below.

Decree affirmed.

COLLINS *v.* RILEY.

1. Land in Virginia, whereof the owner died seised in 1823, descended to his married daughter. In January, 1868, she and A., her husband, conveyed it in fee, and shortly thereafter died, he predeceasing her. In that year and after her death, B., their grantee, brought ejectment. The jury returned a special verdict, setting forth substantially the above facts and finding that the right of A. was, at the date of the conveyance to B., barred by the Statute of Limitations. *Held*, in view of the provisions of the code of that State (*infra*, pp. 324, 325, 326), that the facts so found entitle B. to recover, inasmuch as it does not appear therefrom that her title or right of entry, which passed by the conveyance, was barred at the date thereof, or at the commencement of the suit.
2. A verdict for the plaintiff, if it declares that the land in dispute "was claimed by the defendants," is in substantial compliance with the requirements of the code.

ERROR to the District Court of the United States for the District of West Virginia.

Riley claiming to be the owner in fee-simple of a large body of land, containing 3,000 acres, consisting of several tracts in the county of Ritchie, State of West Virginia, brought this action, on the 28th of March, 1868, to recover the same from the plaintiffs in error, who, it is alleged, unlawfully withheld from him the possession thereof. The plea, following the requirements of the local law, was, "not guilty of unlawfully withholding the premises claimed by the plaintiff in his declaration." A trial resulted in a verdict for the defendants, which was, on motion, set aside. Upon a second trial the jury found for him, the verdict being in these words: "We, the jury, find for the plaintiff the land described in the declaration [here follows a description of the boundary of the entire tract of 3,000 acres], except as to two undivided thirds of [here follows a description of separate tracts, aggregating 1,834 acres, and claimed by the respective defendants]. And as to the two-thirds of the lands hereinbefore described and excepted, we find for the said defendants; and as to the remaining one-third of the lands hereinbefore excepted, and claimed by the said defendants, we find the following facts: That Frederick Swetzer died on the day of , 1823, possessed in fee of lot No. 4 and the lower half of No. 5, as hereinbefore

found for the plaintiff, leaving three heirs-at-law who inherited said property, one of whom, Polly, had, prior to his death, intermarried with Abraham Wagoner; and that subsequently to his death, to wit, on the day of January, 1868, the said Abraham Wagoner and Polly his wife conveyed to the plaintiff in this cause all right and title in said lands; and that before the commencement of this suit Abraham Wagoner died, on the day of February, 1868, and the said Polly Wagoner died afterwards, on the day of March, 1868; and we further find that, at the date of the deed executed by the said Abraham and Polly Wagoner to the plaintiff in this cause, the said Abraham Wagoner's right to recover against the said defendants was barred by the Statute of Limitations. Upon this state of facts as to the interest of Polly Wagoner, if the law be for the plaintiff, then we find for the plaintiff in fee the remaining one-third of the several tracts of land claimed as aforesaid by the defendants, and of which two-thirds have been found for them; if the law be for the defendants, then we find for the said defendants the one undivided third part of the said land conveyed by the said Abraham Wagoner and wife, of which we have herein found two undivided third parts for the defendants."

Riley moved the court to enter judgment in his behalf upon the special verdict. The defendants moved to arrest judgment for him, and, "for various reasons appearing upon the face of the record," to enter judgment in their favor. The motion of the plaintiff was granted and that of the defendants denied, whereupon they sued out this writ of error.

Mr. Robert S. Blair and *Mr. Edwin Maxwell* for the plaintiffs in error.

Mr. Gideon Draper Camden, contra.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

On behalf of Riley it is contended that the verdict is a general finding in his favor as to the undivided one-third of the several tracts claimed by the defendants respectively, and should be followed by a judgment for him, unless the facts, specially stated, preclude his recovery. In that view we are

unable to concur. The finding is, in form, a special verdict as to the undivided one-third of the lands in controversy, and was so treated, in the court below, by both parties. It has all the essential requisites of a special verdict, which is one wherein the jury "state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had a cause of action, they then find for the plaintiff; if otherwise, then for the defendant." 3 Bl. Com., p. 377. The inquiry, therefore, is not whether the facts stated prevent the court from entering a judgment in favor of Riley, in pursuance of a general finding for him, but whether the facts stated — "this state of facts as to the interest of Polly Wagoner" — affirmatively establish his right to any judgment against the present defendants for the recovery of that interest.

The main proposition advanced by the plaintiffs in error is that even if Riley, as between himself and his grantors, acquired that interest by an effectual conveyance, this action was barred by the Statute of Limitations.

The statute, which, it is conceded, governs this case provides, —

That no person shall make an entry on, or bring an action to recover, any land, but within fifteen years next after the time at which the right to make such entry, or to bring such action, shall have first accrued to himself, or to some person through whom he claims. Va. Code, 1860, tit. 45, c. 149, sect. 1.

That if, at the time the right shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the period of fifteen years shall have expired, make an entry on, or bring an action to recover, such land, within ten years next after the time at which the person to whom such right shall have first accrued shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened. Id., sect. 3.

A subsequent section makes the foregoing limitations of the right of entry on, or action for, land subject to these provisos:

that no such entry shall be made or action brought, by any person who, at the time at which his right to make or bring the same shall have first accrued, shall be under any such disability, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person, under disability at such time, may have remained under the same during the whole of such thirty years, or although the term of ten years from the period at which he shall have ceased to be under any such disability, or have died, shall not have expired. And, further, when any person shall be under any such disability at the time at which his right to make an entry or bring an action shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry, or to bring an action, beyond the fifteen years next after the right of such person shall have first accrued, or the ten years next after the period of his death, shall be allowed by reason of any disability of any other person. Sect. 4.

Recurring to the facts stated in the special verdict, it will be observed that Polly Wagoner was under the disability of coverture at the time she inherited the lands in controversy. The interest thus inherited nevertheless passed to Riley by the conveyance of January, 1868, unless *her* rights had been previously lost through adverse possession or hostile claim by others. But whether there was, prior to that conveyance, any such adverse possession or hostile claim, even as against the husband, is not distinctly found. The special verdict, it is true, states that the husband's right to recover against the defendants was barred by the Statute of Limitations. That, we think, is a conclusion of law, rather than a statement of facts upon which it rests. If, however, we give that finding the fullest effect claimed for it, — viz. that the defendants had held continuous adverse possession of, or had asserted a hostile claim to, the lands, long enough to bar an action upon the part of the husband, — we are still not informed by the special verdict as to the time such adverse possession, in fact, commenced, or when such hostile claim was, in fact, first asserted by defendants. It may have existed for only fifteen years prior to

the conveyance by Wagoner and wife to Riley. If it continued for that length of time, the husband's right to the possession of the lands would, under the statute, have been lost. But if adverse possession, or an adverse claim by defendants, for that length of time, be conceded, — and there is no reason why it should be presumed to have continued for a longer period, — it would not follow that the wife's right of entry was barred. The statute expressly declares that a woman shall not be barred of her right of entry into land, even by a judgment in her husband's lifetime, by default or collusion; and, further, that "no conveyance, or other act suffered or done by the husband only, of any land which is the inheritance of the wife, shall be or make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to any one having right or title to the same by her death, but they may respectively enter into such land, according to their right and title therein, as if no such act had been done." Va. Code, 1860, c. 133, sect. 2, p. 608.

If the special verdict had stated that defendants, and those under whom they claim, had adversely held and claimed the land for a period sufficiently long, anterior to January, 1868, to show that the wife, notwithstanding the disability of coverture, had been barred of her right of action, then the law would be with the defendants. But no such facts are found. The verdict is, as we have seen, wholly silent as to when their adverse possession or claim commenced; and the court is asked to adjudge, as matter of law, that she was barred, simply because, at the date of the conveyance to Riley, her husband's right to recover was cut off by limitation. By the express words of the statute she had ten years after the disability of coverture was removed in which to assert her right of entry, provided thirty years from the date when her right first accrued had not expired. Notwithstanding, therefore, her husband's right of possession may have been barred when the deed to Riley was made, that conveyance, in the absence of evidence that she was barred, must be held to have passed whatever interest she then had in the lands.

Further, if it be conceded, as perhaps it must be, that the husband and wife — the former being barred — could not

have brought a joint action to recover the lands, and that during the life of the husband Riley could not have asserted his rights, as against the defendants, it would not follow that he got nothing by the conveyance. He certainly did acquire the wife's interest; and, when her disability was removed, he could enter upon the land, or bring an action for its recovery, precisely as she could have done, upon the death of the husband, had she not joined in the conveyance. This is clear from a comparison of the Limitation Act of Virginia, passed Feb. 25, 1819, with the provision of the code of 1860. The former, while prescribing twenty years as the time within which an action for the recovery of land must be brought, gave to infants, *feme coverts*, and others under disability, and to their heirs, ten years after such disability was removed, in which to sue, notwithstanding twenty years may have passed after the right to sue accrued. Va. Rev. Code, 1819, vol. i. p. 488. On the other hand, the code of 1860, as we have seen, saved the rights of those who claimed through the person to whom the right of entry or action accrued. Riley, undoubtedly, claimed through the wife, and could sue by virtue of his ownership of her interest, because she could have sued, had no conveyance been made.

But it is argued that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record. It is not necessary, in the view we take of this case, to controvert any of these propositions. They undoubtedly embody a correct statement, as far as it goes, of the law in reference to special verdicts. But we do not perceive that their application in this case would lead to any result different from the one already indicated. We have taken the special verdict as presenting the whole case as to Polly Wagoner's interest in the lands. It shows that Swetzer, under whom both sides claim, was, at his death, the owner of the land; that upon his death an undivided third thereof was

inherited by his daughter Polly; and that her interest was conveyed, in 1868, to Riley, by the joint deed of herself and husband. No fact is stated justifying the conclusion that her interest in the land had been lost, prior to the conveyance, either by adverse possession or by adverse claim. If such fact existed it was the duty of the defendants, who relied upon limitation, to have established it by proof, and caused it to be stated in the special verdict. The record contains no bill of exceptions, and were we at liberty to look beyond the special verdict, we should find in the record no evidence whatever upon that point. We cannot presume that any such evidence was offered. It was not for Riley to prove that Mrs. Wagoner's right had not been lost by adverse possession or adverse claim by others. That was matter of defence. Counsel for the plaintiffs in error have proceeded, in their argument, upon the assumption that the special verdict sets forth facts showing that her right was barred, at the time of the conveyance to Riley, or at the commencement of the action. But evidently it shows nothing more than that the husband was barred, as to *his* right of possession.

Another proposition advanced by counsel for plaintiffs in error deserves notice. It is, that the special verdict does not show that they were, at the institution of the suit, in possession of, or claimed title to, the interest of Polly Wagoner in the lands in dispute.

By the code of Virginia of 1860 it is declared that "if the jury be of opinion [in actions of ejectment] for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof, *or* claimed title thereto, at the commencement of the action." p. 612. There was a similar provision in the code of 1849, p. 561. The verdict in this case is in substantial conformity with this statutory requirement. The issue to be tried was whether the defendants unlawfully withheld from the plaintiff the premises described in the declaration. The verdict finds for the defendants as to the undivided two-thirds of the land in dispute. If that be not, in legal effect, a finding that defendants were in possession of the

entire land, there is a finding that defendants, respectively, claimed title to the several tracts in controversy. The verdict describes by metes and bounds each tract embraced in the suit, giving the name of each defendant by whom it is claimed, and finding for defendants as to two-thirds, undivided, of the respective tracts. It then proceeds to find as "to the remaining one-third of the lands hereinbefore excepted, and claimed by said defendants." Although the verdict does not state, in terms, that the defendants were in possession, it does state that they claimed the lands in dispute. And that seems to be sufficient under the local law. In reference to the case of *Southgate* v. *Walker* (2 W. Va. 427), it is sufficient to say that it related to an action of ejectment commenced in 1848, before the adoption of the above-recited provision. We are referred to no decision of the State court in conflict with the construction we have given to that provision.

We deem it unnecessary to comment upon any other objections urged against the special verdict. There is no error in the judgment, and it is

Affirmed.

WOOD *v.* RAILROAD COMPANY.

1. The grant of ten odd-numbered sections of land per mile to the Burlington and Missouri River Railroad Company by the act of July 2, 1864, c. 216 (13 Stat. 356), was *in præsenti*, and although not expressly requiring them to be taken within any specific lateral limit, necessarily implied that they should consist of those nearest to the line of road upon which the grant could, consistently with its exceptions and reservations, take effect.
2. Where the odd-numbered sections within the limit of twenty miles from the line were, conformably to the act, withdrawn, — *Held*, that so much of the land thereby embraced as was not sold, reserved, or otherwise disposed of, or to which, a pre-emption or a homestead claim had not attached, was subject to the grant, and that no right in conflict therewith could be thereafter acquired.
3. *United States* v. *Burlington & Missouri River Railroad Co.* (98 U. S. 334) commented on.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

This was a suit in equity brought by William H. Wood against the Burlington and Missouri River Railroad Company, wherein he prays for a decree adjudging that the legal title to certain land, being a portion of section 13, township No. 8, range 7, in Lancaster County, Nebraska, is vested in him.

The bill alleges that on Feb. 1, 1866, one Robert Beall made a pre-emption filing and an entry upon the land in question, and resided thereon from Feb. 1, 1866, to June 27, 1867, made valuable improvements, but afterwards abandoned it; that, May 24, 1871, the complainant duly made a homestead entry thereon, and complied with the laws so as to entitle him to a patent therefor, had it not been for the grant to the Burlington and Missouri River Railroad Company by the act of Congress approved July 2, 1864; that on or about Jan. 31, 1877, he made the requisite final proof to entitle him to a patent, but that the Land Department rejected his application therefor, on the ground that the land had been approved to the company by virtue of that act; that the company duly accepted the grant, and on June 15, 1865, filed with the Secretary of the Interior a map showing the location of the line whereon the road was built; that the land is within twenty miles thereof, and on or about April 8, 1875, was, through mistake and erroneous construction of law, selected for, and patented to, the company.

A demurrer to the bill having been sustained and the bill dismissed, Wood appealed to this court.

Mr. John I. Redick, *Mr. W. J. Connell*, and *Mr. E. E. Brown* for the appellant.

No counsel appeared for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The grant to the Burlington and Missouri River Railroad Company, by the act of Congress of July 2, 1864, c. 216, was of ten sections of land for every mile on each side of the line of its road when located, such sections to be designated by odd numbers, and the land to be only taken which, at the time the line was definitely fixed, had not been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached. The grant

was one of quantity, without any designation, in express terms, of any lateral limit on either side of the road, within which the land was to be selected. In this respect it differed from nearly all other grants of land made by Congress in aid of the construction of railroads. Other grants usually prescribed a lateral limit. The omission in that case was not accidental. Nearly all the land within the distance usually prescribed as a limit had already been disposed of to another railroad company, or, from the general settlement of the country, was likely to be appropriated before the line of the road could be definitely located. In order, therefore, that its proposed aid might not be defeated, Congress allowed the land granted to be taken on the line of the road wherever it could be found, without regard to the distance from its line to which the grantee might be compelled to go to satisfy its grant, by reason of previous appropriations.

Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land had not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation, and take lands farther removed from its road. In all grants which are to be satisfied out of sections along a line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantees to roam over the whole public domain lying on either side of the road, in search of land desired. The grants must be satisfied out of the first land found which meets the conditions named.

The line of the defendant's road was definitely located in June, 1865. The land consisting of the alternate sections designated by odd numbers within a limit of twenty miles was withdrawn from sale in July following, and so much of it as had not been previously sold, reserved, or otherwise disposed of, or to which a homestead or a pre-emption claim had not attached, was thus appropriated to the satisfaction of the grant. It could not be subsequently applied to other purposes or

devoted to the claim of private parties. It was immediately taken by the grant, and would have been sufficient to satisfy it in full, if no portion of the odd sections had been previously disposed of, or subjected to other claims. And the grantee could only go beyond that limit when it was found that there was a deficiency remaining after all within it had been appropriated.

The grant was one *in præsenti*, and when the sections granted were ascertained, the title to the land took effect by relation as of its date, except as to the reservations named. The land to which the complainant asserts a homestead claim is embraced in one of the sections within the twenty-mile limit; his claim, therefore, necessarily falls before the superior right of the company. Its estate had become vested when he took the initiatory steps to secure a homestead right.

The contention of the complainant, so far as we can understand his position, is this: That as there was no lateral limit expressed in the act of Congress, within which the land granted was to be selected, therefore it might be selected at any distance from the road, and that no appropriation could be considered as made, or any estate deemed to be vested, until the sections were actually selected, that is, until the patent of the United States was issued. This notion arises from a misconception of the language of our decision in the case of the United States against the same company, reported in 98th U. S. It there appeared that within the twenty-mile limit there was not sufficient unappropriated land to meet the grant, and accordingly the company made application to the Land Department for land outside of that limit for the balance, and patents for such balance were issued to it. A suit was afterwards brought by the United States to cancel those patents. We there held, as in this case, that the grant was one of quantity, and we observed that the land was subject only to these limitations: *First*, that the land must be embraced by the odd section; *second*, that it must be taken in equal quantities on each side of the road; *third*, that it must be on the line of the road; and, *fourth*, that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the

line was located. And we said that the terms of the grant did not require the land to be contiguous to the road; and if not contiguous, it was not easy to say at what distance the land to be selected would cease to be along the line. This language was used with reference to the objection in the case, that land could not be taken beyond the twenty-mile limit, where all within that limit had been previously exhausted. We did not intend to intimate that the land granted could be taken at any distance, without regard to previous appropriations, but only that land could be thus taken where, from previous appropriations, as in that case, the grant could not otherwise be satisfied.

Decree affirmed.

EGBERT *v.* LIPPMANN.

1. Reissued letters-patent No. 5216, granted Jan. 7, 1873, to Frances Lee Barnes, executrix of Samuel H. Barnes, deceased, for an "improvement in corset-springs," are void, the invention for which the original letters, bearing date July 17, 1866, were granted, having with his consent been in public use for more than two years prior to his application for them.
2. There may be a public use of the invention although but a single machine or device for which the letters were subsequently granted was used only by one person.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. J. C. Clayton and *Mr. Anthony Q. Keasbey* for the appellant.

Mr. John B. Staples, contra.

MR. JUSTICE WOODS delivered the opinion of the court.

This suit was brought for an alleged infringement of the complainant's reissued letters-patent, No. 5216, dated Jan. 7, 1873, for an improvement in corset-springs.

The original letters bear date July 17, 1866, and were issued to Samuel H. Barnes. The reissue was made to the complainant, under her then name, Frances Lee Barnes, executrix of the original patentee.

The specification for the reissue declares: —

"This invention consists in forming the springs of corsets of two or more metallic plates, placed one upon another, and so connected as to prevent them from sliding off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other, in the direction of their length or longitudinally, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained."

The second claim is as follows: —

"A pair of corset-springs, each member of the pair being composed of two or more metallic plates, placed one on another, and fastened together at their centres, and so connected at or near each end that they can move or play on each other in the direction of their length."

The bill alleges that Barnes was the original and first inventor of the improvement covered by the reissued letters-patent, and that it had not, at the time of his application for the original letters, been for more than two years in public use or on sale, with his consent or allowance.

The answer takes issue on this averment and also denies infringement. On a final hearing the court dismissed the bill, and the complainant appealed.

As to the second defence above mentioned, it is sufficient to say that the evidence establishes beyond controversy the infringement by the defendants of the second claim of the reissue.

We have, therefore, to consider whether the defence that the patented invention had, with the consent of the inventor, been publicly used for more than two years prior to his application for the original letters, is sustained by the testimony in the record.

The sixth, seventh, and fifteenth sections of the act of July 4, 1836, c. 357 (5 Stat. 117), as qualified by the seventh section of the act of March 3, 1839, c. 88 (id. 353), were in force at the date of his application. Their effect is to render letters-patent invalid if the invention which they cover was in public use, with the consent and allowance of the inventor, for more than two years prior to his application. Since the passage of the act of 1839 it has been strenuously contended

that the public use of an invention for more than two years before such application, even without his consent and allowance, renders the letters-patent therefor void.

It is unnecessary in this case to decide this question, for the alleged use of the invention covered by the letters-patent to Barnes is conceded to have been with his express consent.

The evidence on which the defendants rely to establish a prior public use of the invention consists mainly of the testimony of the complainant.

She testifies that Barnes invented the improvement covered by his patent between January and May, 1855; that between the dates named the witness and her friend Miss Cugier were complaining of the breaking of their corset-steels. Barnes, who was present, and was an intimate friend of the witness, said he thought he could make her a pair that would not break. At their next interview he presented her with a pair of corset-steels which he himself had made. The witness wore these steels a long time. In 1858 Barnes made and presented to her another pair, which she also wore a long time. When the corsets in which these steels were used wore out, the witness ripped them open and took out the steels and put them in new corsets. This was done several times.

It is admitted, and, in fact, is asserted, by complainant, that these steels embodied the invention afterwards patented by Barnes and covered by the reissued letters-patent on which this suit is brought.

Joseph H. Sturgis, another witness for complainant, testifies that in 1863 Barnes spoke to him about two inventions made by himself, one of which was a corset-steel, and that he went to the house of Barnes to see them. Before this time, and after the transactions testified to by the complainant, Barnes and she had intermarried. Barnes said his wife had a pair of steels made according to his invention in the corsets which she was then wearing, and if she would take them off he would show them to witness. Mrs. Barnes went out, and returned with a pair of corsets and a pair of scissors, and ripped the corsets open and took out the steels. Barnes then explained to witness how they were made and used.

This is the evidence presented by the record, on which the

defendants rely to establish the public use of the invention by the patentee's consent and allowance.

The question for our decision is, whether this testimony shows a public use within the meaning of the statute.

We observe, in the first place, that to constitute the public use of an invention it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof, but one well-defined case of such use is just as effectual to annul the patent as many. *McClurg* v. *Kingsland*, 1 How. 202; *Consolidated Fruit-Jar Co.* v. *Wright*, 94 U. S. 92; *Pitts* v. *Hall*, 2 Blatchf. 229. For instance, if the inventor of a mower, a printing-press, or a railway-car makes and sells only one of the articles invented by him, and allows the vendee to use it for two years, without restriction or limitation, the use is just as public as if he had sold and allowed the use of a great number.

We remark, secondly, that, whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person.

We say, thirdly, that some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. An invention may consist of a lever or spring, hidden in the running gear of a watch, or of a rachet, shaft, or cog-wheel covered from view in the recesses of a machine for spinning or weaving. Nevertheless, if its inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is a public one. So, on the other hand, a use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the statute. *Elizabeth* v. *Pavement Company*, 97 U. S. 126; *Shaw* v. *Cooper*, 7 Pet. 292.

Tested by these principles, we think the evidence of the complainant herself shows that for more than two years before the application for the original letters there was, by the consent and allowance of Barnes, a public use of the invention, covered by them. He made and gave to her two pairs of corset-steels, constructed according to his device, one in 1855 and one in 1858. They were presented to her for use. He imposed no obligation of secrecy, nor any condition or restriction whatever. They were not presented for the purpose of experiment, nor to test their qualities. No such claim is set up in her testimony. The invention was at the time complete, and there is no evidence that it was afterwards changed or improved. The donee of the steels used them for years for the purpose and in the manner designed by the inventor. They were not capable of any other use. She might have exhibited them to any person, or made other steels of the same kind, and used or sold them without violating any condition or restriction imposed on her by the inventor.

According to the testimony of the complainant, the invention was completed and put to use in 1855. The inventor slept on his rights for eleven years. Letters-patent were not applied for till March, 1866. In the mean time, the invention had found its way into general, and almost universal, use. A great part of the record is taken up with the testimony of the manufacturers and venders of corset-steels, showing that before he applied for letters the principle of his device was almost universally used in the manufacture of corset-steels. It is fair to presume that having learned from this general use that there was some value in his invention, he attempted to resume, by his application, what by his acts he had clearly dedicated to the public.

"An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is that no such consequence will necessarily follow from the invention being in public use or on sale, with the inventor's consent and allowance, at any time within two years before his application; but that, if the invention is in public use or on sale prior to that time, it will be conclusive evidence of

abandonment, and the patent will be void." *Elizabeth* v. *Pavement Company*, *supra*.

We are of opinion that the defence of two years' public use, by the consent and allowance of the inventor, before he made application for letters-patent, is satisfactorily established by the evidence.

Decree affirmed.

MR. JUSTICE MILLER dissenting.

The sixth section of the act of July 4, 1836, c. 357, makes it a condition of the grant of a patent that the invention for which it was asked should not, at the time of the application for a patent, "have been in public use or on sale with the consent or allowance" of the inventor or discoverer. Section fifteen of the same act declares that it shall be a good defence to an action for infringement of the patent, that it had been in public use or on sale with the consent or allowance of the patentee before his application. This was afterwards modified by the seventh section of the act of March 3, 1839, c. 88, which declares that no patent shall be void on that ground unless the prior use has been for more than two years before the application.

This is the law under which the patent of the complainant is held void by the opinion just delivered. The previous part of the same section requires that the invention must be one "not known or used by others" before the discovery or invention made by the applicant. In this limitation, though in the same sentence as the other, the word "public" is not used, so that the use by others which would defeat the applicant, if without his consent, need not be public; but where the use of his invention is by his consent or allowance, it must be public or it will not have that effect.

The reason of this is undoubtedly that, if without his consent others have used the machine, composition, or manufacture, it is strong proof that he was not the discoverer or first inventor. In that case he was not entitled to a patent. If the use was with his consent or allowance, the fact that such consent or allowance was first obtained is evidence that he was the inventor, and claimed to be such. In such case, he was not to

lose his right to a patent, unless the use which he permitted was such as showed an intention of abandoning his invention to the public. It must, in the language of the act, be *in public use* or on sale. If on sale, of course the public who buy can use it, and if used in public with his consent, it may be copied by others. In either event there is an end of his exclusive right of use or sale.

The word *public* is, therefore, an important member of the sentence. A private use with consent, which could lead to no copy or reproduction of the machine, which taught the nature of the invention to no one but the party to whom such consent was given, which left the public at large as ignorant of this as it was before the author's discovery, was no abandonment to the public, and did not defeat his claim for a patent. If the little steel spring inserted in a single pair of corsets, and used by only one woman, covered by her outer-clothing, and in a position always withheld from public observation, is a *public* use of that piece of steel, I am at a loss to know the line between a private and a public use.

The opinion argues that the use was public, because, with the consent of the inventor to its use, no limitation was imposed in regard to its use in public. It may be well imagined that a prohibition to the party so permitted against exposing her use of the steel spring to public observation would have been supposed to be a piece of irony. An objection quite the opposite of this suggested by the opinion is, that the invention was incapable of a public use. That is to say, that while the statute says the right to the patent can only be defeated by a use which is public, it is equally fatal to the claim, when it is permitted to be used at all, that the article can never be used in public.

I cannot on such reasoning as this eliminate from the statute the word *public*, and disregard its obvious importance in connection with the remainder of the act, for the purpose of defeating a patent otherwise meritorious.

WORLEY *v.* TOBACCO COMPANY.

1. Letters-patent No. 181,512, granted Aug. 22, 1876, to Christian Worley and Henry McCabe, for an improvement in manufacturing plug-tobacco are void, inasmuch as the improvement therein described was, with the consent of the inventor, in public use for more than two years prior to his application therefor.
2. *Egbert* v. *Lippmann* (*supra*, p. 333) cited and approved.
3. An inventor cannot relieve himself of the consequences of such use by assigning to those who used his invention an interest therein, or in the letters-patent granted therefor.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. Robert H. Parkinson for the appellants.

No counsel appeared for the appellees.

MR. JUSTICE WOODS delivered the opinion of the court.

The bill of complaint avers that letters-patent No. 181,512, bearing date Aug. 22, 1876, were issued to Christian Worley and Henry McCabe, the complainants, for an improvement in manufacturing plug-tobacco, of which Worley was the inventor, and McCabe his assignee of an undivided half, and that the defendants were infringing them. It prays for an injunction to restrain further infringement, and for damages and an account of profits. The answer asserts the invalidity of the letters, and denied infringement. Upon final hearing the Circuit Court dismissed the bill, and the complainants appealed.

The specifications on which these letters-patent were issued declare as follows: —

"The common way to proceed in finishing plug-tobacco is to press the bunches into plugs having the form seen in the retail stores. The plugs are next removed from the moulds in which they are pressed, and packed in boxes, and the boxes placed in a room where the tobacco is sweated and cured. The plugs are afterward taken from the boxes, and subjected to a second pressing before they are packed in the boxes for sale.

"My improved mode consists in finishing tobacco by placing the plugs in a box in alternate layers with thin metal plates, applying

extreme pressure thereto, and subjecting the plugs to dry heat for several hours, while they are tightly compressed between the plates which are in contact with the broad sides of the plugs; and, finally removing the box, and leaving the contents therein until cold, the whole process being adapted to give a fine and smooth finish to the wrapper, and by putting the plug in proper condition, doing away with its tendency to bulge out at the sides, as plugs are apt to do when they have not been thus treated."

The claim was thus set forth: —

"I am aware that there is not any novelty in, first, the simple finishing of tobacco by placing it in a heated room, and, secondly, the simple pressing of tobacco between metallic plates, and, therefore, I do not claim this distinct heating and pressing of tobacco broadly; but what I do claim as new and of my invention, and desire to secure by letters-patent, is —

"The mode of finishing tobacco substantially as described, consisting of placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat of about 140° Fahrenheit for several hours while they are tightly compressed between the plates, which are in contact with the broad sides of the plugs, and finally removing the box and leaving the contents therein until cold."

It will be seen that the patent disclaims the simple pressing of tobacco between plates, and the finishing of it by simply placing it in a heated room.

What appellants insist is new is this, namely, that while the plugs of tobacco are still confined in the finisher (which is the name given to the box in which they are placed before being subjected to extreme pressure), and while still tightly compressed between the metallic plates, they are placed in a sweat-room and allowed to remain several hours, and before being removed from the finisher are taken from the sweat-room and allowed to cool.

This process, it is contended, brings the oil of the tobacco to the surface of the plug, and gives it a glossy coating which improves its appearance, and keeps the tobacco from moulding or swelling.

The letters-patent are, therefore, for the process described, and nothing more. None of the appliances by which it is

carried on are claimed as new, and the evidence abundantly shows that they are all old devices.

The appellees insist that the letters are void, because the improvement described therein was in public use at the factory where Worley was employed for more than two years prior to his application therefor.

The law applicable to the case is sect. 24 of the act of July 8, 1870, c. 230, now embodied in the Revised Statutes as sect. 4886, which declares: "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

Neither the bill of complaint nor the evidence shows the date of Worley's application, nor the assignment of an undivided half of his invention to McCabe. The date of the letters must consequently be taken as the date of the application and assignment. The question is, therefore, whether the improvement patented to Worley was in public use for more than two years prior to that date; that is to say, whether a public use prior to Aug. 22, 1874, is proven.

We think that the testimony of the appellants themselves shows that this question must be answered in the affirmative.

From their depositions the following state of facts appears: —

McCabe was the proprietor of a tobacco manufactory in the city of St. Louis, and Worley was in his employment as a workman in the factory. In the summer of 1869 McCabe moved his factory from Second Street to Cass Avenue, and lost about two months of good working weather in so doing. The work of the factory was consequently carried on pretty late in the fall, and McCabe told Worley that they should have to go to work early in the spring. It was to prevent the sweating of tobacco which was manufactured in the spring of the year that Worley, in the fall of 1869, conceived the process for which he

afterwards obtained his patent. It was at the suggestion of McCabe that he turned his attention to the subject, and the process was contrived for McCabe's benefit. It is not pretended that Worley and McCabe were joint inventors. The invention was made by Worley alone. He at once began using his invention in McCabe's factory. He testifies that it was complete, and he became satisfied with its results, in 1871. It is true that after that date he made experiments to decide upon the best mode of constructing his finishers so as to secure the requisite strength; but the finisher constituted no part of his patented invention. In 1871 his invention was complete, and in his opinion successful, and was adhered to from that date, without change.

The process was used in the factory of McCabe under the direction of Worley until the application was filed for the patent in 1876, and according to the testimony of McCabe, Worley continued the process for McCabe's benefit, who paid him a salary larger than was usual for his knowledge as a tobacco manufacturer. During all the time from 1870 to 1876 thousands of pounds of tobacco finished by means of this process in the factory of McCabe were sold in the market every year. No injunction of secrecy was laid on McCabe by Worley, no one was excluded from the factory where his process was carried on, and at least one manufacturer learned the process from observing it in McCabe's factory, and adopted it and used it in his own. Worley, it is true, testifies that he told several of the hands employed in the factory not to say anything about what they were doing, and McCabe says that before the patent was obtained there was "an outside understanding" that they were "to keep it away from the public eye as much as possible." The testimony of the appellants on this point is most vague and unsatisfactory, and it is evident that no means were taken by them to keep the process invented by Worley a secret, and it was not kept a secret. Worley, according to his own testimony, communicated his process not only to McCabe but to others, and used it openly in McCabe's factory for a period of six years before applying for his patent.

It has been repeatedly held by this court that a single instance of the public use of his invention by a patentee, for more

than two years before the date of his application, will be fatal to the validity of the letters, when issued. *Egbert* v. *Lippmann*, *supra*, p. 333, and the authorities there cited.

We think the testimony of the appellants themselves shows such a public use of the process covered by Worley's patent as to render it invalid. This evidence brings the case clearly within the terms of the decision of *McClurg* v. *Kingsland* (1 How. 202), where it was declared that if a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of the employer, has his wages increased in consequence of the useful result of the experiments, makes the article invented, and permits his employer to use it, no compensation for its use being paid or demanded, and then obtains a patent for it, the patent is invalid and void.

Suppose Worley had not assigned an interest in his invention to McCabe, and, after obtaining his letters, had brought suit against the latter for infringement, it is perfectly clear that McCabe could have defended the suit successfully on the ground of his own public use of the invention for two years before the date of the patent. If such defence could be made by McCabe, it could be made by any one else, for the facts relied on would render the patent void.

The fact that McCabe, just before the patent was applied for, became the assignee of an interest in it, does not make this defence any the less effectual; for the assignee of a patent-right takes it subject to the legal consequences of the previous acts of the patentee. *McClurg* v. *Kingsland*, *supra*.

The inventor cannot relieve himself of the consequences of the prior public use of his patented invention, by assigning an interest in his invention or patent to the person by whom the invention was thus used.

We think the evidence of the appellants themselves establishes clearly the defence under consideration.

Decree affirmed.

GAUTIER *v.* ARTHUR.

1. It was the intention of Congress, so far as the free list in the fifth section of the act of June 6, 1872, c. 315 (17 Stat. 233), is concerned, to put an end to the discriminating duties imposed by the seventeenth section of the act of June 30, 1864, c. 171. 13 id. 215.
2. Plumbago, being embraced in that list, was not, although imported in a foreign vessel, subject to duty.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Abram Wakeman for the plaintiffs in error.

The Solicitor-General, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover duties paid on goods, consisting of over eight hundred barrels of plumbago, imported into the United States by a French vessel, in July, 1873, from Columbo, in the Island of Ceylon.

The plaintiffs, who are the importers, claim that the goods were exempt from duty under the fifth section of the act of June 6, 1872, c. 315 (17 Stat. 233), "to reduce duties on imports," which places plumbago on the free list, and exempts its importation from duty after the 1st of August of that year. The collector held that the goods were liable to duty under the seventeenth section of the act of June 30, 1864, c. 171. 13 id. 215. The amount exacted was accordingly paid under protest. That section provides, with certain exceptions not material in this case, that a discriminating duty of ten per centum *ad valorem*, "in addition to duties imposed by law," shall be levied upon all goods subsequently imported in ships or vessels not of the United States.

The contention of the government is that this seventeenth section imposes a duty upon all goods imported by foreign vessels, — upon such as were previously free as well as those already subjected to duty; and that the fifth section of the act of 1872 was not designed to affect the discrimination prescribed, and must be, therefore, limited in its application to goods imported in vessels of our own country.

The policy of discriminating against the importation by foreign vessels at all, would seem to require that no distinction should be made between the two classes of goods. The encouragement of importation by vessels of our country would be greater by extending the discrimination to all goods, than by limiting it to those upon which a duty was previously imposed. A construction of the section, in harmony with this view, is not an unreasonable one. In our judgment it best carries out the purposes of the act in imposing a discrimination; and it conforms to the construction which this court, in *Hadden* v. *The Collector*, reported in the 5th of Wallace, gave to the succeeding section of the same act, or rather to one containing the same provisions.

But assuming this construction to be correct, the second part of the contention of the government does not necessarily follow. If the fifth section of the act of 1872 stood alone, it might, with much reason, be claimed that it was not intended to affect the discrimination prescribed by the act of 1864. But it does not stand alone. The general repealing clause of the statute declares that all acts and parts of acts inconsistent with its provisions are repealed; and it excepts from its operation the provisions of certain other acts, among which the discriminating section of the act of 1864 is not mentioned. Both from the general language of the repealing clause, and the enumeration of the provisions of acts excepted from it, we are forced to conclude that it was the intention of Congress to put an end, so far as the free list in the fifth section of the act of 1872 is concerned, to the operation of the discriminating act of 1864. This conclusion necessarily disposes of the case and requires a judgment of reversal.

The Circuit Court founded its decision upon the eighteenth section of the act of 1864, which provided that, after it took effect, there should be levied on all goods "of the growth or produce of countries east of the Cape of Good Hope" (except raw cotton), when imported from places west of the cape, a duty of ten per centum *ad valorem* in addition to the duties imposed on such articles when imported directly from the place or places of their growth or production. But it is evident that the section has no application to the case at bar, for the goods

upon which the duties were levied were imported directly from Ceylon, which, as we know, is east of the Cape of Good Hope, and not a place this side of it. And in founding its decision on that section the Circuit Court also seems to have assumed that the plumbago was of the produce of the island; but of that fact there was no proof in the case. Unless it was so proved, even upon the hypothesis of the court, there was no reasonable pretence for exacting the duty. If the assumed fact were found in the case, the section referred to would not, as stated, apply; nor would the sections of the act of 1865 and 1872, which re-enact its provisions with the exceptions enlarged.

As the facts in this case are agreed to by counsel, it will not be necessary to order a new trial, but the judgment will be reversed and the court below directed to enter a judgment for the plaintiffs for the amount of duties paid, with legal interest and costs; and it is

So ordered.

DRAPER *v.* DAVIS.

Although, in default of payment, a deed of trust authorizes a sale by the trustee, yet where he attempts to sell property which is subject to conflicting liens, and it is doubtful whether a part of it is covered by the deed, a court of equity has jurisdiction to restrain the sale, determine the rights of all parties, and administer the fund.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. William A. Meloy for the appellant.

Mr. John Selden and *Mr. Leigh Robinson*, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The circumstances out of which this case grew were as follows: In 1867, Draper, Thomas, and Bodine, partners in business, having purchased a planing-mill, with its fixtures, machinery, and chattels, from one Henry S. Davis, executed

to Fendall and Winder a deed of trust to secure the payment of notes to the amount of $20,000, given to Davis for the purchase-money. The deed embraced the lot, the mill, machinery, and all other goods and chattels on the premises, and also all other machinery and other articles then in and on said premises, or which might thereafter be placed in and upon them. This debt was reduced by payments to an amount somewhat less than $10,000.

In July, 1872, Bodine sold his interest to Draper and Thomas, and to pay him they borrowed $10,000 of one Mrs. Forest, and executed, as security therefor, a trust deed to Anthony Hyde, upon the same lot, mill, machinery, fixtures, and furniture then on the premises, and also upon several other lots not embraced in Davis's trust deed.

In February, 1875, the mill burned down, and Draper and Thomas rebuilt it at an expense of about $3,600, Davis furnishing the money.

Draper and Thomas failing to pay their interest, in March, 1877, Hyde, as trustee for Mrs. Forest, advertised for sale the property embraced in her deed of trust, including the fixtures, machinery, and personal property in the planing-mill. The original bill in this case was filed by Draper to restrain the sale. The principal grounds on which the bill was founded were, that Hyde threatened to sell more property than was embraced in his trust deed; that the sale at that time would be attended with a great sacrifice; that Davis's trust deed was prior to that of Mrs. Forest's; that her deed did not cover the machinery and chattels procured since the fire, or since its execution; that Thomas in 1870 had executed a trust deed on his share to the complainant Draper to secure $2,600; that Mrs. Forest's trust deed covered other property; and that to secure a just and equitable distribution of the proceeds there should be a sale under a decree of the court. The bill prayed an injunction to prevent Hyde from making a sale as proposed by him, especially as to the machinery and personal property, and made Thomas and his wife, Davis and his surviving trustee, Winder, and one Champlin, parties defendant. A temporary injunction was granted. Answers were filed and proofs taken. In June, 1877, whilst the suit was pending, Davis

directed his trustee, Winder, to advertise for sale the property embraced in his deed of trust. Draper then filed a supplemental bill to enjoin this sale. The court finally made a decree, directing Winder to sell all the property embraced in the trust deed executed to him and Fendall, including the planing-mill, fixtures, machinery, and personal property, and to bring the proceeds into court to abide its further order, retaining the cause in the mean time for the purpose of ascertaining the condition of all the parties after the sale shall have taken place. Hyde was enjoined from making a sale until further order.

Draper appealed from this decree. Why he has appealed it is somewhat difficult to see. The decree is substantially in accordance with what he sought by his bill, — a judicial administration of the property and a provision for ascertaining the equities of the parties. We think that the decree was a just and proper one. Although a deed of trust to secure a debt usually authorizes the trustee to sell on default of payment, yet where a trustee attempts, as Hyde did in this case, to sell property subject to conflicting liens, some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly. No injury is done by the decree appealed from to Davis or to Mrs. Forest, because they want a sale to be made, and the sale ordered by the court will fully protect their rights, as well as those of all the other parties; and, besides, they have not appealed from the decree. It cannot be doubted that the court had full power to take the trustee, Winder, under its control and to direct him to dispose of the trust fund embraced in the deed executed to him, including the personal property in dispute. As it is the purpose of the court to adjust all the equities of the parties in due and regular course, we are unable to perceive anything in the decree which can injuriously affect the appellant.

Decree affirmed.

MILLER *v.* BRASS COMPANY.

1. In reissued letters-patent No. 6844, granted, Jan. 11, 1876, to Joshua E. Ambrose, assignor by mesne conveyances to Edward Miller & Co., for an improvement in lamps, the second claim is void, it not being for the invention described and claimed in the original application.
2. Where a specific device or combination is claimed, the non-claim of other devices or combinations apparent on the face of the specification is, in law, so far as the patentee is concerned, a dedication of them to the public, and will so be enforced, unless he with all due diligence surrenders his patent for reissue, and proves that his omission to claim them arose wholly from inadvertence, accident, or mistake.
3. Such lapse of time as indicates his want of due diligence is fatal, and the reissue, if granted, will be void.
4. The court condemns the practice of reissuing letters-patent with broader claims than those covered by the original letters.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The facts are stated in the opinion of the court.

Mr. John S. Beach for the appellants.

Mr. C. R. Ingersoll, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit brought by Edward Miller & Co. against The Bridgeport Brass Company to restrain the infringement of a patent, and for an account of profits, &c. The patent was for an alleged improvement in lamps, and was originally granted to Joshua E. Ambrose, Oct. 16, 1860, for fourteen years, and was extended for seven years longer. It was twice surrendered and reissued, once in May, 1873, and again in January, 1876. The court below dismissed the bill on the ground that the second reissue, No. 6844, on which the suit was brought, was not for the same invention which was described and claimed in the original patent. We agree with the Circuit Court in the conclusion to which it came. The original patent described a combination of devices, amongst other things, two domes or reflectors, one above the other, elevated above a perforated cap through which a wick tube and a vapor tube ascended. It was claimed that this combination of devices,

especially including the two domes, which admitted the external air between them for producing a more perfect combustion, would make a lamp which, without a chimney and without danger of explosion, would burn those hydro-carbons which are volatile and contain an excess of carbon. The invention proved a failure, but it was found that the use of one of the domes (and the other parts), with the restoration of the chimney, would be a real improvement, and both the complainant and the defendant made such lamps in large quantities. Fifteen years after the original patent was granted, the patentee (or rather his assignee) discovers that the improved lamp was really a part of his original invention, and that by inadvertence and mistake he had omitted to claim it. We think, however, that the court below was clearly right in holding that the invention specified in the second claim of the reissued patent (which is the one in question here) is not the same invention which was described and claimed in the original patent. The latter was for a double dome without a chimney, the peculiarity of the supposed invention being the use of the double dome as a means of dispensing with the chimney. The reissue is for a single dome with a chimney. It is not only obviously a different thing, but it is the very thing which the patentee professed to avoid and dispense with.

But there is another grave objection to the validity of the reissued patent in this case. It is manifest on the face of the patent, when compared with the original, that the suggestion of inadvertence and mistake in the specification was a mere pretence; or if not a pretence, the mistake was so obvious as to be instantly discernible on opening the letters-patent, and the right to have it corrected was abandoned and lost by unreasonable delay. The only mistake suggested is, that the claim was not as broad as it might have been. This mistake, if it was a mistake, was apparent upon the first inspection of the patent, and if any correction was desired, it should have been applied for immediately.

These afterthoughts, developed by the subsequent course of improvement, and intended, by an expansion of claims, to sweep into one net all the appliances necessary to monopolize a profitable manufacture, are obnoxious to grave animadver-

sion. The pretence in this case that there was an inadvertence and oversight which had escaped the notice of the patentee for fifteen years is too bald for human credence. He simply appealed from the judgment of the office in 1860 to its judgment in 1876; from the commissioner and examiners of that date, to the commissioner and examiners of this: and upon a matter that was obvious on the first inspection of the patent. If a patentee who has no corrections to suggest in his specification except to make his claim broader and more comprehensive, uses due diligence in returning to the Patent Office, and says "I omitted this," or "my solicitor did not understand that," his application may be entertained, and, on a proper showing, correction may be made. But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public. This legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident, or mistake, without any fraudulent or deceptive intention on his part; and this should be done with all due diligence and speed. Any unnecessary laches or delay in a matter thus apparent on the record affects the right to alter or reissue the patent for such cause. If two years' public enjoyment of an invention with the consent and allowance of the inventor is evidence of abandonment, and a bar to an application for a patent, a public disclaimer in the patent itself should be construed equally favorable to the public. Nothing but a clear mistake, or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim.

The power given by the law to issue a new patent upon the surrender of the original, for the correction of errors and mistakes, has been greatly misunderstood and abused. It was first contained in the act of July 3, 1832, c. 357, and the law was adopted in view of suggestions made in several judgments of this court. But it was carefully confined to cases where the patent was invalid or inoperative by reason of a failure to com-

ply with any of the terms and conditions prescribed by the law for giving a clear and exact description of the invention, and where such failure was due to inadvertence, accident, or mistake, without any fraudulent or deceptive intention. This being shown, a new patent, with a correct specification, was authorized to be issued for the same invention. The act of July 4, 1836, c. 45, enlarged the power to grant reissues by adding an additional ground for reissue; namely, that the patentee had inadvertently claimed in his specification, as his own invention, more than he had a right to claim as new. And, with that addition, the law has continued substantially the same to the present time. The fifty-third section of the act of 1870, c. 230, which was the law on this subject when the reissue in the present case was granted, is in the following words: "Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent, and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee." It will be observed that whilst the law authorizes a reissue when the patentee has claimed too much, so as to enable him to contract his claim, it does not, in terms, authorize a reissue to enable him to expand his claim. The great object of the law of reissues seems to have been to enable a patentee to make the description of his invention more clear, plain, and specific, so as to comply with the requirements of the law in that behalf, which were very comprehensive and exacting. The third section of the act of 1793, c. 11, required an applicant for a patent "to deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same. And in the case of any machine, he shall fully explain the

principle, and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions; and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings." This careful and elaborate requirement was substantially repeated in the sixth section of the act of 1836, with this addition: "And shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." Although it had been customary to append a claim to most specifications, this was the first statutory requirement on the subject. It was introduced into the law several years subsequently to the creation of reissues; and it was in the thirteenth section of this act of 1836 that provision was made for a reissue to correct a claim which was too broad in the original. Now, in view of the fact that a reissue was authorized for the correction of mistakes in the specification before a formal claim was required to be made, and of the further fact that when such formal claim was required express power was given to grant a reissue for the purpose of making a claim more narrow than it was in the original, without any mention of a reissue for the purpose of making a claim broader than it was in the original, it is natural to conclude that the reissue of a patent for the latter purpose was not in the mind of Congress when it passed the laws in question. It was probably supposed that the patentee would never err in claiming too little. Those who have any experience in business at the Patent Office know the fact, that the constant struggle between the office and applicants for patents has reference to the claim. The patentee seeks the broadest claim he can get. The office, in behalf of the public, is obliged to resist this constant pressure. At all events, we think it clear that it was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of reissuing them with broader and more comprehensive claims, although, under the general terms of the law, such a reissue may be made where it clearly appears that an actual mistake has inadvertently been made. But by a curious misapplication of the law it has come to be principally resorted to for the pur-

pose of enlarging and expanding patent claims. And the evils which have grown from the practice have assumed large proportions. Patents have been so expanded and idealized, years after their first issue, that hundreds and thousands of mechanics and manufactures, who had just reason to suppose that the field of action was open, have been obliged to discontinue their employments, or to pay an enormous tax for continuing them.

Now whilst, as before stated, we do not deny that a claim may be enlarged in a reissued patent, we are of opinion that this can only be done when an actual mistake has occurred; not from a mere error of judgment (for that may be rectified by appeal), but a real *bona fide* mistake, inadvertently committed; such as a Court of Chancery, in cases within its ordinary jurisdiction, would correct. Reissues for the enlargement of claims should be the exception and not the rule. And when, if a claim is too narrow, — that is, if it does not contain all that the patentee is entitled to, — the defect is apparent on the face of the patent, and can be discovered as soon as that document is taken out of its envelope and opened, there can be no valid excuse for delay in asking to have it corrected. Every independent inventor, every mechanic, every citizen, is affected by such delay, and by the issue of a new patent with a broader and more comprehensive claim. The granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and void. It will not do for the patentee to wait until other inventors have produced new forms of improvement, and then, with the new light thus acquired, under pretence of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms. Such a process of expansion carried on indefinitely, without regard to lapse of time, would operate most unjustly against the public, and is totally unauthorized by the law. In such a case, even he who has rights, and sleeps upon them, justly loses them.

The correction of a patent by means of a reissue, where it is invalid or inoperative for want of a full and clear description of the invention, cannot be attended with such injurious results as follow from the enlargement of the claim. And hence a

reissue may be proper in such cases, though a longer period has elapsed since the issue of the original patent. But in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied; and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent. And when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable, and whether the reissue was therefor contrary to law and void.

We think that the delay in this case was altogether unreasonable, and that the patent could not lawfully be reissued for the purpose of enlarging the claim and extending the scope of the patent.

Decree affirmed.

JAMES *v.* CAMPBELL.

CAMPBELL *v.* JAMES.

CLEXTON *v.* CAMPBELL.

1. Norton's reissued letters-patent, dated Oct. 4, 1870, for an improved post-office stamp for printing the post-mark and cancelling the postage-stamp at one blow, are void, by reason of not being for the same invention specified in the original.
2. If letters-patent fully and clearly describe and claim a specific invention, complete in itself, so as not to be inoperative or invalid by reason of a defective or an insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim in order to embrace an invention not specified in the original. *Burr* v. *Duryee* (1 Wall. 531) reaffirmed.
3. In such case, the court ought not to be required to explore the history of the art to ascertain what the patentee might have claimed: he is bound by his statement describing the invention.
4. A patentee cannot claim in a patent the same thing claimed by him in a prior patent; nor what he omitted to claim in a prior patent in which the invention was described, he not having reserved the right to claim it in a separate patent, and not having seasonably applied therefor.
5. Letters-patent for a machine cannot be reissued for the purpose of claiming the process of operating that class of machines; because, if the claim for

the process is anything more than for the use of the particular machine patented, it is for a different invention. *Powder Company* v. *Powder Works* (98 U. S. 126) reaffirmed.

6. The government of the United States has no right to use a patented invention without compensation to the owner of the patent.

7. *Query*, Can a suit be maintained against an officer of the government for using such an invention solely in its behalf; and must not the claim for compensation be prosecuted in the Court of Claims.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The facts are fully stated in the opinion of the court.

These cases were argued at the last term. *Mr. Attorney-General Devens* and *Mr. Samuel B. Clarke* appeared for James. *Mr. George H. Williams*, *Mr. M. P. Norton*, and *Mr. Benjamin F. Butler* appeared for Campbell. *Mr. Edward D. Bettons* appeared for Clexton.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case is founded on a bill in equity filed by Christopher C. Campbell, the complainant below, against Thomas L. James, United States postmaster in and for the city of New York, to enjoin him from using a certain implement for stamping letters, which the complainant claims to have been patented to one Marcus P. Norton, by letters-patent dated April 14, 1863, and surrendered and reissued on the 23d of August, 1864; and again surrendered and reissued on the 3d of August, 1869, and again, finally, on the 4th of October, 1870. The complainant claims to be assignee of Norton, the patentee. Other persons claiming an interest in the patent were made parties to the suit. The Circuit Court rendered a decree in favor of the complainant, and adjusted the rights of the several parties to the amount of the decree. The defendant, James, appealed. The other parties, not being satisfied with the decree as it affected their mutual interests, also appealed. The case is now before us in all its aspects. Supposing the court below to have had jurisdiction of the case, the first question to be considered will be the liability of the principal defendant, James, to respond for the use of the machine or implement in question.

That the government of the United States when it grants

letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," which could not be effected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the government, such as explosive shells, rams, and submarine batteries to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments. It has been the general practice, when inventions have been made which are desirable for government use, either for the government to purchase them from the inventors, and use them as secrets of the proper department; or, if a patent is granted, to pay the patentee a fair compensation for their use. The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.

But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the Court of Claims, if that court has the requisite jurisdiction. As its jurisdiction does not extend to torts, there might be some difficulty, as the law now stands, in prosecuting

in that court a claim for the unauthorized use of a patented invention; although where the tort is waived, and the claim is placed upon the footing of an implied contract, we understand that the court has in several recent instances entertained the jurisdiction. It is true, it overruled such a claim on the original patent in this case, presented in 1867; but, according to more recent holdings, it would properly now take cognizance of the case. The question of its jurisdiction has never been presented for the consideration of this court, and it would be premature for us to determine it now. If the jurisdiction of the Court of Claims should not be finally sustained, the only remedy against the United States, until Congress enlarges the jurisdiction of that court, would be to apply to Congress itself. The course adopted in the present case, of instituting an action against a public officer, who acts only for and in behalf of the government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents except in the manner provided by law. We have heretofore expressed our views on this subject in *Carr* v. *United States* (98 U. S. 433), where a judgment in ejectment against a government agent was held to be no estoppel against the government itself.

But as the conclusion which we have reached in this case does not render it necessary to decide this question, we reserve our judgment upon it for a more fitting occasion.

The subject-matter of the patent on which the bill in this case was founded is an implement or stamp for postmarking letters and cancelling revenue and postage stamps. The original patent, dated April 14, 1863, exhibited two stamps connected together by a cross-bar which was attached to a handle; one stamp being intended for printing the post-mark, and the other for cancelling the postage-stamp, — both operations being performed by a single blow. The stamps consisted of small hollow blocks, or cylinders, in which were inserted and fastened the types which produced the impressions desired. In one were placed the lettered types which produced the post-mark, and in the other a single type which blotted or

cancelled the postage-stamp. The patentee, in his specification, described the invention as follows: —

"The nature of my improvements, herein described, consists in the employment and combination of a device for cancelling postage or other stamps by means of wood, cork, or similar material inserted in a tube or recess therein, for the purpose of effacing or blotting such stamps with indelible ink. It also consists in the combination of a cancelling device, having wood, cork, rubber, or any similar material for the type or blotter therein, with any post-marking device so as to blot, cancel, or efface postage-stamps with indelible ink at the same time and operation of post-marking of letters, packets, &c., &c.

"To enable others skilled in the art to which my invention relates to make and use the same, I will here proceed to describe the construction and operation thereof, which is as follows, to wit: I construct the post-marking stamp (D) of any suitable material. (E), Fig. 3, is the mortice or recess of suitable dimensions to receive the type for the month, the day of the month, and the year, around which is the name of the place where used, and is the same as the postmarking device described in my letters-patent, bearing date the sixteenth day of December, 1862, and which is secured to the cross-piece (B) in the same manner and by the same means as described and set forth in the said patent, which is also the case with the cancelling device (C).

"I construct the cancelling stamp or device (C) of any suitable material, of any size required in diameter, and in length to correspond to the postmarking device (D). (F), Fig. 3, is the tube or recess in the device (C) for the purpose of receiving the blotting or cancelling device (G), Figs. 2 and 5, which device is made of wood, cork, rubber, or similar material, so as to closely fit the said tube or recess (F), Fig. 3. The face of this device may contain a plan or form for cancelling with indelible ink, like that shown at Fig. 2, or it may have any plan or form for that purpose thought best to devise or use. This device (G) may project somewhat below the lower end of the said tube (F), as seen at Fig. 5, and may also project below the face of the postmarking or rating device (D), Figs. 2 and 3, and it may be driven out of the said tube or recess by means of a pin or bolt operating through the hole (A), Figs. 3 and 5, for the purpose of repairs, or to replace it by a new one. The said tube or recess (G) may be any size in diameter required or any depth desired. The said cancelling stamp or device (C)

being thus constructed with cork, rubber, or other elastic substance for type or blotter, will receive and hold on the face thereof ink in quantities sufficient to blot or cancel the postage-stamp in such manner as to prevent the possibility of the said postage-stamp being cleansed of the cancelling ink by any chemical or other process, for the said ink would be so effectually put thereon that any attempts to remove it therefrom would entirely destroy the said postage-stamp, and thereby render the same incapable of a second or re-use. The said cork, rubber, or other elastic substance, as aforesaid, will render the said stamp capable of an easy and rapid use, for there being a yielding of the same when the blow is given, the operator will not tire as soon by a constant or continued use of the same as though it were of solid metal, and the same will greatly aid in raising the entire stamp from the paper and postage-stamp when the impression shall have been given by the operator. The said blotter or type can be more easily repaired or replaced by a new one at less expense than if made of solid metal. The said cork, rubber, or other elastic material may extend upward to the said cross-bar (B), and there be connected to the same by a screw or pin-bolt, if desired, which will be the same in effect and in operation.

"Having thus described my invention and improvements in marking and cancelling stamps, what I claim and desire to secure by letters-patent of the United States of America, therein, is: —

"1. The cancelling device (C) with wood, cork, or rubber type or blotter (G) therein, or any device substantially the same, so as to cancel the postage-stamp with indelible ink, substantially as herein described and set forth.

"2. I also claim the cancelling device (C) with wood, cork, or similar material forming the type or blotter (G) therein, in combination with the cross-piece (B), and with the postmarking device (D) substantially as herein described and set forth."

We have given the description and claim in full for the purpose of better comparing it with the reissued patent on which the suit was brought, and which is dated Oct. 4, 1870. It will be seen that the invention claimed is very specific and definite in its character. In the first place, the cancelling device is claimed separately, consisting of a hollow tube, in which is inserted the cancelling type or blotter made of wood, cork, rubber, or other elastic substance. The nature of the substance of which the blotter was to be made is emphasized thus:

"The said cork, rubber, or other elastic substance as aforesaid will render the said stamp capable of an easy and rapid use, for there being a yielding of the same when the blow is given, the operator will not tire as soon by a constant or continued use of the same *as though it were of solid metal*, and the same will greatly aid in raising the entire stamp from the paper and postage-stamp when the impression shall have been given by the operator. The said blotter or type can be more easily repaired or replaced by a new one, at less expense *than if made of solid metal*." It is plain, therefore, that elasticity in the material of which the blotter was to be composed was a distinctive feature of the blotting device thus separately claimed. Besides the advantages referred to in the foregoing extracts, its superior adaptability to hold indelible ink was evidently regarded by the inventor as important. From the facts appearing in the case, it is quite clear that a separate claim of this blotting device could not have been sustained had it not presented these special characteristics; had it not, in fact, contained all the elements it did contain. The patentee himself, as will be more fully seen hereafter, had, shortly before his application for this patent, obtained a patent for a double stamp exactly like the one patented in this, except that the blotter type was made of "steel, or other material which would answer the purpose." Of course he could not claim a blotter of like material in the patent now under consideration. And the record is full of evidence to show that hand-types for stamping letters and other characters with or without the use of ink had long been constructed of almost every kind of material. The general form of the instrument was old. Stamps fastened to what is called a brad-awl handle, adjusted thereto centrally, so as to balance the pressure, was used for seals and other instruments for making impressions of every sort from time immemorial; and hand-stamps of the same general description, having a cylindrical type-holder in place of a seal, made hollow for inserting and holding the type, had long been used in the Post-Office Department. It was not without good cause, therefore, that the separate claim for the cancelling device, as a distinct invention, was confined to an elastic type or blotter enclosed in a hollow tube. In like manner, the combination of devices in

the entire instrument, forming the subject of the second claim, was necessarily specific in its character, being restricted by the special construction of the cancelling device. The specific form of a cross-bar to sustain the type-holder, and balance the effect of the blow or pressure when making the impression, was substantially contained in the common hand-type, long before used for printing names on linen with indelible ink. This instrument consisted of a metallic trough or receiver to hold the type, the bottom of which, at its middle part, was attached to a wooden brad-awl handle. Inserting the types for a post-mark in one end of this device, and the type for blotting the postage-stamp in the other, it would be a complete double stamp like that claimed by Norton, the patentee. The fact that it might require a stronger piece of metal for post-office uses than was required for stamping letters on cloth, or that the type-holder would be better adapted to the purpose by being divided into two compartments, does not detract from the substantial similarity of the instruments. Given the idea of stamping the post-mark and blotting the postage-stamp with one instrument at a single blow, it required but little invention, in view of what was then in common use, to adjust the printing apparatus to the handle by means of a block, shoulder, or cross-bar, or other similar device. The needs and requirements of the instrument would soon be developed, and manifest themselves to any skilled workman in that branch of mechanics.

The evidence does not show to our satisfaction that Norton was by any means the first inventor of a double post-office stamp, so constructed as to make the post-mark and cancel the postage-stamp at one blow. If that fact was important, the burden of proof was on the complainant to show that Norton's invention antedated those of others proven in the cause, of which there were several independent of each other. But there is no satisfactory proof that Norton ever produced, prior to 1862, or, at most, prior to 1861, any other double stamp than one which he patented in 1859. In connection with one C. A. Haskins, he obtained a patent in October, 1857, for a hand-stamp attached to a standard with a projecting arm, and provided with a spring to lift it from the paper automatically, after the blow which made the impression was given. This stamp was an elaborate

and complicated contrivance of wheels and cylinders for arranging and manipulating the types for making letters and figures showing the month and day of the month in the post-mark. It had no hint of any secondary apparatus for effacing a postage-stamp at the same time. But in August, 1859, Norton obtained a patent for the use of his assignees, Reynolds and Low, which did contain a device for effacing the postage-stamp. Low seems to have been associated with him in the patent of 1857 in the way of furnishing money, but what was the nature or extent of the assignees' real interest in the patent of 1859 is not made to appear. The application for this patent was dated May 3, 1859, but when filed in the Patent Office is not shown. The principal feature of the stamp described in this patent was also an elaborately contrived device for arranging the types for the letters and figures in the postmarking stamp, something in the same line with that described in the patent of 1857; no claim for which, however, was allowed. But to the postmarking stamp, which was fixed to the handle in the ordinary way, was attached, on one side, entirely outside of the bearing of the handle, a flat piece of metal to be used as a blotter, for which, in combination with the postmarking stamp, a claim was allowed. It is clear to us that this was the stamp to which Norton alluded, and which he asked to have the privilege of testing in the post-office at Troy, in his letter to the Assistant Postmaster-General of the 11th of April, 1859, on which much stress has been laid by the complainants. The letter does not give a description of the stamp he wished to test, but it concludes with these words: "I herewith enclose you an envelope containing a post-mark from the stamp on the left, and an erasure upon the stamp made at the same operation of post-mark. As *now* constructed, is believed to work well." This is a clear intimation that what he desired to have tested had been recently brought to its existing form. In a former part of the letter he had said: "While the order given by your department was in force, I was unable, in consequence of sickness, to thoroughly test my stamp. It was used upon about three thousand letters only during that time. I have since made some changes in it which seem to make it a much better thing for the purpose designed. Now I ask the opportunity to test

it without any expense to the government." An order was made by Mr. King, the Assistant Postmaster-General, on the 4th of May, 1859, authorizing the postmaster at Troy to use for postmarking letters at his office for the term of three months "Norton's improved marking stamp." The application for the patent had been prepared and sworn to the day previous to this order, namely, May 3, 1859. In this application the description of the invention commences thus: —

"The nature of my invention consists in constructing, combining, and arranging a hand-stamp, hereinafter described, so as to contain a cylinder with the initials of each and every month in a year, and two other cylinders with figures for the respective days of each and every month; also a cylinder with figures to represent ten years, more or less as the case may be, which cylinders shall revolve upon the same shaft with each, and within a stationary form of type, and thereby print the month, the day of the month, and the year in connection with each, and each in connection with and at the same time of the printing of the subject-matter upon the aforesaid stationary form of type. It also consists in attaching a blotter, hereinafter described, to the hand-stamp aforesaid, upon one or two sides thereof, for the purpose of cutting, blotting, cancelling, or effacing 'the frank' or postage-stamp, so as to prevent a second use of the same, while at the same time the name of the 'post-office,' the year, the month, and the day of the month is printed upon the envelope and one side of the said frank or postage-stamp, thereby giving a good impression of the same, and prevent undue wear of the said postmarking-stamp in consequence of being used upon the uneven surface made by the said frank or postage-stamp."

Now, if Norton had, as he pretends, invented, as early as 1854, the stamps for which he took out his subsequent patents in 1862 and 1863, it is hardly conceivable that he should have taken out the patents for 1857 and 1859 in the form in which they stand. The fact that he did take them out reduces it almost to a demonstration that he had not invented any such stamps at this time.

It is true he produces a caveat filed by him in 1853, which has, or had, an amendment bearing date "Tinmouth, Vt., Aug. 7, 1854," which amendment contained a full description of

the double stamp as finally exhibited in his patent of 1863, and the reissue thereof. But this amendment was shown to have been surreptitiously introduced by him amongst the papers of the office certainly as late as 1864, ten years after its pretended date. In his examination as a witness in this cause he admitted that he made the paper referred to in the summer of 1864, when his assignees, Shavor and Corse, were applying for a reissue of the original patent now in question, and that it was used in that application; but he pretends that it was a copy of a paper which he made and sent to the Patent Office in 1854. No such original paper, however, has ever been found in the Patent Office, and on a regular charge for the offence of making the surreptitious paper and introducing it amongst the files, he was found guilty in September, 1871, and debarred, by order of the Commissioner of Patents, from further access to the papers of the office.

This amendment caveat, therefore, as well as the testimony of Norton on the subject, may be laid out of view.

A witness by the name of Sherwood, a machinist and model-maker, was examined, who produced a sheet or two of items of account, copied from his books, showing charges against Norton for work on "stamps" in 1857, 1859, 1860, and 1862. There were four items in 1857 under date of May, for certain hours of work, charged thus: "May 8. To three hours, finish stamp." There was a large number of items of similar character in the other years named, particularly in January and March, 1859, and August, September, November, and December, 1862, corresponding, as will be observed, with the times when Norton must have been getting up his models for his different patents. The witness was unable to distinguish the kind of stamps he worked on at these different dates, except that he professed to feel quite sure that the first one would postmark a letter and cancel a stamp thereon at the same time. Describing, on his cross-examination, the stamp which he thus referred to, he says: "It was a dating wheel stamp, the wheels giving the dates, with a die for the office and year in the top of the frame that held it, blotting or cancelling at one end the impression given by a blow on the lever by the hand." Now this description applies aptly to both the stamp patented in

1857 and to that patented in 1859, except that it was the latter only which had the blotting attachment. We think it perfectly apparent that the witness had, by a very natural mental process, confounded the instruments together, and imagined that the blotter was attached to the first instead of the second invention. His examination took place twenty years after the date of the accounts, and he relied solely on his memory as to the character of the articles which he worked upon.

This is really the strongest evidence that can be found in the record affording any ground for the conclusion that Norton ever produced any double stamp at all prior to the one he patented in 1859. The testimony of Mr. King, the former Assistant Postmaster-General, when compared with his own contemporary letters and other circumstances, clearly indicates that he had, quite naturally, confounded the device of one date with that of a later date. Other evidence was relied on, but all of such a loose and indefinite character that no reliance can be placed on it in support of the complainant's theory. And it is quite significant that no stamp of the kind claimed, made at the period in question, was produced in the examination. Had such stamps ever been in existence, it is strange that they should have altogether disappeared.

Now, there is abundant evidence in the record to show that double stamps were conceived of and used before 1859, and that about that time they sprung up spontaneously in various parts of the country. It was but recently that there had been any demand for their construction, since postage-stamps had not been in general use in the country for any long period. They were first authorized to be issued and used by the act of March 3, 1847 c. 63 (9 Stat. 188); but it was optional to use them or not. By the act of March 3, 1851, c. 20, postage on single letters was reduced from five cents to three on being prepaid. 9 Stat. 587. It was not till the passage of the act of March 3, 1855, c. 173, that all postage, except on letters to or from a foreign country, was required to be prepaid. This law first brought postage-stamps into universal use; and, as they must be cancelled, two impressions had to be made on a letter, — one for the ordinary post-mark, giving the place and date of mailing the letter; the other for cancelling or effacing

the postage-stamp. This required two blows and produced double work. But without any great exercise of ingenuity, postmasters and clerks in various places improvised double stamps, generally by screwing, welding, or binding to the side of the common stamp an appendage to serve as a blotter at the same time. This was done by Ezra Miller, at Janesville, Wisconsin, as early as January, 1859, or in 1858; and by General Dix in New York, and one Powers in Buffalo, in the summer of 1860. There is also evidence that a similar appendage for the purpose of stamping a large figure 5, to show the postage due, was invented and used by one Rees in the Philadelphia post-office as early as 1845, when the rates of postage were five and ten cents; and that one Ireland devised and used at the same office a like appendage for cancelling postage-stamps as early as 1853. Other similar devices were referred to in the evidence. The adoption of a more artistic and convenient form of the instrument thus spontaneously originated, as its use was continued and became more imperative, was a matter of course. Norton's particular form and construction of the double stamp, as described in his patent of 1863, was undoubtedly an improvement; but we should expect to find, as we do find, that he was restricted in his claim to the particular form and construction set forth in his specification.

A reference to Norton's application for the original patent in question in this case, a copy of which is in evidence, and which, being preserved of record in the Patent Office, may properly be referred to, shows that the functionaries of that office regarded it important that the instrument sought to be patented should be specialized with particularity. This application was presented to the office on the 5th of January, 1863, and was rejected on the 21st of February. On the 21st of March, 1863, the application was renewed in a letter addressed by Norton to the Commissioner of Patents, and after certain amendments were made to the specification, the patent was allowed to pass. The most important amendment was the insertion of that portion of the specification commencing with the words, "The said cancelling stamp or device (C) being thus constructed with cork, rubber, or other elastic substance for type or blotter," and so on, to the end of the paragraph.

This amendment derives further importance and illustration from the letter of Norton above referred to, in which a renewal of the application was made, and which was dated at the National Hotel, in Washington, March 21, 1863. In that letter the writer says: —

"I do not understand that the device referred to in your letter of the 21st of February last is 'a common ink cancelling stamp, such as has been used for years in our post-offices for blotting and thus cancelling post-office stamps.' The devices to which you undoubtedly refer have always been made of metal entirely or of wood entirely. Wood was found to answer no purpose, because not at all durable, so metal ones were used. *Now this device consists of a barrel or tube, into which wood, cork, rubber, or some such material is inserted, for the purpose of holding an indelible ink in quantities sufficient* to blot the postage-stamp so thoroughly as to prevent the same being washed or cleansed by a chemical mixture and again being used in payment of postage. *This tube or barrel holds firmly the elastic substance therein, and prevents the same from undue wear and exposure. The elastic substance therein being worn out, can again be replaced* at the office where used, thus saving the trouble and expense of returning the same to the gov't contractors for such repairs. *This, therefore, constitutes a new device*, composed of two distinct parts in combination, producing new results, besides blotting the postage-stamp.

"This device being new, its combination with the postmarking device for the purposes set forth in the specification is of course new. Upon these two claims I, therefore, most respectfully ask a patent."

On the same day that this letter was received, according to the memorandum on the file-wrapper, the specification was returned to the applicant to enable him to amend it, and was re-examined on the 26th of March, and favorably passed upon on the 1st of April. No one can read the patent in the light of these contemporary documents, and of the previous history of the stamp, without arriving at the conclusion that, so far as the blotting device was separately concerned, the invention consisted of, and was confined to, a tube containing a type-blotter made of an elastic substance, as contradistinguished

from iron or other hard substance. The iron or steel blotter had been patented in 1862, as already mentioned, and as will be shown more fully hereafter. There was not, there could not have been, any inadvertence or mistake in confining the invention to the combination described and claimed in the patent.

The second claim is merely that of a combination of this specific device with the other parts of the apparatus. As the patentee says, in his letter to the commissioner, "This device being new, its combination with the postmarking device for the purposes set forth in the application is of course new." In other words, the substantive invention, for which the applicant desired a patent, was the blotting device constructed specifically in the manner and for the purpose described. The addition of the combination claim was for the purpose of possibly securing the combination, if the principal claim should be found to be untenable.

Perhaps we have gone more minutely into the evidence relating to the progressive improvements in this instrument than was necessary to show that the claim of the patent was not more restricted than it should have been. The court ought not to be called upon to explore the entire history of an art in order to ascertain what a patentee might have included in his patent had he been so disposed. If he was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent. When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim so as to make it embrace an invention not described and specified in the original. It is difficult to express the law on this subject more aptly and forcibly than in the words of Mr. Justice Grier, in the case of *Burr* v. *Duryee* (1 Wall. 531), where, in deliv-

ering the unanimous opinion of the court, he says: "The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, when the original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective nor insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and, therefore, more 'available' for the suppression of all other inventions." Of course, if, by actual inadvertence, accident, or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued, may be granted, as we have explained in the recent case of *Miller* v. *Brass Company*, *supra*, p. 350. But where it is apparent on the face of the patent, or by contemporary records, that no such inadvertence, accident, or mistake, as claimed in a reissue of it, could have occurred, an expansion of the claim cannot be allowed or sustained.

Turning now to the reissued patent on which the present suit was brought, which is the third reissue, dated Oct. 4, 1870, we find the invention described as follows: —

"The nature of my said invention and improvements herein contained and described consists in the employment and combination of a device or die used for the more complete and perfect cancellation of postage-stamps or letter-franks by means of soft wood used endwise, or of cork, rubber, *or other suitable material*, whereby such stamp or frank is effaced and cancelled, in and by indelible or other ink, in the manner substantially as herein described and set forth.

"It also consists in the combination of a postage-stamp cancelling device or die, constructed of wood, cork, rubber, *or any suitable material*, with any suitably arranged and constructed postmarking stamp or device, so as to cancel, efface, or destroy the postage-stamp or letter-frank with indelible or any suitable ink at the same time, blow, or operation of the stamp or instrument by which the postmark is given or made upon the letter, envelope, or packet, substantially as herein described and set forth.

"It also consists of the postmarking of letters, envelopes, or packets, and in the cancellation of the postage stamp or stamps thereon, with, in, or by any suitable ink, or similar material, by means of some soft wood used endwise against the postage-stamp, or by the means of cork, rubber, *iron, or steel, or by means of any other suitable material* so combined with the postmarking stamp or instrument as to cancel, efface, or destroy the postage stamp or stamps at one and the same blow or operation of the entire instrument thus constructed for that purpose, whereby to prevent a second or re-use of such postage stamp or stamps."

After some details as to the mode of construction, the specification proceeds: —

"The said cancelling type or die can be easily repaired, or replaced by a new one, whenever desired, and at very little expense; and such cancelling die or type G may extend upward to the said cross-bar B, and there be connected to the same by means of a screw, pin, or small bolt. In *such case there would not be any tube or pipe surrounding said cancelling die or type* G. The operation and effect produced would in such case of construction be the same.

"The said postage-stamp cancelling device, die, or type G may be of any desired distance from the aforesaid postmarking or dating device or stamp D, or it may be securely *fastened to the immediate side* of the said postmarking and dating part or stamp or device D by any convenient and suitable mechanical means.

"The said cancelling die, type, or device G I prefer to use made of cork, as it will hold a much greater quantity of cancelling ink upon and in the lower face thereof, and when it comes in contact with the printed surface of the postage-stamp, such surface will become somewhat and sufficiently broken by means thereof, and thus and thereby inject into or impregnate such broken surface with the said cancelling ink, whereby such postage-stamp, so operated upon and filled with such ink, cannot be sufficiently cleansed by any means as to enable it to be reused, or used a second time, in fraud upon the postal revenue, without immediate detection of the same.

"Soft wood, used endwise, will answer nearly the same purpose. Still, long and continued use after the granting of my said patent, April 14, 1863, has fully proven the superiority of the cork for the cancelling die or type used upon postage-stamps as aforesaid. . . .

"I also construct my said postage-stamp cancelling device, die, or type of *cast iron, steel, or other suitable metal*, substantially as shown at G', Figs. 5 and 6, and which may be secured to the said cross-bar or piece B in like manner as the said tube or cylinder C, Figs. 2 and 4, and which is done either by screw and nut where the same unites with the said cross-bar, or it may there be firmly fastened by means of suitably constructed and arranged pins or rivets, or the same may be soldered to the under side of said cross-bar or piece B, or otherwise attached thereto. . . .

"The *aforesaid metal cancelling device, die, or type* G', Figs. 5 and 6, *may also be fastened or secured to the immediate side of the said postmarking device by any good and sufficient means*, substantially as hereinbefore described and set forth, in reference to the said device C, or tube or cylinder, constructed to receive and contain the said type or die G, Figs. 2, 3, and 4.

"Such metallic device, die, or type may also have upon its lower face or lower surface any suitable configuration deemed best to use for the purpose of cancelling the postage-stamp in, with, or by any suitable ink at the same time, blow, and operation of the instrument or apparatus, as hereinbefore stated and set forth.

"In any and every case the postmarking of the letter, envelope, or packet, and the effacing or cancellation of the postage-stamp or letter-frank thereon representing value, are done at the same time and by the same blow or operation of the said several devices and parts, constructed and combined in the manner and by the means substantially as herein described and set forth.

"Both the postmarking and cancellation of the said postage-stamp are done with indelible or other and suitable ink, used for such cancellation or effacing of the postage-stamp."

Omitting much more of this verbose specification, containing, amongst other things, a dissertation on the supposed advantages and importance of the invention, we add the summary of the patentee's claims, which is as follows: —

"What I claim, and desire to secure by letters-patent of the United States of America, is —

"1. The postage-stamp cancelling device, cylinder, or tube C, containing a die or type, G, made of cork, wood, *or other suitable material, or any equivalent for said cylinder* or tube C, *or for the said cancelling die* or type G, whereby to efface, cancel, or destroy the postage-stamp with indelible or other ink, in the manner and for the purposes substantially as herein described and set forth.

"2. The cancelling device, cylinder, or tube C, with cork or wood, or *any substantial equivalent* thereof, forming the die or type G, therein, in combination with the cross-bar or piece B, and with the postmarking device D, substantially as and for the purposes herein described and set forth.

"3. *The postmarking of letters, envelopes, and packets, and the cancellation of the postage-stamps* thereon with ink, at one and the same blow or operation of the instrument, in the manner and by the means substantially as herein described and set forth.

"4. *The employment and combination of a postmarking device, with a postage-stamp cancelling device,* both being operated by one and the same handle, for the postmarking of letters, envelopes, or packets, and for the cancellation of the postage-stamps thereon with indelible or other ink, in the manner substantially as herein described and set forth."

By these extracts from the specification, and the summary of claims, it appears perfectly obvious that the patentee has embraced in the reissued patent several matters of supposed invention different from and additional to the invention which formed the subject of the original patent. And it is principally, if not wholly, these new and additional claims which the appellant James, as postmaster of New York, is charged with infringing.

In the first place, a new form of the cancelling device is set forth and claimed, different from that described in the original patent, to wit, a cancelling type or die attached directly to the cross-bar, without any tube or pipe surrounding and holding the same. This is not contemplated or hinted at in the original patent. The latter does suggest, it is true, that "the cork, rubber, or other elastic material may extend upward to the cross-bar, and there be connected to the same by a screw or pin-bolt, if desired;" but this suggestion had reference to a type enclosed, at the same time, by a surrounding cylinder, which formed the distinctive feature of the invention. The context shows that nothing more was intended by the suggestion than the extension of the type upward through the cylinder and fastening it in a particular way. The thought seems to have occurred to the patentee that it might be an advantage, under some circumstances, in addition to fastening the

type in the cylinder by compression, to extend it through the cylinder and fasten it to the bar to secure it from any danger of falling out of the cylinder by becoming loose. Not a hint was given that the cylinder could be dispensed with. This was an after-thought. The cylinder was clearly and distinctly set forth as a necessary constituent of the device, and an essential element in the combination of which the blotting device consisted.

The bearing which this new feature in the reissued patent has on the case is evinced by the fact that one of the devices used for several years in the post-office, which is complained of as an infringment of the patent, was a naked blotter made of cork, directly attached to the cross-bar, without any enclosing cylinder to support it; also by the fact that the other device used in the post-office during the defendant's term of office consisted of an iron blotter directly attached to the side of the postmarking stamp without any enclosing cylinder.

In our judgment, this addition to the patent was no part of the original invention, and could not lawfully be embraced in the reissue, and that the claim for it is therefore void. It is true that this particular feature is not made the subject of a distinct claim. But it is described as part of the invention, and would probably be included in the general and sweeping terms employed in the claims that are made. Regarded as not being a part of the original invention, those claims cannot stand if they are construed to include it: if they are construed so as not to include it, then the use of this form of device by the defendant cannot be adjudged an infringement of the patent.

Another new matter, forming no part of the original invention, but expressly disclaimed in the original patent, is the making of the blotter of cast iron, steel, or other suitable material. The original specification, in various forms of expression, excludes such materials. The words "wood, cork, rubber, or any similar material" have this intention, as shown by the context. A claimed advantage is that "the said cork, rubber, or other elastic substance, as aforesaid, will render the said stamp capable of an easy and rapid use; for there being a yielding of the same when the blow is given, the operator will

not tire as soon by a constant or continued use of the same *as though it were of solid metal.* The said blotter or type can be more easily repaired or replaced by a new one, at less expense, *than if made of solid metal.*" This language amounts to an express disclaimer of solid metal. The merit claimed for the invention was that the elastic materials proposed to be used for the blotter, and the use of which the patent throughout supposes possible by the support received from the surrounding cylinder, were far superior to solid metal and other solid and inelastic substances. How, after this, it could be supposed that the use of solid metal as a material for the type-blotter was included in the invention, and that a claim for it was omitted through inadvertence and mistake, it is difficult to understand. Besides, as already seen, and will be again adverted to, the use of steel or other material that would answer the purpose had already been described and claimed in Norton's patent of 1862. We think that any claim in the reissued patent which can be fairly construed to embrace a blotter made of metal is void, and that the use of such a blotter by the defendant did not afford the patentee or the complainant any just ground of complaint.

In connection with this branch of the subject, it is observable that the patentee has added two new diagrams to his drawings for the purpose of exhibiting and illustrating this new ground of claim. This fact, though not decisive, is strongly corroborative of the conclusion which we have reached on the subject.

The third addition in the reissued patent to the invention described in the original is that of the *process* of stamping letters with a post-mark and cancelling the postage-stamp, at one and the same blow or operation of the instrument, in the manner and by the means described and set forth. Leaving out of view the history of the art prior to the invention claimed by the patentee, what possible pretence can there be for contending that the general process was part of the invention which formed the subject of the original patent? Suppose it be true that Norton was the first inventor of this process, was that process the invention which he sought to secure in the original patent? A patent for a process and a patent

for an implement or a machine are very different things. *Powder Company* v. *Powder Works*, 98 U. S. 126. Where a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be reissued so as to include both, as was done in the case of Goodyear's vulcanized-rubber patent. But a process, and a machine for applying the process, are not necessarily one and the same invention. They are generally distinct and different. The process or act of making a post-mark and cancelling a postage-stamp by a single blow or operation, as a subject of invention, is a totally different thing in the patent law from a stamp constructed for performing that process. The claim of the process in the present case, however, is not so broad as this. It is for the process or act of stamping letters with a post-mark and cancelling the postage-stamp at one and the same blow or operation of the instrument, *in the manner and by the means described and set forth.* Perhaps this claim amounts to no more than a claim to the exclusive use of the patented instrument or device. If it is anything more, it is for a different invention from that described in the original patent. If it is not for anything more, the question is brought back to the instrument or device itself which forms the subject of the patent, and which has been already considered.

The last claim, to wit, "the employment and combination of a postmarking device with a postage-stamp cancelling device, both being operated by one and the same handle, for the post-marking of letters, envelopes, or packets, and for the cancellation of the postage-stamps thereon with indelible or other ink, in the manner substantially as herein described and set forth," may admit of two constructions. It may either amount to a claim for a combination of any kind of devices for stamping and blotting, or for a combination of the particular devices described in the patent. Inasmuch as these specified devices, as we have already shown, embrace new devices not described in the original patent, the claim is too broad in either of its aspects to be advanced in a reissue of that patent, unless the patentee was really the inventor of the general combination of such devices in a double stamp, and was entitled to add a

claim therefor to such reissue. We have seen that his original patent was for a specific blotting device, and for the combination of such specific device with a post-stamping device in the same instrument. Could he, in a reissue of the patent, lawfully make the broad claim of the combination of any and all devices for blotting and post-stamping, at one and the same time, in one and the same instrument? This would be, it is true, only adding a new claim to his patent, but greatly enlarging its scope and making it to embrace every kind of double stamp that can be conceived. Did he forget to insert this claim in his original patent? Was it omitted through accident and mistake? When we examine his original application, the changes it underwent, the careful exclusions as well as inclusions which it contained, and the particularity of the specific combination which he did claim, could he, after the lapse of more than a year (if we take the date of his first application for a reissue as the time for consideration), be allowed to return to the Patent Office and pretend that he had inadvertently omitted the principal claim of the whole thing? If he was, or pretended to be, really the inventor of the entire double stamp, did not the patent, on its face, show that the invention was not secured to him, — that it contained no such claim? And was not this omission obvious on inspection? The truth is, that when he made his original application, and got his original patent, all the documents show demonstrably that he did not intend it to embrace any such broad invention. That was not the invention he sought to secure. Having obtained a patent for his specific device and combination, if he afterwards wished to claim the general combination, and had not already abandoned it by taking a narrower patent, he was bound to make a new application for that purpose. Patentees avoid doing this when they can, and seek to embrace additional matters in a reissue, in order to supersede and get possession of the rights which the public, by lapse of time or other cause, have acquired in the mean time. It is for this very reason that the law does not allow them to take a reissue for anything but the same invention described and claimed in the original patent.

But these broad claims in the reissued patent, if construed according to the latitude in which they are expressed, are void

by reason of embracing inventions which had been patented both in England and in this country prior to the patentee's application for the original patent.

A stamp with a postmarking device and a blotting device combined in one instrument was described in an English patent, dated April 24, 1860, granted to one David G. Berri. As shown in the drawing, the postmarker and blotter were attached to one metallic plate, analogous and equivalent to the cross-bar described in Norton's patent, to the centre of which plate the handle was attached, so that the instrument was equally balanced. The particular object of the patent was to secure a method of hinging the plate containing the types on to the fixed plate to facilitate the insertion and change of the types. But the double stamp is fully exhibited; and the patentee, in the specification, says: "In conclusion to the foregoing description, it may be here necessary to note that my improved date-stamp may be employed, either in connection with the double or obliterating mark, as represented, or separately, in conformity with the usual requirements."

The same combination of postmarker and blotter in one instrument was also exhibited in Norton's own patent of Aug. 9, 1859. As he did not then reserve the process of stamping letters with such an instrument, nor the combination of a postmarker and a blotter, and did not make any simultaneous application therefor, he could not afterwards obtain a patent for such process and combination, but would be restricted to such particular combination or process as might be exhibited in a new device or apparatus.

We have already referred to this patent of 1859, and will here only quote from the specification, to show the construction of the stamp, and the scope which the patentee claimed his invention to possess. He says: —

"*The blotter* (J) is fastened to the frame (B) upon one side thereof by the use of the shaft (D), one end of which passes through the upper part of the said blotter, and which is firmly secured to the said frame by means of the nut (E), or by using it for the nut in place of the said nut (E) as aforesaid. This blotter is then and thereby retained in a fixed and strong position by means of the screw (S) in connection with the said shaft (D), the blotter (J) or nut (E),

and is for the purpose of cutting, inking, blotting, effacing, and effectually cancelling the frank or postage-stamp, while, at the same time and operation, the name of the post-office, the year, the month, and the day thereof are given upon the envelope or letter at one side of the said frank or postage-stamp, and not upon it as now practised, in order to efface and to cancel it under the operation of stamping, which unduly wears out the marking stamp, gives a bad and unintelligible impression, and is in direct violation of the rules or statute of the Post-Office Department. This stamp may have another blotter like (J), which shall be upon the opposite side thereof, by the use of which the frank or postage-stamp would be cut, inked, blotted, effaced, and cancelled upon any part of the letter or envelope where it may be placed. One blotter like (J), however, is believed to answer the required purpose. *This blotter* (J) *may be made of any size or shape, and of any material to answer the end or purpose sought to be obtained.* The face, which receives the ink, and which comes directly upon the frank or postage-stamp, is grooved or cut, thereby leaving various projections, which have a sharp or knife edge sufficient for each to cut entirely through the frank or postage-stamp, but not through the envelope immediately under the same, while at the same time the places thus cut are inked by the same sharp-edged projections or cutters on the face of the said blotter as aforesaid. The said blotter (J) should be made of the best kind of *cast-steel*, and in such shape as not to break any part thereof. The projections upon the face of the said blotter may be kept sharp and in cutting order by filing and sharpening them when dull."

The claim of this patent is as follows: —

"Having thus set forth and described my invention, what I claim and desire to secure by letters-patent of the United States is, —

"The blotter (J), connected or attached to the main part of any 'post-office postmarking stamp' for the purpose of cutting and inking, blotting, and effacing so as to successfully cancel the frank or postage-stamp of any letter or any package at the same time and operation of marking or printing upon such letter or package the name of any post-office, the year, the month, and the day of the month, substantially as and for the purpose herein set forth."

Another patent was taken out by Norton on the 16th of December, 1862, for a double stamp, containing a combination of

the postmarker and blotter and the cross-bar connecting them, and to which they were attached. The drawings attached to this patent exhibit exactly the same form of instrument which is exhibited and described in the drawings and specification of the patent sued on in this case. The blotter, however, instead of being confined to wood, cork, or other elastic material, was proposed to be made of "steel, or other material which will answer the purpose," and to have on its face circular cutters, enclosed in circular rings, to cut the postage-stamp at the same time that it defaced it with ink. The invention is described in the specification as follows: —

"The nature of my improvement consists in so constructing cancelling stamps that the same shall cut the postage-stamp, or any stamp similar thereto, without injury to the contents of the envelope or packet enclosed therein, and at the same time cause a heavy circular mark upon the inside, and one upon the outside of that part of the stamp or letter-frank cancelled by the cutting device, so that said postage-stamp or letter-frank shall readily show cancellation in ink, and when removed from the letter or packet on which the same may have been cancelled it shall be reduced to parts or pieces whereby a second use of the said stamp or frank is thus prevented although it may have been previously cleaned by a chemical or other process.

"It also consists in the employment and combination of a cancelling stamp with a cutting and inking device thereon, with a postmarking or rating stamp, so that the cancelling of the letter frank and the postmarking on the envelope or packet shall be effectually done by the means fully described hereinafter.

"To enable others skilled in the art to which my invention relates to make and use the same, I will here proceed to describe the construction and operation thereof, which is as follows, to wit: I construct the postmarking stamp (D) of steel or any material which will answer the purpose. (G) is the mortice or opening to receive the type for the month, the day of the month, and the year, around which is the name of the place where used. (E) is a screw for the purpose of holding the type in the said openings (G). This stamp is secured or firmly fastened to the block or cross-piece (B), Figs. 1, 2, and 3, by means of the screw (K), which is held in its place by means of the small screw (*a*), Figs. 1 and 2, which is placed near one side of the said screw (K) so as to prevent the same from becoming loose by reason of turning backwards."

After further directions as to the construction of the cancelling stamp, he adds: —

"The cross-piece (B) is made of iron or steel, and in width the same as the diameter of the said rating and cancelling stamp, and of any thickness required. The said cancelling stamp (*c*) is securely fastened to the said cross-piece (B), and at any desired distance from the said rating stamp (D), as seen at Figs. 1, 2, and 3, and in the same manner as that of the said stamp (D). (H) is a screw-bolt or stem, the lower end of which is screwed into the centre of the said cross-piece (B). The handle (A) is then screwed upon the said bolt or stem (H), and firmly upon the said cross-piece (B), thereby making a strong and reliable joining of the handle to the whole stamp."

The claim in this patent is, first, for the cancelling stamp separately, and, secondly, as follows: —

"I also claim the combination of the cancelling stamp (*c*) and the postmarking or rating stamp (D) with the cross-piece (B), substantially as and for the purposes herein described and set forth."

It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared.

Now, a mere inspection of the patents referred to above will show that after December, 1862, Norton could not lawfully claim to have a patent for the general process of stamping letters with a post-mark and cancelling stamp at the same time; nor for the general combination of a post-stamper and blotter in one instrument; nor for the combination of a post-stamper and blotter connected by a cross-bar; for all these things, in one or other specific form, were exhibited in these prior patents.

Any such claim, therefore, in the reissued patent of 1870 must be inoperative and void, as well because the thing claimed was anticipated in former patents, as because it would be for a

different invention from that contained and described in the original patent. We may, therefore, dismiss from consideration the third and fourth claims of the reissued patent. If they are to be construed as being broader and claiming more than the original patent, they are void; if to be construed as claiming nothing more, they are simply redundant, because the first and second claims embrace all that was in the original, and more.

The case, then, upon the patent, is narrowed down to the claim of the specific device of the blotter as described and claimed in the original patent; and the combination thereof with the postmarking device in one instrument by means of the cross-bar. This being the case, it will be pertinent next to inquire whether the defendant used that device or combination. If he did not, it is unnecessary to pursue the subject further.

As we have already seen, the cancelling stamp or device, described in the patent, consisted of a cylinder, corresponding in length to the postmarking device, and containing a type of wood, cork, rubber, or other elastic material, slightly projecting therefrom. It does not appear that this device was ever used by the defendant. The stamp used by him until January, 1876, had a blotter of cork, it is true; but it was not the specific device described in the patent, and to which the patent was restricted. The cork was not enclosed in a cylinder as demanded by the patent. It was a naked piece of cork directly attached to the cross-bar by a common wood screw, passing through a hole in the cross-bar, and driven into the cork, firmly holding it to the bar. This device, of course, was different from that which was patented. The only other stamp used by the defendant had a steel blotter, connected with the postmarker by a solid metallic plate or mass of metal, and having no cylinder. Neither of these devices infringed the complainant's patent, construed as we consider it must be in order to have any validity at all.

The decree of the Circuit Court will be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is

So ordered.

MR. JUSTICE MILLER dissenting.

As regards the right to a patent for an invention like this, which can be of use to no one but the government of the United States, and which is, therefore, in effect a contract by the United States that it will not use that which is essential to some of its most important operations without paying to the patentee whatever he may demand for the use of his invention, I have great doubt,—a doubt which it would have been necessary to solve in this case if the majority of the court had believed the patent sued on valid.

In the opinion just delivered they have held that while the original patent to Norton might have been valid for some purposes, the reissued patent is void because it is not for the same invention. In this view I do not concur.

The general post-office and its branches had long been in search of an instrument which by one blow — one strike of the hand — would mark the name of the place where a letter was mailed and the time, and so deface the postage-stamp on the letter as would make it impossible to be used again.

This had been done by the use of a single die, which held the type indicating date, &c., and which was made to cover the stamp also, so that the date obliterated the stamp by covering it. For reasons not necessary to mention this did not answer, and it became desirable to have an instrument which at one stroke defaced the stamp and made beside, but apart from the stamp, the postmark date.

Many attempts to do this had been made with more or less success. Most of them failed because the handle which conveyed the power from the hand of the operator was so placed in regard to these two marking instruments that they did not strike with entire unity, in point of time, on all the space of the letter to be covered by the two instruments. In my opinion the record shows that Norton was the first man to accomplish this result by uniting these two marking instruments by a cross-bar between them, and placing the shank or handle common to them both so precisely in the centre between them on the cross-bar that the stroke brought the type and the obliterating device on to the surface of the paper precisely

level, and with precision as to time, over the space which they were designed to cover.

This, I think, was the principal merit of his invention. Connected with it, however, and essential to it, was his device for obliterating the stamp. In his original patent this is described as a cylinder into which is fastened something which receives the indelible ink used to obliterate the stamp, and which imparts it to the surface of the stamp by the blow or strike already mentioned. This, he said in his original patent, was made of wood, cork, rubber, or other suitable material.

It was discovered, by experience, afterwards that iron was a more suitable material than wood, or cork, or rubber, and in the reissue of the patent, on which this action is founded, iron is mentioned as one of these suitable materials.

I do not think this should invalidate the reissue if the original patent was good. If iron was a suitable material it was covered by the original patent. If better than the materials specifically named, that did not exclude it from the original patent nor make the reissue void.

Nor do I concur in the opinion that the combination of the printing and erasing instrument by a cross-bar and shank or handle, which brought the force employed in the stroke to act equally and simultaneously on all the surface to be impressed, was anticipated by any other patent or any other invention.

It would serve no good end to go into all the testimony with the elaborate care which characterizes the opinion of the court on these disputed points. I therefore content myself with stating the principal points in which I differ with that opinion.

DAVIS *v.* GAINES.

1. According to the law of Louisiana in force in 1813, if the heirs, whether forced or voluntary, of a testator were absent from the State, the Probate Court had jurisdiction to order a sale of his property.
2. The will having been duly proved, the proper Probate Court, upon the petition of the executor, made an order, pursuant to which the immovables of the deceased were, according to law, sold and conveyed to a purchaser in good faith for a valuable consideration. *Held*, that his title is not affected by the subsequent discovery and probate of a later will appointing another person executor, and making a different disposition of them.
3. The order of sale is an adjudication that all the facts necessary to give the court jurisdiction existed.
4. Where the possession of the immovables so sold was held for over sixty years, under the executor's deed, which recites that the sale was made "after the publications and delays prescribed by law," and it appears from his account, remaining of record in the Probate Court for fifty years, that he paid a specified sum for advertising the sale, — *Held*, that the deed and account are competent evidence of the advertisement, and being uncontradicted are conclusive.
5. When the purchase-money was applied to the extinguishment of a mortgage executed by the deceased, and constituting a valid incumbrance on the immovables, the purchaser, although the sale was irregular or void, cannot be ousted of his possession upon a bill in equity filed by the heirs or the devisees unless they repay or tender him the purchase-money.
6. The prescription applicable to immovables in Louisiana cannot be maintained unless the possessor obtained them in good faith and by a just title; that is to say, by a title which he derived from those whom he believed to be the true owners, and which, if they had in fact been such owners, was by its nature sufficient to transfer the ownership.
7. The prescription against all informalities connected with or growing out of a public sale by a person authorized to sell at auction, may be pleaded by one who purchases in good faith at the sale of an executor or a register of wills, and holds by a just title, against the averment that the sale was not advertised, that the inventory of the estate was not completed before the order of sale was made, or that it was partly made by appraisers appointed by the testamentary executor, or that it was signed by only one of the two appraisers so appointed. Such informalities are cured by the lapse of five years.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated fully in the opinion of the court.

Mr. J. D. Rouse for the appellant.

Mr. John S. Whitaker, *contra.*

MR. JUSTICE WOODS delivered the opinion of the court.

This was a bill in equity filed by Myra Clark Gaines, the appellee, against Minor Kenner, the intestate of Eliza Davis, the appellant, and a large number of other defendants, to recover real estate, of which she claimed to be the devisee under the will of her father, Daniel Clark. The defendants were alleged to be in possession respectively of distinct parcels of the property sued for.

The facts, so far as they concern the controversy between the appellant and appellee, were as follows: Daniel Clark purchased the real estate in dispute between them from one Stephen Henderson, on Dec. 16, 1812, wholly upon credit. The purchase price was $120,000, to secure which a mortgage was retained in the act of sale. On May 20, 1811, he executed and published what then purported to be his last will and testament, as follows: —

"In the name of God, amen. I, Daniel Clark, of New Orleans, do make this my last will and testament.

"Imprimis. I order that all my just debts be paid.

"Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

"Third. I hereby nominate and appoint my friends Richard Relf and Beverly Chew my executors, with power to settle everything relative to my estate.

"DANIEL CLARK.

"NEW ORLEANS, 20 May, 1811."

He died Aug. 16, 1813, and on the next day the will was proven before the Probate Court for the Parish of Orleans, and on the 27th of that month letters testamentary were issued to Richard Relf as sole executor, Chew being absent from the State.

The appellant claimed title to the plantation under a sale thereof made Nov. 8, 1813, by Thomas Beale, register of wills, at public auction, to Michel Fortier and Omer Fortier, for $120,000, by authority, as she asserted, of an order of the Probate Court. Relf, the executor, in pursuance of the sale, conveyed the property to the purchasers by deed, in which he stipulated to apply the purchase-money, as fast as received, to

the discharge of the mortgage of $120,000 placed on it by Daniel Clark.

The purchase-money was so applied, and the entire sum secured by the mortgage, with the interest thereon, was thus discharged.

The property came into the possession of Minor Kenner, whose estate the appellant represents, as owner, by regular chain of conveyances from the vendees of Michel and Omer Fortier.

The title of the appellee was derived under the will of Daniel Clark executed July 13, 1813, which was filed for probate in the Probate Court of the Parish of Orleans on Jan. 18, 1855, and which by the judgment of the Supreme Court of Louisiana on Dec. 17, 1855, was recognized as the last will and testament of Daniel Clark, and ordered to be recorded and executed as such.

The second item of this will was as follows: "Second, I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate whether real or personal of which I may die possessed, subject only to the payment of certain legacies hereinafter named."

Both parties, therefore, trace title to Daniel Clark.

Prima facie the title of the appellee to the property in dispute under the provision of this will, which is the later and last will of Daniel Clark, is clear.

The controversy, therefore, depends upon the three defences set up by the appellant.

The record shows that the will of May 20, 1811, was duly admitted to probate by the Probate Court of the Parish of Orleans, and ordered to be executed; that within the year following the order of probate, to wit, on Aug. 27, 1813, upon the petition of the executor, an order for the sale of the real and personal property of the testator was made by the court having jurisdiction thereon; that an inventory was begun by Thomas Beale, register of wills for the Parish of Orleans, on Aug. 28, 1813, under the direction of said Probate Court, in which the plantation sued for was included as a part of the

estate of Daniel Clark; that on Nov. 8, 1813, pursuant to said order, Beale, the register of wills, sold and adjudicated the plantation to Michel Fortier and Omer Fortier for the sum of $120,000; and that on Nov. 11, 1813, Relf, the executor, made an act of sale to the purchasers.

The appellant, therefore, contends, first, that by virtue of said will and its probate, and the order of sale, and the sale and conveyance thereunder, the said Michel and Omer Fortier acquired a good and valid title to said premises, which, by mesne conveyances from them, was vested in her intestate.

The record further shows that the act of sale recited the existence of the mortgage for $120,000 placed upon the property by Daniel Clark in favor of Stephen Henderson, on Dec. 16, 1812, and his executor bound himself to discharge the same out of the purchase-money, as it should be paid by the purchasers, the Fortiers, and that said mortgage was in fact discharged and paid by the application thereto of said purchase-money.

The appellant therefore contends, secondly, that there can be no decree in favor of the appellee for the property until the purchase-money which was applied to the payment of the debts of the testator is repaid or tendered, if it shall turn out that the Fortiers were purchasers in good faith.

The appellant contends, thirdly, that from Nov. 8, 1813, until Jan. 3, 1866, when process was served in this case, she, and those under whom she claims, held continuous, peaceable, and unequivocal possession of said plantation, and that neither said Michel and Omer Fortier, at the time they purchased the plantation, nor any of the parties through whom she claims title, had any knowledge, information, or belief of the making or existence of the last will of Daniel Clark, executed in 1813; that the various persons who claimed title to said property under the sale made to Michel and Omer Fortier possessed the same in good faith and under a just title as owners, and that each of them had the right to acquire the same by prescription; and she pleads the prescription of ten, twenty, and thirty years in bar of the bill of complaint.

The first question for consideration is whether or not the

proceedings of Relf, the sale made by the Register of Wills under the order of the Probate Court, and the deed of Relf as executor in pursuance thereof, vested a title to the plantation in the purchasers.

The code of 1808 was in force when the proceedings which resulted in the sale to the Fortiers were taken. Article 169, book 3, tit. 2, of that code declares: "When of the testator's heirs some are absent or not represented in this territory, the testamentary executor, whether the seisin be granted to him or not, and whether those heirs be forced or voluntary, shall be authorized to take possession of the property of the succession, to cause it to be sold, and to remain in possession of the portion accruing to the absent heir or heirs, deducting the debts and legacies, until those heirs shall have sent their power of attorney, or till the expiration of the year of the testamentary execution."

By the will of 1811 it appeared that Mary Clark, the mother of testator, who was constituted his universal legatee, and thereby became his heir (Civil Code, art. 880), was absent from the State of Louisiana. Moreover, "the granting of the license to sell was an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal was taken." *Grignon's Lessee* v. *Astor*, 2 How. 319.

It is, therefore, not disputed that, upon the ground of the absence from the State of the universal legatee, it was competent for the Probate Court, upon the application of the executor, to make an order for the sale of the testator's property.

The jurisdiction of the Probate Court of the Parish of Orleans to admit to probate and record the wills of deceased persons is unquestioned.

Its power and authority to order a sale of the property of a testator, by virtue of article 169, book 3, tit. 2, of the code of 1808, is not and cannot be disputed. If the Fortiers purchased in good faith under an order of sale made by the Probate Court, for a valuable consideration, without any knowledge of the later will of Daniel Clark, and while the authority of the executor appointed and qualified under the first will con-

tinued, and there was no fatal defect in the proceedings antecedent to the sale and conveyance to them, does the fact that such later will, making other dispositions of his property, was discovered and admitted to probate, render void their title?

We think this question must be answered in the negative.

A sale by order of a probate court is a judicial sale. *Moore* v. *Shultz*, 13 Pa. St. 98; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Thompson* v. *Tolmie*, 2 Pet. 157; *Lalanne's Heirs* v. *Moreau*, 13 La. 431; *Howard* v. *Zeyer*, 18 La. Ann. 407.

Such sales are, therefore, protected by the rule that a title acquired at a decretal sale of lands, made by a court in the exercise of competent jurisdiction, is not rendered invalid by the reversal of the decree. *Ward* v. *Hollins*, 14 Md. 158; *Irwin* v. *Jeffers*, 3 Ohio St. 389; *Gossom* v. *Donaldson*, 18 B. Mon. (Ky.) 230; *Fergus* v. *Woodworth*, 44 Ill. 374; *Gray* v. *Brignardello*, 1 Wall. 627, 634.

In the case last cited this court said: "Although the judgment or decree may be reversed, yet all rights acquired at a judicial sale, while the decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale."

In the case of *McCullough* v. *Minor* (2 La. Ann. 466), the Supreme Court of Louisiana said: "The jurisdiction of the court was undoubted, and the jurisprudence of the State has long been settled that a *bona fide* purchaser at a judicial sale is protected by the decree."

But it is not necessary to rely solely on this general doctrine. This court and others have directly applied the law probate which governs judicial sales to sales made by order of courts.

Thus, in *Thompson* v. *Tolmie* (2 Pet. 157) this court said: "The law appears to be settled in the States that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of the orphans' courts. When there has been a fair sale the purchaser will not be bound to look beyond the decree, if the facts necessary to

give the court jurisdiction appear on the face of the proceedings."

See also *Grignon's Lessee* v. *Astor*, *supra*. By a law of Michigan passed in 1818 the county courts had power under certain circumstances to order the sale of the real estate of a deceased person for the payment of debts and legacies. In reference to a sale of real estate made under this law the court said in that case: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken. The rule is the same whether the law gives an appeal or not; if none is given from the final decree it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can only be impeached for fraud in the party who obtains it; a purchaser under it is not bound to look beyond the decree; if there is error in it of the most palpable kind, if the court which rendered it have in the exercise of jurisdiction disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, — the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction."

"In the Orphans' Court, and all courts who have the power to sell the estates of intestates, this action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title, but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties, which divests the title of the deceased." See also *Erwin* v. *Lowry*, 7 How. 172; *Griffith* v. *Bogert*, 18 id. 158; *Florentine* v. *Barton*, 2 Wall. 210; *McNitt* v. *Turner*, 16 id. 352.

On the same subject the Supreme Court of Appeals of Virginia, in *Ballow* v. *Hudson* (13 Gratt. (Va.) 672), said: "Considerations of public policy require that all questions of

succession to property should be authoritatively settled. Courts of probate are, therefore, organized to pass on such questions when arising under wills, and a judgment by such a court is conclusive while it remains in force, and the succession is governed accordingly. A judgment of this nature is classed among those which in legal nomenclature are called judgments *in rem.* Until reversed it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all other courts."

In *Lalanne's Heirs* v. *Moreau* (*supra*), the Supreme Court of Louisiana said: "Sales directed or authorized by courts of probate are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them."

So in *Howard* v. *Zeyer* (*supra*) the same court said: "A warrantor is not bound to look beyond the decree of the court ordering the sale of succession property, and he acquires all the right of the deceased to said property, and no more."

In *Grignon's Lessee* v. *Astor* (*supra*), this court said: "Proceedings in a probate court to sell property of a decedent have been held to be proceedings *in rem*, to which all claiming under the decedent are parties."

In *McPherson* v. *Cunliff* (11 Serg. & R. (Pa.) 422), the court said that the decree of an orphans' court for the sale of land was conclusive; that the proceeding was purely *in rem* against the estate of the intestate and not *in personam.*

In *Lalanne's Heirs* v. *Moreau* (*supra*), it was said "that the decree of the Court of Probate ordering a sale of the property of minors is so purely *in rem* and against the property, that a sale made under it extinguishes all the mortgages existing in the name of the owner of the property sold."

In *Green* v. *The Baptist Church* (27 La. Ann. 563), the same court held that purchasers are not bound at their peril to inquire, when property is advertised for sale by an executor, whether anything has occurred outside the court to destroy the will under which he is acting.

In *Gaines* v. *De La Croix* (6 Wall. 719), which was a bill filed by the appellee in the present case against De La Croix, to recover certain slaves claimed by him under a sale made to

him by Relf, as executor of the will of 1811 of Daniel Clark, the defendant claimed that his titles, derived by the purchase from Relf, were valid, because he purchased within the year, while the functions of Relf, as executor, were in full force. In passing upon this point the court said: "This is true if he purchased in good faith, and the requisites of the law on the subject of the sales of succession property were complied with."

The case involved two purchases, and both were held invalid; one because it was made at private sale, and, consequently, the purchaser acquired no title; and the other because, though made at public auction, the court found that De La Croix had knowledge of the will of 1813 and its contents, and "that he knew the will under which he was buying was not the true will of Daniel Clark," and he, therefore, "got the property in bad faith."

It is objected, however, that the discovery of a later will and its probate showed that the will of 1811 was utterly void, and could furnish no valid ground for the order of sale. But it must be borne in mind that the will of 1811 had been duly admitted to probate by a court which had jurisdiction of the subject-matter, and whose duty it was to ascertain and declare whether the will presented to it was in fact the genuine last will and testament of the testator. Having declared the will of 1811 to be the genuine last will of Daniel Clark, acts done under that probate in a lawful manner until the discovery of a later will were valid and binding.

The English authorities hold that the record of probate and of the qualification of the executor is conclusive evidence of the existence of the will and of his authority.

Allen v. *Dundas* (3 T. R. 125) was an action on the case, brought by Allen as administrator of Priestman, against Dundas, for money had and received to the use of the intestate, and to the use of the plaintiff as administrator. The defendant pleaded the general issue. On the trial a special verdict was found, stating, in substance, as follows: The defendant, as treasurer of the navy, was indebted to the intestate in his lifetime £58, &c., for money had and received to his use. Priestman died June 2, 1784; on Aug. 13, 1785, one Robert

Brown proved in the Prerogative Court of the Archbishop of Canterbury a forged paper-writing, dated May 18, 1784, purporting to be the last will of Priestman, whereby he was supposed to have appointed Brown the sole executor thereof, and a probate of that supposed will issued in due form of law under the seal of that court, on the same day, in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him the £58, being the whole balance then due from the defendant to Priestman. Afterwards, on July 21, 1787, upon citation to Brown in the same court, the will and probate were declared void, and it was further declared that Priestman died intestate. On March 31, 1788, letters of administration on the goods of Priestman were granted to the plaintiff. Upon this verdict judgment was entered for defendant. Upon this case Buller, J., said: "The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff's counsel, *first*, that it is not a judicial act; and, *secondly*, that it is not conclusive. But I am most clearly of opinion that it is a judicial act, for the Ecclesiastical Court may hear and examine the parties on the different sides whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive until it be repealed, and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will, of a living person; but in such a case the ecclesiastical courts have no jurisdiction and the probate can have no effect; their justification is only to grant probate of the wills of dead persons. The distinction is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, should avail in all other places; but when they have no jurisdiction, their whole proceedings are a nullity." The judgment was concurred in by Justice Grose, and, as appears by a note at the end of the case, was approved by Lord Kenyon.

The same principle, that a probate is conclusive until repealed, was adverted to in an indictment for forging a will in

Rex v. *Vincent* (1 Stra. 481), where, on an indictment for forging a will of personal estate, on the trial a forgery was proved, but the defendant producing a probate, that was held to be conclusive evidence in support of the will.

To the same effect is the case of *Woolley* v. *Clark*, 5 Barn. & Ald. 746. See also Williams on Executors (6th Am. ed.), 590 and note (x'), where many cases to the same effect are cited.

In *Packman's Case* (6 Co. 19), it was held that, though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated.

To the same effect is the case of *Semine* v. *Semine*, 1 Lev. 90.

So in *Graysbrook* v. *Fox* (Pl. Com. 282), it was held that where one is executor, not of right but of wrong, yet if he had paid any debt due by specialty, or other thing which the law will force the executor to pay, the true executor should have been bound by it, and should have been obliged to allow it because the other was compellable to pay it, and the true executor had no prejudice by it, forasmuch as he himself should have been bound to pay it.

In *Thompson* v. *Harding* (2 El. & Bl. 630), Lord Campbell, C. J., said: "When the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property."

The same doctrine is held in *Parker* v. *Kett*, 1 Ld. Raym. 658.

The American cases are to the same effect. In *Waters* v. *Stickney* (12 Allen (Mass.), 15), it is said that a new decree of probate establishing a later will or codicil would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked.

See also *Peeble's Appeal*, 15 Serg. & R. (Pa.) 39; *Kittredge* v. *Folsom*, 8 N. H. 98; *Stone* v. *Peasley's Estate*, 28 Vt. 716.

In *Steele* v. *Renn* (50 Tex. 467), a question similar to the one now under consideration was passed upon by the Su-

preme Court of Texas, which held that "the title of a purchaser in good faith of land, from a legatee under a will duly admitted to probate, is not affected by proceedings subsequently instituted and resulting in annulling the will as a forgery."

Under the English law, by which probate of a will was only required in reference to personal estate, it might well be that the devisee of land took no title if the will were afterwards discovered to be void. But in this country in most of the States, Louisiana included, probate is required as well of wills of land as of goods, and the same effect should be given to it as a judicial act as to the probate of wills of personal estate in England.

Upon the doctrines and authorities above referred to we are of opinion that a sale of land, duly made by order of the Probate Court having jurisdiction, and a conveyance thereof by the executor of a will duly admitted to probate, while its functions were in full force, to a *bona fide* purchaser for value, vested the purchaser with a good and valid title, which was not affected by the discovery of a later will and its admission to probate and record.

The validity of the title of the Fortiers, under whom the appellant claims, depends, therefore, on the two questions: *First*, whether there was any fatal defect in the proceedings and sale under which their title was derived; and, *second*, whether they were purchasers in good faith.

We have already seen that the proceedings and sale took place within the year after the appointment of the executor, and that it was competent for the court to order the sale by reason of the absence from the State of the universal legatee named in the will of 1811.

The appellee contends that there were fatal defects in the proceedings and sale which rendered the title of the purchasers void.

Firstly, it is said that there was no order for the sale of the property in dispute, or rather that the order of sale made by the Probate Court did not include it.

There is little ground for this objection. The petition was for leave to sell all the property of the succession, movable

and immovable, and the order directed a sale accordingly. There is no dispute, in fact it is the basis of the appellee's title, that the property sold was the property of the succession, and before the sale took place an inventory was filed in which the property in dispute was returned as belonging to the succession.

There can be no question, therefore, that the order of sale included the property which is the subject of this controversy. But it has been expressly held by the Supreme Court of Louisiana that a purchaser of land at a probate sale, under the order of a court of competent jurisdiction, directing a sale of *all* the property of the succession, is not affected by the failure of the executor to have such land placed on the inventory, or to have it accurately described in the inventory. *Mitchell* v. *Levi*, 23 La. Ann. 630.

It is said, *secondly*, that the sale was not preceded by the advertisements required by law; and, *thirdly*, that the inventory of the property of the estate, in which was included the premises in controversy, was not made until after the order of sale, and that the part of the inventory which included them was not made by the two appraisers appointed by the parish judge, but by appraisers chosen by the testamentary executor, and it was only signed by one of them.

There is evidence in the record tending to show that the sale was duly advertised. The executor's conveyance recites that the sale was made after "the publications and delays prescribed by law;" and the account of the executor, which had been of record in the Probate Court for more than fifty years, shows that he paid for advertising the sale the sum of $232.

As possession had been held under the deed for over sixty years, its recitals are evidence even against strangers. *Carver* v. *Jackson*, 4 Pet. 83. And it has been held by the Supreme Court of Louisiana that the account of an executrix recorded in the Probate Court is competent evidence to prove the advertisement of a sale. *Woods* v. *Lee*, 21 La. Ann. 505. The account was subject to exception. It passed under the scrutiny of the Probate Court, whose duty it was to ascertain the balance due upon it to the heir, and render a final judgment

therefor. Civil Code, arts. 1183, 1184. It was, therefore, necessary for the court to allow or disallow the item charged for advertising the sale. As this item remains in the account as recorded, it may be presumed that it was allowed by the court, and after it has been of record for over fifty years, as in this case, may be considered as competent evidence to prove that the advertisement of the sale was made.

This evidence, uncontradicted as it is, is sufficient to prove the fact of the advertisement. But whether this is so or not is immaterial; for on March 10, 1834, an act of the legislature of Louisiana was passed, the second section of which declares: "When a question shall arise out of any public sale heretofore made by the sheriff, auctioneer, or other public officer, and which sale was required by law to be preceded by advertisements, the fact of sale being proved, it shall make *prima facie* evidence that the required advertisements were regularly made."

And this section has been continued in force to the present time. See Voorhies's Revised Statutes, 1876, p. 867, sect. 3391. But even if it were affirmatively shown that there had been no advertisement of the sale, that defect, as well as the alleged irregularities in regard to the inventory, is cured by the rule of prescription established by the fourth section of the said act of March 10, 1834, which is as follows: "All informalities connected with or growing out of any public sale made by a sheriff, auctioneer, or other public officer, shall, after the lapse of five years from the time of making the same, be prescribed against by those claiming under such sales, whether they be minors, married women, or persons interdicted."

This section continued in force until 1870. It was then substantially re-enacted by the general provision contained in the Revised Statutes of 1870, sect. 3392, p. 659, and by art. 3543 of the Civil Code published in the same year, which declares as follows: "All informalities connected with or growing out of any public sale made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

This section is still in force. Voorhies's Revised Statutes, 1876, sect. 3392.

To entitle a party to claim the benefit of this provision of this or any other prescription, it is made necessary by the jurisprudence of Louisiana that he should have acquired the immovable in good faith and by a just title. By the term "just title," in cases of prescription, is not meant that which has been derived from the true owner, but that which has been received from any person whom the possessor honestly believed to be the true owner, provided it were such as to transfer the ownership of the property; that is, such as by its nature would have been sufficient to transfer the ownership if it had been derived from the real owner, such as a sale, exchange, legacy, or donation. Arts. 3484 and 3485 Civil Code; *Pike* v. *Evans*, 94 U. S. 6.

The deed of Relf, executor, to the purchasers falls within the category above mentioned, or, in the language of the civilians, it is translative of property. There is no defect upon the face of it. The only questions, therefore, which arise upon the prescription of five years declared by sect. 4 of the act of March 10, 1834, and its substitute, art. 3453 of the Civil Code, are, Were the Fortiers purchasers in good faith; and are the defects in the title, insisted on by the appellee, such informalities as are cured by that prescription?

The good faith of the purchaser must be presumed until the contrary is shown. *Packwood* v. *Richardson*, 1 Mart. N. S. (La.) 410; *Fletcher* v. *Cavalier*, 4 La. 267; *Rivarde* v. *Rosseau*, 7 La. Ann. 3; *Leduf* v. *Bailly*, 3 id. 8.

There is not a scintilla of proof in the record tending to show that the Fortiers, or those claiming under them, had any direct notice of Daniel Clark's will of 1813, or that the will of 1811, under which the sale was made, was not his last will and testament.

The appellee relies on the fact, which she claims the testimony proves, that there was a general report in New Orleans, then a small town, that the will of 1811 was not the last will of Daniel Clark.

Even if the evidence established this fact, it is entirely too vague and inconclusive as a ground for creating or destroying

valuable rights. But it fails signally to establish any such general report, or to show that the Fortiers resided in New Orleans, where, if such report existed, it might possibly have come to their ears.

The only other fact relied on to prove the bad faith of the purchasers was the fact that De La Croix, on Aug. 18, 1813, following the filing in the Probate Court of the will of 1811, filed in the same court his petition under oath, in which he stated that he had strong reasons to believe, and did believe, that the late Daniel Clark had made a testament or codicil posterior to that which had been opened before that honorable court, and in the disposition whereof he thought he was interested. And the petition prayed that, "whereas the double of this will, whose existence was known to several persons, might have been deposited with any notary public of this city, an order might be made that every notary of the city appear before the court within the delay of twenty-four hours, to certify on oath if there does or does not exist in his office any testament or codicil or any sealed packet deposited by the said Daniel Clark."

The order was made according to the prayer of the petition. Nothing came of it. No subsequent will was found by reason of the steps suggested by the petitioner.

This petition proved that De La Croix had notice of the will of 1813. It was so held by this court in *Gaines* v. *De La Croix*, 6 Wall. 719. But it proved nothing else. It fails utterly to show any bad faith on the part of the Fortiers. There is not the slightest evidence that either of them ever heard of the petition, or that a rumor of the existence of a will later than that of 1811 ever came to their knowledge.

There is an absolute failure of proof to establish any bad faith on the part of the purchasers of the property in dispute. They acted as if they believed that they were getting a good title to the property, for they agreed to pay, and did pay, what at that time was an immense sum of money for it, to wit, $120,000.

The good faith of the Fortiers being beyond question, they and those claiming under them have the right to rely upon the

prescription of five years to cure any irregularity in the proceedings which resulted in the sale.

That want of advertisements of the sale is such an irregularity as falls within the prescription was held in the cases of *Woods* v. *Lee*, 21 La. Ann. 505; and *Pasiana* v. *Powell*, id. 584. And it would seem that when property was sold at public sale, and as in this case brought its full value, the want of previous advertisement was a very immaterial matter.

The other alleged defects in the proceedings clearly fall within the prescription of five years. The fact that the inventory of the estate was not completed before the order of sale, the fact that the inventory was partly made by appraisers appointed by the testamentary executor, and that it was signed by only one of two who were so appointed, are certainly most trifling and inconsequential irregularities when there is no proof or even charge that the inventory was not fairly made or the sale fairly conducted, and when the property sold brought its full value. If these irregularities do not fall within the prescription of five years, it would be hard to conceive of any that would. *Fraser* v. *Zylicz*, 29 id. 534.

The irregularities in the sale alleged by the appellee are, therefore, cured by the lapse of five years, and can have no more influence on the title of the appellant than if they never existed.

We find, therefore, that the appellant derives her title under a public sale made by a public officer by authority of the order of the Probate Court; that the sale took place, and the deed, which on its face was without defect and was translative of property, was made by the executor within the year following his appointment; that the purchasers purchased in good faith for a full consideration; and that there were no nullities or informalities in the sale which have not been cured by the prescription of five years.

In the cases heretofore decided by this court in favor of appellee, except *Gaines* v. *De La Croix*, the defendant claimed title from Relf, or Relf and Chew, executors of the will of 1811, under private sale, made by them as agents of Mary Clark, devisee under that will, and in their pretended capacity as executors, after their term of office had expired, and

without any order of court. See *Gaines* v. *New Orleans*, 6 Wall. 642.

In the case of *Gaines* v. *De La Croix*, the court decided, and on most satisfactory proof, that De La Croix was a purchaser in bad faith, and upon that ground his title was declared invalid.

In her bill in this case the appellee, knowing that it was a vital fact in her case, charged that the sale of Relf, the executor, to the Fortiers was made after the expiration of a year from the date of his appointment and at a time when he had no authority to sell. But, as the proof shows, that averment is not true. The record shows that Relf was appointed executor Aug. 27, 1813, and the sale was made on November 8 following, under an order of court, and the conveyance three days later, on November 11.

Upon the facts of the case, therefore, the title derived by the appellant under the sale to the Fortiers appears to be a good and valid title.

But conceding that the title acquired by the Fortiers at the sale made by the register of wills was void, should there be a decree in favor of the complainant, establishing her title to the lands in question, and placing her in possession, until she has returned or tendered the money which the Fortiers paid on their purchase? This inquiry presents the second ground of defence relied on by appellee.

Clark bought the property for $120,000, wholly on credit, and gave a mortgage on it to secure the purchase-money. It was sold for the same price to the Fortiers, who purchased in good faith. Every cent of the purchase-money was applied to the extinguishment of the mortgage executed by Clark, and for which his estate was liable. No repayment or tender of this sum or any part of it is averred in the bill. Upon this state of facts, we do not think the complainant is entitled to a decree.

To allow the heir or the devisee of a mortgagor, under the circumstances of this case, to recover the property without repaying the money for which it had been sold, and which had been paid by a *bona fide* purchaser, and had been applied to clear the property of a mortgage which rested upon it, and for

which the estate of the mortgagor was bound, would be most inequitable and unjust. It would be an utter disregard of the rule that they who seek equity must do equity. No support for such a decree can be found in the adjudged cases.

On the contrary, in *Scott* v. *Dunn* (1 Dev. & B. (N. C.) Eq. 425), it was held that where an executor sold lands and applied the proceeds to the payment of the debts under a mistake of his power, and the purchaser was evicted by the devisee, the land in equity would be subjected to indemnify the purchaser to the extent to which the purchase-money was applied to the payment of the debts over and above the personal estate.

So in *Valle* v. *Fleming's Heirs* (29 Mo. 152), it was held that when land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase-money is applied in extinguishment of a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase-money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase-money.

To precisely the same effect are the cases of *Blodgett* v. *Hitt*, 29 Wis. 169, and *Hudgin* v. *Hudgin*, 6 Gratt. (Va.) 320. See also *Mohr* v. *Tulip*, 40 Wis. 66; *Grant* v. *Lloyd*, 22 Miss. 191; *Short* v. *Porter*, 44 id. 533; *Haynes* v. *Meeks*, 10 Cal. 110. And see Freeman on Void Judicial Sales, sect. 51, where the authorities on this question are collected and discussed.

The views held in the cases above referred to are sanctioned also by the jurisprudence of Louisiana. Thus, in *Barelli* v. *Gauche* (24 La. Ann. 324), it was held that an action to annul a judicial sale of real property on the ground of irregularities in the proceedings cannot be maintained against the purchaser, unless the parties claiming its nullity have paid or offered to reimburse the purchaser the amounts of the mortgages resting on the property, which he has paid since the purchase. A tender of the amounts thus paid is an essential prerequisite to the prosecution of a suit to annul.

So in *Davidson* v. *Davidson* (28 La. Ann. 269), it was held that a sale made by an administrator to pay debts "could not be disturbed unless the heirs previously returned or offered to return the price of the adjudication."

In *Jouet* v. *Mortimer* (29 id. 207), the court said: "Nothing could be more unjust than to permit a debtor to recover back his property because the sale is irregular, and yet allow him to profit by that irregular sale to discharge his debt."

See *Coiron* v. *Millaudon*, 3 id. 664; *Seawell* v. *Payne*, 5 id. 255; *Barret* v. *Emerson*, 8 id. 503; also *Dufour* v. *Camfranc*, 11 Mart. (La.) 607.

The same rule prevailed in the civil law. It was said by Mr. Justice Story, in *Bright* v. *Boyd* (2 Story, 478): "There is still another principle of the Roman law which is applicable to the present case. It is, that where a *bona fide* purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him."

See also Dig., lib. 6, tit. 1, l. 65; Pothier, Pand., lib. 6, tit. 1, n. 43; Pothier, De la Propriété, n. 343.

The authorities cited settle conclusively the proposition that the complainant is not entitled to the decree she seeks without repayment or tender of the purchase-price of the lands in controversy, which has been applied to the extinguishment of a mortgage thereon.

No case is cited by counsel for appellee where the court refused to give a purchaser in good faith the benefit of this rule. The authorities relied on by him (Sugden on Vendors, c. 16, p. 483; 3 Atk. 287) apply only to purchases in bad faith.

We are aware that it has been held that a purchaser at an irregular or void judicial or execution sale is not subrogated to the rights of the judgment creditor. *Richmond* v. *Marston*, 15 Ind. 134.

The weight of authority is, however, against this position. *McLaughlin* v. *Daniel*, 8 Dana (Ky.), 182; *Bentley* v. *Long*,

1 Strobh. (S. C.) Eq. 43; *Howard* v. *North*, 5 Tex. 290; *Jackson* v. *Bowen*, 7 Cow. (N. Y.) 13. And this court has expressly held that an irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such. *Brobst* v. *Brock*, 10 Wall. 519.

But it is not necessary for the appellant to stand upon the doctrine of subrogation. She is in possession, and ought not to be deprived thereof upon a proceeding in equity, unless the complainant offers to do equity. What we decide on this branch of the case is this: when the purchase-money paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a Probate Court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale is irregular or void, the purchaser cannot be ousted of his possession upon a bill in equity filed by the heir or devisee, without a repayment or tender of the purchase-money so paid and applied.

As the points already decided are conclusive of the case, it is unnecessary to express any opinion on the third defence set up by the appellant; namely, the prescriptions of ten, twenty, and thirty years declared by the Civil Code of Louisiana.

The litigation of which this case forms a part has been before this court in various forms in the following cases: *Ex parte Myra Clarke Whitney*, 13 Pet. 404; *Gaines* v. *Relf*, 15 id. 9; *Gaines* v. *Chew*, 2 How. 619; *Patterson* v. *Gaines*, 6 id. 550; *Gaines* v. *Relf*, 12 id. 472; *Gaines* v. *Hennen*, 24 id. 553; *Gaines* v. *New Orleans*, 6 Wall. 642; *Gaines* v. *De La Croix*, id. 719; *New Orleans* v. *Gaines*, 15 id. 624; *Gaines* v. *Fuentes*, 92 U. S. 10.

We think the facts of this case distinguish it from all the cases above mentioned, and our opinion is, that upon the averments made in this bill, and the evidence adduced to support it, the appellee, Mrs. Gaines, is not entitled to a decree against the appellant. So much, therefore, of the decree of the Circuit Court as relates to the property bought by Michel Fortier and Omer Fortier, and now claimed by the widow and

heirs of Minor Kenner, deceased, must be reversed, and the cause remanded with directions to dismiss the bill, so far as it concerns the appellant.

So ordered.

MR. JUSTICE MATTHEWS took no part in the decision of this case.

HYDE *v.* RUBLE.

1. Under the second section of the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), a suit cannot be removed from a State court to the Circuit Court, unless either all the parties on one side of the controversy are citizens of different States from those on the other side, or there is in such suit a separable controversy, wholly between some of the parties who are citizens of different States, which can be fully determined as between them.
2. That act repealed the second clause of sect. 639 of the Revised Statutes.

ERROR to the Circuit Court of the United States for the District of Minnesota.

The facts are stated in the opinion of the court.

Mr. Angus Cameron for the plaintiffs in error.
Mr. Gordon E. Cole, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit begun by Ruble and Green, on the 6th of March, 1880, in a State court of Minnesota, upon an alleged contract of bailment made by the defendants as partners. The amount involved was a little more than $500. The plaintiffs were citizens of Minnesota. Only one defendant, Rowell, was a citizen of that State. The business of the alleged partnership was carried on there. He filed a separate answer to the complaint, in which he denied the existence of any partnership between himself and the other defendants, and set up a full performance of the contract on his part. The other defendants joined in a separate answer for themselves, in which they denied any partnership with him, and any con-

tract between themselves and the plaintiffs. They also denied generally all the allegations of the complaint.

On the 12th of April, 1880, after these answers were in, all the defendants, including Rowell, filed in the State court a petition for the removal of the suit to the Circuit Court of the United States for the District of Minnesota, on the ground of the citizenship of the parties. At the next term of the Circuit Court the cause was remanded to the State court. This order was entered in the Circuit Court July 31, 1880, and a copy thereof filed in the State court on the 11th of August. On the 12th of January, 1881, at a term of the State court which began on the 10th of that month, another petition was filed, by all the defendants who were not citizens of Minnesota, for a removal of the suit, as to themselves, on the ground that there could be a final determination of the controversy, so far as it concerned them, without the presence of Rowell as a party. It is not contended that this petition was filed in time to effect a removal under the second clause of the second section of the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470); but the State court, under the second clause of sect. 639 of the Revised Statutes, ordered a removal, so far as concerned the petitioning defendants, leaving the suit to proceed in that court as to Rowell. When the case was docketed in the Circuit Court under this second removal it was again remanded. To reverse these several orders of the Circuit Court this writ of error has been brought by the defendants.

This action is clearly one sounding in contract and not in tort. According to the allegations of the complaint the plaintiffs stored, at an agreed rate, their wheat with the defendants, who undertook to buy it and pay for it at the market price whenever the plaintiffs wanted to sell. The action is brought to recover what is alleged to be due on the price according to the terms of this contract. All the allegations of wrongful conversion are immaterial, and in no way change the character of the suit.

The suit, then, as it stands on the complaint, is in respect to a controvesy between the parties as to the liability of the defendants on a singlé contract. One ground of defence is, that there was no partnership between the defendants, and that

Rowell alone was bound by the contract that was made; and another, that the contract, by whomsoever made, had been fully performed. Clearly, then, under our rulings in *Removal Cases* (100 U. S. 457) and *Blake* v. *McKim* (103 id. 336) the case was not removable under the first clause of the second section of the act of 1875, because all the parties on one side of the controversy were not citizens of different States from those on the other.

Neither do we think it was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other. Thus, in *Barney* v. *Latham* (103 id. 205), two separate and distinct controversies were directly involved: one as to the lands held by the Winona & St. Peter Land Company, in respect to which the land company was the only necessary party on one side and the plaintiff on the other; and the second as to the moneys collected from the sales of lands before the land company was formed, and as to which only the natural persons named as defendants were the necessary party on one side and the plaintiffs on the other. One was a controversy about the land and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in each suit as to the particular controversy involved. In that about the land, the land company would have been the only necessary defendant; and in that about the money, the natural persons need only have been brought in. In that about the land there could not have been a removal, because the parties on both sides would have been citizens of the same State; while in that about the money there could have been, as the plaintiffs would all be citizens of one State, while the defendants would all be citizens of another. When two such causes of action are found united in one suit, we held in the case last cited there could be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy,

which, if it had been sued on alone, would be removable. But that, we think, does not meet the requirements of this case. This suit presents but a single cause of action, that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy.

The suit is, therefore, governed by the principles applied in *Removal Cases* and *Blake* v. *McKim*, rather than those in *Barney* v. *Latham*, and was properly remanded.

The second clause of sect. 639 of the Revised Statutes was, as we think, repealed by the act of 1875, and as the second petition for removal was not filed in time under the act of 1875, it was of no avail. The whole case depends on the first petition.

The order to remand is

Affirmed.

BRONSON *v.* SCHULTEN.

1. During the term when it is rendered or entered of record, a judgment or an order, however conclusive in its character, is under the control of the court pronouncing it, and may then be set aside, vacated, or modified.
2. After that term, unless steps be taken during its continuance, by motion or otherwise, errors in a final judgment can only be corrected by an appellate court.
3. To this rule there is an exception. The writ of error *coram vobis* brought before the court of original jurisdiction certain mistakes of fact not put in issue or passed upon, such as that a party died before judgment, or was a married woman, or was an infant and no guardian appeared or was appointed, or that there was error in the process through the default of the clerk. It did not lie, however, to correct errors in the judgment itself. The relief thereby sought is, in modern practice, attained by motion, supported, when necessary, by affidavits.
4. Neither the practice of the State courts in exercising a control over their own judgments and administering equitable relief in a summary way, nor the statutes of the States, can determine the action of the courts of the United States on this subject.
5. In this case the carelessness and laches of the plaintiffs preclude, under any rule, the setting aside of the judgment after the term at which it was rendered.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

Mr. Samuel Shellabarger, *Mr. Jeremiah M. Wilson*, and *Mr. Almon W. Griswold*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

On the twenty-sixth day of January, 1877, the following order was made of record in the court below: —

"J. W. SCHULTEN ET AL.
v.
GREENE C. BRONSON and 22 other Causes.

"A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein:

"Now, on reading and filing notice of motion dated Dec. 27, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, Esq., U. S. District Attorney, in opposition thereto, and due deliberation had, it is ordered that the judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assessment of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, Esq., as sole referee.

"And it is further ordered that the referee proceed to adjust *de novo* the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases, respectively, and that he report the balance, if any, found due the plaintiffs in each of said cases.

"The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party may, on the hearing, raise objections, and said referee shall decide thereon, and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

"Dated Jan. 26, 1877."

March 8, 1877, another order was made that the action be continued in the name of Lucretia Bronson, executrix of the

will of Greene C. Bronson, who had died in 1863. March 10, the referee's report was filed, in which it was found that there was due plaintiffs, in addition to what had been paid under the judgment set aside, the sum of $1,205.90, and on this sum interest was allowed to the amount of $2,017.21. For these sums, with added costs, a judgment was rendered in their favor. To reverse this judgment the present writ of error is brought.

Enough of the record of the original suit, the judgment in which is thus set aside, is produced before us to show that the action was against Bronson, as collector of customs for the port of New York, and the claim was for duties in excess of what was authorized by law on a large number of separate importations; that a verdict was given on the trial for plaintiffs for "the amount, with interest, of the difference between duties levied and paid under protest, on commissions at two and one-half per cent, and such duties if levied on commissions at two per cent," on the class of importations in question. The commissions alluded to were those paid by the importers before shipment to this country. As the amount to be recovered under this verdict was matter of computation and inspection of the custom-house papers, it was referred to Samuel Ogden to make report.

Neither the judgment of the court which was set aside, nor the report of Ogden, on which that judgment must have been entered, nor the plaintiffs' bill of particulars, on which the action was based, is found in the transcript of the record on which we are to consider this case. Nor is there any bill of exceptions, as there should have been, embodying the evidence on which the court acted in setting aside the former judgment. Nor is the date of that judgment to be ascertained from anything in this record, unless we can look at certain affidavits found in the transcript; for neither the notice of the motion to set it aside nor the order granting that motion mention the date of that judgment. It would seem that a party seeking to open or set aside a judgment seventeen years after it had been entered and the amount of it paid, in order that another judgment for a larger amount might be rendered in the same suit, was not very anxious to call attention to dates.

This imperfect state of the record has made us hesitate to

enter upon a review of the case, but as the order setting aside the original judgment refers to the notice of motion and the annexed affidavits as the foundation of that order, and identifies those papers as they are found in the transcript, we are of opinion that they may be considered as part of the record, so far as the question of the authority of the court to make that order is involved.

Looking to these affidavits, in connection with what is more strictly a part of the record, it appears that the original suit was commenced in one of the State courts, Sept. 2, 1858, and afterwards removed into the Circuit Court of the United States, where plaintiffs filed a declaration containing the common counts. It appears that they also served a bill of particulars, setting out seventy-four entries of goods at the custom-house, on which they had been charged excessive duties by the defendant Bronson, which they had paid under protest. The affidavit of Murray, a refund clerk in the custom-house, states that in thirty-four of these entries the sums which should have been allowed plaintiffs were omitted in the adjustment. It was on this statement that the judgment rendered on the report of the first referee, Ogden, without objection or exception on either side, on the fifth day of August, 1860, was set aside, and a new reference made. This judgment, it appears, was also paid and accepted by plaintiffs in a few days, we may suppose, after it was rendered. The affidavit of plaintiffs' attorney, who attended to the original action, and on whose motion the original judgment was set aside, states that the adjustments were made by Ogden, who was an auditor at the custom-house, and by the collector of customs, and by the clerk of the court; that in 1864 he discovered that certain errors had been committed in fourteen other cases of a similar character, in which other persons were plaintiffs, to their prejudice, for which new actions were commenced, and held barred by the Statute of Limitations; that as to other cases, including the one now before us, he did not discover that items embraced in the bill of particulars had been omitted, until an investigation of certain recent cases of like character against Collector Redfield; that in the readjustment of these latter cases his attention was turned to the source of the errors in the one now in question.

The affidavits of Heinrich and Murray tend to show that all was not included in the adjustment under the verdict that ought to have been.

We have thus a case in which plaintiffs sue for excessive charges on account of these commissions paid on seventy-four entries of goods, specifically set out in their bill of particulars. A verdict is rendered in their favor fixing the precise error under which the exessive duty had been exacted, and leaving to a referee to ascertain the amount due on each of these entries. The referee reports as to all but thirty-four, nearly half, of these entries, and as to them makes no report. A judgment is rendered in conformity to the report, the money paid and accepted, and seventeen years afterwards the judgment is opened to correct the omission of these thirty-four entries.

We are of opinion that, if there was any mistake in the report of the referee and in the judgment rendered thereon, it was so clearly due to the negligence and inattention of plaintiffs or their attorney, that no case is made for relief in any of the modes known to the law, of correcting an erroneous judgment after the term at which it was rendered.

Stress is laid upon the fact in argument that the referee was one of the clerks in the custom-house, who had access to all the books and papers of the office. It is probable he was selected by both parties because of his familiarity with those accounts, but he is not mentioned in the order of reference as such clerk or officer. Any other person so appointed would have been permitted to examine the necessary books and papers, and in this matter he must be held to be, as no doubt he was, an impartial referee, representing neither the collector nor the government which was to pay the sum found due.

The plaintiffs had the same right to appear before him, examine his report and the evidence on which it was founded, to take and urge to the court exceptions to it, as in case of any other reference. Nothing of the kind was done, and though it is here said that no report at all was made as to thirty-four out of seventy-four entries set out in plaintiffs' bill of particulars, no exception was made to the report on that ground, nor any inquiry made as to the reason for such omission. It is

obvious that if this had been done, the error which is now complained of would have been corrected before the report of the referee was confirmed and judgment rendered on it.

If, then, there was no question of lapse of time, or of the power of the court over its own judgments after the term at which they are rendered, and if this were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could be granted, because of the negligence, carelessness, and inattention and laches of the plaintiffs, or of their attorney, in the matter.

Does the power of the court over its own judgment, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *Railroad Company*, 102 U. S. 107; *Public Schools* v. *Walker*,

9 Wall. 603; *Brown* v. *Aspden*, 14 How. 25; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Sibbald* v. *United States*, 12 Pet. 488; *United States* v. *The Brig Glamorgan*, 2 Curt. C. C. 236; *Bradford* v. *Patterson*, 1 A. K. Marsh. (Ky.) 464; *Ballard* v. *Davis*, 3 J. J. Marsh. (Ky.) 656.

But to this general rule an exception has crept into practice in a large number of the State courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through default of the clerk. See Archbold's Practice.

In Rolle's Abridgment, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court.

In *Pickett's Heirs* v. *Legerwood* (7 Pet. 144), this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in the British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case.

There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-

fashioned writ of error *coram vobis* did. This practice has been founded in the courts of many of the States on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the States where a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do.

It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the State courts cited by them on this point in support of the action of the Circuit Court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that State, and we are of opinion that on this point neither the statute of that State nor the decisions of its courts are binding on the courts of the United States held there.

The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case.

It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this

must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief.

As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain for seventeen years but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them, when the error, if any existed, only needed a comparison of their own bill of particulars with the report of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside.

It follows that the judgment of the Circuit Court must be reversed, with directions that the order vacating the former judgment be set aside, and the motion of plaintiffs in that matter be overruled.

So ordered.

NOTE. — *Bronson* v. *Loeschigk, Bronson* v. *Warburg, Bronson* v. *Grossman, Redfield* v. *La Chaise,* and *Redfield* v. *Mitchell* were brought by writ of error to the same court and argued at the same time as was the preceding case.

MR. JUSTICE MILLER, in giving the opinion of the court, stated that they were governed by the principles announced in that case, and that in each a judgment would be entered reversing that of the Circuit Court, with directions to set aside the order vacating the original judgment, and to overrule the motion on which that order was made.

CUMMINGS *v.* JONES.

The judgment of a State court cannot be re-examined here unless, within two years after it was rendered, a writ of error be brought.

MOTION to dismiss a writ of error to the Supreme Court of the State of Louisiana.

The facts are stated in the opinion of the court.

Mr. Charles W. Hornor in support of the motion.

Mr. Samuel Field Phillips, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a writ of error to the Supreme Court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by sect. 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of error to State courts. We have no hesitation in saying it does. Sect. 1003 provides that "writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." This is almost the exact language of a similar provision in the twenty-fifth section of the Judiciary Act of 1789, and we are not aware it was ever supposed that writs issued to the State court under that section were not subject to the limitation prescribed for writs to the Circuit Courts by the twenty-second section. In *Brooks* v. *Norris* (11 How. 204), this seems to have been assumed, and a writ to a State court was dismissed "on the ground that it is barred by the limitation of time prescribed by the act of Congress." There was at that time no other limitation than the one contained in the twenty-second section.

Inasmuch as the writ was not brought within two years after the judgment complained of was rendered, the motion is

Granted.

QUINBY *v.* CONLAN.

1. The verdict of a jury upon an issue which a court of chancery directed them to try is merely advisory.
2. A party lawfully settling upon a portion of a quarter-section of public land, who in good faith complies with the statutory requirements, is entitled as against subsequent settlers to pre-empt that quarter-section, and they derive no right thereto by purchasing the claim of a prior settler, unless, by an actual entry at the proper office, he has a transferable interest in the land.
3. The courts cannot exercise a direct appellate jurisdiction over the rulings of the officers of the Land Department, nor reverse or correct them in a suit between private parties.
4. Where, by misconstruing the law, those officers have withheld from a party his just rights, or misrepresentation and fraud have been practised necessarily affecting their judgment, the courts may in a proper proceeding interfere and refuse to give effect to their action.

ERROR to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

Mr. Robert H. Bradford and *Mr. Willis Drummond* for the plaintiff in error.

Mr. James Coleman for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action for the possession of certain real property in the county of Los Angeles, in the State of California. The complaint is in the usual form in such actions, according to the system of pleading prevailing in that State, alleging the ownership of the premises by the plaintiff and his right to their possession on a day designated, the wrongful entry thereon by the defendant, and his subsequent occupation thereof, to the plaintiff's damage.

It also alleges the value of the rents and profits during the occupation of the defendant, and prays judgment for restitution of the premises to the plaintiff, for his damages for their occupation, and for the rents and profits lost.

The answer of the defendant denies the several allegations of the complaint, and then sets up in a special count, by way of a cross-complaint, various matters which, as he claims, constitute in equity a good defence to the action and entitle him

to a decree, that he has an equitable right to the premises, and that the plaintiff holds the legal title for him.

Under the system of pleading which obtains in California an equitable defence of this nature, as well as a defence at law, may be set up to an action for the possession of land. In such case the grounds of equitable relief must be set forth separately from the defence at law. The answer presenting them is in the nature of a bill in equity, and must contain all its essential allegations. It must disclose a case which, if established, will justify a decree adjudging that the title be transferred to the defendant, or enjoining the further prosecution of the action. The equitable defence is, therefore, first to be disposed of by the court before the legal remedy is considered. Upon its disposition the necessity of proceeding with the legal action will depend. When that action does proceed, the ordinary rules as to the controlling influence of the legal title will apply. *Estrada* v. *Murphy*, 19 Cal. 248, 273; *Arguello* v. *Edinger*, 10 id. 150.

This statement will explain what otherwise would appear singular in the record, that one judge heard the issues raised by the special answer in the nature of a cross-complaint in equity, and another judge of the same court subsequently tried the issues in the action at law. There was no more impropriety in this hearing of the different issues by different judges, or incongruity with established modes of procedure, than there would have been had the issues in the cross-action been presented in an independent suit.

The grounds put forth for equitable relief consist of alleged erroneous rulings of the Land Department upon two matters, — the possession and improvement of the lands in controversy by the parties claiming a pre-emption right to them; and the time when that portion of the lands in controversy, claimed to be within the limits of a confirmed Mexican grant, was shown, by a survey of the grant and the appropriation of other lands to its satisfaction, to be without them and thus open to settlement and pre-emption.

1. The lands in controversy constitute the west half and the southeast quarter of a quarter-section. The plaintiff, Conlan, entered upon them in February, 1865, occupying a

portion thereof, and declaring his purpose to acquire, as a settler, a pre-emption right to them. The township was surveyed by the authorities of the United States in February, 1868, and the plat filed in the proper land-office in April following. In May, 1868, Conlan filed his declaratory statement in the form required by law, claiming the quarter-section as a pre-emptor. In May, 1869, four years after Conlan's settlement, the defendant, Quinby, settled upon the quarter-section, occupying a portion thereof, declaring his intention to acquire, as a settler, a pre-emptive right to the land, and in November, 1871, he filed his declaratory statement claiming it as a pre-emptor. Previously to his possession various parties had occupied portions of the section, and had conveyed to him whatever interest they held. It would seem from the answer and the frequent reference to the prior occupation of these parties, that it was supposed that this fact in some way increased the equity of his possession and gave him a better pre-emptive right to the lands than that claimed by the plaintiff. But to this position there are two answers: 1st, It does not appear that the grantors of the defendant ever contemplated the acquisition of a pre-emptive right to the lands by their settlement; and, 2d, The act of Congress forbids the sale of pre-emptive rights to the public lands acquired by settlement and improvement. The general pre-emption law declares that all transfers and assignments of rights thus obtained prior to the issuing of the patent shall be null and void. This court held — looking at the purpose of the prohibition — that it did not forbid the sale of the land after the entry was effected, that is, after the right to a patent had become vested, but did apply to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated. *Myers* v. *Croft*, 13 Wall. 291.

The claim of the defendant to a right of pre-emption stands, therefore, in no better plight than if there had been no prior occupant of the lands. His own settlement can alone be considered, and that dates, as already said, from May, 1869. He had no claim to the lands when the plaintiff settled upon them, and he acquired none by his purchase of parties who had previously occupied them.

He must also be considered as settling upon them with notice of the plaintiff's prior claim by his declaratory statement filed in the land-office the year before. The plaintiff could not, it is true, have asserted a pre-emptive right to the whole quarter-section as against parties at the time of his settlement in the occupation of a portion of them. Had such parties followed up their occupation and improvement by a declaratory statement when the public surveys were extended over the lands, the case would have been different. A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decisions in *Atherton* v. *Fowler*, 96 U. S. 513, and *Hosmer* v. *Wallace*, 97 id. 575.

But a settlement upon a portion of a quarter-section, and making the improvements required by law, will sustain a pre-emptive claim to the whole quarter-section as against subsequent settlers; and such subsequent settlement is not improved, or in any respect rendered more efficacious, by the fact of purchase from earlier occupants. The settlement which the law of Congress will recognize — except where the claim is made by a widow or heirs of a deceased settler — must be personal to the settler, and not that of others who may have conveyed to him.

2. As to the time when the portion of the land in controversy, originally claimed to be within the boundaries of a Mexican grant, was, by the survey of the grant, and the appropriation of other lands to its satisfaction, excluded from them, and thus became open to settlement and pre-emption, only a few words are necessary.

It does not clearly appear from the record what portion of the land in controversy was covered by the claim under the Mexican grant. It would seem, from the complaint, to have been the southeast quarter of the quarter-section; but it is not material. The court found that the grant was surveyed in January or February, 1868, under the act of Congress of July 3, 1866, c. 219, entitled "An Act to quiet land-titles in California;" that such survey was finally approved, and a patent issued upon it; and that the land in controversy was not in-

cluded within it, but "was public land and subject to pre-emption" at the time the plaintiff filed his declaratory statement. The jury, it is true, found, generally, the reverse of this, — that the land was claimed to be within the boundaries of the grant when the declaratory statement was filed. Hence it is contended that the approval of the survey must be considered as subsequently given. It is also contended that a similar conclusion must follow from the period, required by the act of July 1, 1864, for the publication of notice of the survey of a confirmed Mexican grant, before it could be forwarded to the land-office at Washington for approval. But to this argument or assumption there is a satisfactory answer. If there be in an equity case — and so far as the issues upon the cross-complaint are concerned they are to be treated as arising in a proceeding of that character — a conflict between the finding of the court and that of the jury, the former prevails. The finding of the jury is only advisory, and the court may disregard it, and follow its own judgment upon the evidence. *Basey* v. *Gallagher*, 20 Wall. 670, 680.

The survey in the case was made under the eighth section of the act of 1866, and was not subject to the provisions of the act of 1864, requiring publication of it before approval by the Commissioner of the General Land-Office. The statute of 1866 declares that in cases where no request is made within ten months after its passage, or within that period after any subseqent final confirmation, for a survey of a claim under a confirmed Mexican grant, pursuant to sects. 6 and 7 of the act of 1864, the surveyor-general of the United States for California shall cause the line of the public surveys to be extended over the land, and shall set off, in full satisfaction of the grant, and according to the lines of the public surveys, the quantity confirmed, and that the land not included in the grant thus set off by him shall be subject to the general laws of the United States. The survey by that officer of the grant, and the application of land to its satisfaction, as thus prescribed, could undoubtedly have been disapproved by the Commissioner of the General Land-Office, and, had their correctness been contested, they might have been treated as inoperative until approved. But the approval by that officer,

when given, took effect by relation as of the date when the survey and appropriation were made. They must be held valid from that time, so as to protect proceedings taken in accordance with them.

There was, therefore, nothing in the showing made by the defendant to justify the court below in granting the relief prayed, even if we were to take into consideration the facts stated as grounds of relief.

But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the court. Those rulings were upon mere matters of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department.

The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land-Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department is negatived by the finding of the court. It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330–340; *Moore* v. *Robbins*, 96 id. 530.

And we may also add, in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fulness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. *United States* v. *Atherton*, 102 U. S. 372.

In the present case the respective claims of the parties to a pre-emptive right to the land in controversy, from their settlement and improvements, had been the subject of earnest contestation before the officers of the Land Department, and a decision in favor of the plaintiff was finally rendered by the Secretary of the Interior. And the question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings

in the Land Department, namely, that the public surveys had been extended over the land, and that other lands had been appropriated to the satisfaction of the grant.

Judgment affirmed.

BOUGHTON *v.* EXCHANGE BANK.

This court has no jurisdiction to re-examine the judgment of a State court, unless the record shows, affirmatively or by fair implication, that a Federal question, necessary to the determination of the cause, is involved.

MOTION to dismiss a writ of error to the Supreme Court of the State of Pennsylvania.

This was a suit brought in the Court of Common Pleas of Philadelphia, by the American Exchange National Bank, against John W. Boughton, upon two promissory notes, whereof he was the maker. His affidavit of defence, alleging usury, having been declared to be insufficient, judgment was rendered against him, which was affirmed by the Supreme Court of the State. He then sued out this writ.

Mr. Samuel Wagner in support of the motion.

Mr. Thomas Greenbank, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

To give us jurisdiction for the review of a judgment of a State court, the record must show affirmatively, or by fair implication, that some Federal question was involved which was necessary to the determination of the cause. The defence set up in this case was that the notes sued on were void for usury under the laws of New York, where they were made. Judgment was given against the plaintiff in error for want of a sufficient affidavit of defence. This judgment would be right if the affidavit was not such as was required by law or the practice of the court for the presentation of a defence like that relied on. As it is incumbent on him to show by the record, not only that this was not the ground of the decision below, but

that some wrong determination of a Federal question was, — and it has not been done, — we might dismiss the suit without further examination; but on looking into the opinion, which has been sent up with the record, we find that the Court of Appeals based its judgment, which alone we can review, entirely on the fact that the affidavit was not sufficiently specific in its averments to meet the requirements of the rules of pleading applicable to such cases.

It is clear, therefore, that we have no jurisdiction.

Motion granted.

NESLIN *v.* WELLS.

1. By the laws of Utah in force in the year 1873 a mortgage of lands which is first recorded, if it be taken without notice of an elder mortgage, is entitled to precedence of lien.
2. It is only when the equities are equal that the maxim *qui prior est tempore potior est jure* applies.

APPEAL from the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

J. G. Sutherland and *J. R. McBride* for the appellant.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a suit of an equitable nature, brought by Wells, Fargo, & Co., against Neslin and Smith, in the District Court of the Third Judicial District of the Territory of Utah, to foreclose a mortgage of real estate, made by Smith to Kerr, and by the latter assigned to them. Neslin claimed to be a prior mortgagee of the same land, and to be entitled to a lien preferable to that of the complainants.

A decree for the complainants was rendered in the District Court, establishing their mortgage as the first and best lien. A motion for a new trial was made by Neslin. On that motion, a statement in writing, agreed upon as correct, was signed by the attorneys for both parties, and filed and made part of

the record. It embraces the proceedings on the trial, including all the testimony, and also the findings of the court, as to matters of fact, and its conclusions of law, specially and separately stated, together with the decree.

The motion for a new trial was overruled, and Neslin appealed to the Supreme Court of the Territory, from the order overruling the motion and from the decree. The Supreme Court affirmed the decree, to reverse which Neslin prosecutes this appeal.

Under the second section of the act of Congress of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), concerning the practice in territorial courts and appeals therefrom, as explained in *Stringfellow* v. *Cain* (99 U. S. 610), the present appeal rightly brings into review the decree of the Territorial Supreme Court, affirming the decree of the District Court; but we are not at liberty to consider anything as embraced in the statement of facts, required by the statute, except the special findings of the District Court, adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of the exceptions taken in the District Court in the course of the trial, and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves as the sole question for determination here, whether the facts as found justify the decree sought to be reversed.

The facts thus found and stated are as follows: Smith being indebted to Wells, Fargo, & Co. in the sum of $17,107.10, executed and delivered to them his promissory note for that amount, dated July 5, 1873, having, upon an agreement to indemnify John W. Kerr, procured him to indorse the note as surety. In pursuance of that agreement Smith made and delivered to Kerr, Sept. 27, 1873, his promissory note for $13,000, secured by mortgage on land in Salt Lake City, and Kerr assigned it to Wells, Fargo, & Co. as collateral security for the note of Smith held by them. In consideration whereof, Wells, Fargo, & Co. gave to Kerr additional time for payment of the note. It was then overdue, and no part of it has been paid. Neither Kerr nor Wells, Fargo, & Co. had any notice, actual or constructive, of any prior liens on the land at the time when they respectively received the mortgage. It was recorded in

the records of Salt Lake County, Sept. 29, 1873, at 8 o'clock, A. M.

On July 5, 1873, and prior thereto, Smith was in possession of the mortgaged premises. He continued in possession until after the maturity of the note for $13,000, when he surrendered them to the complainants.

On Nov. 27, 1872, Smith executed and delivered to Neslin a note for $7,000, and a mortgage to secure the same on the same premises described in the mortgage to Kerr, being for the unpaid purchase-money therefor, the same having been sold and conveyed by Neslin to Smith by deed duly executed and delivered. This mortgage to Neslin was recorded in the records of Salt Lake County, on Sept. 29, 1873, at twenty-five minutes past noon. No part of this mortgage debt has been paid.

As a conclusion of law, the court found that the lien of the mortgage to Kerr was entitled to priority over that of the mortgage to Neslin.

This conclusion, which is assigned as error, we are now to examine.

It presents the single question whether, under the laws of Utah in force at the time of the transaction, a junior mortgage taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded.

Prior to the organization of the territorial government of Utah, which was effected by an act of Congress approved Sept. 9, 1850, the people dwelling there, who had set up a government under the name of the State of Deseret, passed an ordinance providing for the election of county recorders. It made it their duty to provide themselves with good and well-bound books, suitable for the purpose, and record therein all transfers or conveyances of land or tenements, and all other instruments of writing and documents suitable, necessary, and proper to be recorded, in a fair and legible manner; and also books for the purpose of recording town and city plats, and plats of all surveys of land, roads, and surveys of public works, whenever the same shall be permanently located; and these books of record were required to

be indexed in alphabetical order, and were declared to be "free to the examination of all persons," and upon the filing of any paper for record the recorder was required to indorse upon the back thereof the time of receiving it. Comp. Laws of Utah, 130.

A law on the same subject and in similar terms was passed by the territorial legislature Jan. 19, 1855. Comp. Laws of Utah, 131.

The settlement of the Territory by inhabitants having preceded the establishment by Congress of the legal organization of the territorial government, and the survey and opening to sale of the public lands, early provision was made for ascertaining and defining the possessory rights of those who, unable to obtain title as against the government, nevertheless had appropriated and improved portions of land. By a territorial law passed June 18, 1855 (Laws of Utah, 1851–70, p. 93), a form was prescribed for the transfer and conveyance of these land claims, as they were called, and it was declared that, to be valid, a transfer must be witnessed by two or more competent persons; be acknowledged before some person authorized to take acknowledgments; be recorded, and the record, page and book, be certified thereon by the recorder in the county where the property is located. It is also therein provided that other property than land claims, when disposed of by gift, must be transferred substantially in the same manner, and by specification of kind and number or amount, but unless required the details may be omitted.

The Civil Practice Act of Feb. 17, 1870, sects. 272 and 273, provides that on the hearing of a case for the partition of real property the plaintiff shall produce to the court the certificate of the recorder of the county where the property is situated, showing whether there were or not any outstanding liens of record upon the property, or any part thereof, at the time of the commencement of the action; and if by such certificate, or by the verified statement of any person who may have searched the records, that there were such liens of record at the time of the commencement of the action, and the persons holding them have not been made parties thereto, it is made the duty of the court either to order such persons to be

made parties, by an amendment to the pleadings, or to appoint a referee to ascertain whether such liens or incumbrances have been paid, or if not, what amount remains due thereon, and the order in which they are severally held by such persons and the parties to the action. Those who become parties, if they claim a lien by mortgage, judgment, or otherwise, are required to set forth among other particulars the amount and date of the same; and provision is made for notice to those not made parties to appear before the referee and make proof of their claims. It is also provided that no persons who have or claim any liens upon the property, by mortgage, judgment, or otherwise, need be made parties to the action, unless such liens be matters of record; and immediately after filing his complaint the plaintiff is required to file with the recorder of the county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property to be affected thereby, which, from the time of the filing, it is declared shall be deemed notice to all persons. In case of a sale for purposes of partition, it is also provided (sect. 299) that the conveyance shall be recorded in the county where the premises are situated, and that it shall be a bar against all persons interested, parties to the action.

These are all the statutory provisions in force within the Territory at the time of the transaction involved in this suit; and they continued so to be until the passage of an act on Feb. 20, 1874, concerning conveyances, which regulates the whole subject, and specifically provides "that every conveyance of real estate within this Territory hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, when his own conveyance shall be first duly recorded." This, however, cannot affect the rights of the parties in this controversy, for they had been fixed by the law previously in force.

The legislation on the subject prior to 1874, it will be observed, did not require that a mortgage should be recorded in order to be valid, and did not in terms declare what should be the legal effect of recording or omitting to record it.

That legislation cannot, however, be assumed to be without

significance, and its precise meaning must be determined, not only by what it expresses, but by what it necessarily implies.

There can be no reasonable doubt, we think, that the records which the county recorder is bound to keep, which private persons are authorized to employ for recording their instruments and evidences of title, and which the public have a right to inspect, have all the qualities that attach to public records. Such books are mentioned by Greenleaf (1 Greenl. Ev., sect. 484) as of that description which are recognized by law, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or, at least, under that of official duty; and "books of this public nature, being themselves evidence, when produced, their contents may be proved by an immediate copy, duly verified;" it being a rule, considered as settled, "that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy."

It is a mere corollary from this datum that these records are, by construction of law, notice to all persons of what they contain. Their contents are matters of public knowledge, because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, in order that the knowledge of them may be public, and, therefore, imputes to all interested in it that knowledge the opportunity to acquire which it has provided. The law assumes the fulfilment and not the defeat of its own ends. It will not permit its policy to be gainsaid, not even by a plea of personal ignorance of its existence or extent. It will not allow, therefore, any man to say that he does not know that of which the law itself says it has informed him. The provisions of the law in reference to these records either have no purpose at all, — which we have no right to assume, — or their purpose was, that the public might have knowledge of the titles to real estate of which they are the registers. It would utterly defeat that purpose not to presume with conclusive force that the notice which it was their office to communicate had reached the party interested to receive it; for, if every man was at liberty to say he had

failed to acquire the knowledge it was important for him to have, because he had not taken the trouble to search the record which the law had provided for the express purpose of giving it to him, then the ignorance which it was the public interest and policy to prevent would become universal, and the law would fail because it refused to make itself respected.

In this country, differing in that respect from the ruling of the English courts, it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. The doctrine is founded on the obvious policy of the registry acts, the duty of the purchaser under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance. Story, Eq. Jur., sect. 403.

And the principle applies as well in cases where the conveyances are merely authorized as where they are required by law to be registered.

In *Pepper's Appeal* (77 Pa. St. 373, 377), decided under a statute of Pennsylvania declaring that assignments of mortgages *may be* recorded in the office for the recording of deeds, &c., and that the record of such instrument shall be as good evidence as the original, it was held that, although the recording of an instrument was discretionary, the record is nevertheless notice to a subsequent assignee. After reviewing various statutes of the State on the subject, the court say: "Thus it appears that the language of the Acts of Assembly providing for the recording of written instruments has not generally been mandatory. When recorded, however, we do not understand the effect thereof is in any respect lessened by the absence of an imperative command to record. It is optional whether or not to record. When the election is made, and an instrument authorized by law to be recorded is actually recorded, all the incidents and force of a public record attach to that record. It is an early and well-recognized principle that one great object in spreading an instrument of writing on a public record is to give constructive notice of its contents to all mankind."

It is a further inference which we are judicially bound to make, that records so carefully provided by law, and so useful, were in fact the common resort of the community whose dealings in real estate they were meant to register; that the practice of recording conveyances and incumbrances of the title to land, for the purposes of evidence and of information to those who might be affected by them, and the habit of searching the records in order to obtain that knowledge, was general and usual; that such practice and habit had become so common, that men of ordinary prudence in the management of important concerns affecting their own interests would expect to conform to it themselves, and would act upon the expectation that others of that character would do so likewise. In point of fact this presumption is verified in the present case, the majority of the judges in the court below declaring in their opinion that, at the times when the mortgages in question were executed, it was a common thing, and of public notoriety, to record mortgages and other conveyances.

The statutes under consideration, it is true, do not in express terms make it obligatory upon one taking a conveyance of or incumbrance upon real estate to record it. The recording is not made essential to its validity as between the parties; nor is it declared that the failure to record shall postpone its operation in favor of a subsequent *bona fide* purchaser for value without notice. And yet the implication is very strong that the latter effect must be intended by it. Otherwise what valuable and sufficient purpose is there in construing the record to be constructive notice of its contents, except to protect such a purchaser? If, without recording, the conveyance is not only valid between the parties, but good also as against the world, with or without notice, of what public value or use is the provision for keeping such a record and declaring it to be public, open to the examination of all persons? On that supposition its only purpose would be, in the private interest of proprietors, to furnish a convenient and cheap mode of supplying proof, by certified copies, in case of the loss or destruction of title-papers. But even that purpose is not expressly declared. It is only an inference based on the nature of the record as

public, and the objects which, under the system of registration adopted in this country, in colonial times, and which has since prevailed universally in all the States, have been sought to be attained by it. The chief of these is to secure that publicity in respect of the transfer of titles which, in the earlier history of the common law, was effected by livery of seisin, and, later, by the substituted enrolment of conveyances by way of bargain and sale; and which had in view, as its principal purpose, the protection of innocent purchasers from frauds which might be practised by means of secret conveyances.

To hold otherwise would be to declare that land should cease generally to be the subject of sale; for no amount of diligence on the part of a purchaser would insure his title. He would, of course, demand of the vendor an inspection of his title-deeds. From them he would learn the chain of title. A production and examination of the deeds made in the common form would show by their recitals that none of the preceding owners could have any claim for unpaid purchase-money, for the receipt of it, in each instance, is usually contained in the deed. He would, therefore, reasonably deem it unnecessary to make any personal inquiry, and in respect to supposed incumbrances in favor of strangers he would be compelled to rely upon the statements of the vendor. Who would be willing, or could afford, to purchase under such circumstances, if after every reasonable effort to inform himself of possible incumbrances a mortgagee holding an incumbrance of prior date, and whose failure to give such public notice of the fact as the law had furnished the means of giving had betrayed him into the purchase, should nevertheless be permitted to supersede his title, by asserting a paramount lien? Certainly there would be no injustice, and we think no violation of legal principle, in such circumstances, in preferring over his claim that of the innocent party, who otherwise would suffer loss, occasioned by a fraud which his laches alone had made effective.

But coupling together the obvious purposes of the recording acts in question, and the necessary implications arising thereon, with the general and notorious practice of the people of the territory under them, we have no hesitation in deciding that, under the circumstances of this case, there arose a duty on the

part of Neslin, the vendor, to record his purchase-money mortgage, towards all who might become subsequent purchasers for value in good faith, a breach of which, in respect to Kerr, the subsequent mortgagee, without notice, constituted such negligence and laches as in equity requires that the loss, which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned.

An apposite illustration of the principle involved in this conclusion is found in *Ellis & Morton* v. *Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628. It was there held that, while ordinarily money paid by a banker in payment of a forged check purporting to be drawn upon him by a depositor, to a holder for value, cannot be recovered back, as paid under a mistake of fact, because he is supposed to know the signature of his own customers, yet that the rule does not apply when, either by an express agreement, or a settled course of business between the parties, or a general custom of the place, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and by his negligent failure to perform it has contributed to induce the drawee to act upon the paper as genuine, and to advance the money upon it. In that case, a custom was proved whereby a bank, to whom was offered a check, drawn upon another, by a stranger, was expected and required not to receive it, without requiring the party offering to identify himself as the true owner.

It was decided that the existence of that custom imposed upon the defendants in that case a duty towards the plaintiff, which the latter was entitled to rely upon as performed; and that a breach of that duty constituted negligence, which, if it resulted in a loss to another, the law would cast upon the party in fault. In delivering the opinion of the court, Ranney, J., said: "Nor is it anything remarkable or unusual that such an obligation should arise from a settled course of business between the parties, or be established by the proof of a custom; or that the holder, for his negligent failure to regard it, be deprived of rights which he would otherwise be entitled to demand. . . . When the defendants purchased this check, they knew full well that it deprived the plaintiffs of the ability to make this part of the investigation, and that it would be paid to them

without any examination whatever; and if the custom really exists, they must have known equally well that in afterwards passing upon the genuineness of the paper the plaintiffs would have a right to rely, as an important element in forming a conclusion, upon the supposition that the defendants had made the investigation and were satisfied with the result."

Similar effect was given to the existence of a known custom, in creating an obligation, in *Whitbread* v. *Jordan* (1 You. & Coll. 303), where Lord Lyndhurst held that the creditor of a publican in London, who took from the latter a legal mortgage, knowing that he was indebted to his brewers, and was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage, must be postponed to the security of a brewer who had obtained the title-papers by way of equitable mortgage, on the ground that the existence of the custom put him on inquiry, so as to constitute constructive notice of the prior equity.

In *Luch's Appeal* (44 Pa. St. 519), it was decided, overruling some remarks of Gibson, C. J., to the contrary, in *McLanahan* v. *Reeside* (9 Watts (Pa.), 508), that although the registry laws of Pennsylvania did not expressly prescribe that deeds and mortgages should be recorded in separate sets of books for each class or conveyance, that, nevertheless, a division of subjects and books of record had become legalized by necessity and practice upon the registry system, so as to render it available to present and future generations; and that, consequently, the record of a mortgage in a book kept for the record of deeds was not notice to a subsequent purchaser. The court, after reviewing the history of the practice, said: "It is clear, therefore, from uniform practice, going back so far as to be equivalent in this country to an immemorial usage, that mortgages are and must be recorded in mortgage books, and are of course not properly recorded in any other species of book where they cannot be found by means of the mortgage indexes."

And conversely it was held in *Colomer* v. *Morgan* (13 La. Ann. 202), that a record of a deed in a book of mortgages "does not convey the information required by the statute," and is, therefore, not effectual notice.

The rule to be applied here is merely an extension of that

declared by Lord Chancellor Macclesfield in *Savage* v. *Foster* (9 Mod. 35, 37), — "When anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser; and in such case infancy or coverture shall be no excuse; . . . neither is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it, that it could not be done without their knowledge."

When the public records of conveyances operate as notice of the state of the title to all intending purchasers, it must be that their existence and common use is notice as well to all prior purchasers and incumbrancers, that others will rely upon it as well as themselves; and that to withhold from the record conveyances or incumbrances in their own favor is a waiver of their right, and equivalent to a representation that they do not exist, in favor of innocent subsequent purchasers, who otherwise would be wrongfully affected by them. It is a case for the application of the maxim, *idem est non esse et non apparere*.

It applies to cases of negligence as well as of fraud, for the injurious consequences of both are not distinguishable. It was stated by Lord Romilly, Master of the Rolls, in *Briggs* v. *Jones* (Law Rep. 10 Eq. 92, 98), in this comprehensive form: "A person who puts it in the power of another to deceive and raise money must take the consequences. He cannot afterwards rely on a particular or a different equity." It was applied by Vice-Chancellor Kindersley in *Rice* v. *Rice* (2 Drew. 73, 83), as between a vendor, asserting his equitable lien for unpaid purchase-money, and a subsequent equitable mortgagee by deposit of title-deeds. In deciding the case he said, what is very pertinent in the present: "The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most solemn and deliberate manner, both in the body of the deed and by a receipt indorsed,

that the whole purchase-money had been duly paid. . . . Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. . . . The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the owners to rely on the purchaser's title. They had, in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute title both at law and in equity."

See also *Waldron* v. *Sloper*, 1 Drew. 193; *Dowle* v. *Saunders*, 2 Hem. & M. 242; *Perry Herrick* v. *Attwood*, 2 De G. & J. 21; *Darnell* v. *Hunter*, Law Rep. 11 Eq. 292; s. c. Law Rep. 7 Ch. Ap. 75.

The rule applies in favor of the superior equity of a junior mortgagee, even in cases where the prior mortgage conveys the legal estate. Ordinarily the priority between incumbrances is determined by their quality, as each successive conveyance passes only what title remains after satisfying those which precede it. The first mortgage conveys the legal estate; the second, merely an equity of redemption; and as equity follows the law, and the owner of the legal title, by means of it, has a legal right, after condition broken, to the possession and a remedy at law for acquiring it, he is entitled to priority. A mortgage, however, in equity, at the present day, has almost ceased to be regarded as a conveyance of an estate, and is considered rather as merely a lien upon the estate of the mortgagor, the tendency of the modern law being to look upon it simply as a security for the payment of a debt or duty. Such, indeed, is an express statutory provision in Utah, sect. 260 of the Civil Practice Act of Feb. 17, 1870, enacting that "a mortgage of real property shall not be deemed a conveyance, whatever its term, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." Under this provision all mortgages, without respect to their relative dates, are legal liens, and priority cannot attach to the earlier in date by reason of the superior dignity of the estate conveyed. The rule, therefore, that gives preference to the legal title has no application, and the priority

among them must be determined by purely equitable considerations.

The only circumstance on which the appellant can rest the claim of his mortgage to a preference over that of the appellee, is that it is prior in date. But the maxim quoted in support of this claim — *qui prior est tempore potior est jure* — only applies in cases in which the equities are equal. That, we have already decided, is not this case. Here equity cannot be satisfied otherwise than by subjecting the appellant to the loss, which has to be suffered by one of the two solely in consequence of his own fault.

Some question was made in argument as to whether the appellees were holders of the mortgage to Kerr for a valuable consideration. But the findings of the court, which are conclusive as to the facts, leave no room for doubt upon the legal conclusion.

We find no error in the decree, and it is accordingly

Affirmed.

VIGEL v. HOPP.

Where the answer is responsive to the allegations of the complainant's bill, they must, to entitle him to relief, be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to the testimony of another witness.

APPEAL from the Supreme Court of the District of Columbia.

The facts are sufficiently stated in the opinion of the court.

Mr. Saul S. Henkle for the appellant.

There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit in equity begun by the appellee to set aside a deed executed by her to the appellant, on the ground that the deed, though absolute on its face, was intended only as security for a debt, which has since been paid in full. There are numerous allegations of fraud, but the whole scope and pur-

pose of the suit is to establish a trust, and get back the property in that way. The answer denies every allegation of fraud and trust, and insists that the deed was intended as an absolute conveyance, and not as security. This is responsive to the bill, and before the relief can be granted which is asked, these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another. 2 Story, Eq., sect. 1528. The appellee is the only witness in support of the bill, and the corroborating circumstances are not, in our opinion, sufficient to overcome the answer. It will serve no useful purpose to enter into analysis of the testimony.

Decree reversed, and cause remanded with instructions to dismiss the bill.

BRADLEY *v.* UNITED STATES.

It is no objection to the competency of a witness for the government in the Court of Claims that his interest is adverse to that of the claimants, and that a judgment against them may have the effect of establishing his right to the money claimed.

APPEAL from the Court of Claims.

Certain sugars imported in the year 1869 and seized for the owner's alleged violation of the revenue laws, were duly libelled, condemned, and sold. In the District Court, where the proceedings were had, no party appeared praying for an informer's share of the net proceeds, or for the distribution of them. They were paid into the treasury, and by the Secretary of the Treasury in part distributed, that is to say, one-half to the United States, which was covered into the treasury, and one-fourth in equal shares to the collector, the surveyor, and the naval officer of the port. Those officers claimed also the remaining fourth. Bradley and others, each claiming as informer or seizing officer, asserted a right thereto. Bradley brought this suit therefor, April 27, 1872. On May 9 of that year the Secretary ordered that the one-fourth so undistributed

be paid in equal parts to those officers, but that each of them should first give a bond with surety for his returning to the treasury, on demand, the money so paid to him, should the Court of Claims, or this court on appeal, decide that any other claimant was entitled to the fund. The required bond was given and the money paid.

The United States took the depositions of Dillingham, the collector of the port, and Sheldon, the surety on his bond. Bradley moved to suppress them, on the ground that the deponents were interested in the event of the suit. The court overruled the motion.

The court expressed "no final opinion on the subject" of its jurisdiction; but, holding that on the merits the claimant had no cause of action, dismissed his petition, and he appealed.

Mr. Charles E. Hovey and *Mr. Alexander Porter Morse* for the appellant.

The Solicitor-General, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Sect. 1079 of the Revised Statutes provides that no claimant suing the United States in the Court of Claims, nor any person from or through whom such claimant derives his alleged title, claim, or right, nor any person interested in any such title, claim, or right, shall be a competent witness in supporting the same, but under sect. 1080 the United States may make a claimant a witness.

We agree with the court below that this does not prevent the United States from using as a witness to defeat the claim one whose interest is adverse to the claimant, and that, too, when a judgment in favor of the United States may have the effect of establishing the right of the witness to the same claim.

The objections urged against the competency of the witness under the provisions of sect. 858 of the Revised Statutes are disposed of by *Potter* v. *National Bank*, 102 U. S. 163.

Judgment affirmed.

WELLS v. NICKLES.

1. While no act of Congress expressly authorizes the Secretary of the Interior or other officer of the Land Department to appoint timber agents, the appropriation of money by Congress to pay them is a recognition of the validity of their appointment.
2. Where the instructions of the Commissioner of the General Land-Office directed the agents to seize and sell timber cut on the public lands, and also authorized them to compromise with the trespasser on his paying a reasonable compensation for the timber cut and taken away, — *Held*, that a compromise so made by which he pays all the costs and expenses of the seizure, and gives bond to pay for the timber when its value shall be ascertained, pursuant to the agreement, is binding on the United States.
3. This compromise, should, in violation of its terms, the property be seized and sold by such agents, is evidence of his title and right of possession in his action against their vendee for the recovery of the property.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. J. G. Sutherland and *Mr. J. R. McBride* for the plaintiff.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

Nickles brought replevin in the District Court of the Third Judicial District of Utah to recover possession of a large amount of sawed lumber, laths, and logs, of which he claimed to be the owner. The defendants, Wells and others, denied this, and set up ownership in themselves. The court, at the request of the plaintiff, gave the following instruction to the jury: —

"To make a case entitling plaintiff to recover, it is only necessary for him to show, by a preponderance of testimony, that the logs in question, and the logs from which the lumber in question was made, were cut on government lands, seized by the timber agents, and sold to him, and that the defendants detained the logs and timber from him." The jury found a verdict for the plaintiff, as there was no doubt that all the logs had been cut on government lands, and that he bought them of a timber agent. Judgment was rendered accordingly. This was affirmed by the Supreme Court of the Territory, where the soundness of this instruction was the main question to be decided, as it is here.

One of the defences set up by Wells and his co-defendants, was that this same lumber had been seized and taken out of his possession by timber agents, under order of Oliver A. Patton, and V. M. C. Silva, register and receiver of the land-office within whose district the timber was cut; that he brought a suit against them for that seizure, in the progress of which a compromise was effected, which was reduced to writing and signed by the attorneys of the parties, and that according to its terms the lumber was delivered to Wells.

The paper is as follows: —

"In the District Court for the Third Judicial District of the Territory of Utah.

"DANIEL H. WELLS
v.
OLIVER A. PATTON, V. M. C. SILVA, J. J. HEFFERMAN, and WILLIAM MCKAY, Timber Agents of the United States for the Territory of Utah.

"It is hereby stipulated by said parties as follows: In consideration of the bond to be executed by said plaintiff as below stated and his stipulation herein, said defendants hereby release the property from seizure mentioned in the complaint filed in this action, and will discontinue the publication of the notice of sale thereof, and will not hereafter meddle with said property or interfere with plaintiff's use thereof for his own benefit; said plaintiff, in consideration of the above, hereby agrees that he will not discontinue this suit without the defendants' consent, but will prosecute the same with diligence to final judgment, and will now give bond, with sufficient surety, to pay such sum as he shall be adjudged to pay by final judgment on the merits of this action. The plaintiff also agrees to advance the money to pay the costs of the seizure mentioned in the complaint, and all the costs connected therewith, including advertising, and if the plaintiff shall not be found liable to pay such costs and charges, so paid by such advance, the money so paid shall be deducted from the amount otherwise awarded, if anything, against him by such final judgment.

"SUTHERLAND & BATES,
"MARSHALL & ROYLE & HEMINGRAY,
"*Att'ys for Def'ts.*

"Rec'd of Daniel H. Wells three hundred and twelve dollars for the expenses of seizure mentioned in the last paragraph of the foregoing stipulation.

"SALT LAKE CITY, July 10, 1875.

"MARSHALL & ROYLE & HEMINGRAY,

"*Att'ys for Def'ts.*"

The Oliver A. Patton who made this agreement in that suit is the same man who, as register of the land-office, directed the subsequent seizure of the property, and sold it to Nickles. It is under that sale alone that Nickles asserts a title to the property.

It appears that, in addition to paying the costs of suit and the expenses of the seizure, Wells gave the bond required by the stipulation, and that after this the defendants demurred to his complaint. Their demurrer was sustained, and that suit dismissed. It does not appear that any attempt was made to assess their damages or the value of the timber delivered by them to him, nor that any suit was brought on his bond, or that it was delivered up to him or cancelled.

It would seem to be undeniable that if all the rights thus contested were those of private persons, the transaction above detailed would bar the present suit. Apparently conceding this to be so, as far as we can gather from the opinion of the Supreme Court of the Territory, both courts denied the sufficiency of these facts as a bar, on the ground that the property belonged to the United States, and that the parties to the former suit had no authority to make the compromise which is relied on.

That the lumber when first seized by the timber agents was the property of the United States is not denied. It was, therefore, held by them as agents of the government at the time Wells sued not to replevy it, but to enjoin them from selling it, and to determine his right to it. If, as he maintained, they were seizing and attempting to sell and deliver as public property that which was lawfully his, we know of no principle of law which forbade him to bring them before a legal tribunal. Their authority to act for the government, and the ownership of the property which they asserted a right to seize, were questions eminently proper to be decided by a court, especially a

court of the United States. If it were otherwise, all the property of the citizens of this vast country would be held at the pleasure of any one bold enough to assert that it is government property and he a government agent.

The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.

The Department of the Interior, under the idea of protecting from depredation timber on the lands of the government, has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this, the registers and receivers of the land-offices have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents.

But neither in these acts of Congress, nor in the instructions from the department, are the powers of these special agents well defined. Fortunately that point is not material to the decision of the question before us, for the sale under which Nickles succeeded in obtaining his verdict was made by the same register of the land-office with whom Wells made the compromise whose validity is disputed. The action of the other agents may, therefore, be disregarded in the consideration of these questions. It would seem, in the absence of any express limitation of his authority, that the general power to deal with lumber or timber of this character by suit at law, or by such seizure as would subject him to an action, must also authorize the agent to do whatever could be properly done in the conduct of such a suit.

But these officers were not left without instruction and authority on this point. In a letter from the Commissioner of the Land-Office, dated Nov. 4, 1870, to the land-officers at Salt Lake City, one of whom was Patton, the following language is used: "You will discharge with energy the duty devolved upon you by the enclosed circular, having due regard, however, to the right of homestead and pre-emption settlers,

and to the circumstances of the community requiring a supply of timber, for mining, manufacturing, and other business pursuits. In cases where timber may be cut from the public lands and extenuating circumstances exist, you are authorized to compromise with the parties committing the trespass, on their paying all expenses incurred, and a reasonable stumpage to be fixed by you according to the condition of the markets, and not to fall below the minimum rate of $2.50 per M. feet. When objection is made to the rate fixed under this rule, the matter may be submitted to the judges of the Supreme Court of the Territory, in which case you will be governed by their decision as to the stumpage to be exacted." The circular so enclosed was a general one, to all registers and receivers, of Dec. 24, 1855, by Thomas A. Hendricks, Commissioner of the Land-Office, directing them to be vigilant in preventing persons cutting timber on public lands, and to seize such timber when cut, and sell it to the highest bidder. These instructions are repeated without the limitation to $2.50 per M. feet, in orders from the commissioner of the dates of July 8, 1874, Sept. 8, 1874, and June 21, 1875, the latter of which, after referring to the circular of 1855, and the other letters just mentioned, adds: "When circumstances justify so doing, you may settle with the parties on their paying any expenses incurred, and a reasonable stumpage for the timber. But you are to regard this as a compromise justified by existing circumstances, and not as the granting of permission to cut the timber, which is forbidden by law."

These instructions contain ample authority for the compromise made with Wells. It was made July 10, 1875, and the latest of the letters of the commissioner, from which we have cited, is dated June 21, 1875.

The compromise appears to have been framed in conformity with the language of the letter of Nov. 4, 1870. Wells agreed to pay, and did pay, the expenses of seizure and the costs of suit, and nothing remained but for the judge who decided the demurrer to fix the amount of the stumpage and give judgment therefor against Wells. He had given bond to pay what was so ascertained. The case was settled in precise accordance with the instructions of the commissioner, and we think the set-

tlement bound the United States, whose agent made the compromise.

The authority to make this settlement is quite as clear as the authority of the same officer to sell to Nickles; so that his right to sue depends upon the same authority on which Wells had the property delivered to him, on paying all costs and expenses and giving a bond, with surety, for the damages.

The instruction of the District Court held this settlement to be of no validity. The Supreme Court held the same view; and the register who made the sale to Nickles evidently disregarded his own compromise and sold the property to Nickles under the same idea. All this, we think, was erroneous.

We have been shown a letter of April 5, 1877, from the Secretary of the Interior to the Commissioner of the Land-Office, in which he says, "No agent employed by you will be permitted to make any compromise for depredation on the public lands." But whether this order is limited to the agents specially employed to look after such depredations, or be held to include the registers and receivers also, is immaterial in the present case, for this recall of the power to compromise was nearly two years after the one under consideration was made and a considerable sum of money paid under it.

All the letters from the department to its officers above referred to, except the one last mentioned, are in this record, and are made part of the case on which the Supreme Court of the Territory decided.

We are of opinion that the instruction to the jury, which we have given in full, and the whole theory on which the effect of the stipulation of compromise was decided, is erroneous, and that the judgment of each of the courts below must be reversed, with directions to set aside the verdict and grant a new trial; and it is

So ordered.

HAWES *v.* OAKLAND.

1. A shareholder in the Contra Costa Water-works Company brought his bill in equity against the city of Oakland, the company, and its directors, alleging that the company was furnishing the city with water, free of charge, beyond what the law required it to do, and that the directors, contrary to his request, continued to do so, to the great injury of himself, the other shareholders, and the company. *Held*, that in such a case there must be shown: 1. Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter, or the law under which the company was organized; or, 2. Such a fraudulent transaction, completed or threatened, by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; or, 3. That the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company, or of the rights of the other shareholders; or, 4. That the majority of shareholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity. 5. It must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock was vested in him at the time of the transactions of which he compains, or was thereafter transferred to him by operation of law.
2. It is the duty of the Circuit Court to dismiss the suit if the parties thereto have been improperly or collusively made or joined for the purpose of creating a case of which that court would have cognizance.

APPEAL from the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. Charles N. Fox for the appellant.

Mr. Henry Vrooman for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Water-works Company, and Anthony Chabot, Henry Pierce,

Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed to make answer; and the city of Oakland filed a demurrer, which was sustained by the court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are: —

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in *Dodge* v. *Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a

corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the

business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge* v. *Woolsey* permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

The earliest English case in which this subject received any very careful consideration is *Foss* v. *Harbottle* (2 Hare, 461), where Vice-Chancellor Wigram gave a very full and able opinion. The case was decided in 1843 on a demurrer to the bill, which was brought by Foss and Turton, two shareholders in an incorporation called the Victoria Park Company, on behalf of themselves and all other stockholders, except those who

were made defendants, against the directors and one shareholder not a director, and against the solicitor and architect of the company. The bill charged that the defendants concerted and effected various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened, and wasted; that there had ceased to be a sufficient number of qualified directors to constitute a board; and that the company had no clerk or office. It prayed for the appointment of a receiver and for a decree against the defendants to make good the loss. After showing that the case was one in which the right of action was in the company, the Vice-Chancellor says: "In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative." Again, after pointing out that cases may arise where the claims of justice would be found superior to the technical rules respecting the mode in which corporations are required to sue, he adds: —

"But, on the other hand, it must not be without reasons of a very urgent character that the established rules of law and practice are to be departed from, — rules which, though in a sense technical, are founded on the general principles of justice and convenience; and the question is, whether a case is stated in this bill entitling the plaintiffs to sue in their private characters." He then, in an elaborate argument, holds that the bill is fatally defective because it does not aver that there is no acting or *de facto* board of directors who might have ordered the bringing of this suit; and, secondly, that it was the duty of the plaintiffs — the two shareholders who complain of what had been done — to have called a meeting of the shareholders or attended at some regular annual meeting, and obtained the action of a majority on the matters in issue. The majority, he says, may have been content with what was done, and may have ratified the action of the board, in which case the whole body would have been bound by it.

The demurrer was sustained and the bill dismissed.

In the subsequent case of *Mozley* v. *Alston* (1 Ph. 790), decided in 1847, Lord Chancellor Lyndhurst says that "the observations of the Vice-Chancellor in *Foss* v. *Harbottle* correctly represent what is the principle and practice of the court in reference to suits of this description."

These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate, and always with approval.

In *Gray* v. *Lewis*, decided in 1873, Sir W. M. James, L. J., said: "I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called *Charles Lafitte & Co.* In its corporate character it was liable to be sued and was entitled to sue; and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character, — a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley* v. *Alston* and *Foss* v. *Harbottle*, to which, as I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in *Atwood* v. *Merryweather*, where Vice-Chancellor Wood sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled." Law Rep. 8 Ch. App. 1035.

But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned justice in *MacDougall* v. *Gardiner*, in 1875, 1 Ch. D. 13. "I am of opinion," he says, "that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule in *Mozley* v. *Alston*, and *Lord* v. *Copper Miners' Company*, and *Foss* v. *Harbottle*, should always be adhered to; that is to say, that nothing connected with internal disputes between

shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something *ultra vires* on the part of the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, — there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done."

The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the Federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding *ultra vires*. *Marsh* v. *Eastern Railroad Co.*, 40 N. H. 548; *Peabody* v. *Flint*, 6 Allen (Mass.), 52. In *Brewer* v. *Boston Theatre* (104 Mass. 378), the general doctrine and its limitations are very well stated. See also *Hersey* v. *Veazie*, 24 Me. 9; and *Samuel* v. *Holladay*, 1 Woolw. 400.

The case of *Dodge* v. *Woolsey*, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit — a bill in chancery — was brought in the Circuit Court for the District of Ohio, by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen

of Connecticut, against that bank, its managing directors, and Dodge, tax-collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which, by the Constitution of the State of Ohio, the bank was bound to pay; that in that respect the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax; but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the State concerning taxation, and that the *tax is so onerous upon the bank that it will compel a suspension and final cessation of its business.* The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion of the

fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide; namely, whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax-collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

That difficulty no longer exists, for by the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank, in *Dodge* v. *Woolsey*, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the Circuit Courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a Circuit Court, or removed there from a State court, it shall appear to said court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the Circuit Courts would relieve them of many cases which have no proper place on their dockets.

This examination of *Dodge* v. *Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all

the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, or of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which *forbids* the corporation from dealing with the city in the manner it has done. That

city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity — no right in himself to prosecute this suit.

Decree affirmed.

ROSENBLATT v. JOHNSTON.

The personal property of an insolvent national bank in the hands of a receiver appointed pursuant to sect. 5234 of the Revised Statutes is exempt from taxation under State laws.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This is a bill in equity, filed Sept. 30, 1880, by Rosenblatt, collector of the city of St. Louis, against Johnston, receiver of the National Bank of the State of Missouri.

The bank was duly incorporated pursuant to the act of Congress of June 3, 1864, c. 106 (13 Stat. p. 99), and the acts amendatory thereof, and had its situs in that city. It suspended payment June 9, 1877. Shortly thereafter Johnston was, by the Comptroller of the Currency, appointed such receiver. He then took possession of its assets, and disposed of them in the

settlement of its liabilities. The bill avers that while in his hands the assets were subject to taxation under the laws of that State for the support of the State government, the government of the city, and the public schools, in like manner and to the same extent and effect as all other taxable personal property in the city during the same period; that the assessment of taxes for the years 1877 and 1878 was duly made; that the fund in his hands is sufficient to pay them; and that the shares of the bank since his appointment have been absolutely worthless. It prays for an order upon him to pay the taxes out of that fund, and for general relief.

The court sustained a demurrer to the bill, and Rosenblatt appealed.

Mr. Leverett Bell for the appellant.

Mr. J. M. Krum and *Mr. C. H. Krum* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The single question in this case is, whether the personal assets and personal property of an insolvent national bank in the hands of a receiver appointed by the Comptroller of the Currency, in accordance with the provision of sect. 5234 of the Revised Statutes, are exempt from taxation under State laws, and we have no hesitation in saying that in our opinion they are. Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed. *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383; *Kennedy* v. *Gibson*, 8 id. 498; *Bank* v. *Kennedy*, 17 id. 19. If the shares have any value, they are taxable in the hands of the holders or owners, under sect. 5219 of the Revised Statutes; but the property held by the receiver is exempt to the same extent it was before his appointment.

Decree affirmed.

MURPHY *v.* UNITED STATES.

A claim against the United States for damages which a contractor alleged he had sustained was, by the appropriate department, adjusted upon a basis to which he agreed. He accepted the sum allowed, and gave a receipt therefor in full. *Held*, that the acceptance of the sum is a bar to his suit for the same claim.

APPEAL from the Court of Claims.

Murphy entered into a written contract with the United States for excavating a portion of the pit for a dry dock, and was paid at the contract price for all the work which he performed.

He subsequently presented to the Navy Department a claim for damages suffered by reason of certain alleged violations of the contract, and for extra work. The department adopted a basis of adjustment, to which he agreed; and there was paid to him a certain sum, which, upon full information as to the principles upon which it was awarded, he accepted, and gave a receipt in full.

He some time thereafter brought suit in the court below for the same claim, adding, however, a further item, of which there was no proof.

The court dismissed the petition, and he appealed.

Mr. James W. Denver and *Mr. Luther H. Pike* for the appellant.

The Solicitor-General and *Mr. John S. Blair* for the United States.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We are clearly of the opinion that the acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy, in his adjustment of the account presented to him, was equivalent to a final settlement and compromise of all the items of the present claim included in that account. There is nothing in the findings of the court below to warrant a judgment in favor of the claimant upon the only item

included in the petition in this case which was not mentioned specifically in the account presented to the Secretary of the Navy and passed on by him in the adjustment he made.

Judgment affirmed.

LAMAR *v.* MICOU.

A defendant, who made no defence except to reduce the amount of the recovery, cannot appeal from a decree against him for less than $5,000.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. S. P. Nash in support of the motion.

Mr. Edward N. Dickerson and *Mr. Charles J. Beaman, Jr.*, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal by the defendant below from a decree against him for less than $5,000. There is no claim of set-off or counter-claim, except to reduce the amount of the recovery. In no event can he get any money decree in his favor. All he seeks to do is to defeat the claim of the appellee. Consequently the amount in controversy, so far as this appeal is concerned, is fixed by the decree. *Thompson* v. *Butler*, 95 U. S. 694; *Sampson* v. *Welsh*, 24 How. 207. In effect he insists that, under the rule of liability established against him in the court below, the decree should have been for more than $5,000, and that for this reason he is entitled to an appeal, so that he may show he is not liable at all. This, we think it clear, is not the law.

The case is not changed by the fact that if, under an appeal which is pending in another suit, it shall be found the appellant was credited in this suit with an amount which properly belonged to that, the decree in that suit will be reduced, while the one in this cannot be correspondingly increased. The appellee is satisfied with this decree, and has not appealed. The appellant cannot complain if it turns out in the end that, but

for a mistake which was made in his favor, the appellee might have recovered a larger amount.

Appeal dismissed.

PEOPLE *v.* COMMISSIONERS.

1. *Quære,* Are the statutes of a State in violation of the Constitution of the United States if they subject to taxation the capital of her citizens, although, on the day to which the assessment of it relates, it is invested in products on shipboard in the course of exportation to foreign countries, or in transit from one State to another for purposes of exportation.
2. If on that day it consisted of money, subsequent assessments including it cannot be set aside on the ground that, when they were made, it was employed in the purchase of products for exportation.

ERROR to the Supreme Court of the State of New York.

The facts are stated in the opinion of the court.

Mr. H. Charles Ulman for the plaintiff in error.

Mr. J. A. Beall, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The only question presented upon the writ of error is, whether an assessment made by the board of tax commissioners for the city and county of New York, of the personal estate of Hanemann, the relator of the plaintiff in error, was in violation of the Constitution of the United States. The statute, under the authority of which it was made, provides that "all lands and all personal estate within this [that] State, whether owned by individuals or by corporations, shall be liable to taxation," subject to certain exemptions thereinafter specified. 1 Rev. Stat. N. Y., c. 13, tit. 1, sect. 1. It also declares that "the terms 'personal estate' and 'personal property,' whenever they occur in this chapter, shall be construed to include all household furniture; moneys; goods; chattels; debts due from solvent debtors, whether on account, contract, note, bond, or mortgage; public stocks; and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate." Id., sect. 3.

Hanemann, being a resident of the city, county, and State

of New York, was assessed for taxation, as of Jan. 1, 1876, upon his personal estate, exclusive of bank stock, to the amount of $60,000. He made application, supported by affidavit, for the reduction or remission of such assessment, upon these grounds: That the value and amount of all his personal estate, on the first day of January, 1876, and during the period covered by the assessment, did not exceed $125,000, of which $4,500 was invested in railroad bonds, and $1,000 in household furniture; that the remainder was "continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the Customs Department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different States of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports," and that the only portion of his estate upon which he is liable to be assessed and taxed is the sum of $5,500. In his examination before the tax commissioners, upon the occasion of his application for reduction or remission, he further stated that "his said capital is invested uniformly and continuously in cotton, the product of, and having a situs in, various States outside of New York, and in transit to the port of New York, and other Atlantic ports, for the sole purpose of exportation, and no portion of such cotton is intended to be, or is, sold in New York, or any other United States market; that deponent purchases cotton largely upon credit, and that of his capital as much as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house, and is on shipboard in course of exportation to some foreign State or country."

The reduction and remission were both denied. Upon writ of *certiorari* the proceedings of the tax commissioners were affirmed in the Supreme Court of the State, and its judgment was affirmed by the Court of Appeals.

The assessment in excess of $5,500, it is claimed by plaintiff in error, was in violation as well of art. 1, sect. 10, and clause 2, as of art 1, sect. 8, clause 3, of the National Constitution. The main propositions advanced by his counsel are that products of the United States which have passed the Customs

Department, and are on shipboard in the course of exportation to a foreign market, have become exports, and are no longer within the taxing power of the State; that to tax money invested in such products is, in effect, laying an impost or duty on exports; that a tax on capital invested in the products of the United States, in transit from one State to another for purposes of exportation, or on money used and employed in exporting such products, is an unauthorized interference by the State with the regulation of commerce.

Although these propositions are deemed by counsel to be very easy of solution, we do not feel obliged to determine them in this case. The plaintiff in error was assessed, upon his personal property, as of Jan. 1, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the Customs Department, was, in fact, in money on the first day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries. Neither in his affidavit nor in his examination before the tax commissioners does he distinctly claim (and, perhaps, could not) that the capital which he thus employed in the business of purchasing cotton for exportation was, in fact, so invested on the first day of January, 1876. His capital may have been, in a business or mercantile sense, continuously so employed, and yet it may not have been, in fact, so invested at the date to which the assessment, whenever made, relates. We have no occasion, therefore, in the present case, to consider or determine the questions of constitutional law discussed by counsel. It will be time enough to consider them when they come before us in such form as to require their determination.

Judgment affirmed.

NOTE. — This cause was decided and the opinion delivered at the last term.

LOUISVILLE *v.* SAVINGS BANK.

1. When necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day.
2. The section of the Constitution of Illinois, entitled "Municipal subscriptions to railroads or private corporations" (*infra*, p. 471), which took effect July 2, 1870, did not invalidate township bonds, which, pursuant to a vote cast at an election of the voters of the township lawfully held on that day, before closing the polls of the general election, were issued to pay a previously voted donation, that was to be raised by special tax.
3. *Harter* v. *Kernochan* (103 U. S. 562) cited and approved.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action brought by the Portsmouth Savings Bank against the township of Louisville, Clay County, Illinois, upon coupons detached from bonds issued Jan. 5, 1871, by the supervisor and town clerk to the Springfield and Illinois Southeastern Railway Company, which was formed in February, 1870, by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield, and Northwestern Railroad Company. The bonds, fifteen in number, bear date April 1, 1870, and each recites that it "is one of a series of bonds issued by said township to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'An Act to incorporate the Illinois Southeastern Railway Company,' approved Feb. 25, 1867, and an act amendatory thereof, approved Feb. 24, 1869, and an election of the legal voters of the aforesaid township, held on the tenth day of November, 1868, under the provisions of said act."

The inhabitants, legal voters of the township, pursuant to notice, duly and lawfully issued, met July 2, 1870, at 9 A. M., for the purpose of deciding by vote "whether a special tax be levied for the payment of the sum of $15,000, donated by said town to the Illinois Southeastern Railway Company, or that bonds be issued for the payment of said donation."

Fifty-two votes were cast for bonds and two for a special tax.

The supervisor filed, Jan. 9, 1871, the requisite sworn certificate of that date with the State auditor, who thereupon registered in his office the bonds, each being for $1,000. The bonds were delivered to the company after the first coupon had been cut from each and destroyed. The plaintiff was a *bona fide* holder for value of them without notice of anything impairing their validity other than what appears upon the face of them, or in the Constitution and laws of Illinois. The remaining facts are stated in the opinion of the court. Judgment was rendered for the plaintiff, and the township sued out this writ of error.

Mr. W. J. Henry for the plaintiff in error.

Mr. Shelby M. Cullom for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bonds in question contain the same recitals as those of Harter Township in the same county, the validity of which was determined in *Harter* v. *Kernochan*, 103 U. S. 562. The same questions which arose on the validity, construction, and scope of the enactments under which they were issued, and delivered to the consolidated company, are now presented for determination. We perceive no reason for withdrawing or qualifying the conclusions we then announced.

There is, however, one question of some importance which did not then arise. It appeared in that case that the election held under the act of Feb. 25, 1867, on Nov. 10, 1868, — at which the township voted a donation to be raised by special tax, payable in three equal annual instalments, — was supplemented by another, held, under the authority of the amendatory act, on the twentieth day of May, 1870, at which Harter Township directed bonds to be issued in payment of its donation previously voted. In the present case, while the election at which the township of Louisville voted a similar donation, to be raised by like special tax, was also held on the 10th of November, 1868, the one at which the township voted to issue bonds in payment of such donation was not held until the 2d of July, 1870. On the day last named the people of Illinois voted in favor of the adoption of a new constitution. The second of the additional sections, which is

entitled "Municipal subscriptions to railroads or private corporations," was separately submitted, and is in these words: "No county, city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of any such corporation: *Provided, however,* that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." In *Town of Concord* v. *Portsmouth Savings Bank* (92 U. S. 625), we held that donations by counties or other municipalities in Illinois to railroad companies could not lawfully be made after July 2, 1870, though authorized by a statute enacted and a popular vote cast before the adoption of the Constitution. This ruling was made in ignorance of the fact, to which our attention was not at the time called, that the Supreme Court of Illinois had, in an unreported case, decided that the intention of the framers of the Constitution was not to prohibit donations authorized under pre-existing laws by a vote of the people prior to the adoption of that instrument, but to place subscriptions and donations on the same footing. Consequently, in *Fairfield* v. *County of Gallatin* (100 U. S. 47), the ruling was modified, and the construction placed upon the organic law of Illinois by its highest court accepted and enforced. It may, therefore, be regarded as the settled law of Illinois that its Constitution recognized as binding donations, as well as subscriptions, by a township in aid of a railroad corporation, which were authorized, under existing laws, by a vote of the people prior to the adoption of that instrument.

We have seen that the people of Louisville Township did, prior to the adoption of the Constitution of 1870, vote in aid of this railroad enterprise a donation to be raised by special tax, for a limited period. That donation was, beyond question, unaffected by the constitutional provision prohibiting municipal aid to railroads or private corporations. When that instrument was adopted the township had ample authority, conferred by the vote of the people, to raise by special tax a specific amount to be donated for the purpose indicated.

But the argument, on behalf of the plaintiff in error, proceeds upon these grounds: that this is not a suit to enforce the levy of a special tax in payment of the donation voted Nov. 10, 1868, but a suit on the bonds voted on the second day of July, 1870; that by the settled course of decisions in the Supreme Court of Illinois the township officers could not legally issue *bonds* in payment of a donation, previously voted to be raised by special tax, without the consent of the people expressed at an election duly called and held for the purpose of determining that question; that no election could confer authority to issue bonds unless held before the section of the Constitution which we have mentioned took effect; that the section having been adopted by popular vote on the 2d of July, 1870, was in operation from the first moment of that day; and that, consequently, the township election held on the same day was, in view of the constitutional inhibition, unavailing to confer authority to substitute a donation of interest-bearing bonds maturing many years after date, for a donation to be satisfied by a special annual tax for three years. In other words, that a popular vote authorizing an issue of bonds, in order to escape that inhibition, must have been cast prior to the *day* on which the Constitution was adopted.

Passing by, as unnecessary for determination, the propositions embodied in the first branch of this argument, and conceding them for the purposes of this case to be correct, we proceed to inquire as to the time when the Constitution of 1870, including that section, became the fundamental law of the State, and what effect it had on the township election held on the 2d of July of that year.

At what precise hour on that day the Constitution was adopted by popular vote cannot be stated. But we know that it could not have occurred before sunset, since the schedule, providing for the submission of the Constitution to the popular vote, expressly required the polls to be kept open for the reception of ballots until that hour. Nor are we able to ascertain, from the record, the exact moment when the township voted in favor of the issue of these bonds. The town meeting to determine whether they should be issued, in lieu of a special tax, was to be held at nine o'clock in the forenoon; it was so

held, and only fifty-four votes were cast, of which fifty-two were in favor of the issue. The presumption may, therefore, be fairly indulged that the township had, in fact, voted for issuing bonds before the close of the general election, on the same day at which the people of the State voted on the adoption of the particular sections of the Constitution, separately submitted, which relates to municipal subscriptions to railroads and private corporations.

The schedule provided that if a majority of the votes polled were for the Constitution, so much of it as was not separately submitted should be the supreme law of the State on and after Aug. 8, 1870. The Supreme Court of Illinois, in *Schall* v. *Bowman* (62 Ill. 321), declared that although the result of the election could not have been officially ascertained and declared before the expiration of some weeks thereafter, the provision relating to municipal aid to railroad corporations "was so framed that it could, appropriately and effectually, become a part of the organic law, without the disturbance of any of its elements, and was a declaration of the people *on* the second day of July, 1870, that *from* and *after that day*, no matter what may become of the new Constitution, no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to, or loan its credit in aid of, such corporation." Further, in the same case it was said: "We are unable to find anything in the Constitution itself, or in the schedule thereto, militating against the view we have taken, that this separate article of the Constitution of 1870 went into full effect on the day of its adoption by a vote of the people; that is, on the second day of July, 1870. There is no provision of the Constitution requiring a different construction." The subscription, the validity of which was there involved, we remark, in passing, was made in pursuance of a municipal election held on the third day of August, 1870.

The next case was *Richards* v. *Donagho*, 66 id. 73. It related to a proposed municipal subscription in pursuance of an election called July 12, 1870, and held Aug. 2, 1870. The court adhered to the decision in *Schall* v. *Bowman*. The remaining case to which our attention has been called is *Wright* v. *Bishop*,

88 id. 302. There the vote for an issue of bonds was given at an election held on the second day of August, 1870. The court, referring to the preceding cases, said: "This, we have held, was too late. The clause in the Constitution, containing the prohibition against municipal subscriptions or donations in aid of railroad companies and other private corporations, took effect on the second day of July, 1870; and all such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void."

It is thus seen that the cases related to an election held in the month of August, 1870. Neither of them involved the validity of a subscription or a donation made in pursuance of an election held on the 2d of July, 1870; and, consequently, that learned tribunal has not indicated its opinion as to whether the constitutional inhibition forbade a municipal subscription or donation, in pursuance of an election held on the very day of the adoption of the Constitution. It is true that the court, in *Wright* v. *Bishop*, after saying that the provisions in question "took effect on the 2d of July, 1870," remarked that "all such subscriptions or donations, not authorized by a vote of the municipality, prior to that time, are void." But that language must be interpreted with reference to the facts of the particular case presented for judicial determination. It is not clear that the phrase, "prior to that time," was intended to refer to the day on which the constitutional provision took effect, as distinguished from the precise moment of its adoption by the popular vote. The case involved no such question.

We are justified in so interpreting the decision in *Wright* v. *Bishop* by what was said in *Grosvenor* v. *Magill* (37 id. 239), the doctrines of which have not, so far as we are able to find, been modified by any subsequent ruling of that court. The question involved was whether the law regards fractions of a day. The court, speaking by Mr. Justice Lawrence, said: "It is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time. 2 Bl. Com. 140, notes. The rule is purely

one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules."

The views expressed in the last case are consistent with sound reason and public policy. They accord with our own judgment, and are in line with the settled course of decisions in other courts.

In *Arnold* v. *United States* (9 Cranch, 104), it was declared to be the general rule that where computation is to be made from an act done, the day on which the act is to be done should be included. Hence, an act of Congress, imposing additional duties to be levied and collected upon all goods imported from and after its passage, was adjudged to be in force on the day of its approval by the President. And, upon the principle that the law will not take cognizance of fractions of a day, it has been said in some cases that a statute is operative from the first moment of the day on which it takes effect. But to these general rules there are established exceptions, as an examination of adjudged cases and elementary treatises will show.

Mr. Justice Story has discussed this question with fulness in *In the Matter of Joseph Richardson*, 2 Story, 571. By an act approved March 3, 1843, the statute establishing a uniform system of bankruptcy throughout the United States, approved Aug. 19, 1841, was repealed. But it contained a proviso that the act should not affect any cause or proceeding in bankruptcy *commenced before its passage*, or any pains, penalties, or forfeitures incurred under said act; but that "every such proceeding might be continued to its final consummation," in like manner as if that act had not passed. A petition in bankruptcy was filed by Richardson on the 3d of March, 1843, and the question arose whether it was cut off by the repealing act approved on the same day.

It appeared that the petition was filed about noon, while the repealing act was not, in fact, approved by the President until late in the evening of the same day, several hours after the

filing of the petition. It was ruled, upon the case presented, that the act of Congress should be held to have taken effect only from the act of approval by the President, and not by relation from the commencement of the day on which such approval was given. After a review of the English decisions, the court said: "So that we see that there is no ground of authority, and, certainly, there is no reason to assert that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice."

In *Lapeyre* v. *United States* (17 Wall. 191), it was said that an act of Congress, unless it is otherwise declared by law, becomes operative from the first moment of the day of its passage; and, further, that "fractions of the day are not recognized," and "an inquiry involving that subject is inadmissible." In reference to that case we remark, that the question presented for determination was not as to fractions of a day, but whether a proclamation of the President, bearing date June 24, 1865, took effect on that day or on the 27th of June, 1865, when it was first promulgated by publication in the newspapers. That case did not require a determination of the question of law now before us. The language quoted from the opinion must, therefore, be taken as a declaration of the general rule which obtains when the evidence does not show the necessity of regarding fractions of a day.

In *United States* v. *Norton* (97 U. S. 164), the court, while declaring, upon the authority of *Lapeyre* v. *United States*, that the President's proclamation of June 13, 1865, removing all restrictions upon internal, domestic, and coastwise intercourse and trade, took effect as of the beginning of June 13, 1865, and covered all the transactions of that day to which it was applicable, said: "We do not think this is a case in which fractions of a day should be taken into account." This language of the Chief Justice clearly implies that there were cases in which the court would regard fractions of a day. Besides, there was no question in that case, nor any proof made, as to the particular hour of the day when the proclamation of the President was issued.

At the same term *Burgess* v. *Salmon* (id. 381) was decided. An act of Congress increased the tax on tobacco from twenty to twenty-four cents per pound, but contained a proviso that the increased tax should not apply to tobacco "on which the tax under existing laws shall have been paid when this [that] act takes effect." It was approved on the afternoon of March 3, 1875, while the tobacco of Salmon was stamped, sold, and removed for consumption or use from the place of manufacture in the forenoon of the same day. It was ruled that the court could inquire as to the time of the day when the President approved the act, and that "the time of such approval points out the earliest possible moment at which it could become a law, or, in the words of the act of March 3, 1875, at which it could take effect." It was, consequently, adjudged that the tobacco was not subject to the increased tax imposed by a statute which was not in fact approved, and did not take effect, until after the removal, on the same day, of the tobacco. In that case the parties agreed as to the respective hours of the day when the tobacco was, in fact, stamped and removed, and when the act was approved by the President. But such an agreement could not have authorized an inquiry into fractions of a day, unless such inquiry were permissible by the established rules of law.

The cases in the State courts bearing upon this question, and taking substantially the same view, are numerous. We refer to only two of them. In *Kennedy* v. *Palmer* (6 Gray (Mass.), 316), the question was as to the jurisdiction of a justice of the peace of a particular county to hear and determine an action, commenced May 7, 1865, on which day the governor of the State approved an act, by which the exclusive jurisdiction of all such actions, "not already pending," was vested in a police court thereby established, the act providing that it should take effect from and after its passage. The evidence did not show either the hour of the day when the action was commenced, nor the hour when the governor approved the act. The court adjudged that the justice had jurisdiction until the precise point of time when the act was approved, and thus became a law; and that since it did not appear that the suit was instituted after the approval of the act, it must be treated

as one pending at the passage of the act, and, therefore, as unaffected by its provisions.

The other case is *People* v. *Clark*, 1 Cal. 406. The facts of that case were these: Clark was elected county judge at an election regularly appointed and held. On that day the legislature passed an act repealing the one by virtue of which the election was held, and conferring upon the governor the power of appointment. The repealing act was approved the same day, but at what hour of the day did not appear. Some days thereafter the relator was, by the governor, appointed county judge. The court sustained the validity of the election, remarking that "the time of the approval of the executive is a fact which can be ascertained and proven, and in all cases, where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when the event — the passage of the act — occurred, should be had."

There are decisions in the English courts to the same effect. In *Roe d. Wrangham* v. *Hersey* (3 Wils. 274), the court characterized, as a mere fiction of law, the general proposition that there were no fractions of a day; that, "by fiction of law, the whole time of the assizes and the whole session of Parliament may be, and sometimes are, considered as one day; yet the matter of fact shall overturn the fiction in order to do justice between the parties." *Fictio cedit veritati; fictio juris non est ubi veritas.* In *Combe* v. *Pitt* (3 Burr. 1423, 1434), Lord Mansfield expressed similar views. He said: "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so too, when it is necessary and can be done; for it is not like a mathematical point, which cannot be divided."

In view of the authorities it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. But it may be argued that the rule does not apply where the inquiry is as to the time when constitutional provisions became operative by popular vote; that a popular vote, given at an election covering many hours of the same day, should be deemed one indivisible act, effectual, by rela-

tion, from the moment the electors entered upon the performance of that act, to wit, from the opening of the polls. But we are of opinion that no such distinction can be maintained. In determining when a statute took effect no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was, in fact, given. So, in ascertaining when a constitutional provision was adopted, we perceive no sound reason why the courts may not, in proper cases, inquire as to the hour when such approval became effectual, to wit, as to the time when, by the closing of the polls, the people had adopted such provision. In this case all difficulty is removed by the fact, made certain by the schedule to the Constitution requiring the polls to be kept open until a certain hour of the day of election. That fact should not be disregarded or ignored in ascertaining when the constitutional provision was adopted, especially since it expressly saved the obligations and rights of the municipalities which had, before its adoption, under the authority of pre-existing laws, voted subscriptions or donations.

We are of opinion that, within the fair meaning of the State Constitution, the township election of the 2d of July, 1870, was held prior to the adoption of the section forbidding municipal subscriptions or donations in aid of railroad corporations, and under the authority of valid enactments in force when such election was held. The bonds, the coupons of which are in suit, were, consequently, unaffected by the prohibitions of the State Constitution. All other material objections to their validity have been considered and overruled in *Harter* v. *Kernochan.*

Judgment affirmed.

UNITED STATES v. STEAMSHIP COMPANY.

1. The court holds that all questions relating to the character of the vessels employed by the Pacific Mail Steamship Company in executing its contracts with the United States and to the performance of the voyages were determined in *Steamship Company* v. *United States* (103 U. S. 721), and are no longer open to inquiry.
2. The terms of a stipulation filed in the court below (*infra*, p. 482) commented on.
3. A communication from the Postmaster-General, informing the Court of Claims that, in the event of its accepting a voyage of one of the vessels, he had made an order imposing a fine for her delay in starting, was properly disregarded.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. William E. Chandler and *Mr. John F. Farnsworth* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

In this case, which was before us at the last term, on the appeal of the steamship company, the judgment was reversed, and the case remanded with directions to render a judgment in conformity to our opinion. 103 U. S. 721.

The principal question, in fact the only one then considered, was, whether the mails had been carried by the company between San Francisco and Hong-Kong in such vessels as the contract required.

The finding of facts by the Court of Claims enabled us to decide, that apart from those of the "City of Pekin," which was governed by considerations peculiar to itself, six of the other twelve voyages for which the claimants asserted a right to recover had been performed in vessels of the required character, and six had not. The names of the vessels and their class were specifically set out in that finding, and we held that the voyage of the "Japan," commencing Aug. 29, 1874, at San Francisco, had been performed in a proper vessel, and that the claimants were entitled to recover therefor.

The whole matter would seem to have been thus closed, but

for the following sentence in the opinion of this court: "There may be deductions for non-performance of duty, or other matters provided in the contract in regard to which no finding is made by the Court of Claims, but which will be open to inquiry on the return of the case to that court."

When the case came before it on the mandate and that opinion, it was conceded by stipulation, as a fact, that on this voyage the "Japan" stopped at Yokohama and sent the mails by other vessels to Hong-Kong, and that the return mail from Hong-Kong to Yokohama was carried in the same manner, the "Japan" returning in due time with a mail to San Francisco.

It is argued by counsel for the United States that because the whole of the voyage was not performed in vessels of the character required by the contract, the entire claim therefor is invalidated.

The Court of Claims was of opinion that this matter was not open to inquiry under the ruling made here, and in this we concur.

The questions as to the vessels in which the mail had been carried, and their conformity to the contract, were the only ones in issue before the Court of Claims and this court. The former made such findings of fact, pertinent to them, as enabled us to say that for six of these voyages the government was bound to pay, and the case was sent back to the Court of Claims to render judgment accordingly.

The character of the vessels and the performance of the voyages were then adjudicated and fixed, and were no longer open to inquiry.

The contract contained a provision that suitable fines and penalties should be imposed by the Postmaster-General for delays and irregularities in the performance of the service, and for failure to take or deliver any part of the mail, for suffering it to be injured or lost, and many things of that kind, which had not been passed on because the United States denied the liability *in toto*, on the ground of the character of the vessels.

It was to such matters that the opinion had reference in the passage we have cited, and not to the character of these

vessels which was settled by the first finding of facts and the decision thereon.

It is suggested by counsel for the United States that, by the terms of the stipulation as to these new matters filed in the Court of Claims, the case was opened by agreement. The language relied on is this: "It is agreed that the case be submitted, under the mandate and opinion of the Supreme Court herein, on the following facts, which, as far as they may affect or modify any facts heretofore found by the court, are agreed to be in addition or substitution therefor." We understand this to mean that the matters stated are true, and so far as they are proper evidence, as the case stands they are conceded; but that it was not intended to *consent* to a reopening of the question touching the character of any vessel in which the mails had been carried under that contract; and such was the view taken by the Court of Claims.

After the case was remanded, that court was informed by a letter from the Postmaster-General that, in the event that it should accept the voyage of the "Japan," he had made an order imposing a fine of $13,000 for the delay of that vessel in starting on the voyage at San Francisco. As such an order could be of no avail after the court had decided the case, in which event alone the fine was to be imposed, that court very properly disregarded it.

Judgment affirmed.

HUNTINGTON v. PALMER.

Hawes v. *Oakland* (*supra*, p. 450) reaffirmed.

APPEAL from the Circuit Court of the United States for the District of California.

Huntington filed this bill against Palmer, tax-collector of the County of Alameda, California, and the Central Pacific Railroad Company, alleging that he is a stockholder of the company, and that, on behalf of himself and such other stockholders as will come in and contribute to its prosecution, he

brings the suit to enjoin and restrain the company from wasting and misapplying its funds, as it threatens to do, by paying certain taxes upon its property in that county which, he alleges, were unlawfully and unconstitutionally assessed against it. The other facts are sufficiently stated in the opinion.

The demurrer of Palmer was sustained to the amended bill, and a decree rendered in favor of the defendants. Huntington appealed.

Mr. Hall McAllister and *Mr. Harvey S. Brown* for the appellant.

Mr. Alfred Barstow for Palmer.

MR. JUSTICE MILLER delivered the opinion of the court.

The bill of complaint sets out that the railroad company is unjustly and illegally taxed in many particulars, the laws under which the taxes are levied being repugnant to the Constitution of the State, and in an amended bill they are asserted to be in conflict with the Constitution of the United States.

It is unnecessary to examine into the sufficiency of the allegations of the bill on these points, because we think it comes clearly within the principles announced in the case of *Hawes* v. *Oakland*, *supra*, p. 450.

Although the company is the party injured by the taxation complained of, which must be paid out of its treasury, if paid at all, the suit is not brought in its name, but in that of one of its stockholders. Of course, as we have attempted to show in the case just mentioned, this cannot be done without there has been an honest and earnest effort by the complainant to induce the corporation to take the necessary steps to obtain relief.

The complainant alleges that on or about the fifteenth day of December, 1880, he did inform, and cause to be informed, the board of directors of the company of the invalidity of the pretended assessment and the taxes founded thereon, and did then and there request the board to take such action or legal proceedings as might be proper in the premises to test and determine their validity. He also alleges that the board then

and there absolutely and wilfully refused to do so, and that it will pay these illegal taxes out of the funds of the company, to the detriment of himself and other stockholders.

There is not, as in *Dodge* v. *Woolsey* (18 How. 331), any averment that these taxes are so burdensome as to be destructive of the corporation itself; nor that there was any fraud on the part of the directors, nor anything to show that their decision not to resist the taxes is unwise, or opposed to the best judgment they could exercise in the matter.

There is no averment of any effort to invoke the control of the body of the stockholders, or any reason why it was not done. Nor is it made to appear that a single stockholder was consulted by the complainant, or has any wish to contest the payment of these taxes with the State authorities.

It is the bald claim of one stockholder, owning $100,000 of the stock out of $10,000,000, or thereabouts, without any serious effort to bring the others to his views, or even the board of directors, to assert a right of action for the whole body in the very common matter of paying more taxes than he thinks to be just.

There is here no formal written appeal to the board, nor any formal resolution of that body, as in *Dodge* v. *Woolsey*, and there is nothing to repel the reasonable presumption that parties were improperly and collusively made in order to invoke the jurisdiction of the Federal court.

We are of opinion, therefore, that the demurrer was properly sustained, and the decree dismissing the bill is

Affirmed.

VINTON v. HAMILTON.

Letters-patent No. 143,600, dated Oct. 14, 1873, and granted to John J. Vinton for an improvement in the manufacture of iron from blast-furnace slag, are void, inasmuch as the process and appliances described in his specification and claim were known and in common use before the date of his alleged invention.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The bill of complaint alleged that Hamilton and the other defendants were infringing certain letters-patent, No. 143,600, dated Oct. 14, 1873, and granted to John J. Vinton, one of the complainants, for an improvement in the manufacture of iron from furnace slag, and it prayed for an injunction to restrain them from further infringement, and for damages and an account of profits.

The answer denied that Vinton was the original or first inventor or discoverer of the patented improvement, and it denied infringement.

Upon final hearing, the bill was dismissed because the process described in the letters-patent was known and in common use before Vinton's application for them, and the same were, therefore, null and void.

The complainants thereupon appealed the case to this court.

The specification of the letters-patent declares as follows: —

"My invention relates to the production of cast-iron from the slag, or refuse of the smelting or blast furnace. Heretofore a large percentage of good metallic iron has been thrown away with the slag, and become lost to commerce, so far as its use as metallic iron is concerned. This is more particularly the case with rich ores, such as the Missouri and lake ores, which from their nature flux imperfectly in the ordinary smelting furnace. When imperfectly fluxed the slag assumes a thick consistency, and cools with a general grayish color, and though the presence of metal in it cannot be detected by the eye, yet the slag will be found to be of comparatively great specific gravity, and in fact contains a very large percentage of good metallic iron, often as great as the amount of metal reduced from the ore in the process of smelting.

"To reduce this metal from the heavy slag of the smelting furnace, and thereby increase the production of iron from the same amount of ore, is the object of my invention. To accomplish the desired result I employ a cupola furnace, but furnaces specially adapted to the purpose may be constructed and conveniently used in connection with the blast furnaces where the iron is smelted.

"The heavy slag is first pulverized or broken up into small pieces, or it may be made granulous or spongy by passing water or air through it when in a molten state, or in any of the well-known ways. A bed of coke or other suitable material is first placed in the cupola, and on the top of the coke a small quantity of scrap or other oxidized iron (preferably scale or black oxide of iron) is sprinkled.

"The slag to be operated on is then introduced as evenly as possible on the top of the coke and iron oxide, and on the top of the slag I sprinkle a small quantity of limestone broken up into small pieces, then a layer of coke, followed with scrap and scale slag and lime as before alternately until the whole cupola is charged.

"The fuel is then ignited, and when the fire is above the tuyeres the blast is turned on to the full. Owing to the presence of the iron oxides, the heat is very great when brought in contact with the slag, and the latter is speedily reduced, and as the operation goes on, fresh charges of the materials are supplied from the top of the cupola, provision being made for the passage of the remaining slag from the furnace at a point below the tuyeres.

"In this way it will be seen that the process is continuous, and the furnace is not permitted to get cool.

"The charge is made up in about the following proportions, but may be slightly varied as occasion requires: After the furnace is in operation, *first*, three bushels of coke; *second*, fifty pounds iron oxide (scrap or scale); *third*, eight hundred pounds slag; *fourth*, one-fourth of a bushel of limestone, thrown into the cupola in succession, and from time to time as required.

"When there is much sulphur in the iron a small quantity of the black oxide of manganese may be blown in through the tuyeres, and salt or litharge, or a mixture of any two or all three of these ingredients, may be used in this manner with good effect. The iron thus obtained is run into moulds in the usual way.

"What I claim as my invention, and desire to secure by letters-patent, is the herein-described method of reducing iron from the slag or refuse of blast or smelting furnaces, substantially as set forth."

Mr. Andrew McCallum for the appellants.
Mr. Thomas W. Sanderson for the appellees.

MR. JUSTICE WOODS, after stating the case, delivered the opinion of the court.

It is matter of general knowledge that pig-iron is made from iron ore in a blast or smelting furnace; that to secure this product the furnace is charged, first, with a layer of coke or charcoal, then with a layer of iron ore, mixed with broken limestone, and so on in alternate layers until the proper quantity of these materials is placed in the furnace. The fuel is then ignited, and, for the purpose of increasing the heat, streams of air are forced into the furnace by means of blast-pipes, the nozzles of which, called tuyeres, are inserted in openings in the walls of the furnace, usually from four to six feet above its bottom.

The limestone is used merely as a flux. The ore under this process undergoes a chemical change, and iron is formed and sinks in a molten state to the bottom of the hearth, by which is meant not only the bottom of the furnace, but its sides as high up as the foot of the boshes. The refuse left after the melted iron has dropped into the hearth is also in a molten state, and, being lighter than the iron, floats on its top. This is indifferently called "cinder" and "slag." About three or four times in every twenty-four hours the melted iron is drawn from the furnace. This is accomplished in the following manner: The furnace is constructed with two holes, one called the iron and the other the cinder notch. The iron notch is made at the bottom of the hearth. The cinder notch is higher up the side of the furnace, just below the level of the tuyeres; so high that the cinder can be drawn through it without letting off the molten iron. These holes are kept habitually closed with clay or other similar material. At frequent intervals, and always just before drawing off the molten iron, or making a cast, as the ironmongers call it, the cinder notch is opened, and the cinder or slag is allowed to escape, and is carried away from the furnace in a trough made of moistened sand. The cinder notch is then closed and the iron notch is opened, and the molten iron is drawn off through a sand-trough, and con-

ducted into moulds made in sand-beds, called the sow and pigs, where it is allowed to cool. The result is the pig-iron of commerce.

In the mean time, the furnace is supplied with constant charges of fuel and ore, mixed with limestone, in alternate layers, dumped in from the top; and this process is kept up without cessation for months and sometimes for years.

The sand-trough which connects the pig-beds with the iron notch is usually larger and deeper, but more elevated than the sow or general gutter which conducts the iron into the moulds or grooves in the pig-beds. When the metal is first let into the trough it accumulates so as to fill it nearly to the brim. As the flow from the iron notch decreases, the iron, and a small quantity of cinder or slag, which has been chilled by coming in contact with the cold surface of the trough, adhere to its sides and bottom. When the molten iron on the hearth is about exhausted, the blast is increased, and the material left on the hearth is blown out through the iron notch into the sand-trough. This also cools in the trough, and thus is formed what are known as trough runners, consisting of iron and slag, which have been forced through the iron notch by letting on the blast as just mentioned.

A cupola furnace is one used for melting pig-iron for the purpose of casting it into useful forms and articles. It constitutes part of the equipment of a foundry. In shape it is generally a hollow cylinder. The iron is melted by substantially the same process as the ore in a blast furnace. The cupola furnace has an iron notch but no cinder notch, because there is generally so little cinder or slag in pig-iron, as to render such an opening unnecessary.

In order to reach the merits of the controversy, it is necessary to obtain a definite idea of what, if anything, the appellants are entitled to under Vinton's patent.

The specifications are ambiguous in respect to the particular kind of slag which is to be used in the process therein described, that is to say, whether it is the slag drawn off through the cinder notch, or the runners which are left in the trough through which the molten iron is discharged from the iron notch of a blast furnace. It appears, however, from the

evidence that the use of the latter only is contemplated, the former containing such a very inconsiderable quantity of iron as to be valueless.

We observe, in the first place, that the patent cannot be held to cover the discovery that the slag, which is to be used in the process described in the specifications, contains so large a percentage of good metallic iron that it can be profitably extracted by again smelting it.

The evidence shows beyond controversy that for many years before Sept. 18, 1873, the earliest date assigned to the discovery or invention of Vinton, it had been well and generally known that the trough runners contained a large proportion of metallic iron, and they were broken up and resmelted in blast furnaces. They were thrown into the furnace with scrap iron and iron ore, and smelted in the same manner. It was formerly a notion among old-fashioned furnace men, that the use of this material injured the furnace, and deteriorated the quality of the iron produced. But this conceit had been exploded long before the date of his patent, and the runners and other heavy slag were used habitually in many blast furnaces as above stated.

Secondly, The use of a cupola furnace for the purpose of resmelting trough runners and heavy slag cannot be claimed as any part of Vinton's invention. The evidence in the record shows that as early as the year 1844, at the Jackson furnace, in Venango County, Pennsylvania, which was a blast furnace, a cupola furnace was erected and used for the purpose of smelting heavy slag, from which was manufactured plow-points and hollow-ware, such as skillets, pots, and Dutch-ovens. Sometimes the product was made into pig-iron. This cupola furnace was thus used for three or four years. The fact of such use was public; no effort was made to keep it secret, and it was known, in the language of the witnesses, "all around the furnace."

The testimony of Robert Paisley, William J. Shaner, and Thomas W. Kennedy, which is found in the record, shows that the Beaver Falls Co-operative Foundry Association, in April, 1872, made the experiment of using slag and runners in their cupola furnace; and the experiment proving successful, the

runners, as early as August, 1872, were procured by the carload, and mixed with pig-iron and run into stove-plates. In this way fifty-eight or sixty tons of runners were used prior to Oct. 14, 1873, the date of Vinton's patent.

This use of heavy slag and runners was open and public. No one was excluded from the foundry where the work was carried on. Any one was at liberty to enter and see what was going on, and persons not interested in the furnace — among them the witness Thomas W. Kennedy — did so. No injunction of secrecy was imposed on them. It is true the operatives at the furnace, who were all stockholders of the association, said nothing about the use they were making of trough runners, because, as they said, if it was a good thing, they wanted to keep it to themselves; but they took no steps to keep it a secret, except that they did not talk about it. In fact, it was at the suggestion of Kennedy that the Beaver Falls Co-operative Foundry Association made the experiment of melting runners and heavy slag in their cupola furnace.

After the experiment made by the Beaver Falls Co-operative Foundry Association in April, 1872, had proved successful, Kennedy, in August, 1873, furnished the defendant, Hamilton, with a quantity of trough runners to be smelted in his cupola furnace, and before Oct. 1, 1873, had sold to foundrymen not less than one hundred tons of the same material to be used for the same purpose.

In fact, the record shows that Kennedy, more than a year before the date of Vinton's patent, revived the practice of smelting trough runners and heavy slag in a cupola furnace. As early as the spring of 1872 he declared to the defendant, Hamilton, Thomas Struthers, and others the feasibility of the process, and suggested to Struthers that they ought to take out a patent for it. But Struthers said that unless they could get up some new way of extracting the iron it would not be patentable, and that was the conclusion they came to after talking the matter over. But Kennedy at once, in the spring of 1872, commenced buying up the trough runners from the blast furnaces, and selling them to foundrymen for use in cupola furnaces.

It is, therefore, abundantly shown in the record that before

the date of Vinton's patent, or of his invention, the smelting of trough runners and other heavy slag in cupola furnaces was practised and well known.

Thirdly, The method of making slag granulous or spongy by passing water or air through it when in a molten state is not new, nor is it claimed to be new. Besides, there is no evidence that this process is used by the appellees.

Fourthly, The method of charging the cupola furnace and of smelting the slag as described in the specification of the patent is as old as the art of making pig-iron, except, perhaps, the sprinkling of scale or black oxide of iron on the top of the coke, and this is not done by the appellees.

Fifthly, The appellants do not claim that Vinton's invention covers a cupola furnace. A review of the case shows, therefore, that he did not first discover the value of furnace runners or heavy slag for resmelting, that he was not the first to smelt them and use them for running into pigs or castings, either in a blast furnace or a cupola furnace, and that there is nothing new in his process of smelting which is used by the appellees.

All, therefore, that is left for his invention to cover, and which the appellants can claim as infringed by the appellees, is the employment of a cinder notch or hole in a cupola furnace to draw off the cinder when the furnace is employed in smelting furnace runners or heavy slag. But if the testimony of unimpeached and uncontradicted witnesses is to be believed, as early as June, 1872, at Beaver Falls, Pennsylvania, a cinder notch was used by the Beaver Falls Co-operative Association in a cupola furnace when employed in smelting furnace runners. The notch was put in the cupola at the suggestion of the witness, Thomas W. Kennedy, who was not a member of the association, but who, being the owner of a blast furnace, was selling to it furnace runners to be resmelted and used for making castings. He testifies to the fact distinctly and clearly, and designates the part of the cupola where the notch was placed, namely, "between the tuyeres at the back of the cupola to draw off the slag." He is fully corroborated by the witness, W. J. Shaner, a member of the association, whose business was to do the smelting.

This use of the cinder notch in the cupola was public. No effort was made to exclude spectators from the foundry or to conceal the notch. The invention, therefore, of a cinder notch in a cupola furnace, if it was an invention at all, was made by Thomas W. Kennedy fifteen months before Vinton, according to his own testimony, ever conceived the idea; and Kennedy, during all that time, allowed it to be used by others, without any injunction or secrecy or any restriction or limitation, in a foundry which was open to all who might choose to visit it, and which was visited by many spectators not concerned in its operations.

But even if the application of a cinder notch to a cupola furnace was first made by Vinton, the question remains whether, standing alone, it implies invention and is patentable.

We think that this question must be answered in the negative. Neither a cupola furnace nor a cinder notch is new. The use of a cinder notch for drawing off cinders from a blast furnace is as old as blast furnaces themselves. The function which the cinder notch performs in the process covered by Vinton's invention is precisely the same for which it is used in a blast furnace. In smelting slag in a cupola furnace it was found that the molten cinder accumulated and floated on the top of the molten iron. The application to a cupola furnace, for the purpose of drawing off the cinder, of the cinder notch used in the blast furnace to accomplish the same end, would occur to any practical man. When applied to a cupola furnace the same function was performed in the same way by the same means. In making this application there was no invention. *Pearce* v. *Mulford*, 102 U. S. 112.

We are of opinion, therefore, that the application of a cinder notch to a cupola furnace for the purpose designated is neither patentable nor new, and that all the other parts of the process and appliances covered by Vinton's patent were old and well known long before the date of his alleged invention and the patent therefor. He was not the first inventor, either in fact or in law, of the discovery or invention described in his letters-patent. They are, therefore, void, and

the decree of the Circuit Court dismissing the bill was right, and must be

Affirmed.

MR. JUSTICE MATTHEWS did not sit in this case nor take any part in its decision.

BANK *v.* TENNESSEE.

A bank, by its charter, is required to "pay to the State an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," and is authorized to "purchase and hold a lot of ground" for its use "as a place of business," and hold such real property as may be conveyed to it to secure its debts. With a portion of its capital stock it purchased a lot with a building thereon, a portion of which it occupies as a place of business. It took, to secure money loaned, a deed of trust upon three city lots, which it subsequently purchased under this deed, and now owns. *Held*, that the immunity from taxation extends only to so much of the building, the use whereof is required by the actual wants of the bank in carrying on its business. The remainder of its real estate is subject to taxation.

ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

Mr. William Y. C. Humes for the plaintiff in error.

Mr. Benjamin J. Lea, Attorney-General of Tennessee, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

The Bank of Commerce, plaintiff in this case, is a corporation created in 1856 by the legislature of Tennessee to engage in the business of discounting notes, buying and selling stock, dealing in exchange and gold and silver bullion, and receiving moneys on deposit. Its charter provides that it "may purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same, and may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same." The charter also declares that the

institution "shall pay to the State an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes."

Previous to 1879 the bank purchased with a portion of its capital stock a lot of ground in the city of Memphis, with the improvements thereon, as a place of business, and has held the same ever since. The improvements consist of a three-story brick building, but the bank only uses the first floor for its business, and leases out the cellar and the second and third stories to other parties for a money rent.

On the 1st of January, 1880, the bank was, and ever since has been, the owner of three other lots in the city of Memphis. It had previously made loans to different parties, and taken as security for their payment a deed of the lots executed to a trustee. The loans not being paid, the lots were sold under the deed and purchased by the bank. The purchase was made solely to secure a part of the debt; and the bank now holds the lots for sale, and will sell them when practicable to restore to its legitimate business so much of its capital as is invested in them.

In March, 1875, the legislature of the State passed an act defining what property was exempt from taxation by the Constitution, what the legislature had the power to exempt and did exempt, and what was taxable; and declaring that all other property should be assessed and taxed. In the list of property designated as exempt from taxation, that held by the Bank of Commerce was not mentioned, and the act repealed all inconsistent laws.

Under this act, the lot of ground in the city of Memphis, purchased by the plaintiff, with the building upon it and used as a place of business, was assessed and taxed in the years 1879, 1880, and 1881, for State and county purposes. The three lots were also taxed in like manner for the years 1880 and 1881. The taxes were paid under protest, and the bank commenced the present suit to recover back the money. It appears to have been treated in the State court as a suit in equity, and the Chancellor sustained a demurrer to the bill and dismissed the suit. The Supreme Court of the State reversed the decree in part, holding that the bank was not liable for the

taxes on so much of the lot and building as was used for its business, but was liable for the taxes on the remainder, and on the three lots. From this latter decree the case is brought to this court by the bank, claiming exemption of the entire property from taxation under its charter.

That statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed is a familiar rule. Against the power nothing is to be taken by inference and presumption. Where a doubt arises as to the existence of the restriction, it is to be decided in favor of the State. The restriction here, consisting in the declaration that a specific tax on each share of the capital stock shall be in lieu of all other taxes, is accompanied with authority to purchase certain real property, "for the use of the institution as a place of business." The bank had no express authority to invest its capital in real property not required for that use. And it is to be presumed that the exemption from other than the designated tax was in consideration that the capital would be employed for its legitimate purposes. It certainly would not be pretended that the corporation, by turning its whole capital into real property and engaging in real-estate business, could then, by force of the charter, escape liability to taxation for it under the general laws. But if the exemption could not be carried to that extent, it is difficult to fix any limit to the amount of real property which it may hold thus exempt, unless we take that prescribed by the charter. In our judgment, the limited exemption cannot be extended to property used beyond the actual wants of the corporation in carrying out the purposes of its creation. As well observed by the Supreme Court of the State, the contract of exemption, beyond the extent prescribed, ceased when taxable property was held for any other purpose.

It is true that the capital stock of a corporation may in a general sense be said to be all the property in which the capital is invested, so that an exemption of the capital stock, without other words of limitation, may operate to exempt all the property of the corporation. *Railroad Companies* v. *Gaines*, 97 U. S. 697. But where the purposes for which a corporation

may hold property is specified in connection with the exemption, the limitation of taxation designated must be held to apply only to property acquired for such purposes. This we consider to be the general doctrine established by the numerous cases cited by counsel. The case of *State* v. *Commissioners of Mansfield* (22 N. J. L. 510), decided by the Supreme Court of New Jersey, is a leading one. There it appeared that the charter of the Camden and Amboy Railroad and Transportation Company, after reserving certain imposts, declared that "no other tax or impost shall be levied or assessed upon the said company." The charter conferred upon the company the general power to purchase, receive, and hold real and personal estate; and it had acquired certain houses and lots in the township of Mansfield, which it let to its workmen and employés. These houses and lots having been assessed for taxes by the authorities of the town, the corporation sued out a writ of *certiorari* to revise their action, claiming that houses and lots were exempt under the provisions of the charter stated. The court, in deciding the case, said that the general power of purchasing, receiving, and holding real and personal estate could only be exercised to effect the purpose for which it was conferred by the government; that the power to construct a railroad and establish transportation lines upon it necessarily included the essential appendages required to complete and maintain such a work and carry on such a business, such as suitable depots, car-houses, water-tanks, houses for switch and bridge tenders, and coal and wood yards for the fuel used in the locomotives; that these were within a fair construction of the exempting clause, because they were necessary and indispensable to the operations of the company, and to the accomplishment of the objects of their charter, but that there must be a limit somewhere to the incidental power of the company to enlarge its operations and extend its property without taxation under the exempting clause, and the court concluded that the limitation must be fixed *where the necessity ends and mere convenience begins;* that the necessary appendages of a railroad and transportation company were one thing, and that those appendages which might be convenient means of increasing the advantages and profits of the company were another thing;

that it might be advantageous for the company to purchase land and erect houses for their employés, and establish factories for making their own rails, engines, and cars, and even to purchase coal-mines and supply itself with fuel, but these are not among the necessary appendages of the company; and that the legislature, in exempting the company from all other taxes except those mentioned, only intended to include so much property as was necessary and essential to a railroad and a transportation business such as the corporation was created to construct and carry on. The court, therefore, sustained the validity of the taxes on the houses and lots in question. Numerous other cases to the same purport might be cited. *The State* v. *Newark*, 25 N. J. L. 315, 317; *Vermont Central Railroad Co.* v. *Burlington*, 28 Vt. 193; *Railroad* v. *Berks County*, 6 Pa. St. 70; *Inhabitants of Worcester* v. *The Western Railroad Corporation*, 4 Metc. (Mass.) 564. The doctrine declared in them, that the exemption in cases like the one in the charter before us extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purposes of its creation, could extend its immunity from taxation, and thus escape the common burden of government.

As to the property which was purchased by the bank upon the sale under the trust deed, there is less reason to contend for its exemption from taxation. The express authority conferred upon the corporation to hold real property, except that acquired for the use of the institution as a place of business, was limited to such as might be taken as security for debts; while held for that purpose it was subject to taxation as the property of the debtors. Its liability in this respect, to bear its proportion of the common burden of government, was not lessened because the bank, deeming it might be more readily disposed of if freed from the debtor's right of redemption, thought proper to purchase in the title.

Judgment affirmed.

VIETOR *v.* ARTHUR.

Stockings of worsted, or of worsted and cotton, made on frames and imported after June 22, 1874, are dutiable as knit goods, under schedule L, class 3, sect. 2504, of the Revised Statutes.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Subsequently to June 22, 1874, Vietor imported into New York, stockings. Some of them were wholly worsted. The others were composed of cotton and worsted, cotton being the material of chief value. They were intended to be worn by men, women, and children, and were made on frames. They were also "knit goods," this term comprising all goods made on frames, and also all hand-knit stockings and other knitted articles of various kinds.

They were classified by the appraiser as worsted knit goods, costing over eighty cents a pound, and Arthur, the collector of customs of the port of New York, exacted a duty at the rate of ninety per cent of fifty cents per pound and thirty-five per cent *ad valorem*, holding that the goods were, as knit goods, subject to the duty prescribed by schedule L, class 3, sect. 2504, Rev. Stat. The importer claimed that they were dutiable as stockings made on frames, worn by men, women, and children, and subject to the duty prescribed in schedule M. Both schedules are set out in the opinion of this court.

The duties claimed by the collector were paid under protest, and Vietor brought this suit against him. Judgment having been rendered for the defendant, Vietor sued out this writ.

Mr. Stephen G. Clarke for the plaintiff in error.

Mr. Edwin P. Smith, Assistant Attorney-General, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question in this case is whether stockings of worsted, or worsted and cotton, made on frames, and worn by men, women, and children, imported after the Revised Statutes went into effect, June 22, 1874, are dutiable as knit goods, under

schedule L, class 3, sect. 2504, or as stockings, under schedule M. The two provisions under which the parties make their respective claims are as follows: —

Sched. L. — "Flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound: twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound: thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound: forty cents per pound; valued at above eighty cents per pound: fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem*."

Sched. M. — "Clothing, ready-made, and wearing-apparel of every description, of whatever material composed, except wool, silk, and linen, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, not otherwise provided for, caps, gloves, leggins, mitts, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, except silk and linen, worn by men, women, or children, and not otherwise provided for, articles worn by men, women, or children, of whatever material composed, except silk and linen, made up or made wholly or in part by hand, not otherwise provided for: thirty-five per centum *ad valorem*."

In *United States* v. *Bowen* (100 U. S. 508), we held that the Revised Statutes must be treated as a legislative declaration of what the statute law of the United States was on the 1st of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision. That could only be done when it was necessary to construe doubtful language. We applied this rule in *Arthur* v. *Dodge* (101 id. 34) to the construction of the revision of the tariff laws.

It is also well settled that when Congress has designated an article by its specific name, and imposed a duty on it by such name, general terms in a later act, or other parts of the same act, although sufficiently broad to comprehend such article, are

not applicable to it. *Movius* v. *Arthur*, 95 U. S. 144; *Arthur* v. *Lahey*, 96 id. 112.

It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different enactments: subd. 7 and 9 of sect. 1 of the act of Aug. 30, 1842, c. 270 (5 Stat. 549); sched. C of sect. 11 of the act of July 30, 1846, c. 74 (9 Stat. 44); sect. 22 of the act of March 2, 1861, c. 68 (12 Stat. 191); sect. 2 of the act of July 14, 1862, c. 163. Id. 556. Now, when we find, as we do in schedule M of sect. 2504, "stockings . . . made on frames, of whatever material composed, except silk and linen, worn by men, women, and children," it seems to us clear beyond question that goods coming within that specific description are dutiable in the way thus provided, rather than as "knit goods . . . composed wholly or in part of worsted." It may be true, as suggested, that if there had been no revision, and we had been required to construe the statutes as they stood before Dec. 1, 1873, a different conclusion might have been reached. We have not deemed it necessary to institute such an inquiry, for it would be contrary to all the rules of construction to say that where in one part of a section of a statute it was provided that "stockings made on frames, of whatever material composed, except silk or linen," should pay duties at a certain rate, it was not *plain* such articles were not in any just sense "otherwise provided for" in a preceding clause of the same section fixing the duties to be paid on "knit goods composed wholly or in part of worsted." The judgment below was before *United States* v. *Bowen* (*supra*), was decided here.

Judgment reversed and a venire de novo awarded.

NOTE. — This opinion was announced at the last term. A petition for rehearing filed on the last day of that term was continued under advisement, and at the present term overruled.

DRAPER *v.* SPRINGPORT.

Where a town in New York subscribed for stock in a railroad company, and the commissioners, authorized to execute bonds in payment therefor, issued unsealed obligations, whereon a *bona fide* holder for value brought suit, — *Held*, that the absence of a seal on the paper does not affect his right to recover.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. James R. Cox for the plaintiff.

Mr. William F. Cogswell for the defendant.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The action below was brought by Draper against the town of Springport, to recover the amount of certain interest coupons annexed to certain instruments called bonds of the town of Springport, issued in payment of stock of the Cayuga Lake Railroad Company. One defence was that the bonds had no seals affixed to the signatures of the town commissioners. For this defect the court below gave judgment for the defendant, a jury having been waived by the parties. Other defences were set up on the trial, but were overruled by the court. These were: 1st, That on a *certiorari* (to which the plaintiff was not a party) the proceedings of the town commissioners, which resulted in the issue of the bonds, were set aside. 2d, That there was no sufficient consent of taxpayers of the town to authorize the commissioners to subscribe for the stock of the railroad company. 3d, That many of those taxpayers who did subscribe revoked their consent before the commissioners acted, which reduced the number of those consenting below that required to give the commissioners power to act.

Without expressing any opinion as to the sufficiency of the defences which were overruled, we are of opinion that the ground on which the court below dismissed the petition was insufficient. It related merely to a matter of form, and not to the substance of the transaction. The statute under which the bonds (so called) were issued was passed April 14, 1869, and was entitled "An Act to facilitate the construction of

the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof." The first section authorized the county judge to appoint, under his hand and seal, three freeholders of the town, as commissioners to carry into effect the purposes of the act. These commissioners were duly appointed and qualified. The second section of the act was as follows: —

"SECT. 2. It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the taxpaying inhabitants shall fix upon by their assent in writing, not exceeding in amount ten per cent of the assessed valuation of the real and personal property of said town as shown by the assessment-roll for the year 1868, for said town, at a rate of interest not exceeding seven per cent for a term not exceeding thirty years, and to execute bonds therefor under their hands and seal.

"The bonds so to be executed may be in such sums and payable at such times and places, not exceeding thirty years, and in such form as the said commissioner or commissioners and their successors may deem expedient: *Provided, however*, that the powers and authority conferred by this section shall only be executed upon the condition that the consent shall first be obtained in writing of the majority of the taxpayers of said town owning more than one-half of the taxable property of said town assessed and appearing upon the assessment-roll of the year 1868, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged, or proved by a subscribing witness who shall swear, in addition to the ordinary form of affidavits of subscribing witnesses, that the party assenting informed the witness that he knew the contents thereof.

"The proof required to show that a majority of the taxable inhabitants representing a majority of the taxable property of the town have given their consent required by this section shall be by the affidavit of the assessors or a majority of them of said town, which affidavit, consent, and acknowledgment shall be filed in the town and county clerk's office of the said county, with a copy of the assessment-roll of the year 1868, and it shall be the duty of the said assessors, and they are hereby required, to make such affidavit whenever the said consent shall be obtained on or before the first day of January, 1870.

"(The time of obtaining consents was extended by the act of April 1, 1870, to April 1, 1871.)

"A certified copy of such affidavit, consent, and acknowledgment shall be presumptive evidence of the facts therein contained, and shall be admitted in any court of this State, or before any judge or justice thereof."

Sect. 3 authorized the commissioners in their discretion to dispose of the bonds to anybody at not less than par, and directed that the money raised by the sale of bonds should be invested in the stock of the Cayuga Lake Railroad Company, and that the said money should be used and applied in the construction of said railroad, beginning at the north end as aforesaid, and its buildings and appurtenances, and for no other purpose whatever.

It was further enacted that the commissioners might subscribe for the stock of the company for the amount consented to, and might purchase the stock, receive certificates, and the town should thereby acquire all the rights and privileges of other stockholders, might participate in meetings of stockholders, and be eligible as directors.

Sect. 20 authorized the commissioners to exchange the bonds at par, and issue them directly to the railroad company, receiving therefor the stock of the company.

On the 23d of March, 1871, the three assessors of the town made an affidavit in accordance with the act, stating the facts necessary to enable the commissioners to proceed.

The commissioners thereupon subscribed for one thousand shares of the capital stock of the railroad company, of $100 each, and issued the bonds in question in payment thereof. The plaintiff purchased the coupons on which the suit was brought in the ordinary course of business, in good faith, and for a valuable consideration.

It is apparent from the law, that the substantial thing authorized to be done on behalf of the town was, to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and

the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments. The fundamental authority contained in the law is found in the first three lines of the second section: "It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the taxpaying inhabitants shall fix upon by their assent in writing." The commissioners executed this authority in the form allowed by the statute, namely, by a direct purchase of the stock with the bonds issued. They might have sold the bonds for money, and paid the money for the stock. Had they done this, the town would have been liable to pay the money borrowed, even if the obligations given for it had been void. Where the transaction has nothing in it of *malum in se*, and the parties are not *participes criminis* in a violation of law, money had and received by one from the other in good faith, may be recovered even though the security given therefor be void for some technical defect or illegality. This matter was sufficiently discussed in the case of *Thomas* v. *City of Richmond* (12 Wall. 349), and was very ably considered in *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490. The fact that the stock was taken directly in exchange for the bonds, instead of selling the latter for money and investing in stock, can make no material difference in the nature of the transaction. It is equally the case of value lawfully received for an innocent obligation, whether valid or invalid, given therefor. If valid, a recovery may be had on it; if invalid, a recovery may be had upon the original consideration.

We cannot agree with the courts of the State, that the form of a seal was an essential part of the transaction.

Whether the deviation from the directions of the statute, in the form of the obligations, may not have the effect of notice to the holder, sufficient to allow the other defences to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration.

Judgment reversed, with directions to award a venire de novo.

STEWART *v.* LANSING.

1. The indorsee of negotiable paper which has a fraudulent or illegal inception must, in order to recover thereon, prove that he is a *bona fide* holder thereof for value.
2. Coupon bonds of a town in New York were by commissioners executed to a railroad company pursuant to an order of a county judge, which was annulled and reversed by the judgment of the Supreme Court in a proceeding whereof, before they were issued, the commissioners and the company had due notice. *Held*, 1. That, as between the company and the town, the bonds are invalid. 2. That, in an action on coupons detached therefrom, the plaintiff must, to make out his right to recover against the town, establish his *bona fide* ownership of them. 3. That upon the question of such ownership a judgment in his favor upon other coupons detached from the same bonds does not estop the town.
3. Upon the evidence in this case it was not error to charge the jury to find for the town.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. James R. Cox for the plaintiff.

Mr. Francis Kernan for the defendant.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit by John J. Stewart to recover the interest due on coupons which matured July 1, 1872, Jan. 1, 1873, Jan. 1, 1874, July 1, 1874, Jan. 1, 1875, July 1, 1875, Jan. 1, 1876, and July 1, 1876. They were attached to seventy-five bonds of $1,000 each, purporting to have been issued by the town of Lansing, under the authority of a statute of New York, passed May 18, 1869, to permit municipal corporations to aid in the construction of railroads. The defence, stated generally, was that the bonds had been issued without authority of law. At the trial, after the testimony on both sides was in, the court instructed the jury to find a verdict for the town, which was done, and judgment entered accordingly. This ruling furnishes the principal ground of error assigned here.

The testimony is all set out in the bill of exceptions. The undisputed facts are that the county judge of Tompkins

County, within which the town is situated, assuming to act under the authority of that statute, rendered, March 21, 1871, a judgment appointing commissioners to execute bonds of the town to the amount of $75,000, and invest them in the capital stock of the Cayuga Lake Railroad Company. On the 27th of the same month, at the instance of the opposing taxpayers of the town, a writ of *certiorari*, directed to the county judge, was issued from the Supreme Court of the State for a review of this judgment. This writ was, at or about its date, served on the judge, who, on the 1st of September, made his return thereto, sending up, as required by law, a transcript of the record of the proceedings before him which were brought under review. Of this writ, and what was done thereunder, both the commissioners appointed by the judge and the railroad company had full notice; but the commissioners, on or about the 14th of October, 1871, executed the bonds which had been authorized, payable to bearer on the first day of January, 1902, with coupons for semi-annual instalments of interest attached, and delivered them to the company in exchange for seven hundred and fifty shares of its capital stock. At the same time the commissioners took from the company a bond of indemnity to save them harmless from all costs, liabilities, or expenses on account of what had been done.

The bonds, as soon as delivered, were taken by the company to New York, and there pledged as collateral security for money borrowed. On the 27th of May, 1872, the Supreme Court in general term reversed and in all things held for naught the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. This judgment of the Supreme Court still remains in force.

On the 26th of November, 1872, the company arranged with Elliott, Collins, & Co., a banking firm in Philadelphia, for the money to take up the bonds in New York, and they again pledged the bonds to that firm as security for the advances made. On the 8th of February, 1873, this debt to Elliott, Collins, & Co. was paid, and they parted with the bonds. The entire testimony as to what took place at this time is as follows:—

William Elliott, the senior member of the firm, examined as

a witness, said: "We did not sell the bonds at all. The bonds, on the 8th of February, 1873, we parted with. The cash we received on parting with them was $54,337.50. I have never seen any of the bonds since. The loan negotiated by us was paid in this way. Up to this time the loan had not been paid. It was paid by this money."

On cross-examination, he said: "I cannot tell through whom personally we received the bonds. Think we received them by express. They were negotiated by Mr. Delafield, either personally or by letter. All our transactions with that company have been done through Mr. Delafield. . . . I am not acquainted with John J. Stewart, the plaintiff in this action. I do not know where he lives, or in what State he lives. Neither myself or my banking firm ever had any transactions with him to my knowledge." This testimony was taken on behalf of the plaintiff, by deposition, on the 18th of July, 1876.

Afterwards, on the 18th of August in the same year, another deposition of the same witness was taken in behalf of the plaintiff. In this deposition, looking at Exhibit D, which was as follows: -

"PHILADELPHIA, Feb'y 8, 1873.

"Cayuga Lake R. R. Co.

75,000 Town of Lansing bonds	$54,337 50
Notes March 29, $50,000; 49 days' interest, $408.33 .	49,591 67
Credit Cayuga Lake	$4,745 83"

he said: "This is a statement of the sale of said town of Lansing bonds by the firm of Elliott, Collins, & Co. The sale was made at the time it bears date, Feb. 8, 1873; it was made out and sent to the Cayuga Lake R. R. Co. at that date. I said in my previous examination that we did not sell the bonds in question. I intended by that to say that we did not make the negotiation for the sale of them, but they passed through our hands, on terms which were agreed on by others. The price at which they were sold we were consulted about, and our advice asked. We received the money and delivered the bonds on that day." On cross-examination, he said: "I do not wish to change, but merely explain my testimony given at the previous examination. Exhibit D is in the handwriting of my son, who gener-

ally makes out the accounts, Adolphus William Elliott. He is still living in this city. To my present recollection, the first time I saw Exhibit D is to-day. I have no recollection of ever having seen it before. The statement first credits the Cayuga Lake R. R. Co. with $54,337.50, under date of Feb. 8, 1873, that being the avails of the bonds. . . . It was sent to the Cayuga Lake R. R. Co. at the time, as I have stated before. I have no personal knowledge of Mr. Stewart; I mean the Mr. Stewart who is plaintiff in this action. I have no personal knowledge of any business transaction whatever between myself or my house and Mr. Stewart. I have no personal knowledge whether these bonds ever passed into the hands of Mr. Stewart, the plaintiff in this action, nor whether he ever paid anything for them. Somebody paid for them and we got the money."

Talmadge Delafield, the treasurer of the company, a witness called on the part of the plaintiff, testified that Elliott, Collins, & Co. held the bonds after the transfer to them until Feb. 8, 1873, when they rendered an account of the sale. On cross-examination he said, "I have no personal knowledge of the sale of the bonds. Never saw Mr. Stewart; don't know that there is such a man. I have never corresponded with him, nor he with me. Whatever occurred between them and him was entirely without my knowledge."

On the 30th of May, 1874, a suit was brought in the name of Stewart, the present plaintiff in error, in the Circuit Court of the United States for the Northern District of New York, to recover the coupons due July 1, 1873, averring his ownership thereof.

On the 20th of July, 1872, Manassah Bailey brought suit in the same court to recover the coupons of July 1, 1872. In each of the suits the defences were that the bonds and coupons were issued without the authority of law, and that the plaintiffs respectively were not *bona fide* holders. The suits were tried together, and upon the same evidence, so far as applicable. In both cases it was decided that the bonds were invalid, and in that of Bailey judgment was given for the defendant, because it had not been satisfactorily shown that he was a *bona fide* holder. In the Stewart case, however, the court used this language in its opinion: "The suit of Stewart differs from the

one by Bailey, in that it appears that the bonds were pledged as collateral in February, 1873, to Elliott, Collins, & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins, & Co. were holders for value before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly or not is not clear, but, however this may be, he succeeds to all the rights of Elliott, Collins, & Co., and occupies the position of a *bona fide* purchaser. As against a *bona fide* holder of the coupons, none of the defences interposed are tenable." Acting on this principle, the court gave judgment in favor of Stewart for the coupons he held.

Upon the trial of the present action, the record of the first Stewart judgment was given in evidence, and the counsel for the plaintiff, who had also been counsel for Stewart and Bailey in the former suits, was examined as a witness. He testified that after the judgment against Bailey, he gave the coupons sued for in that action to a Mr. Tryon, in New York. He was unable to say from whom he got them back, nor when. Neither did he tell from whom he got the bonds and coupons which were used in evidence at the present trial.

As between the railroad company and the town, the judgment of the Supreme Court reversing and annulling the order of the county judge invalidated the bonds. If the bonds had not been delivered before, they could not have been afterwards. The judgment of reversal was equivalent between these parties to a refusal by the county judge to make the original order.

The next inquiry is whether, on the evidence, Stewart occupied in this suit a better position than the town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury, under proper instructions, the determination of the question whether he was in a commercial sense the *bona fide* holder of the coupons sued for.

It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The

mere possession of the paper, under such circumstances, is not enough. *Smith* v. *Sac County*, 11 Wall. 139.

Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover. This, it is contended, was conclusively established by the judgment in the suit on the coupons of July, 1873. The issue in that case was as to the ownership of those coupons, and did not necessarily involve an ownership of the bonds. We have often held that coupons detached from bonds are negotiable instruments, and capable of separate ownership and transfer. *Clark* v. *Iowa City*, 20 Wall. 583. While the court in its opinion, when rendering the former judgment, used language broad enough to cover the bonds, this language must be confined in its effect to the issues on trial, that is to say, the ownership of the coupons alone. In *Cromwell* v. *County of Sac* (94 U. S. 351), it was distinctly held that a determination in one action, that a plaintiff was not an owner for value of certain coupons sued on, did not estop him from proving in another action that he was such an owner of other coupons detached from the same bonds. The proposition in this case is but the converse of that.

This makes it necessary to inquire whether upon the testimony the burden of establishing a *bona fide* ownership was so far overcome at the trial as to make it improper for the court to take that question from the jury. The testimony is noticeable rather for what is omitted than for what was introduced. It would seem to have been easy to prove the exact facts as to the "parting with" the bonds by Elliott, Collins, & Co. Although the bonds had been pledged in New York before, Elliott, Collins, & Co. took them from the company, not from the New York holders. The company negotiated the loan from them, and on taking up the bonds in New York made a new pledge. This was all done after the judgment of the Supreme Court upon the *certiorari*. In the former suit a judgment had been secured only by proving a *bona fide* ownership in the plaintiff. Notice of the necessity of establishing the same fact in this case was, therefore, given the plaintiff and his counsel. Acting on this notice, the same counsel who

appeared in the former case went to Philadelphia to get the necessary testimony. He called on the senior member of the firm of Elliott, Collins, & Co. and took his deposition. In this deposition it was clearly shown that although that firm had "parted with" the bonds, and got some money when they did so, which was put to the credit of the company, they did not sell the bonds. That was done, if done at all, by some one else. Not satisfied with this testimony, the same counsel went again to Philadelphia to make another effort. He took with him a paper he had found in the handwriting of the junior member of the firm, now known as Exhibit D. Instead of examining the junior partner, he went again to the senior partner, who evidently knew but little personally about the transaction, and stopped with him, although it appears that the witness who made out the exhibit was then in the city, and it was again stated that the sale was not negotiated by the firm, but that the bonds only passed through their hands under terms which had been agreed on by others. Who those others were is not stated. Neither the actual purchaser nor his representative in the negotiation was named. Stewart, the plaintiff, was not known to any of the witnesses examined. No one had ever seen him. His counsel, though examined as a witness, gave no information in respect to him, and was also unable to tell from whom the Bailey coupons were received. It is by no means certain from the testimony whether such a man as the plaintiff is actually in existence. Even the witness Elliott was not asked whether he knew of the decision of the Supreme Court when his firm took the bonds. The sale, if actually made, was at an enormous discount. Although the Bailey coupons are included in this suit, another action for their recovery was pending at the time Elliott, Collins, & Co. parted with the bonds, in which the same defences now relied on were set up. The counsel now appearing for the present plaintiff was also the counsel for Bailey in that action, and for the railroad company when the bonds were got from the commissioners. It would have been apparently so easy to make the necessary proof, if it could have safely been done, that we are unable to account for its absence, except on the theory that a disclosure of the whole truth would be fatal to a

recovery. While it would not, perhaps, have been improper for the court, in the exercise of its rightful discretion, to leave the case to the jury on the evidence, we cannot say it was error not to do so. In *Pleasants* v. *Fant* (22 Wall. 116), it was held that "if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant" a particular verdict, the jury might be so instructed. *Railroad Company* v. *Fraloff*, 100 U. S. 24; *Oscanyon* v. *Arms Company*, 103 id. 261. This case, in our opinion, comes under that rule.

The record in the Bailey suit was certainly admissible in evidence upon the issue as to the *bona fide* ownership of the coupons of July, 1872.

Without, therefore, considering any of the other questions presented for our consideration, on the argument, the judgment is

Affirmed.

STRONG *v.* WILLEY.

SAME *v.* SAME.

A case in equity, wherein an account and an injunction were prayed for, was at issue upon bill, answer, and replication. *Held*, that the parties, by referring the matter in controversy to an arbitrator, with the stipulation that his report should be the basis of a decree, waived the objection that the complainant's remedy was at law.

APPEALS from the Supreme Court of the District of Columbia.

Strong, in 1873, entered into a contract with the Board of Public Works of the District of Columbia for the construction of a sewer in Washington City. On the 6th of May Willey agreed with him to build a portion of it according to the specifications set forth in that contract with the board, and to receive payment therefor at a stipulated price per foot in his orders on the board, payable in sewer bonds. Disputes having arisen, Willey filed his bill, Sept. 7, 1874, in the court below against Strong, and also made defendants the Board of Audit

for the adjustment of such indebtedness of the District, as that arising under Strong's contract. The bill alleges that the work had been performed, and that Strong, after giving certain orders on the proper authorities of the District, which had been recognized as valid assignments, was attempting to induce the Board of Audit to ignore the orders in favor of Willey. It is further alleged that there was a balance due, for the payment of which Strong refused to give an order. The bill prays for an order restraining Strong from interfering with the Board of Audit in the settlement for the work so done by Willey, and from asking or receiving any certificate, bond, order, &c., therefor; for a specific performance of the agreement set up in the bill; and for general relief.

Strong's answer admits his agreement with Willey and the work done thereunder, but avers that he had given orders for the entire payment thereof, and denies interfering with the action of the board on them. He filed, in February, 1875, his bill in the court below against Willey and his surety, the Commissioners of the District, and the Board of Audit, setting up the same contract, and alleging that Willey had not complied therewith, but had been paid thereon an amount in excess of what was due him. These allegations Willey denied in his answer, and insisted that Strong was indebted to him. The matters arising upon these bills of complaint were by the respective complainants referred to the arbitrament of William B. Webb, under a stipulation that his decision was to be final and conclusive upon all questions arising in the investigation of the cases; that the court should make a final decree based upon his report, and that no exception should be made thereto. Webb made his report, finding that there was due to Willey from Strong $15,413.21, and the court passed a decree therefor accordingly.

In the entry of the decree it is stated that the court overruled the exceptions to the report, but they are not set forth in the record.

Strong filed bills of review, which were dismissed on demurrer, and he appealed.

The remaining facts are stated in the opinion of the court.

Mr. Nathaniel Wilson for the appellant.
Mr. L. G. Hine and *Mr. S. T. Thomas* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

These are bills of review to correct alleged errors of law apparent on the face of a decree. The two original suits were in reality but one. They were considered and decided together, and both are included in the same decree. They relate to controversies growing out of a single contract between the parties. The nature of these controversies is fully disclosed in the pleadings. The case of the appellee against the appellant is so stated as to admit of alternative relief. The object of the appellee evidently was to have the amount due him ascertained, and to preserve his securities. His contract called for payment in a certain class of orders on the Board of Public Works of the District of Columbia; but if for any cause he could not get valid orders, or if, by the wrongful acts of the appellant, the payment of orders actually drawn was refused when presented, compensation might be decreed to him in money, under the prayer for general relief.

In the progress of the litigation the parties agreed to refer all the matters of difference included in their respective bills to the arbitrament of William B. Webb, whose decision was to be final and conclusive, and his award was to be made the basis of the decree of the court. Pursuant to this agreement the reference was formerly ordered. The arbitrator, after hearing, decided that the sum of $15,413.21 was due the appellee from the appellant. To this award the appellant filed in court certain exceptions. What these exceptions were does not appear from the record, but it does appear that they were overruled, and a decree entered against the appellant for the sum named to be collected by execution, as at law.

It is now contended that this decree is erroneous, because, 1, it does not dispose of the issues raised by the pleadings; and, 2, it is for a sum in excess of that claimed by the appellee in his original bill. In our opinion neither of these objections is good. By decreeing the payment of money the

court has in effect found either that the appellant had no fund in the hands of the District authorities on which he could draw, or that the appellant, by his improper interference to prevent the payment of the orders he drew, made himself liable personally for money.

It is not true that the amount of the decree is greater than the demand of the appellee in his original bill, if the orders theretofore issued to him were not paid. He expressly averred in the original bill that there was due him $27,670 under the contract, if his orders were not paid, and in his answer to the bill of the appellant the amount is stated to be $16,899.93. It was only in the event of his holding the orders and getting payment thereon that the balance was stated at a less sum.

The reference of the matter in dispute to the arbitrator, coupled with the agreement that his award should be made the basis of a decree in the suits, is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objection in fact existed, which we are by no means inclined to admit.

The case is to be decided upon the face of the original record, and not upon the averment of new facts in the bills of review.

Decrees affirmed.

EX PARTE GORDON.

1. A writ of prohibition will not be issued to a District Court of the United States sitting in admiralty, wherein a libel claiming damages was filed against a steamer for drowning certain seamen of a vessel with which, as she was navigating the public waters of the United States, the steamer, as was alleged, wrongfully collided.
2. That court, having jurisdiction of the steamer and of the collision which is the subject-matter of the suit, is competent to decide whether, under the circumstances, it may estimate the damages which one person has sustained by the killing of another.

PETITION for a writ of prohibition.

The facts are sufficiently stated in the opinion of the court.

Mr. Arthur George Brown and *Mr. Stewart Brown* for the petitioner.

Mr. John H. Thomas, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an application by the owner of the British steamer "Leversons" for a writ of prohibition to restrain the District Court of the United States for the District of Maryland, sitting in admiralty, from proceeding further in a cause begun in that court against his vessel to recover damages for the drowning of certain persons in consequence of a collision on the Chesapeake Bay between the steamer and the schooner "David E. Wolf," caused by the fault of the steamer.

Sect. 688 of the Revised Statutes gives this court authority to "issue writs of prohibition to the District Courts when proceeding in admiralty." The writ thus provided for is a common-law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. 6 Bac. Abr. 587, tit. Prohibition, K. Its office is to prevent an unlawful assumption of jurisdiction.

The judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction" (Const., art. 3, sect. 2); and Congress, by sect. 563, subd. 8, of the Revised Statutes, committed the exercise of this power in most cases primarily to the District Courts. Admiralty jurisdiction extends to maritime contracts and service, and to torts or injuries of a civil nature, committed on navigable waters. *The Belfast*, 7 Wall. 624. The District Courts have the power to hear and decide all cases arising under this jurisdiction, and when a prohibition is applied for, the question presented is not whether a libellant can recover in the suit he has begun, but whether he can go into a court of admiralty to have his rights determined.

The collision which caused the injury now complained of was certainly a subject of admiralty jurisdiction. It occurred between two vessels while navigating the public waters of the United States, and was a maritime tort. For damages to the

vessels or their cargoes, caused by the collision, a suit could unquestionably be maintained in the District Court of any district where the vessel should be found. The question in the present suit is whether the vessel is liable to the libellants for pecuniary damages resulting from a loss of life in the collision, and that, as we think, a court of admiralty may properly decide. The suit is for damages growing out of the collision. Having jurisdiction in respect to the collision, it would seem necessarily to follow that the court had jurisdiction to hear and decide what liability the vessel had incurred thereby. Suppose the courts of common law had never decided that an action could not be maintained at common law for damages caused by the death of a human being, would any one doubt the power of courts of admiralty to determine whether such an action could be brought in that jurisdiction? It is no doubt true that down to within a comparatively recent period the courts of admiralty, both in England and in this country, have followed the rule of the common law in respect to such actions, and have decided that damages for such wrongs were not recoverable; but since Lord Campbell's Act in 1846 (9 & 10 Vict., c. 93), it has been provided by statute in England, and in most of the States of the Union, that suits may be brought in the courts of common law for the benefit of those having a pecuniary interest in the life of one who has been killed by the wrongful act of another, to recover such damages as they may have sustained in consequence of the wrong that has been done; and we think it is clearly within the power of the courts of admiralty to determine whether this legislation has not wrought a corresponding change in the laws which govern their jurisdiction.

We have not overlooked the fact that in *Smith* v. *Brown* (Law Rep. 6 Q. B. 729), decided in 1871, the Court of Queen's Bench in England, evidently with some hesitation, restrained the Court of Admiralty from proceeding with such a suit; but in *The Franconia* (2 P. D. 163), decided in 1877, Sir Robert Phillimore declined to follow that case, and his action was sustained in the Court of Appeal by a divided court. The English Court of Admiralty has asserted its jurisdiction in *The Guldfaxe*, Law Rep. 2 Ad. & Ec. 325, *The Explorer*, id. 289,

and *The Franconia*, *supra*. We think this case is a proper one for the application of the rule followed by the Court of Queen's Bench in *The Charkieh* (8 Q. B. 197), where the suggestion on an application for a prohibition was, that, in a case of collision between the "Charkieh" and the "Batavier," the Court of Admiralty had no jurisdiction, because the "Charkieh" was the property of the Khedive of Egypt, and was a ship of the Egyptian branch of the Turkish navy, carrying the Ottoman naval pennant; but Lord Chief Justice Cockburn, who participated in the decision of *Smith* v. *Brown*, said, after stating the claims that were made, "There, therefore, is a further question, whether or not a vessel belonging to a foreign potentate, but not used as a vessel of state or a vessel of war, is entitled to the immunity which ships of war, and ships used for the purposes of government, enjoy. This is a question peculiarly within the province of the Court of Admiralty to decide. Why are we to find that the Court of Admiralty cannot deal with it? If it entertains the suit, there is an appeal to the Judicial Committee of the Privy Council, a court of the highest authority. I feel disinclined to grant a rule for a prohibition in a case where the facts are in doubt, and the court whose jurisdiction is sought to be impeached is just as competent to determine the question as we are. . . . But both facts and the law are within the jurisdiction of the Court of Admiralty, and that court is perfectly competent to decide them." And Blackburn, J.: "It does seem to me that the Court of Admiralty has jurisdiction to determine the facts, and to decide whether international and maritime laws do allow the circumstances stated to be a defence to a claim against the "Charkieh;" and if that court be wrong, the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law; and, taking that view of it, I think the court ought not to be prohibited." All the judges concurred in refusing the writ.

So here, the Court of Admiralty has jurisdiction of the vessel and the subject-matter of the action, to wit, the collision. It is competent to try the facts, and, as we think, to determine

whether, since the common-law courts in England, and to a large extent in the United States, are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another, the courts of admiralty may not do the same thing. If the District Court entertains such a suit, an appeal lies from its decree to the Circuit Court, and from there here, if the value of the matter in dispute is sufficient. Under these circumstances, it seems to us clear that the admiralty courts are competent to determine all the questions involved, and that we ought not to issue the prohibition asked for.

Petition denied.

EX PARTE FERRY COMPANY.

Ex parte Gordon (*supra*, p. 515) reaffirmed, the doctrines there announced being applicable, although the amount involved in the suit below is not sufficient to give this court appellate jurisdiction.

PETITION for a writ of prohibition.

James H. Cuddy exhibited his libel against the steamer "Garland," her engines, &c., in the District Court of the United States for the Eastern District of Michigan, alleging that he was the father of David Cuddy and William H. Cuddy, aged respectively ten and thirteen years, passengers on board a steam yacht bound up the Detroit River, when she was sunk by the "Garland," whereby they were drowned, and he was deprived of their earnings, services, and society. The sinking of the yacht and their death are charged to be the direct result of the negligence and unskilfulness of the "Garland."

In a supplemental libel he alleges that he was duly appointed administrator of the estate of each of his sons, and he charges that he is entitled to damages in the sum of $4,000 for their death, not only by virtue of his relationship, but as their personal representative, his right in that behalf being created by the law of Michigan.

The "Garland" was seized. On the application of the Detroit River Ferry Company, the claimant, she was appraised and surrendered. The company now prays for a writ from this court to prohibit the proceedings, as beyond the jurisdiction of the District Court.

Mr. Henry C. Wisner for the petitioner.
Mr. Alfred Russell, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case is, in all its material facts, like that of *Ex parte Gordon, supra*, p. 515. It matters not that the amount demanded in the libel is less than $5,000, and that consequently no appeal will lie to this court. An appeal will lie to the Circuit Court in favor of the libellant if he is defeated, and in favor of the respondent if the recovery exceeds $50. It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities. If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort, and concludes the parties. It rests with Congress to decide whether a case shall be reviewed or not.

Writ denied.

EX PARTE HAGAR.

The District Court sitting in admiralty will not be restrained from proceeding in a suit to recover pilotage.

PETITION for a writ of prohibition.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Henry G. Ward* and *Mr. Richard E. McMurtrie* for the petitioner, and by *Mr. Edward G. Bradford* and *Mr. Thomas F. Bayard, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an application by the agent of the master, part-owner, and claimant of the British ship "William Law," for a writ of prohibition to restrain the District Court of the District of Delaware, sitting in admiralty, from proceeding further in a suit pending in that court against the vessel to recover the half-pilotage, which is claimed to be due under the statutory regulations of Delaware, for refusing to accept the services of a pilot when tendered, outside of Cape Henlopen light-house, to conduct the ship to the Delaware breakwater, where she was bound for orders. It has long been settled that claims for pilotage fees are within the jurisdiction of the admiralty. *Ex parte McNeil*, 13 Wall. 236; *Hobart* v. *Drogan*, 10 Pet. 108. Such being the case, under the decision just rendered in *Ex parte Gordon* (*supra*, p. 515), the District Court can properly hear and decide the matters in dispute, and the application for the writ is accordingly

Denied.

GOTTFRIED *v.* MILLER.

1. The right of a corporation to assign letters-patent, whereof it is the owner, is not affected by an attachment whereunder shares of its capital stock, belonging to a stockholder, were seized, and the assignment may be made by an instrument in writing not under seal.
2. A., on selling a machine containing a patented invention, warranted the title to it and the right to use it. He afterwards acquired a part interest in the letters-patent. *Held*, that the sale, so far as he is concerned, is a license to the vendee to use the machine. *Quære*, Are the other part owners estopped by the sale from setting up that by such use the letters-patent are infringed?
3. Under the contract between A. and the other part owners (*infra*, p. 525) all licenses granted by him were in effect confirmed.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The bill of complaint alleged that Frederick Miller, the defendant, was infringing letters-patent No. 42,580, bearing date May 3, 1864, and granted to the complainants, Matthew Gottfried and John F. T. Holbeck, for an improvement in a

machine for pitching beer barrels. It prayed for an injunction to restrain his further infringement, and for damages and an account of profits.

The only defence relied on was that on Nov. 25, 1872, John H. Stromberg, the owner of an undivided one-third of the entire interest in the letters-patent sued on, sold and delivered to the defendant, for his use forever, a machine for pitching barrels, containing some of the improvements purporting to be secured by said letters-patent; that the defendant paid for it; and since that date used, and was still using it; and that except as aforesaid he never in any manner used or employed the method or improvements, or the process or machine, set forth in the letters-patent.

The controversy relates to Miller's right to use the machine. The evidence establishes the following state of facts, about which there seems to be no dispute: —

The letters-patent were, as above stated, granted to Gottfried and Holbeck. On Nov. 25, 1872, Stromberg sold to Miller a pitching machine containing, as the complainants asserted, the improvements covered by their letters-patent. Miller claimed the right to use it, and did use it from the time of his purchase up to the date of filing this bill. This is the infringement of which complaint is made. The controversy depends on several transfers and other transactions between the parties who at different times had or claimed to have an interest in the patent. They were as follows: On Dec. 19, 1870, Gottfried, one of the patentees, by written assignment, in consideration of five dollars paid, and a royalty to be paid of ten dollars on every machine to be manufactured by Holbeck, sold and transferred all his interest in the letters-patent and the invention to Holbeck, reserving, however, in the same instrument, the right to revoke it if the royalty should not be paid. On Jan. 3, 1871, Holbeck, being then the sole owner of them, sold and assigned to Charles F. Smith and Henry C. Comegys an undivided two-thirds of all his title and interest therein; on the 25th of that month, the title to them being at that time in Holbeck, Smith, and Comegys, they, by written assignment, transferred to the "Barrel Pitching Machine Company" of Baltimore all their right, title, and interest in and to various letters-patent,

including those to Gottfried and Holbeck. The assignment contained this provision: "The same to be held and enjoyed by the said company as fully and entirely as they would have been held by us if this assignment and sale had not been made, with the exception that the said company shall not assign to any one but ourselves any or all the interest in and to the above-named patents in the proportion as they are now held by us, this assignment to hold good until the dissolution or liquidation of the said company, when the said company shall reassign to us in the same proportions as now assigned by us." Afterwards, on June 1, 1871, Holbeck, Smith, and Comegys made a further assignment to the company of their interest in the letters-patent mentioned in the first assignment, which contained the following clause: "And provided also that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be reassigned to each grantor."

On Dec. 9, 1875, the directors of the company resolved that all the right, title, and interest of the company acquired by the assignment from Smith, Comegys, and Holbeck, should be assigned and reconveyed to them for the sum of $500, and directed Charles F. Smith, the president of the company, to execute and deliver on its behalf an assignment to them.

On the 11th of that month, in pursuance of the resolution just mentioned, an instrument, purporting to be an assignment, for the consideration of $500, was executed by the company to Smith, Comegys, and Holbeck, of all its right, title, and interest in and to the patent. The attestation clause and signature were as follows: —

"In testimony whereof, and in pursuance of a resolution passed by said company on the ninth day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith had hereto set his hand, as the act of the said company, this eleventh day of December, 1875.

(Signed)

"CHARLES F. SMITH,

"*President Barrel Pitching Machine Company.*"

On the same day, Smith, for the alleged consideration of $500, granted and assigned to Holbeck and Gottfried all his right and title to the patent; and afterwards, on June 7, 1876, Comegys transferred to Stromberg all his interest in the patent.

It next appears that on Oct. 9, 1876, Gottfried, Holbeck, and Stromberg, who are named as jointly interested in the patent, appointed, by a certain instrument in writing, J. H. B. Latrobe, of Baltimore, their attorney, with authority to prosecute suits against infringers of the patent, and to compromise or adjust the same. This instrument contained the following clause: —

"And it is understood that all expenses, costs, and charges, including counsel fees, attending the litigation, if any, shall be deducted from the collections aforesaid, and the balance paid over to the parties hereto in the proportion of their interest in the said patents, and particularly it is understood that the said John H. Stromberg shall be paid out of said collections, as fast as made, all moneys that he may have advanced in the prosecution of claims under said letters-patent."

This instrument bears the signatures and seals of Holbeck, Gottfried, and Stromberg. During the years 1877 and 1878 bills in equity were filed by them against various defendants, in which they averred themselves to be joint owners of the letters-patent.

On Dec. 15, 1879, Stromberg, in consideration of the sum of $5,000, assigned to Gottfried all his interest in the patent, and in all claims of every kind or nature for past infringements, and all rights of action arising out of, or connected with, infringements. This instrument of assignment recited the fact that Stromberg had theretofore disposed of rights and licenses under the patent as a part owner under mesne assignments of the same, and had caused suits to be instituted against infringers, and that it was a part of the consideration of the assignment from him that he should be released from all claim which Gottfried or Holbeck, or their assignees, might or could have against him for or by reason of any collections theretofore made by him, or his attorneys, or against any person or

persons to whom he had granted licenses to use the patented improvements; and it was then declared as follows: —

"Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck (the said Holbeck uniting herein for the purpose of carrying out the agreement aforesaid), for and in consideration of the premises, have released, and by these presents do hereby release, the said John H. Stromberg from all claim that they or either of them might or could have against the said Stromberg for or by reason of any collection he may have made from parties to whom he or his attorneys . . . may have granted licenses to use the said patented improvement, hereby ratifying and confirming all such licenses, and all the acts of the said Stromberg and his attorneys in the premises. And the said Matthew Gottfried doth hereby covenant and agree that he will save harmless the said Stromberg and his attorneys from all claims that may be made against them or either of them for or by reason of any interest which the said Gottfried and Holbeck or either of them may have given to any other party in the said letters-patent."

It appears also that in September, 1873, Charles F. Smith brought a suit against Henry C. Comegys in the Superior Court of Baltimore City, upon an indebtedness from Comegys to him, in which an attachment was issued and a seizure made of the shares of capital stock held by Comegys in the Barrel Pitching Machine Company, which proceedings, on October 27, resulted in a judgment condemning the stock, according to the laws of the State of Maryland, for the satisfaction of Smith's claim.

On the day upon which Stromberg sold the machine to Miller, he had no interest in the letters-patent and no license under them, and it is admitted that he infringed them by making and selling the machine to Miller.

At the January Term, 1881, on motion of both complainants, the court below dismissed the bill as to Holbeck. Upon a final hearing, in June following, a decree was rendered dismissing the bill as to Gottfried, who thereupon appealed.

Mr. Thomas A. Banning and *Mr. Ephraim Banning* for the appellant.

Mr. E. H. Abbot for the appellee.

MR. JUSTICE WOODS, after stating the case, delivered the opinion of the court.

The appellant rests his right to a decree in this case upon these grounds: *First*, that Stromberg never owned any part of the patent sued on; and, *second*, that if he did, his ownership could not inure to the protection of the defendant Miller. We shall consider these contentions in the order stated.

Upon the first point we remark that it is entirely clear that the assignment of his interest in the patent by Comegys to Stromberg, dated June 7, 1876, transferred to the latter an interest therein, provided the retransfer of the patent by the Barrel Pitching Machine Company to Holbeck, Smith, and Comegys vested the title to the patent in them. Briefly stated, the following is the chain of title: Gottfried and Holbeck are the joint patentees; Gottfried conveys all his interest in the patent to Holbeck, who, becoming thus the owner of the entire patent, conveys one undivided third to Smith and another to Comegys. Holbeck, Smith, and Comegys convey the entire interest in the patent to the Barrel Pitching Machine Company. The company reconveys its interest in the patent to its assignors, Holbeck, Smith, and Comegys; Smith conveys his interest to Gottfried and Holbeck, and Comegys conveys his to Stromberg.

The contention of the appellant is that the assignment of Dec. 11, 1875, by the Barrel Pitching Machine Company to Holbeck, Smith, and Comegys was not properly executed, and was, therefore, ineffectual to pass any title.

The assignment declares that in pursuance of a resolution passed by the Barrel Pitching Machine Company, and in consideration of $500 received by it from Smith, Holbeck, and Comegys, the said company has granted to them all its title and interest in said letters-patent. It is officially signed by Smith as president of the company, who declares the setting of his hand thereto to be the act of the company.

The resolution referred to in this assignment is in the record, from which it appears that the company decided to make the assignment, and directed Smith to execute and deliver the same to Smith, Comegys, and Holbeck on behalf of the company, on receiving from them the sum of $500.

On account of the want of the corporate seal and of the

manner of its execution, it is insisted by appellant that this assignment was not the transfer of the Barrel Pitching Machine Company, but the personal deed of Smith.

There is no ground whatever for this contention to stand on. Assignments of patents are not required to be under seal. The statute regulating their transfer simply provides that "every patent, or any interest therein, shall be assignable in law by an instrument in writing." 16 Stat., p. 203, sect. 36; Rev. Stat., sect. 4898.

A corporation may bind itself by a contract not under its corporate seal, when the law does not require the contract to be evidenced by a sealed instrument. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Fleckner* v. *Bank of the United States*, 8 Wheat. 338; *Andover, &c. Turnpike Corporation* v. *Hay*, 7 Mass. 102; *Dunn* v. *The Rector, &c. of St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Kennedy* v. *Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367; *Stanley* v. *Hotel Corporation*, 13 Me. 51. Even the parol contracts of a corporation made by its duly authorized agent are binding. *Fanning* v. *Gregoire*, 16 How. 524; *Fleckner* v. *Bank of the United States*, *supra*. The absence, therefore, of the corporate seal from the contract of assignment does not render it invalid or void.

The assignment is executed in the manner required by law of an agent when making a simple contract in writing for the corporation and by its authority. The rule as laid down by the authorities is that the agent should, in the body of the contract, name the corporation as the contracting party, and sign as its agent or officer. This is the mode in which bank-bills, policies of insurance, and many other contracts of corporations are ordinarily executed. *Mott* v. *Hicks*, 1 Cow. (N. Y.) 513; *Bowen* v. *Morris*, 2 Taunt. 374; *Shelton* v. *Darling*, 2 Conn. 435; *Brockway* v. *Allen*, 17 Wend. (N. Y.) 40.

The assignment under consideration purports on its face to be the contract of the Barrel Pitching Machine Company. It declares that the consideration has been received by the company; that it is executed in pursuance of a resolution passed by the company; and it purports to be signed by Smith, president of the company, who declares that he signs it as the act of the company.

It would be an absurdity to hold that this instrument is the individual contract of Smith, and not of the Barrel Pitching Machine Company.

It is not the company which asserts that this instrument was ineffectual to divest it of title to the patent, and the record shows that the assignees therein named acted upon the assumption that the assignment vested them jointly with the title.

We are of opinion, therefore, that the assignment was well executed by the Barrel Pitching Machine Company, and transferred the letters-patent to Holbeck, Smith, and Comegys, and that Stromberg, on June 7, 1876, by virtue of the assignment made to him on that day by Comegys, became vested with an undivided interest in the patent.

It is contended by counsel for appellant that the attachment of the stock of Comegys in the Barrel Pitching Machine Company, at the suit of Smith, in the Superior Court of Baltimore City, prevented Comegys from acquiring any interest in the patent by the assignment thereof to Smith, Holbeck, and Comegys by the Barrel Pitching Machine Company, and, therefore, Comegys could convey no interest in the patent to Stromberg. This position seems to be founded on the clause of the instrument by which the patent was transferred to the Barrel Pitching Machine Company, to wit, that any reassignment of the patent to the assignors should be subject to the lawful rights of the creditors of the company.

The answer to this contention is, that Smith was the creditor of Comegys, and not of the company, and the clause in the instrument of transfer to the Barrel Pitching Machine Company gave Smith no claim on the patent to secure a debt due him, not from the company, but from a stockholder in the company.

The fact that Comegys held stock in the company gave him no title to its property, and the attachment of his stock did not in the least incumber the property of the company, or prevent the assignment of the letters-patent by it to Smith, Holbeck, and Comegys, or the transfer by Comegys to Stromberg. *Morgan* v. *The Railroad Company*, 1 Woods, 15; *Bradley* v. *Holdsworth*, 3 Mee. & W. 422; *Arnold* v. *Ruggles*, 1 R. I. 165.

It remains to consider whether the sale by Stromberg to the defendant, Miller, of one of the pitching machines, containing the improvement described in the patent, protects him from liability for its use in this suit.

By the contract of sale, Stromberg warranted not only the title to the machine itself, but the right to use it. If, at the time of the sale, he had been the owner of the patent, the sale would have constituted a license to Miller to use the machine as long as it lasted. But Stromberg did not acquire any interest in the patent until long after the date of his sale to Miller.

If he had subsequently become the sole owner of the patent, his previous sale to Miller of a machine embodying his patented invention would have estopped him from prosecuting Miller for an infringement of the patent by the use of the machine. In analogy to estates in land by estoppel, Miller would have acquired a right to use the machine which could not have been controverted by Stromberg.

But having acquired only a part interest in the patent, we do not undertake to decide that his previous sale of the machine to Miller bound the other joint owners of the patent. It is clear, however, that such sale was a license to Miller to use the machine so far as Stromberg could grant a license. And in our opinion the covenants of Gottfried and Holbeck, in the contract by which Stromberg assigned his interest in his patent to them, are sufficient to protect Miller from this suit. In that contract it is declared to be part of the consideration of the transfer by Stromberg of his interest in the patent to Gottfried and Holbeck "that he should be released from all claims which Gottfried or Holbeck, or either of them, or any person to whom they, or either of them, may have assigned an interest in said letters-patent, might or could have against him, . . . or against any person or persons to whom Stromberg may have granted licenses to use the said patented improvement." And by said instrument Gottfried and Holbeck, for and in consideration of the premises, declare that they do release said Stromberg from all claims they or either of them may have against him or the parties to whom he may have granted licenses to use said patented improvement.

We think there can be no doubt that it was the purpose of all the parties to this instrument, and it is clearly expressed therein, that, as a part of the consideration of the transfer, Stromberg was released from claims against him arising out of his transactions in reference to said patent, and that all licenses granted by him were in effect confirmed. This contract, therefore, affords complete protection to Miller, the appellee, and is an effectual bar to the prosecution of this suit.

Decree affirmed.

MICOU *v.* NATIONAL BANK.

This case involves only disputed questions of fact, and the court, upon a consideration of the proofs, holds that certain decrees against a guardian in favor of his wards, whereunder his real estate was purchased by them, they being his children and he insolvent, were not procured by him to be rendered with the intent thereby to hinder, delay, and defraud his creditors.

APPEAL from the Circuit Court of the United States for the Middle District of Alabama.

The facts are stated in the opinion of the court.

The case was argued by *Mr. William A. Gunter* and *Mr. Philip Phillips*, with whom was *Mr. W. Hallett Phillips*, for the appellants, and by *Mr. David Clopton* and *Mr. Hilary A. Herbert*, with whom was *Mr. Samuel F. Rice*, for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a bill in equity, filed by the First National Bank of Montgomery, to subject to the payment of a judgment recovered by it against Benjamin H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, partners, as Barnett, Micou, & Co., certain lands the legal title to which had been transferred to Henry C. Semple, in trust for Lucy B. Micou, and Clara E. Boykin, wife of Frank S. Boykin, all of whom, together with Benjamin H. Micou, were defendants below, the conveyance being, as charged, in fraud of the complainant's rights as a creditor.

The indebtedness on which the judgment is founded existed

at the time of the occurrence of the transactions which form the subject of the controversy.

The fraud charged in the bill is that Benjamin H. Micou, being at the time guardian in the Probate Court of Tallapoosa County, Alabama, of his daughters, Clara E. Boykin and Lucy B. Micou, confederated and colluded with them, and with Frank S. Boykin, husband of Clara, to procure judgments and decrees to be entered up against himself by said Probate Court in the matter of said guardianships, and to have all of his property liable to sale under legal process, except such personal property as they might aid him to fraudulently convert to his own use, and excepting some property bought by another creditor, sold and transferred to his said daughters, with the intent on the part of all of said parties thereby to hinder, delay, and defraud the creditors of the said Benjamin H. Micou, he being at the time insolvent.

By virtue of this conspiracy, it is alleged that settlements and decrees were caused to be made in said Probate Court, whereby it was falsely and fraudulently made to appear that on Feb. 10, 1874, the said Benjamin H. Micou was indebted to Clara E. in the sum of $88,300, for which sum a decree was rendered in said court in favor of Clara and her husband against him; and that on Feb. 24, 1874, said Micou was indebted to Lucy B. in the sum of $88,031.77, for which sum a decree was rendered in said court in her favor. Copies of the proceedings in the Probate Court are exhibited. At the time of the settlement with her, Lucy was a minor over the age of nineteen years.

It is charged in the bill that in making said settlements Micou "did not contend for or desire fair and proper settlements, and that there was no real effort on his part to introduce, as he had it in his power to do, or inform his attorney of evidence to show that he was not, as your orator avers he was not, chargeable with the amounts and sums he permitted to be found against him by collusion" with his daughter and son-in-law.

The bill further states as follows: "Orator is without any means of showing in this bill the particular items and amounts improperly and collusively charged against said Benjamin

H. Micou, and items for which he should have received credit in such settlements, further than is herein shown, the facts upon which said settlements ought to have been made being peculiarly within the knowledge of said B. H. Micou and the other defendants hereto and not of your orator; but orator charges that the item of ninety-one thousand six hundred and forty-eight and $\frac{95}{100}$ dollars with which the said Benjamin H. allowed his account to be surcharged on said settlement was not, and was known to the said Benjamin H. and to the said Clara E., Frank S., and Lucy B., not to be, legally and justly due from him; that each item of negro hire, of which said sum is partly made up, was, if said Benjamin H. was rightly chargeable with any part thereof, charged at too high a rate, and that said sum of ninety-four thousand seven hundred and ninety-nine and $\frac{95}{100}$ dollars was too much by a large sum, of, to wit, fifty thousand dollars, and that this could have been shown to the court by testimony, if he, the said Benjamin H., had desired to make a fair and valid settlement.

"Orator further charges that said Benjamin H. was not, and he and his said daughters then well knew that he was not, chargeable with the large sums, or any part thereof, shown in Exhibit A and B to have been charged against him for negro hire and land rent, for that, as orator charges, the said B. H. Micou was, by orders of said Probate Court, made as shown by the full and true copies thereof hereto attached, and marked Exhibit D, and prayed to be taken as part of this bill of complaint, authorized to keep his said daughters' property together, and he was only liable to account for the profits arising from the same, which were small."

The decrees referred to were rendered in February, 1874, and by the law of Alabama (Code of Ala., sect. 2794) it is provided that "all final decrees against guardians have the force and effect of judgments at law, upon which execution may issue against them and the securities on their bonds."

The two brothers Barnett, who were partners of Micou, were also his brothers-in-law, uncles of Clara E. and Lucy, his daughters and wards, and were sureties on his bond as their guardian. The decree in favor of Lucy, who at the time of

its rendition was still under age, was rendered in the name of H. A. Garrett, who had been appointed her guardian *ad litem* for that purpose.

Executions were issued upon both decrees to the sheriff of Montgomery County, who also at the same time held some other executions against the same defendants, under which all the real estate belonging to the Barnetts and Micou were sold, and conveyed by the sheriff to Henry C. Semple, who was the attorney for Lucy B. and Clara E. and her husband, except one parcel bought in by one Pittman, plaintiff in one of the other executions, under an arrangement made with him by Semple on behalf of his clients. Each of the executions in favor of Mrs. Boykin and Lucy B. Micou was credited with $49,540.36 as the proceeds of these sales.

Executions were also issued upon the decrees to the sheriff of Macon County, where Benjamin H. Micou owned a plantation, which he cultivated, and on which, it is alleged, there was a large amount of personal property belonging to him, consisting of a crop of corn, cotton, grain, and plantation tools. The executions first issued to this county, it is charged, were returned without levy upon the personal property, under instructions from the plaintiffs to that effect, in order to enable Micou to dispose of it otherwise, which it is averred he did, and thereafter a levy was made on the real estate, which was sold and conveyed to Micou himself as trustee. These lands, it is charged, were worth $6,000, but were sold for $1,250.

Executions on the decree were likewise issued to Elmore County, under which real estate belonging to Micou, and also to the Barnetts, was sold to Semple. It is charged that there was a large amount of personal property belonging to the defendants on these lands, which was not levied on, in order that the defendants might convert it to their own use by some other disposition. And it is charged in the bill "that since the rendition of said decrees there has been a complete understanding and agreement between the parties to said executions that the plaintiffs therein should so use said decrees, and process to be issued thereunder, as to enable the defendants therein to hinder, defraud, and delay their several creditors, in that they were to be permitted and aided in converting property to

their own use," as therein shown; and that in further pursuance thereof, notwithstanding the sales of the real estate, the defendants in the executions have been permitted to remain in possession thereof for their own use.

The Barnetts were not made parties to the bill, and no relief is prayed against them.

It is also charged in the bill that Semple holds the legal title to the property conveyed to him under the sales on execution upon some secret trust, in which the Barnetts and Micou have, by agreement, some beneficial interest.

It is also alleged that, at the time of the settlement of the accounts in the Probate Court, Lucy B. was a minor over the age of nineteen years, but that her disability of nonage had been removed by a special proceeding for that purpose under a statute of Alabama; but these proceedings, a transcript of which is exhibited with the bill, show that the decree of the Chancery Court removing her disability was not rendered until June, 1874, although the petition therefor was filed in May, 1873; and, in point of fact, the settlement by Micou of his account as her guardian was made, as appears by the proceedings in the Probate Court, on his resignation of his guardianship, accepted of record on Jan. 26, 1874, and was effected by the appointment of Garrett as her guardian *ad litem*, in the matter of the settlement.

In his petition to the Chancery Court, praying for the removal of the disability of nonage in respect to Lucy, her father states as reasons for the relief, as follows: "Said minor is possessed in her own right of a considerable estate, real and personal, and a large part of said personal estate consists of demands against petitioner, which he is now ready and willing to settle and account for; said minor is a young lady of at least average intelligence and more than ordinary education and acquirements, and is, perhaps, as competent now to manage her own affairs as she ever will be. Your petitioner is at this time able and willing to settle all her demands against him. But inasmuch as he is engaged in commercial and manufacturing pursuits, and as the result of such pursuits is proverbially uncertain, petitioner may by adverse fortune be deprived of the means of making such full settlement after

said minor arrives at the age of twenty-one years; and petitioner further states that Thomas M. Barnett and Nicholas D. Barnett, the sureties of petitioner on his bond as guardian, are engaged in the same pursuits as himself, and liable to the same disaster," &c.

In point of fact, at and previous to that time Benjamin H. Micou was, and had been, president and managing agent of the Tallassee Manufacturing Company, No. 1, doing a large business, with its office in Montgomery, Ala., and in which he and the Barnetts were largely interested as the principal stockholders. The firm of Barnett, Micou, & Co. had in the fall of 1873 lent its credit to said manufacturing company, to the extent, it is alleged, of $300,000, at which time, it is also alleged, that company had become embarrassed, and in December, 1873, suspended payment.

It is also charged that the firm of Barnett, Micou, & Co., and its individual members, were largely indebted on other accounts, in excess of the value of their property, subject to levy and sale under process, which it is alleged was not greater than $175,000.

Clara E. Micou intermarried with Frank S. Boykin, July 10, 1873, shortly after which, it is alleged, and before the settlement with her as guardian in the Probate Court, her father transferred to her in payment of that sum, on account of what was due to her from him, $30,000 in the capital stock of the Tallassee Company, but omitted the same from his account in the settlement, in pursuance of the fraudulent purpose already charged.

Answers under oath are required from the defendants, and numerous special interrogatories covering the whole scope of the bill are addressed to them.

The account of Benjamin H. Micou, as guardian of his daughters, as filed by him in the Probate Court for settlement, Jan. 13, 1874, is exhibited with the bill. This account begins with a balance to the debit of the guardian, as ascertained on a former settlement by the Probate Court in 1859, which, with interest, amounts to over $20,000, and includes cash items, being amounts received for them, as distributees of the estates of T. M. Barnett, Sen., their mother's father, and of the

estate of their mother, which, with interest, amount to about $70,000; and the other items consisting of sums received on account of the income arising from their property; but no income is allowed them for the years 1862, 1863, 1864, and 1865, on the ground that none was received; and the guardian charges himself with rent for their real estate from 1866 to 1873, rented by himself, at the rate of $1,000 per annum. The balance admitted by the guardian to be due to the two wards is $107,430.52.

That this account was rendered in good faith, and that there was due at the time from Benjamin H. Micou to his wards, at least, as much as the balance shown by it, are facts not questioned by the bill, but admitted — if not expressly, by necessary implication — to be true. Indeed, the very fraud charged and relied on, as constituting the ground of the relief prayed for, is that the parties did not abide by this account.

It appears, however, by the transcript of the proceedings in the Probate Court, that Mrs. Clara E. Boykin, by her attorney, Elmore J. Fitzpatrick, objected to the allowance of certain items in the account as filed, and it is recited that "the court, having listened to the argument of counsel, and heard the testimony offered in support of the said objections, decided and ordered," that the guardian be charged with certain enumerated items. They consisted of amounts charged against him as hire of slaves for the years 1859 to 1865, both inclusive, and also rents for land during the same period, and surcharging the account for rents from 1866 to 1873, and readjusting the account in some other particulars, striking out the items of debit for proceeds of cotton, and disallowing certain items of credit. The final result was to credit the guardian with sums in the aggregate amounting to $22,261.98, and charge him with sums amounting to $92,553.95. The balance against him, after allowing for an error in making the addition, was thus increased in the sum of $76,291.08, making the final balance against him the sum of $185,967.60, of which, after deducting costs and commissions, Mrs. Boykin was entitled to one-half, being $88,300. For that amount judgment was rendered in her favor Feb. 10, 1874, with an order for an execution thereon against the guardian and his sureties.

The account of the guardian with his daughters was kept jointly, as their interests in the property had never been separated; and similar proceedings in the settlement with his daughter Lucy resulted, on Feb. 24, 1874, in a judgment for the sum of $88,031.77, in favor of Henry A. Garrett for her use, he having been appointed her guardian *ad litem*, to represent her in the settlement.

The accounts as originally filed by the guardian are based upon the principle of crediting the wards with the net proceeds of the operation of their plantations, carried on for them by their father, while the accounts, as settled by the Probate Court, charge him with the risks and losses of the business as carried on, requiring him to account as if he had rented the plantations and hired the slaves for his own use, at such sums as he might have obtained from others.

It seems not to be denied that the latter, under the laws of Alabama, was a proper mode and basis of settlement, unless the guardian could show some previous special authority for carrying on the operations of the plantation in the name and at the risk of his wards.

In the settlement of Micou's accounts it was claimed on his behalf, and as a justification of his account as filed by himself, that such special authority existed; and to prove this there was produced an order of the Probate Court of Tallapoosa County, dated July 18, 1859, which, it was claimed, contained such authority. It appears from a copy of that order, exhibited with the bill, that on Nov. 22, 1858, Benjamin H. Micou, as guardian of his daughters, filed a petition, setting forth that it was to the interest of said minors that the slaves belonging to them be kept together and worked on a plantation instead of hired out, and that for said purposes it was necessary to purchase a plantation on which to work said slaves, and to the interest of said minors so to do; suggesting that he had contracted for the purchase of a described tract for the purpose aforesaid, and praying for an order authorizing him to purchase and pay for the same. The probate judge accordingly appointed commissioners to report as to the value of the lands and the necessity of the purchase. On Dec. 20, 1858, another order was entered, reciting the report of the

commissioners in favor of the purchase for the purpose and at the price named; and "it appearing to the court from the report of said commissioners, and from legal and proper evidence, that it is to the interest of said minors that said slaves should be kept together and worked on a plantation, and that the purchase of the above-described plantation is a necessary one," &c., it was therefore "ordered, adjudged, and decreed by the court that the said Benjamin H. Micou do forthwith proceed and purchase said lands or plantation above described, at the price or sum aforesaid, for the use and benefit of the said minors," &c., and "it is further ordered that when said guardian shall have perfected said purchase, and received titles for said land, he report the same to this court."

On June 23, 1859, the guardian made report of the authorized purchase and of the payment of the price, and that a title had been made to the lands. This report was approved and confirmed by an order of the court, made July 18, 1859. But it does not appear that any further order was made by the court, directing or authorizing the guardian to keep the slaves of his wards together and work them on their plantation, at their risk and expense, instead of hiring them out and renting the lands. And the Probate Court decided, in the matter of the final settlement of his accounts, that the order to purchase the additional land, of Dec. 20, 1858, relied on as authority for so doing, did not have such effect; and the judge accordingly adjusted the account and found the balance due on the principle stated.

This judgment is attacked by the complainant below as collusive and fraudulent, and the right to the relief sought rests upon that charge.

The prayer of the bill is that the decrees of the Probate Court establishing these balances as due from Benjamin H. Micou, as guardian, to his daughters, respectively, together with all proceedings, executions, and sales under them of the property of Benjamin H. Micou, be declared to be null and void, and that the lands of Micou sold under them be subjected to the payment of the debt due to the complainant, and for general relief.

As required, the defendants answered severally, under oath,

and specifically deny every allegation of the bill charging fraud and conspiracy. These answers are supported by the testimony of the parties, taken on their own behalf in the cause.

The principal defendant, Benjamin H. Micou, in his answer, states that soon after his daughter Clara, afterwards Mrs. Boykin, became of age, "he commenced to make preparation for settling the whole of his account with his two daughters of his guardianship of their property, and in the spring of 1873 he collected up his accounts and vouchers in regard to his management of their estate and placed them in the hands of his attorney, David I. Blakey, and directed him to make out a full and correct account for settlement of said guardianship; and as he desired to be relieved of the responsibility of said trust entirely, and his other daughter, Lucy, was nearly of age, he, at the same time, instructed his said attorney to prepare a petition to the Chancery Court of Elmore County, praying to have said Lucy relieved from the disabilities of minority, so that he might settle at the same time with both of his said wards; that he failed to procure a decree at the June Term of said Chancery Court of Elmore County, and on account of bad health and absence from the city of Montgomery, and State of Alabama, during most of the summer of 1873, was unable to furnish his attorney with the information necessary from time to time to enable said attorney to properly prepare said account; the said settlement was further delayed by the breaking out of yellow fever in Montgomery in the fall of 1873 and by the financial panic, which occupied the whole of respondent's attention and compelled him to give the whole of his time to the management of the affairs of the Tallassee Manufacturing Company, to the exclusion of his private business, so that he was unable to take up the matter of the settlement of his guardianship until after his connection with the Tallassee Manufacturing Company ceased, in January, 1874, and that in making said settlements he did not consult or confer with said Clara or Frank Boykin or Lucy Micou, and did not give to his attorney any instructions to make out any different account from the one ordered to be made in the spring of 1873, when respondent believed himself to be a rich man and amply able to pay all his debts; and respondent is in-

formed by his said attorney, and believes and so states, that the account filed by him for settlement of his guardianship in the Probate Court of Tallapoosa County is substantially the same that was prepared by his said attorney in the summer of 1873."

This statement is inconsistent with the supposition that the settlement of his accounts as guardian was prompted by any belief in the imminency of his insolvency. And that it was not so is corroborated by the circumstances of a transaction charged in the bill as one of the evidences of the fraud alleged against him. It appears that about the time of the marriage of his daughter Clara, which occurred in July, 1873, he gave her certificates of shares of the capital stock of the Tallassee Manufacturing Company to the amount of $30,000, in payment of that amount of his indebtedness to her as her guardian. She gave a receipt for it at the time; but soon after, upon its being made known to her husband, and on the advice of counsel, the transaction was cancelled, as one that he could not insist upon. The omission to charge this as a payment in his account is alleged against him as proof of fraud. But if at this time he was aware of his own insolvency and that of the manufacturing company, the fraud attempted was against and not in favor of his daughter. No such uncharitable view of his conduct has been entertained in any quarter. The more reasonable and probable supposition is, that at the time he hoped to support his credit, preserve his business, save his property and pay his debts, and thus maintain the value of the property transferred to his daughter. The circumstances which induced the cancellation of the transaction altogether preclude the supposition of an intention to perpetrate a fraud upon the complainant.

Mr. Micou states further in his answer, "that at the time he filed his account for settlement in said Probate Court he did not think he was liable for the rents and negro hires afterwards charged against him, because he believed that an order had been made by the Probate Court of Tallapoosa directing said estate to be kept together, and so informed his attorney; and, therefore, his account was made out on the basis of charging himself only with the real profits derived from the cultiva-

tion of the plantation purchased for said wards, after deducting the plantation expenses and the expense of stocking said plantation with mules, utensils, and other stock; and respondent had no knowledge that any effort would be made to charge him with the said hires and rents until the question came up in the Probate Court of Tallapoosa County on the said settlement, when Elmore J. Fitzpatrick, representing the interest of said wards, contended that the order which defendant had always understood to be an order to keep the said wards' estate together, was in fact an order only to buy a plantation, and insisted on his right to charge defendant with rents and hires. Respondent's attorney, acting under his instructions, resisted said claim and argued the question of the proper interpretation of said order to the said Probate Court, but the court decided that respondent should be charged with rents and hires."

That this litigation was adverse and *bona fide* is testified to, also, by Blakey, the attorney for the guardian, and by Fitzpatrick, the attorney for the wards, and by Semple, the regular attorney of the latter, and for whom Fitzpatrick acted as a substitute on the occasion. They severally deny that there was any collusion or understanding or concert of any kind between them or with their clients in reference to the matter. If in point of fact there was any such collusive agreement, and a feigned contest in pursuance of it, these witnesses must have known it, for they were the instruments through whom alone, together with the judge, it was effectuated; and there is nothing in the case that warrants the alternative of rejecting their testimony as untrustworthy.

Some expressions in the deposition of Sturdevant, the probate judge, are referred to in argument as indicating that the contest before him was not earnest; such as that Blakey, the attorney for Micou, after a short argument in opposition to the contention of Fitzpatrick, "yielded the point;" but he distinctly and clearly states the issue between them, and the grounds of it. He says that "the whole question turned upon the fact that there was no authority given to Micou to keep the estate together and to run the farm;" that he decided that there was no such authority, and that the account was settled

upon that basis. There is no intimation that this judge was privy or party to the fraud charged against Micou, nor is it claimed that any fraud in procuring the judgment was practised by the parties or their attorneys upon him. A legitimate question was in fact submitted to him, and the responsibility of properly deciding it was distinctly imposed upon him by the law and the act of the parties. He rendered his decrees, and, we have no doubt, in perfect good faith; whether correctly or otherwise is not a question that can be made in this case. There is certainly nothing in their nature, nor in the estimate of values contained in them, to justify the inference that the judge was moved by any illegal or improper influences. Indeed, we are not referred by counsel to any principle or authority in the law of Alabama to show that, under the circumstances in proof before the Probate Court, the judge ought to have come to any different decision. But it is enough for the purposes of this case to find, as we do, that there was no fraud in the settlements and decrees on the part of either guardian or wards.

There being a failure of proof of the principal fact alleged — the *corpus delicti* — all the circumstances of suspicion that are arrayed as evidential lose their significance. That Micou was insolvent, and chose to prefer his daughters, to the extent to which they were his creditors, as his wards, and furnished them an opportunity, by means of a settlement made in good faith, and established by the decree of a competent court, to subject his individual property to their payment in preference to the complainant and other creditors of the partnership of which he was a member, may well be admitted to be sufficiently proven. But it is all that remains, and must be admitted at the same time to be fully sanctioned by the law of Alabama. The statute of that State, which is invoked as the ground of the relief prayed for in the bill, prescribes that "all conveyances or assignments, in writing or otherwise, of any estate or interest, in real or personal property, and every charge upon the same made with intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts, or demands; and every bond or other evidence of debt given, suit commenced, decree, or judgment suffered with

a like intent, against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives, and assigns, are void." Nevertheless, it is equally true, as it is expressly admitted in argument, that by the law of that State a debtor has the right to prefer one creditor over another, although such preference may leave the debtor without the means of paying his other debts. And thus conferring upon an insolvent debtor the right of absolute choice among his creditors, the law does not require one who is at the same time father and guardian to discriminate against his own flesh and blood, to whom he is indebted as their trustee.

Even the bankrupt law, which was then in force, and might have been invoked, for aught that appears in this record, by the complainant, to prevent the preference of which it complains, as a fraud upon it, assigns to the debt due from Micou to his daughters, as their guardian, a superior quality to that belonging to the claims of ordinary creditors; for his discharge in bankruptcy would not have released him from his legal obligation to his wards. And even had the distribution of his property, both that belonging to him individually and that of the partnership of Barnett, Micou, & Co., been made under proceedings in bankruptcy, the very preference secured to his daughters by the decrees of the Probate Court would, under the circumstances of the case, have still resulted. For in that case the individual property of the partners would have been first applied to pay in full all their individual debts; leaving to the partnership creditors, such as the present complainant, the partnership assets, and only the surplus of the individual property of the partners. This was precisely what took place under the proceedings in question.

It is alleged in the bill, and urged in argument, that after the decrees were obtained, the executions issued, which eventuated in the sales of real estate to Semple, were handled so as to hinder and obstruct other creditors in the collection of their debts, by covering crops and other personal property from levy and sale; but we have been unable to discover from the record any evidence in support of the charge; and the circumstance that the debtors, after the sales, were not turned promptly out of possession is not, in our opinion, any ground of complaint on

the part of other creditors, who show no right to disturb the sale itself. The same remark equally applies to the trust under which, by agreement with his clients, Semple holds the title acquired by the purchases under the executions. It appears from the answer of Mr. Semple, that, on April 4, 1874, after the decrees had been rendered against Micou, as guardian, and the Barnetts as his sureties, Clara and Francis Boykin, and Lucy Micou, assigned the same to Semple, with the right to control, manage, and collect them, upon trust, nevertheless, to proceed so as to secure to Clara and Lucy the title to certain described portions of the real and personal estate, to be sold under execution and purchased in by him to that end, and upon the further trust to purchase as much of the remainder of the property held and owned by the defendants in the decrees, respectively, as could be sold under said executions and purchased therewith, and to settle that part of it owned by Benjamin H. Micou, and sold as his, on his present wife and her children, and to settle that part of it so purchased, which may be sold as the property of Thomas H. Barnett, on his wife and children, and that sold as the property of N. D. Barnett, on his wife and children, but in the two last cases subject to certain charges specified for the payment of money to Clara and Lucy.

There is no proof whatever that it was in view of this or any similar arrangement that the settlements and decrees in the Probate Court were had, or that any such arrangement was then contemplated by any one of the parties. The contrary is proven by the oath of Mr. Semple, who testifies that it was purely voluntary on the part of Boykin, and his wife, and Lucy Micou, without any consideration from Benjamin H. Micou or the Barnetts, and suggested for the first time, and by himself, to them, after the decrees had been rendered, as a suitable thing to be done. The grounds on which he proceeded in his persuasions to his clients can best be told in his own words. He says: —

"After the rendition of the decrees I saw Francis Boykin and talked with him as a friend as well as his attorney; his father and mother were old friends of my youth, and I had known him since he was a child. I told him that the whole

property of the guardian, Micou, and his sureties, Tom and Nich. Barnett, would not pay the debt; that they and their families would be left penniless; that it would be a hard course to pursue for him and his wife and Lucy to take everything they had, as by law they could do, and that common justice and common decency demanded that they should, out of the abundance which they would have, make some provision for the wives and families of their father and uncles. Boykin very readily agreed to this; but when it came to putting it in writing he seemed to place an exaggerated estimate on the value of the property, and place many difficulties in the way. I told him that it was apparent that the ruin of the Barnetts as copartners in Barnett, Micou, & Co. had been caused by the faith, trust, and reliance they had placed in Micou, his wife's father; that neither he or his wife or her sister could ever enjoy the respect or confidence of the community if they did not make some proper provision for the families of Thomas M. and Nicholas Barnett, and as to their father's family, of course, I knew that nature itself would dictate a provision for them. I suggested to him that the whole property which we could reach by execution in fact came directly or indirectly from old Mr. Barnett, the grandfather of his wife and her sister, and how highly he had been esteemed for his sense of justice and honesty; that in my honest judgment he and his wife and her sister ought to consider what Mr. Barnett would do if he were alive and the owner of the property, and to do it. The young ladies were entirely willing to do whatever I recommended, and Mr. Boykin at last consented to make the provision I incorporated in the assignment, which is copied into my answer. The assignment was made to me as I refused to manage the matter in any other way. Miss Lucy was a minor, but I expected her disabilities of minority to be removed, and she engaged to ratify it when she became of age, which she afterwards did. Mr. Micou, so far as I know or believe, had no part in it and was not informed of it. He was not in town from the time I suggested it till it was executed. I never consulted him directly or indirectly about it, and have no reason to believe he was consulted by any one else on the subject. I never spoke to the Barnetts on the subject or any one else,

or suggested the arrangement, or any arrangement, for the assignment of the decrees, or for any provision to be made for the families of the Barnetts or of Micou, until after the decrees were rendered. In saying this I mean to state that I never even spoke to Boykin on the subject of any provision for the families of his wife's father or uncles until after the rendition of the decrees."

These motives were as honorable to him who urged them as to them who accepted and acted upon them; but, independent of their character, the important fact is that the arrangement was subsequent to the time when Mrs. Boykin and her sister had become absolutely entitled to subject all the property in question to the payment of their decrees, and entirely independent of the proceedings by which they obtained them; so that it clearly and satisfactorily appears that the decrees were not in fact rendered by consent and upon the agreement that such a benefit to the families of the debtors should result. This being so, the daughters of Benjamin H. Micou had a right to dispose of their own, free from question, so long as they infringed not the rights of others; and if they chose, in their turn, to pay a debt of gratitude to the brothers of their mother, and to ease the decline of an impoverished father, we know of no provision in the Code of Alabama which forbids it.

The court below proceeded upon a different view of the evidence, and rendered a decree granting the prayer of the bill. Its operation is to annul the settlements and decrees of the Probate Court of Tallapoosa County in favor of Mrs. Boykin and her sister, and all proceedings under them, and give priority to the complainant's judgment, without provision for securing them in the amounts admitted to be due them. It has been forcibly urged upon us in argument that, even upon the facts as charged in the bill, the decree would be erroneous in this respect, on the ground that the disability of coverture as to Mrs. Boykin, and of infancy as to Lucy Micou, and the circumstances of the fiduciary character of their relation to their father, rendered them, in law, incapable of active and responsible participation in an express fraud, so far at least as to exempt them from all liability, except to restore the actual fruits realized by them from it.

But we have not found it necessary to consider or decide that question, and it is mentioned merely to exclude all inferences that might otherwise arise.

In our opinion the evidence required that the decree below should have been in favor of the defendants, and for that error it must be reversed, and the cause remanded with instructions to dismiss the bill; and it is

So ordered.

MR. JUSTICE WOODS did not sit in this case, nor take any part in deciding it.

STOW v. CHICAGO.

Reissued letters-patent No. 3274, bearing date Jan. 19, 1869, granted to Henry M. Stow, for "improved pavement," and the letters-patent No. 134,404, bearing date Dec. 31, 1872, issued to him for "improvement in wood pavements," are severally void for want of novelty.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. L. Hill* for the appellant, and by *Mr. Lester L. Bond* for the appellee.

MR. JUSTICE WOODS delivered the opinion of the court.

Henry M. Stow filed his bill in equity against the city of Chicago, charging it with the infringement of four certain letters-patent for improvements in street pavements, in which he was either the original patentee, or of which he was the assignee. The city denied the infringement, and the novelty of the inventions covered by the respective patents, and it alleged license and the payment of royalties. Upon final hearing the court below dismissed the bill, and he appealed.

In this court he relies exclusively on the first and fourth patents set out in his bill. They will be separately considered. The first relied on is the reissue, No. 3274, dated Jan. 19,

1869, of an original granted to him, numbered 72,110, and dated Dec. 10, 1867.

The invention covered by the reissue is thus generally described in the specification: "The nature of my invention consists in putting down a pavement of wood or other suitable material upon a foundation-bed of sand or loose earth, and packing the sand or earth by means of wedge-blocks driven down into the same and forming a part or the whole of the pavement."

This pavement consists essentially of blocks of wood or other material set upon end in rows across the street, with spaces between the rows, in which are driven narrow and probably wedge-shaped blocks, which, when driven down, extend a considerable distance below the under surface of the blocks first named, into the foundation-bed of sand on which they rest. The claims are as follows: —

"1. A pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the wedge-shaped ends of the latter being driven into a foundation-bed of sand or earth, substantially as and for the purpose described.

"2. A pavement composed of blocks, with lower ends wedge-formed, and all driven down into a foundation-bed of sand or earth, substantially as shown and described.

"3. A pavement composed of wood, or in whole or in part of other suitable material, laid on a foundation-bed of sand or loose earth, as described, and a portion of the blocks driven down into said foundation-bed to pack the same, substantially as and for the purpose specified."

He does not contend that the second claim is infringed.

A cursory reading of the first and third claims will show that they cover the same invention, the third simply including with wood other suitable material out of which the pavement may be constructed.

The invention described in these claims does not cover the making of a street pavement of wood. The use of wood for that purpose is as old as the English patent of David Stead, granted Aug. 23, 1839. The Nicholson patent, which bore date Aug. 8, 1854, and which is referred to in the specification of the reissued patent under consideration, also covers a device for the construction of a pavement by the use of wooden

blocks. Nor does the invention consist in laying the pavement upon a foundation-bed of sand or earth. This is as old as cobble-stone pavements. *Stead* v. *Williams*, 7 Man. & G. 818. The appellant does not claim either of these devices as a part of his invention. No particular form of block is described in the claims, except that some of the blocks used have their lower ends made wedge-shaped. All, therefore, that there is left for the invention described in the first and third claims to cover is the making of the lower ends of a portion of the blocks of which the pavement is composed in wedge shape, and the driving of these wedge-shaped blocks below the general under-surface of the pavement into the sand or earth-bed on which it rests, so as to pack it and render it solid and unyielding. When thus reduced to what it really is, his invention is clearly and distinctly anticipated by the English patent issued to David Stead, dated April 23, 1839, which is set out in full in the record.

One of the drawings which accompanies Stead's specification shows a pavement laid with contiguous rows of octagonal blocks, so placed as to leave rows of square unfilled spaces. In these square spaces were placed square blocks, longer than the octagonal blocks and wedge-shaped at the lower end, and these were driven down into the earth foundation upon which the octagonal blocks rested.

That part of Stead's specification which these figures illustrate is as follows: —

"Figures 18 and 19 is a plan and side view of a portion of a roadway formed by a series of octangular blocks, L L, placed with the fibre vertical, so as to leave a square recess or interval between them, into which may be inserted a corresponding piece, *m*. When this kind of paving is laid upon a road formed upon a newly made embankment or shrinking base, I should recommend a pile to be driven into the earth through the square recess or interval, of about the size and form represented by the dotted lines, Figure 19, in order to support and keep the blocks firm in their position. When the octangular block paving is used for acclivities, I should recommend the before-mentioned cavities either to be left unfilled or not filled up to the surface, to afford an assistance to animals ascending the same as before described."

It is true that this specification does not in terms say that the purpose of driving the wedge-shaped block or pile through the space left by the octagonal blocks is to pack the earth or sand foundation, but that it does so as effectually as the use of similar blocks in a similar way under the patent of appellant, is too clear for argument. A patentee who is the first to make an invention is entitled to his claim for all the uses and advantages which belong to it. *Woodman* v. *Stimpson*, 3 Fish. Pat. Cas. 98.

It is shown that Stead invented this device. Whether he perceived and stated all its advantages is immaterial. *Graham* v. *Mason*, 5 id. 1; *Tucker* v. *Spalding*, 13 Wall. 453.

Stead's specification, it is clear, covers (to use the language of Stow's reissued patent) "a pavement composed of wood laid on a foundation-bed of sand or loose earth," and having "a portion of the blocks of which it is composed driven down into said foundation-bed."

Everything, therefore, in the first and third claims of the appellant's reissued patent, which he sets up as new, was anticipated nearly thirty years by Stead's English patent. Appellant's patent, therefore, so far as it covers these claims, is void, and cannot be the foundation of any relief against the appellee.

The other patent which the appellant insists that the city infringed, is No. 134,404, dated Dec. 31, 1872, issued to him as the original inventor.

The invention covered by this patent is described in the specification thus: "The nature of my invention relates to that class of wooden pavements in which the blocks are laid directly upon the sand foundation; and it consists in laying the blocks in rows with spaces between the rows, and in filling or partially filling said spaces with sand or gravel and driving or swaging the same into the sand foundation below in order to pack or compress the sand under the blocks, for the purpose of sustaining the weight of heavy vehicles passing over the pavement."

The claim is as follows: "A pavement composed of blocks laid in rows directly upon the sand foundation with spaces between the rows filled with sand or gravel, which is swaged

or driven into said foundation, substantially as and for the purpose specified."

The use of wood for street pavements, the laying of the blocks directly upon a sand foundation, the placing of the blocks in rows, leaving spaces between the rows, are all old devices. As already shown, they are all to be found substantially in the English patent of Stead, issued April 23, 1839, and they are found in the English patent to Lillie, dated Oct. 13, 1860, and the American patent to Richard H. Willett, No. 114,895, and dated May 16, 1871, — all of which are put in evidence by the appellee.

Nor is the filling with sand or gravel of the spaces between the blocks, or rows of blocks, of which the pavement is composed, a new device. It was part of the invention of Nicholson (see *Elizabeth* v. *Pavement Company*, 97 U. S. 126), and, as appears by the record, was mentioned in the specification of the letters-patent No. 112,945, issued to Gordon A. May, March 27, 1871. And in the specifications of the patent granted to W. H. Chappell, No. 42,347, dated April 19, 1864, set out in the appellee's evidence, it is stated that "wooden pavements have been constructed on the continent of Europe and in the United States by laying wood blocks endwise of the grain in parallel rows with openings or channels between, into which gravel or gas-tar was placed."

All, therefore, that is left for the patent of the appellant, now under consideration, to cover, is the ramming of the gravel between the blocks, of which the pavement is composed, so as to drive the same into the sand foundation below the blocks, in order to pack it so that the pavement may sustain the weight of heavy vehicles without giving way.

And this is all which seems to be claimed by his counsel as the invention covered by this patent. The evidence is distinct and clear that the invention thus defined was anticipated by the pavement which J. K. Thompson, city superintendent, laid in the year 1864, at the intersection of North State and Kinzie Streets, in the city of Chicago. This piece of pavement was made of wooden blocks, six inches square, set in rows, on an earth foundation, with spaces between the rows, and the spaces were filled with fine gravel, and the gravel rammed. It was

put down by him as an experiment. It proved successful, and was in use until the great fire in Chicago in 1871.

The record further shows that in the fall of 1870, at the instance of Thompson, there was laid at the north end of the La Salle Street tunnel, in Chicago, another piece of pavement, five hundred yards in length, constructed precisely in the same manner as that laid by him in 1864. It was made with similar wooden blocks, placed in rows on an earth foundation, with spaces between the rows filled with gravel, which was rammed with an iron rammer, made expressly for the purpose. We have here every part of the invention described in the letters-patent under consideration, except that it does not appear that the gravel in the spaces between the rows was so compactly rammed as to drive it below the under-surface of the pavement into the earth foundation. All, therefore, that is left for the appellant's patent of 1872 to cover is the giving of a few more strokes with the rammer, whereby the gravel filling may be forced into the earth foundation of the pavement. Can this be called invention?

The testimony shows that the pavements which he charges infringe his patent of 1872 are constructed according to the plan adopted by Thompson in 1864, and it fails to show that in their construction the gravel filling was forced by the ramming into the earth foundation on which they were laid. So that if there is anything new or patentable embraced in his patent of 1872, that part of his device is not infringed by the city.

Therefore, without noticing the other defences, we declare our opinion to be that he is not entitled to any relief against the city upon either of the patents on which his demand for relief is now based. His case as presented here has no ground to stand on.

Decree affirmed.

MR. JUSTICE FIELD did not sit in this case, nor take any part in deciding it.

GRIGGS v. HOUSTON.

1. Sections 1166 and 1167 of the Code of Tennessee, touching the liability which railroad companies incur by failing to observe certain precautions in running their trains, do not apply to contractors engaged in constructing a railroad.
2. The jury may be properly instructed to find for the defendant, where, if the verdict should be against him, the court should set it aside and grant a new trial.

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

The defendants, contractors engaged in building a railroad in Tennessee, were sued by the widow of Griggs, for herself and his minor children, for damages caused by his death. He was improperly riding on the pilot or bumper of a locomotive, forming part of a construction train of the defendants, at the time it collided with loaded cars standing on the track. The injuries he then received resulted in his death. Persons on the cars attached to the train were not hurt.

Her claim to recover was based upon sect. 1166 and sect. 1167 of the Code of Tennessee, prescribing certain precautions which a railroad company must observe in running its train. They provide that "when any person, animal, or other obstruction appears upon the road, the alarm-whistle shall be sounded, the breaks put down, and every possible means employed to stop the train and prevent an accident; and every railroad company that fails to observe these precautions, or cause them to be observed by its agents or servants, shall be responsible for all damage to persons or property occasioned by or resulting from any accident or collision that may occur." The court charged the jury that these provisions did not apply to the case, and that she was not entitled to recover. The jury found for the defendants, and she sued out this writ.

Submitted on printed arguments by *Mr. J. M. Thornburgh* for the plaintiff in error, and by *Mr. Xenophon Wheeler* for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We agree entirely with the court below in the opinion that the statutes in relation to railroads relied upon by the plaintiff in error are not applicable to the facts of this case. If upon the evidence the jury had brought in a verdict against the defendants it would have been the duty of the court to set it aside and grant a new trial. The case comes clearly within *Railroad Company* v. *Jones* (95 U. S. 439), which was followed below. It was right, therefore, to direct a verdict for the defendants. There was no such conflict of evidence as to make it necessary for the jury to pass on the facts.

Judgment affirmed.

JONES *v.* BUCKELL.

This court will not pass upon the charge below, where the bill of exceptions does not set forth the evidence, and there is nothing to show that the question of law to which the charge relates is involved in the issue.

ERROR to the Circuit Court of the United States for the Northern District of Florida.

This was ejectment for lands in Jacksonville, Florida, brought by John and Mary E. Buckell against Jones and others. Plea, not guilty. There was a verdict for the plaintiffs, upon which judgment was rendered. The defendants sued out this writ.

The bill of exceptions does not contain any of the evidence on the trial, but relates to the charge, which is set out in the opinion of this court.

The following agreement signed by the attorneys of the respective parties was filed in the court below: —

"The plaintiffs and defendants, by their attorneys, admit the following to be true, without the necessity of introducing evidence in proof thereof, that is to say:

"The plaintiffs admit the regularity of all the proceedings in the confiscation suit in the District Court for the Northern

District of Florida against the property of Charles Willey, and that there was a decree of condemnation and sale of said property. The defendants are not required to introduce certified copies of such proceeding or the original papers, and that John S. Sammis was the purchaser at confiscation sale.

"The defendants on their part admit that Francis E. Yale and Mary E. Buckell are the children and only heirs-at-law of Charles Willey, and that the lands in controversy are the same lands which the defendants were in possession of at the date of the service of summons in this suit."

The case was argued by *Mr. William A. Beach* for the plaintiffs in error, and by *Mr. Charles W. Jones* for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question argued in this case is, whether, under the act of Aug. 6, 1861, c. 60, "to confiscate property used for insurrectionary purposes" (12 Stat. 319), a condemnation carried the fee of lands confiscated, or only the life-estate of the owner; but we cannot discover that such a question is fairly presented by the record for our consideration. The ruling of the court below on the motion for a new trial is not reviewable here. This is well settled. *Henderson* v. *Moore*, 5 Cranch, 11; *Railway Company* v. *Heck*, 102 U. S. 120.

The only questions, therefore, arising on the bill of exceptions, are those presented by the exception to the following opinion and charge of the court to the jury: —

"The acts of 1861 and 1862, though differing in some respects, are *in pari materia;* while the one treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong Foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that pardon of the offender absolved the property as well as the person. Upon review of the whole case, the court charges you that the condemnation and sale of the lot in question, purporting to convey a fee-simple, only conveys an estate for the life of Charles Willey, and that the

heirs of the said Charles Willey are entitled to recover the same."

The pleadings nowhere show that the rights of the parties depend on the construction or effect of the act of 1861, and no part of the evidence is set out in the bill of exceptions. Copies of deeds and a stipulation in respect to evidence are found in the transcript, but they are nowhere referred to in the bill of exceptions, and it is not even stated in the record that they were used at the trial. As long ago as *Dunlop* v. *Munroe* (7 Cranch, 242, 270), it was said by this court that "each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide." Of course, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record, and if that had been done here it might have been enough. But with no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error. Such a proposition we are not required to consider. *Reed* v. *Gardner*, 17 Wall. 409.

Judgment affirmed.

MICAS v. WILLIAMS.

Where the record is such as to furnish a sufficient color of right to the dismissal of the writ of error to justify the court in entertaining with a motion to dismiss a motion to affirm under Rule 6, — *Held*, that although the grounds for dismissal be removed by a further showing, the motion to affirm will be granted, when it is manifest that the writ was sued out for delay only.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana, with which is united a motion to affirm under Rule 6, par. 5.

Mr. Joseph P. Hornor in support of the motion.

Mr. Thomas J. Durant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The affidavits which have been filed by the plaintiff in error, in opposition to these motions, are probably sufficient to establish the fact that the value of the matter in dispute exceeds $5,000. The motion to dismiss is, therefore, denied; but on looking into the record we are entirely satisfied the writ was taken for delay only. No assignment of errors has been annexed to or returned with the writ, as required by sect. 997 of the Revised Statutes; and every question presented by the bill of exceptions or suggested upon the argument appears to us so frivolous as to make it improper to keep the case here for any further consideration. There was on the record, as it stood when these motions were made, at least sufficient color of right to a dismissal to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule 6, par. 5.

Motion to affirm granted.

MERRELL *v.* TICE.

1. In an action for the infringement of his copyright of a book, the plaintiff cannot recover without proving that, within ten days from the publication thereof, he delivered two copies of such copyright book at the office of the Librarian of Congress, or deposited them in the mail properly addressed to that officer.
2. *Quære*, Is the certificate of the Librarian, under his official seal, that two copies were so deposited, competent evidence of the fact.
3. Where to his certificate (*infra*, p. 558), setting forth other facts, there is added a statement, not signed or sealed, that two copies of the publication were deposited, — *Held*, that the statement is admissible in evidence only against the party making it.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. Melvin L. Gray for the plaintiff in error.

Mr. C. P. Culver, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action at law to recover damages for the infringement of a copyright. Tice, the plaintiff below, is the author of an almanac known as "Professor Tice's Almanac." The copyright alleged to be infringed was that of the almanac for 1877. The declaration contained the proper averments, and the answer a general denial. On the trial the plaintiff produced a copy of his almanac, having on its titlepage the words required by the act, "Entered according to act of Congress," &c.; and then, to show that he had complied with the law of copyright, produced a certificate of the Librarian of Congress, under his seal of office, in the words following: —

"{ LIBRARY OF CONGRESS, COPYRIGHT OFFICE, UNITED STATES OF AMERICA. } { LIBRARY OF CONGRESS, COPYRIGHT OFFICE, WASHINGTON.

No. 12,579 G.

"To wit: Be it remembered that on the 13th day of November, anno Domini 1876, John H. Tice, of St. Louis, Mo., has deposited in this office the title of a book, the title or description of which is in the following words, to wit: —

"*Professor Tice's Almanac for the year* 1877, *&c.*

"The right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights.

"{ LIBRARIAN OF CONGRESS, COPYRIGHT OFFICE, UNITED STATES OF AMERICA. } (Signed) A. R. SPOFFORD, *Librarian of Congress.*

"I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

"In witness whereof I have hereunto set my hand and affixed the seal of my office, this 11th day of May, 1878.

"A. R. SPOFFORD,
"*Librarian of Congress.*

"Two copies of the above publication deposited December 6, 1876."

To the introduction of that portion of said paper in the words "two copies of the above publication deposited Decem-

ber 6, 1876," the defendant objected, on the ground that it was no part of the certificate, but a mere anonymous statement, when and by whom made not appearing, and incompetent; which objection the court overruled, and permitted the statement to go to the jury; to which ruling the defendant excepted. No other evidence was given to show that any copy or copies of the book had been deposited with the Librarian or in the mail. The infringement was proved to the satisfaction of the jury, who, under the charge of the court, rendered a verdict for the plaintiff. Other exceptions to evidence appear in the bill of exceptions, but it is unnecessary to consider them. The questions to which we have given attention, and which are decisive of the case, are: —

First, Whether the plaintiff was bound to prove that two copies of the book had been deposited with the Librarian or in a post-office, according to the requirements of the law?

Secondly, If he was, whether the proof adduced was competent for that purpose?

These questions will be considered together.

The acts of Congress relating to the subject are found in sects. 4956 to 4961 of the Revised Statutes.

Sect. 4956 declares that no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian at Washington, a printed copy of the title of the book or other article, &c.; nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian, or deposit in the mail addressed to him, at Washington, two copies of such copyright book or other article, &c.

Sect. 4957 requires the Librarian to record the name of the book or other article in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the —— day of ——, A. B. of —— hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article) the title or description of which is in the following words, to wit: (here insert the title or description), the right whereof he claims as author, &c., in conformity with the laws of the United States

respecting copyrights. C. D., Librarian of Congress." The Librarian is required to give a copy of the title or description, under the seal of the Librarian of Congress, to the proprietor whenever he shall require it.

Sect. 4958 prescribes the Librarian's fees: "First, for recording the title or description of any copyright book or other article, fifty cents; second, for every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents," &c.

Sect. 4959 declares that the proprietor of every copyright book, &c., shall deliver at the office of the Librarian of Congress, or deposit in the mail addressed to him, within ten days after its publication, two complete printed copies thereof, of the best edition issued, and a copy of every subsequent edition wherein any substantial changes are made.

Sect. 4960 imposes a penalty of twenty-five dollars for failure to deposit the published copies as required in the previous sections.

Sect. 4961 declares as follows: "The postmaster to whom such copyright book, title, or other article is delivered, shall, if requested, give a receipt therefor; and when so delivered, he shall mail it to its destination."

On a mere inspection of these enactments it is very obvious that the deposit of two copies of the book, after its publication, either with the Librarian of Congress, or in the mail addressed to him, is an essential condition of the proprietor's right; and must, in some way, be proved in an action for infringement. The words of the law are: "No person shall be entitled to a copyright unless he shall also within ten days, &c., deliver at the office of the Librarian of Congress, or deposit in the mail, &c., two copies of such copyright book." Nothing can be plainer than this.

Then, what is competent proof of such a deposit? If, after complying with all the requisite conditions, the law had authorized letters-patent for the copyright to be issued to the proprietor, such letters would be competent, if not conclusive, evidence that the conditions had been complied with. But no such letters are issued in the case of copyrights. It is contended, indeed, that the Librarian's certificate answers the

same purpose. But it is plain that this certificate was only an exemplification of the record required to be made on the filing of the title before publication. Its form, as prescribed by the law, and its contents as shown by the copy produced in evidence, show that it relates to nothing else. The publication of the book, and the deposit of copies thereof, may not take place until the lapse of months afterward. The certificate, therefore, has no relation to the deposit of the books. The record of which it is an exemplification is made without reference to any such deposit. Whether, after the deposit has been made, the certificate of the Librarian, under his official seal, that the books were deposited on such a day, would be competent evidence of the fact, is not now the question; and it may admit of considerable doubt. Perhaps a certificate of the Librarian attached to a copy of the book, certifying that two copies of the same book, or of which that is a true copy, were deposited in his office on such a day, would be competent evidence, inasmuch as the Librarian's office is a public one; the copyright books deposited with him are quasi-records, kept in his custody for public examination, — one object no doubt being to enable other authors to inspect them in order to ascertain precisely what was the subject of copyright. But we express no opinion whether such a certificate would be competent or not. In the present case no such certified copy of the books deposited, nor a certificate of the fact that they were deposited, was adduced in evidence. The memorandum under the certificate had no validity as evidence. It might have been put there by any person. It would be unsafe to hold that a memorandum under a certificate, or indorsed upon it, is part of the certificate. A certificate under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain, and final in itself, without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection. Such extraneous matter may be added by other persons, or may be erased or altered, without involving the offence of forgery or

alteration of the certificate. Memoranda of various kinds are frequently indorsed on instruments of this sort for the convenience of the possessors, either to indicate their contents, or to furnish other information with regard to their subject-matter. To hold that such memoranda are evidence, except as against the party making them, would be wholly inadmissible.

We are satisfied that the evidence offered and objected to was incompetent for any purpose in the cause. The judgment must be reversed, and the cause remanded to the Circuit Court with directions to award a new trial; and it is

So ordered.

ELWOOD *v.* FLANNIGAN.

1. The United States agreed to grant to the chief of an Indian tribe two sections of land to be thereafter selected, and to convey them by patent. After they had been selected, he aliened them by deed, in fee, with covenants of warranty. The patent was issued after his death. *Held*, that the title to the sections inured to and was vested in his alienee.
2. The courts of the United States take judicial notice of the public statutes of the several States.
3. On proof of the loss of a deed executed and acknowledged in Michigan, in conformity to the laws of that State, and recorded in the county in Illinois, where the granted lands are situate, a duly certified copy of the record, with the requisite certificate of such conformity thereto annexed, is by the statute of Illinois admissible in evidence.
4. The certificate of acknowledgment (*infra*, p. 564) conforms to the laws of Michigan in force on the day of its date.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Walter B. Scates for the plaintiff in error.

Mr. Thomas Hoyne, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was an action of ejectment to recover the possession of

fractional section 7, T. 37 N., R. 15 E., in Cook County, Illinois. By the third article of the treaty with the Potowatomies of the State of Indiana and Michigan Territory, made on the 27th of October, 1832 (7 Stat. 399), the United States agreed to grant and to convey by patent to Ash-kum, one of the chiefs, and a reservee under the treaty, two sections of land to "be selected, under the direction of the President of the United States, after the lands shall have been surveyed." Under this provision the lands now in dispute were selected. The selection was approved by the President on the 29th of March, 1837. Ash-kum died intestate in 1846. On the 3d of November, 1864, after his death, a patent was issued, conveying the lands "unto . . . Ash-kum, and to his heirs and assigns forever." Both parties claim under this patent: the plaintiff in error, who was also plaintiff below, by deed from the heirs of Ash-kum; and the defendant by deed with covenants of warranty from Ash-kum himself, while in life, "to Louis De Salle, of the township of Niles, in Berrien County, Michigan Territory," bearing date Oct. 24, 1835.

All the objections to the defendant's title, insisted on in the argument, except those relating to the proof of the deed of Ash-kum, and to the refusal of the court to charge as requested by the plaintiff upon the assumption of fraud in its procurement, are, as we think, disposed of by *Doe* v. *Wilson*, 23 How. 457, and *Crews* v. *Burcham*, 1 Black, 352. Similar reservations and grants under the same treaty were there involved, and it was held that, when such a patent issued, the title to the lands vested in those holding under any deed the patentee might have previously made.

The principal controversy is as to the evidence admitted to prove the deed. After proof of the loss of the original, a certified copy from the records of Cook County was offered in evidence. The record was made on the 31st of May, 1836, and the copy showed a deed purporting to convey the land, signed by Ash-kum with his mark, sealed, and attested by two witnesses. The certificate of acknowledgment is as follows: —

"TERRITORY OF MICHIGAN, } ss.
BERRIEN COUNTY. }

"Be it remembered, that on the twenty-fourth day of October, anno Domini 1835, before me, Titus B. Willard, Esquire, one of the justices of the peace for said county of Berrien, came the above-named Ash-kum, an Indian chief, and acknowledged the above-written indenture by him subscribed to be his free act and deed, and desired that the same might be recorded as such according to law.

"In testimony whereof, I have hereunto set my hand and seal the day and year above written.

"TITUS B. WILLARD, [L. S.]
"*Justice of the Peace.*"

No certificate of any kind as to the official character of Willard was added to the deed before it was recorded. Neither was there before the record any certificate of any clerk of a court of record of Michigan, under the seal of his court, to the effect that the deed had been executed and acknowledged in conformity with the laws of that State. There was, however, annexed to the copy of the deed from the record the following certificate: —

"OFFICE OF COUNTY CLERK, BERRIEN CO., MICH.,
BERRIEN SPRINGS, 187 .

"EDWIN D. COOKE, *Clerk.*

"STATE OF MICHIGAN, } ss.
BERRIEN COUNTY. }

"I, Edwin D. Cooke, clerk of said county, and of the Circuit Court therein, the same being a court of record and having a seal, do hereby certify that the certificate of acknowledgment by Ash-kum, an Indian chief, taken before Titus B. Willard, a justice of the peace in and for said county of Berrien, on the twenty-fourth day of October, A. D. 1835, as appears on the certified copy of the deed hereto annexed, was executed according to and in conformity with the laws of the Territory of Michigan, as they existed at the time of taking such acknowledgment; and I further certify that, as appears by the records of and in the office of the register of deeds of said county of Berrien, that the said Titus B. Willard was, at the time of taking such acknowledgment, an acting justice of the peace in and for said county of Berrien.

"In testimony whereof, I have hereunto set my hand and affixed

the seal of said Circuit Court, at Berrien Springs, this second day of January, A. D. 1878.

"EDWIN D. COOKE, *Clerk.*"

{SEAL OF THE CIRCUIT COURT OF BERRIEN COUNTY, MICH.}

In this connection the defendant proved by parol that Willard was an acting justice of the peace of Berrien County at the date of the certificate of acknowledgment; and they also put in evidence a certificate of the Secretary of State of Michigan, of which the following is a copy: —

"STATE OF MICHIGAN,
OFFICE OF THE SECRETARY OF STATE, *ss.*

"I, E. G. D. Holden, Secretary of State of the State of Michigan, do hereby certify that Titus B. Willard was, on the seventh day of March, one thousand eight hundred and thirty-four, duly appointed justice of the peace for the county of Berrien, as appears from the records in this office; and that the term of office fixed by law at the time of his appointment was three years.

"In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

"E. G. D. HOLDEN,
"*Secretary of State.*
"By WM. CROSBY,
"*Deputy.*"

{THE GREAT SEAL OF THE STATE OF MICHIGAN.}

The defendant also put in evidence a statute of Michigan "concerning deeds and conveyances," in force at the date of the deed. Laws of Mich. 1833, p. 279. It provided that deeds of lands in that Territory, signed and sealed by the parties granting the same, and signed by two or more witnesses, and acknowledged by the parties, should be good and valid to pass title. The acknowledgment required might be made before, among other officers, a justice of the peace in any county in the Territory, and a certificate of the acknowledgment being indorsed on the deed, "and signed by the person before whom the same was taken," the deed was entitled to be recorded.

To the admission of this evidence the plaintiff in due time objected, and his objections having been overruled, exceptions

were taken and made part of the record. The assignments of error relate principally to these exceptions.

By the statutes of Illinois in force when the deed in question was executed, a deed signed and sealed by the party making the same was sufficient for the conveyance of any lands in that State. Rev. Laws 1833, p. 129, sect. 1. To entitle such a deed to record, however, an acknowledgment was required before one of certain designated officers, among which were justices of the peace. If the justice resided out of the State, it was required that there be added to the deed a certificate of the proper clerk, "setting forth that the person before whom such . . . acknowledgment was made was a justice of the peace at the time of making the same." Id., p. 138, sect. 1. Further statutes provide that whenever a deed entitled to be recorded is lost, a certified copy from the record may be used in evidence with the same effect as the original. Rev. Stat. 1845, p. 103, sect. 25; id. 1874, p. 279, sect. 36.

By the Revised Statutes of Illinois adopted in 1845 (Rev. Stat. 1845, p. 105, c. 24, sect. 16), it was enacted that a deed made out of the State and within the United States should be entitled to record when executed and acknowledged or proved in conformity with the laws of the State, Territory, or district where made, "provided, that any clerk of a court of record, within such State, Territory, or district, shall, under his hand and the seal of such court, certify that such deed or instrument is executed and acknowledged or proved in conformity with the laws of such State, Territory, or district." Then, in 1851, it was further enacted (Scate's Stat. 972, sect. 5; Sess. Laws, Feb. 15, 1871, p. 122) "that a certified copy of any deed, . . . affecting any real estate situate within this State which has been acknowledged without this State, in conformity with the laws of the State where such deed . . . was acknowledged, and which has been recorded in the proper county in this State, shall be evidence in all courts and places: *Provided*, the party offering such certified copy in evidence will exhibit with the same a certificate of conformity, as provided for in the sixteenth section of chapter 24 of the Revised Statutes, notwithstanding said certificate of conformity has never been recorded." And again, in 1874 (Rev. Stat. 1874, p. 276, c. 30, sect. 20), "An

acknowledgment or proof may be made in conformity with the laws of the State, Territory, or district where it is made: *Provided*, that if any clerk of a court of record, within such State, Territory, or district, shall, under his hand and the seal of such court, certify that such deed or instrument is executed and acknowledged or proved in conformity with the law of such State, Territory, or district, or it shall so appear by the laws of such State, Territory, or district, duly proved and certified copies of the record of such deed, mortgage, or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence, as in other cases of certified copies, upon such a certificate of conformity to the laws of the State, Territory, or district where such deeds, mortgages, or other instruments were made and acknowledged, being exhibited therewith or annexed thereto."

Such being the laws of the two States applicable to the facts of this case, we proceed to the consideration of the specific objections to the evidence. These may be stated generally, as follows: 1. That the deed was not entitled to record in Illinois because it was not accompanied by a certificate of the proper clerk that the person before whom the acknowledgment was made was a justice of the peace; and, 2. That the deed was not executed in conformity with the laws of Michigan.

It is conceded that the deed was not acknowledged in conformity with the laws of Illinois, and it is no doubt true that when recorded there was no law of that State which allowed a certified copy to be used in evidence. It was, however, recorded in fact. Consequently, under the later statutes, if actually executed in conformity with the laws of Michigan, and that fact was properly certified, the copy was admissible. There is no question but that the deed, if executed, was in form sufficient to convey the land. It was signed and sealed by the grantor, and was otherwise sufficient as a conveyance between the parties under the laws of Illinois. The whole controversy here is as to the proof of its execution in conformity with the laws of Michigan, so as to make the copy from the record competent evidence in place of the original. The

laws of Illinois, therefore, requiring the certificate of a clerk in certain cases as to the official character of a justice of the peace, are unimportant. If in Michigan such a certificate was not necessary to complete the execution of the deed, none was required in Illinois. Certainly a deed may be said to be fully executed when all has been done that is necessary to entitle it to record, and for that purpose in Michigan the evidence of an acknowledgment was complete when the officer before whom it was taken signed a certificate to that effect indorsed on the deed. No provision was made for any authentication of his official character. His certificate, made, as it must necessarily be, under the obligations of his official oath, was deemed sufficient.

Was, then, the deed executed in conformity with the laws of Michigan? Under the laws of Illinois, that fact may be proven by the laws of Michigan themselves, or by the certificate of the proper clerk. There was probably no necessity for the proof of the laws of Michigan which was made, as the courts of the United States take judicial notice of all the public laws of the several States. *Owings* v. *Hull*, 9 Pet. 607; *Covington Drawbridge Company* v. *Shepherd*, 20 How. 227.

The deed was signed and sealed by the grantor, and it was attested by two witnesses. Of that there can be no dispute. It had indorsed upon it a certificate of acknowledgment signed by Titus B. Willard, which set forth that he was one of the justices of the peace of Berrien County, and that Ash-kum, who was named in the deed as grantor, came before him and acknowledged its execution. It is true the certificate does not state that the officer was one who by law could take the acknowledgment of deeds, but it does state what the office was, and as the statute makes it the official duty of one holding such an office to take the acknowledgment of deeds, the statement of his official character necessarily included a statement of his official authority.

It is next objected that the certificate does not state that Ash-kum was personally known to the officer. There is nothing in the Michigan statute which requires any such statement, though there is in Illinois. It is enough in Michigan if

the officer certifies to the fact of an acknowledgment by the proper party. That has been done in this case. The statement is that Ash-kum, an Indian chief, came before the officer and made the necessary acknowledgment. This implies that the grantor was in some way known to the officer, and that the acknowledgment was in fact made. The making of the certificate was an official act, done under the sanction of an official oath, and is presumptively true. The laws of Michigan did not require the officer to state in his certificate the evidence by which the identity of the person was established in his mind. It was enough that he certified to the fact.

The fact that the grantor was in this case an Indian is unimportant. The duty of the officer was precisely the same in respect to him as it was to other men. The officer must, in his case as in others, be satisfied of the identity of the person, as well as of the fact of an acknowledgment. That being done, it was his duty to make the certificate. There is nothing in *Dewey* v. *Campau* (4 Mich. 565) to the contrary of this. There the deed was rejected because the officer in effect only certified that he was told by an interpreter that an Indian woman made the acknowledgment, no power having been given him to swear an interpreter for such a purpose. Here the certificate is that an acknowledgment was in fact made. That is enough until impeached.

It is next objected that there was no proof that Willard was at the time in fact a justice of the peace. The laws of Michigan required no other evidence of that fact to entitle a deed to record than the certificate of the officer himself. That was given in this case, and in addition it was shown that he was acting as a justice of the peace at the time. This makes it unnecessary to consider whether the certificate of the secretary of state, of the fact of his appointment, was competent evidence. The law did not require a copy of his commission, or proof of his having taken the official oath. It was sufficient that he was acting under color of right. That fact was clearly shown. This disposes of the case, so far as the proof of the deed was concerned. Having been executed in conformity with the laws of Michigan, and recorded, a certified copy, with the requisite certificate of conformity annexed, was admis-

sible in evidence, according to the laws of Illinois, after proof of the loss of the original.

In respect to the request which was made of the court to charge the jury as to the effect of fraud in the procurement of the deed, it is sufficient to say there is not a particle of evidence in the record to sustain such a claim. If the jury had found for the plaintiff on any such theory, it would have been the duty of the court to set the verdict aside and grant a new trial. Consequently there was no error in refusing the charge requested.

Judgment affirmed.

DAVIS *v.* FRIEDLANDER.

1. The assignment made to assignees in bankruptcy in proceedings which were brought more than four months after attachments, issued in a chancery suit pending in a State court, were levied upon the property of the bankrupt, does not divest the jurisdiction of that court to determine the priority of lien respectively claimed by the attaching creditors, or to administer the fund arising from the sale of the property.
2. His assignees in bankruptcy, if they enter their appearance in the suit, are bound by the decree, affirming the validity of the liens acquired by the levy of the writs, and directing the application of the proceeds of the sale to satisfy them. The assignees cannot thereafter set up in any other court their title to the property.
3. A., claiming that by a proceeding at law he had a prior lien, filed in the District Court sitting in bankruptcy his bill against the other attaching creditors, the assignees in bankruptcy, and the purchasers of the property. He prayed that the sale under the writs sued out of the chancery court be set aside, that the property be delivered to and sold by the assignees, and that the proceeds be first applied to the satisfaction of his lien. *Held*, that the bill would not lie.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

Friedlander, Stich, & Co., sued Kaufman, their debtor, in the law court of Memphis, taking out an attachment, which was levied, Nov. 30, 1866, upon his real estate in that city. On different days in December, 1866, and January, 1867, Davis and other creditors sued him in the chancery court, each taking out an attachment, which was promptly levied on the same real

estate. On the 14th of July, 1868, he was adjudged a bankrupt upon his petition, filed the 30th of the preceding May, — more than a year after the levy of the last of the attachments. Cirode and Coronna were appointed his assignees in bankruptcy, and to them was made an assignment of his rights, property, and effects. On the 21st of November, 1868, they appeared in the suits in the chancery court, — then consolidated and about to be heard, — and, with their consent, an order was entered making them, in their capacity as his assignees, parties defendant. They had the benefit of any defence they might at any time have had, and assented that the hearing of the cases should proceed. On the 21st of December, 1868, a final decree was entered in the chancery court ascertaining the amount of his indebtedness to the respective complainants, and adjudging that the attached property be sold, free from any right or equity of redemption in him, or in any of the other defendants, and that the proceeds be applied in satisfaction of the debts due the attaching creditors, — the surplus, if any, to be paid to his assignees.

On the 1st of March, 1869, the day fixed for the sale of the attached property, by the master's advertisement, Friedlander, Stich, & Co. presented to the chancellor of the chancery court a petition asserting, in virtue of their prior attachment in the law court, a lien superior to that acquired by Davis and others, under their respective attachments in the chancery court, and praying that the sale, so far as it related to the property covered by their attachment, be postponed; that they be made parties to the consolidated equity suits; and that their priority of lien be established. He declined to order the postponement asked, but indorsed upon the petition that "the sale will proceed, and the complainants to this bill may file this, or a petition, in the consolidated causes to establish their priority, if such exists, to the fund." It does not appear that Friedlander, Stich, & Co. availed themselves of this right, or gave any further attention to, or had any further connection with, the chancery suits. The sale took place as advertised, Hill becoming the purchaser of a part of the property at the price of $2,500, while the remainder was struck off to Carter, Kirtland, & Co., attaching creditors, at the price of $12,520.

The bids were less, by nearly one-half, than the aggregate debts of the attaching creditors in the equity suits. No exceptions were filed to the report of sale. Hill complied with the terms of sale, and his purchase was confirmed. A decree was entered declaring that all the right, title, and interest of the parties, in and to the property purchased by Hill, be divested out of them, and vested in him. It does not appear, from the transcript, that Carter, Kirtland, & Co. complied with the terms of sale, or that any final action was taken by the court as to their purchase. In July, 1869, Friedlander, Stich, & Co. obtained judgment in the law court against Kaufman for the sum of $19,311.81, the amount of their claim, and also an order for the sale of the attached property, the same previously sold under the decree. But that order was suspended to await the consent of the court in bankruptcy to its execution, or until the further order of the law court.

The present suit was commenced on the 20th of August, 1870, by Friedlander, Stich, & Co. filing their petition in the District Court sitting in bankruptcy. The attaching creditors in the suit in the chancery court, the purchasers at the sale of March 1, 1869, and the assignees in bankruptcy of Kaufman were made defendants. Its manifest object is to secure an adjudication, establishing the prior lien of Friedlander, Stich, & Co., as against the other attaching creditors, upon the real estate attached, alike, in the suits in the law and the chancery courts of Memphis. To that end a decree is asked declaring the sales under the order of the latter court to be void, and placing the attached property in the possession of Kaufman's assignees, to be by them sold, under the order of the bankruptcy court, — the proceeds of sale to be applied first to the satisfaction of the judgment of Friedlander, Stich, & Co., in the law court. The District Court disregarding the sale made under the decree of the State court, gave those parties all the relief asked, and its decree was affirmed by the Circuit Court. Davis and the other creditors thereupon appealed.

Other facts are disclosed by the record, but in the view taken of the case by the court it is unnecessary to state them.

Mr. Fillmore Beall and *Mr. William M. Randolph* for the appellants.

Mr. Lewis Abraham and *Mr. Charles D. Mayer* for the appellees.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

In *Doe* v. *Childress* (21 Wall. 642), we considered the effect of proceedings in bankruptcy upon an attachment issued from a State court and levied upon the property of the bankrupt, more than four months prior to their commencement. That was an action of ejectment, by the assignee of a bankrupt, to recover land claimed by the defendant under a decretal sale in an attachment suit in a State court against the bankrupt. The latter was declared a bankrupt ten months after the institution of the attachment suit, four months before the decree therein, and seven months prior to the sale at which the defendant became the purchaser of the land. Upon this state of facts it was ruled that the proceedings in bankruptcy did not operate to dissolve the attachment; that the debtor's title passed to the assignee, subject to the lien created by the attachment; and that a judgment could be entered for the sale of the property, notwithstanding a discharge previously granted was pleaded in bar of the action. It was said by the court that, "where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. . . . If the assignee had intervened in the suit, he would have been entitled to the property or its proceeds, subject to this [the attachment] lien. He did not, however, intervene or take any measures in the case. He allowed the property to be sold under the judgments in the attachment suits, and those under whom the defendant claims purchased it, obtaining a perfect title to the same."

In *Scott* v. *Kelly* (22 id. 57), it appears that the assignee in bankruptcy became a party to an attachment suit in a State court, commenced shortly before the defendant was declared a bankrupt. The attachment was issued and levied after the

adjudication. The assignee claimed the attached property, but the decision in the State court was adverse to him. Upon writ of error to this court, we said that "the assignee in bankruptcy voluntarily submitted himself and his rights to the jurisdiction of the State court. Being summoned, he appeared without objection, and presented his claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the State court to act in the premises and render judgment."

In *Eyster* v. *Gaff* (91 U. S. 521), the main question considered was whether a State court, in which a foreclosure suit was pending at the time of the bankruptcy of the defendant, had jurisdiction to proceed without bringing the assignee before the court. The question arose in an action of ejectment instituted by the assignee against the purchaser at the decretal sale in the foreclosure suit. Referring to the authority expressly given the assignee by statute, to prosecute or defend all suits in which the bankrupt was a party, the court said: "If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defence, he stands as any other person would on whom the title had fallen since the suit was commenced. It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. . . . Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." Again: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction, for the benefit of the assignee, on the Circuit and District Courts of

the United States, it is concurrent with, and does not divest that of, the State courts."

These doctrines were further elaborated in *Claflin* v. *Houseman* (93 id. 130), where it was held that the assignee in bankruptcy, under the act of 1867, had authority to bring a suit in the State courts, wherever those courts were invested with appropriate jurisdiction suited to the nature of the case. See also *Jerome* v. *McCarter*, 94 id. 734; *McHenry* v. *La Société Française*, 95 id. 58.

The principles announced in the foregoing cases would seem to be decisive of the main questions arising on this appeal, and we are of opinion that the decree below cannot be sustained. It rests, necessarily, upon the ground, that immediately upon the assignment of the bankrupt's property to his assignees, the State court of chancery — although the attachments therein were sued out more than four months preceding the bankruptcy — had no jurisdiction to determine the relative rights of the attaching creditors and the assignees in bankruptcy, or to order a sale of the attached property, and apply the proceeds to the satisfaction of the debts of those creditors. But no such position can be maintained. It was competent for the assignees, upon their appointment and qualification, by appropriate proceedings, directed against individual creditors, suing in other courts, to have brought all the property in which the bankrupt had an interest, including that attached in the suits in the State courts, under the direct control of the bankruptcy court, to be disposed of under its orders, with due regard, however, to the previously acquired rights and equities, in whatever way arising, of all the creditors of Kaufman. But they were not bound to pursue that course. Consistently with the bankrupt law, as interpreted by this court, they were at liberty to appear in the State court, and assert there whatever rights they, as assignees, had in the attached property. Electing to pursue the latter course, they voluntarily submitted to the jurisdiction of the State court, which had ample authority to adjudicate, between the attaching creditors and the assignees in bankruptcy, upon all matters arising in the suits before it. Without questioning (as they do not now) the debts of the attaching creditors or the validity of their attachments, the

assignees became parties defendant in the equity suits. They neither filed nor offered to file any formal pleading. Nor did they advise the chancery court of the attachment of Friedlander, Stich, & Co. in the law court. They left that court to adjudge what were their rights in the property attached. Its final decree secured to them whatever surplus might remain after applying the proceeds of sale to the demands of the attaching creditors. If the bankrupt owed the attaching creditors the sums by them respectively claimed, and if the attachments were so issued and levied as, under the laws of the State, to create a valid lien upon the property, it is clear that the State court gave the assignees all that could have been awarded *them*.

It results from what has been said, that the sale, under that decree, — whoever became the purchasers of the attached property, whether third persons or parties to the suits, — divested the *assignees* of whatever interest or title *they* had in the property. That decree, having been passed by a court of competent jurisdiction as to parties and subject-matter, and never having been modified by the court which rendered it, or by any court having authority to review its action, the assignees are precluded from asserting in any other court any interest or title whatever in the property thus sold. Had the present suit been instituted directly by the assignees, for the purpose of setting aside the sale made under the order of the State court, and of procuring another sale of the attached property, under the orders of the court in bankruptcy, the proceedings in the State court would have been a conclusive answer to such an action.

Plainly, therefore, the present suit by Friedlander, Stich, & Co. is an attempt to invoke the jurisdiction of the District Court sitting in bankruptcy, to the end that they may establish, as against other creditors of Kaufman, their priority of lien upon property, in which, as we have seen, the assignees can now assert no right or interest for the benefit of general or unsecured creditors. Whether appellees have such priority of lien in virtue of their attachment in the law court; whether the proceedings in that court were such as, under the laws of Tennessee, gave them a lien superior to that acquired by the

respective attaching creditors in the suits in the chancery court; whether, by reason of their petition addressed to the chancellor of the latter court, and his action thereon, they became, in any proper sense, parties to those suits, or bound by the decree therein rendered, or, whether their rights were altogether unaffected by that decree, — are all questions in which the assignees have now no interest. These questions concern only the respective attaching creditors in the law and chancery courts, and for the determination of them the present appellees may not invoke the jurisdiction or aid of the bankruptcy court. The decree, and the sale thereunder, withdrew the attached property from the assets of the bankrupt. The property brought less than the claims of the attaching creditors; and since the assignees cannot question, collaterally, the proceedings in the State court, to which they voluntarily became parties, they have no possible interest in this litigation. It is, we repeat, a contest exclusively between attaching creditors as to priority of liens upon property in the disposition of which, so far as we can ascertain from the present record, the assignees have not the slightest pecuniary interest.

The decree of the Circuit Court will be, therefore, reversed, with directions that the petition of Friedlander, Stich, & Co., filed in the District Court sitting in bankruptcy, be dismissed with costs to the present appellants, but without prejudice to any claim they may assert, by any proper proceedings in a court of competent jurisdiction, to a prior lien as against appellants, or others, upon the property levied upon by the attachment in the law court of Memphis; and it is

So ordered.

EX PARTE COCKCROFT.

A person cannot appeal from a decree rendered in a suit whereto he was not a party.

PETITION for a writ of *mandamus*.

The facts are stated in the opinion of the court.

Mr. William E. Earle for the petitioner.

There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a petition for a writ of *mandamus* requiring the Circuit Court of the United States for the District of South Carolina to allow an appeal by the petitioner from an order of the court entered on the 7th of October, 1881, confirming a sale of a railroad made pursuant to a decree filed on the 25th of September, 1880, in the suit of *Calvin, Claflin, and Others* v. *The South Carolina Railroad Company and Others*. The petitioner was not a party to the suit, neither does it appear that he ever asked to be made a party. He is not the holder of any of the bonds that by the decree under which the sale was made are entitled to a distributive share of the proceeds. Unless the property should bring at another sale enough to satisfy the mortgages and leave the balance for distribution among the general creditors of the company, he can get no advantage from setting aside the sale which has already been made. In his showing to the Circuit Court he certainly did not make it appear that he had any real interest in the controversy. He was evidently heard as a matter of favor, and not because he had any right to intervene. Before confirming the sale the court seemed desirous of ascertaining whether, under all the circumstances, in the exercise of its judicial discretion such an order ought to be made. For this purpose it was willing to consider the affidavits produced by the petitioner. This seems to have been done out of abundant caution, not because it was necessary in law.

Inasmuch, therefore, as the petitioner was not made a party

to the suit, either by an express order of the court to that effect, or by being treated as such, his application for an appeal was properly denied. This case cannot be distinguished in principle from *Ex parte Cutting*, 94 U. S. 14.

Motion denied.

COUNTY OF CLAY *v.* SOCIETY FOR SAVINGS.

1. The legislation of the State of Illinois reviewed, whereunder the county of Clay issued two series of bonds, one dated Nov. 1, 1869, in payment of its subscription to the stock of the Illinois Southeastern Railway Company, and another dated Jan. 4, 1871, whereby its donation voted before the year 1870 to that company was paid.
2. The bonds are valid, as they were issued in strict conformity to the conditions and requirements prescribed by statute, and pursuant to a popular vote cast at an election lawfully held before the year 1870. The Constitution of Illinois, which took effect during that year, does not attempt to impair the obligation of any prior contract in regard to them, nor prohibit the issue of such as were necessary to give effect to a donation so voted.
3. Where a *bona fide* holder for value of a county bond sues thereon, its recitals, showing that it was issued in accordance with the statute, are conclusive and binding, and the fact that for many years its validity has been recognized by paying the interest thereon as it became due cures mere irregularities in issuing it. The county cannot, by setting them up, escape liability.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

On Nov. 6, 1849, the legislature of Illinois passed an "Act authorizing counties and cities in the State of Illinois to subscribe to the capital stock or make loans to railway companies," which contained the following provisions: —

"SECT. 1. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company, already organized or incorporated, or hereafter to be organized or incorporated, under any law of this State, such city or county may, and are hereby authorized to, purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties, and the stock so subscribed for or purchased shall be

under the control of the county court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"SECT. 2. For the payment of said stock the judges of the county court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest and the ultimate redemption of the principal, or, if the said judges or common council should deem it more advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purpose in sums not less than $50, bearing interest not exceeding ten per centum per annum: *Provided,* that no bond shall be paid out at a rate less than par value.

"SECT. 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated, under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company at par and in lieu of cash.

"SECT. 4. No subscription shall be made, or purchase or bond issued, by any county or city, under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act) shall vote for the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least thirty days' notice, in the same manner as notices are given for election of State and county officers in said counties, requiring said electors of said counties or cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for such capital stock which they may propose to make," &c. See Gross's Statutes of Illinois (3d ed.), pages 552, 553.

Afterwards, on Feb. 26, 1867, the legislature passed an act to incorporate the Illinois Southeastern Railway Company, the seventh section of which was as follows: —

"The county court, or board of supervisors (where such county has adopted township organization), of any county into or through

which this road or its branches may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding one hundred thousand dollars, and may order the clerk of the county court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the county court or board of supervisors, as the case may be, of such county, shall countersign and deliver such bonds so issued to the president or directors of said company; which said bonds may bear any rate of interest not to exceed ten per cent. per annum, payable at the maturity of the bonds, as hereinafter expressed, and yearly thereafter: *Provided*, that no donation by the county court or board of supervisors of any such county shall be of a greater sum than fifty thousand dollars, until the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, canvassed, and published, in the usual manner of calling, conducting, making returns, canvassing, and publishing special county elections," &c.

On Feb. 24, 1869, an act was passed to amend the act to incorporate the Illinois Southeastern Railway Company, sect. 10 of which provided: —

"That any village, city, county, or township organized under the township organization law, or any other law of this State, along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company, to aid in constructing and equipping said railway: *Provided*, that no such subscriptions or donations shall be made until the same shall be voted for, as hereinafter provided."

The section then proceeded to declare that upon the application of twenty legal voters of any such city, village, county, or township, the clerk thereof should call an election to be held by the legal voters, to determine "whether such village, city, county, or township shall subscribe to the capital stock of said company, or make a donation thereto to aid in building or equipping said railway, and whether to be subscribed or donated, and the rate of interest and the time of payment of the bonds to be issued in payment thereof. Section 12 of the act declared as follows: —

"That when payment of subscription to the capital stock of said company or payments for donations to said company have been or shall be made by villages, cities, counties, or townships, in bonds of such villages, cities, counties, or townships, under any act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties, or townships, and appearing regular on the face thereof, shall, in the hands of said company or any other *bona fide* holder thereof, be deemed and taken in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds or by any other act to be done preliminary to the issuing and negotiation of said bonds."

On April 16, 1869, the legislature passed an act for the registration of municipal bonds in the office of the auditor of state, sect. 7 of which required that, before any county bond could be registered, the presiding judge of the county court should certify under oath to the auditor that all the preliminary conditions to their issue required by law had been complied with. See Underwood's Statutes of Illinois, p. 994.

The Constitution of Illinois, which went into effect Aug. 8, 1870, declares (second additional section): —

"No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions when the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

This suit was brought by The Society for Savings against the County of Clay upon certain bonds dated Nov. 1, 1869, with the coupons attached, of a series issued by it to pay for stock in the Illinois Southeastern Railway Company, subscribed by the county board of supervisors, and upon certain bonds dated Jan. 4, 1871, with coupons attached, of another series issued by it to pay for a donation made to the company by that board, both series being issued, as was claimed, by authority of the foregoing legislation.

Although the instruments sued on are under seal, the suit is called in the record an action of assumpsit, and the defendant pleaded non-assumpsit.

Upon the trial, a jury being waived, the court made an elaborate and comprehensive finding of the facts, in which is set out in full a copy of one of the bonds belonging to each class sued on, and of one of the coupons attached to each respectively.

The subscription bonds, as appears by the finding of the court, contain this recital: —

"This bond being issued under and pursuant to orders of the board of supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois. And the faith of the county of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid."

The donation series of bonds the court found to contain the following recital: —

"This bond is one of a series of bonds issued by Clay County to aid in the construction of the Illinois Southeastern Railway Company, in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'An Act to incorporate the Illinois Southeastern Railway Company,' approved February 25, 1867, and an act amendatory thereof approved February 24, 1869, and of an election of the legal voters of Clay County, Illinois, held on April 22, 1868, under the provisions of said act."

"This bond is not to become a binding obligation of the said county of Clay until the following conditions shall have been complied with, to wit: this bond to become due and payable on the express conditions that said company shall have completed the whole length of its line from Shawneetown, on the Ohio River, to the Chicago Branch of the Illinois Central Railroad, and shall have the cars running thereon."

Upon the back of each one of the donation series of bonds was printed the following certificate: —

"State of Illinois, Clay County, *ss:*

"I, Jno. L. Moore, clerk of the County Court of Clay County, in the State of Illinois, do hereby certify that the county court of said county have entered an order on the records of said county

court, directing me to indorse upon this bond the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the county of Clay have been complied with.

"In testimony whereof, I hereto affix my hand and the seal of said court, at Louisville, this fourth day of January, A. D. 1871.

[SEAL.] "JNO. L. MOORE, *Clerk.*"

Upon all the bonds of both series was printed the certificate of the auditor of public accounts, as follows: —

"STATE OF ILLINOIS, AUDITOR'S OFFICE,
"Jan. 9, 1871, Springfield.

"I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An Act to amend an act entitled "An Act to incorporate the Illinois Southeastern Railway Company,"' approved February 24, 1869, as well as the provisions of an act entitled 'An Act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] "C. E. LIPPINCOTT, *Auditor P. A.*"

The court further found that on March 2, 1868, the board of supervisors made an order calling an election to be held by the qualified voters of the county upon two propositions: *First*, that the county should subscribe $100,000 to the capital stock of the Illinois Southeastern Railway Company, and issue in payment thereof bonds for an equal amount; and, *second*, that the county should donate $50,000 to the railway company, and issue bonds of the county to pay said donation; that the election was held in accordance with the order of the board of supervisors, and resulted in a majority of votes being cast in the county in favor of both of the propositions; that at a special meeting of the board of supervisors, held on the first Monday of November, 1868, the president of the board was instructed, by resolutions duly passed by the board, to make such donation, and to subscribe said amount upon the books of said railway company, the subscription and donation to be made strictly and only in accordance with the terms of the

proposition aforesaid, submitted and voted upon on April 22, 1868.

The court also found that the company had located its road and graded, bridged, and tied ten miles thereof before the first day of November, 1869, and that on that day the president of the board of supervisors made the subscription upon the books of the railway company, under and in pursuance of the submission, vote, and resolution aforesaid, the subscription being made upon the terms and conditions aforesaid.

The court further found that the $100,000 of bonds so voted as subscription as aforesaid were delivered to the company on Nov. 1, 1869, and subsequently thereto, the company having fully complied with the terms and conditions of the vote before receiving the bonds.

The court further found that, on Jan. 1, 1871, "the fifty thousand dollars so donated as aforesaid, under and in pursuance of the vote aforesaid, in the bonds of said county, were delivered and donated to said railway company, said railway company having complied with the conditions of said vote," &c.

The court also found that both series of bonds had been registered in the office of the auditor of public accounts, and that taxes had been certified by him, and the interest paid on the bonds up to the commencement of this suit.

The findings of the court further state that the plaintiff purchased all the bonds sued on for full value before maturity, and was an innocent holder thereof without notice of any irregularity in the issue, except such constructive notice as the law charges it with.

The court found the issue for the plaintiff and rendered judgment. The county sued out this writ.

Mr. W. J. Henry for the plaintiff in error.

Mr. David T. Littler for the defendant in error.

Mr. Justice Woods, after stating the facts, delivered the opinion of the court.

Two classes of bonds are sued on, namely, the subscription bonds and the donation bonds. The defences set up against each class will be separately considered.

The findings of the court and the sections of the act of 1849,

recited in the preceding statement of facts, furnish ample ground for the judgment in favor of the defendant in error upon the subscription bonds held by it.

The plaintiff in error, however, insists that there is no evidence or finding that the thirty days' notice of the election required by the statute had been given, or that a majority of the legal voters, taking as a standard the number of votes thrown at the last general election for county officers, voted in favor of the proposition to subscribe stock and issue the bonds of the county to pay for it.

There are three conclusive answers to this contention.

First, the bonds recite that they were issued under and pursuant to the orders of the board of supervisors of Clay County, as authorized by virtue of the laws of the State of Illinois. The act of Nov. 6, 1849, authorized the judges of the county court to issue the bonds only in case a majority of the voters of the county, taking as a standard the number of votes thrown at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company, and pay for it by the issue of county bonds. The ultimate decision of the question whether such a vote had been cast was, therefore, left with the judges of the county court. The recital of the bonds, that they were issued pursuant to the orders of the board, the successor of the county court, as authorized by virtue of the laws of the State of Illinois, is equivalent to a declaration by the board, upon the face of the bond, that the election had been held and had resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a *bona fide* holder this recital is conclusive and binding upon the municipality. *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Marcy* v. *Township of Oswego*, id. 637.

The second answer is, that if the county had, under the law, authority to issue bonds, and did issue them, and they went into circulation and came to the hands of a *bona fide* holder, he was not, in a suit upon them, required to aver or prove the performance of any of the requisites necessary to give them validity. The want of such performance is a matter of defence, and the burden of proof is upon the county to establish it. *Lincoln* v. *Iron Company*, 103 U. S. 412. In this case the

county offered no evidence in any degree tending to show that the conditions precedent upon the performance of which the issue was authorized had not been complied with. It cannot, therefore, assume that the conditions were not performed, and insist on non-performance as a defence.

The third answer is, that sect. 12 of the act of Feb. 24, 1869, amendatory of the act to incorporate the Illinois Southeastern Railway Company, which was indorsed on the bonds, expressly provided that when payment to the capital stock of the company should be made in the bonds of counties or townships, under any act authorizing such subscription, all such bonds issued by the proper authorities and appearing regular on their face should, in the hands of a *bona fide* holder, be deemed and taken in all courts, and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to their issue and negotiation.

As no proof has been submitted of any irregularity in the issuing of the bonds, this section of the law is conclusive against the existence of any.

It is next insisted by plaintiff in error that the general statute of Nov. 6, 1849, so far as it concerned the Illinois Southeastern Railway Company, was repealed by sect. 7 of the act to incorporate that company. That section authorized the county court of any county, or the board of supervisors (when the county had adopted township organization), to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding $100,000, and to issue to the company its bonds in satisfaction of said donation; provided, that no donation of a greater sum than $50,000 should be made until the question of such larger donation should have been submitted to the vote of the legal voters of the county, and a majority thereof should have voted in favor of such donation. The contention is that it was not the purpose of the legislature in these enactments to permit a county to purchase or subscribe to the capital stock of a railroad company and also make a donation to the same company.

There is not a word in the charter of the Illinois Southeastern Railway Company which expressly excludes it from

the benefits of the general railroad subscription law of Nov. 6, 1849. Nor is there the slightest repugnancy between the provisions of the two acts. The latter, being a general law, authorized any city or county in the State to purchase or subscribe to the capital stock of any railroad company anywhere in the State; the former, being an act to incorporate a private corporation, authorized any county through which the railroad of the company or any of its branches might pass, to make a donation to the company as a bonus or inducement towards the building of the railroad or its branches. There is no ground whatever for the contention that the general law was repealed or modified, in any respect, by the act incorporating the Illinois Southeastern Railway Company. There is no repugnancy or inconsistency between them. A statute can be repealed only by an express provision of a subsequent law or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. *McCool* v. *Smith*, 1 Black, 459; *Wood* v. *United States*, 16 Pet. 342.

We are of opinion, therefore, that the act incorporating the Illinois Southeastern Railway Company does not repeal or modify the general law of Nov. 6, 1849.

The plaintiff in error further insists that sect. 10 of an act approved Feb. 24, 1869, amendatory of the charter of the Illinois Southeastern Railway Company, had the effect to repeal, not only sect. 7 of the charter of the company, but also the general law of Nov. 6, 1849, so far as it concerned the company.

This section provides "that any village, city, county, or township along or near the route of said railway or its branches, or that are in anywise interested therein, may, in their corporate capacity, subscribe to the stock of said company, or make donations to said company to aid in constructing and equipping said railway," provided the same shall be voted for at an election called by the clerk of the village, city, county, or township, upon the written request of twenty legal voters thereof, and upon thirty days' notice.

Conceding that this section is a substitute for sect. 7 of the original charter, it cannot be held to repeal the general law,

for the reasons already stated in reference to sect. 7 of the original charter; namely, that there is no direct appeal, and there is no repugnancy between the two acts which would make a repeal by implication.

The subscription bonds sued on were, according to the findings of the court, issued in substantial conformity, not only with the general act of Nov. 6, 1849, but also with the amendatory act of 1869, so that, conceding that the latter act is applicable to the issuing of the bonds in question, they are valid in the hands of a *bona fide* holder. When these bonds were issued there was ample authority for their issue under the laws of the State of Illinois. The recital that they were issued in conformity with the laws of the State, as already shown, is binding on the county, when the suit is brought on the bonds by a *bona fide* holder, and concludes the county from setting up any irregularities in their issue, if any existed. We are of opinion, therefore, that the suit upon the subscription bonds was well maintained.

The objections to the bonds known and designated as donation bonds have nothing substantial in them. The bonds refer on their face to the laws which authorized their issue, and recite that they were issued in pursuance of authority granted thereby. They carry an indorsement made by the clerk of the county court, by its order and under its seal, that all the conditions upon which they were to become a binding obligation of the county have been complied with, and printed on every one of them is a copy of sect. 12 of the act of Feb. 24, 1869, amendatory of the charter of the company, which makes the fact of the negotiation of them in payment of a donation to it *prima facie* evidence of the regularity of their issue when in the hands of a *bona fide* holder. There is no proof or offer of proof that they were not issued in conformity with the requirements of law.

The plaintiff in error argues, however, as conclusive against their validity, that they were not issued until after Aug. 8, 1870, the date upon which the present Constitution of Illinois went into effect, which by the second additional section declared that no municipal corporation should ever make donation to any railroad or private corporation.

The findings of the court show that the people of Clay County, on April 22, 1868, voted in favor of a proposition to donate $50,000 to the Illinois Southeastern Railway Company, provided the railroad of said company should be located on a certain line specifically described, and provided the bonds issued in payment of such donation should not be payable until the railway had been completed the whole length of the line, from Shawneetown, on the Ohio River, to the Chicago Branch of the Illinois Central Railroad, and the cars running thereon; that on the first Monday of November, 1868, the board of supervisors of the county, by resolution duly passed, directed its president to make the donation aforesaid upon the books of the railway company, in accordance with the condition of said vote, and that before the first day of November, 1869, the railway company had located its line of road, as required by the conditions upon which the donation was to be made, and had "graded, bridged, and tied ten miles thereof."

We think it may be fairly deduced from the findings of the court below that, on Nov. 1, 1869, the president of the board of supervisors subscribed upon the books of the railway company as directed by the board of supervisors the donation of $50,000, which the county had voted, and the brief of counsel for plaintiff in error distinctly admits that such is the proper construction of the findings.

These transactions made a contract between the county and the railway company to the effect that in consideration that the railway company should construct its road upon the line designated, and complete it and have the cars running thereon between the points mentioned, the county would deliver its bonds to the railway company in satisfaction of its donation. This contract had been partly performed by the railway company before the Constitution of 1870 went into effect. The adoption of the Constitution could not annul or impair it. The county was bound notwithstanding the provision of the Constitution of 1870. *Town of Concord* v. *Savings Bank*, 92 U. S. 625.

And when, as appears by the findings of the court, the railway company had, on Jan. 1, 1871, fully completed its road according to the terms upon which the donation was to be

made, it was entitled in law under its contract to the bonds of the county in satisfaction of the donation.

There was, therefore, authority to issue these bonds upon the conditions prescribed. The court found that the defendant in error was a *bona fide* holder, and that the railroad company had complied with all the conditions upon which the bonds were to be issued to it. Upon this state of facts the attempt of the plaintiff in error to avoid its liability upon these bonds seems a hopeless undertaking.

Other defences are set up against a recovery in this case. Plaintiff in error alleges that the authority to donate $50,000 to the railway company was expressly conferred upon the board of supervisors without any vote or precedent condition whatever, and the authority being conferred upon the board could not be by it "delegated to the people to be voted upon at a popular election." It further alleges that the bonds are not negotiable, and it insists that the authority of the board of supervisors, under the original charter of the railway company, to make the donation, was repealed by the amendatory act of Feb. 24, 1869.

These defences do not in our judgment merit reply.

The plaintiff in error has received in consideration for the issue of each series of bonds everything for which it bargained. They were regularly issued, and have been registered under the Statute of Illinois with the auditor of public accounts, upon the strength of a certificate under oath made by a supervisor of the county pursuant to law, to the effect that all the preliminary conditions to the issue of the bonds required by law had been complied with. The record shows that taxes had been levied to pay interest, and that interest had been paid on the subscription bonds for eleven years, and on the donation bonds for nine years. This fact would of itself cure mere irregularities in the issuing of the bonds when they were sued on by a *bona fide* holder for value. *Supervisors* v. *Schenck*, 5 Wall. 772. Under these circumstances, when a suit is brought on them by such a holder, as found to be the case here, some substantial defence must be set up by the county before it can escape its liability. Such defences as are relied on in this case will not avail.

Judgment affirmed.

BONAPARTE *v.* TAX COURT.

The Constitution does not prohibit a State from including in the taxable property of her citizens so much of the registered public debt of another State as they respectively hold, although the debtor State may exempt it from taxation or actually tax it.

ERROR to the Court of Appeals of the State of Maryland.

Mrs. Elizabeth Patterson, a resident of Baltimore, Md., returned, in accordance with the law of that State, to the proper board of assessors, the following property: City of New York stock, six per cent; City of New York stock, seven per cent; County of New York stock, seven per cent; County of New York stock, six per cent; State of New York stock, six per cent; State of Pennsylvania stock, six per cent; State of Ohio stock, six per cent; and City of Philadelphia stock, six per cent. She stated their several amounts, and claimed their exemption from taxation because they were of a public character, and, except a portion of the City of Philadelphia stock, were exempt from taxation by the laws of the States respectively authorizing their issue, while that portion had always been subjected by Pennsylvania to a tax which she had paid to that State. They were of the character known as "registered;" *i. e.*, transferable only on the public record books of the States and municipalities issuing them, and the interest was paid only at places provided by the laws of those States, and beyond the boundaries of Maryland. The board of control and review by which this return was revised, disallowed her claim for exemption. She thereupon filed a petition in the Baltimore City Court, praying that the above-described property should be stricken from the lists. The order of the court granting the relief prayed was reversed by the Court of Appeals, whereupon she sued out this writ of error. She died during its pendency, and her executor was substituted in her stead.

Mr. I. Nevitt Steele and *Mr. Charles J. Bonaparte*, for the plaintiff in error, submitted her following propositions: —

The asserted right of one State to tax the loans of its citizens to another State involves its right to prohibit such loans,

and forbid all dealings on the part of its citizens with the governments of other States. Such a right assumes the existence of a power which is inconsistent with the mutual amity imposed on all the States by the Constitution.

The registered public debt of a State is properly subject to its sovereignty, and therefore to its taxing power; and whenever this sovereignty is exercised by the public acts of the State, either taxing or exempting from taxation this debt, they must, under art. 4, sect. 1, of the Constitution, be recognized by the courts of other States as giving it for taxation a *situs* in the State by which it was incurred.

The same property cannot at the same time have more than one *situs* for the purpose of taxation. It, therefore, follows, and it is the only Federal question presented by this record, that the proper *situs* for taxation of property of this description is, under the Constitution, in the State owing the debt. This view finds support also in the following considerations: —

1. It shuts the door to fraud and perjury. The ownership of the debt of each State can be determined by an inspection of public records, always open to its fiscal officers; that of the debt of other States can be learned only from the returns of taxpayers. To say nothing of the gain to public morality, the advantages to the treasury, in the narrowest sense, of a mode of collection dependent in no wise upon the consciences of contributors, would largely exceed the amount raised by taxing foreign investments.

2. It simplifies the whole method of collection. The stock, the thing taxed, remains within the State, subject to levy and sale whenever the tax thereon is in arrear. If a resident of one State, on the other view, invested all his property in the debts of other States (a perfectly supposable contingency), it is hard to see how the State where he resides could compel him to pay taxes.

3. It gives the public debt of each State a fixed value for all investors, and in each of the great financial centres of the country. This is of almost incalculable advantage to the States that borrow, and to the capitalists who wish the largest choice of investments. The opposite construction would, in

the last resort, confine the loans of each State to its own citizens.

4. Finally, it gives the citizens of one State a direct interest in the good order and prosperity of sister States; tends to prevent sectional jealousies and antagonisms; avoids the danger of reciprocally hostile legislation by the several States against the credit of their neighbors, and promotes the "more perfect union" aimed at by the Constitution.

Mr. Charles J. M. Gwin, Attorney-General of Maryland, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question we are asked to decide in this case is whether the registered public debt of one State, exempt from taxation by the debtor State, or actually taxed there, is taxable by another State when owned by a resident of the latter State. We know of no provision of the Constitution of the United States which prohibits such taxation. It is conceded that no obligation of the contract of the debtor State is impaired. The only agreement as to taxation was that the debt should not be taxed by the State which created it.

It is insisted, however, that the immunity asked for arises from art. 4, sect. 1, of the Constitution, which provides that full faith and credit shall be given in each State to the public acts of every other State. We are enabled to give such an effect to this provision. No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular. We are referred to no statute of the debtor State which attempts to separate the *situs* of the debt from the person of the owner, even if that is within the scope of the legislative power of the State. The debt was registered; but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was "movable" like other debts, and had none of the attributes of "immovability." The owner may be compelled to go to the debtor State to get what is owing

to him; but that does not affect his citizenship or his domicile. The debtor State is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the State in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself.

It is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the States are left free to extend the comity which is sought, or not, as they please.

Taxation of the debt within the debtor State does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation.

As the only Federal question involved was decided right in the court below, we cannot look into the other errors which have been assigned. *Murdock* v. *City of Memphis*, 20 Wall. 590.

Judgment affirmed.

DUGGER *v.* BOCOCK.

Inasmuch as a Federal question is not involved in the determination of the case, this court has no jurisdiction to re-examine the decree of a State court dismissing a bill brought by the vendor of lands in Alabama, who prayed that the sale of them be set aside solely on the ground that two instalments of the purchase-money had been paid in the treasury notes of the Confederate States and the last in Confederate bonds, the notes having been received in the usual course of business, and the bonds under such circumstances as almost amounted to coercion.

ERROR to the Supreme Court of the State of Alabama.

The facts are stated in the opinion of the court.

Mr. Samuel Field Phillips for the plaintiffs in error.

Mr. Michael L. Woods for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit in equity begun by the appellants, two of the children and heirs of Henry Dugger, deceased. The case, which was decided on demurrer to the bill, may be stated generally as follows: —

Henry Dugger, a citizen of Alabama, died in 1852, leaving Alice G. Dugger, his widow, and eight children, of whom the present appellants were the youngest. The widow was appointed by the Probate Court of Marengo County administratrix of the estate, which consisted of lands and personal property. The estate being free from debt, she, on the 3d of September, 1860, filed her petition in the Probate Court for leave to sell the lands for the purposes of distribution. The proper order was made, and on the 19th of November they were sold to Willis P. Bocock, one of the appellees, at $42.01 an acre, amounting in the aggregate to $28,806.40, for which he gave her his three notes with sureties, one for $10,370.30, payable Nov. 19, 1861, another for $11,138.47, payable Nov. 19, 1862, and the other for $11,906.64, payable Nov. 19, 1863. The sale was reported to and confirmed by the court, but under the law of Alabama the legal title to the lands did not pass from the heirs to the purchaser until the purchase-money was paid, and a conveyance actually made under an order of the court for that purpose. Until such a conveyance, the heirs

might maintain ejectment for the recovery of possession if the conditions of the sale were not complied with. *Doe* v. *Hardy*, 52 Ala. 297.

It is averred in the bill "that although said Willis P. Bocock was the ostensible purchaser of the whole of said land, yet, by some arrangement between him and said Henry A. Tayloe, made before or at the time of said purchase, said Tayloe obtained by the understanding with Bocock the one hundred and ninety-six acres of land before mentioned, and undertook with said Bocock to pay the purchase-money for the same at the rate aforesaid, and said Tayloe went into and has since had possession thereof." The present suit is brought with reference to this one hundred and ninety-six acres only, the whole property sold consisting of something more than six hundred and forty acres.

The bill then proceeds to state as follows: —

"VI. Your orator and oratrix further show to your Honor that neither said Bocock nor any one else has ever paid the purchase-money evidenced by said notes, or any part thereof, according to the terms of his purchase, or in any manner, except as hereinafter stated, and the purchase-money for said one hundred and ninety-six acres, with interest thereon, remains wholly unpaid.

"VII. That said Bocock took up the said two notes first falling due with Confederate States treasury notes, and the said note last falling due he took up by handing over to Mrs. Alice G. Dugger bonds of the Confederate States. Your orator and oratrix, who were then infants, state, upon information and belief, that Bocock and the defendant Henry A. Tayloe together urged said Alice G. Dugger to accept said Confederate notes and bonds in payment of said Bocock's notes, at a time when all of her children who were of age were absent from home, and the said Alice G. Dugger received such Confederate notes for the note first falling due without remonstrance; she reluctantly yielded and received the Confederate notes for the note secondly falling due, but when they urged her to accept the said treasury notes or Confederate bonds for the last note, she peremptorily refused to accept said Confederate notes and bonds, which were then really almost worthless, in payment of

said note, and for a long time she continued to refuse, and sent the said Bocock and Tayloe away without taking the offer; but she had great confidence in and esteem for said Bocock and Tayloe, who were her neighbors, and were men of high character, and they brought great pressure to bear on her to induce her to take the Confederate notes or bonds. They represented to her that she would be ruinously taxed by the Confederate government if she refused to take Confederate money in payment of said note, and that she would be made to pay the tax in gold, and they or one of them reported her refusal to the Confederate tax-collector, who called upon her and told her he was informed of her refusal, and finally, under great pressure, under protest, and unwillingly, the said Alice G. Dugger very reluctantly yielded and took said Confederate bonds, and gave up to said Bocock said last note. The sons of Alice G. Dugger then of age were absent in the army."

Payment of the purchase-money was never reported in form to the court by Mrs. Dugger, and no order was ever made for her to convey the property. Neither did she ever execute any conveyance, but at the April Term, 1864, of the court she filed her final account as administratrix, in which she charged herself with the purchase-money, making no mention of the fact that it had been paid in the notes and bonds of the Confederate States. This account was audited and settled by the court, and a distribution ordered. The balance found due from the administratrix was $40,170.41, of which the share of each distributee was $5,021.30. These appellants were then infants, and the record shows that in the proceedings for settlement and distribution they were represented by H. A. Woolf. Mrs. Dugger was at the time their guardian, and she charged herself in her accounts as guardian, which were then pending before the court for partial settlement, with the distributive shares of her wards.

In 1866, after the close of the war, no conveyance having been made to Bocock, Mrs. Dugger and her surviving children, including the present appellants, who were still infants, commenced in one of the State courts of Alabama a suit, in the nature of an action of ejectment, against Bocock and Tayloe to recover the lands. Fearing that an attempt would be made by the defendants to get a deed, the widow and heirs, on the

12th of May, 1866, filed in the Probate Court their protest against any order to that effect; but the bill avers that Bocock did, "for the express purpose of defeating said action at law, on the twenty-first day of March, 1868, file his petition in said Probate Court, . . . wherein he represented and stated that he had paid the whole purchase-money for said lands, when in fact he had never paid it, or any part thereof, otherwise than in Confederate States treasury notes and bonds, as already herein set forth in detail, and further setting forth in his petition that the said Alice G. Dugger had not reported such payment, though more than a reasonable time had elapsed for her to have done so, and praying that an order for a conveyance of said lands to him might be made; and said Probate Court, notwithstanding said caveat and protest filed by the heirs-at-law of said Henry Dugger, deceased, long before that time, and which was then on file, and without notice to the administratrix or to any of the said heirs, and without the knowledge by them of said application, and upon *ex parte* proof made by said Bocock, did appoint Henry A. Woolf, a brother of the judge of said court and an entire stranger to the estate, having no interest therein or knowledge of the affairs thereof, to execute titles to said Bocock, and said Woolf, in compliance with said order and decree of said court, made conveyances of said lands to said Bocock, without notice to or knowledge by the administratrix. . . . And the said action in the nature of ejectment brought by said heirs was defeated by the production of said conveyance, on the ground that the remedy was by direct proceedings in chancery to impeach said order or decree."

On the 11th of June, 1868, after Bocock got his deed, the widow and children, the appellants being represented by their guardian, entered into an agreement of compromise with Bocock, by which, "in full and final compromise and settlement of the claims between the parties, . . . touching and concerning their claims and rights in and to the lands hereinafter mentioned, and of the suits between them in respect thereto, and of the damages, rents, and mesne profits," the widow and children agreed to convey to Bocock a certain portion of the lands, and he to convey to them the rest, except the one hundred and ninety-six acres now in dispute. By an express stipulation

nothing in that compromise was "to impair or affect any right, title, or claim of any or either of the parties of the second part [the widow and children] to any lands in possession of said Henry A. Tayloe, or to rents and damages for the use thereof by said Tayloe, or to any action pending against Tayloe."

This agreement was in all respects ratified by the appellants after they came of age, but on the 31st of October, 1873, they began this suit to reach the one hundred and ninety-six acres held by Tayloe, and as to him they made the following averments: —

"Your orator and oratrix have but imperfect knowledge or information of the exact arrangement by which said Tayloe obtained the same, or whether he has the same in his own name or in the name of some other person, and pray that said Bocock and Tayloe and Maupin may answer and set forth how and in what manner the same was acquired and is held by them, or either of them, and also what said Tayloe and Maupin, and each of them, paid for it, and in what sort of money or currency; and your orator and oratrix state upon information and belief that the Confederate currency and bonds with which said Bocock took up his notes was furnished by said Tayloe to the amount of the purchase-money for said one hundred and ninety-six acres, and that said payment, though made in Bocock's name, was in full to the extent of the amount due for said one hundred and ninety-six acres made in part by said Tayloe.

"XVI. Your orator and oratrix charge that said Tayloe paid nothing for said land except Confederate money and bonds, which were not a valuable consideration as against your orator and oratrix, who were then minors; and they further say that said Tayloe well knew that said Bocock had paid only Confederate notes and bonds for said lands; and on information and belief they charge that he participated with said Bocock in said wrong and injury to your orator and oratrix. And your orator and oratrix show that said Maupin is the son-in-law of said Tayloe, and lives with him; that he married the daughter of said Tayloe in 1864 or 1865, and that he has no title to said land, and is not a purchaser for value, and that he acquired whatsoever rights he may have with full knowledge or notice

that nothing but Confederate notes and bonds had been paid for said land."

The prayer of the bill is as follows: —

"To the end, therefore, that an account may be taken of the amount due to your orator and oratrix, respectively, as their several portions of money arising from the sale of said one hundred and ninety-six acres of land, as heirs-at-law of said Henry Dugger, deceased, and as heirs-at-law of said John W. Dugger, deceased, and that payment of the same may be enforced against said one hundred and ninety-six acres of land, and against the rents thereof, to accrue from the filing of this bill, and that said lands may be sold therefor, and that the decree for titles to said Bocock, and the deed made thereto, may be held void, or, if not, that it may be set aside, or held to be subordinate to your orator's and oratrix's lien, and that your orator and oratrix may have such other and further relief as to your Honor may seem proper and as justice may require."

The Supreme Court of the State having affirmed the decree of the court below dismissing the bill, the case has been brought here upon a writ of error allowed by the chief justice of that court. A motion to dismiss for want of jurisdiction has been made, which now stands for hearing with the case on its merits.

The only averments in the bill that can by any possibility raise a Federal question are those which relate to the payments in the notes and bonds of the Confederate States. In *Delmas* v. *Insurance Company* (14 Wall. 661), we said distinctly that a Federal question was not necessarily involved in a case because the consideration of a contract to be enforced was Confederate money, and Mr. Justice Miller, speaking for the court, said: "When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. Like in many other questions of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other." This case was followed in *Tarver* v. *Keach*, 15 Wall. 67; *Rockhold* v. *Rockhold*, 92 U. S. 129;

New York Life Ins. Co. v. *Hendren*, id. 286; *Bank* v. *McVeigh*, 98 id. 332.

In *Thorington* v. *Smith* (8 Wall. 1), a case which came up from one of the District Courts of the United States for Alabama, the question arose whether contracts for the payment of Confederate notes made during the late rebellion, between parties residing within the Confederate States, could be enforced in the courts of the United States, and we held that they could, if made in the usual course of business, and not for the purpose of giving currency to the notes, or otherwise aiding the rebellion. The Chief Justice, in delivering the opinion of the court, said, in speaking of these notes: "As contracts in themselves, except in the contingency of successful revolution, these notes were nullities, for except in that event there could be no payer. They have, indeed, that character on their face, for they were payable only 'after a ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force." And, further on, in reference to contracts stipulating for payment in this kind of currency: "They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection." Such is now the settled rule of decision in this court. *Delmas* v. *Insurance Company*, *supra*; *Confederate Note Case*, 19 Wall. 548; *Wilmington & Weldon Railroad Co.* v. *King*, 91 U. S. 3; *Stewart* v. *Salamon*, 94 id. 434.

In *Hanauer* v. *Woodruff* (15 Wall. 439), it was held that "the war bonds issued by the secession ordinance of Arkansas, though used as a circulating medium in that State and about Memphis, did not constitute any forced currency which the people in the State and city were obliged to use," and "that they were only a circulating medium in the sense that any

negotiable money instruments, in the payment of which the community has confidence, constitute a circulating medium." For this reason we decided in that case, which came up from the Circuit Court of the United States for the Eastern District of Arkansas, that a note given in the purchase of such bonds could not be enforced in the courts of the United States. Mr. Justice Field, in delivering the opinion of the court, stated the difference between that case and *Thorington* v. *Smith* to be "the difference between submitting to a force which could not be controlled, and voluntarily aiding to create that force."

In the light of these cases it is easy to see that this bill does not necessarily involve the decision of any Federal question. There is no pretence that the parties intended, in the payments that were made, to aid the rebellion. Neither is it alleged that the first and second notes were paid in any other than the usual course of business. As to the third, the utmost that can be claimed from the allegations is, that Mrs. Dugger was forced against her will to accept the Confederate bonds and give up the note. There can be no doubt that under our decisions the payment of the first and second notes was good, if she was authorized by law to accept anything else than lawful money. About the third, the question presented was, apparently, not as to the validity of the Confederate bonds, but as to the effect of the coercion employed to get them taken. None of these are Federal questions. Neither is the further one, whether a payment good as to her would be good as to these appellants. All these questions are of a class as to which the judgment of the State court is final and not reviewable here.

The rule in relation to our jurisdiction is that it must either appear from the record in express terms that there has been a decision against the right claimed under the Constitution, laws, or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding. *Murray* v. *Charleston*, 96 U. S. 432. Here there are no averments in the bill which directly present the validity under the laws of the United States of a payment in Confederate securities, and it may fairly be inferred that the appellants relied upon an entirely different ground for the relief they asked. Such being the case, no Federal question was necessarily in-

volved in the decision that has been made. As the burden is on the appellants to show our jurisdiction, and we cannot entertain the case unless they have done so, the writ of error is

Dismissed.

EX PARTE ROWLAND.

1. The county commissioners of a county in Alabama who were required by statute to levy and assess such a special tax not exceeding one per cent upon the real and personal property as would be sufficient to meet the semi-annual interest falling due upon certain bonds of the county, discharged their duty when a valid and sufficient levy of a tax had been made, and everything done to enable the collector to proceed; and the Governor of the State was notified of the failure, if such were the case, of the collector to give bond for the collection of any taxes other than those levied for general purposes.
2. A *mandamus* will, therefore, not lie against the commissioners "to cause the tax to be collected;" and so much of the command of a writ sued out of the Circuit Court for the District of Alabama as attempted to impose that duty upon them, being in excess of the jurisdiction of the court, is void.
3. The commissioners, being adjudged to be in contempt of that command, and imprisoned therefor by order of the Circuit Court, this court, upon a writ of *habeas corpus*, directs that they be discharged.

PETITION for a writ of *habeas corpus*.

This is an application for a writ of *habeas corpus* to procure the discharge of Peter M. Rowland, D. C. Shultze, and R. C. Germany from the custody of the marshal of the United States for the Middle District of Alabama. The facts, as shown by the return to a rule to show cause heretofore made, may be stated as follows: —

On the 31st of December, 1868, the General Assembly of Alabama passed an act to authorize counties, towns, and cities to subscribe to the capital stock of railroad companies. The sections of the act material to the present case are the seventh, eighth, ninth, and twelfth. These are as follows: —

"SECT. 7. *Be it further enacted*, that the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription, are hereby authorized and required to levy and assess in the same manner as is now required by law for the collection of State and county taxes, such tax as may be neces-

sary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds: *Provided*, that in no case shall such tax exceed one per cent per annum upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers.

"SECT. 8. *Be it further enacted*, that the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby, invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax-collectors and tax-assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied.

"SECT. 9. *Be it further enacted*, that the tax assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby invested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of State and county taxes, and be bound by the same duties, and that the same pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax-list or for rendering a false list."

"SECT. 12. *Be it further enacted*, that the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all the provisions of this act, which are not inconsistent with the act itself, and the laws of the State and the United States." Pamph. Laws, 1868, pp. 516, 517.

Under the authority of this act the county of Chambers issued a series of coupon bonds to the Eufaula, Opelika, Oxford, & Guntersville Railroad Company. On the 25th of May, 1875, Dix & Co., subjects of Spain, recovered a judgment against the county in the Circuit Court of the United States for the Middle District of Alabama, for $2,040.50 and costs on account of unpaid coupons cut from these bonds. Execution was issued on this judgment, and returned "no property found," Aug. 6, 1875. On the 19th of November, 1875, an alternative writ of *mandamus* was issued from the Circuit

Court, on the petition of Dix & Co., directed "to P. M. Rowland, judge of probate of Chambers County, Alabama, and *ex-officio* judge of the court of county commissioners of said county, and J. H. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, members of said court of county commissioners," commanding them "to levy and assess, in accordance with the provisions of said act of the General Assembly, . . . such a tax upon the real and personal property in said county of Chambers as will satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is fully satisfied, with interest and costs," or show cause on the 3d of December why they ought not to be required to do so. No cause being shown against the writ, the court, on the 17th December, issued a peremptory writ with the following command: —

"Now, therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shultze, members of and composing the court of county commissioners of said county, are hereby commanded forthwith and without delay to levy and assess, and cause the collection of, in accordance with the provisions of said act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax and cause the same to be collected, as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit, and how you shall have executed this writ make known to us, to the judge of this court, at the next term of said court, on the first day of said term, to wit, on the first day of May, A. D. 1876."

On the 24th of April, 1876, the court of county commissioners, at a regular adjourned term, made the following order, which was duly recorded: —

"On the seventeenth day of December, 1875, a peremptory *mandamus* was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th of February, 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers County to levy a tax for the purpose of paying a judgment in said court in favor

of said Dix & Co. against said county, rendered at the May Term, 1875, for the sum of two thousand and forty and $\frac{50}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises to the May Term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one-fourth of one per cent, on the value of the real and personal property of Chambers County, be levied for the purpose above set forth, and that the tax-collector proceed to collect said tax as required by law."

In obedience to the command of the peremptory writ, the commissioners, on the 3d of May, made return that they had levied the tax as required, and accompanied their return with a copy of the order entered to that effect. Nothing more was done in the suit until May 23, 1881, when, on motion of Dix & Co., the return to the peremptory writ was quashed, and a rule entered on the court of county commissioners, "as well as the members thereof, to wit, P. M. Rowland, judge of probate and *ex-officio* judge of the said court of county commissioners, and to J. H. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, who were members of and together constituted said court of county commissioners" when the peremptory writ of *mandamus* was served, to appear forthwith and show cause why an attachment should not issue against them and each of them for not obeying the command of the writ. This rule was served on Rowland, Shultze, and Germany on the 29th of May. Forman and Grady had died before the rule was entered. The surviving members of the court of county commissioners made return to the rule on the 16th of July, as follows: —

"In this case a rule *nisi* having, on the twenty-fifth day of May, 1881, issued out of said court, commanding P. M. Rowland, as probate judge of Chambers Co., Ala., and *ex officio* a member of the court of county commissioners in and for said county, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, members of said court of county commissioners, to appear instanter, or as soon as duly served with said rule *nisi*, and show cause why an attachment should not issue against them and each of them for violating and disregarding the peremptory writ of *mandamus* heretofore issued and served upon them at the suit of said Dix & Co., the said P. M. Rowland, judge of probate and *ex officio* a member of

said court as aforesaid, begs leave to make the following return, and to show cause under oath as follows why he should not be attached for contempt of the said Circuit Court of the United States:

"He respectfully states that he was at the service of said peremptory writ of *mandamus*, has ever since been, and is now, judge of the court of probate in and for said county of Chambers, and as such *ex officio* a member of the court of county commissioners in and for said county, and that on the twenty-fourth day of April, 1876, the court of county commissioners of said county of Chambers, at a regular term of said court, levied a tax of one-fourth of one per cent on the assessed value of the real and personal property of the taxpayers of said county of Chambers, to pay off and discharge the judgment mentioned in the peremptory writ of *mandamus* issued and served on him and the members of said court, as aforesaid, which said levy is sufficient to pay off and discharge said judgment, together with all interest and costs of suit — the assessed value of the taxable property of said county for said year 1876 being one million six hundred and thirty-one thousand five hundred and sixty-six dollars, and the levy of one-fourth of one per cent thereon is more than sufficient to pay off and discharge the judgment, together with all interest and costs. A copy of said levy is hereto attached, marked 'Exhibit A,' and made part of this return. Affiant, said P. M. Rowland, gave notice to J. G. Weaver, the then tax-collector of said county, and requested him to collect the said one-fourth of one per cent, levied as aforesaid for the purpose aforesaid. Said J. G. Weaver, tax-collector, as aforesaid, refused to collect said taxes upon the ground that he had previously qualified under the act of the legislature of Alabama, approved on the fourth day of March, 1876, by giving a bond for the collection of the State and county taxes, for general and not for special purposes; and his successor, J. M. Driver, who is the present tax-collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes, so levied by said court as aforesaid; and that the said P. M. Rowland notified the governor of Alabama, in the manner and within the time provided by law, of the failure of each of said tax-collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all that the law authorized him to do in relation to the levy and collection of said taxes. Under the laws of Alabama, the said P. M. Rowland, as judge of probate of Chambers County and *ex officio* a member of the court

of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court, except in cases of a tie, a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment, as aforesaid. If in anything affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes, and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court. All of which is respectfully submitted.

"PETER M. ROWLAND.

"Sworn to and subscribed before me, this day of June, 1881.

"J. W. DIMMICK,

"*U. S. Com'r Mid. Dist. of Ala.*"

"R. C. Germany and D. C. Shultze show cause as follows why they should not be attached for contempt of said Circuit Court for disobedience to the peremptory writ of *mandamus* mentioned in the above return of P. M. Rowland: Wm. J. Grady and James H. Forman were members of the court of county commissioners of said county of Chambers on the twenty-fourth day of April, 1876, and on that day, in obedience to the peremptory writ of *mandamus*, mentioned in the above return of P. M. Rowland, the said Germany, Shultze, Forman, and Grady, who constituted said court of county commissioners, on said day, at a regular term of said court, levied one-fourth of one per cent upon the assessed value of the real and personal property of the taxpayers of said county of Chambers, to pay off and discharge the judgment mentioned and described in the peremptory writ of *mandamus* served on them, together with all the interest due on said judgments, and the costs of suit, and instructed the then tax-collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland; and the then tax-collector, and his successor in office, the present tax-collector of said county, have refused to collect the same, for the reasons set forth in the return of Judge P. M. Rowland, above set forth.

"Some time in the year 1878 J. H. Forman, and some time in the year 1880 Wm. J. Grady, died, and John H. Seroyer and John H. Higgins have been elected as their successors in office,

and are now members of the court of county commissioners of said county.

"Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule *nisi* in the present case.

"Affiants honestly believed that when they had levied said tax and ordered the tax-collector to collect the same, they had done all they were required to do, and until the service of the rule *nisi* they did not know they were required to do anything more; and whatever duty they may have omitted to perform, was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected. All of which is respectfully submitted.

"D. C. SHULTZE.
"R. C. GERMANY.

"Sworn to and subscribed before me, this fourteenth day of June, 1881.

"J. W. DIMMICK,
"*U. S. Com'r for said Mid. Dist. of Ala.*"

On the same day the return was filed the court made the following order: —

"The respondents then filed their respective answers to said rule, which were considered and held in all respects to be insufficient, and to furnish no excuse or exoneration for their failure to obey said writ. Said respondents, P. M. Rowland, D. C. Shultze, and R. C. Germany, are therefore adjudged to be guilty of contempt of this court in relation to said writ, but sentence is hereby suspended, and this cause continued until the next term of the court, in order that said respondents may have an opportunity by that time to pay said judgment, with interest and costs; and said respondents are each required to be and appear before this court upon the first day of the next term of this court, to wit, upon Monday, the seventh day of November, A.D. 1881, at 12 o'clock, M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises."

And on the 21st of November the following: —

"In this proceeding by attachment for contempt, all the parties this day appeared in this court, and were further heard by this

court touching the matters of contempt involved in this proceeding. And it appearing to the court that at the last term of this court, to wit, on July 16, 1881, the respondents, the said Rowland, Shultze, and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of *mandamus* duly issued out of this court theretofore to them and duly served on them, and that upon said hearing the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of *mandamus* mentioned in this proceeding for contempt and in disobeying said last-mentioned writ, but that said respondents were required to appear in this court on the first day of this term to receive such sentence as this court may deem meet to pronounce in the premises; and it is now made further to appear to this court that said respondents have not obeyed said peremptory writ of *mandamus*, nor certified any such obedience, but still continue to disobey said writ of peremptory *mandamus*, and that said respondents are guilty of said contempt in disobeying said peremptory writ of *mandamus*, and that the judgment of said Dix & Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied and of full force, and that the amount due upon said last-mentioned judgment, including the principal and lawful interest thereon and the costs up to this day, is thirty-one hundred and fifty-two dollars:

"It is, therefore, considered, ordered, and adjudged, by this court, that the said respondents, the said P. M. Rowland, D. C. Shultze, and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of *mandamus*, and the order and command of this court therein, and that for said contempt each of said respondents is here and now sentenced by this court to pay to the United States, as a fine for his said contempt, the sum of one thousand and eighty-eight dollars, and to be and to stand imprisoned in the common jail of Montgomery County, in the State of Alabama, until the said fine hereby imposed upon him, and all the costs of this proceeding for contempt, are paid; that, in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is, that said respondents pay all the costs of this proceeding, and stand imprisoned, as aforesaid, until the whole of said costs shall be paid. But the court further orders and adjudges, that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of *mandamus* issued, and also all the costs of this proceeding

and of the proceedings in which said peremptory *mandamus* issued, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court before the said fines are paid, then and in that event all further proceedings under said sentence of this court shall thereupon cease, and the said respondents shall thence be discharged from imprisonment under said sentence."

The marshal shows this order as the cause of his imprisonment of the parties named therein who are the petitioners here.

The case was argued by *Mr. John T. Morgan* and *Mr. James L. Pugh* in support of the petition, and by *Mr. Samuel F. Rice* in opposition thereto.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

The single question we have to consider on this application is, whether the order of the Circuit Court, made on the 21st of November, is sufficient authority to the marshal for the detention of the persons he holds under it; and that question, as is conceded on both sides, depends entirely on the power of that court to require the court of county commissioners to do what its members have been held to be in contempt for not doing. If the command of the peremptory writ of *mandamus* was in all respects such as the Circuit Court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 id. 371; *Ex parte Virginia*, id. 339.

It is also settled that more cannot be required of a public officer by *mandamus* than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one. In the present case the law made it the duty of the court of county commissioners to levy the tax required to pay the judgment rendered by the

Circuit Court. This levy was to be made in the same manner as was required by law for the collection of State and county taxes. Whatever, therefore, the court of county commissioners was bound to do to secure the collection of State and county taxes, the Circuit Court had jurisdiction to require it to do in respect to this special tax. Sect. 8 also made it the duty of the county commissioners to require the tax-collector to collect the tax; and for that purpose they were invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against tax-collectors and their sureties as were vested in, granted to, or imposed upon the auditor of public accounts, for the amount of taxes not assessed, collected, and paid over, or misapplied. The commissioners had no authority to collect the tax. That duty was, by sect. 9, put on the tax-collector, who was invested with all the rights and remedies and bound by all the duties he had by law for the collection of State and county taxes.

The court of county commissioners, while called a "court," is in fact the board of officers through whom the affairs of the county are managed. The duties of this board, at least so far as this case is concerned, are administrative, not judicial. The county is a body corporate, and the court its governing body. The judge of probate is, *ex officio*, a member of this body. In performing his duties in that capacity he acts not as a judge of probate, but as county commissioner. The *mandamus* went against him in this case as commissioner, not as judge. No question arises here as to the power of the courts of the United States to imprison a judge of a State court for what he does, or omits to do, in his judicial capacity. As commissioner, this probate judge was amenable to the authorized process of the courts of the United States in the same manner and to the same extent that his associates were.

The laws of Alabama provide for a tax-assessor, a court of county commissioners, a tax-collector, and a county treasurer. The services of all these officers are required in the levy, collection, and disbursement of taxes. The assessor lists the taxable property in the county, and values it for taxation. His list, when made out, constitutes the assessment; and he enters it in a book, called the assessment-book, which, when

completed, he delivers to the probate judge. It is then examined by the probate judge, the county commissioners, county treasurer, and clerk of the Circuit Court, who constitute a board of equalization, of which the probate judge is, *ex officio*, chairman. This board equalizes the assessment, and corrects any errors that may be discovered. When the equalization has been perfected and all the necessary corrections made, the chairman certifies to that effect on the assessor's book, and the assessment thus becomes the basis of taxation in the county for the current year. The court of county commissioners then levy the amount of county taxes required. The taxes thus levied are to be collected by the tax-collector, who is an independent officer, and makes his settlements with the county treasurer and not with the court of county commissioners. He is chargeable with all the taxes levied; but upon his report the commissioners may allow him credit for such as he had been unable to collect and for erroneous assessments.

The peremptory writ of *mandamus* was served on the 14th of February, 1876. The first regular meeting of the commissioners thereafter was on the second Monday in April, and at an adjourned day in that meeting the order levying the tax was made. On the 4th of March before, an act was passed by the General Assembly of Alabama (Pamph. Laws 1875–76, 93) to the effect that whenever any county of the State should be authorized by law, or required by the judgment of any court, to levy any tax for any special purpose, otherwise than the taxes authorized by the general revenue laws of the State, the tax-collector might execute separate bonds, — one for the collection of the taxes levied under the general laws, and one for the collection of taxes levied for special purposes, or in obedience to the requirements of the judgment of a court. If he should give one of the bonds and fail or refuse to give the other, it was made his duty to proceed to collect the taxes for which he gave the bond, and of the probate judge to notify the governor of his failure to give the other. The governor was then to appoint a special tax-collector for the collection of the taxes for which the regular tax-collector had failed to give bond.

The performance of the duty of the court of county commis-

sioners in respect to the levy of taxes was complete when a valid levy had been made, and all had been done which was necessary to enable the collector to proceed with the collection. The duty to collect rested entirely on the collector. He accounted for his collections to the treasurer, who alone was the custodian of the moneys of the county, and paid them out to the parties entitled thereto, on proper vouchers. If the collector failed to perform his duty, he could be compelled by *mandamus* to do what was required of him by law; but it is nowhere made the duty of the court of county commissioners to institute any such proceeding. As the duty of collection was one the tax-collector owed to the judgment creditor as well as the commissioners, we see no reason why the creditor could not himself apply for the necessary writ. If the collector made collections which he failed to pay over, he and his sureties could be proceeded against summarily for the moneys in his hands. So, too, if he failed by his own fault or neglect to make his collections, he and his sureties would undoubtedly be liable to an action on that account; but we have been referred to no statute which made it the official duty of the court of county commissioners or the auditor of public accounts to bring such an action. Under the law as it stood when the bonds sued on were issued, the auditor could obtain a summary judgment for certain penalties imposed by law upon a tax-collector for the non-performance of his duties, but it was not made his absolute duty to institute the necessary proceedings for that purpose. And, besides, the writ in this case does not require the commissioners to do any such thing.

We proceed now to the consideration of the return of the commissioners to the rule upon them to show cause why they should not be attached for disregarding the writ. Their statements in the return have not been controverted, and are consequently to be taken as true. While the return to the *mandamus* itself was quashed, the return to the rule stands in the place of a return to the writ for all the purposes of this proceeding. The command of the writ was that the commissioners levy, assess, and *cause to be collected* the necessary tax. They return that they did levy the tax and order its collection by the tax-collector. It is true that while the writ ordered the

tax to be levied on the real and personal property *in* the county, the levy as ordered was on the real and personal property *of* the county. Clearly there can be no difference between what was done and what was ordered to be done. A tax was levied, and that implies a levy on property which was in law taxable. The property belonging to the county was exempt. It was so expressly provided by law. Pamph. Laws 1868, p. 298, sect. 3; id. 1875–76, p. 44, sect. 2, par. 2. Consequently the return that a tax had been levied, which the tax-collector was directed to collect, necessarily implied that the levy was made on the taxable property in the county, and the Circuit Court could not have understood otherwise. It is, then, to be taken as a fact that the levy which was commanded was actually made, and on the proper assessment. It follows, therefore, that the fine, for the non-payment of which the commissioners are now held in custody, must have been imposed because they failed to cause the tax which was levied to be collected. The orders themselves indicate as much on their face, for in the first the sentence was delayed after the commissioners were adjudged to be in contempt, to give them time to pay the judgment; and in the second, the fine is to be remitted and the contempt purged if the judgment shall be paid.

The case, then, clearly presents itself to us a proceeding against the commissioners for contempt in not causing the tax to be collected after they had done all they were required to do to charge the tax-collector with the duty of making the collection. This we cannot but think was beyond the jurisdiction of the Circuit Court. The duty of the commissioners in respect to the collection of the tax is performed when they have done all that is necessary to authorize a qualified tax-collector to enter upon his work under the law. The original act of 1868 made it the duty of the collector of general taxes to collect the special tax as he did the others. If the act of 1876, which permitted the regularly elected collector to disqualify himself from collecting the special tax by not giving the new bond, was unconstitutional as to Dix & Co.'s coupons, which the Supreme Court of the State is reported to have decided recently in the case of *Edwards* v. *Williamson*, the judgment creditors might, by proceedings in *mandamus* against him, have

required that he make the collection, notwithstanding the change in the law; but we are referred to no statute which makes it the duty of the court of county commissioners to test that question in that way or any other. As the law stood on its face the commissioners and the probate judge had performed their duty when the governor was informed, in the proper way, of the failure of the tax-collector to give his bond for the collection of the special tax. Whatever it is within the power of the creditor to compel the tax-collector to do without the intervention of the court of commissioners, the commissioners are not required by the writ against them to do. Their whole duty in respect to the collection of the tax is performed when they have so far set the machinery of collection in motion that others are required to keep it going. Their obligations in this respect end where those of another public officer begin. They cannot be required by *mandamus* to compel another officer to do his duty, if, without their intervention, the moving party can himself accomplish the same result. It is true that, under sect. 12, general powers are conferred on the commissioners to carry out the provisions of the bonding act; but this does not change the rule of their liability to the bondholder in the particular now under consideration. The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy. As a necessary consequence the writ must issue directly against him whose duty it is to do the thing which the parties seek to have done; for, as was said in *Reg.* v. *Mayor of Derby* (2 Salk. 436), "it is absurd that the writ should be directed to one person to command another." The question here is, whether it was the duty of the tax-collector under the law to collect the special tax which the commissioners had levied. That question the creditor could have had determined in a direct proceeding against the collector, without the help of the commissioners. It follows, that if the command of the writ against the commissioners was what the Circuit Court has construed it to be, it was in excess of the jurisdiction of the court, and consequently void. If the command of the writ was in excess of jurisdic-

tion, so necessarily were the proceedings for contempt in not obeying. We are led, therefore, to the conclusion that the order of the court under which the marshal holds the petitioners in custody was a nullity, and that a writ of *habeas corpus* should issue as prayed for, unless the parties are willing that an order of discharge shall be entered without further proceedings.

It is consequently *So ordered.*

NOTE. — *Ex parte Alabama* was argued at the same time and by the same counsel as the preceding case, and the writ of *habeas corpus* prayed for was refused, as the relief thereby sought could be had under that case.

DAVIS *v.* FREDERICKS.

The court affirms the decree below, dismissing the complainant's bill, it appearing that the lands which he seeks to subject to the payment of his claim belong to the wife of his debtor, and that the purchase-money therefor was paid with funds constituting a part of her separate property.

APPEAL from the Supreme Court of the Territory of Montana.

The facts are stated in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Martin F. Morris* for the appellant.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Section 2 of the act of April 7, 1874, c. 27 (18 Stat., pt. 3, p. 27), "concerning the practice in territorial courts and appeals therefrom," is as follows: —

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: *Provided*, that

on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal."

As such appeals lie to this court only from the Supreme Court of a Territory (Rev. Stat., sect. 702), it follows that the statement, both as to facts and rulings on which we are to act, must be made directly or indirectly by that court. In *Stringfellow* v. *Cain* (99 U. S. 610), we said that where, under the practice in a Territory, a case went from the District Court to the Supreme Court on a statement of facts, and there was a general judgment of affirmance, the statement of facts made by the District Court, thus approved and enforced by the Supreme Court, would be accepted here as a "statement of facts" made by the Supreme Court under the requirements of this act. And so, too, if there was a reversal of the decree of the District Court and a different decree entered in the Supreme Court upon the facts as stated. In the present case there was no statement of facts made by the District Court. The only questions presented to the Supreme Court were those which arose on the rulings of the District Court in the admission or the rejection of evidence, and in its charge to the jury impanelled to try certain questions prepared and submitted to them. The judgment having been affirmed, Davis, the appellant, asked that a statement of facts be made by the Supreme Court and certified up with the transcript of the proceedings on an appeal. This request was complied with, and from the statement made it appears that prior to July 1, 1871, he held the title to a certain saw-mill, which on that day he conveyed by deed, with covenants of warranty, to the appellee, Sarah J. Fredericks, and William H. Drew. Afterwards, in 1872, Davis and Drew built a flouring-mill on another piece of land, which they continued to own in common until March 30, 1874, when Drew sold his half to Mrs. Fredericks for $2,000; which she

paid him in cash from her own separate funds. On the same day she sold and conveyed to Drew her half of the saw-mill, receiving in payment certain notes and securities. She subsequently began this suit against Davis to obtain a partition of the flouring-mill property. As the property was indivisible, a sale was necessary to effect the partition.

In March, 1875, Davis sued the husband of Mrs. Fredericks, and attached as his property the half of the flouring-mill standing in her name. In the partition suit, Davis insisted that she held the property in fraud of his rights as an attaching creditor of her husband, and he attempted to make proof of that fact so that he might reach by his attachment the part of the proceeds of the sale that would otherwise be set off to her. For this purpose he offered to prove that his own conveyance to her of the one-half of the saw-mill was in fraud of his own rights as a creditor of her husband. This, as appears from the statement, the Supreme Court ruled he was estopped by his deed to her from doing.

The assignments of error relate principally to the questions arising on this ruling, but we deem it unnecessary to consider them, as we agree with the court below that, in view of the other facts which have been directly found, it is wholly immaterial whether there was fraud in the saw-mill transaction or not. It is expressly stated that Mrs. Fredericks paid for the flouring-mill in cash from her own separate funds, and with this found there is nothing whatever in the case to impeach or in any manner invalidate the conveyance from Drew to her.

Decree affirmed.

UNITED STATES v. MCBRATNEY.

The Circuit Court of the United States for the District of Colorado has no jurisdiction of an indictment against a white man for the murder of a white man within the Ute Reservation in the State of Colorado.

CERTIFICATE of division of opinion from the Circuit Court of the United States for the District of Colorado.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. Thomas G. Putnam, *contra*.

MR. JUSTICE GRAY delivered the opinion of the court.

The defendant, having been indicted and convicted, in the Circuit Court of the United States for the District of Colorado, of the murder of Thomas Casey, within the boundaries of the Ute Reservation in that district, moved in arrest of judgment for want of jurisdiction of the court. The indictment does not allege that either the accused or the deceased was an Indian. The certificate of division, upon which the case has been brought to this court, states that at the trial it appeared that both were white men, and that the murder was committed in the district of Colorado, within the Ute Reservation, the said Ute Reservation lying wholly within the exterior limits of the State of Colorado; and that, upon the motion in arrest of judgment coming on to be heard before Mr. Justice Miller and Judge Hallett, their opinions were opposed upon this question: "Whether the Circuit Court of the United States sitting in and for the district of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation in said district, and within the geographical limits of the State of Colorado."

The Circuit Courts of the United States have jurisdiction of the crime of murder committed in any "place or district of country under the exclusive jurisdiction of the United States;" and, except where special provision is made, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the

United States, except the District of Columbia, shall extend to the Indian country." Rev. Stat., sect. 629, cl. 20, sect. 2145, sect. 5339, cl. 1.

By the second article of the treaty between the United States and the Ute Indians, of March 2, 1868, the United States agreed that a certain district of country therein described should be set apart for the absolute and undisturbed use and occupation of the Indians therein named, and of such other friendly tribes or individual Indians as from time to time they might be willing, with the consent of the United States, to admit among them; and that no persons, except those therein authorized so to do, and except such officers, agents, and employés of the government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle upon, or reside in the territory so described, except as otherwise provided in the treaty. The sixth article provided that, "if bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians," the United States, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs, would proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent, and notice to him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws." By the seventh article, "the President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each;" and "the United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation and the internal police thereof, as may be thought proper." 15 Stat. 619–621.

By the first section of the act of Congress of Feb. 28, 1861, c. 59, to provide a temporary government for the Territory of Colorado, all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State or Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado; and by the sixteenth section, "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States." 12 Stat. 172, 176. If this provision of the first section had remained in force after Colorado became a State, this indictment might doubtless have been maintained in the Circuit Court of the United States. *United States* v. *Rogers*, 4 How. 567; *Bates* v. *Clark*, 95 U. S. 204; *United States* v. *Ward*, 1 Woolw. 17, 21.

But the act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;" and the act contains no exception of the Ute Reservation, or of jurisdiction over it. 18 Stat., pt. 3, p. 474. The provision of section one of the subsequent act of June 26, 1876, c. 147 (19 Stat. 61), that upon the admission of the State of Colorado into the Union "the laws of the United States, not locally inapplicable, shall have the same force and effect within the State as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of the Territories of which the United States have sole and exclusive jurisdiction.

The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. *The Cherokee Tobacco*, 11 Wall. 616. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reser-

vation, it has done so by express words. *The Kansas Indians*, 5 Wall. 737; *United States* v. *Ward*, *supra*. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offences committed by white men against white men. It follows that the Circuit Court of the United States for the District of Colorado has no jurisdiction of this indictment, but, according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the State of Colorado to be dealt with according to law. *United States* v. *Cisna*, 1 McLean, 254, 265; *Coleman* v. *Tennessee*, 97 U. S. 509, 519.

The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians. The single question that we do or can decide in this case is that stated in the certificate of division of opinion, namely, whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation, and within the limits of the State of Colorado; and, for the reasons above given, that question must be

Answered in the negative.

MOORES *v.* NATIONAL BANK.

1. The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court in a case decided the other way in the Circuit Court before the decision of the State court.
2. The erroneous sustaining of a demurrer to a replication to one of several defences in the answer requires the reversal of a final judgment for the defendant, which is not clearly shown by the record to have proceeded upon other grounds.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The action was brought by Caroline A. Moores against the Citizens' National Bank of Piqua, in March, 1873. The amended petition, filed on the 11th of February, 1874, and subsequently amended by leave of court in some particulars, after a motion of the defendant to require the plaintiff to make it more specific, alleged that the defendant was a banking corporation duly incorporated under the laws of the United States in 1864, with a capital stock of one thousand shares of one hundred dollars each, of which the whole was paid in, and certificates issued to the stockholders; that on the 15th of July, 1867, G. Volney Dorsey was president and Robert B. Moores was cashier, and they were charged with the keeping of its transfer books and the issue of certificates of stock; that on that day Robert B. Moores represented himself to the plaintiff, and appeared on the books of the bank, to be the owner of more than ninety-one shares, and she purchased of him ninety-one shares, and paid him therefor the sum of $9,100 in money, and he, as cashier and stockholder, falsely and fraudulently represented to her that he had, in consideration of such purchase and payment by her, assigned and transferred the ninety-one shares to her on the books of the bank, and thereupon Dorsey as president, and Robert B. Moores as cashier, signed and issued to her a certificate therefor in the usual form, that the plaintiff believed and relied upon the representations of Robert B. Moores, as cashier and stockholder, that the stock had been duly transferred by him to her on the books of the bank, and that the certificate was duly issued and was valid; that she was recognized as a stockholder for that amount of stock until

on or after the 1st of January, 1873, when she first learned that the defendant disputed the validity of the certificate, denied that any transfer had been made to her upon its books, and refused to recognize her as a stockholder; that after the issue of the certificate to her the defendant fraudulently permitted and procured Robert B. Moores to make on its books transfers of all the stock owned by him, or standing in his name, to Dorsey, its president, for its benefit, and refused, and still refuses, to recognize the plaintiff as owner of the stock, or to recognize the validity of the certificate; that the facts that no transfer had been made to the plaintiff on the books of the bank at the time of the issue and delivery of the certificate to her, that the certificate was not authorized by the bank or recognized by it as valid, and that the stock standing in the name of Robert B. Moores had been transferred on the books to its president, were fraudulently concealed by the defendant, through its cashier, Robert B. Moores, and she was aware of no circumstances calling for inquiry on her part until after the 1st of January, 1873; that, by reason of the fraudulent conduct and acts aforesaid of the defendant, the certificate was invalid and worthless in her hands, and she had lost the sum of $9,100 paid by her therefor; and that the defendant had been requested by the plaintiff to repay or reimburse that sum to her, or to recognize the validity of the certificate, and had refused so to do.

The defendant filed an answer, setting up three grounds of defence: 1st, Averring that the plaintiff's alleged cause of action did not accrue within four years next preceding the commencement of the action; and denying that the plaintiff was ignorant of the facts set forth in her petition, if they existed, or of facts which called upon her to inquire as to the validity of the certificate, until the 1st of January, 1873, or any other date after the 15th of July, 1867. 2d, Averring that, pursuant to an agreement made by the plaintiff and her husband with Robert B. Moores and William B. Moores on the 15th of July, 1867, which the defendant had no knowledge of, interest in, or connection with, the sum of $9,100 had been repaid to the plaintiff by William for the paper purporting to be a certificate of stock, and Robert had thereby become en-

titled to take up the same. 3d, Averring that the paper purporting to be a certificate of stock was executed and delivered by Robert to the plaintiff, in violation of his duty, and without the knowledge or consent of Dorsey or any other officer of the defendant; that, according to the defendant's rules and usages, no one could procure a certificate of stock without the contemporaneous surrender of a certificate for an equal amount for cancellation; and that before the 15th of July, 1867, all the shares previously held by Robert had been transferred by him, and on the books of the bank, to other persons.

The plaintiff replied, alleging, as to the first ground of defence, *first*, that at and before the 15th of July, 1867, and ever since, she was a married woman; and, *second*, that the cause of action did accrue within four years; and, as to the second ground of defence, denying the agreement and payment therein alleged; and demurred to the third ground of defence. And the defendant demurred to both the replies, for the reason that they did not constitute good replies to the first ground of defence.

The court ordered that the defendant's demurrer to the plaintiff's first reply to the first ground of defence be sustained, to which the plaintiff excepted; ordered that the defendant's demurrer to the plaintiff's second reply to the first ground of defence be overruled, to which the defendant excepted; ordered that the plaintiff's demurrer to the third ground of defence be sustained, to which the defendant also excepted; and gave the parties leave to plead within thirty days, which did not appear to have been availed of.

The defendant afterwards, by leave of court, in lieu of the third ground of defence, filed an amendment of the answer, denying that Dorsey had any connection with the transaction alleged in the petition, or that he issued to the plaintiff the certificate therein set forth, or that Robert B. Moores, as its cashier, or in his official capacity, issued the certificate to her, or that he held any certificate of stock in the bank on the 15th of July, 1867, or at any time thereafter; alleging that, according to its rules and usages, no one was entitled to receive a certificate of ownership of shares without the surrender of a certificate of corresponding amount for cancellation, all of

which was well known to the plaintiff; and denying generally all allegations of fraud or negligence contained in the petition. And it was ordered by the court that "the default herein" (of which there was no previous mention in the record) be set aside, and the plaintiff have leave to reply; and she did reply, joining issue on the denials and denying the allegations of the amended answer.

The record stated that the parties afterwards, by their attorneys, filed a written stipulation waiving a jury, and "submitted the case to the court upon the issue joined. On consideration whereof the court find the issues to be in favor of the defendant, to which finding the plaintiff by her attorneys excepts." The bill of exceptions presented by the plaintiff, and allowed by the judge presiding at the trial, stated that the case was submitted to the court upon all the evidence (which was in writing and annexed to the bill), and "thereupon the court found for the defendant, to which the plaintiff excepted."

The Civil Code of Ohio of 1853, in the chapter concerning the limitation of personal actions, provided that the following actions should be brought within four years next after the cause of action shall have accrued, namely, "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated;" and "an action for relief on the ground of fraud; the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud" (sects. 12, 15); and that "if a person entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed" (sect. 19); and, in the chapter concerning parties to civil actions, provided that "where a married woman is a party, her husband must be joined with her; except, when the action concerns her separate property, she may sue without her husband, by her next friend; when the action is between herself and her husband, she may sue or be sued alone; but in every such action other than for a divorce or alimony, she shall prosecute and defend

by her next friend." Sect. 28. 2 Rev. Stat. of Ohio (Swan & Critchfield's ed.), 947, 949, 953. The section last cited has been amended by the act of April 15, 1870, sect. 1, by providing that in actions concerning her separate property she may sue and be sued alone, and shall in no case be required to promote or defend by her next friend. 67 Ohio Laws, 111.

The case was argued by *Mr. Edward W. Kittredge* and *Mr. Alonzo Taft* for the plaintiff in error, and by *Mr. William M. Ramsey* for the defendant in error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The principal embarrassment in this case arises from the difficulty of ascertaining from the prolix and obscure record what was actually decided in the court below.

The decision of that court sustaining the demurrer to the plaintiff's first reply to the first ground of defence was based upon the position that the exception in the statute of limitations of Ohio in favor of a married woman was repealed by the statute of 1870, by which it was enacted that a married woman might sue alone in actions concerning her separate property. That decision was in accordance with an opinion of the majority of the Superior Court of Cincinnati in *Ong* v. *Sumner*, 1 Cincinnati Superior Court, 424, which appears to have been the only decision upon the question in the courts of Ohio at the time of the trial of the present case in the Circuit Court. But in *Lawrence Railroad* v. *Cobb* (35 Ohio St. 94), the Supreme Court of Ohio has since adjudged that, even if the statute of 1870 withdrew the protection of coverture (a point which it did not decide), yet the action of a married woman was not barred until four years after the passage of this statute; and the construction thus given to the statute by the highest court of the State should be followed by this court. *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137; *Kibbe* v. *Ditto*, 93 U. S. 674; *Fairfield* v. *County of Gallatin*, 100 id. 47.

It follows that the order sustaining the demurrer to the plaintiff's first reply was erroneous, and that the judgment

below in favor of the defendant must be reversed, unless it clearly appears that the plaintiff was not prejudiced by the error. *Deery* v. *Cray*, 5 Wall. 795; *Knox County Bank* v. *Lloyd*, 18 Ohio St. 353.

To the first ground of defence stated in the answer, namely, that the cause of action did not accrue within four years, the plaintiff had made two replies: the first, in the nature of confession and avoidance, that she was a married woman; the second, in the nature of a traverse, that the action did accrue within four years. This allegation of fact in the second reply cannot affect the issue of law raised by the defendant's demurrer to the first reply. After that demurrer had been sustained, the case, as was assumed and contended by the learned counsel for the defendant at the argument, presented three issues: *First*, Whether the cause of action accrued within four years. *Second*, Whether there had been a payment, as alleged in the second ground of offence. *Third*, Upon the third ground of defence, which included a general denial of all the material allegations in the petition.

A verdict of a jury, or, where a trial by jury is waived, a finding by the court, upon any one of these issues, would be sufficient to sustain a general finding for the defendant, and would render the other issues of fact immaterial. The bill of exceptions merely states generally that "the court found for the defendant;" and the statement in the record, that under a submission "upon the issue joined" the court found "the issues" to be in favor of the defendant, is too ambiguous to enlarge the effect of the general finding as stated in the bill of exceptions.

The sustaining of the demurrer to the plaintiff's first reply deprived her of the right to insist upon the ground of action, which was open under the petition, that the defendant, more than four years before the action was brought, permitted and procured the transfer upon its books to other persons of shares of which the plaintiff held the certificate (*Bank* v. *Lanier*, 11 Wall. 369; *Telegraph Company* v. *Davenport*, 97 U. S. 369); and limited her, so far as regarded the first ground of defence, to proof of a cause of action accruing within the four years. The general finding in favor of the defendant may have pro-

ceeded solely upon that ground of defence, without touching the second and third grounds.

The defendant therefore fails to show that the error in sustaining its demurrer did not prejudice the plaintiff, and consequently the judgment must be reversed and a

New trial ordered.

MR. JUSTICE MATTHEWS did not sit in this case.

HOPT v. PEOPLE.

1. Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.
2. Under a statute which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. John R. McBride and *Mr. J. G. Sutherland* for the plaintiff in error.

The Solicitor-General, contra.

MR. JUSTICE GRAY delivered the opinion of the court.

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, — is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Sect. 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Sect. 90. Compiled Laws of Utah of 1876, pp. 585, 586.

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally" (sect. 257, cl. 7); the jury, upon retiring for deliberation, may take with them the written instructions given (sect. 289); and "when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." Sect. 315. Laws of Utah of 1878, pp. 115, 121, 126.

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was indorsed "refused" by the judge, was as follows: "Drunken-

ness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offence depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, sect. 315, above quoted, their correctness is clearly open to consideration in this court. *Young* v. *Martin*, 8 Wall. 354.

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. *United States* v. *Drew*, 5 Mas. 28; *United States* v. *McGlue*, 1 Curt. 1; *Commonwealth* v. *Hawkins*, 3 Gray (Mass.), 463; *People* v. *Rogers*, 18

N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points (*Commonwealth* v. *Dorsey*, 103 Mass. 412); and in well-considered cases in courts of other States. *Pirtle* v. *State*, 9 Humph. (Tenn.) 663; *Haile* v. *State*, 11 id. 154; *Kelly* v. *Commonwealth*, 1 Grant (Pa.), Cas. 484; *Keenan* v. *Commonwealth*, 44 Pa. St. 55; *Jones* v. *Commonwealth*, 75 id. 403; *People* v. *Belencia*, 21 Cal. 544; *People* v. *Williams*, 43 id. 344; *State* v. *Johnson*, 40 Conn. 136, and 41 id. 584; *Pigman* v. *State of Ohio*, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, sect. 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.

The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice of such importance that it is proper to express an opinion upon it, in order to prevent a repetition of the error upon another trial.

By the provisions of the Utah Code of Criminal Procedure, already referred to, the charge of the judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written

charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. *Feriter* v. *State*, 33 Ind. 283; *State of Missouri* v. *Cooper*, 45 Mo. 64; *People* v. *Sanford*, 43 Cal. 29; *Gile* v. *People*, 1 Col. 60; *State* v. *Potter*, 15 Kan. 302.

The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed.

This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. *Merrill* v. *Nary*, 10 Allen (Mass.), 416.

For these reasons, the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a

New trial.

SMELTING COMPANY *v.* KEMP.

1. A patent, duly signed, countersigned, and sealed, for public lands which, at the time it was issued, the Land Department had, under the statute, authority to convey cannot be collaterally impeached in an action at law; and the finding of the department touching the existence of certain facts, or the performance of certain antecedent acts, upon which the lawful exercise of that authority may in a particular case depend, cannot in a court of law be questioned.
2. If in the issuing of a patent the officers of that department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from either imperfect views of duty or corrupt motives, the party aggrieved cannot set up such matters in a court of law to defeat the patent. He must resort to a court of equity, where he can obtain relief, if his rights are injuriously affected by the existence of the patent, and he possesses such equities as will control the legal title vested in the patentee. A stranger to the title cannot complain of the act of the government in regard thereto.
3. A defendant in ejectment claimed adversely to the title to a placer mining claim, derived from a patent of the United States bearing date March 29, 1879, which describes, by metes and bounds, the premises, containing one hundred and sixty-four acres and sixty one-hundredths of an acre, more or less. *Held*, that he cannot put in evidence the proceedings in the Land Department for the purpose of showing that the patent was issued upon a single application, including several mining locations, some made after the passage of the act of July 9, 1870, c. 235 (16 Stat. 217), limiting the location of one person or an association of persons to one hundred and sixty acres, and others made after the passage of the act of May 10, 1872, c. 152 (17 id. 91), limiting a location to twenty acres for each individual applicant.
4. A patent issued subsequently to the passage of the said act of 1870 may embrace a placer mining claim consisting of more than one hundred and sixty acres, and including as many adjoining locations as the patentee had purchased. The proceedings to obtain a patent therefor are the same as when the claim covers but one location.
5. The terms "location" and "mining claim" defined.
6. Labor and improvements, within the meaning of the statute, are deemed to have been put on a mining claim, whether it consists of one or more locations, when the labor was performed or the improvements were made for its development, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, or may be at a distance from the claim.

ERROR to the Circuit Court of the United States for the District of Colorado.

This was an action at law brought in one of the courts of Colorado by the St. Louis Smelting and Refining Company, a corporation created under the laws of Missouri, for the possession of a parcel of land in the city of Leadville. On appli-

cation of the defendants it was removed to the Circuit Court of the United States. The complaint is in the usual form of actions for the possession of real property under the practice obtaining in Colorado. It alleges that the plaintiff was duly incorporated, with power to purchase and hold real estate; that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them, to the damage of the plaintiff of $5,000.

The defendants filed an answer admitting that the plaintiff was incorporated as averred, but denying that it was the owner in fee of the demanded premises, or that they were wrongfully detained from its possession, or that it had sustained any damage. The answer also alleged that the plaintiff, as a foreign corporation, was incompetent to acquire title to any real estate in Colorado, except such as might be necessary for the transaction of its business as a smelting and refining company, and that the premises in controversy were not necessary for that purpose, but were acquired for speculation.

The plaintiff filed a replication, denying its incompetency to hold real estate as alleged, and averring that it was authorized, under the laws of Missouri, to buy, sell, and deal in real estate for any purpose whatever; that the property in controversy was acquired as a site for smelting and reduction works, and that such works were afterwards erected upon it and used for reducing and smelting silver ores.

The case was tried in November, 1879. To maintain the issues on its part the plaintiff offered in evidence a patent of the United States to Thomas Starr, dated March 29, 1879, for mining ground, which, it was admitted, included the premises in controversy. The patent recited that pursuant to provisions of chapter six of title thirty-two of the Revised Statutes, there had been deposited in the General Land-Office the plat and field-notes of the placer mining claim of Thomas Starr, the patentee, accompanied by a certificate of the register of the land-office at Fairplay, Colorado, within which district the premises are situated; that Starr had, on the 6th of March, 1879, entered an application for the said claim, which contained one hundred and sixty-four acres of land and sixty-one hundredths of an acre, more or less. The patent also specified the boun-

daries of the tract according to the field-notes, and contained the recitals and words of grant and transfer usually inserted in patents for placer mining land. To the introduction of this patent the defendants objected; but the record does not state on what grounds the objection was founded, and it was overruled. The patent was accordingly admitted in evidence. The plaintiff traced title to the land by sundry mesne conveyances from the patentee. It also introduced the certificate of the register of the same land-office, showing that the application of Starr at that office to enter and pay for his claim was made on the 18th of March, 1878; also a copy of the articles of incorporation of the plaintiff, and of the laws of Missouri under which the incorporation was had; and proved that, in 1877, prior to the existence of the town of Leadville, the company purchased of the claimant the tract embraced in the patent, for the purpose of erecting reduction works thereon, and that at the time of the purchase and when it commenced the construction of the works the land was unoccupied by other parties.

The plaintiff having rested its case, the defendants offered in evidence a certified copy of the record of proceedings in the General Land-Office at Washington, upon which Starr obtained his patent; to the introduction of which the plaintiff objected, on the ground that it could only show or tend to show the regularity or irregularity of the proceedings before the executive department in obtaining the patent, or the validity or invalidity of the possessory title or pre-emption right upon which the patent was founded, and that no evidence could be introduced to impeach the patent or attack it collaterally, or in any way affect it in this action. But the court overruled the objection and admitted the record. To this ruling an exception was taken.

The case being closed, the court instructed the jury substantially as follows: That a patent for a mining claim, since the passage of the act of Congress of 1870, could not embrace more than one hundred and sixty acres; that individuals and associations were, by that act, put upon the same footing, and that either might take that amount, but that by the mining act of Congress of 1872 an individual claimant was limited to twenty acres, whilst an association of persons could still take

one hundred and sixty, as before; that the proceedings in the land-office were allowed in evidence, in order to show whether the patent was issued upon locations made prior to 1870, and that they showed that the claim of Starr was based upon twelve or fifteen locations, some of which were prior to 1870, and some since then; and added, that "if Mr. Starr was the owner of these claims, if he had obtained them by purchase, and they were valid and regular locations, he would, under the act, be required, if he desired to obtain a patent for them, to make application for each one of them, to post the notice, as required by the statute, and give the publication, and file his plat and survey, and do all these things which are required in the several claims upon each one of them. If he had done so, and his right had been supported as to all of them, and the patent had been issued for all of these claims, and each of them described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim embracing one hundred and sixty-four acres;" and that the officers of the Land Department had no authority in law to proceed in that way, and, therefore, the patent upon which the plaintiff relied was void and its title failed.

To the instructions given exceptions were taken. The jury thereupon found for the defendants, and judgment in their favor was accordingly entered. To review this judgment the plaintiff removed the case here by writ of error.

The case was argued by *Mr. J. H. McGowan* and *Mr. Walter H. Smith* for the plaintiff in error, and by *Mr. Fletcher P. Cuppy* and *Mr. Thomas A. Green* for the defendants in error.

Mr. Allen G. Thurman, on behalf of certain interested parties, was heard by the court, in opposition to the judgment below.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows: —

As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds: 1st, Error in

admitting the record of the proceedings of the land-office to impeach the validity of the patent to Starr issued upon them; 2d, Error in instructing the jury that a patent for a placer claim, since the act of 1870, could not embrace in any case more than one hundred and sixty acres; and, 3d, Error in instructing the jury that the owner, by purchase of several claims, must take separate proceedings upon each one, in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land-officers, to allow such application and to issue a patent thereon.

We are of opinion that these several grounds are well taken, and that in each particular mentioned the court below erred.

The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public

lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. *Moore* v. *Wilkinson*, 13 Cal. 478; *Beard* v. *Federy*, 3 Wall. 478, 492.

Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

These views are not new in this court; they have been, either in express terms or in substance, affirmed in repeated instances. One of the earliest cases on the subject was that of *Polk's Lessee* v. *Wendell*, reported in 9th Cranch, where the doctrine we have stated was declared, and the exceptions to it mentioned. There the plaintiff brought an action upon a patent of North Carolina, issued in 1800, for five thousand acres. The defendants relied upon a prior patent of the State for twenty-five thousand acres, issued in 1795 to one Sevier, through whom they claimed. Each patent embraced the lands in controversy, and they were situated in that portion of Tennessee ceded to the United States by North Carolina. On the trial it was contended that the elder patent was void on its face because it covered more than five thousand acres, the limit prescribed for a single entry by the laws of that State. Proof was also offered that the lands had not been entered in the office of the entry-taker of the proper county before their cession to the United States, and it was contended that the patent was therefore invalid. We shall hereafter refer to what the court said as to the alleged excess of quantity in the patent. At present we shall only notice the general doctrine declared as to the unassailability of patents in a court of law, and its decision upon the admissibility of the proof offered. It seems that a statute of 1777 directed the appointment in each county of an officer called an entry-taker, who was required to receive entries of all vacant lands in his county, and, if the lands thus entered were not within three months claimed by some other party than the person entering them, to deliver to such person a copy of the entry, with its proper number, and an order to the county surveyor to survey the land. This order was called a warrant. Upon it and the survey which followed a patent was issued. If there were no entry, there could be no warrant, and of course no valid patent. The ninth section declared that every right claimed by any person to lands which were not acquired in this mode, or by purchase or inheritance from parties who did so acquire them, or which were obtained in fraud or evasion of the provisions of the act, should be declared void. In 1779 North Carolina ceded to the United States the territory in which the lands lie for which the patent to Sevier

was issued, reserving, however, to the State all existing rights, which were to be perfected according to its laws. The cession was accepted by Congress. The survey, upon which the patent to Sevier was issued, was made in 1795, and the plaintiff, to impeach the patent, offered, as already stated, to show that there had been no entry of the land in the office of the entry-taker of the county where it was situated, previous to the cession; that is, in substance, that the grantor had no authority to make the grant, the land having been previously conveyed to the United States. This offer was disallowed by the court below, and as judgment passed for the defendants, the case was brought to this court, where, as mentioned, the general doctrine as to the presumptions attending a patent, which we have stated, was declared, with the exceptions to it. Upon the general doctrine the court observed, speaking through Mr. Chief Justice Marshall, that the laws for the sale of the public lands provided many guards to secure the regularity of grants and to protect the incipient rights of individuals and of the State from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty; that these rules were in general directory, and when all the proceedings were completed by a patent issued by the authority of the State, a compliance with those rules was presupposed, and that "every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself." "It would, therefore, be extremely unreasonable," said the court, "to avoid the grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of the title from its commencement to its consummation in a patent;" but there were some things so essential to the validity of a contract, that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title was acquired might be examined, and that a court of equity was a tribunal better adapted to this object than a court of law; and it added that "there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the

officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." So the court held that proof that no entry had been made in the office of the entry-taker in the county where the lands patented were situated, prior to the cession to the United States, was admissible under the ninth section; for without such entry they would not be within the reservation mentioned in the act of cession. In other words, proof was admissible to show that the State had not retained control over the property, but had conveyed it to the United States.

In *Patterson* v. *Winn*, reported in 11th Wheaton, this case is cited, and, after stating what it decided, the court said: "We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a court of law in an action of ejectment, *but in general other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.*"

The doctrine declared in these cases as to the presumptions attending a patent has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.

With these explanations of the exceptions, the doctrine of the cases cited may be taken as expressing the law accepted by this court since they were decided. *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Boardman* v. *Lessee of Reed*, 6 Pet. 328; *Bagnell* v. *Broderick*, 13 id. 436; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530.

In *Johnson* v. *Towsley* the court had occasion to consider under what circumstances the action of the Land Department in issuing patents was final, and after observing that it had found no support for the proposition offered in that case by counsel upon certain provisions of a statute, said, speaking by Mr. Justice Miller, that the argument for the finality of such action was "much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others." "That the action of the land-office," the court added, "in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted under the circumstances under which it was obtained;" and then observed, that there exists in the courts of equity the power to correct mistakes and relieve against frauds and impositions; and that in cases where it was clear that the officers of the Land Department had by a mistake of the law given to

one man the land which, on the undisputed facts, belonged to another, to give proper relief. The doctrine thus stated was approved in the subsequent case of *Moore* v. *Robbins*.

The general doctrine declared may be stated in a different form, thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in *Minter* v. *Crommelin*, reported in 18th Howard, where it appeared that an act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the Land Department unless specifically directed by the Secretary of the Treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the court said: "The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent; and one of the necessary steps here being an order from the Secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell* v. *Broderick* (13 Pet. 436), and is not open to controversy anywhere, and the State court was mistaken in holding otherwise."

On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is

the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.

According to the doctrine thus expressed and the cases cited in its support, — and there are none in conflict with it, — there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs* v. *Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation.

This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and therefore passes the title. Such evidence in no way trenches upon the ruling of the department upon matters pending before it. Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in

North Carolina, mentioned in *Polk's Lessee* v. *Wendell*, declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such anterior matters and others of like character, no one in a court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded.

The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the Land Department supervised the proceedings. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing; it is properly countersigned, and the seal of the General Land-Office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion that a patent cannot issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words "*more or less*," accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the acts of Congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding "location" and "mining claim," as though the two terms always represent the same thing, whereas they

often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act. Rev. Stat., sect. 2324. The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally appropriated. So, now, if the miner has only the ground covered by one location, "his mining claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor,—that is, the ground which his neighbor has taken up,—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners and the meaning they attach to the term.

Previously to the act of July 9, 1870, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold-seekers into that Territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up, in other words, mining claims be located and their continued possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privi-

lege. The extent of ground which each might locate, that is, appropriate to himself, was limited so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit drove great numbers of the miners to seek other means of livelihood and fortune, and they therefore disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claims by an equally good title. Their transferable character was always recognized by the local courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locations, and the amount which each person or an association of persons might acquire and hold was only limited by his or their means of purchase.

The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not to any great extent been interfered with by legislation, either state or national. In the first mining statute, passed July 9, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the States and Territories in which mines of gold and silver were found. That act declared, and the declaration was repeated in a subsequent statute, that the mineral lands of the public domain were free and open to occupation and exploration by all citizens of the United States, and by those who had declared their intention to become such, subject to such regulations as might be prescribed by law, and subject, also, "to the local customs or rules of miners of the several mining districts," so far as the same were not in conflict with the laws of the United States. It authorized the issue of patents for claims on veins or lodes of quartz or other "rock in place" bearing gold, silver, cinnabar, or copper. Placer claims first became the subject of regulation by the mining act of July 9, 1870, c. 235 (16 Stat. 217), which provided that patents for them might be issued under like cir-

cumstances and conditions as for vein or lode claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The mining act of May 10, 1872, c. 152 (17 id. 91), declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are re-enacted in the Revised Statutes. Sects. 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Sect. 13 of the act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the Statute of Limitations of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Sect. 5 of the act of 1872, rendering a mining claim subject to relocation where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, "*their heirs, assigns, or legal representatives*, have not resumed work upon the claim after such failure and before such location." These provisions are of themselves conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to it that the derivative right by purchase or assignment is mentioned. Rev. Stat., sects. 2332, 2334.

In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by

different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the government a fee of five dollars an acre, a sum that would not be increased if a separate patent were issued for each location.

The decision of this court upon one point in the case of *Polk's Lessees* v. *Wendell*, already cited, is directly applicable here. The patent to the defendants in that case was for twenty-five thousand acres of land, and one of the objections taken was that it was void because the statute of North Carolina limited an entry of one person to five thousand acres. But the statute declared that where two or more persons had entered, or should afterwards enter, lands jointly, or where two or more persons agreed to have their entries surveyed jointly in one or more surveys, the surveyor should survey the same accordingly in one entire survey. It was contended that as the statute provided for entries made by two or more persons it could not be extended to the case of distinct entries belonging to the same person. To this the court replied as follows: "For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries, *adjoining each other*, in one survey. It appears to the court that the case comes completely within the spirit, and is not opposed by the letter, of the law. The case provided for is 'where two or more persons agree to have their entries surveyed jointly,' &c. Now this does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or severally, at his election. The court is of opinion that, under a sound construction of this law, entries, which might be joined in one survey, if remaining the property of two or more persons, may be joined, though they become the property of a single person." The objection

to the patent by reason of its embracing over five thousand acres was accordingly overruled.

By a provision of the mining act of 1870, still in force, two or more persons, or association of persons, having contiguous claims *of any size*, are allowed to make a joint entry thereof. Rev. Stat., sect. 2330. If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry as when they were held by the original parties. To quote the language of the case cited, "No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries adjoining each other in one survey."

The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land-officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is sought, and the expenses attendant upon the proceeding are in many instances very great. To lessen these as much as possible the practice has been common for miners to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed — indeed, from the earliest period in which mining for gold and silver was pursued as a business — miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original loca-

tions, into one, for convenience and economy in working them. It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the department, and its propriety has never before been questioned. Patents, we are informed, for mining ground of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the positions assumed by the defendants could be sustained.

It was urged on the argument that a patent for each location was required to prevent a monopoly of mining ground, — to prevent, to use the language of counsel, the public domain from being "monopolized by speculators." The law limiting the extent of mining lands which an individual may locate has provided, so far as it was deemed wise, against an accumulation of them in one person's hands. It could not have prohibited the sale of the location of an individual without imposing a restriction injurious to his interests, and in many instances destructive of the whole value of his claim. Every one, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances, by means of canals, flumes, and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth, and flumes constructed to carry away the débris of the mine. Indeed, successful mining, whether on lode claims or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

There is no force in the suggestion that a separate patent for each location is necessary to insure the required expenditure of labor upon it. The statute of 1872 provides that on each claim subsequently located, until a patent is issued for it,

there shall be annually expended in labor or improvements one hundred dollars; and on claims previously located an annual expenditure of ten dollars for each one hundred feet in length along the vein; but where such claims are held "in common," the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the débris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations; and yet that is seriously argued by counsel, and must be maintained to uphold the judgment below.

The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By sects. 6 and 7 of the act of 1872, which constitute sects. 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow is prescribed: —

1st, The party must file an application in the proper land-office under oath, showing a compliance with the law, together with a plat and the field-notes of the claim, or "claims in common," made by or under the direction of the Surveyor-General

of the United States, showing the boundaries of the claim or claims, which must be distinctly marked by monuments on the ground.

2d, Previously, however, to the filing of the application, the claimant must post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced in it, and file an affidavit of at least two persons that such notice has been duly posted with a copy of the notice in the land-office.

3d, When such application, plat, field-notes, notice, and affidavits have been filed, the register of the land-office is required to publish a notice of the application for the period of sixty days, in a newspaper, to be designated by him, nearest to the claim, and post such notice in his office for the same period.

4th, The claimant, at the time of filing his application, or at any time thereafter within sixty days, is required to file with the register a certificate of the United States Surveyor-General, that five hundred dollars' worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors; that the plat is correct, with such further description, by reference to natural objects or permanent monuments, as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

5th, At the expiration of sixty days the claimant is required to file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land-office within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists.

6th, The statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon the oath of the party making it, and must show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of the notice and the making and filing of the affidavit, shall be thereupon stayed until the controversy shall have been settled by a decision of a court of competent jurisdiction, or the adverse claim waived. And it

is made the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so is to be deemed a waiver of his adverse claim. After judgment has been rendered in such proceedings, the party entitled to the possession of the claim, or any portion of it, may file a certified copy of the judgment-roll with the register of the land-office, together with a certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases; and must pay to the receiver five dollars an acre for his claim, together with the proper fees; and then the whole proceedings and the judgment-roll are to be certified by the register to the Commissioner of the General Land-Office, and a patent thereupon issued for the claim, or such portion thereof as the applicant, by the decision of the court, shall appear to be entitled to.

It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons, in cases where a patent for such ground is relied upon, to maintain the doctrine which we have declared, that it cannot be assailed in a collateral proceeding, than in the case of a patent for agricultural land.

But it is unnecessary to pursue the subject further. The judgment of the court below must be reversed and the cause remanded for a new trial; and it is

So ordered.

MR. JUSTICE MILLER and MR. JUSTICE HARLAN dissented.

NOTE. — *Smelting Company* v. *Ray*, error to the Circuit Court of the United States for the District of Colorado, was argued at the same time as the preceding case, and by the same counsel for the plaintiff in error, and by *Mr. Thomas M. Patterson* for the defendants in error.

MR. JUSTICE FIELD remarked that, as it presented the same questions there determined, the judgment of the court below must be reversed and the cause remanded for a new trial.

MR. JUSTICE MILLER and MR. JUSTICE HARLAN dissented.

ST. LOUIS *v.* KNAPP COMPANY.

Where the city of St. Louis filed its bill to enjoin the defendant from completing on his premises within the city a work then in the course of construction, whereby the Mississippi River would be divided from its natural course, and a deposit created rendering it impossible for boats and vessels to land at the city's wharf north or south of the premises, — *Held,* that it is not necessary that the bill should relate all the minute circumstances which may be proved to establish its general allegations, and that the defendant should be required to answer it.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The city of St. Louis commenced this suit by petition filed in a State court. The suit, upon the application of the defendant, the Knapp, Stout, & Co. Company, a corporation created by the laws of Wisconsin, was removed into the Circuit Court of the United States. The defendant, treating the petition as a bill in equity, filed a demurrer, which was sustained. The bill was dismissed, and the city appealed. The record, therefore, presents the question, whether the city, upon the showing made, is entitled to the relief asked.

The case, as made by the bill, is this: Since the year 1822 the city has been, as it still is, a municipal corporation. It has for its eastern boundary the middle of the main channel of the Mississippi River, and is the proprietor of the bed of that river within the city limits. By its charter it is authorized to construct all needful improvements in the harbor; control, guide, or deflect the current of the river; erect, repair, and regulate public wharves and docks; regulate the stationing, anchoring, and mooring of vessels and wharf-boats within the city; charge and collect wharfage; and set aside and lease portions of the improved wharf. By an ordinance to establish and open the wharf from Biddle Street to the northern, and from Hazel Street to the southern, boundary of the city, the lines of the wharf were laid down and established upon a certain piece of real estate fronting the river, and the southern boundary of which is about 320 feet north of the north line of Bremen Avenue, produced to the river. The defendant is

engaged in the business of manufacturing and selling lumber, and is erecting a saw-mill upon the premises just described.

For the purpose of hauling saw-logs from the river, the defendant is constructing a run-way, extending from the mill into the river, a distance of about one hundred feet eastwardly from its western bank. It is also driving piles in the bed of the river east of the eastern boundary of its premises, and east of the eastern line of the wharf, as established by the city. Portions of the wharf, established by the ordinance, to the north and to the south of defendant's premises, and improved and completed by the city, are used for landing boats and vessels engaged in navigation.

After averring, in substance, these facts, the bill proceeds: "That the effect of driving the piles in the bed of the river and constructing the run-way as aforesaid, as proposed and intended by defendant, will be to divert the navigable water of the Mississippi River from its natural course and throw it east of its natural location, and from along the river bank north and south of said run-way and piling, and create, in front of and upon plaintiff's improved wharf as aforesaid, a deposit of mud and sediment, so that it will be impossible for boats and vessels engaged in navigating the Mississippi River to approach or land at the improved wharf north and south of defendant's premises."

The formal allegation is then made that the act of defendant, in building the proposed run-way and driving piles east of the western water's edge and in the bed of the river, is a legal wrong for which no adequate remedy can be afforded by an action for damages, and will be a substantial impairment of, and obstruction to, the navigation of the river.

The prayer of the complaint is that the defendant, its agents and servants, be forever enjoined from driving piles and constructing its run-ways east of the western water's edge in front of its premises; that it be required to remove the piles already driven, and the run-way so far as constructed; and that the city have such other and further relief in the premises as may be proper.

Mr. Leverett Bell for the appellant.

Mr. J. M. Krum and *Mr. C. H. Krum* for the appellee.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

Upon the hearing of the demurrer two questions were considered by the court: *First*, whether the bill, upon its face, shows that the construction of the run-way will intrude upon the city's rights and cause special damage; *second*, whether, upon its allegations and in advance of the construction of the work, a decree to prevent its completion should be rendered in favor of the city.

The court, in disposing of the demurrer, waived a final decision of the first question, expressing, however, some doubt whether the case was within the general rule that a suit in equity to enjoin or abate a public nuisance must be brought by one who has sustained, or is in danger of sustaining, individual special damages, apart from those suffered by the community at large.

Touching the second question, the court below remarked, it was very clear that a public navigable stream must remain free and unobstructed; that no private individual has a right to place permanent structures within the navigable channel; and that if the proposed run-way, when completed, proved to be a material obstruction to the free navigation of the river, or a special injury to the rights of others, it might be condemned and removed as a nuisance. It was, however, of opinion that the case presented was one of a threatened nuisance only, and that the reasons assigned for interference by injunction, in advance of the construction of the run-way, were not sufficient.

We are of opinion that the demurrer should have been overruled, and the defendant required to answer. The bill makes a *prima facie* case, not only of the right of the city to bring the suit, but for granting the relief asked. It distinctly avers what the defendant proposes to do, and that averment is accompanied by the general charge or statement that the driving of the piles in the bed of the river, and the construction of the run-way, will not only cause a diversion of the river from its natural course, but will throw it east of its natural location, from along the river-bank north and south of the proposed run-way and piling, creating in front of the city's improved wharf

a deposit of mud and sediment, and rendering it impossible for boats and vessels engaged in the navigation of the Mississippi River to approach or land at the improved wharf north and south of defendant's premises. This is not, as ruled by the Circuit Court, merely the expression of an opinion or apprehension upon the part of the city, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended, without departing from correct rules of pleading, they distinctly apprise the defence of the precise case it is required to meet. There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. Cooper, Eq. Pl. 5. But, in most cases, general certainty is sufficient in pleadings in equity. Story, Eq. Pl., sects. 252, 253. Let the case go back for preparation and hearing upon the merits. If it should be again brought here, we may find it necessary to discuss the numerous authorities cited by counsel. In its present condition, we do not deem it wise to say more than we have in this opinion.

The decree will be reversed, with directions to overrule the demurrer, and for further proceedings according to law; and it is

So ordered.

MR. JUSTICE GRAY did not sit in this case.

UNION PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

1. The sixth section of the act of Congress of July 1, 1862, c. 120, incorporating the Union Pacific Railroad Company (12 Stat. 489), constitutes a contract between the United States and the company, whereunder the latter, for its service in transporting upon its road, from Jan. 1, 1876, to Oct. 1, 1877, the mails, and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service.
2. The contract is not affected by the sections of the Revised Statutes declaring that the Postmaster-General may fix the rate for such service when performed by railroad companies to which Congress granted aid, and he had no authority to insist that it was not binding upon the United States.
3. The company, having been required to perform the contract, lost no rights by a compliance therewith, as it protested against and rejected all illegal conditions attached to the requirement.

APPEAL from the Court of Claims.

This was an action brought by the Union Pacific Railroad Company against the United States to recover compensation alleged to be due for services rendered from Jan. 1, 1876, to Sept. 30, 1877, in the transportation of the mails over its road, and of the employés accompanying them, who were charged with sorting, distributing, and delivering them.

The United States traversed the petition of the company, and set up a counterclaim for five per cent upon the amount of the net earnings of the company's road from Nov. 6, 1875, to Nov. 6, 1877.

The Court of Claims was of opinion that the compensation for that service was not to be determined by reference to the act of July 1, 1862, c. 120, but by the general laws regulating the compensation for similar service by other railway companies. It therefore adjudged and decreed as follows: That whereas the sum of $618,910.54 has been found to be due to the claimant from the defendants for the services alleged in its petition, of which it is entitled to recover a moiety, to wit, the sum of $309,455.27, pursuant to the act of 2d July, 1864, c. 216; and whereas the sum of $682,032.18 has been found to be due from the claimant to the defendants on the matters alleged in their plea of counterclaim, — therefore the said moiety of $309,455.27 be set off against and deducted from the said sum found to be

due the defendants, and the defendants recover from the claimant the balance remaining, to wit, the sum of $372,576.91.

The company thereupon appealed.

Mr. Sidney Bartlett for the appellant.

The Solicitor-General for the United States.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The controversy in the Court of Claims related to the amount of compensation to which the Union Pacific Railroad Company is entitled for postal services from Jan. 1, 1876, to Oct. 1, 1877. The claim is based upon the sixth section of the act of July 1, 1862, c. 120 (12 Stat. 489), which reads as follows: —

"SECT. 6. *And be it further enacted*, that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad, for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The contention on the part of the appellant is, that this section of the statute is a contract between the government and the company, whereby the former bound itself to furnish the employment specified, and the latter to render the corresponding services; that this contract has not been abrogated or modified by subsequent legislation, and regulates the rate of compensation for the services rendered during the period named; that the agreed rates of compensation are to be equal to those paid by private parties for the same kind of service; and that the compensation received by the appellant from private parties for the transportation of matter in express cars furnishes the true standard of that comparison.

We have no hesitation in conceding that the section quoted constitutes a contract between the United States and the railroad company; but we are unable to find in it an absolute obligation on the part of the government to employ the railroad in the described services. It reserves the right so to do at its option; but it does not stipulate that it will do so.

On this point we agree with the opinion of the Court of Claims, and adopt its language, as follows: —

"The section means, we think, that the company shall transport the government's mails, munitions, troops, &c., whenever required so to do, and that the government at all times shall have the preference over private parties; but that the transportation in all cases shall be done at fair and reasonable rates, which in no case (of preference or otherwise) shall exceed the rates paid by any private party for the same kind of service, while in all cases, even where the ordinary rates are fair and reasonable, *per se*, the government shall have the benefit of those exceptional reductions of rate which railroads frequently make, sometimes as a matter of policy and sometimes as a matter of favor."

But it is contended on the part of the government that this contract does not apply to the services, the compensation for which is in question, because prior to the time when they were rendered it had been terminated by subsequent legislation. The legislation which it is claimed has that effect is embraced in tit. 46, c. 10, Rev. Stat., sects. 3997–4005, inclusive, regulating the subject of the railway postal service.

Section 4002, Rev. Stat., fixes a scale of maximum rates, graded according to the average weight of the mails carried, according to which the Postmaster-General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of mails on said railroad routes. And it was in accordance with a readjustment based on these rates that, in the present case, the government insisted that the appellant was bound to conform its claims, and the Court of Claims so adjudged.

Section 4001 provides that "all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as

Congress may provide; and until such price is fixed by law, the Postmaster-General may fix the rate of compensation."

The substance of this provision, as is pointed out by the counsel for the appellant, first appeared in the act of Sept. 20, 1850, c. 61 (9 Stat. 466), granting the right of way and public lands to the State of Illinois, in aid of the construction of the Central Railroad, said to be the first land grant to aid in the construction of a railroad. The grant was accompanied by the condition that the "United States mail shall at all times be transported on said railroad, under the direction of the Post-Office Department, at such prices as the Congress may by law direct." All subsequent similar grants to such corporations were coupled with the same condition. Prior to 1850, the legislation of Congress had regard only to the transportation of the mails over railways established in the various States to which no government grants or subsidies had been made; and it merely enabled the Postmaster-General to contract for the service, if terms could be made with the corporations, and, if not, to resort to the previous methods of transportation. The provision in the sixth section of the act of 1862 — the Pacific Railroad Act — is the first of its kind. The clause in sect. 4001, authorizing the Postmaster-General to fix the rate of compensation to land-grant roads, in the absence of a price fixed by law, was first added to the general postal legislation by sect. 214 of the act of June 5, 1872, c. 335 (17 Stat. 309), which purports to be "An Act to revise, consolidate, and amend the statutes relating to the Post-Office Department," and is substantially a codification of the provisions of the law then in force relating to the subject. From that act it was transferred into the Revised Statutes in the form as quoted.

It is certainly true that these provisions, in their primary intention, did not apply to the appellant, for it did not then exist; and when it came afterwards into being, by virtue of the act of 1862, it did so with the special legislative contract in the sixth section of its charter, which constituted it a land-grant railroad company, *sui generis*, differing at least in that respect from those previously provided for; and these diverse rules as to compensation for service rendered for the government continued thenceforth to coexist without conflict. No change of

a substantial character was made in the provisions enacted prior to 1862, either by the consolidated act of 1872 or the Revised Statutes, and there is not, therefore, any ground for the inference of a change of the legislative intention that might be drawn from a significant change of language. There is consequently no present inconsistency between the existing provisions of the Revised Statutes, as applicable to the land-grant roads within their purview, and the continued existence of the contract contained in the sixth section of the appellant's charter.

The legislation referred to furnishes, therefore, no evidence of any intention on the part of Congress to alter the relation between the appellant and the government, established by the sixth section of the act of 1862, and we are of the opinion that the company is entitled, under its provisions, for the services rendered during the period covered by the present claim, to fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services. To what extent and upon what considerations Congress has the power to make such change, under the reservations in the act, in a case where it manifests an intention to do so, is a question which does not arise in this suit, and has not been considered.

This conclusion cannot be reconciled with the view taken by the Court of Claims, that the government, having the option under its contract to employ the appellant or not in its postal service, had the right to prescribe the terms on which it would do so; that the sections referred to in the Revised Statutes contain the terms so prescribed, and that the appellant, having performed the service with notice of the law, must be taken to have assented to those terms, notwithstanding its protest, in which it claimed the benefit of its contract as still in force. For the Revised Statutes, as we have found, do not apply, and, therefore, did not alter the contract, and gave to the Postmaster-General no authority to insist that it was not binding; and as the company, by its terms, was bound to render the service, if required, its compliance cannot be regarded as a waiver of any of its rights. The service cannot be treated as voluntary, in the sense of submission to exactions believed to be illegal, so

as to justify an implied agreement to accept the compensation allowed; for according to the terms of the obligation, which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights. This it did.

In computing the amount of compensation to which it claimed to be entitled, under its contract for the services performed, the appellant insisted upon the adoption of the rates charged by it to private parties, for goods carried in express cars, as being the only service of the same kind, and so furnishing the criterion of its compensation. In the agreed statement of facts two other modes of computation were introduced: one, including with express matter, cars transporting fruit, fish, and perishable articles hauled in passenger trains; the other, adopting the charges upon the latter, exclusive of the express matter, as furnishing alternatives for the judgment of the court in determining the amount due according to the contract.

Viewed as a question of law, it is impossible to say that either of these rules of computation is the true one. The question is, what is a fair and reasonable rate of compensation? and, in reference to that, we adopt the opinion of the Court of Claims, as thus expressed: —

"Construing the statute as we do, we think the court would not be limited, in an action where it was compelled to estimate damages, to the rates charged by the company to private parties for a single kind of similar service. We think that a court or jury would be authorized to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the cost and running expenses no greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of 'fair and reasonable rates of compensation.' The reports of the auditor of railroad accounts show what rates of compensation the claimant has received for passenger cars, but in the determination of the case we

do not feel at liberty to go outside of the agreed statement of facts upon which it was submitted."

The case was not submitted to the Court of Claims in a way to enable it to determine the question of fact; and upon a retrial, if the parties do not agree upon the amount or upon the rule of computation, the compensation, at fair and reasonable rates, must be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service.

It will be just and necessary to include in that estimate and finding an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service, to be paid for, necessarily, at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the government, for which, as an entirety, the compensation should be made, at fair and reasonable rates, according to, and subject only to, the limitation required by the sixth section of the act of 1862.

To this end, for the reasons assigned, the judgment of the Court of Claims will be reversed, and the cause remanded with instructions to proceed therein in conformity with this opinion; and it is

So ordered.

KOSHKONONG *v.* BURTON.

1. The Statute of Limitations of Wisconsin applies to the coupons of a municipal bond, whether they be detached from it or not, and begins to run from the time they respectively mature.
2. The legislature has the constitutional power to provide that existing causes of action shall be barred, unless, within a shorter period than that prescribed when they arose, suits to enforce them be brought, if a reasonable time is given by the new law before the bar takes effect.
3. The right to interest upon interest, whether arising upon an express or an implied agreement, if allowed by the statutes then in force, cannot be impaired by subsequent legislation declaring their true intent and meaning. Such legislation can only be applied to future transactions.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. L. B. Caswell for the plaintiff in error.

Mr. John A. Sleeper and *Mr. Henry K. Whiton*, *contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

The object of this action, which was commenced on the twelfth day of May, 1880, is to recover the amount due on bonds, with interest coupons attached, issued on the first day of January, 1857, by the town of Koshkonong, a municipal corporation of Wisconsin, pursuant to authority conferred by an act of the legislature of that State. They were made payable to the Chicago, St. Paul, and Fond du Lac Railroad Company, or its assigns, on the first day of January, 1877, at the American Exchange Bank, in the city of New York, with interest at the rate of eight per cent per annum, payable semi-annually, on the presentation of the interest warrants at that bank on the first day of each July and January, until the principal sum should be paid. Of the bonds in suit, with their respective coupons, Burton became the owner by written assignment from the railroad company, indorsed upon the bonds, under date of Nov. 16, 1857. None of the coupons have ever been detached from the bonds nor paid, except those maturing July 1, 1857, and Jan. 1, 1858.

The coupons are all alike except as to dates of maturity. They are complete instruments, capable of sustaining separate actions, without reference to the maturity or ownership of the bonds. *Commissioners of Knox County* v. *Aspinwall et al.*, 21 How. 539; *Clark* v. *Iowa City*, 20 Wall. 583; *Amy* v. *Dubuque*, 98 U. S. 470. The following is a copy of the one last due: "The town of Koshkonong will pay to the holder hereof, on the first day of January, 1877, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day. S. R. Crosby, clerk."

The main question is whether the action, as to coupons maturing more than six years prior to its commencement, is not barred by the Statutes of Limitation of Wisconsin. The court

below being of opinion that no part of plaintiff's demands was barred, gave judgment for the principal of the bonds, with interest from the first day of January, 1877, at the stipulated rate of eight per cent per annum until paid, and also for the amount of each coupon in suit, with interest from its maturity at the rate of seven per cent per annum, the latter being the rate established by the local law in the absence of a special agreement by the parties.

The present writ of error questions the correctness of that judgment, as well because it overrules the defence of limitation to coupons maturing more than six years before the commencement of this action, as because it allows interest upon the amount of each coupon from its maturity.

The statutes of Wisconsin, in force when the bonds and coupons were issued, provided that "all actions of debt founded upon any contract or liability, not under seal" (except such as are brought upon the judgment or decree of some court of record of the United States, or of a State or Territory of the United States), shall be commenced within six years after the cause of action accrued, and not afterwards; and that all personal actions on any contract, not otherwise limited by the laws of the State, shall be brought within twenty years after the accruing of the cause of action. Rev. Stat. Wis. 1849, sects. 14–22, pp. 644, 645.

We remark that the foregoing provisions, without substantial change of language, were taken from the statutes of the Territory of Wisconsin, adopted in 1839. Further, that the revision of 1849 did not, in terms, prescribe any limitation to actions upon sealed instruments. They were, therefore, embraced by the limitation of twenty years as to personal actions on contracts not covered by other provisions.

The revision of 1849 was superseded by one made in 1858, which went into operation on the first day of January, 1859. By the latter, as modified by an act passed in 1861, civil actions, other than for the recovery of real property, were required to be commenced within the following periods: Actions upon judgments or decrees of courts of record of the State, and actions upon sealed instruments when the cause of action accrued in the State, within twenty years (Rev. Stat. Wis. 1858,

c. 138, sect. 15); actions upon the judgments or decrees of courts of record of any State or Territory of the United States or of courts of the United States, and actions upon sealed instruments, when the cause of action accrued out of the State, within ten years (sect. 16); and actions upon contracts, obligations, or liabilities, express or implied, excepting those mentioned in sects. 15 and 16, within six years, the time to be computed, in each case, from the date where the cause of action accrued. Gen. Laws Wis. 1861, p. 302. The revision of 1858 also contained the general clause that, "in any case where a limitation or period of law prescribed in any of the acts hereby repealed [which included the revision of 1849], for the acquiring of any right or barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the Revised Statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the Revised Statutes." Id., c. 191, sect. 13, p. 1038.

Thus stood the law of the State until the ninth day of March, 1872, — a little over fifteen years after these bonds and coupons were issued, — when an act was passed entitled "An Act to limit the time for the commencement of action against towns, counties, cities, and villages on demands payable to bearer." It provided that "no action brought to recover any sum of money, on any *bond*, *coupon*, *interest warrant*, agreement, or promise in writing, made or issued by any *town*, *county*, *city*, or *village*, or *upon any instalment of the* principal or *interest thereof*, shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has or shall become due, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order: *Provided*, that any such action may be brought within *one year after this act shall take effect: Provided further*, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." Gen. Laws Wis. 1872, p. 56.

Our attention has also been called to certain sections in the revision of the statutes of Wisconsin of 1878, which went into

operation on the first day of November of that year, superseding that of 1858, as well as the act of 1872. Those sections contain, in substance, the clauses first quoted from the revision of 1858, with the modifications made by the act of 1872. Rev. Stat. Wis. 1878, pp. 1015, 1016. It is to be observed in this connection — for it has some bearing upon what we shall presently say — that sect. 4220 of the revision of 1878, in terms, prescribed twenty years as the limitation for "an action upon a *sealed* instrument when the cause of action accrues within this State, except those mentioned in sect. 4222;" while the latter section embraces, among others, "an action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village, or school district in this State,"— thus indicating that the framers of the revision of 1878 regarded municipal securities for the payment of money as belonging to the class of sealed instruments. We observe, also, that the revision of 1878 contains a provision in reference to those cases in which limitation had commenced to run, similar to that already quoted from the revision of 1858. Rev Stat. 1878, sect. 4984; Rev. Stat. 1858, p. 1038.

From the foregoing summary it will be seen that by the local law, when the bonds in suit were issued, all civil actions for debt, founded on contract or liability, not under seal (except actions upon judgments or decrees of some court of record of the United States, or of a State or Territory), could be brought within six years after the cause of action accrued, and not afterwards; while such actions, if founded on contract or liability, under seal, would not be barred until twenty years after the cause of action accrued. If, as contended by plaintiff, the question of limitation is to be determined exclusively by the revision of 1849, in force when the bonds were issued, and if, as is further insisted, an action on municipal bonds and coupons, such as are here in suit, is, within the meaning of that revision, "founded on contract or liability not under seal," it is clear that, without reference to the statute of 1872, this action is barred as to all coupons maturing more than six years before its commencement, whether such coupons were separated or not from the bonds to which they were originally attached.

This, upon the authority of *Amy* v. *Dubuque* (98 U. S. 470), with the doctrines of which we are entirely satisfied. We there said, construing the statutes of Iowa, upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that "upon the non-payment at maturity of each coupon the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. . . . Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment could not prevent the statute from running."

But we are inclined to the opinion — although uninformed upon the subject by any direct decision of the Supreme Court of the State to which our attention has been called — that municipal bonds and coupons were regarded by the framers both of the revision of 1849 and that of 1858, as, alike, sealed instruments to which the limitation of twenty years was applicable. The word "bond" at common law (and even now as a general rule) imports a sealed instrument. And although, under some circumstances, a municipal corporation issuing and delivering bonds and coupons, in aid of railroad enterprises, may be liable thereon, notwithstanding they are unattested by its corporate seal, we are satisfied that the legislature of Wisconsin intended, by the revision of 1849, as well as that of 1858, to prescribe the same limitation for actions upon such obligations as was, in terms, prescribed for actions upon what, technically or in common legal parlance, are denominated sealed instruments.

If this interpretation of the revision of 1849 and 1858 be correct, it would follow that this action was not, at the passage of the act of 1872, barred by limitation as to any of the coupons in suit. Twenty years had not then expired from the maturity of any of them.

It remains now to inquire as to the effect of the act of 1872 upon municipal obligations executed and outstanding at the date of its passage. Of the object of that statute there cannot,

it seems to us, be any reasonable doubt. The specific reference to coupons and interest warrants made or issued by towns, counties, cities, and villages, without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the legislature to reverse the policy which had been pursued, by holders of such securities, of postponing the collection of interest coupons until after the bonds, to which they were annexed, had matured, — a delay which had the effect, in some instances, of compelling municipal corporations to meet, all at once, a large indebtedness, which the legislature intended, at least as to the interest accruing thereon, should be provided for in instalments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated.

We are here met with the argument that the act of 1872, neither in terms nor by necessary implication, applies to any municipal obligations, except those "payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order;" whereas, the bonds in suit are payable to the railroad company *or its assigns*, and the coupons are payable to the *holder* thereof. Waiving any expression of opinion as to whether the phrases "payable . . . to the order of some person," or "payable . . . to some person or his order," do not, upon a reasonable construction of the act, embrace the case of a bond payable to a railroad company or its assigns, — a question which need not be determined, since it is conceded that the action, as to the principal of the bonds, is not, in any view of the case, barred by limitation, — we are of opinion that a coupon, payable to the holder thereof, is, within the meaning of the act, and, according to the usages of the commercial world, payable to bearer. Consequently the suit, as it respects interest coupons, is embraced by the terms of the act of 1872.

But the further contention of plaintiff's counsel is, that the act of 1872 is unconstitutional as impairing the obligation of the contract between the town and the holders of its securities. This objection is founded upon the proviso, which declares

that "any such action [of the class specified in the act] may be brought [only] within one year" after the act takes effect. While that proviso is very obscurely worded, its meaning is, that no action to recover money due upon a municipal bond, coupon, interest-warrant, or written agreement or promise, or upon any instalment of the principal or interest thereof, whether such obligations were issued before or after the passage of the act, should be maintained, unless brought within six years (not from the passage of the act, but) from the time the money sued for became due; except — and no other exception is made — that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the act passed, the action should not be barred, if brought within that year. It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628; *Hawkins* v. *Barney's Lessee*, 5 Pet. 457; *Jackson* v. *Lamphire*, 3 id. 280; *Sohn* v. *Waterson*, 17 Wall. 596; *Christmas* v. *Russell*, 5 id. 290; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Osborn* v. *Jaines*, 17 Wis. 573; *Parker* v. *Kane*, 4 id. 1; *Falkner* v. *Donman*, 7 id. 388. Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand. And we think it is not. For if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it

does not follow that the entire act would fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but — under the construction we have given to the statutes in force prior to the act of 1872 — to a reasonable time after its passage within which to sue. And if a proper construction of that act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the act of 1872. It is, consequently, barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained.

The question next to be considered relates to that portion of the judgment allowing interest upon the amount of each coupon from its maturity.

The general proposition suggested by this question seems to have been determined, in 1865, in *Mills* v. *Town of Jefferson*, 20 Wis. 50. That was a suit upon interest coupons attached to bonds issued by a municipal corporation to a railroad company, under the authority of an act passed in the year 1857. The coupons were similar to those here in suit. While recognizing the fact that many courts of high authority had disallowed interest upon interest, the Supreme Court of Wisconsin expressed its approval of those cases in which it was adjudged that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. "For," said the court, "when a person agrees to pay interest at a specified time, and fails to keep his under-

taking, why should he not be compelled to pay interest upon interest from the time he should have made the payment? If he undertakes to pay in a sum at a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld from the time he should have made such payment." To the same effect is *Pruyn* v. *The City of Milwaukee* (18 Wis. 367), where, without question, so far as we can gather from the report of the case, interest upon interest was given upon the amount of coupons from their respective maturities. We remark, in this connection, that among the authorities cited by the State court in *Mills* v. *Town of Jefferson*, in support of its conclusion, is *Gelpcke* v. *City of Dubuque* (1 Wall. 175), where it was said (the suit being upon coupons of municipal bonds) that, "if the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed." In harmony with this view are *Aurora City* v. *West*, 7 Wall. 82, *Town of Genoa* v. *Woodruff*, 92 U. S. 502, *Amy* v. *Dubuque*, 98 id. 470, and *Walnut* v. *Wade*, 103 id. 683.

Another question arises upon this branch of the case. The law of Wisconsin, as declared in *Mills* v. *Town of Jefferson*, remained, without attempt to change it, until March 3, 1868, when an act was passed entitled "An Act to *construe* sections one and two of chapter 160 of the General Laws of 1859, and to amend section 2 of said chapter." Its first and second sections are as follows: —

"1. It was and is the true intent and meaning of sections one and two of chap. 160 of the General Laws passed in the year 1859, and of all other laws heretofore enacted in the State prescribing and limiting the rate of interest, that interest should not be compounded or bear interest upon interest, unless an agreement to that effect was clearly expressed in writing, and signed by the party to be charged therewith.

"2. Section 2 of chap. 160 of the General Laws of 1859 is hereby amended by adding thereto the following: 'And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest.'" Gen. Laws Wis. 1868, pp. 62, 63.

In the Revised Statutes of 1878 the following provision appears: —

"SECT. 1689. . . . And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

It is contended that the foregoing enactments govern the present case, and preclude recovery of interest upon the amount of the respective coupons from their maturities. In this view we do not concur. By the first section of the act of 1868, the legislature assumed to declare what was the true intent and meaning of previous legislation prescribing and limiting the rate of interest. It was said by Chancellor Walworth, in *Salters* v. *Tobias* (3 Paige (N. Y.), 338, 344), that, "in England, where there is no constitutional limit to the powers of Parliament, a declaratory law forms a new rule of decision, and is valid and binding upon the courts, not only as to cases which may subsequently occur, but also as to pre-existing and vested rights. But even then the courts will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it." When counsel, in *Ogden* v. *Blackledge* (2 Cranch, 272, 277), announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from

the judicial, this court interrupted them with the observation that it was unnecessary to argue that point. Prior to the passage of the act of 1868, the highest judicial tribunal of the State had adjudged, that when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the act of 1868, that declaration was accompanied by a distinct provision, in terms, changing the pre-existing law. In *Stockdale* v. *Insurance Company* (20 Wall. 331), this court, speaking by Mr. Justice Miller, said, that "both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may, in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated." Sedgwick, Contr. Stat. and Const. Law (2d ed.), pp. 214, 227; Cooley, Const. Lim. 93, 94. It is clear, therefore, that neither the act of 1868 nor the provision quoted from the revision of 1878, which is but a continuation of the second section of the act of 1868, can be deemed applicable to the case before us. The contract between the town and the holders of its securities was entered into prior to those enactments, and the rights of the parties must necessarily be determined by the law as it was when the contract was made. It was not within the constitutional power of the legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right, under the law of the State.

Without pursuing the case further, it is sufficient to say that we do not concur with such of the views of the learned district judge as are inconsistent with those here announced. The

judgment must be reversed, with directions to enter judgment in behalf of plaintiff for the amount of the bonds, with interest at the stipulated rate, from their maturity until paid (*Spencer* v. *Maxfield*, 16 Wis. 185; *Pruyn* v. *City of Milwaukee*, *supra*), and also for the respective amounts of those coupons only which fell due within six years preceding the commencement of this action, with interest thereon at the rate established by the law of the State; and it is

So ordered.

MR. JUSTICE GRAY did not sit in this case.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* UNITED STATES.

1. A railroad company, in aid of which Congress granted land, entered, September, 1875, into a contract with the United States to transport for four years the mails over its road at a price which conformed to the statute then in force. It received from the Postmaster-General due notice of his orders, reducing the rates of compensation, pursuant to the act of July 12, 1876, c. 179 (19 Stat. 78), and the act of July 17, 1878, c. 259. 20 id. 140. The company protested against the order, but performed the stipulated service. *Held*, that it is entitled to recover the contract price therefor.
2. Those acts apply only to contracts thereafter made, or to such as did not require the performance of the service for a specific period.

APPEAL from the Court of Claims.

The Chicago and Northwestern Railway Company owns and operates lines of railroad, of which parts were constructed by companies which severally received from the United States, to aid in their construction, grants of public lands, to which was attached this condition: "The United States mail shall be transported over such roads, under the direction of the Post-Office Department, at such price as Congress may by law direct: *Provided*, that, until such price is fixed by law, the Postmaster-General shall have the power to determine the same." Act of May 15, 1856, c. 28 (11 Stat. 9); Act of June 3, 1856, c. 42, id. 18.

In September, 1875, the company entered into three contracts in writing with the United States, acting by the Post-

master-General, each for conveying the mail on a certain route numbered and described therein, over a part of its line, for four years from July 1, 1875, at a fixed price per annum, being at the rate of a specified sum per mile. These contracts are in the usual form prescribed by the department, and specify the services to be performed, among other things requiring the company to convey, free of charge, all mail-bags and post-office blanks, and all accredited agents of the department free of charge, and to collect from postmasters on the route quarterly balances due from them to the government, and account for the same; and stipulate for the payment of fines to be imposed upon the company for certain defaults. The ninth clause of each is as follows: "That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

These contracts were made by the Postmaster-General under the authority of the following sections of the Revised Statutes:—

"SECT. 3942. The Postmaster-General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor.

"SECT. 3946. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

The prices agreed to be paid were in conformity to the provisions of sect. 1 of the act of March 3, 1873, c. 231 (17 Stat. 558), being sect. 4002 of the Revised Statutes.

In the act of July 12, 1876, c. 179, making appropriations for the service of the Post-Office Department, &c., Congress inserted the following provisions, viz.: —

"That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies

for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30th, 1874, and for other purposes,' approved March 3d, 1873, for the transportation of mails on the basis of the average weight."

"SECT. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such prices as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act." 19 Stat. 79, 82.

On Aug. 18, 1876, the Postmaster-General issued an order, which was communicated to the company, reciting the foregoing provision relative to the ten-per-cent deduction, and stating that the Assistant Attorney-General of the Post-Office Department had advised, with reference to railway service performed under contract with the government, "that when the contract has been made in due form of law with a railroad company for the transportation of the mails for a term not yet expired, such contract is not affected" by the provision.

On Oct. 20, 1876, the Postmaster-General issued another circular, reciting that provision, and also sect. 13 of the act of 1876, and informing the company that, as required by that section, a reduction of twenty per cent would be made for mail service performed after July 1, 1876, upon the routes over the roads aided by land grants.

To this notice the company replied with a protest against the proposed reduction, as in violation of its contract.

The act of June 17, 1878, c. 259 (20 Stat. 140), contains this provision: —

"That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies, for the transportation of mails, five per centum per annum from the rates for the transportation of mails, on the basis of the average weight, fixed and allowed by the first section of an act entitled 'An Act making appropriations for

the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

On July 29, 1878, the Post-Office Department notified the company that there would be a reduction of five per cent from its compensation, under this act, against which the company promptly protested.

The company performed all the service required by its contracts during the entire period covered by them; but deductions from the contract rates were made, in accordance with the notices of the department, at each settlement, amounting in the aggregate to $83,310.91, for which the company, on July 14, 1879, after the contracts had been completely performed on its part, brought the present suit. The Court of Claims rendered judgment in its favor for the sum of $876, being the amount of the deductions for the service performed from July 1 to July 12, 1876, the latter being the date when the first act, under which they were made, took effect.

From this judgment the company appealed.

Mr. John F. Farnsworth for the appellant.

The Solicitor-General for the United States.

MR. JUSTICE MATTHEWS, after stating the case, delivered the opinion of the court.

The power of Congress to direct by law the price at which the mail service here in question should be performed was expressly reserved as a condition of the land grants, which formed, in part, their motive and consideration. But when Congress authorized the Postmaster-General to fix the price by contract, within specified maximum rates, and for a period of four years, it was an agreement on the part of the United States that the stipulated compensation should not be withheld during that period, which it could not refuse to perform without a breach of the public faith. The contract was an exercise of the reserved power, with an added obligation not to exercise it otherwise for the period agreed on, and we are unable to perceive any ground on which its validity can be denied. The

stipulations in the contract on the part of the railroad company transcend its necessary obligations, growing out of the acceptance of the conditions of the land grant, and furnish a sufficient and distinct consideration for the promise of the government not to disturb the rates of the contract during the period of its existence; for there are several stipulations collateral to the service to be rendered, which the government could not have exacted as due by previous obligation and irrespective of the assent of the company.

The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might by a repeal of the contract, expressly stipulated, restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself.

Some claim of this kind is put forward in the present case, and the ninth clause in the contracts is referred to as containing such a reservation. Clearly this confers power upon the Postmaster-General to discontinue or curtail the service, in whole or in part, he allowing, as an indemnity to the contractor, a month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for that retained and continued. But this is not a power to reduce the compensation for the full service performed, or to alter the terms of the contract. It is true, that under this reservation the Postmaster-General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself, on making the indemnity specified. But in that event, the contract being at an end, the company would no longer be under any obligation except that imposed by the original conditions accepted with

the land grants, and the government could rightfully impose upon it no others. There is, therefore, in the contract itself, no power reserved to alter the amount of compensation, except by a reduction of the required service. If the government insists upon full performance of that, it can be only upon the terms fixed by the contract.

It is argued, however, on the part of the government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the acts of Congress of July 12, 1876, c. 179, and of June 17, 1878, c. 259, and the notices from the Post-Office Department that the reductions assumed to be contemplated by them would be insisted on; the fact that they were made in the adjustment of accounts, and that the railroad company, notwithstanding its protest, continued to perform the service, — had the effect to supersede the contracts of 1875, and substitute new ones in their stead, on the basis of the reduced compensation. Such, in substance, was the view taken by the Court of Claims.

In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the railroad company. They contained, within themselves, a mode for lessening, or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right.

If, in these circumstances, the government not merely accepted, but demanded, the performance of the contract service, the presumption is that it meant to pay the contract price. It would require positive and express words to negative that presumption. We find none such in the statutes of 1876 and

1878. Their language may be well satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter to be entered into. They do not legitimately apply to contracts then existing, whose terms had not expired, such as those in the present case.

Such was the opinion of Mr. Attorney-General Taft, to whom the Postmaster-General submitted one of the contracts on which this suit is founded, for his opinion, whether it was affected by the act of 1876. He replied in the negative, saying: —

"In my opinion, Congress did not intend it to have this effect. The contracts, of which that with the Chicago and Northwestern Railway submitted by you for inspection is a sample, were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages. The act of July 12, 1876, was apparently passed with a view to reduce the public expenses. But it would not have this effect if an equivalent to the reduction of pay were recoverable under the name of damages, with, perhaps, the expenses of litigation added. Therefore I conclude that the construction most consistent with justice and fair dealing is the true one, viz., that, as to existing contracts, the rate remains as stipulated in the agreement during the term therein mentioned, but that in those cases where no contract prevailed the reduction should be made." 15 Op. Atty.-Gen. 182.

Of course, if it was not the intention of the acts of Congress referred to, to affect the contracts of the company, the erroneous interpretation of them by the Postmaster-General, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not. For it had no option. It was bound by its contract to perform the service, and

its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so, without prejudice to its lawful claims, leaving the ultimate right to future and final decision. It was not the case of a voluntary payment of an illegal exaction, where the maxim, *consensus tollit errorem*, prevents a recovery; because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria.* But here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either.

We are of opinion, for these reasons, that the Court of Claims should have rendered judgment in favor of the appellant for its whole claim.

Judgment reversed, and cause remanded with instructions to render a judgment in conformity with this opinion.

CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

UNITED STATES *v.* CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

The provisions of the act of July 12, 1876, c. 179 (19 Stat. 78), touching a reduction of rates for railway service, do not apply to a contract then in force which provided for transporting the mails for a term of years.

APPEALS from the Court of Claims.

The facts are sufficiently stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. John W. Cary, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The action in the Court of Claims was brought by the Chicago, Milwaukee, and St. Paul Railway Company to recover compensation withheld by the Postmaster-General, claimed to

be due upon a written contract for mail service, entered into July 1, 1875, for the period of four years.

The amount in controversy had been retained by the Postmaster-General as a reduction of the ten per cent on the previous rates, under the provision in the act of July 12, 1876, c. 179, and of the further reduction of twenty per cent on the remainder, under the thirteenth section of that act, it being insisted that the company's road had been constructed, in whole or in part, by the aid of a grant of public lands by Congress.

The Court of Claims found that the company had not been aided in the construction of its road by a land grant, and that it was, therefore, not subject to the deduction from its compensation made on that account. From that part of the judgment the United States appealed.

It also found that the Postmaster-General was entitled to make the deduction of ten per cent. From that part of the judgment the company appealed.

This case is covered by the decision in *Chicago & Northwestern Railway Company* v. *United States* (*supra*, p. 680), where it is held that the deduction under that section could not be made against a company whose road had been the subject of a land grant, when the service had been rendered during the term of a written contract for four years, which had not terminated when the act took effect.

The question in the present case, therefore, whether the railroad of the company was or was not the subject of a land grant becomes immaterial; although were it otherwise we should have no hesitation in affirming the finding of the Court of Claims upon that point, for the reasons set forth in its opinion.

Upon the question of the ten per cent deduction, the Court of Claims held that the act of July 12, 1876, operated as a notice that the service would be discontinued under the old rates, and would be continued, if at all, under the new rates; and that, as the claimants continued to render the service under the new law without dissent or protest, it was to be presumed that they acquiesced in its provisions and accepted the change which it made in their contract.

We are unable to agree with this view, for the reasons already stated. That act was not intended to apply to the case of contracts previously made for a term of years, not expired when it took effect.

The judgment of the Court of Claims must, therefore, be reversed, and the cause remanded with instructions to render a judgment in favor of the claimants for the full amount of their claim; and it is

So ordered.

MASON *v.* SARGENT.

A testator who died Dec. 4, 1867, bequeathed certain personal property to trustees, to be held by them in trust for his widow during her life, and on her death to his children. She died June 17, 1872. *Held*, that a legacy tax upon the property was, without authority of law, assessed in April, 1873, as no right to the payment thereof had accrued at the date when the act of July 14, 1870, c. 255 (16 Stat. 256), repealing such tax, took effect.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. George Putnam for the plaintiffs in error.

The Solicitor-General, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The action was brought by William P. Mason and Walter C. Cabot, to recover back the amount of a legacy tax, paid, under protest, by them to John Sargent, the defendant, as collector of internal revenue for the Fourth Massachusetts District.

The facts upon which the judgment was rendered in the court below, it was agreed, were as follows: William P. Mason, the plaintiffs' testator, died Dec. 4, 1867. By his will, duly proved and allowed, the personal property upon which the tax in question was levied was bequeathed to plaintiffs in trust for his widow for her life, and upon her death one-half to the plaintiff, William P. Mason, and one-half to Elizabeth R. Cabot,

children of the testator of full age at his death. The widow died on June 17, 1872. In April, 1873, the tax in question was assessed by Jonathan H. Mann, assessor of said district; and, May 13, 1873, plaintiffs paid defendant said tax under protest, to avoid distraint or other forcible process to collect the same. May 19, 1873, plaintiffs duly made claim upon the Commissioner of Internal Revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiffs' *cestuis que trust,* until the death of the testator's widow, which occurred after Oct. 1, 1870, the date at which the repeal of the legacy succession tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal. Act of July 14, 1870, sect. 17. Aug. 5, 1873, the Commissioner of Internal Revenue rejected the appeal, "for the reason that the tax accrued under the 124th section of the act of June 30, 1864, and was saved by section 17 of the act of July 14, 1870, and, still existing, was properly assessed." Judgment was rendered in favor of the collector, and the plaintiffs sued out this writ of error.

The tax in question was imposed by sect. 124 of the act of June 30, 1864, c. 173 (13 Stat. 223, 285), upon legacies or distributive shares of personal property exceeding the sum of $1,000, passing, after the passage of the act, from a decedent, either testate or intestate, in the hands of an executor, administrator, or trustee, varying in rate, as the party beneficially entitled was less or more remote in consanguinity, or a stranger in blood, to the person from whom it passed; with a proviso that legacies or distributive interests in intestate estates, passing to husband or wife, should be exempt from such tax.

Section 125 of the same act, as amended by the act of July 13, 1866, c. 184 (14 id. 98, 140), provides that this legacy tax or duty "shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom," &c. It also provides that it shall be a lien for twenty years, unless sooner paid, upon the property taxed; and the executor, administrator, or trustee, having charge of the

property, is required, within thirty days after he shall have taken charge of the trust, to give notice thereof to the assessor of the district in which the deceased last resided. He is also required, before payment of the legacy to the legatee, to pay the tax to the collector. As a preliminary to the payment of the tax to the collector, he is further required to make out in duplicate a schedule, list, or statement, containing the names of every person entitled to any beneficial interest in the property, together with the clear value of such interest, the original of which he renders to the assessor, and the duplicate of which "shall be by him immediately delivered, and the tax thereon paid to such collector." The collector gives him a receipt, which is his voucher for that much paid on account of the legacy in his settlement with the legatee.

By the third section of the act of July 14, 1870, c. 255 (16 id. 256), the taxes imposed by the laws then in force on legacies and successions, among others, were repealed "on and after the first day of October, eighteen hundred and seventy;" and by the seventeenth section of that act (p. 261) it was enacted that "all acts and parts of acts relating to the taxes herein repealed, and all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, or drawbacks the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

The court below decided that the tax in question had been properly exacted and collected on the ground that the right to it had accrued to the United States before Oct. 1, 1870, when the repealing act took effect, and was within the saving clauses of the seventeenth section.

The contention of the plaintiffs in error, on the other hand, is that, until the legacy itself became payable, the tax upon it did not become a claim in favor of the government; and as the legacy was vested in the widow during her life and the payment of it was postponed until her death, which occurred

June 17, 1872, after the repealing act had taken effect, no right that could be saved by the exceptions had at that time accrued.

It is our opinion that the tax was illegally demanded and collected.

The property or fund which is the subject of the legacy was expressly exempt from tax or duty, in the hands of the trustee, during the life of the testator's widow. It seems to us very plain that the trustee was not bound to make return of the legacy upon the schedule, list, or statement specified in sect. 125 of the act of 1864, until, by the death of the owner of the life-estate, the legacy became payable to those entitled in remainder; for the delivery of that list or statement to the assessor is to be followed immediately by a delivery by the trustee of its duplicate to the collector, and the tax paid thereon to such collector; whereas, by the express terms of the section, as amended by the act of 1866, the tax or duty becomes due and payable only when "the party interested in such legacy, &c., shall become entitled to the possession or enjoyment thereof," &c. The return for assessment and the actual payment of the tax, therefore, are made by the law so nearly simultaneous as that one follows the other in immediate succession; and it cannot well be said, upon the terms of the act, that the right to the tax has become vested until the obligation arises to list the property for taxation. The subject of the tax is the interest of the legatees in remainder; but it is not taxable as a remainder, for by the terms of the law it does not become a subject of taxation until the right accrues to reduce it to possession. Until then it is expressly exempt from taxation.

The amendment to sect. 125 of the act of 1864, made by the act of 1866, which requires the trustee to give written notice to the assessor of his trust within thirty days after he shall have taken charge of it, is not material to the argument, because it does not appear that this requirement has any other purpose than to give information to the officer for future use. It does not seem to have any connection with the present assessment and collection of the tax.

The provision in sect. 125 of the act of 1864, that the tax

or duty thereby imposed shall be a lien or charge upon the property bequeathed for twenty years, or until the same is paid within that period, determines nothing as to the time when the tax accrues. It becomes a lien only from that time; for the lien presupposes the existence of the tax, for which it is a security, and is a charge upon the property, out of which it is payable and upon which it is imposed. In the present case it is clear beyond dispute that during the life-estate of the widow there was no lien upon the fund, because during that period it was expressly exempt from the tax.

In the case of *Clapp* v. *Mason* (94 U. S. 589), a similar question, as to the liability of these parties under the same will, for a tax collected on their succession to the real estate of the testator, devised upon the same limitations, was decided in their favor. The court in that case said: "It is manifest that the right does not accrue until the duty can be demanded, that is, when it is made payable." p. 592.

The statement is equally applicable here, and leads to a similar result.

No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses.

Judgment reversed, with instructions to render a judgment upon the agreed statement of facts, in favor of the plaintiffs, for the amount therein specified.

MERRITT v. WELSH.

A., in 1879, imported sugars to which an artificial color was not given after they had been manufactured. *Held*, that, under schedule G, sect. 2504, Rev. Stat., the sole test of their dutiable quality was their actual color, as graded by the Dutch standard, and that they were subject to the duties prescribed by that schedule, with twenty-five per cent added thereto, pursuant to sect. 3 of the act of March 3, 1875, c. 125, 18 Stat. 339.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

Mr. William M. Evarts, *Mr. Stephen G. Clarke*, and *Mr. Edwin B. Smith*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by S. & W. Welsh, the plaintiffs below, to recover back duties alleged by them to have been illegally exacted by Merritt, the defendant below, as collector of the port of New York, on certain sugars imported by them. The importations were made in 1879, and were subject to the duties imposed by schedule G, sect. 2504, of the Revised Statutes, and by the third section of the act of March 3, 1875, c. 127, which are in the following words: —

"SECT. 2504: Schedule G:

"Sugar not above number seven, Dutch standard in color: one and three-quarter cents per pound.

"Sugar above number seven, and not above number ten, Dutch standard in color: two cents per pound.

"Sugar above number ten, and not above number thirteen, Dutch standard in color: two and one-quarter cents per pound.

"Sugar above number thirteen, and not above number sixteen, Dutch standard in color: two and three-quarter cents per pound.

"Sugar above number sixteen, and not above number twenty, Dutch standard in color: three and one-quarter cents per pound."

The following sections of the Revised Statutes were appended as provisos to the original acts from which the above articles were taken: —

"SECT. 2914. The standard by which the color and grades of sugar are to be regulated shall be selected and furnished to the collectors of such ports of entry as may be necessary, by the Secretary of the Treasury, from time to time, and in such manner as he may deem expedient.

"SECT. 2915. The Secretary of the Treasury shall, by regulation, prescribe and require that samples from packages of sugar shall be taken by the proper officers, in such manner as to ascertain the true quality of such sugar; and the weights of sugar imported in casks or boxes shall be marked distinctly by the custom-house weigher, by scoring the figures indelibly on each package."

To the foregoing duties twenty-five per cent was added by the third section of the act of March 3, 1875.

The plaintiffs claimed that the sugars imported were all below number 7, Dutch standard in color, and were, therefore, chargeable, under schedule G, with only a duty of one and three-quarter cents per pound, with the addition of twenty-five per cent, under the act of 1875. The defendant, under general instructions from the Treasury Department, rated them at a higher grade, and charged a duty of two cents upon some of them, and two and one-quarter cents upon others, with the addition of the twenty-five per cent, under the act of 1875. His action was based on the position that the sugars in question had been colored by artificial means, so as to reduce them, in appearance, below the grade of the Dutch standard to which they properly belonged according to the amount of crystallized sugar which they contained, as shown by chemical test by the polariscope.

The treasury instructions under which the test was applied were issued on the 19th of July and the 2d of September, 1879. After premising that it had been decided by the courts that the term "Dutch standard in color," as used in the statutes, means the color of the sugar obtained by the ordinary processes of manufacture as practised at the time of the enactment of the law, and that any means used to degrade the color of sugars during or after the process of manufacture is a fraud upon the revenue, the instruction of July 19, 1879, declares that —

"All sugars containing ninety per cent, and not more than

ninety-four per cent, of crystallizable sugar, the apparent color of which is not above No. 7, Dutch standard in color, shall be classified as above No. 7 and not above No. 10, Dutch standard in color.

"All sugars containing more than ninety-four per cent of crystallizable sugar, the apparent color of which is not above No. 10, Dutch standard in color, shall be classified as above No. 10 and not above No. 13, Dutch standard in color."

As the presence of water in the sugars was found to interfere with uniform results, the instruction was changed in September, as follows: —

"All sugars the apparent color of which, as imported, is not above No. 7, Dutch standard in color, and which contain over ninety-three per cent, and not over ninety-seven per cent, of crystallizable sugar in one hundred parts of the dry substance, shall be classified as No. 7 and not above No. 10, Dutch standard.

"All sugars the apparent color of which, as imported, is not above No. 10, Dutch standard in color, and which contain over ninety-seven per cent of crystallizable sugar in one hundred parts of the dry substance, shall be classified as above No. 10 and not above No. 13, Dutch standard."

It was shown beyond dispute, on the trial, that, so far as their color was concerned, the sugars were below No. 7 of the Dutch standard, — a grade chargeable, by the statute, with only one and three-quarters cents per pound; but the court allowed the defendant to prove, if he could, that the color of the sugars was an artificial color, imparted after the process of manufacture, or after they became the sugars of commerce. As no proof was offered to show that they were artificially colored after the process of manufacture was completed, the court instructed the jury to find a verdict for the plaintiffs for the difference of duty.

The defendant offered to prove that color was imparted to the sugars in the course of manufacture, by the use of an extra quantity of lime (some quantity of which is always used to neutralize acids) or by the introduction of molasses, and increasing the temperature of the vacuum-pan or boiler; but this evidence the court held to be incompetent. To narrow

the point of difference, he offered to show that coloring matter, namely, molasses, was introduced into the vacuum-pan or boiler after the mass had been brought to the state of sugar, but before its final passage through the coolers and the centrifugal tubs, — the last process through which it goes; but this evidence was also decided to be incompetent.

The position and argument of the defendant may be more fully shown by the instructions which his counsel asked the court to give the jury, and which were severally refused. They were as follows: —

"1. That if the jury shall find from the evidence that the true color of the sugar in suit, as ascertained by comparing them in every respect with the standard selected by the Secretary of the Treasury, and actually used in ascertaining and determining their dutiable character, was not sugar 'not above number seven Dutch standard in color,' they shall find a verdict for the defendant.

"2. That if they shall find from the evidence that on December 22, 1870, and prior thereto, the sugars of commerce were comprised substantially of crystallized sugar and molasses, and that the color of the different grades of such sugar was produced by molasses, the highest grades being No. 20, Dutch standard in color, having no molasses in them, and the lower grades being 16, 13, 10, and 7, Dutch standard in color, having molasses in them, each of the lower grades having more molasses than the other, so that the greatest quantity of molasses was contained in the lowest grades;

"And if the jury shall also find from the evidence that the sugars in suit were not generally known as the sugars of commerce in December 22, 1870, and prior thereto, and that their color at the time of importation was not produced by molasses, but was produced by the introduction of some foreign substance after the sugars were made for the purpose of giving to them a color darker than their true color;

"And if the jury shall also find from the evidence that the true color of said sugars is different from their apparent color, and that the true color of said sugars at the time of their importation was above No. 7, Dutch standard in color, they shall find a verdict for the defendant.

"If the jury shall find that the sugars were colored with burnt molasses, and were manufactured prior to the time when the burnt molasses was introduced into the vacuum-pan, and that the same was so introduced into the pan merely for the purpose of producing a dark surface-color upon the sugars, so that the sugars, the true color of which was above No. 7, Dutch standard in color, appeared to the eye by comparison with the Dutch standard in color to be sugars not above No. 7, Dutch standard in color, and shall also find that the true color of the sugar when it became manufactured was above No. 7, Dutch standard in color, they shall find a verdict for the defendant.

"The court ruled there was no evidence to submit to the jury tending to show that the color was not imparted to the sugar during the process of manufacture.

"4. If the jury shall find from the evidence that the Dutch standard consists of sugars in which the color indicates the grade of the sugar, and shall also find that the color of the samples in suit does not indicate at all the grades of the sugar, but that the sugars in suit are in fact of a high grade, say No. 16, as indicated by the Dutch standard, but have a surface-color of the lowest grade, say not above No. 7, Dutch standard in color, which surface color was imparted to it after the crystals of sugar were found in the vacuum-pan at a time when the boiling of the sugar was completed, they shall find a verdict for the defendant.

"5. That the surface or external color of the sugars in suit was not necessarily the color by which their dutiable character was to be ascertained, but the true color of the sugars in suit, as ascertained by comparison with the standard which was in use by the collector, and was actually used for the purpose of ascertaining the duitable character of the sugars in suit, was the color to guide him in ascertaining and levying duties upon them.

"6. That if the jury shall find from the evidence that the surface or external color of the sugars in suit was produced by the introduction of a foreign substance at a time subsequent to the manufacture of sugar, and shall also find from the evidence that when said foreign substance is removed from the surface

of said sugars, that they have not a color of sugars not above No. 7, Dutch standard in color, but do have a color of sugars above No. 7, Dutch standard in color, they shall find a verdict for defendant.

"The court ruled there was no evidence to submit to the jury tending to show that the color was not imparted to the sugar during the process of manufacture.

"7. That for tariff purposes centrifugal sugars are required to have a color obtained by the process of manufacture, without the introduction of any foreign substance in the process of manufacture for the purpose only of obtaining a darker color than that which the sugars would have obtained in the natural process of manufacture.

"8. That if the jury shall find from the evidence that a foreign substance was introduced into the sugars in suit, during the process of the manufacture, which made them darker in color than they would have been but for the introduction of such foreign substance, and shall also find from the evidence that but for the introduction of said foreign substance the apparent color of the sugars in suit would not have been that of sugars not above No. 7, Dutch standard in color, but would have been of a higher grade, they shall find a verdict for the defendant.

"9. The jury may examine the samples of the sugars in suit, and themselves compare them with the sugars of the Dutch standard; and that if the jury find as a matter of fact that the sugars in suit are not of the color of any of the colors of the Dutch standard, they may find as a matter of fact whether the defendant erred in his classification.

"And that if they find the collector did classify the sugars in suit according to their true color from the best means in his control, they may find for the defendant.

"10. Sugar is above No. 7, Dutch standard in color, within the intent of the statute, if it be above that number when reduced mechanically to the same fineness and packed in the same manner as such standard.

"11. Sugars composed of crystals larger than those of the standards furnished by the Secretary of the Treasury may properly be reduced to the same fineness as those of such standards, and packed in bottles in the same manner for comparison

with such standards, in order to determine the color or classification."

It will be perceived that the real question in the case is, whether (supposing that sugars are not artificially colored for the purpose of avoiding duties after being manufactured) their dutiable quality is to be decided by their actual color, graded by the Dutch standard, or by their saccharine strength as ascertained by chemical tests. The plaintiffs maintain the former proposition; the defendant, the latter.

The test described by the statute is, "Dutch standard in color." The first question that naturally arises is, if Congress desires the application of the chemical test, in order to determine the saccharine strength of the sugar, why does not Congress say so? There are two very distinct and different modes of distinguishing sugar, — by its color, and by the intrinsic percentage of specific crystalline sugar in the mass. One is determined by a color standard, the other by a chemical standard. Which of these did Congress adopt? We think, clearly, the former.

Perhaps Congress may have acted under a mistaken idea that color would always indicate quality. Perhaps, up to the time that the law was passed, as the processes of manufacture had been conducted, color was an approximate, or general, indication of quality. Suppose this to be so, does it derogate from the fact that color was the standard which Congress, with the lights which it had, saw fit to adopt? Does it not tend to fortify that fact? If it be found by experience that the standard is a fallacious one, can the executive department supply the defects of legislation? Congress alone has the authority to levy duties. Its will alone is to be sought.

It appears very clear, from the evidence, that the Dutch standard is a color standard only. As applied to the sugars of the Island of Java, brought to the mother country, it was undoubtedly a very fair standard of the quality of sugar. The juice of the cane was reduced in open boilers, and the viscous or molasses matter was expelled by drainage, assisted by percolation of water from a covering of white clay, which improved the sugar both in quality and color. The sugar-merchants of Holland adopted a scale of colors from No. 1 to No. 20, which

is exhibited in small square bottles, containing sugar of the different shades of color, from dark up to nearly white. These bottles were prepared by leading firms of high standing in Holland, and were accepted by the trade as the true standard by which to estimate the grade of sugars. Other nations adopted it as a matter of convenience. It was not an infallible test of quality; because some sugars had a higher color than their intrinsic charater entitled them to; whilst others had a lower. Nevertheless, no more convenient standard was at hand; and if, by the feel, or the taste, or other physical indications, the merchant had reason to believe that the standard was not a strictly accurate test of quality in a particular case, he exercised his own judgment as to the price he would give, or take, for the article.

In process of time new modes of manufacture were adopted: the vacuum-pan in place of the open boiler, for condensing the liquor; the centrifugal tube in place of the old inverted cone, or leech-tub, for expelling the molasses; and animal charcoal, instead of clayey infiltration, for refining and whitening the result. The perfection of the refining process as now practised renders color in raw sugars a matter of little consequence, provided they contain abundance of saccharine matter. The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.

Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand, — that of the polariscope, or other

chemical test. If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, "Where law ends, tyranny begins."

It is argued that, although the Dutch standard of color is named in the statute, yet the intent of the law was to adopt it as a standard of quality; and if, in consequence of changes in the mode of manufacture, it ceases to be such, the reason of the law ought to prevail, and quality ought to be still the test. And that quality was the object sought is inferred from the language of sects. 2914 and 2915 of the Revised Statutes.

This reasoning would be very good if the law prescribing the standard were not explicit in its terms. Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurrent enactments, to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used. But there is no obscurity or ambiguity here. Two tests for fixing the dutiable grade of sugars were open to the legislative choice, — that of color and that of constitution or chemical quality. Congress chose the former. It is not strange that it did so: the color test had long been used, and it was well calculated to designate quality in the old sugars, manufactured in the old way. But in making its election, Congress did not leave any room for doubt as to its meaning. It used apt terms to express it; terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience, or loss to the treasury, need only be temporary: it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell

out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used.

We see nothing in the sections referred to to change this plain and simple view of the subject. Sect. 2914 merely directs that the standards to be used by the collectors shall be furnished by the Secretary of the Treasury. This was to insure certainty and uniformity in the selection of the Dutch standards. The evidence shows that the Secretary performed this duty by procuring the standards from the proper parties at Amsterdam, and furnishing them to the collector. They were exactly the same, however, as those procured by private dealers. It cannot be justly contended that this section authorized the Secretary to adopt a different standard from that prescribed by Congress; to wit, a standard of chemical constitution indicated by a polariscope, instead of a standard of color indicated by the Dutch glass bottles, carefully sealed, graded, and numbered. This would be to give to the section an unnatural force, and cause it to overrule the primary section to which it was a proviso. In like manner, when sect. 2915 authorizes the Secretary, by regulation, to require that samples from packages of sugar shall be taken in such manner as to ascertain the true quality of such sugar, there is no indication of an intent to change the dutiable standard adopted in the purview of schedule G. Even if it be conceded that the word "quality," as here used, has reference to saccharine purity or strength, the most that can be inferred is, that it was the aim of Congress, by this clause, to enable the officers to take samples from the packages in such manner as to secure a knowledge of their entire contents, in the interior and in every part, as well as on the surface; in other words, to see that there was no fraud in making up the packages. It was supposed that the true quality of an entire package could be ascertained by proper care in taking out the samples, — by the manner in which they were taken out. Whether the quality was to be ascertained by any other test than that of the color is not stated; and, if it was, there is no indication that a different standard from that of the Dutch standard of color, prescribed in the principal section, was to be used in fixing the amount of duty. It may have

been the object of sect. 2915 to detect the use of artificial coloring on the surface of the packages, applied after the sugar was manufactured and after the packages were made up. At all events, we think that there is nothing in either of these sections that modifies or qualifies the plainly prescribed standard by which imported sugars were to be graded and assessed for duty.

We have examined the prior legislation on the subject from the act of Dec. 24, 1861, c. 2, down to that of Dec. 22, 1870, c. 6, which is substantially reproduced in the Revised Statutes; but, without reviewing the laws in detail, it suffices to say that we find nothing in this legislative history to change or affect our views. The concession that Congress may have supposed that the Dutch standard of color would be a sufficient test of quality, answers all that can be deduced from the prior statutes. If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufac-

tured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter. The sugars would then have a different color from that which belonged to them when manufactured. This might be held to be a fraud on the revenue. But it is unnecessary to decide this question in this case.

A better remedy than that of making a forced construction of the law is in the power of Congress. All that has to be done is, to change the law so as to reach the goods in their new form, if it is thought desirable to do so. If the law is found defective, let it be altered so as to attain the result desired.

The argument that the sugars in question are not "sugars" in the sense of the law, because the standard adopted by the law for fixing the grade is, as to the sugars in question, defective in its application, is too metaphysical to be of weight in the consideration of the question. They are sugars of commerce, and the complaint of the custom-house is, that they are better sugars than they appear to be.

We think that the decision of the court below was right, and the judgment is

Affirmed.

MR. JUSTICE MATTHEWS, with whom concurred MR. JUSTICE HARLAN, dissenting.

It seems not to be denied by the opinion of the majority of the court, as it was expressly conceded by the court below, that if an artificial color had been imparted to the sugar *after* its manufacture, by which it was made identical in appearance with the color of the sample of the Dutch standard of a particular number, below that with which it would have been classified but for such adulteration, the government would have been entitled to prove the fact, and exact duties according to the classification of sugar of equal grade in its natural color.

This admission is not gratuitous, but is required upon any just construction of the law. And yet I cannot perceive what difference there ought to be if, during the process of manufacture, the same color is artificially produced by foreign matter, not necessary to the production of the sugar, and introduced for the express purpose of counterfeiting a color of a lower grade,

in order to evade the law and escape the duties imposed by it. This is precisely what the plaintiff in error offered to prove on the trial, and what, by the rulings of the court, he was not permitted to do. In my opinion, this was error, for which the judgment should be reversed.

The admission that it would be unlawful to produce artificially the color of the Dutch standard, after manufacture, to disguise the grade of the article, is inconsistent with the proposition that the color of that standard, as a visual impression, is the sole ground of distinction for rating duties on sugar; and yet that proposition is the only foundation that supports the judgment of the court below.

The phrase "No. 7 Dutch standard in color," and other similar phrases in the act of Congress, were not, in my opinion, intended to establish mere sensible color as the test for distinguishing the grades of sugar, for the purposes of the act; so as to embrace every description of sugar that could not, by the unaided eye, be differentiated in color from the sample. If so, sugar of the highest grade in other respects might be painted on the surface of its grains, after its manufacture was complete, without affecting its nature or quality commercially as sugar, so as perfectly to imitate an article of inferior strength and value, whose color had been naturally produced, and thus be imported at a lower rate of duty than would otherwise be lawful. For if mere color is the sole test to be regarded at the custom-house, as it may be determined by the eye alone, on comparison with the color of the standard, the officer has no right to inquire when or how the color was produced, so that it does not destroy the commercial character of the article. If the article is, and continues to be, sugar, and corresponds in color with the color of the sample used as the standard, it is to be rated accordingly.

A color imparted to sugar artificially, either during the process of manufacture or after its completion, and which it would not contract by means of any of the processes necessary merely to the production of sugar, is, in my opinion, not its natural color, and not the real and true color of the Dutch standard, however closely it may resemble it, or however impossible it may be, by sight merely, to distinguish it from the

color of the sample. It is a mere imitation and counterfeit of the Dutch standard in color; for that means, not merely an abstract color, of a certain hue, but a concrete color inhering in, and belonging only to, sugar when produced according to the processes which, in the Dutch standard, result in differences of color, according to differences in the quality of the sugar itself. Congress, by the use of the phrase in question, intended to refer to color as resulting from and indicating a certain quality of sugar, considered in reference to its strength and corresponding value; and hence used words, not descriptive of color, in reference to the various hues into which the ray of light is divided by the differences of refrangibility as it passes through the prism, and which are represented as primitive colors to the human eye, and designated by their associated names. Congress did not mean to scale the duty, as the sugar might be considered, according to such a standard, light yellow, yellow, dark yellow, light brown, brown, dark brown, &c. It meant to divide sugars for purposes of duties, according as they corresponded with certain samples of other sugars, produced according to a certain known mode of manufacture and designated in commerce, as well as in the statute, as of the Dutch standard, and classified by numbers, according to a gradation of color, resulting from that mode of manufacture, and not otherwise. So that to correspond with the color designated as a particular number of the Dutch standard, the sample produced must have to the sight not merely a color so like it that the eye cannot distinguish between them, but the resemblance must be, in all respects, such that it is manifest that it is not a mere similarity by reason of imitation, but an identity of color, because it has resulted from the necessary processes of the manufacture, and belongs, by necessity of its nature, to the sugar itself, and not to a foreign ingredient, mixed with it as a coloring matter. In other words, sugar which is classed as No. 7, Dutch standard in color, must be sugar of that quality in other respects, which, in the Dutch standard, has a color known as No. 7.

For these reasons I feel compelled to dissent from the opinion of the court.

SAVINGS BANK *v.* ARCHBOLD.

1. The last clause of sect. 3408 of the Revised Statutes exempts savings banks of the character there mentioned from taxation on so much of their deposits as they have invested in securities of the United States, and on all sums not exceeding $2,000 which they have on deposit in the name of any one person.
2. The act of March 1, 1879, c. 125 (20 Stat. 327), does not change the effect of that clause.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Lewis Sanders and *Mr. William M. Evarts* for the plaintiff in error.

The Solicitor-General, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff is a savings bank, incorporated by the legislature of New York, and the defendant was in 1876 a collector of internal revenue in the district in which the plaintiff did business. The present action is brought to recover the amount of certain taxes and penalties collected by him from the bank in that year. Its determination involves the construction of the concluding clause of sect. 3408 of the Revised Statutes, exempting deposits of money in savings banks, under $2,000, from the tax imposed by the previous clause of the same section on deposits generally. The section declares that a tax of one twenty-fourth of one per cent shall be levied each month on the average amount of deposits of money, subject to payment by check or draft, with any person, association, company, or incorporation engaged in the banking business. The concluding clause provides that deposits in savings banks "having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits not exceeding $2,000 made in the name of any one person."

The plaintiff is a savings bank of the character here mentioned, but the language used in expressing the exemption is not as happy as could be desired. "Deposits in . . . savings banks . . . shall be exempt from the tax on so much thereof as they have invested in securities of the United States, . . . and on all deposits not exceeding $2,000," is the form in which the law is given. "Deposits on deposits" not exceeding a certain amount is not a felicitous mode of expressing the legislative purpose. The bank, believing that the exemption extended to $2,000 of all deposits, reported the balance as the amount of its deposits subject to the tax, and paid the sum of $253, assessable thereon. The collector of internal revenue took a different view of the law, and held that the exemption applied only to such deposits as amounted to $2,000 or under that sum. He, accordingly, levied upon all other deposits a tax, which amounted to $5,236; and although the savings bank acted on the advice of counsel, and, as the court specifically finds, in good faith, without any fraudulent intent, and readily informed the collector, at his request, of the amount of all its deposits, that officer added to this $5,236, a penalty of one hundred per cent, as though the return made by the bank had been a false and fraudulent one; and, also, a further penalty of five per cent, for a failure to pay the tax assessed within the prescribed period, and interest upon the whole, making the gross sum of $10,838.52. This amount being collected by distraint, the present action is brought to recover it.

The concluding clause of the section in question, in our judgment, intended to exempt from the tax all deposits to the extent in which they were invested in United States securities, and also to the extent of $2,000. We think that the term "deposits," as it is last used, is to be taken as equivalent to the terms "sums deposited" or "sums," and the clause be read as if the language were: "The deposits in . . . savings banks . . . shall be exempt from tax on so much thereof as they have invested in securities of the United States, and on all sums not exceeding $2,000 deposited in the name of any one person."

This construction gives a clear meaning to the clause and avoids the inconsistency of holding that the addition of a

single mill to $2,000 would subject the whole deposit to the tax, even though such addition might be the accumulation of interest. It upholds, also, the policy of encouraging and protecting savings by exempting those of each depositor to a certain amount; and is in harmony with the amendment made by the act of March 1, 1879, c. 125, to obviate the possibility of the construction which the defendant adopted. That amendment declares that savings banks shall be exempt from tax on so much of their deposits "as they have invested in securities of the United States, and on two thousand dollars of savings deposits, and nothing in excess thereof, made in the name of and belonging to any one person." 20 Stat. 327, 352.

But the section, as it originally stood, meant, in our judgment, the same thing. The interpretation we give to it secures, equally with the amendment, uniformity in the tax, and lays its burdens alike upon all. An interpretation which accomplishes this end in the operation of tax laws should be preferred to one leading to a different result.

It follows that the defendant erred in his construction of the law; that the assessment of the tax on all deposits which exceeded $2,000, without any deduction of that amount, and the imposition of a penalty for not making a return in accordance with his views, were illegal, and that the moneys thus exacted from the savings bank should be returned. We express no opinion as to the legality of imposing a penalty where no fraud was intended. As a general thing, the imposition of a penalty implies delinquency by the party on whom it is imposed. Its consideration, however, is immaterial, in view of the construction we give to the law.

Upon the agreed statement of facts, the plaintiff was entitled to recover the amount exacted from him, with interest. The judgment of the court below must, therefore, be reversed, and the cause remanded with directions to enter judgment in his favor accordingly; and it is

So ordered.

PRINTING HOUSE *v.* TRUSTEES.

1. A corporation was created in one State to promote a benevolent enterprise, and its charter provided that the presidents of institutions organized in other States of the Union to collect funds to aid it should constitute a board of visitors, with absolute supervisory control over its affairs. In another State such an institution was formed. The trustees thereof reserved the right, in conjunction with the presidents of other similar boards, to supervise and administer the affairs of the original corporation in accordance with its charter, and collected a fund to be applied in aid of it. A fundamental change was subsequently made in the charter, whereby the visitorial rights of the auxiliary institutions were materially changed. The contributors to the fund demanded a return of it, upon the ground that the conditions upon which it had been advanced were not performed, and the corporation brought suit against the institution to recover it. *Held*, that the suit could not be maintained.
2. Section 9 of the amended charter of the corporation (*infra*, p. 721) changed essentially the constitution and powers of the board of visitors, as created and defined by sect. 10 of the original charter (*infra*, p. 717).
3. The general doctrine relating to charities, and to the jurisdiction of a Court of Chancery over them, has no application to this case.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. J. D. Rouse and *Mr. William Grant* for the appellant.

Mr. Edwin T. Merrick, *Mr. George W. Race*, and *Mr. John A. Campbell* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was instituted in May, 1876, by a bill in equity filed by the American Printing House for the Blind, a Kentucky corporation, against the Louisiana Board of Trustees of the American Printing House for the Blind, a Louisiana corporation, praying for an account and payment of moneys alleged to be in the hands of the defendant, which had been raised by contributions for the benefit of the complainant. An amended bill was filed in December, 1876, adding as defendants Henry B. Foley, Valsin J. Dupuy, Nathaniel Cropper, of Louisiana, who, claiming to be original contributors to the fund in question, had sued the defendant corporation for a return of their several contributions; also, Magruder and Richardson, a law

firm, who represented other contributors making the like claim; also, the Attorney-General of the State of Louisiana, which had contributed to the same fund, and had brought suit to recover its contribution; also, finally, the American Printing House for the Blind and the American University for the Blind, a corporation of the District of Columbia, which made some claim to the fund.

The claim of the original and amended bills was based upon an allegation to the effect that in the year 1858 the complainant received a charter from the State of Kentucky to enable it to raise and collect funds for establishing at Louisville, Ky., a publishing house for printing and publishing books in raised letters for the use of the blind in the United States; that said charter contemplated, and was granted in expectation of aid and co-operation from other States, particularly Tennessee, Mississippi, and Louisiana; that the original defendant was chartered by the legislature of Louisiana in 1859 for the express purpose of collecting funds to aid the Kentucky corporation to carry out its benevolent enterprise; and that the funds in question had been collected and were held for that purpose, and no other, and ought in equity to be paid over to the complainant, who, it was alleged, had complied with all the conditions required to entitle it to the money.

The Louisiana board filed an answer, in which the principal point of defence set up was, that, although the moneys in question had indeed been collected for the purpose indicated by the bill, yet that after their collection, and in the year 1861, the Kentucky corporation obtained a new charter materially different from the original one, and subversive of the rights which the Louisiana board were to enjoy in the administration of the scheme, and which were expressly named in their own (Louisiana) charter as a condition of entering into said scheme and contributing to it. They also set up the delay of fifteen or sixteen years in making any demand for the fund as a fatal objection to any such demand being sustained now. The rights referred to as having been abrogated by the new charter are specially set forth in the answer; being the right of visitation, supervision, and control over the affairs and management of the central institution at Louisville, to be exercised by the presi-

dents of the several State boards of trustees contributing to the general scheme, who were to constitute a board of visitors, with the right to visit the printing house, examine the books, and investigate the proceedings of the trustees, and of discharging them and vacating their offices and appointing new trustees in case of finding them guilty of mismanagement, malfeasance in office, or neglect of duty. The answer alleges that all this was abrogated by the new charter of 1861, and the right of visitation, instead of being left to the presidents of the State boards of trustees, was given to governors of States of North America contributing the smallest aid in sustaining the printing house, and superintendents of institutions devoted exclusively to the education of the blind, and State auxiliary boards. The answer also contended that the new charter created a new and different corporation by the substitution of new names of corporators in place of those contained in the original charter.

The allegations of the answer, in point of fact, are clearly proven; but the complainant contends that, in point of law, no such change was made in the new charter as to exonerate the defendants from the duty of paying over the funds collected by them; and that the defendants, in their litigation with the original contributors, acknowledged the rights of the complainant, and are estopped from denying them.

The other defendants filed answers and cross-bills, in which they contend that the complainant failed to perform the conditions on which the money was contributed, — as, that the sum of $25,000 should be raised within seven years, and that a permanent printing establishment should be erected and in operation within nine years, from the date of the charter; and they claimed to have their several contributions restored to them with interest.

This is a general description of the litigation. Considerable evidence was taken, much of it being directed to the supposed admissions of the Louisiana board as to the right of the complainant to the money. On final hearing the court below dismissed the bill. The complainant appealed from that decree.

In order to a proper understanding of the controversy, it will be necessary to examine somewhat more minutely the

charters of the respective parties, and the acts and proceedings which led to their formation, and to the collection of the fund sought to be recovered.

The scheme for establishing a general printing house for printing books for the blind of the United States, which led to the organizations referred to, originated in Mississippi as early as 1857, if not earlier. A Mr. Dempsey B. Sherrod took much interest in the subject, and visited several of the Southwestern States, for the purpose of getting up organizations and collecting funds. His operations were commenced in Mississippi, and extended thence to Kentucky, Tennessee, Louisiana, and other States. In December, 1859, he was appointed by the Kentucky board agent to organize auxiliaries in Missouri, Illinois, Indiana, and Ohio; and acted as such during the year 1860. But he had previously been appointed agent for the Mississippi board, which was the first organized, and afterwards by the Louisiana board. The Mississippi board was chartered Nov. 14, 1857. The preamble of the charter recites as follows: "Whereas it is contemplated to establish at Louisville, Kentucky, a publishing house to print books in raised letters for the use of the blind in the United States; and whereas, to establish said publishing house upon a permanent basis, and with a sufficient capital, contributions from various States of the Union will be necessary; to effect which object acts of incorporation like this will be applied for in other States, the object of which incorporation will be to aid in collecting and effectually securing for such object the money which may be contributed in each State:" therefore it was declared (sect. 1), that the Hon. C. P. Smith, Hon. William L. Sharkey, and three others named, and their successors, &c., should be a body corporate under the name of the "Board of Trustees to aid in establishing a publishing house to print books, &c., for the benefit of the blind," with power to use a common seal, and to make such contracts as might be necessary to effect the objects of their corporation. By sect. 3, Dempsey Sherrod was appointed general agent of said board to solicit subscriptions and contributions for the above purpose in this and other States of the Union, and to apply to other States for similar acts of incorporation. Upon his

death or resignation the board should have power to appoint another. By sect. 6, the board of trustees were authorized to receive contributions in money, &c., for the purpose aforesaid, and, until $25,000 should be raised in this and other States, were to invest the same at interest. By sect. 7, if the sum named should not be raised within seven years, and the publishing house should not be established within nine years, the contributions should be returned to the contributors with interest. By sect. 8, it was declared that, so soon as the legislature of Kentucky should pass an act incorporating trustees for establishing said publishing house in Louisville, and this board had evidence that $25,000 were raised, the fund in the hands of this board should be transferred to the board of trustees incorporated by the State of Kentucky, in such sums as might be needed to carry on the business; provided, if Kentucky should not pass such a law incorporating said board, the Mississippi board might select some other place for publication in such State as might pass such act.

At the same time the legislature of Mississippi passed an act, by which, after reciting that $12,000 had been subscribed by private individuals, they appropriated $2,000 to the board of trustees in aid of the object.

It may be remarked here that only about $1,000 of the money raised in Mississippi were ever paid to the Kentucky institution. What was the cause of this does not clearly appear. From the evidence of Mr. Bullock, the president of the complainant, it appears that the Kentucky board became dissatisfied with Sherrod after 1860, and he was no longer employed as their agent. Mr. Foster, a witness for the defendant corporation, and one of its trustees from its organization, testifies that after the war they learned from Mr. Sherrod that the trustees at Louisville had changed their charter, making material changes which affected the whole institution, and he, Mr. Sherrod, had withdrawn entirely his connection from it; so had the parent society, organized in Mississippi, and he had established another institution called the American Publishing House and American University for the Blind, in the District of Columbia. It may be that this explains the discontinuance of co-operation on the part of the Mississippi board.

Although a board of trustees was chartered in Tennessee, and an appropriation of $2,000 was made by the legislature of that State in 1858, and a law was passed making an annual appropriation of $10 for every blind person in the State, according to the census, which amounted in seven years to the sum of $38,780; yet, for some unexplained reason, no money was ever contributed from that State to the Kentucky institution, and in 1867 the law was repealed.

The first charter granted by Kentucky, and under which the complainant claims to have been organized, was an act of the legislature, passed Jan. 26, 1858. As this charter is important, because it was in force when that of the Louisiana board of trustees was adopted, and when the funds in question were mostly contributed, it will be proper to give the exact language of its most important provisions. It commenced with the following recital: —

"Whereas the State of Mississippi has by law made an appropriation of 2,000 dollars to aid in establishing in Kentucky a national institution to print and circulate books in raised letters for the blind; and whereas said State has incorporated a board of trustees to receive said money, and 12,000 dollars which have been subscribed for the aforesaid purpose by citizens of Mississippi, and to transfer said fund to said institution in Kentucky; and whereas it is anticipated that other States will make donations and incorporate trustees to aid in this enterprise."

It then enacted, —

"SECT. 1. That an institution under the name of the American Printing House for the Blind be established in Louisville, Kentucky, or its vicinity, and that James Guthrie, William F. Bullock, Theodore S. Bell, Bryce M. Patten, John Milton, H. T. Curd, and A. O. Brannin, and their successors, be, and they are hereby, declared a body corporate under the name and style of the Trustees of the American Printing House for the Blind, with the right as such to use a common seal, to sue and be sued, to plead and be impleaded, in all courts of justice and in all cases in which the interests of the institution are involved. The said trustees are hereby fully empowered to receive, by legacies, conveyances, or otherwise, lands, money, and other property, and the same to retain, use, and apply to the publishing of books in raised letters for the blind in the

United States. Said trustees are authorized to purchase land and erect, purchase, or rent buildings for the use of said institution, and to make all such contracts as may be necessary to accomplish the purposes of their incorporation. . . .

"SECT. 2. The trustees shall elect, annually, a president, a treasurer, and a secretary, who shall hold their offices until their successors shall be elected and duly qualified. Said trustees may prescribe the duties and fix the compensation of said officers. . .

"SECT. 6. It shall be the duty of the board of trustees, before commencing the publication of any book, to request the superintendent of every institution for the education of the blind in the United States to make out and send to the trustees of the printing house a list of such books as he may deem most desirable for the use of the blind; and said trustees shall select for publication the book that shall have received the greatest number of superintendents in its favor. This mode of selecting books for publication shall be repeated at least once every year.

"SECT. 7. Every school for the blind located in a State whose legislature or citizens contribute to the funds of the American Printing House shall, in proportion to the funds, be entitled to copies of every book published by said house, to be distributed gratuitously to such blind persons as are unable to purchase them. And the superintendents of said schools shall be required to report to the trustees of said house the names and residences of all persons to whom books may be thus distributed. The prices of books published by this institution shall be made so low as merely to cover the cost of publication and other incidental expenses of the institution.

"SECT. 8. It shall be the duty of the board of trustees to make an annual report of its proceedings, which shall embrace a full account of the receipts and disbursements, the funds on hand, the number of books sold, and the number distributed gratuitously, and a general statement of the condition of the institution; and they shall transmit copies of said reports to the General Assembly of Kentucky, to the governors of the several States of the Union, the president of each State board of trustees, to the superintendent of every institution of the blind in the United States, and to every person who shall have made to the institution a donation of more than five dollars the previous year.

. . . . . .

"SECT. 10. The presidents of the State boards of trustees shall, *ex officio*, constitute a board of visitors, each member of which shall

at all times be authorized to visit the printing house, examine the books, and investigate the proceedings of the trustees; and the president of the oldest State board of trustees shall, at the written request of a majority of the visitors, call a meeting of the board of visitors, who shall be fully empowered to investigate the proceedings of the trustees of the institution, and in case they shall find said board or any member thereof has mismanaged the affairs of said institution, by malfeasance in office or neglect of duty, they may, a majority of three-fourths of all the members concurring, declare the office or offices of said trustee or trustees vacant, and proceed to fill such vacancy by election from the citizens of Louisville or its vicinity. Notice of all meetings of the board of visitors shall be sent by mail to all the presidents of the State boards and to all the trustees of the printing house at least one month before the time appointed for said meetings.

"SECT. 11. The trustees of said printing house shall continue in office until their offices shall become vacant by resignation, death, or removal from office as hereinbefore provided for. All vacancies caused by resignation or death shall be filled by the remaining members of the board.

"SECT. 12. Be it further enacted, that each donor shall be entitled to his donation, with the interest, after the deduction of the necessary expenses are paid, provided said publishing house is not established within nine years from the passage of this act; and should the board refuse to make said distribution among the donors according to their respective interests, then, and in that event, said donors may have the right to proceed to recover the same by legal proceedings instituted in any of the courts of this Commonwealth having jurisdiction thereof."

The provisions of the tenth section of this act are especially material in the determination of this cause. It was the change made therein by the subsequent act of 1861, as will hereafter appear, on which the defendants principally rely for refusing to pay over to the complainant the moneys in controversy. It will be seen that direct reference was made to it in the Louisiana charter. This charter was taken out under the general corporation law of the State of Louisiana, and is dated Jan. 3, 1859. It recites as follows: —

"Whereas, it is contemplated to establish at Louisville, in the State of Kentucky, a publishing house, to print and publish books

in raised letters for the use of the blind in the United States; and whereas, to establish said publishing house on a permanent basis, and with sufficient capital, contributions from various States of the Union are anticipated; and whereas, it is proper and just that a portion of said funds should be contributed by the citizens of the State of Louisiana, and believing the object to be worthy the consideration and liberality of a generous public, and desiring to cooperate in the accomplishment of the proposed enterprise, we, the undersigned citizens of Louisiana, do hereby associate ourselves together, and constitute ourselves and our successors a body corporate, under the provisions of an act of the legislature of the State of Louisiana, approved March 14, 1855, entitled 'An Act for the organization of corporations for literary, scientific, religious, and charitable purposes,' and we do hereby agree to the following article of corporation: —

"1. The name and style of this corporation shall be 'The Louisiana Board of Trustees of the American Printing House for the Blind,' by which name it shall be known, and be capable to sue and be sued, and the domicile of this corporation shall be in the city of New Orleans.

"2. The object of this association and corporation shall be to raise funds for, and otherwise to aid in, the permanent establishment and successful management at Louisville, Kentucky, of a publishing house for the printing and publication of books in raised letters for the use of the blind in the United States.

"3. The trustees shall annually elect, by ballot, from their own number, a president, on whom all legal process shall be served, a treasurer and secretary, provided that said officers shall continue in office until their successors shall have been elected and qualified.

"4. The trustees shall have power to fill all vacancies occurring in the board by death, resignation, or otherwise; to adopt by-laws for their own government, and prescribe the duties of its officers and members, and they shall be empowered to receive by donation, bequest, purchase, or otherwise, and to hold and use properties, real and personal, to the amount of one hundred thousand dollars.

"5. The trustees shall hold the funds and properties of the corporation for the purposes thereof, and until the sum of twenty-five thousand dollars is raised in this State and other States of the Union, the same may be safely invested at the discretion of the trustees; that so soon as the trustees are officially informed by

the trustees of the American Printing House for the Blind, at Louisville, Kentucky, that the sum of twenty-five thousand dollars has been raised, they shall then remit the funds and properties received by them to said trustees at Louisville, in such sums as may from time to time be required to establish and carry on said publishing house; provided that should said sum of twenty-five thousand dollars not be raised within seven years from the date of this incorporation, or said publishing house not be established within nine years from said date, then the donations and contributions received, together with the interest thereon accrued, after deducting expenses of the incorporation, shall be returned to the contributors and donors thereof.

"6. The trustees reserve to themselves at all times the right, through their president, of visiting the establishment, or printing and publishing house, at Louisville, and inspecting the books and management of the same, and, in conjunction with the presidents of other boards that may be formed, the supervision and administration of the affairs thereof, in accordance with the provisions of the tenth section of the charter of 'The Trustees of the American Printing House for the Blind,' as incorporated by the General Assembly of the State of Kentucky."

From the sixth article, above quoted, it clearly appears that the Louisiana board regarded the provisions of the tenth section of the Kentucky charter as material and fundamental. It gave them, through their president, in conjunction with the other State boards, through their presidents, the ultimate control and management of the central institution; and they expressly reserve to themselves at all times this vital prerogative. It may be fairly presumed that without it they would never have engaged to pay over their contributions to the Kentucky board.

The question then is, whether this provision has been materially altered by the Kentucky legislature in the new or amended charter which was granted to the Kentucky board in April, 1861.

A glance at this amended charter is sufficient to decide the question. It is a recast of the whole incorporating act. After copying the preamble of the original charter, it proceeds to name the corporators, substituting two new names in place of two others in the original. Perhaps this is a change of but

little moment; though the defendants regard it as a change of the corporation. The general objects of the association and duties of the trustees are substantially the same as those contained in the original act. It is observable, however, that in referring to States that may become interested in the institution, and to institutions for the education of the blind which it is anticipated will share in its benefits, the States of North America are named instead of the States of the Union, or of the United States; and institutions for the education of the blind in North America, instead of institutions in the United States, — evidently contemplating the possibility of a disintegration of the United States, and the establishment of another government in its territories. But without further reference to this noticeable change, we proceed to copy the ninth section, which replaces the tenth of the original act. It is in these words: —

"The superintendents of State institutions devoted exclusively to the education of the blind, and the governors of the States that aid in sustaining the American Printing House for the Blind, and the presidents of the State auxiliary boards of trustees, shall, *ex officio*, constitute a board of visitors, each member of which shall be at all times authorized to visit the printing house, examine the books, and investigate the proceedings of the trustees; and the president of any State board may, at the request of a majority of the visitors, call a meeting of the board of visitors, who shall be fully empowered to investigate the proceedings of the trustees of the institution, and in case they shall find that said board, or any member thereof, has mismanaged the affairs of the institution by malfeasance in office or neglect of duty, they may, a majority of three-fourths of all the members present concurring, declare the offices or office of said trustees or trustee vacant, and proceed to fill the vacancy, by election from the citizens of Louisville or its vicinity. Representatives from a majority of the States that contribute to the support of the American Printing House for the Blind shall constitute a quorum of the board of visitors, and each State represented shall be allowed one vote in the action of the board. Notice of every meeting of the board of visitors shall be sent by mail to all the members of the board, and to the trustees of the American Printing House for the Blind, at least one month before the time appointed for the meeting."

This is certainly a material change in the supervisory government and control of the institution; indeed, it may be denominated a subversion of the original constitution. By the original charter, the State boards of trustees, through their presidents, were constituted the board of visitors, with absolute supervisory control, even to the extent of discharging from office the entire board of trustees of the central institution for mismanagement of its affairs, malfeasance in office, or neglect of duty. By the new charter, the presidents of the State boards have a seat in the board of visitors, it is true; but their power, which before was exclusive, is now in effect taken from them, and shared by the governors of all the States that aid in sustaining the institution, and the superintendents of all State institutions devoted exclusively to the education of the blind. In a matter so important as the government of the institution, such a change cannot be said to be immaterial, or anything less than fundamental. It is more especially important in this case because made the subject of an express reservation in the charter of the defendants.

In view of the facts above detailed, the question still remains, whether, after such a fundamental change in the constitution of the central organization, affecting so materially the rights of the auxiliary boards in regard to the control of the institution, they are bound to pay over to that institution the funds committed to their charge. If an individual should subscribe to a charitable scheme upon certain conditions as to its organization and control, and those conditions are violated before the payment of his subscription, it can hardly be doubted, that he would be discharged from his obligation to pay it. Whatever power the legislature may possess to modify the organization of an established charity in point of form, it cannot change an executory contract to contribute to such charity. The power to do this would, in effect, be a power to make a contract for a party which he is himself unwilling to make. The authorities which affirm the legislative power to modify the forms of public and charitable institutions, do not apply to such a case.

The position of the defendants is somewhat anomalous.

They are not themselves the original contributors; but they represent them. They are their trustees, as well as trustees for the benefit of the proposed foundation. The money of the contributors has been deposited in their hands to be applied to a proposed charity on certain conditions. The defendant board, as the representatives of the contributors, occupy a relation to the general foundation similar to that of a subscriber to its funds. They stand upon the terms of an agreement, or contract, by which, in effect, they engage, upon certain conditions, to contribute and pay over to the central institution the money intrusted to them. They cannot be considered as bound, in law, to pay it over at all events. They certainly would not be so bound if the character of the charity should be materially changed. It is difficult to see how they can be so bound if its constitution and government are so changed as to deprive the defendants of that participation in the control which it was stipulated they should have. If the original contributors were all willing to waive the objection, the case might be different; but the original contributors are claiming a return of their contributions; and if they were not doing this, it would nevertheless be difficult to ascertain their united will. The duty and only safe course of the defendant trustees is, to withhold the contributions in their hands if they see that there has been a clear violation of those conditions upon which such contributions were made. By their own constitution, they have certain distinct rights and duties, — rights which they not only may, but ought to, insist on; because they are not only theirs, but, representatively, those of their constituents, the donors of the fund. They are not part and parcel of the Kentucky institution; though they were to have had an important share in its control. They are a separate organization, existing under distinct laws. It is apparent from the evidence in the case that the several State contributions, and incorporations of trustees, whilst looking to a common and general foundation, or charity, for the benefit of the blind in the United States, had also special reference to the benefit of that class in the particular State. The legislative appropriations which were graduated by the number of blind in the State, which were made in most of the States interested, indicate this. The

provision of the Kentucky charter securing to schools for the blind in a contributing State a gratuitous distribution of books in proportion to the amount contributed, indicates the same thing. Reciprocal benefits were evidently expected in consideration of the amount of aid to be contributed. This is shown by the entire testimony. Mr. Bullock, president of the complainants, whilst complaining of the unwillingness of the Louisiana board to pay over their fund, says: "From the beneficial agencies of our institution the blind of Louisiana have been almost entirely shut off through the unwillingness of the Louisiana board to give up the money in their hands." Again: "It is easy to see that if the Louisiana board gives us the money raised for us, every dollar will be returned to the blind of Louisiana in the shape of books and apparatus for their education, undiminished by any tax for the expenses incurred in starting our enterprise. The institution for the education of the blind in Baton Rouge, La., is in need of books, maps, slates, models, and educational appliances of all kinds. The funds held by the Louisiana board should be sent to us to supply these wants." The testimony of the defendants' witnesses, Adams and Foster, who were members of the Louisiana board from its first organization, is to the same effect in regard to the special advantages expected to accrue to the blind of Louisiana by joining with the boards of other States in the establishment of a general institution. In fine, the Louisiana board, by virtue of their distinct organization, their separate position, the local character of their operations, and their just expectations of special benefit to the blind of their own State, not only had a right, but were under an obligation, to take due care that the institution to which their fund should be intrusted was such an institution in its objects and constitution as was contemplated when the scheme was undertaken and entered into, and not one materially different therefrom in either respect.

We think, therefore, that the defendants, when they found that the constitution of the Kentucky corporation had been materially changed, and their share in its management and control had been superseded by a totally different arrangement, in which their influence was, or might be, totally anni-

hilated, were justified in refusing to pay over to such alleged body the funds in their hands.

The complainants, however, contend that the actual trustees of the Louisiana board have admitted the right of the complainants, and are therefore estopped from setting up the defence which we have been considering. It is very questionable whether the personal admissions of the individual trustees are entitled to any weight in such a case. But a careful examination of the whole evidence convinces us that no admissions of the kind, made under a full and fair knowledge of the circumstances, have been made by the Louisiana trustees. Indeed, the argument might well be retorted, that the complainants, by their great delay in demanding the fund, — a delay of fourteen or fifteen years, or, throwing out the period of the civil war, a delay of eleven years, — are estopped from prosecuting for it now. No formal demand was made until the year 1876. An agent was sent to New Orleans in 1871, it is true, to get aid from the Louisiana board, and to inquire into their mutual relations. But the latter always referred to legal impediments which would at least require the aid of legislation to remove. What the nature of these impediments were does not clearly appear. But we may presume that the Louisiana board had in view the change which Mr. Sherrod reported to them had been made in the Kentucky charter, the nature of which, however, had not been distinctly explained to them. In answer to a communication from Mr. Huntoon, secretary of the Kentucky board, Mr. Foster, the secretary of the Louisiana board, wrote the following letter in 1872, which seems to throw some light on the subject: —

"DECEMBER 22, 1872.

"B. H. HUNTOON, Esq.,

Sec'ty Am. Printing House for the Blind, Louisville, Ky.:

"DEAR SIR, — Your favor of Dec. 11th is at hand, and contents noted, but board of trustees are not in condition at present to appropriate funds to any purpose. When the board meets, your communication will be laid before them. Though not authorized to speak on their behalf, I may add that the change in your charter may be found upon examination, probably, to seriously change the relations of our board to yours.

"Our board will probably have a meeting in course of the coming spring. "W. H. FOSTER,
" *Secretary, &c.*"

This was certainly a very pregnant intimation of the objection which lies at the foundation of the defence in the present case.

It is true that in 1876, when the defendants were sued by several of their original donors for the recovery of their contributions, on the ground that the conditions of raising $25,000 within seven years, and of establishing a printing house within nine years, from the date of the charter, had not been complied with, the Louisiana trustees made inquiry as to these points from the complainants. They also had, or some of them had, a conference with Mr. Barrett, the treasurer of the Kentucky corporation, and inquired of him as to the change in their charter, which had been reported by Mr. Sherrod. They testify that Mr. Barrett assured them that Sherrod was entirely mistaken; that no material change had been made in their charter, and that they were acting under the original charter of 1858; at least, so he was understood by them. The defendants' counsel, acting on the supposition that these representations were correct, prepared the defence of the board accordingly; and being satisfied that the amount of $25,000 had been raised within the seven years, and that an establishment sufficient to answer the requirements of the charter had been started within the nine years, on that basis contested the suits brought by the donors. During the progress of that litigation, however, having procured and examined the amended Kentucky charter of 1861, his views were entirely changed on the subject of the right of the Kentucky corporation to demand the fund.

This is, in substance, the admission which is relied on by the complainants. We think it is quite satisfactorily explained in the testimony of Judge Merrick and Mr. Adams; and that it cannot, in the slightest degree, affect the rights of the parties in this case.

It is unnecessary to inquire what should be done with the fund in question. The original scheme has failed. The

cross-bills of the donors, who were made defendants in the case, were dismissed without prejudice, and they have not appealed. The legislature of Louisiana, by an act passed May 14, 1878, authorized the trustees, in their own exoneration, to pay the whole fund into the State treasury so far as the same remained in their hands unclaimed by the contributors; and appropriated the same as a special and inviolable fund for the sole and exclusive benefit of the Louisiana Institution for the Blind and the Industrial Home for the Blind, domiciled at Baton Rouge in said State. An additional section provides for paying to any original contributor, on judicial proof of his claim, the amount contributed by him, with interest. We have no doubt that the fund will be properly administered and disposed of under the laws of Louisiana, to whose superintending care the matter rightfully belongs.

It is proper to add that, in our view of this case, the general doctrine of charities has nothing to do with its decision. When a charitable trust has been fully constituted, and the funds have passed out of the hands and control of the donors, and into the hands of the proper institution, or organization, intended for its administration, the Court of Chancery, or some analogous jurisdiction, becomes its legal guardian and protector, and will take care that the objects of the trust are duly pursued, and the funds rightfully appropriated. But where contributions to a charity are proposed to be made upon certain express conditions, the rights of the donors stand upon contract; and if the conditions are not performed, their obligation to contribute is discharged.

Decree affirmed.

UNITED STATES v. SAVINGS BANK.

1. The Court of Claims has jurisdiction of a suit brought against the United States to recover back certain taxes and penalties alleged to be of the character mentioned in sects. 3220, 3228, Rev. Stat., where payment thereof was refused to the plaintiff, whose claim thereto had in due time been presented on appeal to and allowed by the Commissioner of Internal Revenue. *United States* v. *Kaufman* (96 U. S. 567) cited and approved.
2. Lodging the appeal with the proper collector of internal revenue, for transmission to the commissioner in the usual course of business, under the requirements of the treasury regulations, is in effect the presentation of it to the commissioner.

APPEAL from the Court of Claims.

Sections 3220 and 3228 of the Revised Statutes are as follows: —

"SECT. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. . . .

"SECT. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. . . ."

The material regulations prescribed by the Secretary of the Treasury applicable to this case are these: —

"Claims for the refunding of taxes erroneously assessed and collected should be presented through the collectors of the respective districts upon blank form No. 46. . . .

"The collector should keep a perfect record, in a book furnished for the purpose, of all claims presented to the commissioner, and must certify as to each claim, whether it has been before presented or not.

"Where the case of an appeal involves an amount exceeding

two hundred and fifty dollars, and before it is finally decided the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement.

For some years it has been the practice of the officers of the Treasury Department to regard appeals for refunding taxes illegally assessed and paid, when deposited with collectors, under the rules, in season to be forwarded to Washington within the two years' limitation, to have been duly presented to the commissioner according to law.

On the 10th of July, 1878, the Real Estate Savings Bank of Pittsburg, Pa., paid to the collector of internal revenue for the proper district in Pittsburg, certain internal taxes which had before that time been assessed; and on the 9th of July, 1880, it presented to the same collector, at his office, an appeal to the Commissioner of Internal Revenue, made out on the blank form prescribed by the secretary, to refund and pay back $972.69, which, it was alleged, had been illegally assessed, and erroneously paid. This appeal was delivered to the collector in time to have reached Washington by due course of mail on the 10th of July, if it had been promptly forwarded; but it was retained until the 15th, when it was sent to the commissioner, with an indorsement by the collector that he had investigated the facts, and found the statements of the claimant were in all respects true. The papers reached the commissioner on the 17th of July, and he, on the 13th of October following, submitted them to the Secretary of the Treasury, as required by the regulations, for his consideration and advice. On the 18th of October the secretary signified to the commissioner his approval of the payment of the claim, and on the 21st the commissioner certified its allowance. On the presentation of this certificate through the accounting officers of the Treasury Department payment was refused. The certificate has never been revoked by either the secretary or the commissioner, but it is still in force so far as the action of these officers is concerned. After payment was refused, suit was brought on the certificate in the Court of Claims, where judgment was given for the claimant. From this judgment the United States appealed.

The Solicitor-General, *Mr. William Lawrence*, and *Mr. John S. Blair* for the United States.

The following points are taken from Mr. Lawrence's brief:

I. The claim is barred because not presented at the office of the Commissioner of Internal Revenue in Washington within two years.

1. The statute says such claim "must be presented to the Commissioner of Internal Revenue." Rev. Stat., sect. 3220. The commissioner has an office "in the Department of the Treasury" (id., sect. 319), and this "shall be at the seat of government." Id., sect. 233. The claim is to be "settled and adjusted in the Department of the Treasury." Id. 236. Effect is to be given to the words as they are, "not importing . . . words . . . not found there." *Leavenworth, &c. Railroad Co.* v. *United States*, 92 U. S. 733, 751. A presentation at Pittsburgh is not a presentation "in the Department of the Treasury."

The "treasury of the United States" is "in the treasury building," and there the treasurer performs his duties. Rev. Stat., sect. 3591.

Banks are required to make returns for taxation "to the treasurer." Id., sect. 5215.

If for the convenience of the banks a regulation is made (id., sect. 161) permitting them to make reports "through" a sub-treasurer, are the banks relieved from the duty to still make them "to the treasurer"?

2. The "regulation" does not change this. It says claims "should be presented through the collector." "Should" is not "shall," and if so, "through" is not "to." This permits presentation through a collector, but contemplates presentation to the commissioner. The regulation is to be construed in harmony with the statute, which gives the claimant a right to present directly to the commissioner, but permits a collector to aid him.

3. The commissioner had no power to receive the claim after two years, and any action thereon was *ultra vires*. An officer cannot waive a right denied by statute. *Andrae* v. *Redfield*, 12 Blatchf. 407; *United States* v. *McKnight*, 98 U. S. 179. The claim is, as said in *United States* v. *Kaufman* (96 id. 367, 570), "impeached for . . . mistake."

4. The duty imposed by statute on the commissioner cannot be delegated to a collector. *Delegata potestas non potest delegari.*

It is the right of the claimant to have the privilege of presenting his claim at the office of the commissioner.

5. A claimant cannot impose a duty on a collector to receive a claim. Official duties are fixed by law. *Ames* v. *Huron, L. & B. Co.*, 11 Mich. 147; Cooley, Const. Lim. 363, 451.

II. The allowance of the commissioner does not give a *prima facie* right of action. Rev. Stat., sect. 1059.

The test, whether such allowance gives such right, is this: Is it evidence of a "promise on the part of the United States to pay" (*United States* v. *Kaufman*, *supra*), or an award showing a debt due; that is, does it *per se* so operate? If it does not, *per se*, impose a duty on all officers charged with duties in relation to it to make payment without examining the evidence on which it is based, how can it be said that it is the evidence which the law requires of a right to payment? If other steps are by law required to secure payment, how can it be, *per se*, *prima facie* evidence of a right to payment?

1. It is "a mere step in the system of internal revenue." House Ex. Doc. No. 27, 2d Sess. 45th Cong., p. 43.

2. The whole power of the commissioner is found in the words "to refund and pay back."

These had a meaning when first used in the act of June 30, 1864, c. 173. The commissioner did literally "refund and pay back," "by drafts drawn on collectors of internal revenue." This power was taken away by the third section of the act of March 3, 1865, c. 78, and the words to "refund and pay back" became inoperative, — they ceased to have a meaning. The commissioner could no longer literally "pay back."

Such claim cannot be paid unless it has been "settled and adjusted in the Department of the Treasury." Rev. Stat., sects. 184, 187, 236, 248, 269, 277, 305, 313; *McKnight's Case*, 13 Ct. Cl. 302; 1 Op. Atty.-Gen. 624, 680; 2 id. 507; 10 id. 5.

The claimant must "pursue the statutory remedy to the end." *United States* v. *Kaufman*, *supra*.

3. To hold that these words authorize the commissioner to give evidence of a *prima facie* right of action seems objection-

able. The law (Rev. Stat., sects. 989, 3226, 3227) recognizes a remedy by action against a collector. It would seem improbable that Congress intended to give a duplicate remedy by action on the allowance of the commissioner.

If the allowance of the commissioner gives *prima facie* right of action against the United States, it is not barred until six years (id., sect. 1069), when the government may have lost the means of impeaching it, whereas Congress seems to have intended to limit the remedy by requiring a presentation within two years to the commissioner (id., sect. 3228), and for a short period against the collector. Id., sects. 983, 3226, 3227.

The approval of the commissioner has no element of a contract. He is not authorized to contract.

4. It will enable a claimant to withdraw from the government the benefit of an examination by the proper accounting officers.

It should require clear language to produce such a result.

Whenever Congress has intended to withdraw from this supervision any class of cases, it has been done in very explicit language. Rev. Stat. sects. 48, 1089, 1911.

III. Congress having given another judicial remedy, it is to be deemed exclusive. Rev. Stat., sects. 846, 989, 3226, 3227; *State* v. *Marlow*, 15 Ohio St. 114; *Commonwealth* v. *Garrigues*, 28 Pa. St. 9; *Commonwealth* v. *Baxter*, 35 id. 263; *Commonwealth* v. *Leech*, 44 id. 332.

Mr. George L. Douglass for the appellee.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

The objections made to the recovery are, in substance: 1, That the Court of Claims had no jurisdiction of the suit, because the claim sued for was not founded on any law of Congress, or upon contract; and, 2, That the appeal to the Commissioner of Internal Revenue was not taken within two years after the cause of action accrued, and that consequently the allowance by that officer was without any authority of law.

The first of these objections is, we think, disposed of by *United States* v. *Kaufman*, 96 U. S. 567. That case arose

under sect. 3426, Rev. Stat., which is as follows: "The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal revenue act, and may have been spoiled, . . . and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment, the sum of five per cent, to the owner thereof. . . ."

And we held that the allowance of a claim by the commissioner under this section was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, and that, if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because it raised an implied promise on the part of the United States to pay what might actually be due the claimant, and also because the claim therefor was founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court. We cannot discover any material difference between the powers of the commissioner under sect. 3426, and those which he has under sect. 3220. Under sect. 3426 he is to "allow" the claim, which is done either by giving other stamps in lieu of those that have been spoiled, &c., or by repaying the amount or value. Under sect. 3220 he is to "refund" and "pay back." His payments of money in both cases must be made through the accounting officers of the Treasury Department, as he is not himself a disbursing officer. Whether his allowance is conclusive on the other officers, through whose hands it must necessarily pass before it can be paid by the treasurer, we did not then, and need not now decide. All we said then, and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the government the burden

of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress. Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector (Rev. Stat., sect. 3226), and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the government in the Court of Claims. This, as it seems to us, is the logical result of the legislation of Congress upon the subject. A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims. To say the least, the decision of the commissioner on the appeal is sufficient to determine whether one form of remedy shall be resorted to by the claimant, or the other.

Upon the other branch of the case we are entirely satisfied with the conclusions reached by the court below, and that the lodging of the appeal made out in due form with the proper collector of internal revenue for the purpose of transmission to the commissioner in the usual course of business, under the requirements of the regulations of the secretary, was in legal effect a presentation of the appeal to the commissioner. The effect of the regulation was to designate the office of the collector of internal revenue as a proper place for the presentation of the appeal. The whole subject is so fully and satisfactorily considered in the opinion below, that we deem it unnecessary to do more than refer to what is there said.

Judgment affirmed.

POTT *v.* ARTHUR.

Books imported in August, 1874, were subject to a duty of twenty-five per cent *ad valorem*.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Edward Hartley and *Mr. Walter H. Coleman* for the plaintiffs in error.

The Solicitor-General for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by James Pott, Edwin Young, and James B. Young, against Arthur, the collector of customs of New York, to recover back duties paid on books imported in August, 1874. A duty of twenty-five per cent *ad valorem* was exacted; whilst the plaintiffs claim that they should have been required to pay only ninety per cent of that amount, or twenty-two and a half per cent *ad valorem*.

As the law stood at the time, in sect. 2504, schedule M, of the Revised Statutes, a duty of twenty-five per cent *ad valorem* was imposed on "books, pamphlets, blank books, &c." But by sect. 2503 it was provided that, on the goods enumerated therein, only ninety per cent of the duties imposed by the said schedules should be levied and collected; and amongst the articles enumerated for the reduction were those contained in the following specification: "All paper and manufactures of paper, excepting unsized printing paper, books and other printed matter, and excepting sized or glazed paper suitable only for printing paper."

Of course the articles expressly excepted in this clause are not entitled to the proposed reduction. The question is whether, by the words used, books are excepted from the general class of articles designated as paper and manufactures of paper, intended to be benefited, or whether they are enumerated as independent articles entitled to the reduction. The plaintiffs contend that they are not embraced in the exception because

they do not properly belong to the class of articles designated as "paper and manufactures of paper;" and cannot, therefore, be excepted therefrom. A thing that is excepted, they argue, must necessarily belong to the class of things from which it is excepted. This, of course, is true, as a general proposition, but the question is whether it applies to the clause of the act in question. No man of literary culture, it is true, would call a book paper or a manufacture of paper, any more than he would designate a masterpiece of Raphael as canvas or a manufacture of canvas. By a license of speech, it is true, he might say that a particular book was mere waste paper, or rubbish, or that a particular picture was nothing but a piece of spoiled canvas; but speaking seriously, and in accordance with good usage, he would not make such an application of terms. All this, however, has little to do in construing the act in question. If Congress had reduced the duty on all manufactures of wood and leather except cutlery, we should be obliged to regard cutlery as excepted in the particular case, from the manufactures of wood and leather intended to be benefited by the law. Our duty is to get at the intent of the law: we are not responsible for its style. And in the present case the intent seems to be unmistakable. The language under consideration first appeared in the act of June 6, 1872, c. 315, and was not accompanied by the concluding exception, but read as follows: "On all paper and manufactures of paper, excepting unsized printing paper, books, and other printed matter." The additional exception was added in the revision. It can hardly be doubted that, as the words were used in that act, "books and other printed matter" were included in the exception. We have no doubt that such is the intent and meaning of the same words in the Revised Statutes. In transferring the language, it is to be presumed that it was intended to transfer the sense.

Judgment affirmed.

HEALD *v.* RICE.

1. The specification (*infra*, pp. 738–742) forming part of the original letters-patent, No. 146,614, granted to Harvey W. Rice, Jan. 20, 1874, for an improvement in steam-boilers, and that forming part of the reissued letters, No. 6422, issued to him May 4, 1875, show that the original and the reissued letters are not for the same invention. The latter are therefore void.
2. The said letters were anticipated by letters No. 135,659, dated Feb. 11, 1873, the reissue whereof, No. 6420, bears date May 4, 1875, and by letters No. 139,075 dated May 20, 1873, all of them granted to David Morey for a straw-feeding attachment for furnaces.
3. The question of the identity of an invention described in the original and the reissued letters-patent is one of law for the court, whenever it can be determined solely from their face by mere comparison, without the aid of extrinsic evidence to explain terms of art or to apply the descriptions to the subject-matter.

ERROR to the Circuit Court of the United States for the District of California.

The case is stated in the opinion of the court.

Mr. George Harding and *Mr. John H. Boalt* for the plaintiff in error.

Mr. Milton A. Wheaton for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action at law brought by Henry W. Rice against John L. Heald to recover damages for an alleged infringement of reissued letters-patent No. 6422, granted May 4, 1875, to him for improvements in steam-boilers. The original patent was No. 146,614, dated Jan. 20, 1874. The invention, as stated in the complaint, consisted, among other things, of a combination of a straw-feeding attachment with the furnace-door of a return-flue steam-boiler, for the use of straw alone as fuel, in generating steam ample for practically operating steam-engines.

The case was tried by a jury, and resulted in a verdict and a judgment for the plaintiff; to reverse which this writ of error is prosecuted.

A bill of exceptions sets out the exceptions of the defendant to the rulings of the court below, and all the evidence. The court was asked at the close of the plaintiff's testimony, and again when all the evidence on both sides had been introduced,

to instruct the jury to return a verdict for the defendant; the refusal to do which, amongst other rulings, is assigned for error; and thus the whole case on the merits is brought here for review, so far as they rest upon questions of law.

The plaintiff introduced in evidence his original and reissued patents. For the purpose of comparison,— which, in view of the questions of law raised becomes important and necessary,— the specifications and claims are exhibited here in parallel columns, using one copy for both patents when they are identical, and putting all the language that is in the original and not in the reissued patent in the left-hand column in italics, and putting in the right-hand column, in italics, all the language used in the reissued patent that is not in the original.

"Specifications forming part of letters-patent No. 146,614, dated Jan. 20, 1874.

	Reissue, No. 6422 *dated May* 4, 1875.
application filed	
November 3, 1873,	*March* 17, 1875.

"*To all whom it may concern:*

"Be it known that I, Harvey Wood Rice, of Haywood, Alameda County, State of California, have invented new and useful improvements in steam-boilers; and I do hereby declare the following description and accompanying drawing are sufficient to enable any person skilled in the art or science to which it most nearly appertains, to make and use my said invention without further invention or experiment.

"My invention relates to

certain improvements in the construction of steam-boilers where-	*the combination of a straw-feeding device with the furnace door of that class of boilers which are known as return-flue boilers, by which combination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam.*
	Many attempts have heretofore been made, both in this country and in Europe, to successfully

by I am enabled to utilize straw and other light substances for fuel, so that a complete combustion of the smoke is attained, and the danger from fire in the harvest fields, where those boilers are more especially useful, is entirely utilize straw as a fuel for generating steam in steam-boilers; but these attempts have always resulted in failures or partial failures.

When straw is fed into the furnace of an ordinary steam boiler, it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate-bars to impede the draft; and, unless the cinders are frequently removed from between the grate-bars, they soon accumulate to such an extent as to choke the draft entirely and prevent combustion.

Many devices have been tried and patented for overcoming these troubles; but, as far as I am aware, none of them have succeeded in remedying the difficulties sufficiently to make the straw-burning engine a practical success.

My experiments, however, have developed the fact that, by attaching a tube or box-door to the furnaces of that class of boilers, known as return-flue boilers, in which the chimney or stack is constructed directly above the furnace, and the heat and products of combustion from the furnace are carried along under the boiler and then returned back to the stack through flues or tubes leading through the length of the boiler, the combustion will be so complete that no sparks, and but very little smoke, will escape from

obviated; and

the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate-bars.

My invention also relates

to a novel method of securing the tubes and tube-sheet within the shell of the boiler, so that they can be at any time easily removed for the purpose of cleaning or repairing, and at a much less expense than is ordinarily entailed for such work.

"Referring to the accompanying drawings for a more complete explanation of my invention, Figure 1 is a perspective view,

exposing the tube-sheet of one end of the boiler. Fig. 2 is a longitudinal section. Fig. 3 is an end view with rear head removed. Fig. 4 shows the tube and tube-sheet removed. Fig. 5 is an enlarged view showing the rear tube-sheet, flange and ring.

of my boiler from the rear end. Fig. 2 is a sectional elevation. Fig. 3 is a rear-end view with cap removed. Fig. 4 is a view of tubes and sheet. Fig. 5 is an enlarged view, showing the manner of securing the tube-sheet in the shell.

"A is the shell of my boiler, which is more especially intended to be used for that class of engines employed in threshing and other field work where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out, on account of incomplete combustion.

"In order to remedy these faults, and perfectly consume all the smoke and sparks, I perforate my tube-sheet B B, so as to admit one large

tube | *furnace*

C, near the bottom, which receives the fuel upon the grate D, and acts at the same time as a tube and fire-box.

Any suitable feeder may be employed to supply straw to the grate; but I have found the device patented by D. Morey, June 20, 1873, to be very suitable.

To the door of the furnace C, I attach a straw-feeding tube, E, through which the straw or other light fuel is fed to the furnaces.

This tube can be constructed in the manner described by David Morey in his patents dated February 11, 1873, and May 25, 1873, for straw-feeding attachment for

furnaces, or in some other similar manner for feeding the straw without admitting a draft of air.

"Above and around the sides of the large

tube | *furnace*

C, I place small or locomotive boiler tubes *e e*, as shown, and these serve to return the heat and the products of combustion to the chimney F, which is located at the front end of the boiler and communicates with the chamber H, formed between the flue-sheet and the head or door G. A similar chamber H′, is formed at the back end of the boiler into which the products of combustion pass from the large

tube | *furnace*

C before entering the return-flues *e*.

"By this construction the light fuel is thoroughly ignited in its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and this latter will not even need a bonnet.

"The tube-sheets B B are made with a flange *i*, which is turned outward, and these flanges are pierced so as to admit screw-bolts or rivets *g*, as may be preferred. These bolts secure the tube-sheets in their places perfectly steam and water tight.

"Whenever, by reason of long use, there is a collection of scale or sediment, or if the tubes of the interior of the boiler need repairing, the screw-bolts can be removed; or, if rivets are used, they can be cut off, when the two tube-sheets, with the tubes, can be removed from the shell in a body, and repairs or cleaning can be easily effected, with much less time and trouble than when the boilers are made in the ordinary manner.

"The flange on the rear tube-sheet is turned so much smaller than the interior of the shell that an iron ring, *n*, can be introduced between it and the shell, the bolt passing through it.

"When it is necessary to remove the tubes and sheets, this ring can be taken out after removing the nuts and rivets, and this leaves the rear tube-sheet small enough to pass any rivets or obstructions freely when taking it out.

"By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected.

"Having thus described my invention, what I claim, and desire to secure by letters-patent is: —

1. *The boiler A, having the furnace C, grate D, return-flues or tubes e e, and stack or chimney B, arranged as described, in combination with the straw-feeding furnace-door attachment, substantially as and for the purpose described.*

"2. In a horizontal steam boiler, the *large tube* | *furnace* C, formed with a grate D, to serve as a fire-place, in combination with small return-flues *e e*, when the tubes and tube-sheets are secured by flanges *i* and bolts *g*, so as to be removable from the shell in a body, substantially as and for the purpose described."

It is admitted that there had been no infringement by the defendant of the second claim of the reissued patent, which included that feature of the improvement described, which consisted in the peculiar construction by which the tubes and tube-sheets were secured by flanges and bolts, so as to be removable from the shell in a body. This claim, therefore, is excluded from further consideration in the case.

The patents of David Morey for a straw-feeding attachment for furnaces, referred to in the specifications in the Rice original and reissued patent, consisted of an original patent, No. 135,659, dated Feb. 11, 1873, reissued as reissue No. 6420, dated May 4, 1875, and original patent No. 139,075, dated May 20, 1873.

The specifications of the latter describe the invention as relating to "an improved furnace-door attachment, which is especially intended for facilitating the use of straw as a fuel, especially applicable to the removable furnaces of threshing-machine engines; and it consists in attaching to the opening of the furnace intended for the door a tube or funnel having arranged within it a diagonal swinging valve, with its lower end turned up into a shoe, whereby the straw can be inserted into the furnace, and no sparks allowed to fly out, nor a draft of air

allowed to enter." It was also therein declared that the straw was to be fed through the tube by means of an ordinary hay-fork. When the straw is pushed through the tube, the valve or door will be lifted so as to allow the straw to pass through, when it will immediately drop down and cut off the draft of cold air which would otherwise be admitted into the furnace, to the detriment of the fire. The claim of the patent was for "the removable tube or funnel, having arranged within it the diagonal valve with its lower edge turned up, in combination with a furnace, as set forth."

In the reissued Morey patent a revolving partition in the box or attachment is substituted for the diagonal swinging valve, suspended upon and revolving upon journals, and kept in position by means of springs. The office of the partition is to keep the box or tube closed and prevent the entrance of air after the straw has been pushed through the tube; though the specification adds that "it is evident that by leaving the tube or box filled, so as to choke the opening through it, the partition or door can be dispensed with." The straw is introduced into the furnace through the hopper of the box, by means of an ordinary hay-fork. The fork-load of straw is placed against the lower end of the partition and pushed through the box, the pressure turning the partition to a horizontal position to admit the hay or straw. As soon as the fork is unloaded and withdrawn, the partition is closed automatically by the springs, thus making a half revolution each time a fork-load of straw is introduced, and immediately closing again, so as to shut off the draft. The claim of the reissued patent embraced, first, "in combination with the furnace of a threshing machine, the detachable box or tube, provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, substantially as and for the purpose set forth;" and, second, "in combination with the furnace of a threshing engine, the box or tube, provided with a flaring mouth, and having the partition or door, substantially as and for the purpose set forth."

The following is a statement in the language of counsel for the defendant in error, of what he claims to be the proof, on the trial of the cause, as contained in the bill of exceptions,

showing the state of the art and the history of the inventions attributed to Morey and Rice respectively: —

"For many years before the invention threshing machines had been driven by steam as a motive-power. In generating steam, portable fire-box boilers had been used. Such fire-box boilers were about like the ordinary locomotive boilers in common use. They had a fire-box furnace and a number of tubes or flues passing from one end to the other through the water in the boiler. The fire and products of combustion passed from front to rear through such tubes or flues, and thence out through a smoke-stack placed at the end of the boiler farthest from the furnace.

"Wood or coal was used for fuel with such fire-box boilers. During all this time it had been a great desideratum to substitute straw as fuel, in place of wood and coal. In California, in most grain districts, wood and coal were very expensive, and were inconvenient on account of having to be transported to the harvest fields, and from place to place in the fields as the threshing machine was moved from one spot to another, as one section of the field was threshed and another about to be commenced. The transportation of the wood and coal for fuel required teams and men at a time when all were needed in the harvest fields for other purposes. At the same time, where the threshing was done, there was always an accumulation of straw which was of no value, and which the farmers were glad to burn to get it out of the way.

"With the portable engines and boilers then in use straw could not be successfully used as fuel. Steam could be raised with it while the engine was not working; but when the engine was put to work the steam would run down. In 1872 David Morey attempted to accomplish the desired object by attaching straw-feeding attachments to the fire-box boilers then in use with wood or coal for fuel. He experimented with one in Watsonville, and believed from that experiment that his efforts were successful. He took out two patents early in 1873 for his inventions. . . . He made his experiment in Watsonville in 1872, after the threshing season was over for that year.

"He was anxious to introduce his supposed invention, and desired to exhibit it to the large dealers in agricultural imple-

ments in San Francisco. He accordingly went to San Francisco and looked for a place to try his invention at which it would be convenient for the merchants to attend. Rice had a machine-shop at Haywards, and also had threshing engines which he had for many years used in the harvest fields during the threshing season. He had at his place two portable engines with return-flue boilers, and one with a fire-box boiler; one of the engines with return-flue boilers was used for running the machinery in his shop, when not in the field during the threshing season.

"Morey went to Rice and requested the privilege of attaching his straw-feeder to one of Rice's boilers, and exhibiting its operation. Rice readily consented and assisted in making the attachment and test. Morey wished to attach the straw-feeder to Rice's fire-box boiler; but Rice insisted on attaching it to the return-flue boiler. It was attached to the return-flue boiler; a test of it was made, and an exhibition given, by getting up steam and running the machinery in the shop with it. The test and exhibition gave satisfactory results as far as they went, as Morey's experiment had previously done when made with the same straw-feeder attached to fire-box boiler in Watsonville. *No one learned from the test and exhibition at Haywards whether there was any advantage in substituting the return-flue boiler for the fire-box boiler or not. Rice was the only man that thought the return-flue boiler was the better for the purpose.*

"Morey then licensed the firm of Treadwell & Co. to make and sell his invention. The exhibitions of Morey had created a belief that straw could be used for fuel in generating steam for running threshing machines, and that very season (1873) many of the heaviest firms in San Francisco, and Morey himself, used and exercised their means and abilities to make the invention practically successful. Hawley & Co. tried it; Baker & Hamilton tried it; Treadwell & Co. tried it; and Morey tried it. *Some of the partners or engineers of each of the said firms had witnessed the exhibition with the return-flue boiler at Haywards.* Yet each of said firms and Morey himself made all their *subsequent* tests in the season of 1873 *with fire-box boilers, and they all failed.* They all gave up the invention after testing it that season, and believed that their tests and

experiments had proved that straw could not be successfully used for fuel in generating steam for running threshing machines. *Not one of them thought for a moment that anything could be gained by substituting the return-flue boiler for the fire-box boiler.* All of them worked and experimented with the fire-box boiler; and when they found it impossible to make that do the work with the straw-feeding attachment, *they believed that they had exhausted the subject by proving that it was impossible to utilize straw for fuel, as desired, by any possible means.* Yet they had all seen or thoroughly understood all that was shown or proved by the test and exhibition with the return-flue boiler at Haywards in the previous month of March.

"Rice alone believed in the advantages of a return-flue boiler combined with the straw-feeding attachment. Rice alone went into the harvest fields with the return-flue boiler and straw-feeding attachment, and it proved entirely successful. Rice did not know at the time what the other parties were doing, neither were they informed of what Rice was doing. Rice's operations in the threshing season of 1873 were in different sections of the country from where the other parties were experimenting. While all the other parties were by their experiments with fire-box boilers proving that straw could not be utilized for fuel as desired, *Rice alone proved that it could be so utilized*, by substituting the return-flue boiler for the fire-box boiler. Rice was the first and only one that suggested the combination of the return-flue boiler with the straw-feeding attachment, and he was the only one that tested and proved its advantages; and except for this individual and independent idea and action of Rice, there is no reason for supposing that the great advantages of using straw for fuel in the harvest fields would have been enjoyed to-day."

It further appears from the testimony of Rice that he considered the main principle of his invention to be combining the arrangement, patented by Morey, with the return-flue boiler. He supposed at first that his invention covered the boiler itself, though he found afterwards that it was not new, but was on the contrary well known as the Cornish boiler. The main difficulty he claimed to overcome by his invention, was in prevent-

ing air from being admitted when the straw was fed into the furnace. He says, "I took his [*Morey's*] tube, and attached it to this boiler [*the return-flue boiler*], and it was a success." The act of invention he specified to consist in "combining the two together."

The contention on the part of the defendant in error is set forth in the language of his counsel in argument, as follows: —

"Applying the rules of law to the Morey and Rice patents, and (admitting Morey's patent to be valid) the following are the extent and limits of their respective inventions; viz., Morey discovered that by attaching a straw-feeding tube with a door in it to prevent a draft of air through it, to portable locomotive or fire-box steam-boilers, straw could be used with them for fuel more effectively than it could be without such tube. The combination of a straw-feeding tube which would prevent a draft of air through it, with portable steam-boilers, was Morey's invention. The discovery that a draft of air must not be admitted between the top of the fire and the bottom of the boiler was his discovery. All of Morey's discoveries and inventions, however, were insufficient to make portable steam-boilers adequate to the one great task which it was so desirable for them to perform; viz., that of running threshing machines with only straw for use as fuel.

"Rice began his discoveries and invention where Morey left off. Morey's patents were both issued before Rice had given the subject a thought. Rice discovered that by tearing out the inside of the boiler, which he found in Morey's combination, and by adding to the combination (but inside of the boiler) the large tube *C*, to serve as a furnace and the return-flues, that he obtained a combined machine which was a very great improvement over Morey's. Rice's combination may have and probably did include Morey's combination; but it included more viz., the large tube or furnace *C*, and the return flues *e e*.

. . . . . .

"In this case Morey's patents were for combining straw-feeders with portable steam-boilers generally. Rice discovered that by substituting one particular kind of portable steam-boiler which no one else had used for the steam-boilers which had been used, that he had a better combination than was

ever before made, — a combination which did better work than any others, and had within it a new and better mode of operation than any others. It burned all of the straw put in it, while the others would not. It did not choke up with partly-burned straw and cinders, while the others would. It caused the heat and flame of the fire to pass twice through the length of the boiler, while in the others the heat and flame passed but once through the length of the boiler.

. . . . . .

"It is to be noticed that the Morey patents describe and claim only the combination of the straw-feeding device with the *furnace* of a boiler. His patents stop at the furnace-door. They do not go into the boiler beyond the furnace.

"Rice's patent, on the other hand, *begins at the furnace-door where Morey's stop*, and goes beyond into the boiler, adding new elements."

The bill of exceptions contains fourteen exceptions to as many rulings of the court during the trial; but in argument all the points raised by them were reduced and classified by counsel for the defendant under three heads, as follows: —

1. That the reissued letters-patent to Rice, on which the action was founded, were for an invention different from that described in the original, and was therefore void.

2. That the invention described and claimed in the first claim of the plaintiff's reissued patent, which alone was material to the controversy, was anticipated and covered by the letters-patent granted to Morey.

3. That if, after the Morey patents were issued, there was any invention in the combination claimed in the Rice reissued patent, then, in fact, it is to be attributed to Morey himself, and not to Rice.

I. The first question for our determination is that raised as to the identity of the invention intended to be described in the original and reissued patents to Rice, upon the answer to which the validity of the latter, so far as this suit is concerned, depends.

In cases of reissues of patents, inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery

more than he had a right to claim as new, it is imperative that the new patent, when issued, shall be for the same invention, and that no new matter shall be introduced into the specification, when, as in the present case, there is a drawing with reference to which the invention is described. — (Rev. Stat., sect. 4916.)

The principles for determining the validity of reissued patents have been discussed and formulated so repeatedly and so recently in this court that it is necessary at present only to refer to *James* v. *Campbell*, *supra*, p. 356; *Miller* v. *Brass Company*, *supra*, p. 350; *Burr* v. *Duryee*, 1 Wall. 531; and *Powder Company* v. *Powder Works*, 98 U. S. 126.

In the present case the question of the identity of the invention in the original and reissued patents is to be determined from their face by mere comparison, notwithstanding what was said in *Battin* v. *Taggert* (17 How. 74), and consistently with *Bischoff* v. *Wethered* (9 Wall. 812), according to the rule laid down in *Seymour* v. *Osborne* (11 Wall. 516), and *Powder Company* v. *Powder Works*, *supra*. That is, if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court is able from mere comparison to say what is the invention described in each, and to affirm from such mere comparison that the inventions are not the same, but different, then the question of identity is one of pure construction, and not of evidence, and consequently is matter of law for the court, without any auxiliary matter of fact to be passed upon by a jury, if the action be at law.

The question arises in the present record, upon an exception of the defendant below to the refusal of the court, after the plaintiff had read in evidence the original patent, to sustain an objection to the introduction in evidence of the reissued letters-patent, on the ground that they were void for want of identity in the invention; and also upon the refusal of the court to instruct the jury, both after the close of the plaintiff's case and after all the evidence was in, to return a verdict for the defendant.

Looking, therefore, to the original patent, nothing can be more clear than that the supposed invention described in it is nothing more or less than the return-flue boiler itself. The

patent is for a new and useful improvement in steam-boilers. The specification begins by declaring that the invention relates to certain improvements in the construction of steam-boilers, whereby, the inventor says, "I am enabled to utilize straw and other light substances for fuel, so that a complete combustion of the smoke is attained, and the danger from fire in harvest fields, where these boilers are more especially useful, is entirely obviated." It also relates, as is said, to a novel method of securing the tubes and tube-sheets within the shell of the boiler. Reference is then made to the accompanying drawings for a more complete explanation of the invention. He refers to the shell of the boiler, which he says is more especially intended to be used for that class of engines employed in threshing and other field-work where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out, on account of incomplete combustion. It was, "in order to remedy these faults and perfectly consume all the smoke and sparks," he continues, that "I perforate my tube-sheets, so as to admit one large tube near the bottom, which receives the fuel upon a grate and acts at the same time as a tube and fire-box." Then occurs this sentence: "Any suitable feeder may be employed to supply straw to the grate; but I have found the device patented by D. Morey, June 20, 1873, to be very suitable." He then proceeds with the description of the tubes and the return tubes conducting to the chimney in front, and the communicating chamber between the flue-sheet and the boiler-head, and the similar chamber at the back-end of the boiler, into which the products of combustion pass from the large flues before entering the return-flues. "By this construction," the specification continues, "the light fuel is thoroughly ignited in its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and very little smoke will escape from the chimney, and this little will not even need a bonnet." This is followed by a description of the device for removing the tubes and tube-sheets from the shell in

a body for repair or cleaning, which is not material. The inventor then adds: "By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected," and concludes: "Having thus described my invention, what I claim and desire to secure by letters-patent is: In a horizontal steam-boiler, the large tube, C, formed with a grate, D, to serve as a fire-place, in combination with small return-flues, *e e*, when the tubes and tube-sheets are secured by flanges, *i*, and bolts, *g*, so as to be removable from the shell in a body, substantially as and for the purpose set forth."

The allusion to the mode of supplying straw to the grate is merely casual and incidental. Any suitable feeder may be employed, it is said; the inventor adds: "but I have found the device patented by D. Morey, June 20, 1873, to be very suitable." In what respect this device has been found to be very suitable is not mentioned, nor is it hinted that there are not many others quite as good. No attempt is made to explain what is needed in a feeder to make it suitable, nor any hint that any of the advantages described as resulting from the operation of the machine depend in any degree upon the character of the feeder. For aught that may be inferred from what is said concerning it, there need be nothing peculiar in the mode of supply, except what is rendered necessary by the character of straw as a fuel in lightness and bulk, and a supposed convenience on that account of supporting it, as it is pushed into the furnace. There is certainly no suggestion that it is considered important much less necessary in supplying this fuel, to do it in such manner and by means of such device as will prevent the introduction of a draft of cold air between the top of the fuel and the bottom of the boiler, while in the act of replenishing the supply. Neither the mode of feeding the fuel, nor any device for doing it, is made any part of the described invention; nor is either referred to, in any way, as performing any useful or essential function in the operation of the machine described. Every desired advantage which it is expected to accomplish is referred expressly to the boiler itself, and its structure and internal arrangement. As is well said by counsel for plaintiff in error, on this point: "What he sought

was complete *combustion* of the straw by making the products of combustion pass through the boiler twice before they were allowed to escape into the chimney, and the office of the feeder was not auxiliary to the combustion, but preliminary to it. It supplied the straw. It did not burn it. It is true that a Morey tube is shown in the drawing as attached to the front of his engine; but that does not make it part of his invention, any more than a set of wheels and axles would have become part of it if the drawing had represented his boiler as mounted on running gear."

If we turn now to the reissued patent, we find that the patentee declares that, "my invention relates to the combination of a straw-feeding device with the furnace-door of the class of boilers which are known as return-flue boilers, by which combination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam." He then refers to the failure of previous attempts to utilize straw as fuel for generating steam, and gives as the reason, that "when straw is fed into the furnace of an ordinary steam-boiler, it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate-bars to impede the draft, and unless the cinders are frequently removed from between the grate-bars they soon accumulate to such an extent as to choke the draft entirely and prevent combustion." He then adds that his experiments have developed the fact that, by attaching a tube or box door to the furnaces of that class of boilers known as return-flue boilers, the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate-bars.

He then gives a description, with reference to the drawings, which are the same as those attached to the original specifications. In that description, differing in that respect from the former one, he inserts: "To the door of the furnace C, I attach a straw-feeding tube E, through which the straw or other light fuel is fed to the furnaces;" and changes the sentence in reference to the character of the straw-feeder, so as to read as follows: "This tube can be constructed in the manner de-

scribed by David Morey in his patents dated Feb. 11, 1873, and May 25, 1873, for straw-feeding attachment for furnaces, or in some other suitable manner, *for feeding the straw without admitting a draft of air.*" The first claim of the reissued patent reads thus: "The boiler A, having the furnace C, grate D, return flues or tubes *e e*, and stack or chimney B, arranged as described, *in combination with the straw-feeding furnace-door attachment*, substantially as and for the purpose described."

It appears, then, from the mere reading of the two specifications, that the invention described in the first is for the return-flue boiler; while that described in the second, abandoning the claim for the boiler itself, is for a particular mode of using it, with straw as a fuel, by means of an attachment to the furnace-door for that purpose. It might well be that Rice was entitled to patents for both, separately, or to one for both inventions. But it is too plain for argument that they are perfectly distinct. A patent, consequently, originally issued for one cannot lawfully be surrendered as the basis for a reissue for the other. They are as essentially diverse as a patent for a process and one for a compound, as in the case of *Powder Company* v. *Powder Works* (98 U. S. 126), where the reissued patent was avoided, although the original application claimed the invention both of the process and the compound. The case comes directly within the principle held in *James* v. *Campbell*, *supra*, that a patent for a machine cannot be reissued for the purpose of claiming the process of operating that class of machines; because, if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention.

II. The second principal objection to the validity of the Rice reissued patent is, that it is anticipated by the Morey patents. We are of opinion that it also is well taken.

Morey's reissued patent of May 4, 1875, covers distinctly and expressly a combination of the furnace of a threshing engine with a detachable box or tube provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, the office of which is to furnish means for the supply of straw as fuel to the furnace in such manner as to prevent the entrance of air after

the straw has been pushed through the tube; which may be effected either by means of a movable partition, for which a separate claim is made, or without it by merely having the tube or box filled, so as to choke the opening through it, with successive supplies of straw.

It applies to every description of threshing engines and boilers, whether fire-box or return-flue. It is true that it does not specify either class, but it embraces both by its language; and in its application to both it operates in precisely the same manner, and with precisely similar effect. If there is any superiority in the return-flue boilers used with this attachment as a straw burner, over the fire-box boiler, when used in the same way, the superiority is due, not to any difference in the straw-feeding attachment, nor in the mode of its operation, nor to any new feature of the combination, but merely to the superiority of the return-flue boiler itself. And it does not militate against the validity of Morey's patent, or limit the extent and effect of its application, to concede what is claimed, that he was not aware, at the time of his invention, of the superior value of its application to return-flue boilers over fire-box boilers, or that the discovery of that superiority is attributable to Rice. That application of it is within the scope and provision of Morey's invention, whether it had been tested by his experience, or was anticipated by his foresight or not. If, at the date of Morey's invention, return-flue boilers had not been known, but had been subsequently invented, his patent, as applied to them, would still have prevailed against any new claimant; for the new application does not produce any new effect. It is only the occasion which is new; the use itself is merely analogous. *Hall's Patent* (1 Web. P. C. 97), where the flame of gas was used instead of an argand lamp for singeing lace, is pressed upon us as authority for a different conclusion upon this point; but the decision of Lord Abinger in *Losh* v. *Hague* (id. 202), and his comments upon *Hall's Patent*, show that it has no application here.

There was no patentable invention in Rice's adaptation. The return-flue boiler, it is admitted, was old. The Morey attachment had been already invented. The idea and principle of its operation, in adapting boilers to the use of straw as a

fuel, was the essence of his invention. Rice, it is confessed, discovered nothing more than that, for such purpose, a return-flue boiler was better than fire-box boilers, which were the only kind that had then been used.

"But this," in the language of Mr. Justice Nelson in *Hotchkiss* v. *Greenwood* (11 How. 248, 266), "of itself, can never be the subject of a patent. No one will pretend that a machine made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more." *Hicks* v. *Kelsey* (18 Wall. 670) affirms this case.

The same principle was applied in *Stow* v. *Chicago*, *supra*, p. 547.

The case would not be altered if we suppose that at the date of Morey's patent there had been also a valid patent outstanding in a stranger for the return-flue boiler. On that supposition, could it for a moment be contended that Rice could secure for himself a valid patent for the combination as an improvement on both? What invention could he claim? He uses Morey's device precisely as Morey's patent contemplated, and the Cornish boiler exactly as it was designed it should be used. And in the combination each operates separately, producing its own results. There was no inventive resource drawn upon to bring them together. Could not the owners of the patents for the straw-feeding attachment and the return-flue boiler unite their machines and work them together, in defiance of a claim for the combination? To ask the question is to answer it. Yet the case supposed does not differ from the case as it exists; for the public owned the right to the Cornish boiler, and was entitled to every use to which a patentee owning it might lawfully apply it.

On the trial of the cause below, Morey's patent seems to have been treated in the charge of the court as if it were a

patent for a combination of a straw-feeding attachment with the furnaces of boilers other than those with return-flues, and that Rice added to the combination the new element of the return-flues with a new and important result. But this view, in our opinion, is not justified by the true construction of the patents. If Morey's patent is for a combination, it is a combination of the straw-feeding attachment with all boilers for generating steam, when it is desired to use straw for fuel, and therefore includes the very combination claimed by Rice. And if it is for the straw-feeding attachment as an independent device, but to be used in boilers for generating steam, when straw is to be used as fuel, then the application of it to the return-flue boilers, although these were not actually known to the inventor, is merely a new and analogous use of an old device, operating in the very manner intended by its inventor, and the use of which, in the new application, involved no invention, and could not therefore be the subject of a patent.

III. In fact, it is very apparent from the testimony on the part of the plaintiff, that the actual application of the Morey straw-feeding attachment to the return-flue boiler, at Rice's establishment, was a demonstration made by Morey himself of the practical operation of his device; intended to show what he had already proved by previous trials with fire-box boilers, to his own satisfaction, that he had invented an arrangement for applying the principle by which straw could be made useful as a fuel for steam-boilers, that principle being to prevent the introduction of a draft of cold air while feeding the supply. He showed this to Rice by the trial at the establishment of the latter, on one of his own return-flue boilers. Rice, by subsequent experience or previous knowledge, it matters not which, perceived the advantages of the return-flue boiler over the fire-box boiler for such a use. That was his sole discovery, and constitutes the basis of the claim for his patent. The marvel is that he should have succeeded in persuading Morey that he had given all its value to the invention of the former, and obtained from him the conveyance of his patent for a consideration dependent upon the result of this litigation.

The court below, in its rulings upon objections to the introduction of the reissued patent of Rice, in its refusals to charge

the jury as requested by the defendant, and in its charge as given, took views of the validity of the patent, on which the case of the plaintiff rested, which are opposed to those expressed in this opinion, and which necessarily resulted in the verdict and judgment against the defendant. For these errors the judgment must be reversed, with directions to grant a new trial; and it is

So ordered.

MR. JUSTICE GRAY did not sit in this case nor take any part in deciding it.

BRITTON v. NICCOLLS.

1. A party in Illinois transmitted to bankers residing in a city in Mississippi a note for collection which was there dated, but did not inform them nor were they aware of the residence of the maker. The only instruction sent was that the note was to be collected if paid, and if not paid on presentment it was to be protested and notice of non-payment sent to the indorser. In due time they put the note in the hands of a reputable notary of that city for the purpose of presentment and demand, and of notice to the indorser should there be a default of payment. *Held*, that they are not liable to their correspondent for the manner in which the notary performed his duty.
2. The notary is a public officer; and when he received the note, he, according to the ruling of the Supreme Court of that State, became the agent of the holder, and for failure to discharge his duties he alone is liable.
3. The duty and liability of bankers as collecting agents stated, and the authorities bearing upon their responsibility for the acts of the notary to whom the notes sent to them for collection are delivered for presentment, demand, and protest, cited and examined.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. James Lowndes and *Mr. A. H. Handy* for the plaintiff in error.

Mr. William L. Nugent for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The defendant in the court below is the surviving partner of the firm of Britton & Koontz, which was engaged in the bank-

ing business at Natchez, in the State of Mississippi, in 1874 and 1875. The plaintiff in the court below, Niccolls, was at that time a citizen of Illinois, and the present suit is brought by him to recover damages from the surviving partner of the firm for its neglect to present for payment to the maker, at their maturity, two promissory notes sent to it for collection, by reason of which the liability of a responsible indorser was released.

The facts in the case are briefly these: In April, 1874, the plaintiff was the holder of a promissory note of one John I. Lambert for $3,666.66, dated at Natchez, April 24, 1872, and payable to his order two years after date, with interest at the rate of eight per cent per annum. The note was indorsed by three parties besides the payee, — J. M. Reynolds, John Flemming, and J. S. Everet. Flemming's indorsement was without recourse to him; the other indorsements were without any such restriction upon the liability of the parties.

In April, 1874, the plaintiff caused this note to be sent, through a banking-house in Bloomington, Illinois, to the firm at Natchez for collection. The only instructions accompanying it were that it was to be collected if paid, and if not paid on presentment it was to be protested and notice of non-payment sent to the indorsers.

In April, 1875, the plaintiff was the holder of another note of the same maker, identical in amount, date, and terms with the first, except that it was payable in three years after date; and it was indorsed in like manner by the same indorsers. This note matured on the 27th of that month. Some days previously the plaintiff sent it to the firm at Natchez, with instructions to collect it if paid, and if not paid to have it delivered to a protesting officer for protest, and to give notice to the indorsers.

No information as to the residence of the maker was given to the firm with the notes; nor does it appear that either member of it had, then or subsequently, any knowledge on the subject. The plaintiff himself was ignorant of it. He resided, in fact, on his plantation, twelve or fifteen miles from Natchez; he had no domicile or place of business in that city. The notes not being paid at their respective maturities, — the first one on the 27th of April, 1874, and the second one on the 27th of

April, 1875, — before the close of banking hours on those days, were handed by the firm to a notary-public of the county, with instructions to demand payment of them, and if they were not paid to protest them and send notice of non-payment to the indorsers. No other directions were given. The notary knew that the maker resided on his plantation, and had no place of business in the city; but he inquired for him at the post-office, the city hall, and the court-house, — three of the most public places there, — and, not finding him, protested the notes for non-payment, and gave notice thereof to the indorsers.

The plaintiff soon afterwards brought suit against the maker and also against the indorser, Everet, which proceeded to judgment and execution; but nothing was obtained from the parties. Suit was also brought against Reynolds, the first indorser, in which judgment passed for the defendant, on the ground that due presentment of the notes to the maker and demand of payment had not been made at their maturity, by reason of which the indorser was released from liability. It is admitted that if judgment had been rendered against Reynolds, the money due upon the notes might have been collected upon execution. The plaintiff thereupon brought the present action.

The notary testified that, in his endeavors to make presentment of the notes for payment, he had acted upon his own opinion as to his duty, without instructions from the firm; and because he considered that the notes, being dated at Natchez, and no place of payment being stated, the place of presentment was, in law, at Natchez, and not at the maker's domicile outside of the city.

The surviving partner, Britton, testified that it was always the custom of the firm, when it had notes for collection, whether its own or those belonging to others, to send through the post-office a notice of their amount and of the date of their maturity to the proper parties, a reasonable time before the notes became payable, and if payment was not made at their maturity, to place them in the hands of a notary for presentment and protest; that this course was pursued with respect to the notes in question; that Koontz, the deceased partner, who, it would seem, took special charge of the business of protesting paper

left with the firm for collection, when that was necessary, had inquired of several persons coming into the banking-house as to the residence of the maker of the notes, and on one occasion left the house for the express purpose of trying to ascertain it, and returned stating that he had not succeeded; and that "the notary would have to comply with the law in such cases, and present at several of the most public places." He also testified that he was "certain that Koontz made diligent efforts to ascertain Lambert's (the maker's) place of residence, and that they were unsuccessful."

Upon the facts and testimony as stated, the defendant, among other things, requested the court to instruct the jury, in substance: that if the bankers had no knowledge of the residence or place of business of the maker, and were unable, after diligent inquiry in the city of Natchez, to ascertain the same, and thereupon, at the maturity of the notes, handed them to a notary-public for the purpose of having presentment made thereof to the maker for payment, and of having them protested in case of non-payment and notice thereof given to the indorsers, then the bankers were not liable for negligence in performing the duties intrusted to them, nor for failure of the notary to discharge the duties required of him with respect to the demand of payment.

We do not give the precise language of the instruction asked, but only its substance and purport. The court refused it, and instructed the jury, in substance: that if it was the duty of the bankers to perform such acts as the law required to charge the indorsers upon the notes, which were to present them to the maker for payment on their last days of grace respectively, and upon non-payment to give notice thereof to the indorsers; and that the bankers were not exonerated from this duty by the delivery of the notes to the notary for their performance, unless it was within a reasonable time for him to present the notes to the maker, and to demand payment, on the days they respectively became due, at his residence or place of business. To the refusal of the instruction asked, and to those given, an exception was taken. The plaintiff recovered judgment for the amount due on the notes, and the case is brought here for review.

The notes being dated at Natchez, the presumption of law, in the absence of other evidence on the subject, is that that was the place of residence of the maker, and that he contemplated making payment there. The duty of the bankers as collecting agents was, therefore, to make inquiry for his place of business or residence in that city, and, if he had either to make there the presentment of the notes, but if he had neither to use reasonable diligence to find him for that purpose; or if the employment of a notary-public for that object was sanctioned by the usage of bankers, or by the law as declared by the courts of the State, instead of making the presentment and demand personally, they could have placed the notes in his hands for the performance of that duty. As it turned out that the maker had neither domicile nor place of business in the city, and was absent at the time from it, no demand upon him there was possible, nor was that essential to charge the indorsers.

The law on this subject we consider to be well settled, as will be seen by an examination of the numerous adjudged cases as to what constitutes due presentment and demand of payment of commercial paper, and what will excuse both. The only point upon which we find any marked difference of opinion in them respects the liability of the collecting bankers for the manner in which the notary, to whom the notes are delivered for presentment and protest, discharges his duty.

In the State of New York the doctrine obtains that bankers, to whom notes are intrusted for collection are responsible for the failure of agents employed by them in the presentation of the notes to the maker and in protesting them when not paid, though the agents are notaries exercising a public office and especially charged with the performance of such duties. In the case of *Allen* v. *Merchants' Bank of New York*, it was decided by the Court of Errors of that State that the liability of the bank extended to any neglect of duty by which any of the parties to a bill are released, whether arising from default of its own officers or servants, or its correspondents at a distance, or agents employed by them. Previously a more limited liability was supposed to rest upon a collecting bank. In that case the bill was drawn in New York upon parties in Phila-

delphia and placed in the defendant's bank of the former city for collection, and by it forwarded to a bank in Philadelphia. The latter bank handed it to a notary to present for acceptance. He presented it, but omitted to give notice of its non-acceptance, by which a responsible indorser was released. The action was against the collecting bank to recover the amount of the bill, and was brought in the Superior Court of the city of New York, where the jury was charged that the defendant was, upon general principles of law, independently of any custom or usage, or of any agreement express or implied, only bound to transmit the bill to Philadelphia in due time to some competent agent; and that it was not liable for his negligence or omission in giving notice of its non-acceptance. Judgment having passed for the defendant, the case was taken to the Supreme Court of the State, and was there affirmed. That court, speaking through Mr. Justice Nelson, said that "a note or bill of exchange left at a bank and received for the purpose of being sent to some distant place for collection, would seem to imply, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to some competent agent to do what should be necessary in the premises. The language and acts of the parties fairly import so much, but nothing beyond it. The person leaving the note is aware that the bank cannot personally attend to the collection, and that it must therefore be sent to some distant or foreign agent," and that there seemed to be nothing in the nature of the transaction which could reasonably imply an assumption for the fidelity of the agent abroad. 15 Wend. (N. Y.) 482. The case being carried to the Court of Errors, the decision of the Supreme Court was reversed, and the doctrine declared that the bank was responsible for all subsequent agents employed in the collection of the paper. 22 id. 215. The reversal was by a vote of fourteen senators against ten; Chancellor Walworth, who composed a part of the Court of Errors in cases appealed from the Supreme Court, voting with the minority and giving an opinion for affirmation of the judgment. Senator Verplank delivered the prevailing opinion. The decision has since been followed in New York, and its doctrine, we believe, has been adopted in Ohio.

But in the courts of other States it has been generally rejected and the views expressed by the Supreme Court approved.

In *Dorchester and Milton Bank* v. *New England Bank*, it was held by the Supreme Court of Massachusetts that when notes or bills, payable at a distant place, are received by a bank for collection, without specific instructions, it is bound to transmit them to a suitable agent at the place of payment, for that purpose; and that when a suitable sub-agent is thus employed, in good faith, the collecting bank is not liable for his neglect or default. In giving its judgment the court referred to the ruling in *Allen* v. *The Merchants' Bank*, and observed that it was opposed to a number of decisions of great authority, and, in its opinion, was not well founded in principle; that if the bank in that case acted in good faith in selecting a suitable sub-agent where the bill was payable, there was no principle of justice or public policy by which the bank should be made liable for his neglect or misfeasance. 1 Cush. (Mass.) 177.

In the Supreme Courts of Connecticut, Maryland, Illinois, Wisconsin, and Mississippi, the doctrine of the Supreme Court of New York in the case reversed, and of the Supreme Court of Massachusetts in the case cited, has been approved and followed. In the New York case, in the Court of Errors, it was conceded that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and in some of the cases in other States, proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them. Thus in *Warren Bank* v. *Suffolk Bank*, (10 id. 582), a note left with the latter bank for collection had been placed at the close of banking hours with a notary-public for presentment and protest, and by his negligence in presenting the paper to the maker the liability of an indorser was released. The bank was thereupon sued. On the trial, proof was offered to show that in Boston, where the case arose, it was the invariable usage of banks, when notes were sent for collection by other banks, to keep them for payment until the close of banking hours on the day they became payable,

and if not then paid to put them into the hands of a notary-public for demand on the maker and protest; and that the defendant had pursued that course. The court below decided that, if there were negligence on the part of the notary, the evidence was immaterial, and that the usage did not constitute a defence. The Supreme Court reversed this decision, and held that the evidence was admissible. "It would, we think," said the court, "have authorized the jury to find an implied agreement or assent to the employment of a sub-agent or notary-public for the purposes of making a demand on the maker, requiring only in the collecting bank due diligence and care in selecting the notary, or a general usage binding certainly those who were conversant of it. It is no sufficient answer to this to say that it was not absolutely necessary to employ a notary in a case like the present to certify to the demand and protest. If this was the well-established course of business, and known to the plaintiffs when they sent to the defendants this note for collection, they must be bound by it." The court also said, that when the nature of the business in which an agent is engaged requires for its proper and reasonable execution the employment of a sub-agent, the principal agent is not responsible for the default of the sub-agent, provided a proper one be selected; and it was of opinion that, if the usage of the banks authorized the employment of a sub-agent holding an official character, it then became a case of sub-agency, with its incidents.

In the case at bar there was no proof of any general usage of bankers at Natchez as to the employment of notaries-public in the presentment and protest of notes left with them for collection. But we have before us the decisions of the Supreme Court of Mississippi, and they are of equal potency to limit the liability of the bankers for the negligence of the notary. We can look into those decisions to ascertain what the law is in that State, and how far it has modified what would otherwise be deemed the general law on any particular subject. By them we are informed that it is the settled law of the State, that "a bank receiving commercial paper, as an agent for collection, properly discharges its duties, in case of non-payment, by placing the paper in the hands of a notary-public to be pro-

ceeded with in such manner as to charge the parties to it, and secure the rights of the real owner; and that the bank is not liable in such cases for the failure of the notary to perform his duty." This is the language used by that court in *Bowling* v. *Arthur* (34 Miss. 41); and in support of it *Tiernan* v. *Commercial Bank of Natchez* (7 How. (Miss.) 648), and of *Commercial Bank of Manchester* v. *Agricultural Bank* (7 S. & M. 592), are cited. And the court adds, that these cases decide that the notary is the sub-agent of the holder, through the bank, and as such is liable to him; and it is satisfied that the rule declared in them is correct.

By a statute of Mississippi notaries are authorized to protest promissory notes as well as bills of exchange, and they are required to keep a record of their notarial acts in such cases; and the record is admissible in evidence in the courts of the State just as though the notary were present and interrogated respecting the matters recorded. And it was decided in the case of *Bowling* v. *Arthur*, that, under the statute, it is a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it.

Judged by the law of Mississippi, the bankers, Britton and Koontz, discharged their duty to the plaintiff when they delivered the notes, received by them for collection, to the notary-public. There is no question as to his habits or qualifications. He was not connected in business with the bankers, nor employed by them except in his official character. What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant, as they were, of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them? Had they known that the maker resided on his plantation, without the city limits, in time to make the demand upon him, it might, perhaps, have been incumbent upon them to forward the notes there for presentment. It is not necessary to express any opinion on this head, for the only question is whether, on the knowledge they possessed, they discharged their whole duty. For the reasons stated we are of opinion that they did all that the law required of them.

The notary, it is urged, was aware of the residence of the maker; but we do not perceive how this could affect the liability of the bankers. We are not prepared to say that even with this knowledge he was bound, receiving the paper at the close of banking hours, to go out of the limits of the city to present it to the maker. He took the paper to inquire for the maker in the city, not outside of it, and to make presentment if he were found. If his knowledge of the residence of the maker could have required him to leave the city, so it would have done had the maker resided one hundred miles distant instead of twelve or fifteen. But on this head we are not called upon to express an opinion. It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them.

The fact that in the action against the indorser, Reynolds, judgment passed in his favor, on the ground that due presentment and demand of payment had not been made of the maker, can have no weight in this case. The bankers were not parties to that action, had no control over its management, and are not bound by the judgment rendered. If the plaintiff was not satisfied with that judgment, he should have appealed from it. The rulings of the court in that case are not authority in this.

It follows from these views that the instruction refused should have been given, and that the instructions given should have been refused. The judgment, must, therefore, be reversed, and the cause remanded for a new trial; and it is

So ordered.

MR. JUSTICE HARLAN concurred in the judgment.

MR. JUSTICE GRAY did not sit in this case.

UNITED STATES *v.* BABBITT.

1. *Quære,* In computing the longevity pay to which an officer of the army is entitled under sect. 7 of the act of June 18, 1878, c. 263 (20 Stat. 145), should the time during which he was a cadet at West Point be included in his period of service.
2. The Court of Claims decided that question adversely to the plaintiff. As the case in which it arose was one of a class, and a judgment against him could not, by reason of the amount in controversy, be reviewed, a *pro forma* judgment was, by consent of the Attorney-General, rendered against the United States on a claim for such pay, in which that time was embraced. The United States appealed. *Held,* that the consent so given was a waiver of any error in including that time as a basis of computation.

APPEAL from the Court of Claims.

Lawrence S. Babbitt reported at the Military Academy at West Point as a candidate for admission, June 11, 1857, and was admitted as a conditional cadet on the first day of the following month. He received his warrant as a cadet, Feb. 6, 1858. He was graduated from that institution July 1, 1861, and commissioned a second lieutenant of artillery June 24 of that year. He has served continuously in the army ever since. The accounting officers, in computing his longevity pay, held that his period of service commenced from the date of his commission as such second lieutenant, while he claimed that he should be credited also with the time he remained at the academy. He brought suit against the United States to recover the difference in his pay between the sum which they allowed and that to which he would have been entitled had they adopted his manner of stating the account.

The seventh section of the act of June 18, 1878, c. 263 (20 Stat. 145), is as follows: "That on and after the passage of this act, all officers of the army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men, in computing their service for longevity pay and retirement."

The Court of Claims announced a decision adverse to the claimant; but for the reasons stated in the opinion of this

court judgment was rendered in his favor. The United States appealed, and assign for error that the court erred in computing the plaintiff's service, and should have excluded therefrom the time he was a cadet at West Point.

The Solicitor-General for the United States.
Mr. William Penn Clarke for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer of the army of the United States, under the provisions of sect. 7 of the act of June 18, 1878, c. 263 (20 Stat. 145), his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that, after the decision was announced, a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal. In *Pacific Railroad* v. *Ketchum* (101 U. S. 289), we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of. For this reason the judgment below must be affirmed; and it is

So ordered.

BLAIR *v.* GRAY.

The charter of an insurance company in Illinois declares that, "in all cases of losses exceeding the means of the corporation each stockholder shall be held liable to the amount of unpaid stock held by him." An action at law was brought against a stockholder, who had not paid his stock subscription, to recover the amount due upon the policy issued by the company to the plaintiff's intestate. *Held*, that the declaration is bad in substance, as it fails to aver that the losses of the company, or its liabilities, exceed its assets. *Quære*, If there was a deficiency of assets, could such an action be maintained to enforce the liability of a stockholder.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action at law by Blair. The declaration alleges that a policy of insurance was issued by the Republican Life Insurance Company of Chicago on the life of his intestate, who died while the policy was in full force and effect; that proof of death and the adjustment of the loss were duly made, but that the company failed to pay any part of the sum due by the terms of the contract.

The declaration also avers that Gray, the defendant, was a stockholder of the company to the amount of $10,000, of which he had actually paid in only $2,000; and that under the sixth section of the charter, which is set out in the opinion of this court, he is, to the amount of his unpaid stock, liable to the plaintiff.

The court sustained a demurrer to the declaration, and Blair sued out this writ.

Mr. E. A. Otis for the plaintiff in error.

Mr. Francis Kales, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The charter of the Republic Life Insurance Company of Chicago contains the following section: —

"SECT. 6. The real and personal property of each individual stockholder shall be held liable for any and all liabilities of the company, to the amount of stock subscribed and held by him and not actually

paid in. In all cases of losses exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him."

The defendant, Gray, subscribed $10,000 to the capital stock of the company. He has paid only $2,000 on his subscription, and still owes the company for the rest. Under the foregoing section of the charter some appropriate action for the benefit of creditors may undoubtedly be maintained against him for the recovery of this unpaid balance, if the losses of the company are in excess of its means.

This suit was at law by a policy-holder of the company, against the defendant as a stockholder, to recover an amount claimed to be due on the policy. There is no averment in the declaration to the effect that the losses of the company, or its liabilities, exceed its assets. The case stands on demurrer to the declaration. Without, therefore, determining whether, under the decisions of the courts of Illinois, if it appeared that there was a deficiency of assets, an action like this might be maintained, we affirm the judgment below, because we are all of opinion that, until such contingency arises, a creditor cannot sue a stockholder to enforce this liability.

Judgment affirmed.

POPPE *v.* LANGFORD.

This court has no jurisdiction to re-examine the judgment of a State court affirming that the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time that would bar an action of ejectment.

MOTION to dismiss a writ of error to the Supreme Court of the State of California.

Langford, the substituted plaintiff in an action of ejectment, against Poppe, in the District Court of the Fifth Judicial District of California, for the County of San Joaquin, recovered judgment for a tract of land in that county. The only real question involved in the case, and passed upon by the Supreme

Court of the State to which an appeal was taken, is stated in the opinion of this court.

Mr. C. T. Botts and *Mr. James D. Coleman* in support of the motion.

Mr. C. R. Greathouse and *Mr. A. Chester*, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is clear we have no jurisdiction in this case. All the court below decided was, that in California the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment. This is not a Federal question. All that was said about sect. 1007 of the Civil Code of California was unnecessary and not required in the determination of the cause.

Motion granted.

LOUDON v. TAXING DISTRICT.

1. Lawful interest is the only damages to which a party is entitled for the non-payment of money due upon contract. His right is limited to the recovery of the money so due and such interest.
2. A city entered into a contract with A., whereby it executed its bonds in discharge of certain indebtedness to him and agreed to appropriate a specific portion of the revenue derived from taxation to pay judgments in his favor against it. The city did not apply the taxes pursuant to its contract, and he was compelled to pay exorbitant interest to raise money to meet his engagements. The bonds were not worth more than fifty per cent of their par value. *Held*, that the failure of the city to make the stipulated application of the taxes furnishes no ground for setting aside the contract, and that A. is entitled to no other relief than a provision for paying the balance due upon the judgments out of the taxes levied or to be levied in that behalf.
3. A party whose appeal has been dismissed cannot be heard in opposition to the decree.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The firm of J. & M. Loudon, of which James A. Loudon, the appellant, is the surviving partner, entered in the year

1867 into several contracts with the city of Memphis to pave certain streets and alleys and part of the wharf and public landing. The city was directly liable for a portion of the work, and gave its negotiable notes therefor. It failed to meet them at maturity, and the firm recovered four judgments thereon, Nov. 4, 1871, aggregating $64,613.18. These judgments were, as the notes had been, put in the hands of parties from whom the firm borrowed money, for the use of which it was compelled to pay exorbitant interest, to meet its engagements, the city having failed to make payment.

For another portion of the work the owners of the adjoining property were liable, and the city guaranteed the payment. The owners did not pay the assessments, and the city failed to make good its guaranty. In May, 1872, the Supreme Court decided that the law pursuant to which the contracts were made that provided for charging upon the owners of the abutting property the cost of paving streets, was unconstitutional.

The firm and the city agreed Sept. 16, 1872, that the amount due from the property-holders — for a part of which, however, the city was not responsible — amounted to $45,367.89, and that the city should execute to the firm forty-five six-per-cent coupon bonds of $1,000 each, due thirty years after date. This was done, the city paying in cash $367.89. It was further agreed, that of the tax of one per cent on the assessed value of the property within the city, subject to taxation, three tenths of the sum levied for the year 1872 should be set apart to pay the judgments due the firm.

The city bonds were worth but fifty per cent of their face value, and that was the only amount which the firm realized from such of them as it sold.

In the tax levy for 1874 no provision was made for the payment of the judgments, and nothing has been paid thereon since January of that year. The firm was compelled to sell two of them at an exorbitant rate of discount.

The bill prays that the contract of September, 1872, so far as it interferes with a recovery by the complainant of the debt of $45,000, for which the bonds of the city were accepted, be set aside and vacated; that the city may be decreed to pay all that in justice and equity is due to him by reason of the

exorbitant interest the firm was compelled to pay to raise money in consequence of the refusal of the city to meet its engagements, and also by reason of the money lost by the sale of the judgments; that accounts for the purpose of ascertaining the amounts so due may be taken and stated, and the city compelled by proper process to pay it. The bill also prays for general relief. The city answered, and the cause was heard on the pleadings and proofs. A decree was rendered that Loudon was entitled to a specific performance of the agreement entered into in September, 1872; and that, for the payment of the balance due him on the judgments not disposed of by him, the city should set apart and appropriate three tenths of the amount that may be collected from the tax theretofore or thereafter levied as the tax for the then present or the following years, and should also pay the costs.

Each party prayed an appeal. That of the city was, for a failure to comply with the rules, dismissed at a former term.

The General Assembly of Tennessee repealed, in 1879, the charter of Memphis. The legislation relating thereto and to the establishment of taxing districts will be found in *Merriweather* v. *Garrett*, 102 U. S. 472. On motion of Loudon, the taxing district of Shelby County was substituted in place of the city.

Mr. William M. Randolph for the appellant.

Mr. Isham G. Harris and *Mr. C. W. Heiskell* for the taxing district.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The questions in this case are, —

1. Whether, because the city of Memphis neglected to pay the debts it owed the appellant when they fell due, it must make good to him the losses he sustained on that account through exactions of extraordinary interest and discounts on sales of securities to raise money to meet his own obligations; and,

2. Whether, upon the facts as shown, a decree should be passed rescinding the contract under which the appellant received bonds of the city in settlement of what was due him on certain of his claims.

As to the first of these questions, it is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.

As to the second, we are satisfied that the only contract which was entered into by the parties is that expressed in the resolution of the city council accepting the proposition of the appellant to take bonds of the city in payment of what was due him on the designated claims. This required the city only to set apart, for the payment of the judgments which the appellant held, three tenths of the specified tax levied to defray the expenses of the city for the year 1872. That was done, and large sums of money collected and paid over under the appropriation. There was no fraud in the inception of the contract. The value of the bonds accepted by the appellant was well understood by him, and it is not denied that the officers of the city at the time acted in good faith. The failure of the city since 1874 to keep its contract and pay over the taxes of 1872 collected after that time is certainly no ground for setting aside the contract altogether. The more appropriate relief certainly is that which was granted; to wit, provision for the payment of the balance that remains due out of the future collections of taxes levied or to be levied in that behalf.

The city took an appeal from that part of the decree which gave the appellant affirmative relief; but that appeal has been dismissed, under the ninth rule, for want of prosecution. The case stands here now as though no such appeal had been taken. The city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. *Canter* v. *American and Ocean Insurance Companies*, 3 Pet. 307; *Chittenden* v. *Brewster*, 2 Wall. 191; *The Stephen Morgan*, 94 U. S. 599. An appeal brings up for review only that which was decided adversely to the appellant. It is unnecessary to determine what might have been done in this case if the appeal of the city had not been formally dismissed for want of prosecution.

Decree affirmed.

WARNOCK *v.* DAVIS.

1. A person who has procured a policy of insurance on his life cannot assign it to parties who have no insurable interest in his life. *Cammack* v. *Lewis* (15 Wall. 643) cited and approved.
2. The plaintiff's intestate, on procuring an insurance upon his life, entered into an agreement with a firm, whereby the latter was to pay all fees and assessments payable to the underwriters on the policy and to receive nine tenths of the amount due thereon at his death. Pursuant to the agreement, he executed an assignment of the policy (*infra*, p. 777), and the firm paid the fees and assessments. On his death, the firm collected from the underwriters nine tenths of the amount due on the policy and his administrator sued the firm therefor. The parties to the agreement did not thereby design to perpetrate a fraud upon any one. *Held*, that the plaintiff was entitled to recover from the firm the moneys so collected with interest thereon, less the sums advanced by the firm.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Warnock, the plaintiff, is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. Davis and the other defendants are partners, under the name of the Scioto Trust Association, of Portsmouth, Ohio, and reside in that State. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company, of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of $5,000; and, on the same day, entered into the following agreement with the Scioto Trust Association: —

"This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, State of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy on his life, limited to the amount of $5,000.00, hereby agrees to and with the Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and

transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also, to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of $6.00 in hand on the execution and delivery of this agreement, and annual dues of $2.50, to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

"In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

"It is hereby expressly understood and agreed by and between the parties hereto, that said Scioto Trust Association do not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

"Witness our hands, this 27th day of February, A. D. 1872.

"HENRY L. CROSSER.

"THE SCIOTO TRUST ASSOCIATION,

"By A. MCFARLAND, *President*,

"GEORGE DAVIS, *Treasurer*."

The policy, bearing even date with the agreement, was issued to Crosser, and on the following day he executed to the association the following assignment: —

"In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association, of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign, to said Scioto Trust Association all my right, title, and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same; which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association; to wit, nine tenths thereof, and to pay the balance, one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

"Witness my hand and seal, this 28th day of February, A. D. 1872.

"HENRY L. CROSSER." [SEAL.]

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the association collected from the company the amount of the policy, namely, $5,000; one-tenth of which, $500, less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which with interest exceeds $5,000. The defendants admit the collection of the money from the insurance company; but, to defeat the action, rely upon the agreement mentioned, and the assignment of the policy stipulated in it. The agreement and

assignment are specifically mentioned in the second and third of the three defences set up in their answer. The first defence consists in a general allegation that Crosser assigned, in good faith and for a valuable consideration, nine tenths of the policy to the defendants; that a power of attorney was at the time executed to them to collect the remaining one tenth and pay the same over to his widow; and that after the collection of the amount they had paid the one tenth to her and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial, the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the association of the insurance money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

Mr. J. B. Foraker for the plaintiff in error.
Mr. A. C. Thompson for the defendants in error.

MR. JUSTICE FIELD, after stating the facts, delivered the opinion of the court, as follows: —

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defence. All the facts established by it are admitted in the other defences. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable

to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise

to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the State courts; and there is a conflict in their decisions. In *Franklin Life Insurance Company* v. *Hazzard*, which arose in Indiana, the policy of insurance, which was for $3,000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." (41 Ind. 116.) The court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts, in *Stevens* v. *Warren*, 101 Mass. 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said "that the same would

probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John* v. *American*

Mutual Life Insurance Company, 13 N. Y. 31; *Valton* v. *National Loan Fund Life Assurance Company*, 20 id. 32. In the opinion in the first case the court cite *Ashley* v. *Ashley* (3 Simons, 149) in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other — so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in *Cammack* v. *Lewis*, 15 Wall. 643. There a policy of life insurance for $3,000, procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance com-

pany, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

So ordered.

FOX *v.* CINCINNATI.

1. Pursuant to authority conferred by law, the board of public works of a State leased the surplus water of her canals, but reserved the right to resume the use of it, when it should be needed for the purposes of navigation. A statute was subsequently passed whereby one of the canals within certain limits was granted to, and appropriated by, a city for a highway. *Held*, that the lessee was not thereby deprived of his property without due process of law, as the State, so far from assuming an obligation to maintain the canals to supply water-power, had the right, of which every lessee was bound to take notice, to discontinue them, whenever the legislature deemed expedient.
2. The question as to whether the city acted in excess of the grant, and violated the conditions thereto annexed, cannot be re-examined here on a writ of error to a State court.

ERROR to the Supreme Court of the State of Ohio.

The facts are stated in the opinion of the Court.

Submitted by *Mr. Timothy D. Lincoln* and *Mr. Charles Fox* for the plaintiff.

There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

By the laws of Ohio the board of public works was authorized to sell or lease, for hydraulic purposes, the surplus water in the canals of the State not required for the purposes of navigation. This included water passing round the locks from one level to another; but it was expressly provided that no power should be leased or sold, except such as should accrue from surplus water, "after supplying the full quantity necessary for the purposes of navigation." The laws also required that every lease or grant of power should contain a reservation of the right to resume the privilege, in whole or in part, whenever it might be deemed necessary for the purposes of navigation. In case of resumption, the rents reserved were to be remitted or corre-

spondingly reduced. Rev. Stat. 1880, sects. 7775–7778; act of March 23, 1840, Laws of 1840, p. 174, sects. 20, 21, 22, 23.

The State owned, among others, the Miami and Erie Canal, having one of its termini at the city of Cincinnati, where it connected with the Ohio River through a series of locks, beginning on the east side of Broadway, a street in the city. A lease was made by the board of public works of the water which passed around one of these locks, known as lock No. 8, for hydraulic purposes. Provision was made, in accordance with the requirements of the law, for a resumption of the privilege, if deemed necessary for the purposes of navigation, &c. Fox became the owner of this lease as early as 1855.

On the 24th of March, 1863, a statute was enacted, under which a grant was made to the city of that part of the canal between Broadway and the river, for a public highway and sewerage purposes, but subject to all outstanding rights or claims, if any, with which the grant might conflict. No work could be done by the city upon the granted premises until its plan of improvement should be approved by the board of public works. Sect. 2 of the statute authorizing this grant is as follows: —

"The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by 'An act to provide for leasing the public works of the State,' passed May 8, 1861, or by the instrument of lease executed in pursuance of said act, except as and to the extent that they may be interfered with, as said city may from time to time, enter upon, improve, and occupy any part of said grant."

In constructing the avenue contemplated by the statute, Fox claimed that the power to be furnished under his lease was destroyed, and he brought this suit against the city to recover

the damages which he alleges he thereby sustained. The defence relied, among other things, on the statute as an abandonment of the canal by the State for the purposes of navigation, and claimed that this amounted to a rescission of the lease. To this he replied that, if the statute had that effect, it was void under the Constitution of the United States, because it deprived him of his property without due process of law and without just compensation. The Supreme Court of the State sustained the law; and, to test the correctness of that decision, he brought this writ of error.

That the State by its grant to the city actually abandoned the canal at the point in question cannot be denied. The use of the property as a public street is clearly inconsistent with all ideas of navigation by water. The single question we have to consider is whether there is anything in the lease under which Fox claims which prevents the State from making such an abandonment without compensation to him. Whether the city has acted in excess of the grant, and violated the provisions of sect. 2 of the statute, so as to render itself liable for damages on that account, is for the State court to determine, and its decision on that question is not reviewable here.

The use of the water for hydraulic purposes is but an incident to the principal object for which the canal was built; to wit, navigation. The large expenditures of the State were to furnish, not water-power, but a navigable highway for the transportation of persons and property. The authority of the board of public works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied; and it never could have been intended in this way to impose on the State an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the State to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment

of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the State was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue its canal and stop his supply of water.

This is an accordance with repeated decisions, both in Ohio and other States, and seems to us fully sustained on principle and authority. *Hubbard* v. *City of Toledo*, 21 Ohio St. 379; *Elevator Company* v. *Cincinnati*, 30 id. 629; *Trustees of the W. & E. Canal* v. *Brett*, 25 Ind. 409; *Fishback* v. *Woodruff*, 51 id. 102; *Commonwealth* v. *Pennsylvania Railroad Co.*, 51 Pa. St. 351. We are referred to no case to the contrary.

Judgment affirmed.

WOOD *v.* WEIMAR.

1. In Michigan, replevin will lie at the suit of the mortgagee of personal chattels against an officer who, by virtue of an attachment sued out against the mortgagor, levied upon them while they were in his possession, and who, when they are properly demanded, refuses to surrender them to the mortgagee.
2. Such a mortgage, executed in good faith to secure the amount actually due upon what was deemed to be valid and subsisting obligations, will be upheld and enforced, although the several items which make up that amount are not set forth; provided that subsequent creditors have not been injured by the want of specifications, and the proofs, which are adduced to establish the identity of the debt, show that it comes fairly within the general description.
3. An unrecorded mortgage is not, by the laws of Michigan, rendered void as to creditors, although the mortgaged goods remained in the possession of the mortgagor, if before the expiration of twelve months from its date they were replevied by the mortgagee, who thereafter retained the possession of them.
4. Where the interest on a certain mortgage debt was paid, and the assignee took from the debtor other notes for that interest which were secured by another mortgage, the latter cannot, as to them, avail against attaching creditors.

5. Where the objection to the admissibility of a deed offered in evidence was grounded on its irrelevancy, no question as to the form of its authentication will be considered here.
6. Where, after replevin by the mortgagee, payments were made on the mortgage debt, he cannot enforce his lien on the mortgaged chattels or their value beyond the amount actually due him when judgment is rendered.
7. Where the payee of a note dies, and no administration is granted on his estate, and there are no creditors, his distributees may transfer the note so as to vest in the assignee the equitable title thereto.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. L. D. Norris for the plaintiff in error.

Mr. Edward Bacon and *Mr. George M. Lawton* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in replevin begun by Wood, the mortgagee of a stock of goods in a hardware store at St. Joseph, Michigan, against Weimar, a sheriff, who had seized the mortgaged property under certain writs of attachment, issued by the Circuit Court of Berrien County, Michigan, against Charles A. Stewart, the mortgagor. The case was tried by the court under a stipulation of the parties waiving a jury, and comes here on the facts and a bill of exceptions. The facts are very inartificially presented; a part appearing in the findings of the court incorporated into the opinion of the judge and mixed up with his reasoning in deciding the case, and the rest in two stipulations filed in the progress of the trial, one of which was omitted from the record as originally sent here, but has been brought up since. An objection is made to our considering these stipulations; but we think the case stands upon agreed statements as to part of the facts and findings as to the rest.

The facts thus appearing material to the questions presented by the assignments of error may be stated as follows: —

On the 25th of May, 1875, Stewart mortgaged his stock of goods to Wood to secure the payment of a debt of $10,465.46, and interest, on or before Nov. 25, 1875. This was done in good faith and without any intention to hinder or defraud cred-

itors. The mortgage was filed in the town-clerk's office the day it was executed, in accordance with the requirements of the Michigan statute. The mortgaged property remained in Stewart's possession after the mortgage, and he continued his sales from the stock in the usual course of business. There was no express agreement between the parties that this might be done, neither was it prohibited. The mortgage contained the usual power of sale in case of default, and authorized the mortgagee to take possession at any time, if he deemed himself insecure.

The mortgage purported on its face to be executed to secure a debt owing to Wood. The debt was represented by seven notes, none of which were described. Of these notes, five only actually belonged to Wood. The five all bore date May 25, 1875, the same as the mortgage, and were payable to Wood's order. One for $1,263.43, payable one month after date, with interest at ten per cent, and another for $250, also payable one month after date, with interest from June 22 at ten per cent, were taken in good faith for interest supposed to be past due on a mortgage of lands in Berrien County for $5,000, dated Dec. 22, 1868, and payable in five years, executed by Stewart to one Terwilliger. This mortgage, together with the note it secured, Wood bought in good faith, supposing it to be valid and subsisting, on the first day of May, 1875, after its maturity, and paid for it $5,000 and accrued interest. Both the note and mortgage were delivered to him when his purchase was made, and he had them with him at the time the chattel mortgage was taken. Stewart gave the notes to Wood under the impression that he owed the interest they represented, and the transaction securing their payment by the chattel mortgage was in entire good faith.

Full payment of interest to June 22, 1872, was indorsed on the Terwilliger note on the 29th of August of that year. On the next day, the 30th of August, Terwilliger released twenty acres of land covered by the mortgage; and on the 19th of October afterwards there was recorded in the records of Cook County, Illinois, what purported to be a deed, with covenants of warranty, except as to certain incumbrances, dated Sept. 21, 1872, and executed by Charles A. Stewart to Terwilliger, conveying one undivided half of certain lands in Chicago, "in

consideration of the sum of five thousand dollars, which is paid by way of the release of a mortgage for that sum, recorded in liber No. 4 of mortgages, in the office of the register of deeds of Berrien County, . . . the receipt whereof is hereby acknowledged." There was no other evidence except the record tending to show that this deed was ever delivered to Terwilliger, or that he knew of its being recorded. Wood had no knowledge of the deed when he bought the mortgage. The note was never surrendered to Stewart, and the mortgage was never discharged on the records of Berrien County. When Wood took the chattel mortgage he understood that Terwilliger claimed to own an interest in the Chicago lands in common with Stewart; and on the 27th of May, two days after the chattel mortgage was executed, Stewart made another deed to Terwilliger for an undivided half of the Chicago lands, which he delivered to Wood as agent for Terwilliger. In connection with these facts, the court below said in its findings: "But although there is some confusion about the facts as to whether the mortgage debt of $5,000 was understood by Stewart and Terwilliger as having been paid, on the whole evidence it should be regarded as paid as to creditors."

To prove the deed from Stewart to Terwilliger, bearing date Sept. 21, 1872, a copy from the records of Cook County, certified by the recorder under his seal of office, was offered in evidence. There was no other authentication. This deed was objected to, "for that it was incompetent, immaterial, and irrelevant." The objection was overruled and the deed admitted. Exception was taken, which was in due form embodied in a bill of exceptions and made part of the record.

As to two other of the notes to Wood, one for $800 and the other for $1,890, the first payable one month from date, with interest at ten per cent, and the other one month from date, with interest at the same rate after June 18, it was found that after the commencement of this suit Wood realized from other securities which he held for the payment of the debt of which these notes represented the interest, enough to satisfy both, less the sum of $477.

As to another note given to Wood for $669.91, payable in six months from date, no special facts are found.

The sixth note was for $3,300, payable one day after date, Jan. 1, 1873, with interest at ten per cent, to the order of Elizabeth Stewart. The payee of the note had died intestate before the execution of the chattel mortgage, and no administrator had been appointed on her estate. She left no creditors, so far as the proof shows, but several heirs. One of the heirs was Cornelia Stewart, and all the others united in an assignment of this note to her. Wood was in some way related to Elizabeth and Cornelia Stewart, and Cornelia Stewart had indorsed the note to him to collect or get security. When he took the chattel mortgage he had the note and the assignment from the heirs in his possession. There was due on the note at the time $4,092.12, and Charles Stewart wished to secure it by the chattel mortgage. What was done was for the benefit of Cornelia Stewart.

The seventh note belonged to Harriet A. Stewart; but upon this no questions arise here, as the judgment below was in favor of Wood for all he claimed.

When the attachments under which Weimar claims were put on the property, Charles A. Stewart was in possession. The attachment was not made subject to the chattel mortgage; and in the pleadings in this case it is insisted by the sheriff that the goods were not the property of Wood and that the chattel mortgage was without consideration, and void as to creditors. The value of the property taken by the replevin was $8,870.46.

The attachments were served on the 15th of July, and were for debts, amounting in all to $7,601.77. On the 11th of October, 1875, Wood demanded the goods of the sheriff, who then had them in possession; but the delivery was refused. This suit was begun on the same day, but after the demand and refusal. Weimar at the trial waived a return to him of the goods, and prayed a judgment for their value.

Upon this state of facts the court below ruled —

1. That replevin would not lie in favor of a mortgagee against a sheriff for personal property covered by a chattel mortgage, seized under an attachment against the mortgagor, while the mortgagor was in possession, and that consequently

Weimar was entitled to a judgment, the only question being as to the amount of his recovery;

2. That Wood could claim nothing under the chattel mortgage on account of the notes given for what was believed to be past due interest on the Terwilliger debt;

3. That his lien on account of the two notes of $800 and $1,890 could only be enforced for $477, the balance that remained due after deducting what had been realized from the proceeds of other securities since this suit was begun; and —

4. That he could claim nothing on account of the Elizabeth Stewart note, as, until administration on her estate, and distribution, her next of kin had no right or title to the note, legal or equitable, which they could convey for collection or otherwise, and that consequently there was no one capable of taking or holding security for it.

The result was that the lien of Wood, under his mortgage, was fixed at $3,295.36. This amount he was allowed to retain out of the value of the goods in his hands, and a judgment was given against him in favor of Weimar for the balance, being $5,575.10 and costs. To reverse this judgment against him the case has been brought here by Wood. The errors assigned present for our consideration the foregoing rulings below and the exception to the admission in evidence of the deed recorded in Cook County.

As to the right to bring an action of replevin. Practically this involves only a question of costs; for in the progress of the cause Wood was given the same kind of relief he would have been entitled to if the court had held that his suit was properly brought. By a statute of Michigan (C. L. of 1871, sect. 6754), "when either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

Confessedly Wood was only a lien-holder. The goods were delivered into his possession under the writ, and their value was agreed on. Weimar did not ask their return, but was content with a judgment for the value of what had been wrongfully taken from him. His interest in the property was only that which the attaching creditors could subject to the payment of their debts. Another provision of the Michigan statutes is (id., sect. 6759), that "whenever the defendant shall be entitled to a return of the property replevied, instead of taking judgment for such return, . . . he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section 29 of this chapter. Sect. 29, here referred to, is the same as sect. 6754, *supra*. As the court below found as a fact that Wood had a valid mortgage, it proceeded, notwithstanding the suit was improperly brought, to ascertain the amount and value of his lien and adjudge accordingly. This is all that could have been done if the ruling had been the other way upon the right to maintain the action.

If this were all there was in the case we should, under our uniform practice, decline to consider it. No writ of error lies from a judgment as to costs alone. *Canter* v. *American and Ocean Insurance Companies*, 3 Pet. 307; *Elastic Fabrics Company* v. *Smith*, 100 U. S. 110. But there are other questions, and this may, therefore, properly be taken up. Since the judgment below, the Supreme Court of Michigan has held, in *King* v. *Hubbell* (42 Mich. 597) that although goods mortgaged could be taken under an attachment if in the possession of the mortgagor, the officer must surrender them to the mortgagee on demand, after his inventory and appraisement have been completed, unless the attaching creditors dispute the validity of the mortgage. This clearly implies that replevin will lie if a delivery to the mortgagee is refused when properly demanded. We hold therefore, on the authority of that case, that there was error in deciding that the action was improperly brought.

Before taking up the questions arising on the assessment of damages, it is necessary to consider some objections which

have been urged to the mortgage. It has been found as a fact that the mortgage was executed in good faith to secure what were supposed at the time to be valid and subsisting obligations, and with no intent to defraud other creditors. We are therefore to enter on our enquiries with this established. It is insisted, however, that notwithstanding the good faith of the parties, the mortgage is invalid, because it does not truthfully describe the indebtedness secured. It is conceded that the real transaction was not set forth in detail. The amount of the indebtedness the parties intended to secure is correctly stated, though the several items which made it up are not specified. They were, however, identified at the trial, and the honesty of the transaction established. In *Shirras* v. *Caig* (7 Cranch, 34), where a mortgage purported to secure a debt of £30,000, due to all the mortgagees, but was in fact intended to secure different sums due at the time to particular mortgagees, and advances afterwards to be made and liabilities to be incurred to an uncertain amount, Mr. Chief Justice Marshall said: "It is not to be denied that a deed which misrepresents a transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." Here it has been found that all was fair. It was material for creditors to know the amount of the indebtedness secured, and the property covered. These are truly stated. To enforce his mortgage, the mortgagee must prove his debt, and he can recover only to the extent of what he proves. If the items which make up the debt are particularly described in the mortgage, it may save trouble in establishing the facts; but if there has been no fraud, and subsequent creditors have not been injured by the omission of specifications, identity may be established by parol. In making the proof, the debt must come fairly within the general description which has been

given; but if it does, and the identity is satisfactorily made out, the mortgage will be sustained where good faith exists.

It matters not in this case that the notes actually intended to be secured became due at different dates, and not at the time fixed by the mortgage. Suits might be brought on the notes when they matured, for the recovery of the debt; but the mortgage could only be enforced according to its terms. Possession might be taken under the mortgage when necessary for the preservation of the security; but no sale of the mortgaged property could be made until after the condition was broken; that is to say, until after a failure to pay on the 25th of November.

It is also claimed that the lien of the mortgage was lost after the suit was begun, because of a failure to comply with the requirements of the recording acts. These acts prescribe that where mortgages of chattels are not accompanied by immediate delivery and followed by an actual and continued change of possession, they shall be void as against creditors and subsequent purchasers in good faith, unless copies are filed in the proper office. Another provision is that every such mortgage shall cease to be valid as against creditors and subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall annex to the instrument on file an affidavit setting forth the interest which the mortgagee has, by virtue of his mortgage, in the property mortgaged. The goods in this case were replevied before the year expired, and while the mortgage was in full force under the recording acts. The possession of the property was then taken by Wood. After that the recording acts did not apply, unless the property was again put into possession of the mortgagor. Nothing of this kind appears in the findings, and the presumptions are all the other way. We conclude, therefore, that at the time of the replevin the lien of the mortgage was valid and subsisting to the extent of the debt secured by it as established by the findings.

This brings us to the questions arising on the assessment of damages.

1. As to the notes given for the interest on the Terwilliger mortgage. The court found as a fact that the Terwilliger note was

"paid as to creditors." By this we understand that, as between Stewart and Terwilliger, the debt had been satisfied, and that there was consequently no consideration for the interest notes given Wood. Such being the case, he could not enforce those notes against creditors. Although Stewart might, if he saw fit, recognize the debt in the hands of Wood, and pay it if the rights of creditors did not intervene, as against creditors an agreement to pay would not be binding. The court has found the transaction fair and *bona fide* as between Wood and Stewart. This saves the mortgage as to the remainder of the indebtedness secured, but does not make the notes themselves of any avail against the attaching creditors. We cannot consider the evidence on which this finding was made. That was the province of the court below.

In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: "To the reading in evidence of which deed, plaintiff, by his counsel, objected, for that it was incompetent, immaterial, and irrelevant." It is now insisted that "the attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the act of Congress of March 27, 1804, prescribing the mode in which the public records in each State shall be authenticated, so as to take effect in every other State." This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality, and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof. We see no error in the judgment below as to this item in the claim for allowance under the mortgage.

2. As to the notes of $800 and $1,890. It is insisted by Wood that collections made by him on the mortgage debt since

the commencement of the suit cannot be taken into account in stating the amount of his lien; and, if they could, that what was realized by him from his other securities should be applied on the principal of the debt rather than on these notes, which represent only the interest. Wood ought not to be permitted to enforce his lien on the goods he holds, or their value, beyond the amount which is actually due him on the mortgage debt when the judgment is rendered. The judgment must be such as shall "be just between the parties." If, when the suit was begun, his lien was equal to the full value of the property, and it was reduced by payment afterwards, he must account in the judgment for what is left after his debt is eventually satisfied, but will be protected in respect to costs.

From the finding it may fairly be inferred that the entire debt, principal and interest, was paid from the proceeds of the other securities, except the sum of $477. Certainly there is nothing inconsistent with such a presumption. Before a judgment can be reversed because it is not supported by the findings, the error must be apparent. All intendments are in favor of what has been done. This assignment of error has not been sustained.

3. As to the Elizabeth Stewart note. The court has distinctly found that this was a valid debt, which Charles A. Stewart wished to have secured by the chattel mortgage. There was no fraud intended; but, on the contrary, everything was done in good faith. Inasmuch, however, as Mrs. Stewart was dead and no administration had been granted on her estate, it was decided that Wood had no lien on the property for the security of this note. In this we think there was error. There can be no doubt, from the facts as found, that in equity the debt was owing to Cornelia Stewart. There were no creditors, and all who would have been distributees under an administration of the estate of Elizabeth Stewart had assigned to her their interest in the note. This assignment, with the necessary authority from Cornelia Stewart, Wood had in his possession. There can be no doubt that if Charles Stewart had taken up the old note, and given another to Wood or Cornelia Stewart in its place, the new note would have been good as against every one but a creditor of Mrs. Stewart. So, too, if he had

actually paid the debt instead of securing it, his creditors could not complain. Such being the case, we do not see why the security he gave may not be enforced. He owed the debt and had the right to provide for it without waiting for administration on the estate of Mrs. Stewart, if it could be done with safety. Of that he was to judge, if he acted in good faith, and not his creditors. All they can ask is that his property shall not be charged with its payment more than once. While, therefore, Wood, as the indorsee of Cornelia Stewart, may not have had the legal title to the note, he certainly held the equitable title, which Charles A. Stewart was at liberty to recognize if he would. Having recognized it in good faith and acted accordingly, his creditors cannot interfere. He was at liberty to select such trustee as he chose to hold the security he desired to give. If there was fraud or bad faith the case would be different. The court has found against any such claim, and in our judgment a valid lien was created on the property in favor of Wood for the benefit of Cornelia Stewart, whose interests he rightfully represented, and whose trustee he was.

The judgment will be reversed and the cause remanded, with instructions to enter a judgment in favor of Wood for the costs of the suit, and against him for only $1,482.98, the difference between the value of the mortgaged property and the amount due on the mortgage debt, including the amount adjudged in his favor below and the Elizabeth Stewart note; the judgment so to be rendered to bear interest from and after the 12th day of June, 1878, and it is

So ordered.

MR. JUSTICE GRAY took no part in deciding this case.

INDEX.

University Press: John Wilson & Son, Cambridge.