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OF THE

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VOL. 105.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1881.

REPORTED BY

WILLIAM T. OTTO.

VOL. XV.

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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. WILLIAM B. WOODS.
HON. HORACE GRAY.
HON. STEPHEN J. FIELD.
HON. JOHN M. HARLAN.
HON. STANLEY MATTHEWS.
HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL.

HON. BENJAMIN HARRIS BREWSTER.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

As made April 3, 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.	1882.
Hon. SAMUEL BLATCHFORD, N. Y.	New York, Vermont, and Connecticut.	March 27. President Arthur.
	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 HUNT, *by reason of sickness, resigned during the term, before the cases reported in this volume were decided.*

THE HON. SAMUEL BLATCHFORD, *whose commission as an Associate Justice of this Court bears date March* 27, 1882, *took the oath of office in open court, April* 3, 1882. *He took no part in deciding the cases reported in this volume which precede Corbin* v. *Van Brunt, p.* 576.

MEMORANDA.

The resignation of Mr. Justice Hunt gave rise to the following correspondence: —

Supreme Court of the United States,
Washington, March 4, 1882.

Dear Judge Hunt, — Your resignation as one of our number having taken place just at the beginning of the February recess, we have had no opportunity until now of expressing to you our regret that your long-continued illness made such a step necessary. We have none of us forgotten how faithfully you labored, while health permitted, to perform your full share of the work that was constantly pressing upon us, and we cannot but feel that if you had been more careful of your strength and less determined to do all of what you conceived to be your duty, the necessity for this separation would not have existed. Your absence from the bench has not taken from us the recollection of your conscientious service while there, nor of your uniform kindness and courtesy everywhere and on all occasions.

With sincere regard we remain your friends and former associates,

M. R. Waite,
Sam. F. Miller,
Stephen J. Field,
Joseph P. Bradley,
John M. Harlan.

1733 De Sales Street,
Washington, D. C., March 25, 1882.

My dear Chief Justice, — It is some weeks since I have received your letter, but I have been unwell and unable to write until now.

You and Mr. Justices Miller, Field, Bradley, and Harlan, who were with me on the Supreme Court Bench, have my warmest thanks for your kind expression of sympathy in my protracted illness and of regret at our separation. I feel a grateful sense to you for the patience and unfailing kindness and cheerfulness with which you have borne the increased labor my illness has caused you. Now, by the addition of Justices Wood, Matthews, Gray, and

Blatchford, the Bench has renewed strength, and your labor will be lightened. I shall ever retain the recollection of our pleasant intercourse, both official and social.

With the best wishes for your happiness and prosperity, I remain, my dear Sir, ever gratefully,

Ward Hunt.

Mr. Chief Justice Waite, and Justices Miller, Field, Bradley, and Harlan.

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.

WADE *v.* WALNUT.

The court adheres to the decision of the Supreme Court of Illinois declaring that the provision in the existing Constitution of that State entitled "Municipal subscriptions to railroads or private corporations" took effect July 2, 1870.

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

This was an action brought by Wade against the town of Walnut, upon coupons cut from bonds purporting to be issued by the defendant, under the style of Township of Walnut, in the County of Bureau and State of Illinois. The declaration avers that each of the bonds contains, among other recitals, the following: "This bond is issued under and by virtue of the charter of said Illinois Grand Trunk Railway Company, and amendments thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township, at the special election held August 6th, 1870, in accordance with said charter and amendments and laws."

The defendant demurred to the declaration, and judgment was rendered in its favor. It is unnecessary to state the remaining facts, as the only question upon which this court passed was as to whether at the foregoing date there was in

force an article of the Constitution of Illinois which is as follows: —

"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 where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Wade sued out this writ of error.

Mr. Thomas S. McClelland and *Mr. George A. Sanders* for the plaintiff in error.

Mr. William C. Goudy and *Mr. Allan C. Story* for the defendant in error.

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

The only question we have to decide in this case is, whether the section of the Illinois Constitution adopted in 1870, relating to "municipal subscriptions to railroads or private corporations," was in force on the 6th of August, 1870. This question came before the Supreme Court of the State at the January Term, 1872, only eighteen months after the Constitution was adopted, in *Schall* v. *Bowman* (62 Ill. 321), and it was then decided that this section took effect on the 2d of July, the day the people voted for its adoption. The opinion in the case was written by Mr. Justice Breese, two justices dissenting. At the September Term in the same year the same questions came again before the court in *Richards* v. *Donagho* (66 id. 73), and the opinion was then delivered by Mr. Justice Thornton, in the following words: "The only question presented by this record was, after mature deliberation, settled by the opinion in *Schall* v. *Bowman*. . . . Notwithstanding the able and plausible argument made in this case, the majority of the court adhere to the opinion in the case referred to above." Afterwards, at the January Term, 1878, in *Wright* v. *Bishop* (88 id. 302), the court said: "Appellants make a very able and

interesting argument against the rulings in those cases; but we are not convinced they should be overruled."

This court has never until now been called on to decide the question, but in numerous cases it has assumed that the section took effect on the day fixed by the Supreme Court of the State. *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625; *County of Moultrie* v. *Rockingham Ten-cent Savings Bank*, id. 631; *County of Randolph* v. *Post*, 93 id. 502; *Fairfield* v. *County of Gallatin*, 100 id. 47; *Walnut* v. *Wade*, 103 id. 683; *Louisville* v. *Savings Bank*, 104 id. 469. Under these circumstances we are not inclined to consider the question an open one here while the Supreme Court of the State adheres to its present rulings.

Judgment affirmed.

SWOPE *v.* LEFFINGWELL.

This court has jurisdiction to re-examine the judgment of a State court involving the right of a national bank to purchase a promissory note secured by a deed of trust upon real estate. A motion to affirm will, however, be granted where that is the only Federal question in the case and the decision below is in recognition of the right.

ERROR to the Supreme Court of the State of Missouri.

This was a suit brought in the Circuit Court of St. Louis County, Missouri, against Leffingwell and the other defendants, to restrain and enjoin the sale of certain real estate in the city of St. Louis, under a deed of trust executed to secure the payment of a promissory note whereof the Atlas National Bank of Boston became the purchaser. The case was ultimately determined by the Supreme Court of the State reversing the decrees of the subordinate courts, and directing that the bill be dismissed. Swope sued out this writ of error.

A motion was made to dismiss the writ for want of jurisdiction, upon the ground that there was no Federal question involved; to which was united a motion to affirm.

Mr. Philip Phillips in support of the motions.

Mr. E. B. Sherzer, contra.

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

We have jurisdiction of this case. The motion to dismiss is, therefore, denied; but as the only Federal question presented on the merits was decided by the court below in accordance with our rulings in *National Bank* v. *Matthews* (98 U. S. 621) and *National Bank* v. *Whitney* (103 id. 99), the motion to affirm is

Granted.

CLARK *v.* FREDERICKS.

1. A judgment will not be reversed because the court below erred in directing the order in which the evidence was introduced, unless it clearly appears that the complaining party was thereby injured.
2. An objection to matters which was not brought to the attention of the court below will not be considered here.
3. The finding below covering all the issues is conclusive, and where a request for special findings was refused, this court will assume that they were not established by the evidence.

ERROR to the Supreme Court of the Territory of Montana.

Davis, having obtained a judgment against Wellington A. Fredericks, sued out a writ of attachment, by way of execution, which Clark, the sheriff of Gallatin County, Montana Territory, levied upon some personal chattels alleged to belong to the judgment debtor, but which his wife claimed were her separate property. This suit was, therefore, brought in the District Court of that county, by her, against Clark and Davis, to recover possession of the chattels, or their value in case the delivery of them could not be had.

There was a judgment for the plaintiff, which was, on appeal, affirmed by the Supreme Court of the Territory. Clark and Davis sued out this writ. The assignment of errors is set out in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Martin F. Morris* for the plaintiffs in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the defendants in error.

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

The errors assigned in this case are: —

1. That Mrs. Fredericks, when on the stand as a witness in her own behalf, was not permitted to answer certain questions put to her on cross-examination;

2. That the court did not separate its findings of fact from its conclusions of law; and,

3. That the court did not find the distinct facts requested by the plaintiffs in error.

As to the first assignment, it is sufficient to say that no harm could have resulted from the ruling on the cross-examination, as in a subsequent stage of the case, when the questions were clearly proper, the witness testified fully as to all the matters originally inquired about. A judgment will not be reversed because of an error of the court in directing as to the order in which testimony shall be introduced, unless it clearly appears that the complaining party has been injured by what was done.

The matter referred to in the second assignment does not seem to have been brought to the attention of either of the courts below, and the objection now made comes too late in this court for the first time. If the defect complained of had been specifically pointed out to the District Court when the findings were filed, it would no doubt have been corrected. There is nothing in all this very confused record to indicate that the point was ever made until the brief for the plaintiffs in error was filed here.

The findings are conclusive as to the facts, and they cover all the issues. Whether the distinct facts set forth in the requests for findings presented by the plaintiffs in error were proved or not we need not inquire. As the court declined to find them, we must assume they were not established by the evidence.

This record is so confused as to be almost unintelligible. If counsel here had been less careful in the presentation of the questions raised for our re-examination, we should have declined to consider the case on this account.

Judgment affirmed.

BARTHOLOW *v.* TRUSTEES.

The judgment rendered in an action at law where the judges of the Circuit Court were opposed in opinion cannot be re-examined here otherwise than on a writ of error.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Illinois.

Submitted by *Mr. John D. Stevenson* for the plaintiff.

There was no opposing counsel.

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

All the questions certified in this case are answered in the negative, on the authority of *Weightman* v. *Clark*, 103 U. S. 256. As the judgment was in accordance with this opinion, it would have been in all respects affirmed if the case had been brought here by writ of error. We find no such writ, however, and on that account dismiss the suit for want of jurisdiction. Under sect. 693 of the Revised Statutes, final judgments or decrees of the Circuit Courts in civil suits or proceedings, wherein there has been a division of opinion of the judges, are only reviewable here on writ of error or appeal. The sixth section of the act of 1802, c. 31 (2 Stat. 159), which allowed the questions to be certified up before judgment, was superseded by the first section of the act of July 1, 1872, c. 255 (17 Stat. 196).

Suit dismissed.

POLLARD *v.* VINTON.

1. The legal character and effect of a bill of lading stated in reference to its negotiable quality.
2. Neither the master of a steamboat, nor its shipping agents at points on the rivers of the interior where cargo is received and delivered, can, by giving a bill of lading for goods not received for shipment, bind the vessel or its owner, and such bill is void even in the hands of a transferee in good faith and for value.
3. *Schooner Freeman* v. *Buckingham* (18 How. 182) cited and approved.

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

The facts are stated in the opinion of the court.

Mr. E. Ellery Anderson for the plaintiff in error.

Mr. Benjamin H. Bristow and *Mr. Augustus E. Willson* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams, & Co. at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs, who sued out the present writ.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his

name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence: —

"During the month of December, 1873" (the date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, *with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, 'Ben. Franklin.'*"

This authority to execute and deliver bills of lading has two limitations; namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition

of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of *Schooner Freeman* v. *Buckingham*, 18 How. 182.

In that case the schooner was libelled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libellants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libellants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel; and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner.

The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the

master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

The court cites as settling the law in this way in England the cases of *Grant* v. *Norway*, 10 C. B. 665, *Coleman* v. *Riches*, 16 id. 104, *Hubbersty* v. *Ward*, 8 Exch. Rep. 330, and *Walter* v. *Brewer*, 11 Mass. 99. See also *McLean & Hope* v. *Fleming*, Law Rep. 2 H. of L. (Sc.) 128; Maclachlan's Law of Merchant Shipping, 368, 369.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very questions of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of *New York & New Haven Railroad Co.* v.

Schuyler (34 N. Y. 30) is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent.

In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think that case presents a rule for this case.

Judgment affirmed.

NOTE. — *Pollard* v. *Mail Line Company*, error to the Circuit Court of the United States for the District of Kentucky, was argued at the same time and by the same counsel as the preceding case. MR. JUSTICE MILLER remarked that the bill of exceptions in each case being identical, except as to the name of the defendant and the steamboat owned by it, the judgment must be

Affirmed.

MR. JUSTICE HARLAN did not sit in these two cases, nor take any part in deciding them.

GREENWOOD *v.* FREIGHT COMPANY.

1. Where, by a State statute, the charter of a street-railroad company was repealed, and its franchises and track were transferred to another, and the company refuses to seek a remedy, a stockholder who asks an injunction on the ground that the statute impairs the obligation of a contract will have a standing in a court of equity.
2. Such a statute impairs the obligation of a contract, unless the legislature reserved the right to repeal the statute conferring the charter.
3. In Massachusetts such a reservation becomes part of every act of incorporation, by virtue of sect. 41, chap. 68, of the General Statutes, which declares, "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the legislature."
4. The origin of this and similar clauses of reservation in the statutes of the States stated.
5. By the exercise of the repealing power reserved by such a clause the charter no longer exists, and whatever validity transactions entered into and authorized by it while it was in force may possess, there can be no new transactions dependent on the special power conferred by the charter. Such power is abrogated when the law granting it is repealed.
6. Neither the rights of the shareholders to the real and personal property of the corporation, nor rights of contract, or choses in action, are destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power.
7. If the legislature has the power to repeal the statute under which a company was organized, it can charter a new one, and confer the same powers on it as the former possessed; and, so far as the property or franchises of the old company are necessary to the public use, it can authorize the new one to take them, on making due compensation therefor.
8. A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation so taken by the new one.

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

The facts are stated in the opinion of the court.

The case was argued by *Mr. George F. Edmunds*, with whom was *Mr. Alonzo B. Wentworth*, for the appellant, and by *Mr. Darwin E. Ware* and *Mr. William G. Russell* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company, — all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment of compensation. This latter act also repealed the charter of the Marginal Company.

Sections 4, 6, and 7 of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the

Marginal Company, and, as they are short, they are here given verbatim: —

"SECT. 4. Said corporation may, within its authorized limits and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one."

"SECT. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

"SECT. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an 'Act to incorporate the Marginal Freight Railway Company,' and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed."

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an in-

junction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes* v. *Oakland* (104 U. S. 450), in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two: —

1. The repeal of the charter of the Marginal Company.

2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the

unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company,

we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease* v. *Babcock*, 23 Pick. (Mass.) 334; *Erie & N. E. Railroad Co.* v. *Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent, Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law

may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales* v. *Stetson* (2 Mass. 143), the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be

controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518), decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher* v. *Peck* (6 Cranch, 87) and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations

we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass. 143.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren* v. *Pennington*, 1 Paige (N. Y.), 102), in which the legislature of New Jersey, when chartering a bank with a capital of $400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of Feb. 25, 1822. How long the legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, *supra*; *Tomlinson* v. *Jessup*, 15 Wall. 454; *Railroad Company* v. *Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 id. 700; *Railroad Company* v. *Georgia*, 98 id. 359; *McLaren* v. *Pennington*, *supra*; *Erie & N. E. Railroad* v. *Casey*, *supra*; *Miners' Bank* v. *United States*, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no

person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co.* v. *Dix*, 6 How. 507; *Central Bridge Corporation* v. *City of Lowell*, 4 Gray (Mass.), 474; *Boston Water-power Co.* v. *Boston & Worcester Railroad Corporation*, 23 Pick. (Mass.) 360; *Richmond, &c. Railroad Co.* v. *Louisa Railroad Co.*, 13 How. 71.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that

the Union Freight Company, within four months from the passage of the act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for $15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares *all* acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

THE "SCOTLAND."

1. The act of March 3, 1851, c. 43, reproduced in the Revised Statutes in sects. 4282, &c., applies to owners of foreign as well as domestic vessels; and to acts done on the high seas as well as in waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or perhaps of two foreign nations having the same maritime law.
2. The maritime law of the United States, as found in the statute, is the same as the general maritime law of Europe, and is different from that of Great Britain in this, that the former gauges the liability by the value of the ship and freight after loss or injury, and the latter by their value before the loss or injury, not exceeding £15 per ton.
3. The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. The principles laid down on this subject in *Norwich Company* v. *Wright* (13 Wall. 104), and in *The Lottawana* (21 id. 558), reasserted and affirmed.
4. The courts of every country will administer justice according to its laws, unless a different law be shown to apply; and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding ships belong to the same foreign country, or perhaps to different countries using the same law, when they will be governed by the laws of the country to which they belong.
5. Ship-owners may avail themselves of the defence of limited responsibility by answer or plea as well as by the form of proceeding prescribed by the rules of this court, at least so far as to obtain protection against the libellants or plaintiffs in the suit. Those rules were not intended to restrict them, but to aid them in bringing into concourse those having claims against them arising from the acts of the master or crew.
6. If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing

said amount *pro rata* amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute.

7. It is not necessary that ship-owners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in, or confessing, fault, may abide a decree against them for the value of ship and freight as found by the proofs.
8. The rule of damages, in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the place of shipment, with all charges of lading, insurance, and transportation, and interest at six per cent per annum, but without any allowance for anticipated profits.
9. When the goods have no market value at the place of shipment, resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination, with a fair deduction for profits and charges.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

The facts are stated in the opinion of the court.

The case was argued by *Mr. William Allen Butler*, with whom was *Mr. Thomas E. Stillman* and *Mr. John Chetwood*, for the "Scotland," and by *Mr. James C. Carter* and *Mr. Robert D. Benedict*, with whom was *Mr. Joseph H. Choate*, for the libellants.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The steamship "Scotland," belonging to the National Steam Navigation Company, a corporation of Great Britain, sailed from New York for Liverpool, on the 1st of December, 1866, with freight and passengers; and after reaching the high sea, opposite Fire Island light, ran into the American ship "Kate Dyer," bound from Callao, in the republic of Peru, to New York, laden with a cargo of guano. The "Kate Dyer" immediately sank, and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further than the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging, and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels *in personam* were filed in the District Court for

the Eastern District of New York, against the Steam Navigation Company by the owners of the "Kate Dyer," the Peruvian government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the steamship company, lying in the port of New York, which was duly claimed and released on stipulation, and the steamship company appeared and responded to the libel. The answer admitted the collision, but denied that the "Scotland" was in fault, and further alleged as follows: "Respondents further answering say, that said steamer 'Scotland' was by said collision sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the 'Kate Dyer.'" Proofs being taken, the District Court rendered a decree in favor of the libellants, which, on appeal to the Circuit Court, was substantially affirmed. The owners of the "Kate Dyer" were awarded $56,000, with interest; the owners of the cargo, $57,375, with interest; and the passengers and crew, upwards of $11,000, with interest.

On the trial in the Circuit Court, the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court as follows: —

"The steamer was, by reason of the said collision and in consequence thereof, so injured that, although at once put about, she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging, and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage-money paid in advance by the passengers was $1,703.65; of this $225 was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line; the remaining passengers were forwarded by the 'Queen,' and the expense charged to the 'Scotland.'

Irrespective of the carriage of the passengers by the 'Queen,' the respondents paid return money as above, $225, and the expenses of bringing the passengers to New York, and taking care of them before they were reshipped, $566.83, in all, $791.83; the balance of the passage-money, $911.82, was credited to the 'Queen' and charged to the 'Scotland.'"

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit: —

"The liability of the respondents, as owners of the said steamship 'Scotland,' did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage money earned, the respondents are thereby discharged from any liability on account thereof."

The Circuit Court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libellants was based on what they supposed to be an erroneous conclusion of the court in reference to the allowance of interest, and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is, whether the steamship company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred, — a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the company that it is entitled to the benefit of such limitation, either under the general maritime law or under the act of Congress of March 3, 1851, c. 43. On the other side, it is contended that the general maritime law on this subject (if there be any) is not in force in this country, and that the benefit of the act of Congress cannot be claimed by foreign vessels. It is further contended by the

libellants that the steamship company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it, — *first*, in not filing a petition according to the rules of this court; and, *secondly*, in not surrendering the property recovered from the wreck, or its proceeds.

In the case of *Norwich Company* v. *Wright* (13 Wall. 104) we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient code called the Consolato del Mare, and in many other authorities which are quoted and commented upon by Judge Ware in the case of *The Rebecca* (Ware, 187); and it is specifically formulated in various national ordinances and codes, amongst others, in the Marine Ordinance of Louis XIV., adopted in 1681. Emerigon, in his treatise of Contracts "a la Grosse," says: "The owners of the ship are bound *in solidum* by everything which the captain does in the course of the voyage for the promotion of the voyage. . . . But this action *in solidum* does not exist against the owners farther than according to the interest which they have in the body of the ship; hence, if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North; and such is the regulation of our own ordinance:" and he refers to the Consolato and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute. The English statutes, indeed, have not yet adopted, to its full extent, the maritime law on this subject. They make the owners responsible to the value of ship and freight at the time of the injury (that is, immediately before the injury), although the ship be destroyed, or injured by the same act, or afterwards in the same voyage;

whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana* (21 Wall. 558), the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under

their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The act of Congress creating a limited responsibility of shipowners in certain cases, first passed March 3, 1851, and reproduced in sects. 4282–4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employés, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the cor-

porations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, "Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master." Jure B. & P., lib. 2, c. 11, s. 13.

But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which in generality of terms were similar to our own, did not apply to foreign ships. See *The Nostra Signora de los Dolores*, 1 Dod. 290; *The Carl Johan*, cited in *The Dundee*, 1 Hagg. Adm. 109, 113; *The Girolamo*, 3 id. 169, 186; *The Zollverein*, 1 Swa. 96; *Cope* v. *Doherty*, 4 Kay & J. 367; s. c. 2 De G. & J. 614; *The General Iron Screw Collier Co.* v. *Schurmanns*, 1 John. & H. 180; *The Wild Ranger*, 1 Lush. 553. We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign States, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in

its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that, as foreigners are not subject to their law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature? or the civil or common law? Is not the maritime law, as their own legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the acts of Parliament on the subject, and the supposed policy of those acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England, since the act of 1862 (25 & 26 Vict., c. 63), by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the acts of Parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our act of Congress. Some of the clauses of the British acts, however, relating to registered ton-

nage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of ship-owners. And public policy, in our view, requires that the rules of the maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule, and the mode of enforcing it, are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicile. We think they should not be restricted by construction. Our opinion, therefore, is that in this case the National Steamship Company was entitled to the benefit of the law of limited responsibility.

But it is objected that the appellants did not properly, and in due time, claim the benefit of the law. Under this head it is strenuously contended that the appellants did not comply with the rules of this court adopted in December Term, 1871. Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceeding was necessary to enable ship-owners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the ship-owners should deem

such a mode of pleading adequate to their protection. It is obvious that in a case like the present, where all the parties injured are represented as libellants or intervenors in the cause, an answer setting up the defence of limited responsibility is fully adequate to give the ship-owners all the protection which they need.

But it is objected that they did not follow the statute by giving up and conveying to a trustee the strippings of the wreck and the pending freight. It is sufficient to say that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship-owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief. The primary enactment, in sect. 4283, Rev. Stat., is, that the liability of the owner for any loss or damage, without his privity or knowledge, shall in no case exceed the amount or value of his interest in the vessel and her freight then pending. Two modes for carrying out this law are then prescribed, one in sect. 4284, and the other in sect. 4285. By sect. 4284, a *pro rata* recovery against the ship-owner is given to the various parties injured "in proportion to their respective losses;" and it is added: "for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto."

The other mode of attaining the benefit of the law is prescribed by sect. 4285, which declares that "it shall be deemed a sufficient compliance on the part of such owner, with the requirements of this title, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, &c., from and after which transfer all claims and proceedings against the owner shall cease." This last proceeding the respondents did not see fit to adopt; but that does not deprive them of the benefit of the preceding section.

As to the form of proceeding necessary to give the respon-

dents the benefit of sect. 4254, which declares that either party "may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable," what more "appropriate proceeding" could be taken for this purpose, where all the parties are before a court of admiralty, and where the ship-owners plead their exemption under the statute, than to give a decree against them for the amount of their liability, and to distribute the sum amongst the parties entitled to it?

It seems to us that no additional rules are necessary to attain the object of the law in the case. It is plain enough to execute itself. If there are parties, not represented in the suit, who have claims for damages, it is the respondents' fault for not bringing them in, as they might have done after the rules of 1871 were adopted, by pursuing the remedy pointed out in those rules. But as to the actual libellants and intervenors in the suit, there is no reason in the world why the respondents should not be decreed to pay the value of the ship's strippings and remnants into court, nor why such amount should not be distributed *pro rata* amongst the claimants.

We think that this should have been done. If any further inquiries are necessary to be made, in order to ascertain the proper amount to be paid by the respondents, as depending upon the value of the articles saved, including freight or passage money realized, the court below can institute them in a proper way.

The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the Circuit Court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits. When, as in this case, the goods have no ascertainable market value at the place of shipment, the guano being a natural deposit owned by the Peruvian government, indirect means must be resorted to for the purpose of ascertaining the real value at that place. The Circuit Court had the evidence of an experienced merchant on this subject, who based his estimate upon the price for which the goods were

usually sold in New York, with a fair deduction for profits and expenses of every kind. Under the circumstances of the case we do not see that any juster method could have been adopted. The rate of interest allowed, six per cent per annum, was the proper rate in such a case. See *The Vaughan and Telegraph*, 14 Wall. 258; *Murray* v. *Charming Betsey*, 2 Cranch, 64; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 id. 546; *Smith* v. *Condry*, 1 How. 28; *Williamson* v. *Barrett*, 13 id. 101.

In conclusion, our decision is, that as no error has been shown in any part of the decree below except on the question of limited responsibility, the same is in all respects affirmed with that exception; and for the error in that respect the decree of the Circuit Court must be reversed so far as it condemns the respondents to pay the whole amount of damage sustained by the libellants and intervenors; and the cause must be remanded with instructions to modify the decree and take such further proceedings as may be necessary to carry out the principles laid down in this opinion.

As to the costs of the litigation up to the time the appeal was taken to this court, the decree of the Circuit Court will not be disturbed, inasmuch as the respondents did not place themselves alone on the defence of limited responsibility, but contested the question of fault and any liability whatever, which was found against them.

As to the costs of this appeal, we think that no costs should be decreed to either party against the other. The question before the Circuit Court was a new one, upon which there was wide room for difference of opinion; and neither court nor parties had any precedents to guide or direct them as to the mode of proceeding. Therefore each party will be decreed to pay their own costs on this appeal.

MR. JUSTICE MATTHEWS and MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

UNITED STATES *v.* GRANITE COMPANY.

Where a party who delivered granite was, by the terms of his contract, to receive "the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet," — *Held,* that where the dimensions of a stone exceed twenty feet, he is entitled for each cubic foot sixty-five cents, and one cent additional for every cubic foot of the entire stone.

APPEAL from the Court of Claims.

The Dix Island Granite Company, a corporation created under the laws of New York, contracted with the United States to deliver at the site of the post-office in the city of New York all such granite as might be required for the construction of the building, "wrought and dressed in such manner and style of workmanship" as might be directed by the United States. The latter stipulated to pay for the stone delivered "the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet."

Under the contract the company delivered, at the proper time and place, 456,544 cubic feet of granite, of which quantity 353,728 cubic feet were in stones the quarried dimensions of which severally exceeded twenty cubic feet. In the settlement of the account the parties disagreed as to the stipulated price per cubic foot of stones the general dimensions of which exceeded twenty feet. The Treasury Department construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot exceeding twenty, — thus, if the stone contained twenty-one cubic feet, the price for each cubic foot of the entire stone was to be sixty-six cents; if it contained twenty-two cubic feet, the price for each was to be sixty-seven cents; and so on, increasing the price one cent for each additional cubic foot. On the other hand, the company construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot of the entire stone, — thus, if the stone contained

twenty-one cubic feet, the price was to be sixty-five cents plus twenty-one cents, that is, eighty-six cents a cubic foot of the entire stone; if it contained twenty-two cubic feet, the price was to be eighty-seven cents; and so on, adding to the sixty-five cents one cent for each cubic foot of the entire stone. The difference in the amounts resulting from the two interpretations as to the price of the granite delivered was $70,745.74.

The amount allowed by the department was paid on account, the question of the construction of the clause being reserved for judicial decision. The company thereupon brought the present action in the Court of Claims for the difference. Other demands were also included in the action; but as they were disallowed, and the company has not appealed, no reference need be made to them. For the difference in the price of the stone, mentioned above, the company recovered judgment, and the case is brought here for review.

The Solicitor-General for the United States.

Mr. Enoch Totten for the appellee.

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

The clause of the contract in question, upon the interpretation of which the determination of this case must depend, divides the stones to be delivered into two classes, — those whose dimensions do not exceed twenty cubic feet, and those whose dimensions do exceed that number of cubic feet. For those of the first class the price is fixed at sixty-five cents a cubic foot. For those of the second class the price per cubic foot is fluctuating, increasing with the size of the stone; but the mode of ascertaining this price is prescribed. It is to add to the sixty-five cents as many cents as there are cubic feet in the stone; and this sum will constitute the price per cubic foot. The last clause must, therefore, be read as if the words "per cubic foot" were inserted in it; thus, "one cent additional [per cubic foot] for every cubic foot" of the larger stones, that is, for the whole number of such feet in the stone. It will serve to remove doubt as to the meaning of the clause if we look at it with the insertion of these words after elimi-

nating the provision as to the smaller stones. It will then read thus: "The party of the first part hereby covenants and agrees to pay . . . the sum of sixty-five cents per cubic foot for all stones . . . and one cent additional [per cubic foot] for every cubic foot" of the stones; that is, sixty-five cents for each cubic foot plus one cent for every cubic foot in the stone. This is the interpretation for which the claimant contends; and it appears to us to be the only one permissible from the language used. The interpretation adopted by the Treasury Department requires the interpolation of terms excepting from the computation the first twenty feet; and this exception is inconsistent with the provision that for "every cubic foot" of the larger stones an additional price is to be paid.

Nor is there anything unreasonable in the increased price for the larger stones required by this interpretation. Every contract must be considered with reference to the subject in respect to which it is made, and its language construed accordingly. It was stated by counsel on the argument, and the fact is a matter of common knowledge, that with builders, materialmen, and architects the value, and consequently the price, of dressed building stone, per cubic foot, is determined by the size of the stone, and that this value cumulates with the size; thus, the value of a cubic foot of granite in a small block — weighing a single ton, for example — is much less than the value of a cubic foot in a larger block weighing several tons. The difficulty of preparing and moving blocks weighing several tons is very much greater than that of preparing and moving an equal quantity of stone in small blocks; and the expense of time and labor must, of course, be proportionately greater.

The contract compelled the company to furnish "all such stone" as might be required in the construction of the post-office building. It left the size of the blocks to the direction of the United States. They might have called for blocks equal in size to some of those furnished for the building of the Treasury Department, which are said to contain five hundred and sixty-three cubic feet, and to weigh forty-seven tons. The dressing and transportation of a stone of such a size would have been very much greater than the dressing and transportation of forty-seven blocks each of a single ton. We do not,

therefore, appreciate the force of the objection urged by the government to the construction for which the claimant insists, that instead of allowing a rate gradually increasing beyond the twenty feet dimension, it requires, to quote the language of counsel, "a sudden leap at one point" when the dimensions of the stone pass the twenty cubic feet limit. Had the government called for blocks, all of one hundred or more cubic feet, as it might have done, the change would have been as much against the interest of the claimant as the supposed benefit to him by the change in price at the point mentioned. The reason suggested — and we cannot say that it is not a good one — for having a fixed price for blocks, not exceeding twenty cubic feet, is, that blocks of that size and weight could be handled by a known power, for which provision was made; but for moving stones of a larger size special arrangements would be required, depending upon their dimensions and weight. It may well be that at the point where stones can be readily handled, and beyond which special arrangements are required to move them, a great change should be made in the price. The company may have been indifferent as to their weight and size under a specified figure, and yet been unwilling to furnish any of a larger size without a greatly increased price.

There are many articles in commerce whose value is greatly increased by a small augmentation in size, and they are consequently sold at a cumulative price, as their dimensions are enlarged. Plate-glass is one of them; diamonds are another. Such increased value arises either from the greater rarity of the article of the larger size, or the greater difficulty in its production or transportation. The cumulative character of the price in the present case is not exceptional, for the reasons mentioned, that the difficulty and expense of moving the blocks increase with their size. It is stated in the able opinion of one of the justices of the Court of Claims, that the price of similar stones bought by the government for the building of the Treasury Department was seventy cents per foot for those of ten feet, eighty cents for those of twenty feet, ninety cents for those of thirty feet, and so on; in other words, that there was a cumulative price for every additional cubic foot of the stone.

Applying the contract to the subject to which it relates, we think that the interpretation placed by the company upon the clause as to the price was correct.

Judgment affirmed.

MR. CHIEF JUSTICE WAITE, MR. JUSTICE MILLER, and MR. JUSTICE HARLAN dissented.

YOUNG *v.* STEAMSHIP COMPANY.

1. A shipping commissioner who has received two dollars for services in connection with the shipment of a seaman is not entitled to a fee on his reshipment on subsequent successive voyages of the same vessel.
2. This court will not review the decision of a State court, that the fee exacted by the commissioner on the seaman's reshipment can be recovered back, although no objection thereto was made at the time it was paid.

ERROR to the Supreme Court of the State of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Henry Flanders for the plaintiff in error.

Mr. Morton P. Henry for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The defendant in the court below, John H. Young, who died since this case has been pending here, was appointed shipping commissioner of the United States at the port of Philadelphia, in July, 1872; and was continuously in office from that time until the present action was commenced, in March, 1876. The American Steamship Company, plaintiff in the court below, is a corporation created under the laws of Pennsylvania, and, during the period the deceased held his office, was the owner of four steamships sailing under the American flag between the ports of Philadelphia and Liverpool. The men composing the crews of the steamships were shipped before the commissioner for a voyage from Philadelphia to Liverpool and back; and for every man shipped on each voyage the commissioner received from the company the sum of two dollars, the payment of which was demanded by him by virtue of his office.

The total number of men shipped at Philadelphia, on board these steamships, between the dates mentioned, was 6,136; of which number 2,439 reshipped and sailed on the next succeeding voyage of the same steamship on which they had returned to that port. For these the commissioner demanded and received from the company $4,878, payments being made from time to time, as the bills were presented by him, immediately after the reshipment of the men.

The present action was brought in the Court of Common Pleas of the county of Philadelphia to recover this sum, and was submitted for decision upon an agreed statement of facts. That court held that the payments were voluntary, and that the money, therefore, could not be recovered back. The case being carried to the Supreme Court of the State, the decision of the Court of Common Pleas was reversed, and judgment ordered for the plaintiff for the amount claimed. To review this judgment the case is brought here.

Two questions were presented for consideration to the Supreme Court of the State: 1st, Whether the shipping commissioner was entitled to charge a fee of two dollars for each seaman who, on the return of a vessel of the company to Philadelphia, reshipped and sailed on the same vessel in succeeding voyages; and, 2d, whether, if the fees collected by him were illegally exacted, they could be recovered back, it not appearing that any objection was made at the time to their payment. That court decided both questions in favor of the company; and the same questions are now presented to us.

The Revised Statutes require the several Circuit Courts of the United States, within whose jurisdiction there is a port of entry and of ocean navigation, to appoint a shipping commissioner for it; and empower them to regulate the mode of conducting business in his office; and to exercise full control over it. Sect. 4501. They also require him to take an oath of office, and to give a bond, with sureties, in such sum as the circuit judge may prescribe, not less than $5,000, for the faithful discharge of his duties. Sect. 4502. They provide, with certain exceptions, not necessary to be stated in this case, that the master of every vessel bound from a port in the United States to any foreign port shall, before he proceeds on such voyage,

make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, which must contain various particulars relating to the nature and probable duration of the voyage contemplated, the port or country where it is to terminate, the number and description of the crew, the time when the seaman is to be on board to begin work, the capacity in which he is to serve, the wages he is to receive, the provisions with which he is to be furnished, and regulations as to his conduct, and to the fines and punishments to which he may be subjected, and stipulations as to advance and allotment of wages. Sect. 4511. The agreement, except as otherwise specially provided, is to be signed in duplicate in the presence of the commissioner, acknowledged before him, and certified under his hand and official seal, one copy of which is to be retained by him and the other to be delivered to the master of the vessel. Sect. 4512. For each seaman thus shipped the commissioner is allowed a fee of two dollars.

But the statutes also declare that these provisions as to the duty of the master and the contract with the seamen, shall not apply to masters of vessels in cases where the seamen are, by custom or agreement, entitled to participate in the profits or results of a cruise or voyage, nor to masters of coastwise or lake-going vessels that touch at foreign ports; but that "seamen may, by agreement, serve on board such vessels a definite time, or, on the return of any vessel to a port in the United States, may reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master." Sect. 4513.

The solution of the first question presented depends upon the construction given to this last clause. The contention of the commissioner is that the exemption from payment of fees on the reshipment is limited to the reshipment for one other voyage and to that immediately following the one at which the fees were paid. On the other hand, the contention of the steamship company is that the exemption applies to a reshipment for all voyages succeeding the first one in regular order. We are of opinion that this latter construction is the correct one.

The legislation of Congress was designed for the protection

of seamen in the merchant service; they had previously been the subject of constant imposition and deception. As a class, particularly those serving as common sailors, they are proverbially improvident, and frequently the prey of unscrupulous landsmen. Soon stripped when in port of their hard earnings, they are generally willing to accept employment on almost any terms. Their necessitous condition often compelled them to submit to harsh contracts which placed them completely in the power of masters of vessels. To remedy these evils, the office of shipping commissioner was created; and he is charged with the performance of important duties connected with the shipment and discharge of seamen. Every engagement for their service must be made and signed before him. But when satisfied with the vessel upon which they have served and with the treatment received, they are disposed to continue in the employment of the same owners, they can have no occasion for his services. All that is then required of him is to see that the renewed contract is signed and acknowledged in his presence. The exemption of the reshipment from fees was undoubtedly made, as suggested by the Supreme Court of Pennsylvania, to encourage a more steady and continuous service, and to make it for the interest of masters to so treat their crews as to induce them to remain with the vessels. This object requires the extension of the exemption to a reshipment on all voyages succeeding in regular order the one for which fees were paid, equally as to the one next succeeding. Every reshipment must, by its terms, be only for another voyage, not for several voyages. So, upon a strict construction, as well as upon a view of the intention of the exemption, the same result must follow. No reason can be assigned why the exemption should extend to the first reshipment on the same vessel, that will not apply to all subsequent reshipments following continuously.

It is of no weight against this construction of the statutes that it may deprive the commissioner of fees to an extent materially affecting his compensation. Statutes are not to be wrested from their true meaning because a diminution of the fees of an office may result from it.

It follows that we agree with the Supreme Court of the State on the first question presented. Upon the second question,

whether the payments were voluntary, and, therefore, the money could not be recovered back, we express no opinion; for in any view in which it may be considered, it is not one of Federal law. The ruling of the State court on this point is final, so far as we are concerned, in this action.

Judgment affirmed.

HEAD v. HARGRAVE.

1. A "statement" of the case, according to the law regulating civil proceedings in the Territory of Arizona, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken; and, though prepared for and used on a motion for a new trial, it is available on appeal from the judgment, when, by stipulation of the parties, it is made a part of the record for that purpose.
2. In an action for legal services, the opinions of attorneys as to their value are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of a witness is not, as a matter of law, to be accepted by the jury in place of their own.

ERROR to the Supreme Court of the Territory of Arizona.

This was an action brought in a district court of Arizona to recover the sum of $2,000 alleged to be owing by the defendants to the plaintiffs for professional services as attorneys and counsellors-at-law in that Territory in 1877 and 1878. The complaint alleges that the services were performed in several suits and proceedings, upon a retainer by the defendants; and that they were reasonably worth that sum. The answer is a general denial.

On the trial, one of the plaintiffs testified to the rendition of the services by them in several suits, stating generally the nature of each suit, the service performed, and its value. Five attorneys-at-law also testified to the value of the services; three of whom were called by the plaintiffs and two by the defendants. They differed widely in their opinions, the highest esti-

mate placing the value of the services at $5,440, the lowest at $1,000.

The court instructed the jury, that, in determining the value of the plaintiffs' services, they might consider their nature, the length of time they necessarily occupied, and the benefit derived from them by the defendants; that the plaintiffs were entitled to reasonable compensation for the services rendered; and that the reasonableness of the compensation was a fact to be determined from the evidence as any other controverted fact in the case; and then proceeded as follows: —

"The services rendered were skilled and professional, and for the purpose of proving to you the value of that class of services rendered, professional gentlemen, attorneys-at-law, claiming to be familiar with the value of such services, have testified before you. If you accredit *these witnesses* with truthfulness, their testimony should have weight with you; and the fact as to what is a reasonable compensation should be determined from the evidence offered, and not from your own knowledge or ideas of the value of that class of services. In other words, you must determine the value of the services rendered from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services."

The defendants thereupon asked the court to instruct the jury as follows: —

"In determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.

"In determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct."

The court refused to give these instructions, and an excep-

tion was taken. The jury thereupon gave a verdict for the plaintiffs for $1,800; upon which judgment was entered. A statement of the proceedings at the trial was then prepared, which, among other things, set forth the alleged errors of law excepted to by the defendants. This statement was used on a motion for a new trial, which was denied; and by stipulation it was embodied in the papers for the appeal to the Supreme Court of the Territory from the judgment, as well as from the order denying the new trial. The order and judgment were both affirmed; and, to review the judgment, the case is brought to this court.

Mr. Thomas Fitch and *Mr. C. J. Hillyer* for the plaintiffs in error.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the defendants in error.

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

The defendants in error object to the use of the statement, which sets forth the exceptions taken, as not constituting a part of the record before us. The ground of the objection is, that the statement was prepared for and used on the motion for a new trial, with the disposition of which this court cannot interfere. The objection would be tenable but for the stipulation of the parties that the statement might be used on appeal from the judgment. A statement of the case, according to the law regulating civil proceedings in the Territory, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial. We have had occasion to refer to this subject in *Kerr* v. *Clampitt*, which arose in Utah, where a similar system of procedure in civil cases obtains; and it is unnecessary to repeat what is there said. 95 U. S. 188.

The only question presented for our consideration is whether the opinions of the attorneys, as to the value of the professional services rendered, were to control the judgment of the jury so

as to preclude them from exercising their "own knowledge or ideas" upon the value of such services. That the court intended to instruct the jury to that effect is, we think, clear. After informing them that, in determining the value of the services, they might consider their nature, the time they occupied, and the benefit derived from them; also, that the plaintiffs were entitled to reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence, — it proceeded to call special attention to the testimony of the attorneys, and told the jury that if they accredited *these* witnesses with truthfulness their testimony should have weight, and the fact as to what is reasonable compensation should be "determined from the evidence offered," and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition, as follows: "You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas as to the value of such services." This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that by the words "evidence offered" and "evidence that has been offered before you" reference was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: that while the jury might consider the nature of the services and the time expended in their performance, their value — that is, what was reasonable compensation for them — was to be determined exclusively from the testimony of the professional witnesses. They were to be at liberty to compare and balance the conflicting estimates of the attorneys on that point, but not to exercise any judgment thereon by application of their own knowledge and experience to the proof made as to the character and extent of the services; that the opinions of the attorneys as to what was reasonable compensation was alone to be considered. That the defendants so understood the charge is evident from the qualifications of it which they desired to obtain; and the jury may, in like manner, have so understood it. And as we so construe it, we think the court erred, and that it should have been qualified by the instructions requested. Those instructions correctly presented the law of

the case. It is true that no exception was taken to the charge; but its modification was immediately sought by the instructions requested, and to the refusal to give them an exception was taken. Objection to the charge was thus expressed as affirmatively and pointedly as if it had been directed in terms to the language used by the court.

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to

be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.

As justly remarked by counsel, the present case is an excellent illustration of the error of confining the jury to a consideration merely of the opinions of the experts. Of the five attorneys who were witnesses, no two agreed; and their estimates varied between the extremes of $1,000 and $5,440. Directing the jurors to determine the value of the professional services solely upon these varying opinions was to place them in a state of perplexing uncertainty. They should not have been instructed to accept the conclusions of the professional witnesses, in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors. The instructions tended to mislead as to the weight to be given to the opinions of the attorneys, especially after qualifications of them designed to correct any misconception on this head were refused.

In *Anthony* v. *Stinson*, a question similar to the one here presented came before the Supreme Court of Kansas, and a like decision was reached. The instruction given at the trial that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that they should be governed by it in finding the value of the services rendered, was held to be erroneous; the court observing that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. 4 Kan. 211.

In *Patterson* v. *Boston*, which arose in Massachusetts, the question was as to the damages to be awarded to the plaintiff for his property, taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact which bore upon the issue, he ought to disclose it

and be sworn, and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses. The case being taken to the Supreme Court of the State, it was held that these directions were not open to exception. Said Chief Justice Shaw, speaking for the court: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, which depends on knowledge and experience, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties." 20 Pick. (Mass.) 159, 166.

In *Murdock* v. *Sumner*, the same court, speaking through the same distinguished judge, said that "the jury very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition, and cost of certain goods, and given *his opinion* as to their worth, and the court said that "the jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." 22 id. 156.

In like manner, in this case, the jurors might have taken the facts testified to by the attorneys as to the character, extent, and value of the professional services rendered, and then come to a different conclusion. The instructions given, whilst stating that the nature of the services rendered, the time occupied in their performance, and the benefit derived from them might be considered by the jury, directed them that they should be governed by the opinions of the experts as to the value of the services, and, in effect, forbade them to exercise their own knowledge and ideas on that kind of services. This error would have been avoided if the instructions requested by the defendants had been given.

Judgment reversed and a new trial ordered.

SMITH *v.* FIELD.

A imported goods invoiced as "white linen torchon laces and insertings," which, as "thread lace and insertings," were, he claimed, subject to a duty of thirty per cent *ad valorem*, under schedule C of sect. 2504, Rev. Stat. He paid, under protest, forty per cent, the duty prescribed by that schedule on manufactures of which flax is "the component material of chief value not otherwise provided for," and he brought suit against the collector. The court instructed the jury to determine from the evidence whether the goods were "thread lace" such as the schedule describes, and, if they were not, to find for the defendant. The jury found for A. *Held*, that the instruction was correct.

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.

Submitted by *The Solicitor-General* for the plaintiff in error, and by *Mr. Edward S. Isham*, *Mr. E. B. Smith*, and *Mr. John H. Thompson* for the defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

In 1878 the defendant in the court below was collector of customs for the port of Chicago, and this action is brought to recover from him the amount of certain duties alleged to have been illegally imposed in that year upon goods of the plaintiffs. It appears that the plaintiffs imported into the United States, from France, certain articles invoiced as "white linen torchon laces and insertings;" that they were brought by steamship to New York, thence transported to Chicago under internal transportation bonds, and there entered; that the defendant, as collector, decided that the goods were subject to a duty of forty per cent *ad valorem*, under schedule C of sect. 2504 of the Revised Statutes, as a manufacture of flax, or of which flax was a component material of chief value "not otherwise provided for," and exacted that duty. The plaintiffs claimed that the goods were subject to a duty of only thirty per cent *ad valorem*, as "thread lace and insertings," which is the amount prescribed in the same schedule for articles of that kind. They paid the difference, ten per cent, under protest, and brought this action to recover back the amount.

On the trial, the chief point in controversy was whether the laces in question were embraced in the description of "thread laces" in the schedule; for, if so, the duties upon them were fixed at thirty per cent *ad valorem*, and they were not subject to the duty exacted, of forty per cent, as a manufacture of flax, or of which flax was a component part of chief value "not otherwise provided for."

The evidence produced by plaintiffs tended to show that the terms "thread lace and insertings," as used and understood among commercial men of the country, included all laces made of thread on a cushion, with bobbins moved by hand, in distinction from laces made by machinery or with needles; that they have a special name attached to them, such as point lace, torchon lace, Smyrna lace, and the like, by which their style and kind are indicated; and that torchon laces, though a very old kind, and not imported to any considerable extent until within a few years past, were generally known as thread laces, and were such in fact.

The evidence produced by the defendant tended to show that there was a class of laces known to commerce, and to dealers, as thread laces, made by hand on cushions with bobbins, and more particularly designated as English, French, or German laces, which were supposed to be made of linen thread, but which were in fact composed chiefly of a fine cotton thread, with only one large linen thread running through the pattern to mark the figures; that torchon laces were not known as "thread laces," but only by their special designation; and that torchon and Smyrna laces and some Saxony laces were all that were made of linen thread by hand on cushions with bobbins.

The court left it to the jury to determine whether the torchon lace imported by the plaintiffs was "thread lace," such as is meant and described in the statute; and instructed them that if it did not come under that general designation, they should find for the defendant; that it made no difference whether the lace was known to commerce at the time the law was enacted; that, if brought into use afterwards, and yet came under the general designation of "thread lace," the government must accept the duty imposed by the law upon that article.

The defendant requested a special instruction, that if the jury believed from the evidence that the torchon lace did not come within the class known as thread lace, designated and intended as such by the statute when it was enacted, they should find that it was not a thread lace. This instruction the court refused to add to that already given, and an exception was taken. The jury found for the plaintiffs, and the case is brought here for review.

The record does not disclose any error. The instruction of the court was correct. The special instruction asked was substantially a repetition of that given, and, therefore, unnecessary; there was evidence upon which the jury could find its verdict, and no legal reason is shown why it should be disturbed. The judgment is, therefore,

Affirmed.

MATHEWS *v.* MACHINE COMPANY.

1. Letters-patent No. 4887, bearing date April 30, 1872, granted to Washburn Race and S. R. C. Mathews for an improvement in hydrants, being a reissue of letters No. 19,206, dated Jan. 26, 1858, are void, inasmuch as, by claiming the elements of the invention separately and not as a combination, which is claimed in the original letters, they enlarge the scope of the latter, and they also cover a different invention. *Miller* v. *Brass Company* (104 U. S. 350) cited and approved.
2. Letters-patent No. 96,959, bearing date Nov. 16, 1869, granted to said Race and Mathews for an improvement in hydrants, are also void, as they embrace matters previously known and in public use.

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

The facts are stated in the opinion of the court.

Mr. George L. Roberts and *Mr. George Harding* for the appellants.

Mr. Causten Browne for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case comes before us on an appeal from a decree dismissing a bill in equity filed by Samuel R. C. Mathews and

others, the appellants, against the Boston Machine Company and others, in which they prayed for an injunction and account of profits for an alleged infringement of two certain patents granted to Washburn Race and S. R. C. Mathews, one dated April 30, 1872 (being a reissue of a patent granted Jan. 26, 1858), and the other dated Nov. 16, 1869. The defendants, in answer, denied that Race and Mathews were the first inventors of the thing patented, referring to several prior patents, and naming prior instances of knowledge and use of the alleged invention; and amongst other things setting up a patent issued to one Zebulon E. Coffin, dated July 21, 1868. They also denied that the reissued patent was for the same invention as the original; and denied infringement. The complainants filed a supplemental bill, alleging that since the filing of the original the defendants had procured a reissue of Coffin's patent, which contained substantially the same invention as that described in the complainants' patent of 1869; but that Race and Mathews were the first and original inventors of the thing patented; and therefore they prayed that the Coffin patent might be declared void.

The Race and Mathews patents, on which this suit was brought, relate to casings or jackets around hydrants, and to the valves for letting on the water when wanted for use, and for draining it out of the hydrant when not in use. It is conceded that the objects of the casing are to prevent freezing in and around the hydrant, by surrounding it with a volume of dead air, to keep it free from contact with the surrounding earth, and to enable the hydrant to be taken out of the ground without removing the surrounding earth. If the earth is in contact with the hydrant, it lifts the hydrant out of place by the action of the frost, and has to be dug away when repairs or other operations have to be performed below the surface. Many casings formerly used were fastened in different ways to the hydrant, and they raised it, when they were lifted by the frost, causing breakage or leakage or other damage by the displacement; and the hydrant could not be disconnected from the main and removed, without removing the casing also.

So far as the improvement in the casing is concerned, the

principal thing claimed to be effected by the patentees, Race and Mathews, is the placing of the case in position without attaching it to the hydrant, or to the elbow of the main pipe below, so that the hydrant, whilst being protected from frost and the surrounding earth, may be lifted out separately, and so that the lifting of the case by the frost and surrounding earth will not disturb the hydrant. These objects are effected by two different devices; first, by causing the case to rest loosely on a flange projecting from the elbow of the main, or otherwise, and allowing it to slide up the hydrant which it surrounds, and which is enlarged at that point, for holding the valves; secondly, by allowing the upper end of the case to embrace the hydrant (enlarged at that point also), and to slide up and down upon it like a sleeve. Of course, the case must fit the hydrant snugly enough to keep out the influx of cold air above, and of dirt below; but not so tight as to prevent the hydrant from being lifted out, or the case from slipping up and down upon it. This is the thing which the complainants contend that Race and Mathews invented.

As first patented in 1858, the invention did not accomplish the object. The bottom of the case, it is true, surrounded the hydrant like a sleeve, and rested on a flange projecting from the elbow (which allowed the hydrant to be separately removed without removing the case); but the top of the case was enclosed in a flange projecting from the enlarged part of the hydrant above, like the brim of a hat, but turned down over the top of the case, so that the latter, though unconnected otherwise with the hydrant, yet if it were lifted by the frost, it would press upward against the flange and raise the hydrant also. This difficulty was remedied by the invention of the improvement patented in 1869, by which the top of the case was made to surround and enclose the upper enlargement of the hydrant, and to slide over it like a sleeve, as before stated. The reissued patent of 1872 substantially embraces both features of the improved case, namely, its disconnection with the hydrant both above and below, and places much stress on the dead-air chamber as a protection from frost, and on the protection of the hydrant below from the surrounding earth; although no claim is based on these last features.

The defendants contend that this reissued patent is not for the same invention as that which is described and patented in and by the original patent of 1858; that the latter made no mention of the dead-air chamber formed by the casing, as a protection of the hydrant from the frost; and that it contained no indication that the case should fit closely to the hydrant, so as to prevent the passage of cold air into the chamber from without. But to these objections it is answered, that the case invented by Race and Mathews in 1858 was a machine or apparatus having, or being susceptible of, various functions, some of which were well known and needed not to be mentioned or described. Amongst these known functions of the hydrant casing were, the formation of a dead-air chamber to prevent freezing, and the protection of the hydrant from contact with the surrounding earth. The patent of Coffin, on which the defendants rely, states that prior to the date of his invention *frost jackets*, or cases, on hydrants were well known; that they surround the hydrant proper, an air space existing between the two. It was not necessary for the patentees, Race and Mathews, to enumerate all the known functions of these frost jackets in their original patent; and, as no claim was based upon them, it could not be hurtful to enumerate them in the reissued patent.

But the complainants, in their reissued patent, have split up and divided the elements of their invention, and claimed them separately, and not as a combination. Of course, this enlarges the scope of their patent. The separate claims embrace fewer elements in combination than were embraced in the claim of the original patent. No one could infringe the original patent unless he used all the elements of the combination. Any one will infringe the reissue who uses any of those elements which are now separately claimed.

The original patent had but a single claim in reference to the case, being a claim for a combination between the hydrant, the induction pipe provided with a flange to sustain the jacket, and the jacket itself, when arranged as described in the specification to effect the desired end, to wit, the ready removal of the hydrant. This, in the reissued patent, is divided into two claims, namely, first, the jacket surrounding the hydrant and

forming a separate and removable part from the elbow, substantially as and for the purpose set forth; secondly, the independent jacket supported on the arm or elbow of the main at or near the junction of the hydrant, substantially as shown and described; that is to say, there is a claim of a jacket separate and removable from the elbow, and of a jacket resting on the elbow. It cannot be denied that each of these separate claims is much broader than the claim in the original patent; and they are put forth in the reissue fourteen years after the original was granted. The latter showed on its face that these broad claims were not made; and if the patentees were really the inventors of an independent jacket standing loosely on the elbow of the main, when apprised that it was not claimed in the patent they ought to have used due diligence in surrendering it and having the mistake corrected. The case clearly comes within the ruling in *Miller* v. *Brass Company*, 104 U. S. 350.

There is still another objection to the claims in question. There is a wide departure from the original invention in this, that the subject of the latter was a jacket, or casing, whose top was enclosed and covered by a flange projecting from the hydrant, which effectually prevented the removal of the jacket without removing the hydrant also; and which caused the hydrant to be raised when the jacket was lifted by the frost. In the reissued patent nothing is said of this arrangement of the top of the jacket, and the claims ignore it altogether; so that, as already intimated, the patent as it now stands would cover such a jacket as that described and claimed in the complainants' patent of 1869, which slides like a sleeve over the hydrant at top as well as bottom. The reissue is not only for a broader claim made many years after the original was granted, but is for a different invention. Therefore, so far as the jacket is concerned, we think it cannot be sustained.

But the patent of 1869 still remains. That was for an improvement by which it was proposed to liberate the top of the case from the flange which covered and enclosed it, and make it surround the hydrant and slip over it like a sleeve. The claim is for "the detached case B, so combined and arranged with the hydrant A, as to have an end play, or vertical motion

of several inches, to compensate for the heaving by frost, the upper part of same passing outside of main stock of hydrant." Had this patent been confined to a hydrant jacket closed at the bottom, and resting on a flange of the main elbow, perhaps it might have been sustainable. But it is not so confined. It is only said that the lower end *preferably* shuts into a flange of the elbow. The specification, it is true, commences with a statement that the invention was a mere improvement upon that described by the patent of 1858, which was for a case closed at the bottom by standing on a flange; but before getting through, there is an evident departure from that, and an indication that the patentees had begun to entertain views of an expanded construction intended to be placed on the original patent, which afterwards found expression in the reissue of 1872. The claim of the patent of 1869, as it stands, covers any and every loose jacket having an end play to compensate for the heaving of the frost, and having the upper end passing around the hydrant. It covers the old New York wooden case, or housing, which was in public use for many years before Race and Mathews gave their attention to the subject. We are of opinion, therefore, that this patent cannot be sustained.

As to the valve apparatus, the object of which is to let the water in the body of the hydrant escape when the main valve is closed, and to prevent any escape of water when the main valve is open, since Race and Mathews were not the original inventors of this process, but only of a particular arrangement of valves to effect it, they can only properly claim the specific arrangement which they invented. And in view of the older valve in the St. Louis hydrants, which that of the defendants most nearly resembles, and of the fact that the valve used by the defendants is not in the specific form of that invented by Race and Mathews, we think that the defendants are correct in their position that they do not infringe the patent of Race and Mathews, as that patent must be construed in order to be sustained.

Decree affirmed.

MR. JUSTICE MATTHEWS and MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

TAYLOR *v.* YPSILANTI.

1. Under a statute of Michigan of March 22, 1869, authorizing cities to pledge their aid, "by loan or donation, with or without conditions," in the construction of any railroad by a company organized under the laws of the State, the electors of a city voted to issue its bonds to aid such a company upon certain conditions, touching the eastern terminus of the road, and providing that if any citizen should subscribe and pay for stock in the company the latter should deliver him such bonds therefor, and that the citizens should, within thirty days, have the right to subscribe for the stock to the amount of aid voted. The bonds were delivered to the company. *Held*, that the conditions were not unauthorized by the statute, and constitute no defence to an action on the bonds.
2. The court adheres to the ruling in *Township of Pine Grove* v. *Talcott* (19 Wall. 666), and measures the rights and obligations of the parties under the statute in question, as it was there enforced, and as it was acted upon by all the departments of the State government at and before the time when the company earned the bonds by the performance of the prescribed conditions. The court, therefore, declines to accept the subsequent adjudications of the Supreme Court of Michigan, declaring the statute to be repugnant to the Constitution of the State.
3. The courts of the United States, in cases within their jurisdiction involving contract obligations and rights depending upon the laws of the State, will conform to the settled construction which the highest court of the State gave to those laws at the time when the rights accrued or the obligations were incurred.

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

The case is stated in the opinion of the court.

Mr. George F. Edmunds and *Mr. Elijah Meddaugh* for the plaintiff in error.

Mr. Hiram J. Beakes for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by Taylor, a citizen of New York, to recover from the city of Ypsilanti, a municipal corporation of Michigan, the amount of certain coupons cut from bonds issued by that city in aid of the construction of the Detroit, Hillsdale, and Indiana Railroad. At the conclusion of the evidence, the jury, being so instructed, returned a verdict in behalf of the city, upon which judgment was entered.

The bonds purport to have been issued under the authority of a general statute, approved March 22, 1869, declaring it to be lawful, within prescribed limits as to amount, for any city or township — a majority of its electors voting, at a meeting called for that purpose, assenting — to pledge its aid, "by loan or donation, with or without conditions," in the construction of any railroad by a corporation organized under the laws of Michigan. The electors voted aid to the extent of $50,000 in bonds of the city, upon condition that the company should have and continue the eastern terminus of its road in the city, or connect, within its limits, with the Michigan Central Railroad; and upon the further condition, that if any citizen of Ypsilanti should subscribe and pay for any share in the stock of the company, the latter "shall deliver to the persons so subscribing and paying for such share the bond or bonds of said city equal to the amount so subscribed and paid for, not exceeding in all the amount of bonds issued by said city to said railroad company; and that citizens of said city shall have the right to subscribe to the stock of said railroad company to an amount not exceeding $50,000 for thirty days after such aid shall have been voted." Upon each bond appears a declaration, under the official signature of the mayor and clerk of the city, setting forth the conditions attached by the popular vote to the issue and delivery of the bonds.

In support of the judgment, it is contended that the city, in giving aid to the construction of a railroad, was restricted to the specific modes — loan or donation — designated in the statute; that this transaction was neither a loan nor a donation; that it is essential to a donation that it should not be made for a valuable consideration, or in execution of a contract embracing reciprocal obligations, since, in a legal sense, it implies an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration; and, consequently, the city was without power to issue bonds upon conditions such as those imposed by the electors. It is argued that the conditions are inconsistent with any correct idea of donation, and that the bonds based thereon are unauthorized by law, and therefore invalid as obligations of the city.

In this conclusion we are unable to concur. The argument of counsel fails to give proper effect to material portions of the statute. Power was conferred, not simply to make a loan or donation, but to make a loan or donation "with or without conditions." The statute is silent as to the nature of the conditions with which the loan or donation might be accompanied. It was, in our opinion, a legitimate exertion of that power to secure, in connection with a corporate donation, such advantages or special privileges for the people of the municipality, not inconsistent with public policy, as the railroad company was willing to concede. The requirement that the company should have and continue the eastern terminus of its road in the city, or connect, within its limits, with the Michigan Central Railroad, inured to the benefit of the mass of the population interested in the growth and prosperity of the city; while the stipulation that citizens of Ypsilanti should be entitled, for a limited period, — thirty days, — to receive the city s bonds to an amount equal to the stock they might subscribe and pay for (not exceeding the amount of the bonds donated), was of value to such persons only as chose to avail themselves of the privilege thus secured. If the transaction has any element of bounty to individual citizens, and was not, for that reason, a donation, within the technical meaning of that word, it is quite sufficient to say that it is within the express statutory authority to attach conditions to any donation which the people might sanction. We are, therefore, of opinion that the donation by the city of its bonds, upon the condition prescribed by popular vote, was within the terms of the statute.

This brings us to the consideration of the proposition advanced in behalf of the city, that the act of March 22, 1869, is repugnant to the Constitution of Michigan, as expounded by its highest judicial tribunal, in *People* v. *Salem*, 20 Mich. 452; *Bay City* v. *State Treasurer*, 23 id. 499, and subsequent cases. These adjudications, it is claimed, constitute the law of this case, and should be followed, as of obligation, without reference to the time when they were made, or to any opinion we may entertain as to the soundness of the principles announced.

The specific provisions which, it is supposed, establish the

invalidity of the act in question are sections six, eight, and nine of article fourteen, and section thirty-two of article six. They declare that "the credit of the State shall not be granted to, or in aid of, any person, association, or corporation;" that "the State shall not subscribe to, or be interested in, the stock of any company, association, or corporation;" that "the State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property;" and that "no person shall be . . . deprived of life, liberty, or property without due process of law." These sections constitute a part of the Constitution of 1850, which is still the fundamental law of the State.

It is not to be questioned that the Supreme Court of Michigan, in the cases cited, has ruled that it was beyond the constitutional power of the legislature to grant to a municipal corporation authority to pledge its credit, or issue bonds, in aid of the construction of railroads by corporations organized, owned, and managed by private persons. Before examining the particular grounds upon which those decisions rest, it is necessary that we should ascertain what was, at the date of the passage of the act of March 22, 1869, the law of Michigan, declared and acted upon by the several departments of its government, upon the general subject of the relations between railroad corporations and the public. The earliest case, to which our attention has been called, is *Swan* v. *Williams*, 2 Mich. 427. It was determined in 1852. The constitutional validity of an act incorporating a railroad company, in so far as it authorized the appropriation of private property for the location, construction, and operation of the road authorized by its charter, was there assailed chiefly upon the ground that property, so appropriated, is in no sense taken for public purposes, but for the private profit and advantage of the corporators. But the court declined to accede to that view. It held that counties, towns, cities, and villages are political or municipal corporations which, from their nature, are subject to the unlimited control of the legislature; that corporations such as banking, insurance, manufacturing, and trading companies were private corporations, the private advantage of the corporators being the ulti-

mate as well as the immediate object of their creation, and the resulting benefits to the public being merely incidental; and that turnpike, bridge, canal, and railroad companies are more properly styled public corporations, since, in their creation, public duties and public interests are involved, the discharge of those duties and the attainment of those interests being the primary object to be worked out through the powers delegated to them. The very existence of the latter, said the court, was based as well upon the delegation to them of the sovereign power to take private property for public use, as upon the continued exercise of that power in the use of property for the purposes for which it was condemned; that such corporations are the means employed to carry into execution a given power; that the character of a corporation is determined, not so much by the object sought by it, as by that designed by the legislature; that if that object be the public interest, to be secured by the exercise of powers, delegated for that purpose, which would otherwise repose in the State, the corporation is public, although private interests may be incidentally promoted; that such a corporation is essentially "the trustee of the government for the promotion of the objects desired, a mere agent to which authority is delegated to work out the public interest through the means provided for that purpose and broadly distinguished from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally, and not necessarily, from its operations." That there might be no doubt as to the scope of the decision, Martin, J., speaking for the whole court, further said: "Nor can it be said that the property when taken is not used by the public, but by the corporators for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators; but it is nevertheless true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the services. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium, or

by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. . . . The purpose designed by the government in the construction of these roads is the *use* of the public, the expeditious communication from point to point, and not revenue."

In 1859 the legislature of Michigan passed an act providing for the payment from the State treasury of a certain sum, by way of bounty, for every bushel of salt manufactured by any individual, company, or corporation, from water obtained by boring in Michigan, and exempting from taxation property used for such purposes. Laws Mich., 1859, p. 551. That law was subsequently amended, and in *People* v. *State Auditors* (9 Mich. 327), decided in 1861, it was held that the relators, a manufacturing company, acquired a vested right to the amount, offered by the original act, for all salt manufactured prior to the amendatory statute reducing the bounty. And the doctrines of that case were reaffirmed in *East Saginaw Manuf. Co.* v. *City of East Saginaw, &c.* (19 id. 259), decided in 1869, after the passage of the act of March 22, 1869.

The diligence of counsel, aided by our own researches, has not disclosed any adjudication of the Supreme Court of Michigan, prior to May 26, 1870, in which the doctrines of these cases were recalled or, in any degree, modified, — doctrines constituting, as will not be denied, the foundation upon which, in the courts of this country, rests the power of the legislature, when unrestrained by constitutional inhibitions, to authorize municipal aid to railroad enterprises.

So far as the action of the legislative and executive departments of Michigan is concerned, we find that from the adoption of the Constitution of 1850 down to the passage of the act in question, authority was given, in many instances, to municipal corporations to aid in the construction of railroads and plank-roads by corporations organized and managed by private persons. And by a general statute passed in 1855, providing for the incorporation of railroad companies, authority was given

to condemn real estate, property, and franchises for the purposes of the corporation, making compensation therefor in the mode prescribed. That statute expressly declares that "all real estate or property whatsoever, acquired by any company, under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use." Compiled Laws of Mich., 1857, vol. i. pp. 638, 643. It was in force when the act of March 22, 1869, was passed. But this is not all. In the year 1867 a convention was held, charged with the duty of revising the Constitution of the State. The delegates in that body were of course aware of the existence of numerous statutes, public and private, authorizing railroad corporations to condemn private property for the purpose of constructing and maintaining railroads, and empowering municipal corporations of the State to pledge their credit in aid of their construction. If such legislation was in opposition to the will of the people, or if it was deemed to be forbidden by the letter or spirit of the existing constitution, to remodel which was the object of the convention, we should expect to find in the new constitution some distinct provision reversing the policy which had been steadily pursued by the legislative and executive departments of the State, and which had been sustained as constitutional by the judiciary. But no such provision was adopted. On the contrary, two sections were adopted, relating to the subject of municipal aid to railroads, one declaring that "the legislature shall not authorize any city or township to pledge its credit, for the purpose of aiding in the construction of any railroad to such an extent that the outstanding indebtedness, exclusive of interest, on account of aid to any and all railroads, shall exceed ten per cent of the assessed valuation of such city or township;" while the other affirmatively declared that the legislature might authorize any city or township to raise money by taxation, for such purposes, within the amount named. Although the constitution submitted by the convention of 1867 was not adopted by the people, the sections, to which we have referred, adopted by delegates representing every portion of the State, show that there was no purpose to take from the legislature the power, under all circumstances, of authorizing municipal aid to railroad corpora-

tions. The effort was only to restrict the power theretofore exercised by the legislature.

The act of March 22, 1869, contains no clause of an unusual character. It is general in its application to all the townships, villages, and cities of the State. It requires all bonds executed under its provisions to be delivered to the State treasurer, to be by him held, as trustee for the municipality and the railroad company, until all the conditions prescribed by popular vote or by the statute were performed. It declares that the railroad company for which the bonds were voted shall be entitled to receive them whenever the governor certified that all conditions have been performed. The bonds having been deposited with the State treasurer, the company entered upon the work of construction in the winter of 1869–70. The road was completed prior to Jan. 1, 1871, and has been in operation ever since. But prior to May 26, 1870, it had been so far constructed that the railroad company became entitled under its contract to the bonds voted by the city of Ypsilanti. And on the 10th of June, 1870, the governor gave his certificate under the State seal, stating that the company had performed all conditions prescribed by the statute, and by the vote of the people, and was entitled to receive the bonds voted by the city. On the 21st of June, 1870, the treasurer delivered them to the company, indorsing upon each that it was delivered by him, on that day, under the provisions of the act of March 22, 1869. Thus the city and the railroad company received all for which they respectively bargained.

On the twenty-sixth day of May, 1870, — after, let it be observed, the railroad company had earned the bonds under its contract with the city, and was entitled to the required certificate from the governor, — the case of *People* v. *Salem* was determined in the Supreme Court of the State. It involved the constitutional validity of an act passed in 1864, authorizing certain townships to pledge their credit, and the county of Livingston to raise by tax a loan of money, in aid of the construction of a railroad. The court, Graves, J., dissenting, held the act to be unconstitutional. The point was distinctly made in argument that municipal aid to railroads was prohibited by sects. 6, 8, and 9 of art. 14 of the State Constitution. It was

claimed that those sections would be rendered nugatory if so construed as to recognize the power of the legislature to authorize, or compel, each city and township in the State to grant or loan its credit to, or subscribe to the stock of, railroad or other companies, to the amount of a fixed or uniform percentage of the assessed valuation of its taxable property. But the court did not rest its decision upon any specific provision of the State Constitution. Its conclusion was placed upon what were declared to be fundamental maxims of all taxation. It held the exercise, by a municipal corporation, of the power to pledge its credit to be an incipient step in the exercise of taxation; that it is essential to a valid exercise of the power of taxation that it be for a public purpose; that a corporation created for the purpose of constructing a railway, to be owned and operated by the corporators, is a private corporation; that taxation for such a purpose is no more for a public purpose than would be taxation in behalf of the proprietors of a mill, or hotel, or newspaper establishment, or other similar enterprise, which, while private in its nature, supplied a public need. The conclusion of the court was distinctly placed upon general principles, and not upon grounds of local law or upon any special provision of the State Constitution, as is manifest from the last paragraph in the leading opinion, in these words: "As, therefore, it appears that the first and most fundamental maxim of taxation is violated by the act in question, it becomes superfluous to consider whether the act would also violate the maxim of apportionment, or be obnoxious in its application, because the burden, even if public, could not also be regarded as local and peculiar to this township. Equally superfluous is it to consider in detail the several express provisions of the State Constitution which the respondents suppose to be violated. If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise." The conclusion in that case, as thereafter declared in *Bay City* v. *State Treasurer*, struck at the root of all legislation in aid of railroad companies.

We remark in passing that the doctrines of *People* v. *Salem* were, when announced, in direct conflict with those previously

promulgated as well by this court, as by the highest courts of a large majority of the States. It was said by Mr. Justice Clifford, speaking for the court, in *Rogers* v. *Burlington* (3 Wall. 654), decided in 1865, that the rule that the legislature, in the absence of constitutional prohibitions, could authorize municipalities to aid in the construction of railways, owned and managed by private corporations, pervaded the jurisprudence of the United States. We will not, at this late day, enter upon the vindication of that rule. And we may add, that, under the later doctrines announced by the Supreme Court of Michigan, it is difficult to perceive how railroads can be regarded as public highways, subject, in the interest of the public, to governmental control and regulation.

Subsequently, in *Bay City* v. *State Treasurer*, the Supreme Court of Michigan reaffirmed the doctrines of *People* v. *Salem*. In that case, however, the invalidity of municipal aid and taxation for the construction of railroads by railroad corporations was apparently placed upon these additional grounds: 1. That such taxation, being inadmissible under the fundamental principles announced in *People* v. *Salem*, was to be deemed unlawful confiscation, and, therefore, inhibited by sect. 32 of art. 6 of the State Constitution, protecting all persons against deprivation of property without due process of law; 2. That taxation for such purposes was also in violation of sects. 6, 8, and 9 of art. 14 of the State Constitution. It is unnecessary to notice the declarations of the State court in subsequent cases, since they are in line with those made in the two to which we have referred.

In January, 1872, *Talcott* v. *Township of Pine Grove* was determined in favor of the plaintiff in the Circuit Court of the United States for the Western District of Michigan. The question there was as to the constitutional validity of the identical act of March 22, 1869, under the authority of which the bonds in suit were issued. That court, the circuit and district judges concurring, declined to follow the case of *People* v. *Salem*, upon the ground, among others, that the act was valid as well under the laws of Michigan, declared and acted upon by all the departments of the State government at the time of its passage, as under the principles announced in this court

and in the highest courts of most of the States. Upon writ of error the judgment was affirmed in this court at its October Term, 1873. *Township of Pine Grove* v. *Talcott*, 19 Wall. 666. In the argument here attention was called to the decisions in *People* v. *Salem* and *Bay City* v. *State Treasurer*, and it was earnestly contended to be the duty of the courts of the Union to accept the declarations of the State court as to the want of power in municipal corporations of Michigan to pledge their credit or aid in the construction of railroads by corporations owned and managed by private persons. After adverting to the principle that a statute was not to be pronounced void unless the repugnancy to the Constitution be clear and the conclusion that it exists inevitable, this court, speaking by Mr. Justice Swayne, affirmed the judgment, holding the act to be consistent with the Constitution of Michigan. *Railroad Company* v. *County of Otoe*, 16 Wall. 667; *Olcott* v. *The Supervisors*, id. 678. Under the circumstances, it was said that we could not yield to the authority of the decisions of the State court without abdicating the performance of one of the most important duties with which this tribunal is charged.

Of the bonds here in suit, Taylor became the purchaser, for a valuable consideration, in the year 1877. He was aware, at the time of his purchase, of the before-mentioned decisions of the Supreme Court of Michigan, adjudging municipal aid to railroad corporations to be forbidden by law, and bonds issued therefor to be invalid. But it is to be presumed he was also aware that this court, affirming the judgment of the Circuit Court of the United States, sitting in that State, had, at a subsequent period, and long before his purchase, distinctly refused to follow the later decisions of the State court, and had adjudged the act of March 22, 1869, to be in conformity with the fundamental law of Michigan. The present case then appears to be this: Testing the rights and obligations of the parties by the law of the State as declared by this court, and as declared and acted upon by all the departments of the State government, at and before the time when the railroad company entered upon the execution of its contract with the city, we should be obliged to reverse the judgment of the court below;

whereas, if we accept the decision of the Supreme Court of Michigan, made after those rights accrued and after the railroad company had earned the bonds, as conclusive evidence of the constitutional invalidity of the act of March 22, 1869, the judgment must be affirmed.

The position taken by counsel for the city is that the established settled construction, given by the highest court of a State, of the laws and Constitution of that State, must be deemed, in all cases, binding upon the courts of the Union; this, because the statute defining and regulating the jurisdiction of the Federal courts declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those courts. This proposition, in the general terms in which it is announced, is undoubtedly supported by the language of some of the opinions which have emanated from this court. But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal courts, in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws. "The sound and true rule," said Mr. Chief Justice Taney, in *Ohio Life Ins. Co.* v. *Debolt* (16 How. 416, 432), "is that if the contract when made is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law." So in *The City* v. *Lamson* (9 Wall. 477, 485), Mr. Justice Nelson, speaking for the court, said: "It is urged, also, that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was

in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued, the decisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed."

Again, in *Olcott* v. *The Supervisors* (*supra*), the court, speaking through Mr. Justice Strong, said: "This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature, or the judiciary, will be regarded by this court as establishing its invalidity." To the like effect are some very recent decisions of this court. In *Douglass* v. *County of Pike* (101 U. S. 677), upon a review of some of the previous cases, the court, speaking by the present Chief Justice, said that "the true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

For these reasons, and without reference to any other questions discussed, we are of opinion that the rights of the plaintiff, as the owner of bonds issued under a statute which, when passed, was valid by the laws of Michigan, as declared and acted upon by the several departments of its government, are not affected by decisions of the Supreme Court of the State rendered after the railroad company, to whose rights the plaintiff succeeded, had earned the bonds under contract with the city made in conformity with the statute. Upon the case as

presented the jury should have been instructed to find for the plaintiff, rather than for the defendant.

Judgment reversed with directions to set aside the verdict, and for such further proceedings as may be consistent with this opinion.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

NEW BUFFALO *v.* IRON COMPANY.

1. *Taylor* v. *Ypsilanti* (*supra*, p. 60) cited and approved.
2. An assignee of municipal bonds issued to a railroad company succeeds to its rights by virtue of its contract with the municipality, although at the time of the assignment the statute under which they were issued was declared by the Supreme Court of the State to be repugnant to the Constitution.
3. Bonds voted in aid of one company, which, under the law then in force, was subsequently consolidated with another company, may be delivered to the consolidated company.

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

The judgment below was for the amount due on certain bonds, with interest coupons attached, issued by the township of New Buffalo, in the county of Berrien, and State of Michigan, plaintiff in error, under the authority of a general statute of that State, approved March 22, 1869, conferring power upon townships, cities, and villages to pledge their aid, by loan or donation, with or without conditions, to any railroad company organized under the laws of that State, in the construction of its road. Sess. Laws Mich., 1869, p. 89. It is the same statute whose validity and construction were involved in *Taylor* v. *Ypsilanti*, *supra*, p. 60. The bonds were voted on the twenty-second day of May, 1869, as a donation in favor of the Chicago and Michigan Lake Shore Railroad Company, a corporation of Michigan, whose road-line commenced at the north line of the State of Indiana, in Allen County, running northwardly to the St. Joseph River, in the village of St. Joseph, Michigan, a distance

of thirty miles, passing through the township of New Buffalo. When the bonds were voted there was in force a general statute, under which any railroad company of the State, forming a continuous or connected line with any othey railroad company, in or out of the State, could consolidate with the latter. The statute provided that such new corporation "shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization." Further: "All and singular the rights and franchises of each of said corporations, . . . and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer." Compiled Laws of Mich., 1857, sects. 1994, 1995, p. 653.

On the 3d of July, 1869, the Lake Shore Railroad Company of Western Michigan was organized, with authority to construct a road from the northern terminus of the before-mentioned road, at St. Joseph River, northerly to the mouth of the Muskegon River, a distance of ninety miles. By articles of agreement between the two companies, made on the 12th and 13th of July, 1869, and filed in the office of the secretary of state on the nineteenth day of July, 1869, the two companies became consolidated into a new corporation, under the name of the Chicago and Michigan Lake Shore Railroad Company.

On the day last named the bonds, having been executed on the 1st of June, 1869, were deposited in the office of the treasurer of state, who was required by the statute to "hold the same as trustee of the municipality issuing the same, and for the railroad company for which they were issued." The road was finished from New Buffalo to the village of St. Joseph as early as Feb. 1, 1870, and has been in operation ever since. On the fourth day of February, 1870, the governor of the State made his certificate, stating that the railroad company had constructed the road in compliance as well with the statute as with the conditions upon which aid had been voted by the people, and was, consequently, entitled to receive the bonds from the State treasurer. They were thereupon delivered to

the consolidated company, who held them until Nov. 4, 1874, when such of them as are here in suit were transferred to the Cambria Iron Company, defendant in error, in payment of antecedent debts due to it by the railroad company. Upon such transfer the company's acceptances theretofore given for its debts were surrendered and the debts discharged.

Mr. Henry F. Severens for the plaintiff in error.
Mr. Mitchell J. Smiley, contra.

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

1. On behalf of the plaintiff in error it is contended that, by the settled law of Michigan as it existed when the bonds were issued, they were void. In support of that position we are referred to *People* v. *Salem*, 20 Mich. 452, decided May 26, 1870; *Bay City* v. *State Treasurer*, 23 id. 499; and *Thomas* v. *Port Huron*, 27 id. 320. This question was fully considered in *Taylor* v. *Ypsilanti* (*supra*, p. 60), where we ruled that by the law of Michigan, as expounded by its Supreme Court, and acted upon by its legislature and executive departments, prior to the decision in *People* v. *Salem*, bonds issued in conformity with the act of March 22, 1869, were valid obligations of the municipality by whom they were issued. For the reasons there stated the present objection cannot be sustained.

2. Equally untenable is the proposition that the rights and obligations of the parties are to be determined by the law, as expounded by the Supreme Court of the State, at the time the defendant in error, in fact, received the bonds. The defendant in error is a holder for value. *Railroad Company* v. *National Bank*, 102 U. S. 14. But if not, it is still entitled to whatever rights the railroad company had by virtue of its contract with the township. That contract was made and fully performed before the decision in *People* v. *Salem* was rendered, and, as already indicated, was not affected by the decision in that case.

3. Nor is it a material circumstance that this was a donation, and not a subscription of stock. In *Railroad Company* v. *County of Otoe* (16 Wall. 667), it was held that, in the absence of constitutional provisions making a distinction between mu-

nicipal subscriptions to stock and municipal appropriations of money or credit, there was no solid ground upon which, so far as legislative power was concerned, to rest such a distinction. "Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers." *Olcott* v. *The Supervisors*, 16 Wall. 678; *Town of Queensbury* v. *Culver*, 19 id. 83.

4. The only remaining objection to the judgment is that the bonds were delivered to the consolidated company, when they were not voted to that company. We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute, authorizing two or more railroad companies forming a continuous or connected line to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property, and franchises of the constituent companies. *Nugent* v. *The Supervisors*, 19 Wall. 241; *County of Scotland* v. *Thomas*, 94 U. S. 682; *Town of East Lincoln* v. *Davenport*, id. 801; *Wilson* v. *Salamanca*, 99 id. 499; *Empire* v. *Darlington*, 101 id. 87; *Menasha* v. *Hazard*, 102 id. 81; *Harter* v. *Kernochan*, 103 id. 562; *County of Tipton* v. *Locomotive Works*, id. 523. The bonds were, therefore, rightly delivered to the new or consolidated corporation.

Judgment affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

HAMMOCK *v.* LOAN AND TRUST COMPANY.

1. A judge of a Circuit Court in Illinois cannot, in vacation, appoint a receiver of a railroad corporation. The possession of a receiver so appointed is not that of the court.
2. Section 49 of chapter 37, Rev. Stat. Ill., 1874 (p. 332), is to be construed as if there was no comma between the words "to hear and determine motions" and the words "to dissolve injunctions." Punctuation is no part of a statute.
3. The legislation of Illinois, giving the right to redeem mortgaged lands sold under decree, does not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty, and franchises, so mortgaged, should be sold as an entirety, and without the right of redemption given by statute.
4. The chattel-mortgage statute is inapplicable to an ordinary railway mortgage.

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

To secure the payment of its bonds, aggregating the sum of $660,000, and issued for the purpose of raising money as well for its mining and manufacturing business, as for the completion and maintenance of its road, the Chester and Tamaroa Coal and Railroad Company, an Illinois corporation, executed, on the twelfth day of April, 1871, a deed of trust containing such conditions and provisions as are usually inserted in railway mortgages. It embraced the entire road of the grantor, then made or thereafter to be constructed, from Chester, in Randolph County, to Tamaroa, in Perry County, together with the right of way, and all the real and personal property then owned or subsequently acquired, and used or appropriated for railroad purposes; also, its privileges and franchises for holding, operating, and maintaining the road, together with any income derived from the property, not applied to the construction and repair of the road, the conduct of the business of the company, its current expenses, or the purchase of equipments, tools, and machinery. Subsequently, the mortgagor company was consolidated with the Chester and Iron Mountain Railroad Company, the consolidated company taking the name of the Iron Mountain, Chester, and Eastern Railroad Company.

From the first day of October, 1874, until the fifth day of

June, 1876, the railroad and other property included in the mortgage was in the possession of D. C. Barber, as receiver, in a creditor's suit instituted by one Maxwell in the Circuit Court of the United States for the Southern District of Illinois. On the last-named day, in conformity with a stipulation signed by the attorneys in that suit, Barber was discharged as receiver, without being required to render an account of his acts, and the bill of Maxwell was dismissed at his costs. The present transcript does not show the grounds upon which Barber was appointed receiver, perhaps for the reason, disclosed in an affidavit, that the bill filed by Maxwell was not to be found among the files of his suit.

On the day succeeding Barber's discharge as receiver, Hammock, assignee of two judgments (aggregating less than $1,000), with returns of no property, against the Iron Mountain, Chester, and Eastern Railroad Company, and suing in behalf of himself and such judgment creditors as might unite with him, presented his bill in equity to the judge of the Circuit Court of Perry County, Illinois, in vacation, "at Chambers," in Washington County, Illinois, praying the appointment of a receiver of the railroad company and its effects, with authority to hold and administer the same under the direction of the court, and out of the net income arising therefrom to pay the judgments held by complainant and others. The only grounds assigned in the bill for a receiver are, the indebtedness of the company, the returns against it of *nulla bona*, its insolvency, and its refusal to pay the judgments outstanding against it. The judge, without notice to the company, appointed Thomas M. Sams receiver, and made an order requiring the railroad company, its officers, servants, and agents, to deliver to him all of its property and effects of every kind, upon his presenting the certificate of the clerk of the court that he, Sams, had filed his bond as receiver, in the penal sum of $15,000, with certain named sureties (Barber, then recently the receiver in Maxwell's suit, being one of them), conditioned that he would account for all property and effects coming to his hands, as receiver, under the order and direction of the court. By the terms of the order, Sams was authorized to use and operate the railroad, and pay all expenses incurred in its opera-

tion as far back as Oct. 1, 1874, nearly two years prior to his appointment. The bill of Hammock, with the foregoing order indorsed thereon, was filed in the clerk's office on the 7th of June, 1876, and Sams, having executed the required bond, took possession of the railroad and all the property and effects of the company.

On the thirteenth day of June, 1876, the Farmers' Loan and Trust Company — without knowledge, as we infer from the record, of the suit in the State court — commenced proceedings in the court below for the foreclosure of the beforementioned mortgage, and to obtain a decree for the sale of all the property embraced by it, in satisfaction of the interest and principal of the bonds thereby secured, the whole amount of which had, under the terms of the mortgage, become due by reason of the continued default of the company in meeting the interest as it matured. The bill (verified under date of June 2, 1876) and the supplemental bill charged that the consolidated company was insolvent; that its entire property was inadequate for the payment of the mortgage debt; that divers persons, by defaults and collusions with Barber, late receiver, had obtained judgments against the company, and had levied, or were about to levy, upon its rolling-stock and other movable property, with the intent to deprive the trustee and those it represented of the benefit of their security; that the company itself was a party to that fraudulent collusion; that the bill of Maxwell had been dismissed, and Barber, as receiver, discharged, to the end that such levies might be made; that these facts had only then come to complainant's knowledge; and that, if time was taken to give notice of an application for an injunction and a receiver, great and irreparable loss would ensue to the trustee, and those whose interests it represented.

Upon the filing of the original and supplemental bill the Federal court appointed a receiver, with direction to take possession of the mortgaged property, and, at the same time, issued an injunction against judgment creditors interfering with or taking possession of it. A few days thereafter the Farmers' Loan and Trust Company filed in the office of the clerk of the Perry Circuit Court its petition to be made a party defendant in the suit of Hammock, also its answer and cross-bill therein,

and its petition, accompanied by proper bond, for the removal of the suit into the Circuit Court of the United States. An application was subsequently made by the complainant to the judge of the State court, in vacation, to discharge Sams, as receiver, upon the ground, among others, that he was illegally appointed in the vacation of court. That motion was denied; and thereupon the company made an application, based upon the before-mentioned papers, to the judge, in vacation, to be admitted as a party to Hammock's suit. But in reference to that application the judge declined to take action, upon the ground that he could not legally do so in the vacation of his court.

On the nineteenth day of July, 1876, the Farmers' Loan and Trust Company, having filed a certified transcript of the proceedings in the Hammock suit, including copies of all the foregoing papers, moved the Federal court to take jurisdiction of that suit. That motion — Mr. Justice Davis and the district judge concurring — was sustained, and an order made that the Hammock suit proceed in that court as if originally commenced there, and be consolidated with the mortgage suit. It was further ordered that Sams surrender to the receiver of the Federal court all property in his hands, as receiver, and pay over all funds by him in that capacity collected. That order was immediately executed, and thenceforward the mortgaged property was in the actual and exclusive custody of the Federal court by its receiver.

At the November Term, 1876, of the State court a motion was made by Hammock to strike from the files of his suit the answer, cross-bill, and the petition for the removal of the cause, previously filed therein by the Farmers' Loan and Trust Company, upon the ground that they had been so filed without leave of court, and because that company was not a party to the suit. That motion was sustained on the fourth day of May, 1877, and all of those papers were stricken from the files.

Nothing occurred in the progress of the consolidated cause which need be referred to, except that the court, in response to a suggestion by the attorney-general of the State, and by consent of parties (all the judgment creditors interested in Hammock's suit having appeared, in some form, in the consolidated

cause, saving, however, all questions as to the jurisdiction of the Federal court), an order was made, under which the receiver surrendered to county collectors the rolling-stock and personal property of the company in his hands to be levied on and sold. It was levied on and sold for State, county, school, and other taxes assessed in Randolph and Perry Counties upon the property in the receiver's hands for the years 1873 to 1876, inclusive. That portion sold in Randolph County brought $6,053.92, which, after deducting costs of sale, satisfied in full the taxes due in that county on the real and personal estate of the railroad company, and all of the tax on its capital stock, except $999.93. The sale in Perry County netted the sum of $5,165, which satisfied in full the taxes due and collectible in that county on the company's real and personal estate, and all of the capital-stock tax, except $852.39.

A final decree was made on the eleventh day of January, 1878, for the sale of the mortgaged property, including the franchises of the company, as an entirety, to satisfy the principal and interest due on the bonds, then amounting to $940,625.40. The sale was directed to be made "without appraisement and without reference, and not subject to any law or laws of Illinois allowing redemption from mortgage sales, but absolutely without redemption." Henry C. Cole became the purchaser of the entire property at the sum of $50,000. The sale was subsequently confirmed and a deed made to the purchaser, who was let into possession on the twenty-sixth day of April, 1878.

On the seventeenth day of October, 1878, the Wabash, Chester, and Western Railroad Company, an Illinois corporation, to which had been conveyed by Cole, after the confirmation of his purchase, the railroad and other property sold under the foregoing decree, represented to the court below, by petition, that Hammock and other judgment creditors, parties to the consolidated cause, had then recently caused Sams, still pretending to be the legal receiver of the property sold in the foreclosure suit, to advertise the same for sale, without redemption, under an order or decree of the Perry Circuit Court, made in Hammock's suit after the execution of the final decree in the foreclosure suit, to wit, on the eleventh day of May, 1878; and

that, unless restrained, such sale would be had in disregard of the decree of the Federal Court. Upon this petition a temporary injunction was issued, and Hammock, Sams, and others were required to show cause why they should not be attached for contempt of court.

Upon final hearing the temporary injunction of Oct. 17, 1878, was, by an order entered on the seventeenth day of January, 1879, perpetuated, and Sams, Hammock, and their associates were enjoined from taking any steps in execution of the decree of the Circuit Court of Perry County, from selling any part of the railroad property theretofore sold under the decree of the court below, and from interfering with it in any manner.

The present transcript embraces two appeals, one from the several orders and the final decree under which the mortgaged property was sold, and the other from the final order or decree of Jan. 17, 1879.

The case was argued by *Mr. James K. Edsall* for the appellants, and by *Mr. Robert E. Williams* for the appellees.

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

Whether the State court or the Circuit Court of the United States first acquired control and possession of the property conveyed in trust by the Chester and Tamaroa Coal and Railroad Company, is the first question to which our attention will be directed. If, when seized under the order of the Federal court, it was in the custody of the State court, by its receiver, then, it is claimed, that all the proceedings in the former, so far at least as their regularity and validity depended upon possession of the property, were in violation of the established principles governing courts of concurrent jurisdiction in their relations to each other. *Peck* v. *Jenness*, 7 How. 612; *Taylor* v. *Carryl*, 20 id. 583; *Freeman* v. *Howe*, 24 id. 450; *Hagan* v. *Lucas*, 10 Pet. 400.

The solution of this question, it must be conceded, depends upon the authority which the judge of the State could lawfully exercise in vacation; for if, under the laws of the State, he had no power in vacation to appoint a receiver of the property

and effects of a railroad company, the order under which Sams took possession was a nullity, and his custody was not that of the court which he assumed to represent. Counsel for appellants admits that, except to the extent expressly permitted by statute, the judge of the State court could not exercise any judicial functions in vacation. Such, beyond question, is the established doctrine of the Supreme Court of Illinois. In *Blair* v. *Reading* (99 Ill. 600), the court said: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation, except such as are expressly authorized by statute." In *Devine* v. *People* (100 id. 290), the language of the court was that "judges can exercise no judicial functions in vacation, except such as they are especially authorized to do by statute." *Keith* v. *Kellogg*, 97 id. 147.

It is stated by counsel, and our examination verifies the correctness of the statement, that in the few cases in which the statutes of Illinois make special provision for the appointment of a receiver, the power is conferred upon the court, and not upon the judge thereof. Rev. Stat. Ill., 1874, sect. 25, p. 290; id., sect. 24, p. 553; id., sect. 88, p. 613.

But the action of the judge of the State court is attempted to be sustained under the forty-ninth section of chapter 37 of the Revised Statutes of Illinois, enacted in 1874 (p. 332), which is in these words: —

"SECT. 49. *Powers of judges in vacation:* The several judges of said courts [judges of the Circuit Courts, and of the Superior Court of Cook County] shall have power, in vacation, to hear and determine motions, to dissolve injunctions, stay or quash executions, to make all necessary orders to carry into effect any decree previously rendered, including the issuance of necessary writs therefor, to order the issuance of writs of *certiorari*, to permit amendments in any process, pleading, or proceeding in law or equity. Any order so made shall be signed by the judge making it, and filed and entered of record by the clerk of the court in which the proceeding is had, and from the date of such filing shall have like force and effect as if made at a regular term of such court. The pendency of a term of court in another county than that in which the suit is pending,

or about to be commenced by the same judge, shall not prevent the granting of such order. L. 1871–72, p. 504, sects. 1, 2."

The succeeding section (sect. 50) provides that "no such order shall be granted in vacation unless the party applying therefor shall give the opposite party, or his attorney of record, reasonable notice of his intended application."

We are of opinion that the authority of a judge, in vacation, to appoint a receiver of a railroad corporation cannot be derived from the foregoing section. This precise question has not, that we are aware, been determined in the Supreme Court of Illinois. But what fell from that learned tribunal in the cases already cited leads us to believe that when the question is directly presented it will be determined in accordance with the view we have just expressed.

In the argument before us attention was called to the fact that between the words in sect. 49, "to hear and determine motions," and the words "to dissolve injunctions," there appears a comma; and that was, to some extent, relied on as showing that a judge in vacation could hear and determine motions of every kind, not simply those relating to matters specially defined in that section. While the comma after the word "motions," if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute. Lord Kenyon, C. J., in *Doe* v. *Martin* (4 T. R. 65), said that courts in construing acts of Parliament or deeds should read them with such stops as will give effect to the whole. Sedgwick's Constr. Stat. and Const. Law (2d ed.), 223, note *a*; Bouvier's Law Dic. 347, 402. The general rule is well illustrated in Barrington's Statutes (4th ed.), 438, note *x*; *Price* v. *Price*, 10 Ohio St. 316; *Cushing, &c.* v. *Worrick*, 9 Gray (Mass.), 382; *Geiger's Estate*, 65 Pa. St. 311; and *Hamilton* v. *Steamer R. B. Hamilton*, 16 Ohio St. 428. In the last case it was said: "But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punc-

tuation, or repunctuate, if need be, to render the true meaning of the statute." Apart from the general rule upon this subject, there are reasons why the punctuation of sect. 49 should not control its interpretation. It will be observed that at the close of that section is a reference to the laws of Illinois passed at the session 1871–72 of the General Assembly, indicating that sect. 49 was, in part at least, founded upon an existing or previous statute. One of the rules prescribed by the revision of 1874 for the construction of statutes is that "the provisions of any statute, so far as they are the same as those of any previous statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." Rev. Stat. Ill., 1874, p. 1012, sect. 2. Turning then to the previous law, — the act of March 7, 1872, — we find no comma after the word "motions," but the statute reads, "to hear and determine motions to dissolve injunctions," &c. Sess. Laws, Ill., 1871–72, p. 504. We are not prepared to hold that the power of a judge in vacation to appoint a receiver of a corporation, charged with important public duties, was conferred by the introduction of a comma into the Revised Statutes of a State, where the established doctrine is that no judicial functions can be exercised by a judge, in vacation, except where expressly or specially authorized by statute.

But if, as the argument of counsel would imply, a judge, in vacation, may, by virtue of the powers conferred by sect. 49, hear and determine every matter presented by way of motion, and not simply motions relating to the dissolution of injunctions, to staying or quashing executions, to orders carrying into effect decrees previously rendered, to writs of *certiorari*, or amendments in process, pleading, or proceedings in law and in equity, — which are the subjects specifically referred to in that section, — we are satisfied that an application to dispossess those in control of a railroad corporation, whose road is declared by the Constitution of the State to be a public highway, and to place its entire property in the hands of a receiver, is not, within the meaning of the statute, a motion which may be heard and determined by the judge out of term time. It is rather a proceeding involving the exercise of the highest discretion, and embracing a very wide field of judicial investigation

and inquiry. The injustice which may result from the exercise of such a power in vacation is well illustrated in this case by the fact that, while the judge of the State court did not doubt his power, out of term time, to oust those in the control of a public corporation, and appoint a receiver, with authority to carry on the business of a carrier of freight and passengers, he could not, under his view of the statute, determine, in vacation, an ordinary motion to become a party to the suit, made by the trustee in a first mortgage or deed of trust covering the entire property and franchises in question.

It results from what has been said that the seizure of the property by the receiver of the Federal court was not an interference with the possession of the State court, nor in derogation of its authority. The property was not, in any legal sense, then in the custody of the State court, or of any officer by it appointed. It was, when seized by order of the Federal court, in the custody of one who assumed, without lawful authority, to represent the State court, but who in fact proceeded under a void order of a judge in vacation.

The Circuit Court of the United States, having thus lawfully acquired possession of the property, prior to any action in reference to it by the State court, the former had the right to retain possession for all the purposes of the suit for foreclosure of the mortgage of the 12th of April, 1871. Under the final decree of foreclosure it was, as we have seen, sold in satisfaction of the mortgage debt, leaving nothing to be applied on the claims of Hammock and other judgment creditors.

We proceed now to inquire whether, in the orders or decrees under which the property has been disposed of, any error has been committed to the prejudice of the substantial rights of appellants. On their behalf it is suggested that the decree was erroneous, in that it required the sale of the real estate, covered by the mortgage, to be made absolutely and without the right of redemption allowed by the local statutes in decretal sales of mortgaged lands. The question is one of great importance, and has received, upon our part, all the consideration which it demands.

By the statutes of Illinois, in force when the mortgage was made, real estate, taken in execution, if susceptible of division,

is required to be sold in such quantities as may be necessary to satisfy the execution and costs. Rev. Stat. Ill., 1869 (Gross ed.), p. 397, sect. 11. And it is made the duty of the sheriff or other officer, selling lands or tenements, by virtue of an execution, to give to the purchaser, or purchasers, a certificate, in writing, describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when, if the property be not redeemed, the purchaser will be entitled to a deed. Id., p. 380, sect. 15.

It is further provided that the defendant, his heirs, executors, administrators, or grantees, might, within twelve months from the sale of his lands or tenements, under execution, redeem the same by paying to the officer who sold it, for the benefit of the purchaser, the sum of money which may have been paid on the purchase, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of ten per centum from the time of sale. Id., sect. 16. The right was given to any judgment creditor, after the expiration of twelve, and within fifteen, months from the sale, to redeem the property, by paying the amount paid by the purchaser,— such payment entitling him to have a resale under the execution upon his own judgment. Id., sects. 17, 18. This right, given to judgment creditors, could be exercised as to the whole, or any part, of the lands or tenements sold, provided the redemption is made in the like distinct quantities, or parcels, in which the same are sold. Id., sect. 19.

If the lands or tenements so sold are not redeemed by the defendant, or by a judgment creditor, within fifteen months from the sale, it is the duty of the officer making it to execute a deed to the purchaser. Id., sect. 25.

The provision in reference to redemption from mortgage sales is that, "where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators, or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such

decree, in the same manner as is prescribed for the redemption of lands in like manner sold upon executions upon judgments issued at common law." Id., p. 382, sect. 27.

The history of the right of redemption, as given by the laws of Illinois, may be traced in Statutes of 1825, p. 151; Rev. Stat., 1829, p. 85; id., 1833, p. 374; id., 1845, p. 302. When originally conferred as to sales of land under execution, there were no railroads in that State, and very few, if any, when it was first (in 1845) extended to decretal sales of mortgaged lands.

In *Brine* v. *Insurance Company* (96 U. S. 627), we held that the right of redemption given by the Illinois statutes constituted a rule of property which the Federal court, sitting in equity in that State, is bound to recognize and enforce. The property there in controversy was a lot of ground in the city of Chicago, which had been owned by a private person, who conveyed it in trust to secure a loan of money by an insurance company.

When the mortgage by the Chester and Tamaroa Coal and Railroad Company was made, there was in force a general statute, passed in 1855, conferring upon any railroad company organized or incorporated under the laws of Illinois the power to mortgage all or any portion of its property and franchises to secure the payment of money borrowed to aid in the construction, completion, or operation of its road. Gross ed., p. 553; Laws of Ill., 1855, p. 304.

And by the State Constitution adopted in 1870, railroads thereafter constructed were declared to be public highways, free to all for the transportation of their persons and property thereon, under such regulations as should be prescribed by law. Art. 11, sect. 12.

The question is, therefore, presented for the first time in this court, whether the statutory provisions giving the right to redeem as well lands or tenements sold under execution as mortgaged lands sold under decrees of courts of equity, has any application to the real estate of a railroad corporation, which, with its franchises and personal property, is mortgaged, as an entirety, to secure the payment of money borrowed for railroad purposes.

Undoubtedly in all such cases the chief value of the real estate comes from the right or franchise to hold and use it, in connection with the personal property of the corporation, for railroad purposes. It is equally true, not only that the bonds, to secure which the mortgage is given, could not be negotiated in the markets of the country did not the mortgage embrace as an entirety the franchises and all the real and personal property of the corporation used for railroad purposes, but that a sale of the real estate, franchises, and personal property, separately, might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway.

It is, nevertheless, contended by counsel that, as the statute attaches to decretal sales of mortgaged lands the right of redemption, that right exists as well in cases of mortgages, covering the entire property and franchises of a railroad corporation, as where the land is owned and used by private persons for exclusively private purposes.

In other words, — for to that result the argument would lead, — the court, in decreeing the sale of the mortgaged property and franchises of a railroad corporation, has no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately, in parcels when susceptible of division, and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus, one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for, its franchise to be a corporation and to use its real estate for railroad purposes, will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but rather a power or privilege, partaking more or less of sovereignty, and which may not be exercised without a special grant. 1 Redfield on Law of Railways, 94. Consequences equally injurious would flow even from the sale, as an entirety, of the real and personal property and franchises of the corporation, if the right was reserved to the company, or its creditors, to redeem the realty. Individuals or associations

desiring railroad property would not purchase when they could not know, until the expiration of fifteen months from the confirmation of the sale, whether they were to have all for which they might bid. During that period of uncertainty the property would necessarily depreciate in value for the want of repairs and betterments essential to its preservation. A construction of the statute which leads to such results ought not to be adopted, if it can be avoided. And we think it can be without contravening the spirit of the statute or the public policy which suggested its enactment.

We are of opinion that mortgaged real estate, to which is attached the right of redemption, is such and such only as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation, mortgaged with its franchise to acquire, hold, and use property for public purposes, and whose chief value depends upon its being so used and appropriated. The difference between real estate, so acquired, held, and used, and real estate which may, at law, be sold under execution, is well illustrated in *Gue* v. *Tide Water Canal Co.*, 24 How. 257. In that case it appeared that an execution was levied upon a house and lot, sundry canal locks, a wharf-boat, and several lots, the property of the canal company, chartered under the laws of Maryland for the construction of a canal from Havre de Grace, in that State, to the Pennsylvania line. The property so levied upon was admitted to be necessary to the uses and working of the canal, which was a public improvement, and a great thoroughfare of trade. It was of little value apart from the franchise to take tolls, and if sold separately under execution, the franchise to take tolls, said Mr. Chief Justice Taney, speaking for the court, would not have passed to the purchaser. It was consequently ruled that the real estate there in controversy could not be seized and sold under *fieri facias*, and, consistently with the rights of stockholders and creditors, could not be sold separately from the franchise from which was derived its chief value.

The laws of the State of Illinois having permitted the Chester and Tamaroa Coal and Railroad Company to mortgage its franchises and property as an entirety, it was, we think, the duty of the court to decree the sale, as an entirety, of the

whole property, so mortgaged, without reference to the local statutes upon the subject of redemption. Real estate, thus mortgaged with the franchises of the company, is of necessity relieved from the operation of that statute. There may possibly be cases in which real estate, of an ordinary kind, owned and mortgaged by a railroad corporation, cannot be sold by decree of court, except subject to the right of redemption; as when it is not used for necessary railroad purposes, or when it is mortgaged separately from its franchises and other property. What may be the operation of the statute in such cases we do not now decide. All that we do decide is, that, by the laws of Illinois, the real estate, franchises, and other property of a railroad corporation, mortgaged as an entirety, may be sold, as an entirety, under the decree of a court of equity, without any right of redemption in the mortgagor or in judgment creditors as to such real estate.

The construction we have given to the statute is not inconsistent with the provision of the State Constitution which declares that "the rolling-stock and all other movable property, belonging to any railroad company or corporation in Illinois, shall be considered personal property, and shall be liable to execution and sale in the same manner as personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." Art. 11, sect. 10.

When the mortgage of April 12, 1871, was executed, there was no levy upon the movable property of the company, and consequently the rights of the mortgagee were superior to the lien arising from a subsequent levy, by execution, upon the movable property. The State Constitution did not forbid the creation, by mortgage, of such superior lien.

So far from that section militating against the construction we have given the statute, it rather fortifies it. It furnishes a strong implication that the right to levy an execution upon the movable property of a railroad corporation was intended to be restricted to that kind of corporate property. It is a partial modification of the general rule that the property of a railroad corporation, used for necessary railroad purposes, cannot be seized and sold under an execution at law.

The next question to be considered relates to the distribution of the proceeds of the sale of the mortgaged property. The argument, upon this branch of the case, in behalf of the appellants, briefly stated, is this: That by the laws of the State in force when the mortgage of April 12, 1871, was executed, a mortgage of personal property, certified by a justice of the peace in the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where the mortgagor resides, shall, "if *bona fide*, be good and valid from the time it is so recorded, for a space of not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided that such conveyance shall provide for the possession of the property so to remain with the mortgagor," Gross ed., 1869, p. 67; that more than two years having expired, after the execution of the mortgage of April 12, 1871, and before the suit for foreclosure, — the property mortgaged remaining in the possession of the railroad company until seized in Hammock's suit, — the judgment creditors, by virtue of their suit in the State court, acquired a lien, at least upon the rolling-stock and other movable property covered by the mortgage, superior to any claim on the part of the mortgagee and those it represented; and that since the personal property was surrendered and the proceeds of its sale applied in discharge of taxes upon the real and personal property and capital stock of the corporation, the court upon principles of equity should have appropriated to the judgment creditors so much of the proceeds of the decretal sale as was equal to the taxes on real estate paid from the proceeds of the sale of personal property by the collectors.

We are of opinion that the statutory provisions in regard to chattel mortgages (Gross ed., p. 66) do not embrace mortgages by a railroad corporation, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes. The statute provides a mode by which possession of the mortgagor of personal property should not defeat the mortgage, viz. the acknowledgment and record of the mortgage. The acknowledgment is required to be made before a justice of the justice's district in which the mortgagor

resides, and recorded in the recorder's office of the county where he resides. These directions are wholly inapplicable to a railroad company, whose line of road might pass through several justices' districts and extend through several counties. And, if the construction contended for be sound, a railway mortgage security, so far as the personalty of the corporation is concerned, would cease to be of any value after the expiration of two years from its execution, unless the mortgagor, before the expiration of that time, takes possession of it, — the authority to do which, in advance of the maturity of the mortgage debt, and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult if not impossible. Clearly the chattel-mortgage statute has nothing to do with the present case.

What we have said renders it unnecessary to consider the other branches of the proposition last stated, and disposes of all questions of importance upon the merits, arising on the appeal from the final decree ordering a sale of the mortgaged property, and directing a disposition of the proceeds arising therefrom.

We have seen that the Farmers' Loan and Trust Company, in vacation, filed in the clerk's office of the State court a petition to be made a party to the creditor's suit of Hammock, with an answer and cross-bill, and also a petition for the removal of that suit into the Federal court, accompanied by the required bond; and that the judge of the State court, in vacation, declined to act upon the petition to be made a party, or to recognize the right of removal. Whether the cause was, under these circumstances, properly docketed in the court below as one legally removed under the act of Congress, or whether the Federal court exceeded its authority in the final order of injunction, made on the seventeenth day of January, 1879, upon the petition of the Wabash, Chester, and Western Railroad Company, are questions about which there is a difference of views among those members of the court who heard the cause and participated in its decision. We, therefore, forbear to make any expression of opinion upon them. And it is not at all important to the parties that we should do so. The object of the suit in the State court was to reach the property

of the railroad company, and from it, or from the income to be derived therefrom, obtain satisfaction of the judgments against the corporation. Whether that suit was or not, under the act of Congress, legally removed into the Federal court, the entire property, we have seen, passed lawfully into the custody of the latter court, and by proceedings therein, to which the judgment creditors were parties, and by which they are concluded — it has been all sold, and the proceeds adjudged to be rightfully distributed in satisfaction of the mortgage debt. It would, consequently, serve no valuable purpose for the appellants, were it now decided that the suit commenced in the State court was not legally removed into the Federal court, or that the order of Jan. 17, 1879, was beyond the power of that court to make.

The decrees appealed from are, therefore,

Affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

LEHNBEUTER *v.* HOLTHAUS.

1. Letters-patent granted by the United States are, as against an infringer, *prima facie* evidence of the novelty and utility of the device or invention for which they were granted.
2. Letters-patent No. 8814, granted Nov. 30, 1875, to Joseph Lehnbeuter and Casper Claes for a design for show-cases are valid.

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

The bill, filed by Joseph Lehnbeuter and Casper Claes, charged Arnold Holthaus and Anton Holthaus with infringing design patent No. 8814 for show-cases, granted to the complainants jointly, and dated Nov. 30, 1875.

The answer denied that the complainants were the first inventors of the design patented; denied its utility, and the alleged infringement. To sustain these denials all the testimony offered by the defendants was directed.

Upon final hearing the court dismissed the bill, because "said letters-patent were not good and valid in law," and the complainants appealed.

The record contains certain stipulations in respect to the evidence. These are: —

"That the following exhibits may be produced by either party at the hearing upon an appeal in the Supreme Court, and used in evidence as a portion of the transcript herein, viz.: 'Defendants' Exhibit, Wiegal Catalogue,' and 'Defendants Exhibit, Maws' Price Current;' also, 'Design Patents Nos. 8287, 8813, and 8814;' also, 'Complainants' Exhibit Holthaus Circular.'

"That it shall be taken, as admitted for the purposes of this case, that said exhibits, 'Wiegal Catalogue' and 'Maws' Price Current,' were issued prior to January, 1874.

"That the circular marked 'Complainants' Exhibit Holthaus Circular' is a copy of circulars issued by the defendants in the month of July, 1877, and subsequently thereto; that the cuts therein correctly represent show-cases made and sold by the defendants in St. Louis, within said Eastern District of Missouri, during and after January, 1877, and before the commencement of this suit, and still made and sold by them; also, that the circular marked 'Complainants' Exhibit Claes & Co., Circular,' is a copy of a publication issued and circulated by complainants in the month of September, 1875, and subsequently thereto; also, that the model marked on bottom 'Complainants' Exhibit Model No. 1,' under the hand of the same notary, correctly represents show-cases made and sold by defendant in said St. Louis during and after the month of January, 1877, and before the commencement of these suits."

The only witness in the case was Charles K. Pickles, who testified for the complainants that he made the original drawings from which the plates were made of the cuts 33, 34, and 36 of the Holthaus circular; that he made the drawings for Holthaus, the defendant, who gave him cuts from Claes & Co.'s circular, from which to make the plates or prints, and that there were slight changes suggested by Holthaus, which the witness followed in making the drawings.

The Wiegal Catalogue, Maws' Price Current, the Holthaus

Circular, and the design patents, numbered respectively 8287, 8813, and 8814, with their drawings, the first granted to Joseph Lehnbeuter, and the other two to Lehnbeuter and Claes, the complainants, were put in evidence. The one last named was that on which this suit was brought.

Mr. Robert H. Parkinson for the appellants.

There was no opposing counsel.

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

A comparison of the drawing which is appended to patent No. 8814, with cut No. 34 of the Holthaus Circular, which it is admitted represents show-cases manufactured and sold by the defendants, during and since January, 1877, makes it clear that the latter is a servile copy of the former, excepting a slight inclination backwards, hardly perceptible to the naked eye, of the glass constituting the front of the elevated portions of the case. We think, therefore, that the infringement is clearly established.

The attempt to prove that the complainants were not the first inventors of the design covered by their letters-patent has entirely failed. The only evidence offered on this branch of the defence are the publications designated as Maws' Price Current and the Wiegal Catalogue. The first of these bears date in 1869, and the latter in 1872. After a careful search through both, we have been unable to find any design for a show-case which remotely resembles that described in the complainants' patent.

The design patented by the complainants differs essentially from any other which has been called to our attention. It is not covered by the other patents which are set out in the record. Whether it is more graceful or beautiful than older designs is not for us to decide. It is sufficient if it is new and useful.

The patent is *prima facie* evidence of both novelty and utility, and neither of these presumptions has been rebutted by the evidence. On the contrary, they are strengthened. No anticipation of the design is shown, although the attempt has been made to prove anticipation. The fact that it has been

infringed by defendants, is sufficient to establish its utility, at least as against them. *Whitney* v. *Mowry*, 4 Fish. Pat. Rep. 207.

Our conclusion is that the complainants have a valid patent which the defendants have infringed. The decree of the Circuit Court dismissing their bill must, therefore, be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is

So ordered.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

UNITED STATES *v.* TEMPLE.

An officer of the navy, while engaged in public business, travelled by land and sea under orders, the travel by sea not being in a public vessel of the United States. *Held*, that under the act of June 30, 1876, c. 159 (19 Stat. 65), he is entitled to mileage for the whole distance travelled.

APPEAL from the Court of Claims.

This was an action brought in the Court of Claims by Temple, a commodore in the United States navy, to recover mileage for travel under orders.

The controversy arises upon the construction of an act of Congress. The history of our legislation on the subject of mileage to officers of the navy is as follows: The act of March 3, 1835, c. 27 (4 Stat. 756), after giving certain pay, &c., to officers of the navy, declares in the second section that they shall be entitled to no other compensation, but with an exception, thus stated: "Except for travelling expenses while under orders, for which ten cents per mile shall be allowed."

This provision was abrogated by a clause in the act of June 16, 1874, c. 285 (18 Stat., pt. 3, p. 72), which is as follows: "That only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid are hereby declared illegal."

On June 30, 1876, however, mileage was restored to officers of the navy by the act of that date, c. 159 (19 Stat. 65), which declares that so much of the act of June 16, 1874, "as provides that only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged in public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers so engaged, in lieu of their actual expenses."

The travel for which Commodore Temple claims mileage was performed in 1878.

It appears by the findings of the Court of Claims that while engaged in public business he travelled under orders from Washington City, *via* New York City and Rio de Janeiro, to Montevideo, in South America, and thence back to Washington City, *via* Rio de Janeiro, Liverpool, and New York. The voyages were performed in vessels not the property of the United States. The whole distance travelled was 16,660 miles. He applied to the accounting officers of the treasury for payment of mileage at the rate of eight cents per mile on the whole distance travelled by him. His demand was refused. But he was allowed eight cents per mile for the distance between the city of Washington and New York, going and returning. For all travel by sea the accounting officers would allow him only his actual expenses.

The Court of Claims allowed him mileage at the rate of eight cents per mile for the entire distance travelled by him. Judgment was rendered in his favor therefor, after deducting the money actually paid him. The United States appealed.

The Solicitor-General for the United States.

Mr. Enoch Totten and *Mr. James Lowndes* for the appellee.

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

The statute and the finding of the Court of Claims leave little room for controversy. The law as it stood when the travel was performed was explicit, and is not open to construction. We find in it no warrant for the distinction made by the accounting officers of the treasury between travel by sea

and travel on land within the United States, performed by an officer of the navy while engaged on public business. To hold that for one class of travel he should have eight cents per mile, and for the other his actual expenses, is to make the law and not to construe it. When this travel was performed there was not a line on the statute-book of the United States which made any provision whatever, under any circumstances, for allowing officers of the navy, when engaged on the public business, their actual expenses of travel. The only law ever enacted which made such provision had been expressly repealed by the act on which the appellee based his claim for mileage. This act declared him entitled, without condition or limitation, to mileage at the rate of eight cents per mile, and is the only law upon the subject.

Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. *Waller* v. *Harris*, 20 Wend. (N. Y.) 561; *Pott* v. *Arthur*, 104 U. S. 735. When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision.

The attempt to justify the decision of the accounting officers of the treasury is based on an alleged practice in conformity therewith, which, it is said, grew up in the Navy Department under the act of 1835. The practice, if such there was, finds no higher warrant or sanction in the act of 1835 than in the act of 1876. But even if it could have any influence in settling the meaning of an act passed forty-one years afterwards, under changed circumstances and conditions, we find no reference to it in either the findings or the opinion of the Court of Claims, and we cannot assume that it ever existed.

The law on which the appellee bases his case is plain and unambiguous. We must give it its natural and obvious meaning, and thus interpreted it leaves the appellant no ground to stand on.

Judgment affirmed.

BLENNERHASSETT *v.* SHERMAN.

1. A mortgage of his entire estate, executed by an insolvent mortgagor to a creditor who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, actively conceals the mortgage, withholds it from record, and represents him as having a large estate and unlimited credit, by which means he is enabled to contract other debts which he cannot pay, is void at common law.
2. A mortgage executed by an insolvent with intent to give a preference to a creditor, who has reasonable cause to believe him to be insolvent, and knows that it is made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading them, actively conceals it and withholds it from record for two months, is void, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

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

The bill in this case was filed Jan. 26, 1875. The suit was brought to foreclose a mortgage executed by Allen, lately of the city of Chicago, in the State of Illinois, to Allen, Stephens, & Co., of the city of New York, a firm composed of Allen, the mortgagor, and Stephens and Blennerhassett. The bill of complaint set out the mortgage in full, as follows: —

"NEW YORK, 18 Nov., 1874. — I hereby acknowledge the receipt of four hundred and sixty-five thousand four hundred and seventy-six and 88-100 dollars of advance to the Cook County National Bank, of Chicago, for my account, same being made by Allen, Stephens, & Co. in money, paper, and indorsements. I have arranged with them for additional advances. In consideration thereof I hereby grant and convey to Allen, Stephens, & Co., by way of mortgage and security for such advances, all my real estate of every kind and description, and wherever situated.

"B. F. ALLEN."

This instrument was duly acknowledged by Allen before a notary public in the city of New York, and delivered to the complainants, Stephens and Blennerhassett. It was not recorded until Jan. 19, 1875. On that day it was filed for record in Cook County, Illinois, and on the next day in Polk County, Iowa.

The bill charged "that in consideration of said security the complainants had further advanced to said Allen in money and valuable securities, and become personally liable by indorsement of securities for said Allen, in the further sum of four hundred and thirty-four thousand five hundred and twenty-three dollars and twelve cents, making a total amount of advancements and indorsements on account of said security of the sum of $900,000, paid and advanced by your orators, and for which they became liable as indorsers." The bill then gave a description of the real estate which complainants claimed was covered by the mortgage, and prayed for an account of the moneys advanced by the complainants to Allen, and the moneys paid by them on account of the liabilities incurred and the amounts intended to be secured by the mortgage, and for a foreclosure of the same, and general relief.

On Feb. 8, 1875, the mortgage mentioned in the bill was assigned by Allen, Stephens, & Co. to the Charter Oak Life Insurance Company of Hartford, Conn., and on April 17 that company, leave of the court having been obtained allowing it to intervene and become a party complainant, filed a supplemental bill, in which the assignment of the mortgage was averred. A petition in bankruptcy was filed Feb. 23, 1875, against Allen in the United States District Court for the District of Iowa. He was adjudged a bankrupt April 22, and on July 1 following Hoyt Sherman was appointed assignee of his estate.

On Aug. 7, 1875, Stephens and Blennerhassett, and the Charter Oak Life Insurance Company, filed their bill of review, in which they prayed that Hoyt Sherman, the assignee of Allen, might be made a party defendant. Allen was retained as a defendant on account of a claim of homestead which he set up to certain of the property covered by the mortgage.

In this bill, which is called in the record "a bill of revivor and consolidated bill," the complainants averred, that prior to the date of the mortgage Allen had applied to Stephens and Blennerhassett, as copartners in the firm of Allen, Stephens, & Co., in behalf of the Cook County National Bank, to make to the bank, upon his credit and responsibility, certain large advances

of money, commercial paper, and indorsements, and that in pursuance of such application Allen, Stephens, & Co. did make such advances to the amount of $465,476 prior to the date of the mortgage, and that after its date "they continued to make advances of money and valuable securities to the said Cook County National Bank, at the request of said Allen, and between the said date of the 18th of November, 1874, and the date of the suspension of payment by the said Cook County National Bank, as hereinafter set forth, in addition to the said sum of four hundred and sixty-five thousand four hundred and seventy-six 88-100 dollars, ascertained and acknowledged to have been received at the date of said mortgage, the said Allen, Stephens, & Co. advanced in the aggregate the sum of two million seven hundred and twenty-two thousand two hundred and eighty-four and 29-100 dollars.

"That said Cook County National Bank from time to time, between said dates, to wit, between the said eighteenth day of November, 1874, and the eighteenth day of January, 1875, made remittances to the said firm of Allen, Stephens, & Co., on account of said advances, which remittances were made in currency and in bills receivable, on which currency was realized, and all of which was applied on account, and was sufficient to extinguish and did extinguish wholly the amount so advanced prior to the date of the execution of said mortgage, but was wholly inadequate to pay the amount advanced subsequent to said date. That the balance due on account of said advances and in excess of the credits and remittances aforesaid, on the said eighteenth day of January, 1875, and still due and unpaid, is the sum of nine hundred thousand dollars."

Sherman, the assignee, filed his answer to this bill, in which he averred that the advances made by Allen, Stephens, & Co. prior to the date of the mortgage were made to Allen on his own individual account and for his own use, and not to the Cook County National Bank, but denied that such advances amounted to the sum of $465,476, "or anything like that amount." He admitted the execution of the mortgage, but charged that on and prior to its date Allen was largely indebted to persons and banks in New York City and to the Cook County National Bank; that he was insolvent, his liabil-

ities were more than $1,500,000, and exceeded his assets by at least $600,000; that the Cook County National Bank was embarrassed and unable to pay its debts; and that all these facts were then well known to Stephens and Blennerhassett. That they, desiring to take advantage of the necessities of Allen, and desiring to extort from him a mortgage on his real estate in Iowa and elsewhere, in fraud of his other creditors, falsely represented to him that he was largely indebted to the firm of Allen, Stephens, & Co., for advances theretofore made to the Cook County National Bank for his account, "and that if he, Allen, would execute to said firm an agreement or mortgage as hereinbefore mentioned, said firm of Allen, Stephens, & Co. would advance, or procure to be advanced, to him an amount that would be sufficient to enable him and the said Cook County National Bank to go on with their business, and that they would continue to make such advances till he and the said bank had gotten over their crippled financial condition, and were able to go on with their business without such assistance; and that if he, the said Allen, would do so, that the same should not be put upon record, and should not in any manner be uttered or published; that it should be held by said Stephens and Blennerhassett, and should be kept from the knowledge of all the general creditors of said Allen, and of said Allen, Stephens, & Co.; that the only use they would make of it would be as a justification to their depositors for making such advances to said Allen, and then only in case any question should be made with them, the said Stephens and Blennerhassett, by such depositors in regard thereto; and that it should in no way or manner have any force or validity, even between the said parties thereunto, unless the said Allen, Stephens, & Co. should advance to said Allen funds sufficient to enable him and the said Cook County National Bank to go on with their business, as above stated, and then that it should be held by them, the said Stephens and Blennerhassett, and in no way used without the consent of the said Allen.

"They further declared to Allen that if he refused to execute said mortgage they would at once cease to make advances to him or the Cook County National Bank, and would take no steps to protect the drafts drawn by the Cook County National

Bank on New York, which would cause its suspension. That Allen being in great need of money, and relying on the representations of Stephens and Blennerhassett, and believing that if he could procure the aid which they promised he could sustain the Cook County National Bank and pay off his debts, and fearing lest Stephens and Blennerhassett would carry out their threats, executed said mortgage."

The answer averred that Allen, Stephens, & Co., on and before Jan. 18, 1875, refused to make the advances, upon the making of which alone said mortgage was to have any validity or effect, even between the parties thereto, and said firm in other respects failed to comply with the promises made, upon the faith of which the said mortgage was executed. That in consequence of the refusal and failure of Stephens and Blennerhassett to comply with their promises, Allen and the Cook County National Bank were compelled to and did suspend payment, and to quit business and go into liquidation, and so it was averred that the said mortgage became null and void.

The answer denied that, after the execution of the mortgage, Allen, Stephens, & Co. continued to make advances to the Cook County National Bank; denied that there was due from Allen or the Cook County National Bank to Allen, Stephens, & Co. the sum of $900,000, and averred that Allen and the Cook County National Bank had paid and delivered to Allen, Stephens, & Co., in money and securities, sufficient to satisfy all the advances of said firm to Allen and the Cook County National Bank, if any such were made.

It was further averred in the answer as follows:—

"That on and prior to the eighteenth day of November, 1874, the date of said pretended mortgage, the said Allen and the said Cook County National Bank was each insolvent and unable to pay their debts; that said firm of Allen, Stephens, & Co., as well as the several members thereof, had, at and prior to such date, reasonable cause to believe said Allen and said bank were each insolvent; that said firm fraudulently procured said Allen to execute and deliver said pretended mortgage, knowing it was made to and would give said firm a preference over the other creditors of said Allen, and that it was made in fraud of the provisions of the bankrupt

law, and the more effectually to perpetrate such fraud on the general creditors of said Allen at the time said mortgage was executed and delivered, and said Stephens and Blennerhassett, for themselves and said firm, agreed to conceal the same, not to publish the same or put the same on record; and in pursuance of such agreement they did, with intent to defraud the general creditors of said Allen, keep the same in their possession for two months after it was executed, and until the nineteenth day of January, 1875, and until they had positive knowledge that the said Allen and the said Cook County Bank would be compelled to suspend, when said pretended mortgage, or a copy thereof, was fraudulently, and for the purpose of creating an illegal preference in their favor, filed for record in the recorders' offices in the different counties in Iowa and Illinois wherein the real estate of said Allen is situated. That while said mortgage was, as aforesaid, secretly kept by said Stephens and Blennerhassett, it had no effect or validity as against the other creditors of said Allen, and that as to them (if valid between the parties to it, which this respondent denies) it only took effect at and from the time the same was filed for record, which was within the two months next prior to the filing of the petition in bankruptcy against the said Allen, and on which he was adjudged a bankrupt as aforesaid; and that the same is fraudulent and void under and by virtue of the provisions of the national bankrupt law and the amendments thereto, and that the same is now a cloud upon the said real estate then owned by said Allen, the title of which has passed to your orator as the assignee of said bankrupt, and it ought by the decree of this honorable court to be so declared, and said cloud removed."

The complainants filed the general replication to this answer.

Afterwards, on Jan. 17, 1876, an amendment was filed to the said "consolidated bill," in which it was averred that, by the application of money collected by Allen, Stephens, & Co. from collateral securities held by them to secure the amount due them from the Cook County National Bank, the amount of such indebtedness had been reduced to the sum of $784,000, by reason whereof the said firm of Allen, Stephens, & Co. had no longer any beneficial interest in said mortgage, but the

entire and absolute interest in and ownership of said mortgage was held and owned by the Charter Oak Life Insurance Company.

Sherman, as assignee of Allen, filed his cross-bill against Stephens, Blennerhassett, and the Charter Oak Life Insurance Company, alleging the invalidity of said mortgage on substantially the same grounds as those set up in the answer, and praying that the mortgage mentioned in the original bill might be declared fraudulent and void, and that the cloud upon the title to the real estate of the bankrupt, Allen, created by the registry of the same, might be removed. The defendants to the cross-bill filed their answer thereto, to which Sherman, the assignee, filed the general replication.

It is unnecessary to state the pleadings in greater detail. Proofs were taken; and upon final hearing the Circuit Court dismissed the original bill and made a decree in accordance with the prayer of the cross-bill, declaring the mortgage to be null and void, and cancelling the same. The appeal of the complainants brings up this decree for our consideration.

The defendants in the court below contended that the mortgage was void, because —

First, It was procured by fraud and used without the consent of Allen, and was given and received to hinder, delay, and defraud his creditors.

Second, It was concealed and kept from the records from its date until Jan. 19, 1875, and until after Allen failed, and that such concealment gave him and the Cook County National Bank a delusive and fictitious credit, thereby enabling him, under the semblance of being the owner of a large amount of unincumbered real estate, to deceive and mislead other persons to give him credit which would otherwise have been withheld, by reason of which he did contract debts after the giving of this mortgage, now remaining unpaid, of a greater amount than the value of the real estate covered by this mortgage. Many of these debts were contracted by Allen, Stephens, & Co. upon the representations of W. A. Stephens and H. Blennerhassett, members of said firm, while they held this mortgage in concealment; that his real estate was a vast property and was unincumbered.

Third, This mortgage was a fraudulent preference under the provisions of sects. 5128, 5129, and 5130*a* of the Revised Statutes of the United States, under the title of bankruptcy then in force.

Fourth, If the instrument was valid, it was given to secure a debt of Allen, and not a debt of the Cook County National Bank, and that he did not then, nor does he now, owe Allen, Stephens, & Co. anything.

Fifth, If the advances were made by Allen, Stephens, & Co. to the Cook County National Bank, such advances would create no valid debt against the said bank under sect. 5202 of the Revised Statutes of the United States; and being no debt there can be no mortgage.

Sixth, The instrument is not a legal mortgage, for the reason that it describes neither debt nor real estate.

The case was argued by *Mr. C. C. Nourse* and *Mr. A. P. Hyde* for the appellants, and by *Mr. J. S. Polk* and *Mr. L. H. Bisbee* for the appellees.

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

After an attentive consideration of the evidence in this case, much of which is conflicting and irreconcilable, we have reached the conclusion that the mortgage, which is the basis of the suit, is fraudulent and void at common law, because it was accepted by Allen, Stephens, & Co., and used by them to hinder, delay, and defraud the creditors of Allen, the mortgagor, and that it is also void under that section of the Bankrupt Act now embodied in the Revised Statutes of the United States as sect. 5128.

We shall state the grounds of our conclusion as succinctly as the case will admit. We are relieved from any discussion of the question of the insolvency of Allen, the mortgagor, by the admissions of counsel for the appellants. They concede, and, in our judgment, the evidence abundantly shows, that he was insolvent not only at the date of the mortgage, on Nov. 18, 1874, but also at the date of its registration, on Jan. 19, 1875. It is conceded that at the same dates the Cook County National Bank was also insolvent. We may add to this con-

cession, what is perfectly clear from the evidence, that the insolvency of both Allen and the bank was actual and absolute; that their assets were largely insufficient to pay their debts.

In order to a clear understanding of the controversy between the parties, it will be necessary to state generally the financial history of Allen and of the firm of Allen, Stephens, & Co., of which he was the senior member prior to the date of the mortgage.

Allen commenced business as a private banker in Des Moines, Iowa, in 1856, and soon began dealing in Iowa lands. He bought claims, made entries, and located them mainly in Polk County, Iowa. The real estate of which he was seised at the date of this mortgage had cost him $242,616, and that of which he was seised on Jan. 18, 1875, had cost him $240,794.

He continued his business as a banker in Des Moines up to a short time before the proceedings in bankruptcy were instituted against him. On Oct. 31, 1867, he was appointed by the Circuit Court of the United States for the District of Iowa receiver in the case of *Mark Howard* v. *The City of Davenport*, then pending in that court, and as such there came into his hands five hundred and forty-one bonds of $1,000 each of the Chicago, Rock Island, & Pacific Railroad Company, and between $90,000 and $100,000 in cash. The bonds bore seven per cent interest per annum, which Allen collected as it fell due, amounting to $37,870 per annum. He continued the custodian of this entire fund until May, 1873.

In 1868, according to his evidence, which is corroborated by his books, his assets amounted to $1,641,017, and his liabilities, including his indebtedness as receiver, amounted to $1,466,131, leaving an excess of assets over liabilities of $174,886. Of these assets $150,000 were invested in his house and furniture, in addition to the cost of the land, one hundred and thirty acres, on which his house stood.

It is, therefore, apparent that at the time mentioned he had little or no available capital of his own with which to carry on business. This state of his affairs caused him to succumb to the temptation to use the trust assets in his possession as receiver. Towards the close of the year 1868 he had deposited

a part of the Chicago, Rock Island, & Pacific Railroad bonds (which we shall call, for the sake of brevity, Rock Island bonds), which belonged to this trust fund, with Gilman Son & Co., bankers in the city of New York, and borrowed upon them, as collateral security, the sum of $55,000. At this time Blennerhassett was the confidential clerk of Gilman Son & Co.

On Nov. 2, 1868, Blennerhassett left that firm and became a partner in the banking-house of George Opdyke & Co., in which Stephens was already a partner. At the solicitation of Blennerhassett, Allen, on Dec. 19, 1868, changed his account from Gilman Son & Co. to George Opdyke & Co. During the years 1869, 1870, and 1871, it is made clear by the letters of Allen to Opdyke & Co., which appear in the record, that he was pressed for money and embarrassed. During this time he was speculating largely in the stock of the Chicago, Rock Island, & Pacific Railroad Company, and had used through Opdyke & Co. a large part of the Rock Island bonds, which belonged to the receiver fund in his possession.

In the fall of 1871 Stephens and Blennerhassett began negotiations with Allen with a view to a partnership between the three to carry on the business of banking in the city of New York, which resulted in the creation of the partnership of Allen, Stephens, & Co., which began business on Jan. 1, 1872.

It was agreed that Allen should furnish the capital on which the partnership was to do business. The amount named was $50,000.

At this time Allen was largely insolvent, and neither Stephens nor Blennerhassett had any means. Allen never contributed any money or property to the partnership capital. Stephens and Blennerhassett were not required by the partnership articles to pay anything, and they paid nothing. The firm, therefore, started without any capital whatever; two of the partners had no property, and the other owed more than he could pay.

The complainant, the Charter Oak Life Insurance Company, at once made a large deposit with the new firm, and in a few days their deposits amounted to more than $200,000. With the funds thus placed in their hands they paid the over-drafts

of Allen on Gilman Son & Co., and received from them the securities which had been deposited with them by Allen, namely, 168 Rock Island bonds of $1,000 each, certificates of 3,050 shares of stock of National State Bank of Des Moines, and of 960 shares of First National Bank of Des Moines.

It is unnecessary to trace minutely the shifts and devices to which Allen resorted to keep afloat. They are fully shown by the record. On Oct. 7, 1872, it appears from a letter addressed to him by Stephens for the firm of Allen, Stephens, & Co., that he was indebted to the firm in the sum of $379,000, and the security held by the firm was 416 Rock Island bonds. That these were the bonds which belonged to the fund of which he was receiver, the record leaves no doubt. He so testifies; and there is no conflicting testimony, and his possession of so large an amount of these bonds is not otherwise accounted for.

He at various times pledged all the bonds which belonged to the receiver fund. They all passed through the hands of New York brokers as collateral security for loans made to him. In January, 1873, all the Rock Island bonds held by him as receiver were in the hands of a broker in New York, held by him as security for advances made to Allen. This broker continued to borrow upon them for Allen until July 1, 1873, when he commenced selling, and continued to sell them until October, 1873, before which nearly all were disposed of, some of them at quite low prices.

During the months of February, March, and April, 1873, Allen paid the broker who negotiated these loans for him the sum of $43,000 extra interest over and above seven per cent on the loans.

Before May, 1873, it fairly appears from the evidence that Allen's losses had entirely consumed the receiver fund. In the month just mentioned he was ordered to pay into court by the middle of July the 541 bonds of $1,000 each, which had come into his hands as receiver, or their equivalent in money. The residue of the fund, amounting to about $300,000, was to be paid in May of the following year. He was in a desperate strait, and resorted to desperate means to save himself. On May 30, 1873, he purchased $275,000 of the stock of the Cook County National Bank of Chicago, Illinois, which gave him the

control of the bank. He paid for a large part of this stock by his checks on the bank, and the residue by a check on Allen, Stephens, & Co.

Having thus obtained the control of the Cook County Bank, which had a deposit of $1,300,000, he paid the $541,000 demanded of him as a part of the receiver fund, mainly by his checks on the bank. At this time the larger part of the receiver's bonds had been sold and their proceeds applied to the payment of moneys borrowed by him in New York on the pledge of the bonds.

In the fall of 1873 he bought an interest in the New York State Loan and Trust Company. His purchases of stock in that institution amounted to nearly $200,000. He paid for this stock by giving his notes and a check on the Cook County Bank. His object in making this purchase, as he states it, was to get control of the institution, and be enabled thereby "to carry his assets until he could realize on them." In other words, he bought the stock on credit with a view to get in his hands the cash assets of the Trust Company.

During the panic of September, 1873, the Cook County Bank lost $100,000 by the purchase of worthless drafts drawn by one Badger. The bank suspended a short time, but soon resumed.

During the fall of 1873, the private bank of Allen at Des Moines, and the National State Bank of Des Moines, in which he was a large stockholder, were both overdrawn with the house of Allen, Stephens, & Co. They were both hard pressed for money.

In January, 1874, Allen sold, through the house of Allen, Stephens, & Co., to the Charter Oak Life Insurance Company, bills receivable, "in the shape of mortgages," drawn from his private bank in Des Moines, to the amount of $114,000. This money all passed through the books of his private bank at Des Moines.

In May, 1874, the house of Allen, Stephens, & Co. made a loan of $400,000 to two men of the name of Hussey and Gisbourne, and took for security a deed of trust to Stephens upon a silver mine, called the Mono mine, in Utah Territory. The Charter Oak Life Insurance Company took one-third of this

loan off the hands of Allen, Stephens, & Co. The mine proved worthless, and the entire loan was a total loss, taking from Allen, Stephens, & Co. $266,666. This largely exceeded all the profits made by the firm since it commenced business, and left it insolvent.

In October, 1874, it was arranged between Allen and the Charter Oak Life Insurance Company, the negotiation therefor having been carried on through Allen, Stephens, & Co., that he should make his twelve notes for $25,000, payable in five years from date, and deliver the same to the company, and secure the same by pledge of mortgage notes, stocks, and bonds. The company was to advance to Allen $300,000 on the notes so secured. Allen, on Oct. 24, 1874, made his notes accordingly, and delivered them to Allen, Stephens, & Co. for the company, and the company sent $300,000 of its paper to Allen, Stephens, & Co. to be used for his benefit. His notes were secured by the pledge of mortgage notes, amounting to $277,041; by Cook County Bank stock, $70,000; New York State Loan and Trust Company stock, $100,000; National State Bank of Des Moines stock, $30,000; and county bonds, $500; amounting in all to $478,000.

On the same day Allen, for himself, executed to Allen, Stephens, & Co. a paper-writing, in which he authorized them, in case he became indebted to them for loans or advances, or liabilities assumed by them for him, to sell, without notice to him, any property, things in action, collateral securities belonging to him and held by them, or to hypothecate the same and use their proceeds towards the payment of such indebtedness and the interest. On the same day he, as president of the Cook County Bank, executed and delivered to Allen, Stephens, & Co. a similar paper.

Between the date of his appointment as receiver, and Oct. 24, 1874, Allen had sustained great losses. In 1871 he had lost by stock speculations in New York City $200,000. He had lost $50,000 by a subscription to the Canada Southern Railroad. He built for a church society at Des Moines a church edifice, in which was tied up the sum of $60,000, and which afterwards resulted in a loss of $50,000. In 1873 and 1874 he had lost $200,000 as a member of the firm of B. F. Murphy &

Co., and $75,000 as a member of the firm of H. M. Bush & Co., and $30,000 in the firm of Lewis & Stephens. In swamp, coal, and mountain lands he lost $61,000. He lost in corn speculations in Chicago and in property in the towns of South Evanston, Ill., and Sheffield, Ind., $92,000. He sunk $35,000 in the stock of the Toledo, Wabash, and Western Railroad Company, and lost $30,000 in the firm of A. T. Andreas & Co., and $10,000 invested in the Grand Pacific Hotel in Chicago. Besides his residence and furniture at Des Moines, which cost him $150,000, he had invested in a residence in Chicago $50,000. His actual losses amounted to over a million dollars, and he had $200,000 invested in unproductive real estate. It is true so inveterate a speculator sometimes made a fortunate venture, but his losses were greatly in excess of his gains.

The mortgage on which this suit is founded was given on Nov. 18, 1874. On that day the firm of Allen, Stephens, & Co. was insolvent, and Stephens and Blennerhassett must have known it. Their profits, since Jan. 1, 1872, when the partnership was formed, had not exceeded $200,000. They began with no capital. Both Stephens and Blennerhassett had drawn out their share of the profits. Allen's share remained, which was one-third, and amounted to about $66,000. The loss of the firm in the Mono mine loan was $266,000, leaving a deficit of $200,000. As already stated, it is conceded that at the date of the mortgage both Allen and the Cook County Bank were insolvent. But they were not merely insolvent, but irretrievably so.

On that day Allen owed the depositors in his private bank at Des Moines $736,783, he owed the Cook County Bank $557,943, the Charter Oak Life Insurance Company $300,000, the Newark Savings Institution of Newark, N. J., $200,000, making an aggregate of $1,794,726. At the same time, placing a liberal estimate on the value of his assets, they did not exceed $800,000, leaving a deficit of $994,727, which other smaller items of indebtedness shown by the record would swell to more than a million dollars, the excess of his liabilities above his assets. The condition of the Cook County Bank on the same day may be approximately ascer-

tained from the following facts: On Nov. 18, 1874, its books showed its indebtedness to be $1,891,620. The receiver of the bank testifying on Aug. 26, 1876, said that he had admitted and given certificates for claims against the bank to the amount of $803,035, that other claims had been presented to the amount of $915,000, for which receiver's certificates had not been given, and that the amount collected from its assets was $92,000. The cash on hand when the receiver took possession was $4,000.

Such was the condition of the firm of Allen, Stephens, & Co., Allen, and the Cook County Bank when the mortgage in suit was executed.

There are several propositions of fact which, in our opinion, the evidence satisfactorily shows. A statement and discussion of the evidence which sustains them would extend this opinion beyond reasonable limits, and would not be profitable.

First, Allen when he gave the mortgage, and Stephens and Blennerhassett when they took it, knew that both he and the Cook County Bank were insolvent. A large part of the correspondence between Stephens and Blennerhassett and the firm of Allen, Stephens, & Co. on the one hand, and Allen on the other, commencing before the partnership of Allen, Stephens, & Co. was formed, down to the date of the mortgage, is to be found in the record. The record also contains the correspondence between the firm and the Cook County Bank, and many letters written by the firm, in the interest of Allen, and much correspondence between Stephens and Blennerhassett. This evidence shows that both he and the Cook County Bank were on the verge of suspension from the time when he was compelled to replace the bonds intrusted to him as receiver, down to the date of the mortgage in November, 1874, and the suspension of payment by him and the bank in January, 1875. It also brings home to Stephens and Blennerhassett the knowledge of the desperate shifts and devices to which he and the bank were driven to meet their engagements, and keep the fact of their utter bankruptcy from the knowledge of the public. It is impossible that men of much less business experience and intelligence than they are shown to be should know what they did of the resources and practices of Allen and the

Cook County Bank, and not have known of the insolvency of both.

Notice of his insolvency was also brought home to Stephens and Blennerhassett by their knowledge of the fact that he had appropriated to his own schemes and speculations a fund which, principal and interest, amounted to over $800,000, committed to his custody as a trustee and receiver. The evidence that they knew of the fact of his appointment as receiver, the amount of the fund which came to his hands, and the appropriation of the fund to his own uses is conclusive.

During the sixty days which elapsed between the date of the mortgage and its registration, the proofs of the insolvency of Allen and the Cook County Bank accumulated, and Stephens and Blennerhassett knew that the insolvency was hopeless and irretrievable.

Second, The record shows that the mortgage covered all the property of Allen. His personal property had long been exhausted, and his real estate was all that remained which was not pledged for his debts.

Third, In order that the credit of Allen and the Cook County Bank might not be impaired, the mortgage was purposely withheld from record, and actively concealed by Stephens and Blennerhassett until after the suspension of both Allen and the Cook County Bank on Jan. 18, 1875.

Blennerhassett testifies that after its execution he disposed of the mortgage as follows: "I put it in our safe, and kept it there until December 1, when I gave it in a sealed parcel to A. N. Denman. I said to Denman something like this: 'Here is a sealed package which contains instructions and valuable documents; you will go to Chicago, take quarters at some hotel there, and remain there, never leaving the hotel for any great length of time; and should a telegram come, you are to open that parcel and obey instructions.'"

The instructions directed Denman, when ordered by telegram to act, to have the mortgage recorded in Chicago, and then catch the first train for Des Moines, Iowa, and have it recorded there, &c.

On Jan. 18, 1875, Allen and the Cook County Bank both suspended. On the next day Allen, Stephens, & Co. sent a

telegram to Denman at Chicago, as follows: "Open your instructions and act." Denman opened his instructions and followed them. He filed the mortgage for record in Chicago on January 19, and in Des Moines on January 20.

Fourth, While the mortgage was thus kept from the record and from public knowledge, Stephens and Blennerhassett were busily engaged in sustaining the credit of Allen and the Cook County Bank, and, to accomplish their end, falsely and fraudulently represented him to be a man worth over a million of dollars, and of unlimited credit, and the Cook County Bank to be sound and good.

Fifth, That by means of these representations of Stephens and Blennerhassett, and the concealment of the mortgage, and the withholding of it from the record, the creditors of Allen and the Cook County Bank were misled and deceived, and in consequence thereof they did, between the date and the registration of the mortgage, deposit large sums of money in Allen's private bank at Des Moines, and in the Cook County Bank, and, at the instance of Stephens and Blennerhassett, discounted the paper of Allen and the Cook County Bank to a large amount, and that such deposits and discounts, though due, still remain unpaid.

Sixth, That the mortgage was made by Allen, who was insolvent, with a view to give a preference to the firm of Allen, Stephens, & Co., the firm being a creditor of Allen individually, and the firm and all its members having reasonable cause to believe him to be insolvent, and knowing that the mortgage was made in fraud of the provisions of the Bankrupt Act, and it was withheld from the record and actively concealed for the period of two months preceding the failure of Allen and the filing of the petition in bankruptcy against him, for the purpose of protecting it from assault as a preference void under the provisions of the Bankrupt Act.

There is a large mass of evidence in the record, which in our opinion establishes the truth of the foregoing propositions beyond controversy. The new debts which were contracted by Allen and the Cook County Bank, after the date of the mortgage and before its registration, on the strength of the representations of Stephens and Blennerhassett, and the fact

that Allen's property appeared to be unincumbered, amounted to a larger sum than the value of the real estate covered by the mortgage.

By the aid of the means thus obtained, Stephens and Blennerhassett were able to stave off the suspension of Allen and the Cook County Bank for a period of exactly two months after the date of the mortgage. They, doubtless, supposed this lapse of time would render the mortgage proof against any attack by an assignee in bankruptcy of his estate. He and the bank were then allowed to fail, and the mortgage was placed on record.

Upon this state of facts we are of opinion that the mortgage was a fraud upon the creditors of Allen, and, therefore, void at common law and without regard to the provisions of the Bankrupt Act.

It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage.

But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor.

It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. *Twyne's Case*, 3 Rep. 80; *Holmes* v.

Penney, 3 Kay & J. 90; *Gragg* v. *Martin*, 12 Allen (Mass.), 498; *Brady* v. *Briscoe*, 2 J. J. Marsh. (Ky.) 212; *Bozman* v. *Draughan*, 3 Stew. (Ala.) 243; *Farmers' Bank* v. *Douglass*, 11 Smed. & M. (Miss.) 469; *Bunn* v. *Ahl*, 29 Pa. St. 387; *Root* v. *Reynolds*, 32 Vt. 139; *Kempner* v. *Churchill*, 8 Wall. 362; Kerr on Fraud and Mistake, 200.

As long ago as the case of *Hungerford* v. *Earle* (2 Vern. 261), it was held that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly reaffirmed. *Hildreth* v. *Sands*, 2 Johns. (N. Y.) Ch. 35; *Scrivenor* v. *Scrivenor*, 7 B. Mon. (Ky.) 374; *Bank of the United States* v. *Housman*, 6 Paige (N. Y.), 526.

In *Coates* v. *Gerlach* (44 Pa. St. 43), a deed of land had been made directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until Dec. 2, 1857. On Jan. 21, 1858, the husband, professing to act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase-money in the hands of the vendees, and between them and the wife a contest arose on the question which had the better right to the proceeds of the sale. Touching this controversy, Mr. Justice Strong, delivering the opinion of the court, said: "There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until Dec. 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

So in *Hilliard* v. *Cagle* (46 Miss. 309), it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may nevertheless be held to be fraudulent and void

as to all creditors, existing and future, by evidence *aliunde*, showing the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The court declared that "the natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known, and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object."

In the case of *Gill* v. *Griffith & Schley* (2 Md. Ch. 270), the court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in this case was, therefore, declared void. Upon appeal, the court of appeals affirmed the decree for the reasons assigned by the Chancellor. See note of the reporter at the end of the case.

So in the case of *Hafner* v. *Irwin* (1 Ired. (N. C.) L. 490), which grew out of the making of a deed of trust by one Dwight to the plaintiff Hafner, to secure certain creditors named thereon, it was said: —

"There was evidence tending to show that it was a condition of this instrument, and as understood between the parties thereto, that it should not be registered nor put in use, but kept a secret from the world until after the 20th of February ensuing the date. . . . There was also evidence tending to

show that it was a further part of the agreement between the parties that the transaction should be kept secret, at all events until the debtor should escape beyond the reach of the process of his creditors. . . . We need not and cannot lay down as a rule of law that those who take securities from a debtor about to abscond must apprise creditors of his intention to place himself beyond their reach, under penalty of forfeiting such securities; but we feel ourselves justified in holding that, when secrecy is part of the consideration of such securities, the securities are contaminated thereby, and ought not to be regarded as given *bona fide*."

In *Hildeburn* v. *Brown* (17 B. Mon. (Ky.) 779), a mortgage was executed by one Sherrod to the plaintiffs, which they withheld from record. Commenting on that fact, the court said: —

"The petition of appellants avows that the arrangement between their agents and Sherrod was to withhold the mortgage from registration, for the purpose of sustaining the latter in business, and 'not to record the same unless there was danger of Sherrod's failure.' . . . The effect of the arrangement, though it may not have originated in any actual fraudulent or evil purpose, was to secrete from the public eye the true condition of the debtor, and thereby enable him, under the semblance of being the owner of unincumbered real estate, to deceive and mislead other persons by inducing them, upon the faith of his supposed unembarrassed condition, to give him credit which would otherwise have been withheld. Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors.

"If not directly within that class of acts which the law denominates constructive frauds, it approximates so nearly to it that the party avowing himself a participant in such transaction ought not to receive the countenance or aid of the Chancellor in enforcing any lien or claim growing out of it as against a third person."

Neslin v. *Wells* (104 U. S. 428) arose in the Territory of Utah, where the law permitted, but did not require, the registration of mortgages, but where there was a general custom to record such instruments. Neslin, the vendor of land, took from Smith, his vendee, a mortgage to secure a part of the purchase-money, but did not file it for record until after a subsequent mortgage executed by the vendee on the same land, to one Kerr, had been filed for record, Kerr having no notice, actual or constructive, of the prior mortgage to Neslin. It was held by the court, Mr. Justice Matthews delivering its opinion, that, "under the circumstances of the 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."

See also *Worseley* v. *De Mattos*, 1 Burr. 467, and *Tarback* v. *Marbury*, 2 Vern. 510.

The principles upon which these decisions are based are, in our opinion, conclusive of this case. None of the cases cited disclose such a premeditated and contrived purpose to deceive and defraud other creditors of the mortgagor as appears in this. We are of opinion, therefore, that the mortgage executed by Allen to Allen, Stephens, & Co., on Nov. 18, 1874, which the complainants in this case seek to foreclose, is a fraud upon the creditors of Allen, and void at common law.

We further declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the Bankrupt Act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

If the mortgage had been executed within the period of two

months next before the filing of the petition in bankruptcy, it would have been void under the letter of the Bankrupt Act. Where all the other circumstances necessary to render it void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and is void as against its spirit.

The conduct of the mortgagees in this case shows them to be without claim to the consideration of a court of equity. On the contrary, it clearly appears to be the duty of the court to take care that they shall not reap the fruits of their fraudulent practices. Their assignee of the mortgage, the Charter Oak Life Insurance Company, stands in no stronger position.

Decree affirmed.

Mr. Justice Gray did not sit in this case, nor take any part in deciding it.

McCormick *v.* Knox.

A., whose debt was secured by deed of trust on lands, purchased them when, in default of payment, they were offered at a public sale by the trustee, and on taking a deed therefor entered into possession thereof. He subsequently paid off a prior lien. On a bill filed by a junior incumbrancer, the court granted the latter the right to redeem on his paying to A. the debt and the money expended in discharging the older incumbrance, with interest, and also the amount paid for taxes, repairs, and insurance, less the rents and profits while A. was in possession. *Held*, that the decree is correct.

Appeal from the Supreme Court of the District of Columbia.

The pleadings and evidence in this case disclose the following state of facts: —

Prior to Oct. 3, 1871, R. W. Bruff was the owner in fee of certain real estate in the city of Washington. On the day just mentioned he executed to Albert J. Meyer his promissory note of that date for $5,000, payable in five years, and secured it by a deed of trust on the property, with power of sale, to one Wimer as trustee. On June 29, 1872, Bruff conveyed the property to Mary J. Wheeler, who on July 1, 1872, for his

accommodation, made her note of that date, payable one year thereafter to his order, for $2,000, and to secure it executed a deed of trust on the same property to William H. Ward as trustee, with power of sale in case of default in the payment of the note.

On July 13, 1872, Bruff, for himself and his partner, one Holtzclaw, executed to the Freedman's Savings and Trust Company a note for $3,000, and as collateral security therefor deposited with the company forty shares in the Capitol Hill Building Association, and the above-mentioned note of Wheeler, secured as aforesaid. Payments were made upon the note of Holtzclaw & Bruff, so that on April 9, 1873, there appeared to be due thereon the sum of $1,045.

On June 3, 1873, Wheeler conveyed the property to Michael McCormick, by deed of that date, which, though absolute on its face, it is clear from the evidence was merely given as security for a pre-existing debt.

The Freedman's Savings and Trust Company having become insolvent, three commissioners were appointed under an act of Congress to take possession of and administer its assets. They entered on their duties about July 12, 1874. Default having been made in the payment of the balance due on the note of Holtzclaw & Bruff, and also in the payment of the note made by Wheeler, the commissioners directed Ward, the trustee, to proceed to execute the trusts imposed on him by Wheeler's deed of July 1, 1872. He accordingly advertised the property. It was sold at public auction on March 17, 1876, and bid in by the commissioners, to whom Ward, the trustee, made a deed of conveyance.

The note for $5,000, which was held by Meyer, having become due, he insisted that it should be paid, and threatened, if it were not paid, to cause the property to be again advertised and sold under the trust deed to Wimer. The commissioners thereupon paid him the amount due on the note, namely, $6,128, and received from the trustee, Wimer, a deed of release to the property.

After the conveyance of the property by Ward to the commissioners, they took possession of it, and received its rents until March 17, 1879.

On March 15, 1879, McCormick filed the bill in this case against the commissioners. He founds his title to relief upon the deed made to him by Wheeler on June 3, 1873. The prayer of his bill is, that, on account of certain alleged informalities, the sale made by Ward, trustee, to the commissioners, be declared void and his deed cancelled, that an account be taken of the balance due on the note secured by the trust deed to Ward, and that the rents received by the commissioners while in possession of the property be set off against such balance, and for general relief.

The commissioners filed an answer and a cross-bill. In the latter they pray that the sale made to them by Ward, the trustee, be ratified and confirmed, and their title to the property declared to be good and valid.

McCormick answered the cross-bill, in which he denies the right of Ward, the trustee, to sell the property, the regularity of the sale, &c.

There are other pleadings in the case which are not necessary to be stated.

By virtue of an act of Congress approved Feb. 21, 1881, the court made an order substituting Knox, the present appellee, for the three original commissioners. Upon final hearing on the pleadings and evidence, the court, in special term, made a decree to the effect that McCormick or Wheeler might redeem the property by paying the balance due on the note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and also the amount paid by the commissioners on the note held by Meyer, and the sums paid by them for taxes, insurance, and repairs upon the property in question, after deducting the rents collected by them; but in case said sums were not paid within thirty days after confirmation of the auditor's report ascertaining the same, the sale and deed by Ward, the trustee, to the commissioners, should stand ratified and confirmed. McCormick appealed from this decree to the court in general term, by which it was affirmed, and he has brought the case to this court by appeal from the latter decree.

Mr. John J. Weed and *Mr. William A. Meloy* for the appellant.

Mr. Enoch Totten for the appellee.

Mr. Justice Woods, after stating the case, delivered the opinion of the court.

The counsel for appellant has submitted an argument to show that the sale and deed made by Ward, the trustee, to the commissioners of the Freedman's Savings and Trust Company were void. Without discussion of this question, we simply declare our opinion to be, that there is no solid ground for this contention to rest upon. But whether the sale is valid or not is an immaterial question in this case, for the decree of the court below permitted the complainant to redeem the property, and so avoid entirely the effect of the sale and deed, by the payment of the balance due on the promissory note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and the amount due on the note for $5,000 made by Bruff to Meyer, and the taxes, &c., paid by the commissioners of the Freedman's Savings and Trust Company, after deducting the rents received by them. The decree of the court below substantially gives the appellant all the relief prayed for by his bill, on condition, however, that he should pay off the incumbrances on the property in question, older and better than his own.

The only practical question, therefore, is, Are the terms upon which the appellant and his grantor, Mrs. Wheeler, were allowed to redeem, just and right? Upon this point, it seems to us, there can be no doubt. The amount due on the note of Holtzclaw & Bruff, it is conceded, is less than the sum due on the note of Mrs. Wheeler, which it was pledged to secure. Neither she nor her grantee, the appellant, can complain if they are required to pay the balance, whatever it may be, due on the Holtzclaw & Bruff note before they can be allowed to redeem. It is equally clear that they ought to be required to pay the sum applied by the commissioners to discharge the amount due on the note held by Meyer, which was secured by a trust deed on the premises in controversy, and was the first lien thereon.

The contention of complainant that he should receive a clear title to the property, without first discharging the lien thereon created by the trust deed of Mrs. Wheeler, and without first paying the sums which had been applied by the commissioners

to the discharge of the lien held by Meyer, both of which were prior in date to his own, is not founded on any equity, and is not supported by any authority. On the contrary, it is clear that the commissioners, having paid off the oldest incumbrance on the property, are entitled to be subrogated to the rights of the incumbrancer. *Robinson* v. *Ryan*, 25 N. Y. 320; *Redmond* v. *Burroughs*, 63 N. C. 242.

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem. *Page* v. *Foster*, 7 N. H. 392; *Arnold* v. *Foote*, 7 B. Mon. (Ky.) 66; *Harper* v. *Ely*, 70 Ill. 581.

The same rule applies to the payment by the mortgagee of taxes on the mortgaged premises, or any valid assessment thereon for public improvement. *Dale* v. *McEvers*, 2 Cow. (N. Y.), 118.

The decree of the court below gave the complainant every right which the law accorded him. It must, therefore, be

Affirmed.

AGER *v.* MURRAY.

A patent-right may be subjected by bill in equity to the payment of a judgment debt of the patentee.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Submitted on printed briefs by *Mr. Thomas T. Crittenden* and *Mr. Warwick Martin* for the appellants, and by *Mr. Lemon G. Hine* and *Mr. S. T. Thomas* for the appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity by a judgment creditor to subject to the payment of his debt the interest of his debtor in patent-rights. The case was heard in the Supreme Court of the District of Columbia upon bill and answers, by which it appears to be as follows: —

On the 10th of April, 1876, Talbot C. Murray, in an action at law upon a promissory note, recovered judgment against Wilson Ager for the sum of $2,164.66, with interest and costs. Upon that judgment a writ of *fieri facias* was issued, and returned *nulla bona*. Wilson Ager had no real or personal property in the District subject to execution at law, but was the owner of sundry letters-patent issued to him by the United States for useful inventions, which, if sold, would produce more than enough money to satisfy that judgment. On the 26th of September, 1876, he conveyed all his right and interest in these letters-patent to the other defendant, Elisha C. Ager, who owned an equitable interest of one-third therein, and who, on the 8th of October, 1877, reconveyed the patent-rights to Wilson by an assignment which was not recorded in the Patent Office. Wilson Ager resides in the District of Columbia, and the other defendant resides in the State of California, and both have appeared in the cause and answered to the merits of the bill.

The bill prays for an injunction against further assignment pending the suit, and that the patents be sold under the direction of the court, and the proceeds of the sale applied to the payment of the judgment debt, and the defendant, Wilson Ager, be required to execute such assignment as may be necessary to vest title in the purchaser or purchasers, in conformity with the patent laws, and for further relief. The decree is, that in default of his paying by a certain day the judgment mentioned in the bill, with interest and costs, and the costs of this suit, the patent-rights be sold and an assignment thereof executed by him as prayed for, and that, in default of his executing such assignment, some suitable person be appointed trustee to execute the same.

From that decree the original defendants have appealed to this court; and the single question argued before us is whether a patent-right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee.

A patent or a copyright, which vests the sole and exclusive right of making, using, and vending the invention, or of publishing and selling the book, in the person to whom it has been

granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against subsequent purchasers or mortgagees for a valuable consideration without notice. Rev. Stat., sects. 4884, 4898, 4952, 4955. And the provisions of the patent and copyright acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him, of which he receives the profits, and has the absolute title and power of disposal, from liability to be subjected by suitable judicial proceedings to the payment of his debts.

In England it has long been held that a patent-right would pass by an assignment in bankruptcy, even without express words to that effect in the Bankrupt Act. *Hesse* v. *Stevenson*, 3 Bos. & Pul. 565; s. c. Davies, Pat. Cas. 263; *Longman* v. *Tripp*, 2 New Rep. 67; *Bloxam* v. *Elsee*, 1 Car. & P. 558; s. c. Ry. & M. 187; 6 Barn. & Cress. 169; 9 D. & R. 215; *Mawman* v. *Tegg*, 2 Russ. 385; *Edelsten* v. *Vick*, 11 Hare, 78; *Hudson* v. *Osborne*, 39 L. J. N. S. Ch. 79. In *Hesse* v. *Stevenson*, Mr. Justice Chambre, in the course of the argument, said: "The right to the patent is made assignable; why then may it not be assigned under a commission of bankrupt?" 3 Bos. & Pul. 571. And Lord Alvanley, delivering the unanimous judgment of the court, after observing that it was contended "that the nature of the property in this patent was such that it did not pass under the assignment," and "that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignee, yet that the fruits of a man's own invention do not pass," said: "It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignee require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an

argument why that interest should not pass in the same manner as any other property acquired by his personal industry." 3 Bos. & Pul. 577, 578. The recent Bankrupt Act of the United States, in defining what property should vest in the assignee in bankruptcy, expressly enumerated "all rights in equity, choses in action, patent-rights, and copyrights," and required the assignee to sell all the property of the bankrupt for the benefit of his creditors. Rev. Stat., sects. 5046, 5062–5064. The only difference is, that in England all such rights pass that become vested in the bankrupt before he obtains a certificate of discharge, whereas here only those rights pass which belong to him at the time of the assignment.

It has been said by an English text-writer that "a patent-right may be seized and sold in execution by the sheriff under a *fieri facias*, being in the nature of a personal chattel." Webster on Patents, 23. We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. *M'Dermutt* v. *Strong*, 4 Johns. (N. Y.) Ch. 687; *Spader* v. *Hadden*, 5 id. 280, and 20 Johns. (N. Y.) 554; *Edmeston* v. *Lyde*, 1 Paige (N. Y.), 637; *Wiggin* v. *Heywood*, 118 Mass. 514; *Sparhawk* v. *Cloon*, 125 id. 263; *Daniels* v. *Eldredge*, id. 356; *Drake* v. *Rice*, 130 id. 410.

In *Stephens* v. *Cady* (14 How. 528), and again in *Stevens* v. *Gladding* (17 id. 447), the point decided was that, by a sale of the copperplate engraving of a map on execution from a State court against the owner of the copyright, the purchaser acquired no right to strike off and sell copies of the map.

Mr. Justice Nelson, in delivering judgment in *Stephens* v. *Cady*, said: "The copperplate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser the same as if made at a private sale. But the incorporeal right, secured

by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process, — certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of creditors." He then cited the cases in Johnson's and Paige's Reports, above referred to, and added: "But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to vest him with a complete title to the property." 14 How. 531.

In *Stevens* v. *Gladding*, Mr. Justice Curtis said: "There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be added, that these incorporeal rights do not exist in any particular State or district; they are coextensive with the United States. There is nothing in any act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts. That an execution out of the Court of Common Pleas for the County of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That by the levy of such an execution the entire right could be divided, and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty. These are important questions, on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was attempted to be sold." 17 How. 451. The difficulties of which the learned justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property, or the rents and profits of property, that has itself a visible and tangible

existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction. *Massie* v. *Watts*, 6 Cranch, 148. And the terms in which he refers to the statement of Mr. Justice Nelson show that there was no intention to criticise or qualify that statement.

There are, indeed, decisions in the Circuit Courts that an assignee in insolvency, or a receiver, of all the property of a debtor, appointed under the laws of a State, does not, by virtue of the general assignment or appointment merely, without any conveyance made by the debtor or specifically ordered by the court, acquire a title in patent-rights. *Ashcroft* v. *Walworth*, 1 Holmes, 152; *Gordon* v. *Anthony*, 16 Blatchf. 234. But in *Ashcroft* v. *Walworth* Judge Shepley clearly intimated that the courts of the State might have compelled the debtor to execute such a conveyance. And the highest courts of New York and California have affirmed the power, upon a creditor's bill, to order the assignment and sale of a patent-right for the payment of the patentee's judgment debts. *Gillette* v. *Bate*, 86 N. Y. 87; *Pacific Bank* v. *Robinson*, 57 Cal. 520.

In *Carver* v. *Peck* (131 Mass. 291), the court reserved the expression of any opinion upon that question, because unnecessary to the decision. And the assumption in *Cooper* v. *Gunn*, *&c.* (4 B. Mon. (Ky.) 594), that an author could not be deprived, against his will, and in favor of any of his creditors, of any of the rights secured to him by the copyright acts, was merely *obiter dictum*, unsupported by reasoning or authority.

In the case at bar, the bill is filed by a judgment creditor of the patentee, in a court of the United States of appropriate jurisdiction, against the patentee, residing within the District and holding the entire legal title and two-thirds of the equitable interest in the patent-rights, and against the owner of an equitable interest in the remaining third, who is properly made a party to the bill. Both defendants are before the court and have filed answers. The debtor's interest in the patent-rights is property, assignable by him, and which cannot be taken on execution at law. The case is thus brought directly within the

opinion delivered by Mr. Justice Nelson in *Stephens* v. *Cady*, of the soundness of which we entertain no doubt.

The clause of the decree below, appointing a trustee to execute an assignment if the patentee should not himself execute one as directed by the decree, has not been objected to in argument, and was clearly within the chancery powers of the court as defined in the statute of Maryland of 1785, which is in force in the District of Columbia. Maryland Stat., 1785, c. 72, sects. 7, 13, 25; 2 Kilty's Laws; Laws of District of Columbia (ed. 1868), pp. 326, 328, 333, 336.

Decree affirmed.

RIVES *v.* DUKE.

On the 5th of December, 1863, after the Proclamation of Emancipation, and in that part of Virginia the people of which were in rebellion against the United States, one resident therein sold and delivered to another a number of slaves, with warranty of title, but not of soundness, the purchaser covenanting "to pay on delivery the sum of $25,000 in bankable Confederate currency, and, in addition, to give his note," with two persons named as sureties, "for the further sum of $20,000, to be paid in twelve months after call, in equal annual payments thereafter, or at the purchaser's option it may be, on call, all or a part paid;" and the seller covenanting "not to call upon the purchaser for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call." On the 1st of January, 1864, the purchaser, in lieu of the note, made to the seller two bonds, with the same persons as sureties, to pay $8,000 "on demand, or twelve months thereafter, at the option of the obligors," and $12,000 "on demand, or two years thereafter, at the option of the obligors," "in the bankable currency of the day, according to the agreement of the 5th of December last," "the said demand shall be made in writing by the obligee, his heirs or legal representatives only." Payment of the bonds was demanded in writing by the obligee after the end of the war of the rebellion, and when the bankable currency of Virginia consisted wholly of notes of the United States or of the national banks. *Held*, in an action on the bonds, that the plaintiff had no ground of exception, 1, to the admission of evidence that, at the time when the agreement and bonds were made, Confederate currency was bankable and was the only currency in circulation in Virginia, the value of gold in relation to such currency was as nineteen or twenty to one, slaves were not selling at all for gold, and these slaves were not worth in Confederate currency so much as $45,000, and that before the war, when the price of slaves was at its highest, such a lot of slaves would not have been worth more than a fifth of that sum in gold; 2, to an instruc-

tion to the jury that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount, therein stipulated to be paid, at the value of Confederate money compared with national currency at the time of the making of the bonds.

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

This was an action of covenant, brought by the executor of the will, and prosecuted by the administrator *de bonis non* of George Rives, against Duke, the administrator of the estate of William P. Farish, a surety on two bonds.

The declaration alleged that on the 5th of December, 1863, in the county of Albemarle and State of Virginia, George Rives and George L. Peyton executed an agreement under seal, which began with a "list of servants sold to George L. Peyton" (giving the names and ages of thirty-three negroes, the oldest of whom were fifty-one years of age, and the youngest were infants), and the rest of which was as follows: "I have this day contracted to sell and deliver on the place, on the 1st of January next, to George L. Peyton the above list of negroes, thirty-three in number. The title thereto I warrant, but make no warranty of soundness. For the same negroes the said George L. Peyton agrees to pay on delivery the sum of twenty-five thousand dollars in bankable Confederate currency, and in addition to give his note, with William P. Farish and William H. Peyton as sureties, for the further sum of twenty thousand dollars, to be paid in twelve months after call, in equal annual payments thereafter, or at said Peyton's option it may be, on call, all or a part paid. The said George Rives covenants he will not call on said Peyton for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call. The said postponed payment to carry interest from 1st January next, and to be annually paid at Monticello Bank. The said George Rives farther engages to furnish said Peyton one hundred barrels of corn at $20 per barrel, to be delivered on the place as soon as gathered, and the money therefor to be paid down in Confederate bankable currency. In witness whereof, and mutual obligation to perform our respective engagements, we

this day, 5th of December, 1863, have signed our hands and seals."

The declaration then alleged that on the 1st of January, 1864, in pursuance of that agreement, Rives delivered the negroes to Peyton on the farm in Albemarle on which Rives then resided, which was "the place" referred to in the agreement, and also delivered the one hundred barrels of corn; and Peyton paid to Rives in bankable Confederate currency $25,000 in part payment of the purchase-money contracted to be paid for the slaves, and gave to Rives his two bonds, executed by William P. Farish and William H. Peyton as sureties, amounting in the aggregate to $20,000, the first of which bonds was in these terms: "On demand, or twelve months thereafter, at the option of the obligors, we promise to pay in the bankable currency of the day (according to agreement of the 5th December last), to George Rives, his heirs or assigns, eight thousand dollars with interest from date, to be annually paid on 1st January at Monticello Bank, Charlottesville; the same being in part of the purchase-money for thirty-three negroes, the title whereof is warranted, but no warranty is made of soundness. The said demand shall be made in writing by said George Rives, his assigns or legal representatives only. In witness whereof, we have hereto put our hands and seals this first day of January, 1864;" and the other bond was precisely like the first, except in substituting the words "two years" for "twelve months," and "twelve thousand" for "eight thousand;" and that these bonds were delivered and accepted as a compliance on the part of Peyton with the provision in the previous agreement to give his note for $20,000.

The declaration further alleged that in August, 1866, before the institution of this suit, Rives demanded in writing of the obligors payment of the principal and arrears of interest of the bonds; and that, with the exception of the interest for one year, which fell due on the 1st of January, 1865, and which was paid, no part of the principal or interest had been paid.

The defendant demurred generally to the declaration, and pleaded covenants performed and covenants not broken, and twenty-five special pleas, which set forth at length, and in various forms, that the bonds were executed in consideration

of part of the price of thirty-three negroes which Rives agreed to sell and did sell and deliver to Peyton, with warranty of title as slaves, after the Proclamation of Emancipation issued by the President of the United States on the 1st of January, 1863, and from that date until after the sale and delivery of the negroes both Rives and Peyton were participants in the then existing rebellion against the United States, and they and the negroes were residents of Albemarle County in the State of Virginia, which were designated in the proclamation among the States and parts of States the people of which were in rebellion against the United States, and the negroes were there held as slaves, and were by the proclamation ordered and declared to be thenceforward free, and therefore, at the time of the contract, sale, and delivery, were free persons; that before the demand of payment, or the institution of this suit, and by action of the sovereign authority and government of the United States and of the State of Virginia, and by the amendments of the Constitutions of the United States and of the State of Virginia, slavery in Virginia had been abolished, and these negroes had been made, recognized, and declared to be free persons; that afterwards Peyton, in pursuance of the proclamation, was, by the authority and power of the executive government of the United States, including the military and naval authorities thereof, wholly deprived of these negroes; that by reason of the premises the warranty of title was broken, and the consideration of the bonds failed; that the contract, sale, and delivery were in direct contravention of the policy of the government of the United States, as manifested by the proclamation, and it had become unlawful to make or to enforce in the courts of the United States, or of the State of Virginia, any contract of the plaintiff's testator whereby these negroes had been or were treated or dealt with otherwise than as free persons; that the plaintiff's testator, being one of the persons included in the offer of amnesty and pardon contained in the proclamations of the President of the 8th of December, 1863, and the 29th of May, 1865, had accepted the same upon the terms and conditions therein set forth, and had taken the oaths therein prescribed, and had also received from the President a special pardon upon the

same conditions; and that upon each of these grounds the plaintiff could not maintain this action.

The defendant also filed a notice "that on the trial of this cause he will insist upon his right to have the bonds sued upon scaled according to the provisions of chapter 138 of the Code of Virginia (edition of 1873) as bonds which were either, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate State treasury notes, or were entered into with reference to such notes as a standard of value."

The plaintiff joined issue on the first and second pleas, and demurred to the twenty-five special pleas. The court overruled the demurrer to the declaration, and sustained the demurrers to the special pleas.

At the trial of the issues of fact the plaintiff introduced evidence tending to prove the allegations of the declaration, and that at and ever since the date of the demand in writing, in August, 1866, the bankable currency of Virginia consisted wholly of United States notes commonly called greenbacks and of national bank notes, which have always been of about equal value in their relations to gold.

The defendant offered evidence tending to prove the following facts: "1. That Confederate currency was the only currency in circulation in Virginia in December, 1863, or January, 1864. 2. That in December, 1863, the value of gold in relation to such currency was as 20 to 1, and in January, 1864, as 19 to 1. 3. That of the thirty-three slaves sold by George Rives to George L. Peyton, one woman and her two children were scrofulous, and another woman a cripple; and that in December, 1863, and January, 1864, the said thirty-three slaves were not worth in Richmond, Virginia, in Confederate currency, as much as $45,000; and that they were worth less in Albemarle, where they were sold, than in Richmond. 4. That such a lot of slaves, before the late war, even when the price of slaves was at its highest, would not have been worth more than $8,000 or $9,000. 5. That in December, 1863, and in January, 1864, all Confederate currency in circulation was bankable. 6. That as early as the fall of 1863 there was a general expectation among the people of Virginia that the Confede-

rate Congress would adopt measures to reduce the volume of Confederate money, and that the value of such money would be thereby much increased. 7. That in point of fact the Confederate Congress, in February, 1864, did pass a law taxing to the extent of 33⅓ per cent all Confederate currency which should not be invested in 4 per cent Confederate bonds, on or before the 1st of April, 1864; the effect of which law was to depreciate still further the value of Confederate currency then in circulation; and that after the 1st of April, 1864, the Confederate money issued prior thereto ceased to be bankable. 8. That in December, 1863, and January, 1864, slaves were not being sold at all for gold. 9. That about the same time Tucker Coles, of Albemarle, living five or six miles from George Rives, owned about two hundred slaves, mechanics and field hands, and averaging in value better than the slaves of George Rives; that he tried to sell a large number of said slaves at $50 a head, in gold, but could not; and that he would have sold them at $30 a head, in gold, had it been offered to him. 10. That all of the slaves purchased of George Rives by George L. Peyton perished as property on his hands at the close of the war. 11. That in August, 1866, the premium on gold as compared with national currency was 49 per cent; in August, 1867, it was 41 per cent; and in August, 1868, 45 per cent; and that at this time such premium is only ½ of 1 per cent."

To the introduction of each and every part of this evidence the plaintiff objected, and moved the court to exclude the same: "1st, Because the contract sued upon is in writing, and its meaning free from ambiguity, obscurity, or uncertainty of any kind, and cannot therefore be explained, added to, or in any manner varied by parol evidence. 2d, Because the evidence offered does not come within the scope or meaning of the statute of Virginia in reference to Confederate contracts, which was intended to apply only to contracts for the payment of dollars in general, and not to those in which the kind of dollars is specifically expressed, or becomes certain by some event or contingency mentioned in the contract. 3d, Because if, according to the true interpretation of the Virginia statute just referred to, it makes parol testimony admissible to explain, add to, or in any manner vary a contract in writing entered into

prior to its enactment, and which is in no way ambiguous or uncertain, then the statute is a violation of the Federal Constitution, because it not only impairs but destroys the obligation of the contract, making a new one in its stead. 4th, Because the evidence is irrelevant, since if all the facts which it legitimately tends to prove were admitted they would show no defence."

But the court overruled the plaintiff's objections, and admitted the evidence, and to the ruling admitting it the plaintiff excepted.

The plaintiff asked the court to instruct the jury as follows: "*First*, If they find that the contract in writing between George Rives and George L. Peyton, dated the 5th of December, 1863, and given in evidence by the plaintiff, is the contract referred to in the bonds sued on, then the contract and bonds are to be construed together, and, so construed, they import in themselves, not a contract to be paid absolutely in Confederate money, or any other specific currency, but a contract of hazard, that is to say, a contract payable in whatever currency should be bankable at the respective dates when the obligors were bound to pay said bonds, that is to say, on the 30th of August, 1867, as to the smaller bond, and the 30th of August, 1868, as to the larger bond. *Second*, If the jury find that the contract of the 5th of December, 1863, and two bonds of the 1st of January, 1864, given in evidence by the plaintiff, contain the true understanding and agreement of the parties as to the currency in which said bonds were to be paid; that more than two years before the institution of this suit George Rives demanded payment of said bonds of each of the obligors therein, and in the mode agreed upon; that at the time of said demand, and ever since, bankable currency in Charlottesville and throughout Virginia consisted wholly of national bank notes and greenback notes of the United States government, and that these have always been equal in their relation to gold, — then the jury must find for the plaintiff the face amount of the bonds, less the one year's interest credited thereon. *Third*, there is no evidence in the case to warrant the jury in finding that there was any other agreement or understanding between the parties, as to the kind of currency in which the bonds were

to be paid, than that which is contained in the written contract and bonds themselves."

But the court refused to give the instructions requested, or either of them, and instructed the jury as follows: "If the jury find from the evidence that George Rives and George L. Peyton, on the 5th of December, 1863, entered into the agreement offered in evidence, and in pursuance thereof, and in accordance with its terms, Rives delivered the negroes to Peyton, and the bonds sued on were given, on which the defendant's intestate was surety, then the plaintiff is entitled to recover the amount stipulated to be paid in said writings obligatory in the currency of the United States at its value at the time the same fell due according to their tenor and effect, unless the jury find, from the evidence in the cause, that the said writings obligatory were at the time made and understood by the parties thereto to be made payable in Confederate money. And if the jury find from the evidence that the said bonds or writings obligatory were made in reference to Confederate currency, then the plaintiff is entitled to recover the amount stipulated to be paid in such bonds, at the value of Confederate money compared with national currency at the time of the making thereof, with interest from the time said bonds according to their tenor and effect became payable. But if the jury find from the evidence that the bonds and contract offered in evidence were made in view of the uncertainty of the value of the then or future bankable currency of the place of payment, and that each party, in entering into the contract, took the risk of what money should be current at the time for payment of said bonds according to the tenor and effect thereof, then the plaintiff, if the jury find that the parties executed the contract offered in evidence, and the bonds offered in proof in pursuance thereof, is entitled to recover the sum nominated in said bonds in national currency at the time the same became due, with interest thereon."

The plaintiff excepted to the refusal to give the instructions requested, and to the instructions given, upon the same grounds on which he had objected to the admission of the evidence offered by the defendant.

The jury, by their verdict, "find for the plaintiff on the

issues joined, and assess his damages at $1,000, with interest at the rate of six per cent per annum from the 1st of January, 1865, till paid, that being the scaled value as of the 1st of January, 1864, of the nominal amount of the bonds sued on, less the one year's interest thereon;" and the court gave judgment for the plaintiff accordingly. He thereupon sued out the writ of error.

Mr. E. R. Watson and *Mr. William W. Crump* for the plaintiff in error.

Mr. S. V. Southall and *Mr. William J. Robertson* for the defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

It is settled by the decisions of this court that a contract, made within the so-called Confederate States during the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown, by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in Confederate currency; and that if that fact is shown, in an action upon the contract, no more can be recovered than the value of that currency in lawful money of the United States. *Thorington* v. *Smith*, 8 Wall. 1; *The Confederate Note Case*, 19 id. 548, 559; *Wilmington & Weldon Railroad Co.* v. *King*, 91 U. S. 3.

By the bonds in suit the obligors promise to pay "on demand, or" (in the first bond) "twelve months," and (in the second bond) "two years thereafter, at the option of the obligors," eight thousand and twelve thousand dollars respectively, "in the bankable currency of the day, according to the agreement of the 5th December last." In the agreement so referred to, which is a contract for the sale of slaves, that part of the price which is to be paid on the delivery is clearly expressed to be "the sum of twenty-five thousand dollars in bankable Confederate currency;" and the agreement, upon its face, affords strong ground for inferring that "the further sum of twenty thousand dollars to be paid in twelve months after call," and as to which the seller covenants not to call for specie, but to be satisfied with the "bankable currency of the

day," is also to be paid in Confederate currency, and that the effect of this clause is not varied by the omission to repeat therein the word "Confederate," the use of which, in the previous as well as in the subsequent part of the agreement, shows the kind of bankable currency which the parties to the agreement, and to the bonds that refer to it, had in mind. And a consideration of the nature of the agreement, and of the circumstances under which it was made, removes all doubt upon the subject.

It was a contract for the sale and purchase of slaves, made and to be performed in, between parties residing in, that part of the State of Virginia from which the authority of the national government was excluded by the rebel armies, and was made after the Proclamation of Emancipation issued by the President of the United States had declared all slaves in that district to be free. If the so-called Confederate States should achieve independence, the money of the United States would be the money of a foreign country. If the national authority should be re-established over the insurgent districts, the slaves, for part of the price of which the payment was to be made, would be free, in fact and in law, and be wholly lost to the purchaser. In view of either alternative, the parties cannot reasonably be held to have contemplated payment in any other currency than that of the Confederate States.

That part of the evidence introduced by the defendant, of the competency of which, in the light of the decisions in *Thorington* v. *Smith* and in *The Confederate Note Case*, above cited, there can be no question, leads to the same conclusion. It tended to prove that, at the time and place of the making of the agreement and of the bonds, the only currency in circulation or bankable was Confederate currency, the value of that currency in relation to gold was as one to nineteen or twenty, slaves were not being sold at all for gold, and these slaves were not worth more than the stipulated price computed in Confederate currency, and would never, even before the war, have been worth more than a fifth of that price in gold.

The competency of the evidence as to the popular expectation of an increase in the value of Confederate currency, and

as to the price at which another person would or could have sold other slaves, is much more doubtful, and need not be considered, inasmuch as it was not specifically contested at the argument, probably because its exclusion could not vary the result, so long as the evidence which we hold to be competent is admitted.

The facts of the case clearly distinguish it from *Gavinzel* v. *Crump* (22 Wall. 308), and bring it within that class of cases in which the Court of Appeals of Virginia has held contracts made during the war to be payable in Confederate currency only. See *M'Clung* v. *Ervin*, *Hilb* v. *Peyton*, *Bowman* v. *McChesney*, and *Calbreath* v. *Virginia Porcelain Co.*, 22 Gratt. (Va.), 519, 550, 609, 697.

For these reasons, we are all of opinion that the parties to the bonds in suit contemplated payment in Confederate currency; and it is immaterial to consider whether, by reason of the option given to the seller in the original agreement, and to the obligors in the subsequent bonds, the value of that currency should be estimated as of the date of the bonds, or as of the date of the demand of payment, because the earlier estimate, upon which the instructions of the court and the verdict of the jury proceeded, is the more favorable to the plaintiff.

As no error prejudicial to the plaintiff is shown in the rulings and instructions of the court, and as the defendant has not and could not have brought a writ of error, it would be extra-judicial to pass upon the further position of the defendant, that the bonds sued on have no legal validity or effect.

Judgment affirmed.

SCOVILL *v.* THAYER.

1. Certificates of stock of an incorporated company issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities, of a holder of authorized stock.
2. He is not estopped to set up the invalidity of such unauthorized stock as a defence to an action by creditors against him, to recover the balance unpaid thereon, by the fact that he attended the meeting at which it was voted to issue the same, or that he received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock.
3. When the company which issued stock beyond such limit has been adjudicated bankrupt, the holder of the unauthorized stock is not entitled to have the money paid thereon applied as a credit on the unpaid balance due on his authorized stock.
4. Subscribers to the stock of an incorporated company paid twenty per cent on their shares, and entered into an agreement with the company that no further assessments should be made thereon, and certificates for full-paid shares were issued to them. The company was adjudicated a bankrupt, and to satisfy the claims of its creditors it became necessary to assess the unpaid stock. *Held*, 1. That the agreement was in equity void as to creditors. 2. That before an action at law can be maintained by the assignees in bankruptcy against a stockholder to recover upon his unpaid subscription of stock, some proceedings in the interest of creditors are necessary in a court of competent jurisdiction, to set aside the agreement, and to make an assessment upon such unpaid stock. 3. That until an order of such court to that effect, and an assessment, or some authorized demand upon the stockholder to pay the balance due on his stock, no cause of action accrues against him in favor of the assignees, and the limitation prescribed by the second section of the Bankrupt Act does not begin to run in his favor.

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

On Nov. 25, 1870, the Fort Scott Coal and Mining Company was organized as a corporate body under the General Laws of the State of Kansas, with a capital stock of $100,000.

According to the laws of that State, any corporation might increase its capital stock to any amount not exceeding double its authorized capital.

Under the provision of this law the corporation, on April 19, 1871, increased its capital stock from $100,000 to $200,000. On Oct. 16, 1872, the corporation attempted, by taking the steps required by law for the lawful increase of stock, to increase its capital stock to $300,000, and on Dec. 27, 1872, to

make a further increase of $100,000. The nominal capital was thus raised to the sum of $400,000.

Nathaniel Thayer, the defendant in error, who was a holder of shares in the company, attended by proxy the meetings of the stockholders at which the third and fourth issues of stock were voted. After this attempted increase of the stock, the officers and agents of the company, by advertisements, bill-heads, and verbally, represented that its capital stock was $400,000.

Thayer was the holder of two hundred and eighty-five shares of the first two issues of stock. On two hundred of these shares he had paid to the company $20 per share, and on the remaining eighty-five he had paid $40 per share. He was also the holder of five hundred and eighty-five shares of the third and fourth issues, upon which he had paid the company $50 per share. No other payments were ever made by him on his shares of stock.

The other stockholders paid the same amounts on the shares of stock of the several issues held by them respectively. By agreement made at the date of the several issues of stock the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full-paid shares were delivered to the subscribers, and the stock account between the company and them balanced by such "discount."

On April 2, 1874, a petition in bankruptcy was filed against the company in the United States District Court for the District of Kansas. The company was adjudicated a bankrupt on the eleventh, and the plaintiffs in error were appointed its assignees on the twenty-ninth day of that month. On March 31, 1876, the assignees filed their petition in that court, wherein they prayed for an order directing them to make an assessment and call upon the unpaid stock of the company for the purpose of paying its debts.

In their petition the assignees represented as follows: "At the date of adjudication in bankruptcy the affairs of said company were in a very embarrassed and complicated condition, and much time has been necessarily consumed and considerable expense incurred in opposing claims attempted to be estab-

lished in said bankrupt court for failures on the part of said company to comply with contracts made by it. Many fraudulent claims for large amounts have been filed against said bankrupt, requiring time to oppose and defeat, which have been defeated. The litigated claims are now reduced to a small number, not covering more than ten thousand six hundred and one dollars and eighty cents. The property of the company on hand at the date of adjudication in bankruptcy has been disposed of as rapidly as seemed conducive to the interests of all concerned. The sale of a portion of the real estate has been delayed in the hope that the demand for land would increase, and your petitioners realize something out of it for the benefit of the creditors. Your petitioners believe, however, that any further delay in the disposal of the bankrupt's property would not be advantageous.

"Your petitioners had intended before making this application to have fully closed up the contest over litigated claims, disposed of assets of the company, and collected all its bills receivable, but find it is impossible to accomplish it without a longer postponement than is convenient or expedient."

The petition further averred that "the amount of the liabilities of the bankrupt over and above the assets is $124,684, while the amount yet due and unpaid on the stock held and owned by said stockholders is $222,650."

By an amendment to their petition, the assignees represented as follows: "That an assessment of seventy-six per cent upon the par value of each share of stock in said company, if credited with the amount paid each stockholder heretofore, would equalize the burden upon the stockholders, and also bring into the hands of your petitioners a sufficient amount to pay the debts of the company."

Upon the filing of this petition, the court made an order that all the stockholders of the bankrupt company show cause on April 21, 1876, why the assessment and call prayed for in said petition should not be made, and that the assignees cause a copy of the order to show cause to be mailed to each stockholder at his usual place of residence and address, and also give notice by publication in the "Fort Scott

Daily Monitor," for at least ten days before the said April 21, 1876.

By order of the court, the hearing of the rule was postponed to June 10, 1876. R. S. Watson, a stockholder, had in the mean time filed exceptions to the rule, on behalf of himself and all other stockholders desiring to avail themselves thereof. On the date last named, the petition and amended petition of the assignees, and the exceptions thereto, came on for hearing, whereupon the court overruled the exceptions, and decreed that an assessment and call be made upon the stock of the company of seventy-six per cent, upon which should be credited to each stockholder any sums paid by him on his shares, and that the sum so assessed should be paid to the assignees on or before Aug. 1, 1876, and in default of payment they were directed to sue for and collect the same.

On July 17, 1876, the assignees made an assessment and call as authorized by the order and decree of the District Court, and gave notice thereof to the stockholders; but before the assessment could be collected, Watson, the stockholder before mentioned, filed with the circuit judge a petition for the reversal of the order and decree of the District Court authorizing the assessment and call.

It does not appear from the record upon what day this petition was filed. But on Dec. 4, 1876, the decision of the circuit judge thereon was transmitted to the District Court, affirming its decree, "with this modification: that the said District Court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock in ninety days from this twenty-ninth day of November, 1876, a credit on his or her proportion of the amount so assessed as was included in said assessment for the purpose of paying the costs of enforcing by suit the collection of said assessment."

The District Court, on Dec. 4, 1876, entered a decree in conformity with the order of the circuit judge.

Thayer having failed to pay within the time limited by the court the assessment made upon him on account of his stock, although served with notice to do so, the assignees, on April 9, 1877, brought against him, in the Circuit Court of the United

States for the District of Massachusetts, an action at law to recover the sum of $27,160, the amount of the assessment on his unpaid stock.

The declaration alleged in substance the facts above recited.

The defendant filed two pleas, the first of which was a general denial of the allegations of the declaration, and the second set up the limitation of two years prescribed by sect. 2 of the act of March 2, 1867, c. 176, and now embodied in the Revised Statutes as sect. 5057.

The case was submitted to the Circuit Court upon an agreed statement of facts. The court found for the defendant, holding, in an opinion which appears in the record, that the cause of action was barred by the limitation of two years pleaded. Judgment was, therefore, rendered for him. The plaintiffs below brought the case here, and assign for error the ruling upon the Statute of Limitations and the rendition of the judgment for defendant.

Mr. J. E. McKeighan and *Mr. A. A. Ranney* for the plaintiffs in error.

Mr. Sidney Bartlett, *Mr. William G. Russell*, and *Mr. George Putnam* for the defendant in error.

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

The averments made in the declaration were substantially supported by the agreed statement, and there should have been judgment thereon for the plaintiffs, unless, upon the facts as disclosed, they were shown not to be entitled to a recovery on the merits, or unless the Statute of Limitations was a bar to the action.

The defendant insists, *first*, that the third and fourth issues of stock, which were made after the limit had been reached, within which the amount of capital stock of the company was restricted by the laws of Kansas, were absolutely void, and no assessment could be made on them which he was bound to pay; *secondly*, that the sums voluntarily paid by him upon his void stock should be applied to the payment of the balance due on his valid stock, and that when so applied they

would fully satisfy the assessment thereon; and, *thirdly*, that in any event the facts sustained the plea of the Statute of Limitations. We shall consider these contentions in the order stated.

The Constitution of Kansas forbids special charters. Art. 12, sect. 1. All corporations in that State are, therefore, organized under general laws. The Fort Scott Coal and Mining Company was organized under the general law of the State, which, with its articles of incorporation, that were required to be filed with the secretary of state, constituted its charter. By those articles the original stock of the company was fixed at $100,000. Chap. 23, sect. 14, of the Statutes of Kansas provides that "any incorporation may increase its capital stock to any amount not exceeding double the amount of its authorized capital." The second issue increased the stock to $200,000, which was the limit prescribed by the charter. The question, therefore, is whether the stock of the third and fourth issues, by which the aggregate amount was raised to $400,000, is or is not void.

As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties. *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Salomons* v. *Laing*, 12 Beav. 339; *Eastern Counties Railway* v. *Hawkes*, 5 H. L. Cas. 331.

And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void. *Mechanics' Bank* v. *New York & New Haven Railroad Co.*, 13 N. Y. 599; *New York & New Haven Railroad Co.* v. *Schuyler*, 34 id. 30; *Railway Company* v. *Allerton*, 18 Wall. 233; *Stace & Worth's Case*, Law Rep. 4 Ch. App. 682, note.

In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The increased stock itself was, therefore, void. It conferred on the holders no rights and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a

contest between them the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights, he can be subjected to none of the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration and cannot be enforced.

It is insisted, however, that the defendant having attended by proxy the meetings at which the increase of the stock beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of $400,000, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full.

We think that he is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton* v. *Tribilcock*, 91 U. S. 45; *Chubb* v. *Upton*, 95 id. 665; *Pullman* v. *Upton*, 96 id. 328. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant.

But here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation. "A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company has no power to issue, in truth had nothing at all, and are not

contributors." 2 Lindley, Partnership, 138. And see *Lathrop* v. *Kneeland*, 46 Barb. (N. Y.) 432; *Mackley's Case*, 1 Ch. D. 247.

In *Stace & Worth's Case* (*supra*) it appeared that there was an agreement for the amalgamation of the London Northern Insurance Corporation and the Life Investment Mortgage Insurance Company, the two corporations to be formed into one, under the name of the corporation first mentioned. The corporation was to issue shares in exchange for those held in the company, and the amalgamated board was to consist of the five directors of the corporation, and of seven of the directors of the company, to be selected by themselves. After the amalgamation Stace and Worth, it was alleged, received and accepted certificates for shares in the corporation in exchange for their shares in the company, and they with five others were appointed directors of the corporation. Afterwards a resolution was passed for voluntarily winding up the corporation, and the names of Stace and Worth were placed upon the list of contributors. An application to have their names removed from the list was made to Vice-Chancellor James, who, after hearing the case argued, directed their names to be removed. This was done on the ground that the agreement for amalgamation was beyond the powers of the corporation, and, therefore, void. In giving the reasons for his decision he said: "It is, however, contended that notwithstanding the agreement itself was *ultra vires* and void, yet there are personal acts and things personally affecting these two gentlemen which render them still liable as shareholders." These were the acceptance of shares by Stace and Worth, the fact that their names appeared on the register of shareholders, and that they had sat as directors of the corporation after the attempted amalgamation. But he declared: "This was a void agreement with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders."

So in *Zabriskie* v. *Cleveland, Columbus, & Cincinnati Railroad Co.* (23 How. 381), this court, after holding the railroad

company to be liable on certain bonds which it was alleged had been indorsed by the directors without lawful authority, added: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization."

Upon the principles stated in these authorities, we are of opinion that the defendant is not estopped by any acts of his, to assert the invalidity of the stock issued in excess of the limit authorized by the charter, and to deny his liability thereon.

It would seem to follow that if he is not estopped by his own acts, he is not by the acts of the agents of the Fort Scott Coal and Mining Company, in representing the company, by advertisements and otherwise, as having a capital of $400,000.

The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. *Zabriskie* v. *The Cleveland, Columbus, & Cincinnati Railroad Co.*, *supra*. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false.

As forcibly suggested by counsel, a creditor, who has been defrauded by misrepresentation of the real capital of the company, has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it.

We are of opinion, therefore, that the defendant is not estopped by the acts of the agents and officers of the company to allege the nullity of the overissue stock, and his nonliability to an assessment on such void stock.

The next question for our consideration is whether he is

entitled to offset against his liability to pay the sum due on his valid stock, the money paid on his void stock.

It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation in a suit by an assignee in bankruptcy. *Sawyer* v. *Hoag*, 17 Wall. 610; *Sanger* v. *Upton*, 91 U. S. 56; *Scammon* v. *Kimball*, 92 id. 362; *County of Morgan* v. *Allen*, 103 id. 498.

The ground upon which this rule stands is thus stated by Mr. Justice Miller in *Sawyer* v. *Hoag*: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging in equity to all its creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

The defendant seeks to avoid the application of this rule to his case, on the ground that the real capital of the company was only $200,000, and this constituted the trust fund for the security of the debts of the company; that all the money that had been paid in as capital stock had been paid into that fund, and that the party paying any money to that fund was entitled to credit upon his dues thereto.

We cannot assent to this view. He was as much bound to know the limits of the charter of the company in which he was a stockholder, as the public or creditors of the company. He knew, therefore, that all stock issued beyond the limit fixed by the charter was absolutely void. When he paid in his money on the void stock, he knew that he was not paying it on the valid stock, and he is presumed to have known that it was not a good payment on the valid stock. The company had no right to apply it on the valid stock, without his direction. He never directed such application, and it remained in the possession of the company until the rights of the assignees in bankruptcy attached. To say that it was a contribution to the trust fund devoted to the payment of the creditors of the company is an entire misapprehension. It could not be such contribution unless it were a payment on the stock, and this,

we have seen, was not the case. No call had been made for payment on the valid stock, to which the amounts paid on the void stock could be said to apply. No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors, and it does not appear that when the payments were made the company had any creditors. It was a voluntary payment for the benefit of the company, and tended to increase the value of the authorized stock. In that way the stockholder got the benefit of it. There is no rule of law or equity which entitles him, in a contest between himself and a creditor of the company, either to receive a credit for it on his unpaid stock, or to have it repaid to him *pro rata* out of the assets of the company. We are of opinion, therefore, that it could not be offset against the money due on the valid stock held by him.

We are next to consider whether, upon the facts as disclosed by the record, the defence of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, When would this action at law, brought by the assignees of the bankrupt company against a stockholder, to recover a part of the balance due on his stock, be barred by the statute?

This will depend on the answer to the question, When did the cause of action accrue to the assignees? In other words, When could they have commenced this action against this defendant to recover the amount due on his stock? *Wilcox* v. *Plummer's Ex'rs*, 4 Pet. 172; *Amy* v. *Dubuque*, 98 U. S. 470.

The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter.

If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock, which had been satisfied "by discount" according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company.

In fact, it has been held in recent English cases that not only is the company but its creditors also are bound by such a contract. *Waterhouse* v. *Jamieson*, Law Rep. 2 H. L. (Sc.) 29; *Currie's Case*, 3 De G., J. & S. 367; *Carling*, *Hespeler*, *and Walsh's Cases*, 1 Ch. D. 115.

But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. *Sawyer* v. *Hoag*, *Assignee*, 17 Wall. 610; *New Albany* v. *Burke*, 11 id. 96; *Burke* v. *Smith*, 16 id. 390.

The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood* v. *Dummer*, 3 Mas. 308; *Mumma* v. *Potomac Co.*, 8 Pet. 281; *Ogilvie* v. *Knox Insurance Co.*, 22 How. 387; *Sawyer* v. *Hoag*, *supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance require it to be paid.

In this case the managers and agents of the bankrupt company had in effect represented to the public that all its capital stock had been subscribed for, and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the company and its stockholders was this, namely, that the stockholders should pay, say, for example, twenty dollars per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when the necessity arose and the amount required

was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

When the company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock, which, with the other assets of the company, would be sufficient to satisfy the company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the company and not to the stockholders. And we have seen that the company in this case would have no right to any surplus.

The question for solution is, therefore, When, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. *Curry* v. *Woodward*, 53 Ala. 371; *Robinson* v. *Bank of Darien, &c.*, 18 Ga. 65; *Ward* v. *Griswoldville Manufacturing Co.*, 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. *Van Hook* v. *Whitlock*, 3 Paige (N. Y.), 409; *Salisbury* v. *Black's Adm'r*, 6 Har. & J. (Md.) 293; *Sinkler* v. *The Turnpike Company*, 3 Pa. 149; *Walter* v. *Walter*, 1 Whart. (Pa.) 292; *Quigg* v. *Kittredge*, 18 N. H. 137; *Nimmo* v. *Walker*, 14 La. Ann. 581.

In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the

creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes: first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which he should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

It appears from the petition of the assignees for an assessment upon the stock of the bankrupt company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court, and the stockholders were required to pay it, the action was brought long before the limitation of the statute could bar it.

All the delay which has occurred has been caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the court and to the opposition of the stockholder referred to. It does not lie in the mouth of the defendant to say that, while the steps necessary to fix his liability and limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether.

The cases cited by the defendant to sustain his contention, that the cause of action accrued to the assignees in bankruptcy at the time of their appointment, are clearly distinguishable from this. In *Terry* v. *Tubman* (92 U. S. 156), the suit was by a bill-holder of an insolvent bank against a stockholder to enforce the individual liability of the latter to pay the bills of the bank held by the former. The court decided that the case was not so much like that of the guarantee of the collection of a debt, where a previous proceeding against the principal is implied, as it was like a guarantee of payment where resort may be had at once to the guarantor, without a previous proceeding against the principal. The conclusion of the court, therefore, was that the cause of action in favor of the bill-holder arose against the stockholder when the bank ceased to redeem its notes and became notoriously and continuously insolvent. It is clear that this authority has no application to the question in hand.

The case of *Terry* v. *Anderson* (95 U. S. 628), also relied on by the defendant, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the Statute of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

In *Baker* v. *Atlas Bank* (9 Metc (Mass.), 182), and *Commonwealth* v. *Cochituate Bank* (3 Allen (Mass.), 42), also relied on by the defendant, it appeared that upon suspension of payment by the banks there was a present and unconditional liability of their stockholders, which the court held was barred by the limitation of six years. In the case of *Baker* v. *Atlas Bank* the court said: "The demand sought to be enforced in this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock an action accrued to the bank, according to the construction of the thirtieth section (Rev. Stat., c. 36), which is contended for by plaintiff's counsel to recover the sum from the stockholders respectively, equal to each one's share of stock. The statute, therefore, began to run in strictness immediately on the loss of the capital stock, and certainly when the bank stopped payment, and after the lapse of six years from that time the debt was barred."

But in the present case, as we have seen, there was, as between the company and its stockholders, no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the necessity for the payment had been ascertained, and an authorized demand of payment made.

It is said by the defendant that to hold that the suit to recover the sums due on the stock held by him is not barred would defeat the policy of the Bankrupt Act, which is a speedy settlement of the bankrupt's estate and the equitable distribution of his assets among the creditors.

Unquestionably a prompt administration of the bankrupt's assets was one of the ends which that act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day, he could not be compelled to pay it before maturity in order that the estate

might be speedily settled. So if some act must be done by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional liability to pay something is fastened on the debtor no action can be maintained against him, and the Statute of Limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor, and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty. If he fails to do it he is subject to the order of the bankruptcy court, which, at the instance of those interested, can compel him to act.

Our opinion is, therefore, that this action at law, prosecuted by the plaintiffs, assignees in bankruptcy of the Fort Scott Coal and Mining Company, against the defendant, to recover from him the balance due on his unpaid valid stock in said company, was not barred by the limitation of two years prescribed by the Bankrupt Act.

For the error in holding that the action was barred, the judgment of the Circuit Court must be reversed, and the cause remanded with directions to award a

New trial.

MR. JUSTICE FIELD and MR. JUSTICE GRAY dissented.

BANTZ *v.* FRANTZ.

1. Reissued letters-patent No. 4731, granted Feb. 6, 1872, to Gideon Bantz for an improvement in boiler furnaces for burning wet fuel, are void, inasmuch as the specification and claim attached to the original letters No. 26,616, which bear date June 22, 1858, were confined to a combination therein described, whilst the reissued letters cover the several elements of that combination as distinct inventions.
2. If the first specification was defective in not asserting a separate claim for each device, the right of the patentee to make the requisite correction was forfeited by his delay and laches. *Miller* v. *Brass Company* (104 U. S. 350) cited upon this point and reaffirmed.

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

On June 22, 1858, there was issued to Gideon Bantz, the appellant, who was complainant in the court below, an original patent of that date "for an improvement in furnaces for heating steam-boilers." On Feb. 6, 1872, Bantz obtained a reissue, and on June 22, 1872, an extension for seven years of his reissued patent.

The bill in this case was filed by him on May 4, 1876, to restrain infringement by the defendant, David Frantz, of the extended reissue.

The answer denied the novelty and utility of the invention, denied infringement, and asserted the invalidity of the reissue.

The Circuit Court dismissed the bill, and the case is brought here by the complainant.

The specification of the original patent declared: —

"The object of this invention is the more perfect combustion of tan, sawdust, bagasse, and all other kinds of refuse fuel in a wet or dry state, as well as of wood or coal. It is, however, with particular advantage to the burning of wet fuels. My invention consists in the arrangement embracing, for united use in the manner and for the purposes hereinafter specified, the following features, to wit:

"First, two or more arched fire-chambers, with throats of less area than their capacity; second, an auxiliary combustion reservoir or chamber, with *cima-reversa* shaped bottom and side draft-door; third, a series of reverberatory chambers, with side draft-doors and

passages at top for communication with each other; and, fourth, a diving or direct flue leading into the chimney or smoke-stack.

"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

"A A are two arched fire-chambers, arranged side by side furnished with grates *a a*, having ash-pit B B provided below the said grates. These fire-chambers are not placed below the boiler, H, but directly in front thereof, and longitudinally therewith. They may, however, be placed at one side of the boiler or at any angle to it. Each is provided with the usual door *b*, but these are only used for lighting the fires; and the ash-pits are provided with doors *c* to regulate the supply of air through the grates, and permit the cleaning out of ashes. On the top of each chamber there are feeders *d d* for supplying the fuel, but as these feeders are the same as used in other furnaces, no particular description of them is necessary. The fire-chambers are covered with a flat floor built over the arches, that the fuel may be wheeled to the feeders in barrows, or brought in any other convenient manner. At the rear end of each fire-chamber there is a throat-like aperture *e* communicating with what I term the reservoir C, which is built of brick, lined with fire-brick, under the front portion of the boiler, and which has a concave bottom *m* and convex back *n*, which are formed by a *cima-reversa* shaped plate. By having the bottom and back of the reservoir formed by a *cima-reversa* shaped plate, the throat *e* is not partially closed up, as it would be if the plate was straight and set inclined, and, beside this, the heated products of combustion are made to hug the bottom of the boiler, and as the draft is at this point, the perfect combustion of partially ignited gases is insured. The convex back of the reservoir terminates in and serves as a bridge-wall, and has a concave top so formed as to leave a space, *o*, of but three or four inches between it and the boiler.

"The purpose of the reservoir will be presently explained. In rear of the bridge-wall *f* there is a series of reverberatory-chambers D D D, two, three, or more, one behind the other, the series extending nearly as far as the rear end of the boiler, and the said chambers being severally separated by bridge-walls, *g g*, and each chamber being provided with one or more doors *h*, in either or both sides, for the purpose of admitting air in sufficient quantities either to complete the combustion of the gases from the fire-chambers or to check the draft. The reservoir is furnished with a door h^1, for a similar purpose as those *h h* in the reverberatory-chamber. At the rear of the hindmost reverberatory-chamber there is a wall g^1, like

g g, behind which there is a diving or drop flue E leading to the chimney.

"The operation of the furnace is as follows: The gaseous products of the combustion in the fire-chamber A A escape by the throats *e e* into the reservoir C, where they mingle together, and the combustible portion thereof becomes ignited, and where their heat acts upon the boiler, and from whence they pass into one after another of the reverberatory-chambers, in each of which a portion of their heat is abstracted by contact with a portion of the boiler, and finally they descend the flue E to the chimney. The effect of the principal portion of my improvement, which consists in the employment of the reservoir C, connected with the fire-chambers by the throats *e e*, of much smaller transverse area than the fire-chamber, is that the products of combustion and heat are prevented leaving the fire-chamber too rapidly, and the said chambers are consequently caused to be heated to an intense degree, and a very nearly perfect combustion of the fuel is obtained therein, and when the gaseous products of combustion leave the fire-chambers by the said throats and arrive in the reservoir C, the side walls and curved bottom and back of which are kept at a white heat, the still combustible portion of the gaseous products is ignited under the boiler."

The claim was thus stated: —

"What I claim as my invention, and desire to secure by letters-patent, is: the arrangement of fire-chambers A A, contracted throats *e e*, auxiliary combustion-reservoir C, with the *cima-reversa* bridge-plate *m n*, and the door *h'*, reverberatory-chambers D D, with doors *h h*, and the diving or direct flue E, substantially as and for the purposes set forth."

The description of the invention in the specification of the reissued patent is substantially the same as that in the specification of the original patent. The drawings are identical. In the reissue the invention is called "a new and useful improvement in furnaces for burning wet fuel." The claim is thus set forth: —

"I do not claim a furnace for burning wet fuel, broadly, nor the use of a series of fire-chambers connecting with the common flue, arranged between the furnace and the boiler, as I am well aware that this has been done before.

"Having described my invention, I claim —

"1. In a furnace for burning wet fuels, having two or more single fire-chambers not arranged under the boiler, the combustion-chamber or reservoir C, arranged above the top of said fire-chambers, and located directly under the front end of the boiler, essentially as described.

"2. The *cima-reversa* bottom *m n* of the combustion-chamber or reservoir C, in combination with the narrow throats *e* of the separate fire-chambers, and the narrow exit flue *o* of the bridge-walls *f*, for the purpose essentially as described.

"In combination with the combustion-chamber or reservoir C, arranged and located as described, I claim the side door or doors *h'* for the admission of atmospheric air, for the purpose described.

"4. In combination with a series of fire-chambers, A, and the combustion-chamber or reservoir C, located and arranged directly beneath the front end of the boiler, and above the crown of said fire-chamber, I claim a series of reverberatory-chambers, D, provided with side-doors *h*, and a diving-flue, E, at the rear end of the boiler, to hold the heat beneath the same throughout its entire length, and to arrest and deaden the sparks as described.

"5. In a furnace for burning wet fuels in which the fire-chambers are not arranged under the boiler, I claim the arrangement of the boiler upon the rear wall of the furnace and the rear wall of the diving-flue E, for the purpose of obtaining the full advantage of the heat of the walls of the furnace, and of the diving-flue, as described.

"6. In a furnace for burning wet fuels, having a flat top, and supplied through openings therein, I claim the dead-chambers, arranged between the floor and the arches of the fire-chambers, for the purpose of maintaining the top of the furnace cool for the workingmen as described."

The figures on page 164 were annexed to the specification.

Mr. Arthur Stem for the appellant.

Mr. William A. Maury and *Mr. Lewis N. Dembitz* for the appellee.

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

We are clearly of opinion that the reissued patent is void.

It is evident on a cursory reading of the specification and

claim of the original patent that it was meant to cover a combination of the several contrivances therein described, and not to cover the several elements of the combination as distinct inventions. No claim is made for the several parts of which the furnace is constructed, but for the "arrangement embracing, for united use in the manner and for the purposes specified, the following features," &c.

If the claim had been for the several distinct contrivances of which the furnace is composed, as claimed in the reissue, the original patent would not have been granted, because the evidence in the record shows that at least the sixth claim in the reissued patent, for dead-chambers over the arches of the fire-chambers, was distinctly covered by the patent of Moses Thompson, dated April 10, 1855, for an improvement in burn-

FIG 1.

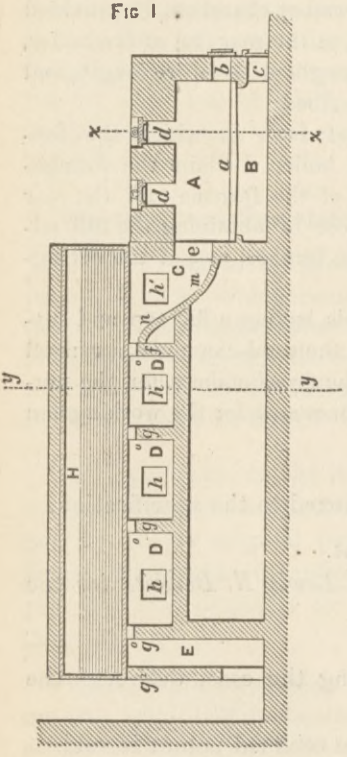


FIG. 2.

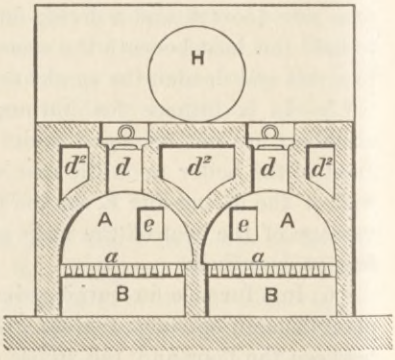
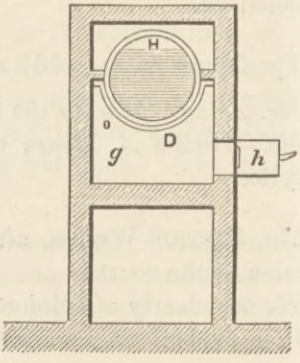


FIG. 3.



ing tan-bark, bagasse, sawdust, or other kinds of fuel in a wet state, for the purpose of creating heat to generate steam, &c. This the drawings accompanying the specification of Thompson's patent clearly show.

It is evident, therefore, that if the appellant had, in his application for the original patent, claimed as his own invention all the distinct devices described in the specification, he could not have obtained his patent in its present form. It could have been only on the ground that his claim was for a combination that it was allowed and the patent issued. *Prouty* v. *Draper*, 1 Story, 568; *Pitts* v. *Whitman*, 2 id. 609; *Prouty* v. *Ruggles*, 16 Pet. 336.

If the reissued patent is valid the appellant could maintain an action against the infringer of any one of the separate claims covered by it. Under the original patent, suit could be maintained only against those who employed the combination embracing all the distinct contrivances described in the reissued patent. The reissue is, therefore, broader than the original patent, and is, under the circumstances of this case, void.

The act of July 8, 1870, c. 230 (16 Stat. 198), was in force when the reissue was granted. Section 53 (Rev. Stat., sect. 4916) declares "that 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."

In this case the original patent bears date June 22, 1858. The reissue bears date Feb. 6, 1872, more than thirteen years and six months after the date, and less than five months before the expiration, of the original patent. If the specification in the original patent was defective or insufficient in claiming a combination of several devices instead of making a distinct claim for every device which entered into the combination, the fact was instantly discernible, even to an unpractised eye, as

soon as the patent was read. Therefore, as said by Mr. Justice Bradley in delivering the opinion of this court in a similar case, *Miller* v. *Brass Company* (104 U. S. 350), if any correction was desired it should have been applied for immediately; the right to have the correction made was abandoned and lost by unreasonable delay. That case is apposite and is conclusive of this.

Decree affirmed.

MR. JUSTICE HARLAN did not sit in this case, nor take any part in deciding it.

RAILROAD COMPANY *v.* ELLERMAN.

1. By its charter and the statutes of Louisiana the city of New Orleans was authorized to erect and maintain wharves within its limits, and to collect wharfage. *Held*, that no right of the city was infringed by a subsequent enactment of the General Assembly of that State granting to a railroad company the authority to enclose and occupy for its purposes and uses a specifically described portion of the levee and batture, and maintain the wharf it theretofore erected on its property within those limits, and exempting it from the supervision and control which the municipal authorities exercise in the matter of public wharves.
2. The question as to whether the company, in constructing, pursuant to such authority, the wharf on its property, and collecting wharfage, acted *ultra vires*, cannot be raised by a claimant under the city who is not a stockholder, and whose rights have not been infringed.

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. John S. Cadwalader and *Mr. Thomas L. Bayne* for the appellants.

Mr. Charles N. Hornor for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The New Orleans, Mobile, and Texas Railroad Company, one of the appellants, and the principal defendant below, is a corporation of the State of Alabama, by the original name of the New Orleans, Mobile, and Chattanooga Railroad Company, which has constructed a line of railroad from Mobile to New

Orleans. It was authorized by its charter "to obtain by purchase or grant from any person or corporation, and afterwards maintain, manage, use, and enjoy, any railroad property, and the appurtenances thereto, or any steamboats, piers, wharves, and the appurtenances thereto, that the directors may deem necessary, profitable, and convenient for the corporation to own, use, and manage in connection with its railroads." Session Acts of Alabama, 1866.

The General Assembly of Louisiana, on Aug. 16, 1868, passed an act which recognized the company as a body corporate, and authorized it to exercise its franchises in Louisiana, and expressly conferred upon it power "to construct, establish, or purchase in the State of Louisiana, and thereafter to own, maintain, and use, suitable wharves, piers, warehouses, steamboats, harbors, depots, stations, and other works and appurtenances connected with and incidental to said railroad and the business of said company, and by the directors of said company deemed necessary and expedient for said company to own and manage."

In 1869 that State further enacted "that the said company, with the consent of the owners of lands fronting on any navigable watercourse, or after such lands have been acquired by the company by purchase, release, donation, or in any other manner, in accordance with the laws of the State of Louisiana, may erect, construct, and thereafter maintain and use wharves, warehouses, depots, or other buildings and structures in and upon the margins, or upon that portion of the margins reserved to public use, of any and all navigable rivers, bayous, or watercourses in the State of Louisiana, wherever the same may be deemed, by a majority of the directors of the company, necessary and requisite for the legitimate and convenient transaction of the business of the company."

On March 6, 1869, the General Assembly of Louisiana passed a joint resolution, having the force of law, granting to the company "the right to enclose and occupy for its purposes and uses, in such manner as the directors of said company may determine, that portion of the levee, batture, and wharf in the city of New Orleans, between the street laid out between Pilie Street and the Mississippi River, and from Calliope Street to

the lower line (about three hundred and fifty-five feet below Calliope Street) of the batture rights owned by said company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf for said company, or any steamships or vessels using said wharf, by and with the consent of said company, and not receiving or discharging cargo at or occupying any other wharf in the city of New Orleans, shall be exempt from payment of all levee and wharf dues to the city of New Orleans. Said wharf shall be maintained and kept in repair by said company." All laws and parts of laws, and all ordinances and parts of ordinances, conflicting with the provisions of the joint resolution were thereby repealed.

At the date of the passage of the joint resolution the company was the owner by previous purchase of the land described in it, and in possession, using it for the purposes of a depot and for other railroad purposes, and as a wharf, appropriate structures having been built for that use. A portion of this property was leased in June, 1875, by the receivers of the railroad, appointed under proceedings to foreclose, for twelve months, at the sum of $7,200, to Roberts and Witherspoon, who were made defendants to the bill, the use and employment of the wharf granted by such lease consisting "in the mooring of vessels coming to the consignment, custody, or care of the parties of the second part (the lessees) or to either of them, and the loading and unloading of cargoes upon all vessels of this kind with the full consent of the parties of the first part, exempt from wharf and levee dues, according to the terms of the said resolution."

The object of the bill filed by Ellerman, the appellee, was to enjoin the execution of this contract, and the use and employment of the wharf described therein in the manner contemplated by it. His claim is based on a contract between himself and the city of New Orleans, entered into June 29, 1875. It purports to be a grant from the city to him, for a term of four years and eleven months from the date of the contract for building and repairing the wharves and levees

according to certain specifications on file, and for the payment of debts contracted on account of them, and for transferring the revenues of the same for the said term, agreeably to the terms of a certain ordinance and resolution of the city, all which are set out in the contract. The specifications state the particulars of the required repairs and extensions of the wharves. The subject-matter of the ordinance is declared to be the sale of "the revenues of the wharves and levees of the city of New Orleans, collectible under existing ordinances upon all ships, vessels, steamships, steamboats, flatboats, and water-craft of any and every description, upon the terms and conditions" therein set forth. The purchaser was to assume certain specified liabilities of the city, connected with the wharves, and it was provided that the sale should be awarded to the bidder who would assume to discharge the obligations set forth, in consideration of the transfer of the revenues assigned, in the shortest time. The purchaser should be subrogated to all the rights and privileges of the city, to sue for and collect the revenues; and it was understood and agreed that "the city only undertakes to transfer only such rights as she possesses, and the purchaser takes the said revenues subject to all the rights now held by other persons by way of lease, privilege, contract, or by law, and the purchaser shall, in reference to them, be subrogated only to the rights of the city." It was provided that the purchaser should take possession of the wharves, landings, and levees in the condition in which the same might be at the time, and should repair the same and keep them in good order and condition during the term stipulated. It was further provided that if, from overpowering force, the city should not be able to protect the transferee in receiving the said revenues, or if they should by any such cause be diminished over one-third, the transferee might, after satisfying all obligations incurred under the contract up to the time, surrender it and be discharged from further responsibility; but the city, it was expressly declared, in nowise guaranteed the payment of the wharfage and levee dues, the collection of which is to be enforced by the transferee at his own cost.

The wharves and levees which constitute the subject-matter

of this arrangement consisted of artificial improvements made at the expense of the city, by grading, and by driving piles which are securely fastened, and covered by a plank flooring, so as to furnish safe and convenient landings and moorings for water-craft, and places for loading and unloading their cargoes. Provision was made not only for keeping in repair the existing works and structures, but the transferee of the revenues was bound to build additional new wharves in certain specified districts of the city, if required to do so, not to exceed a named sum per annum; but if new wharves should be required in other districts by the city council at their own or the request of any other person, the party so desiring them should be bound to pay for the cost thereof, and should be entitled to receive the revenues derived from such wharves during the term of contract with the transferee, unless sooner reimbursed.

The claim of Ellerman is, that the administration of the wharves and levees within the city limits is intrusted by law to the municipal government; that with this administration is coupled a franchise, that the city may charge and receive a reasonable remuneration for the expense of the facilities afforded to commerce; that under this franchise the city expended out of its revenues very large sums on the wharves and levees in permanent works and improvements for the benefit of commerce; that, in consequence, it had a vested right in the franchise and the revenues legitimately derived from these expenditures, of which it could not be divested by an act of the legislature, and that he, by virtue of his contract, is subrogated during its term to the rights of the city.

He further claims that it is a violation of these rights for the defendants to permit the use and employment of their property as a wharf, and to charge and receive wharfage for such use, by and from persons not engaged in conducting the proper business of the company, thus opening a rival wharf business in competition with the city, and him as its lessee; and that if the joint resolution of March 6, 1869, must be construed so as to confer upon the company any such authority, it is null and void, because contrary to that provision of the Constitution of the United States which forbids the taking of private property without due process of law.

It is not claimed that the city has ever used as a public wharf the premises so occupied by the appellants, or made any expenditures for works and constructions upon them; and it is admitted that all expenditures of that description which have been made thereon have been at the cost of the railroad company.

A decree was rendered in the Circuit Court in favor of the appellee, granting the relief prayed for, to review which this appeal is prosecuted.

In the opinion of the circuit judge (2 Woods, 120), the case turned upon the construction to be given to the joint resolution of March 6, 1869; and being of opinion, upon the authority of the decision of the Supreme Court of Louisiana in *City of New Orleans* v. *New Orleans, Mobile, & Chattanooga Railroad Co.* (27 La. Ann. 414), that this resolution conferred upon the railroad company no right to charge wharfage dues against vessels landing at said wharf which were in no way connected with the business of the railroad company, and no right to maintain a free wharf for such vessels, it was assumed that the appellee had such an interest in the question as qualified him to maintain this suit and entitled him to the relief prayed for.

City of New Orleans v. *New Orleans, Mobile, & Chattanooga Railroad Co.* (*supra*) was a suit brought against the company to recover a sum of money for levee dues charged against the defendant for barges and flatboats belonging to it which were lying at this wharf, and used in its business. The Supreme Court of the State, in that case, decided that the joint resolution was not void for either of the reasons urged. It said: "The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. C. C. 453, 455, 458. The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled. 5 Ann. 661; 15 id. 577; 22 id. 545; 6 N. Y. 523; 26 id. 287. In the case now under consideration the State granted the right to the riparian owner. This is permissible. 1 Black, 1. Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank

for public purposes, to wit, to facilitate the transaction of its business with the public. It was the control by the legislature of a public servitude."

The extent of the rights of the company under the joint resolution — whether the use of the wharf was limited to railroad purposes merely, or embraced all purposes — was a point not involved in that case, nor decided either in express terms or by any fair inference. What that decision did affirm, however, was, that the disposal of the public right in the premises, as a wharf, was in the State, to the exclusion of the city, so that if the joint resolution had been a cession to a natural person, as riparian proprietor, to improve the premises as a landing-place for water-craft, and for loading and unloading cargoes, by building levees and wharves, at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming in its right. And construing the grant to the company as limiting the use of the property as a wharf, to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the company should have the right to exclude all other uses; and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

Neither would this be in derogation of any vested right of the city. Whatever powers the municipal body rightfully enjoys over the subject is derived from the legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation, which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river. *Cannon* v. *New Orleans*, 20 Wall. 577.

And while it may be true, as was decided by the Supreme Court of Louisiana in *Ellerman* v. *McMains* (30 La. Ann., pt. 1, 190), that the city cannot lawfully be required to permit the use of its wharves, without compensation, on the ground that they

are private property; it is equally true, as decided by the same court in *City of New Orleans* v. *Wilmot* (31 La. Ann. 65), that the city cannot forbid any water-craft from using the banks of the navigable waters of the State for purposes of navigation and commerce, and cannot compel them to pay to it wharfage except for the use of wharves of which it is the proprietor.

The rights of the city in respect to this controversy would seem, then, to be reduced to that of building levees and wharves on the banks of the river within its corporate limits for the public utility, with the exceptions established by paramount law, and collecting reasonable wharfage for the actual use of such structures. Its right to build a wharf upon the land of the company is, we have seen, excluded by the terms of the joint resolution of March 6, 1869, according to its narrowest construction.

The sole remaining question then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and

character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed.

This was the principle on which this court proceeded in the case of *City of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91. It is applied in *Mayor, &c. of Liverpool* v. *Chorley Waterworks Co.*, 2 De G., M. & G. 852; *Stockport District Waterworks* v. *Mayor, &c. of Manchester*, 9 Jur. N. S. 266; *Pudsey Coal Gas Co.* v. *Corporation of Bradford*, Law Rep. 15 Eq. 167.

On this ground it is our opinion that the appellee failed to allege and show any right to maintain his bill, which should, therefore, have been dismissed. The decree will be accordingly reversed, with directions to dismiss the bill; and it is

So ordered.

MR. JUSTICE WOODS dissented.

MANUFACTURING COMPANY *v.* BRADLEY.

1. A corporation organized under the laws of South Carolina agreed, by an instrument under its seal, to pay on a certain date to A. a sum of money at a specified rate of interest, and by an indorsement under its seal (*infra*, p. 177), on the paper after it matured, further agreed, in consideration of forbearance to a date named, to pay at a higher rate of interest the money to *bearer*. *Held*, 1. That the indorsement is a new contract upon sufficient consideration, and is negotiable within the meaning of the law merchant, and by the law of that State. 2. That B., the lawful holder thereof, is not precluded from suing thereon in the Circuit Court, by the fact that A. is a citizen of that State.
2. Where the paper by its terms creates a lien for the debt therein mentioned, the stockholders also being by law jointly and severally liable therefor, and their property subject to seizure upon an execution against the company, — *Held*, that, to a suit in equity seeking a decree for the debt, and the enforcement of B.'s lien, the stockholders are proper parties defendant.
3. The fact that after the paper had matured the president of the company bought it and transferred it by delivery to B. furnishes no defence to a recovery, the purchase having been made in good faith with his own means, and sanctioned by the directors of the company.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The facts are stated in the opinion of the court.

Mr. A. G. Magrath and *Mr. Samuel Lord, Jr.*, for the appellants.

Mr. William E. Earle and *Mr. James B. Campbell* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The Marine and River Phosphate Mining and Manufacturing Company, one of the appellants, is a corporation organized under the General Statutes of South Carolina, on March 15, 1870, with a subscribed capital of $500,000, the amount limited by the articles of association, of which but one-half had actually been paid in. On Dec. 28, 1872, it borrowed from William J. Gayer, receiver, appointed by the Court of Common Pleas for the County of Charleston, in a cause pending therein, of Dabney, Morgan, & Co. against The Bank of the State of South Carolina, $20,000 of the funds in his hands, which he was authorized so to invest. As evidence of, and security for,

the loan it executed and delivered its bond, of which the following is a copy: —

"STATE OF SOUTH CAROLINA,
CHARLESTON COUNTY.

"Know all men by these presents, that we, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, are held and firmly bound unto William J. Gayer, receiver, in the sum of twenty thousand dollars, with interest thereon at the rate of ten per cent annually, payable semi-annually, to be paid on the first day of July next ensuing the date hereof, for which payment well and truly to be made we, the said company, do hereby bind ourselves and our successors firmly by these presents.

"In witness whereof the said company have caused their seal to be hereunto affixed, the twenty-eighth day of December, A. D. 1872.

"We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of the said company, and that the same is issued under and pursuant to the provisions of section thirty-nine of chapter sixty-four of the General Statutes."

It is signed by "D. T. Corbin, president Marine and River Phosphate Mining and Manufacturing Company of South Carolina," countersigned by "Reuben Tomlinson, treasurer," and sealed with the corporate seal.

Subsequently to the maturity of this bond, C. C. Puffer, who had become successor in the receivership to Gayer, on April 2, 1874, transferred and delivered it to D. T. Corbin, in exchange for three hundred shares of the capital stock in the Phosphate Company, owned by him. This transaction was reported by the receiver to the court as a payment of the note, and the shares of stock were carried as part of the fund in his hands, and were afterwards sold by order of the court. No express order of the court is produced authorizing the transaction, but his accounts disclosing it were passed and confirmed and he was discharged. Corbin at this time was still president of the company. The bond, while held by the original receiver, had been duly recorded in the office of the register for mesne conveyances, as a lien upon the company's property.

On May 13, 1874, an indorsement was made upon the bond, as follows: —

"In consideration of further forbearance on the part of the holder of this bond till the first day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promises, waiving all set-off or other defence, to pay this bond to bearer on the first day of January, A. D. 1875, with interest at the rate of twelve per cent per annum, from the first day of April, 1874, payable quarterly; and should said bond not be paid on the first day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned, till paid."

This indorsement was signed "The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, by D. T. Corbin, president," and countersigned by "Reuben Tomlinson, treasurer." The corporate seal was thereto affixed.

The evidence on the point does not permit any doubt that this arrangement between Corbin and the company was made with the full knowledge and express sanction of the directors. The treasurer testifies that he objected to taking action upon the proposal of Corbin for an extension of payment as contained in the indorsement, without first submitting the question to them. The form of the renewal was the one agreed to by them, and by them ordered to be indorsed on the bond. This was done with knowledge that Corbin then held it. The interest to be paid appears to be lawful and customary, being then the rate charged by banks. It was regularly paid by the treasurer to Corbin, and in December, 1876, a payment of $10,000 was made to him by the treasurer on account of the principal. That payment was reported to the board of directors, some of whom had been consulted in regard to it by the treasurer before it was made; because, as he states, "the funds on hand at the time having been provided for other purposes, I did not feel at liberty to use them for that purpose without first consulting with such directors as were conveniently at hand." He adds: "Mr. Corbin frequently, during the months of January and February, 1877, requested me to arrange for the payment of the balance of $10,000 principal, and the inter-

est due on said bond. The matter was brought to the attention of the directors by me, and no objection was made by them to the payment of said money, if it could be raised without serious embarrassment to the company. Arrangements to pay said bond were finally made and the money actually raised and deposited in bank for that purpose, subject, however, to conditions, the fulfilment of which was prevented by the change in the organization of the company which took place in March, 1877."

In June, 1877, Corbin transferred and delivered the bond to Bradley, the appellee, in consideration of ten dollars paid, and his agreement to pay the amount still due on the face of it, less the ten dollars paid, as stated in a letter from Corbin to Bradley, making the offer which was accepted, "only when you shall have collected the amount from the company, and what you shall collect from the company, less the cost and expenses of collection."

In answer to a question, on cross-examination, as to his motive and purpose in parting with the bonds in this way, Mr. Corbin said, "that the company had refused to pay the bond, and I believed if I held the bond I would be compelled to litigate the same with the company, and I believed if it passed into the hands of a third person, in good faith, that the company would pay it to him without a long and tedious litigation, having no prejudices against him, as I believed; and further, I did not wish to be a party plaintiff in an important suit against the company that I had been so long connected with as president."

On July 5, 1877, Bradley, being a citizen of Massachusetts, filed his bill in equity in the court below against The Marine and River Phosphate Mining and Manufacturing Company, and several others, alleged to be citizens of South Carolina, and stockholders in that corporation. It alleges that the bond is a lien upon all the property of the corporation, embracing certain described personal property, and the franchise granted to it by the State to dig, mine, and remove from the bed of the navigable streams and waters within the jurisdiction of the State the phosphate rock and deposits, according to an act passed March 1, 1870. It also alleges that the defendants

charged to be stockholders in the corporation have not fully paid up the amount of the capital subscribed by them, and that they are within the provisions of section 23 of chapter 64 of the General Statutes of South Carolina, under which act the corporation was organized, which provides that "the members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company in manner aforesaid is paid in, and a certificate thereof made and recorded as prescribed by the following section."

The bill contains the following averment: "That to bring a separate and distinct action at law against each of such stockholders would be a great hardship to your orator, inasmuch as a court of equity has full power to hear and adjudicate all the issues between your orator and the said several defendants, thus preventing a multiplicity of suits; and by ascertaining the number of shares of the capital stock of the said Marine and River Mining and Manufacturing Company of South Carolina, held by the said several defendants, the amount of the subscription paid upon each of said shares, and the amount still due and unpaid thereupon, can adjust and decree the amount which each of said defendants justly owes to your orator, and can afford him that relief which a court of law is unable to give."

The prayer of the bill is that the defendant, The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, be decreed to pay the amount due upon the bond, with interest; that the same be declared to be a lien upon its property described in the bill, and that the same be sold for the payment and satisfaction thereof; and that the other defendants be decreed to be justly and severally liable for the amount of the said debt, and to pay on account thereof so much of the unpaid subscription of each share of the stock in said corporation, held by them severally, as shall be necessary to pay the same, and for general relief.

A final decree was rendered against the company and several of its stockholders, co-defendants, for the payment of the amount due on account of the said bond, for which execution was awarded, and a decree foreclosing the equity of

redemption in the corporate property described in the bill, on which the bond is declared to be a lien, and directing its sale.

To review this decree the defendants below prosecute the present appeal.

Several questions, arising upon the pleadings and evidence, and embodying the errors assigned upon the decree, will be considered in their order.

I. The first of these relates to the jurisdiction of the court.

It is objected in the first place that the complainant is the assignee of a chose in action on which no suit could have been maintained in the Circuit Court by his assignor, and that consequently he is within the prohibition of the first section of the act of March 3, 1875, c. 137. The answer to this objection is, that the obligation sued on is a negotiable promissory note, and is, therefore, excepted out of the prohibition relied on. It is true that the bond, as originally executed, was payable to Gayer, receiver, simply, and was not negotiable; but the subsequent indorsement was a new and complete contract, upon a distinct and sufficient consideration, and being payable to bearer, is negotiable by delivery merely. It is a negotiable note within the meaning of the law merchant, and according to the law of the place of the contract, notwithstanding it is an instrument under seal. *Langston* v. *South Carolina Railroad Co.*, 2 S. C. 248; *Bank* v. *Railroad Company*, 5 id. 156; *Bond Debt Cases*, 12 id. 200, 250.

It is further objected, however, that the transaction between Corbin and Bradley was fictitious and not real; that the title to the bond remained in the former, so that the latter, not being the real party in interest, cannot maintain an action to enforce it; that the present suit is collusive, for the purpose of conferring jurisdiction upon the Circuit Court, and, therefore, within the rule declared in *Smith* v. *Kernochen* (7 How. 198), *Jones* v. *League* (18 id. 76), and *Barney* v. *Baltimore City* (6 Wall. 280), and enacted by the fifth section of that act, as construed in *Williams* v. *Nottawa*, 104 U. S. 209.

The delivery of the bond by Corbin to Bradley, under the arrangement we have mentioned, was, however, a transfer of the legal title to the obligation. Whether the agreement was not also a transfer by Corbin of all beneficial interest in the bond,

depends on whether Bradley was bound to account to him specifically for the net proceeds of its collection, or only to pay him so much money as they should amount to, — a question which it is not necessary to decide; because it does not appear from this record but that Corbin could himself have maintained a suit in his own name in the Circuit Court upon the bond. It is nowhere distinctly alleged or shown that at the time this suit was brought he was a citizen of South Carolina. That he was so at the time of the original transaction may be presumed or inferred from the circumstances; but to confer or oust jurisdiction, when that depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved. Upon the present state of the record, the assumption could not have been made in his favor to sustain the jurisdiction if he were seeking as a citizen of South Carolina to prosecute a suit; and equally it will not be made to defeat the jurisdiction, which otherwise is rightly invoked by the complainant.

It is further objected that the jurisdiction in equity cannot be sustained, because the complainant had a complete and adequate remedy at law, so far, at least, as relief is sought against the stockholders individually upon their statutory liability.

That liability is a joint and several personal obligation of all the members of the company, unlimited except by the amount of the debts and contracts of the corporation, to which it extends. It is unconditional, original, and immediate, not dependent on the insufficiency of corporate assets, and not collateral to that of the corporation, upon the event of its insolvency. It is, in one aspect, a suretyship for the corporation, for by sect. 37 of the act any stockholder paying a debt of the company for which he is personally liable is entitled to an action against it for indemnity, in which he may take the corporate assets, but is without recourse upon the property of any other stockholder.

The jurisdiction in equity, then, cannot rest upon the administration of a trust fund, as in cases where delinquent stockholders are charged with the obligation to make good their subscriptions to unpaid capital stock, or in those where a constitutional or statutory liability is imposed beyond the

amount of the subscription, to a fixed sum, but on each in proportion to his share in the capital stock. There the necessity of enforcing a trust, marshalling assets, and equalizing contributions, constitutes a clear ground of equity jurisdiction.

The statute under consideration prescribes no form of action, and the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises. The thirty-fifth section of the act expressly authorizes separate actions at law against the company and against its officers, in cases where, by the statute, the latter are made personally liable for defined delinquencies; while the thirty-sixth section provides that the property of stockholders, in cases where they are liable, may be taken on attachment or execution issued against the company. In the present case there was an acknowledged jurisdiction to grant equitable relief, by enforcing the lien of the bond upon the corporate property, and as incident to that to make a decree against the corporation for the payment of the debt. Having jurisdiction for that purpose, it is entirely consistent with its principles and practice for a court of equity to extend it, so as to avoid a multiplicity of suits, and to give to the plaintiff a single and complete remedy. As the individual stockholder is bound by the judgment against the corporation, it is equitable that he should be present as a party, that he may have the opportunity to defend for himself; and in case of payment out of his property he is entitled to be subrogated to the right of the creditor against the company, in order to indemnify himself out of the corporate assets. On these grounds, we think, the jurisdiction in equity is well supported.

II. The remaining grounds of defence have been, in effect, anticipated in the statement of the case. They are without merit or substance.

The title of the complainant to the bond sued on cannot be assailed for want of authority in the receiver to transfer it, even if such a defence was open to the obligors, for it sufficiently appears that the transaction, if not previously authorized, was subsequently confirmed by the court.

Nor does the relation between Corbin and the company at the time of the transaction furnish any defence, either at law

or in equity. The relation undoubtedly was one of a confidential and fiduciary character, but there seems to be no ground in the evidence to challenge the good faith with which the business was conducted. The bond of the company was purchased from the receiver with his own means, and not those of the company; the value paid, so far as the testimony discloses, was full; and every step, when taken, was made known and assented to by the directors of the corporation. The transaction was legitimate in itself and beneficial to the company, and the dealing was not by the president with himself, but with the corporation, in fact, represented and acting by other directors, with full knowledge of all the facts.

A defence of payment was suggested by the circumstance that the receiver, after parting with the bond in exchange for the stock, reported it as paid in that way. So far as the fund in his hands was concerned, it might be so treated; but the company and its stockholders must be conscious that they have no right so to consider it.

We find no error in the decree, and it is accordingly

Affirmed.

UNITED STATES *v.* HUNT.

1. In a suit upon the official bond of A., approved July 19, 1866, on which day he entered upon duty as collector of internal revenue, and continued therein until May 23, 1867, the United States offered in evidence a duly certified treasury transcript of his accounts. The defendants objected to the evidence on the ground that the bond related solely to his second term of office, and that the balance shown by the transcript was the result of transactions which occurred during his first and second terms, and after the appointment and qualification of his successor. In support of the objection, the defendants produced the bond of his successor, approved April 29, 1867. *Held*, that it was irregular to permit the defendants, in support of their objections, to put in evidence going to the merits of their defence, and that the bond did not show when A.'s successor entered upon duty. 2. That the transcript was admissible, inasmuch as it is entirely consistent with the description of the assessment lists of dates prior to July, 1866, and of those subsequent to May 23, 1867, that the taxes were actually received by him during his second term, and, were it otherwise, the objectionable items could, on mere inspection, be excluded from the account.

2. Receipts signed by A. for the aggregate amount of the alphabetical lists, although the latter show in detail the names of persons assessed and the amount severally due from each, are competent evidence for the United States, as is also the original statement signed by him, showing the amounts collected and the amounts abated as uncollectible during the month, and those collected May 18, 1867.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. William L. Nugent for the defendants in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action brought by the United States upon the official bond of Fidelio S. Hunt, as collector of taxes, under the Internal Revenue Act, for the second district of Mississippi. He died pending the suit, and it was revived against his executrix. The other defendants were sureties. The condition of the obligation was that the said Hunt "shall truly and faithfully execute and discharge all the duties of the said office according to law, shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession," &c. It is alleged in the declaration that the bond was delivered and approved on July 19, 1866, on which day Hunt entered upon the discharge of the duties of his said office, and continued therein until on or about May 23, 1867. The breach alleged was that during that period he became indebted to the United States in the sum of $139,463.15, received by him as such collector for and on account of taxes due to the United States, being a balance reported to be due from him upon the adjustment of his account as such collector in the Treasury Department, of which a duly certified copy was filed, and which he had refused to pay. The sureties filed joint pleas, and the executrix pleaded separately. The pleas were alike, and amounted to a general denial of every allegation necessary to constitute a liability.

There was a judgment for the defendants. The United

States sued out this writ, and the errors which are assigned arise upon the rulings of the court upon questions of evidence, presented by a bill of exceptions.

The plaintiff offered in evidence the certified transcript of Hunt's account from the books of the Treasury Department. The certificate of the fifth auditor, accompanying it, states that he has examined and adjusted "an account between the United States and Fidelio S. Hunt, late collector for the 2d district of Mississippi, from July 19th, 1866, to May 23d, 1867, and find him chargeable as follows, under bond approved July 19th, 1866." The debit side of the account is, "to amount of assessment lists receipted for, per form 23½, viz." Its first item is dated July 28, 1866, and is to "amount receipted for as December, 1865, list." It also embraces similar debits, of the same and subsequent dates of entry, for lists of January, February, April, May, and June, 1866. The last five items on the same side of the account bear date, as to the entries, subsequently to May 23, 1867, but are for amounts receipted for as lists of January, 1866, April and May, 1867. The credit side of the account contains items of cash paid at dates subsequent to May 23, 1867, and also gives credit for amounts collected by his successors in office on lists he receipted for, and also for amounts collected by him as collector under the first bond on lists receipted for by him as collector under the second bond. This statement of account shows a balance due the United States of the amount claimed in the declaration.

The transcript included, as part of the statement of account and explanatory of it, a statement of differences, showing and accounting for the discrepancies between the balance exhibited by the collector's own account and that ascertained by the adjustment. From this it appeared that the balance due the United States by the collector's account to March 31, 1867, since which date he had rendered none, was $76,756.17, showing a difference to his debit of $62,706.98. This is explained, in part, by showing the whole amount of assessments of form 23½ charged under his first bond and under his second bond separately, which he had failed to give correct credit for, to the amount of $137,430.78; in part, by showing the amount of cash deposited by him under his first and second bonds respec-

tively, and that he had twice credited himself with $169,517.83 on account thereof; and by other errors, the whole amounting to $702,434.36. On the other hand, this is reduced to the sum of $62,706.98, the difference to be accounted for, by credits for taxes abated by the adjustment, by credits therein for collections by successors in office, on bills receipted for by him during his term, and by amount claimed and credited in his accounts as collections on cotton. A list of warrants covering into the treasury, the amounts of cash deposited, is appended, showing the amount of each, and on account of which bond it was paid.

To the introduction in evidence of this transcript objection was made on the part of the defendants, "upon the grounds that the balance exhibited by the said account is the result of the transactions of both terms of the defendant's service, whereas the suit is upon a bond which covers only the transactions of the second term; and because it embraces transactions made by the collector after his removal from office and after the appointment and qualification of his successor, and the balance is in part made up of these transactions, occurring when the collector no longer sustained any official relation to the United States, and after the alleged breach had occurred." And in support of their said objections, the defendants by their attorneys, the bill of exceptions proceeds to state, introduced in evidence the bond of Martin Keary, the successor of the said Hunt as such tax-collector, showing that the same was approved on April 29, 1867. Thereupon the objections to the introduction of the certified account in evidence were by the court sustained, and the same was excluded, the court holding that the said certified statement should stand and be considered only as a bill of particulars annexed to plaintiff's declaration.

This ruling was excepted to and is assigned for error.

It was an irregularity to permit the defendant to interject into the plaintiff's case testimony upon the merits of the defence in support of his objection that the evidence offered was irrelevant, and the testimony interposed was not by itself sufficient to establish the date on which Hunt ceased to hold an official relation to the United States as collector, for it did not show when his successor actually entered upon the dis-

charge of the duties of the office. But passing by, without further comment, these minor errors, we find that the objection to the transcript of the account, as matter of evidence, is without foundation, either in fact or in law.

It was assumed on both sides, though there is no proof to that effect in the record, that Hunt had filled a prior term as collector, being his own successor, and it was admitted that his second term commenced on July 19, 1866. The objectionable items in the first part of the account charge him with amounts of assessment lists receipted for per form 23½ on dates subsequent to the beginning of his second term, though being described as lists for specified months prior to July, 1866, it is argued that he could not be chargeable upon his second bond with those sums. But this does not follow; for it is entirely consistent with the description of the lists, that the collector actually received the taxes paid upon them, after the date of his second term, and just as he is charged with them in this account. And so, on the other hand, with similar items charged upon receipts of assessment lists, of dates subsequent to May 23, 1867, the alleged date when his second term expired. It is consistent with the nature of those charges that they were for moneys received on account of taxes paid on account of these lists, and received by him before the end of his second term. The account charges him with distinct sums of money collected by him. They are identified by reference to assessment lists for particular months, and then by the dates of his receipts to the government for the lists, upon form 23½. No dates are traced in the account as those on which the taxes were actually collected by him, but the certificate of the Treasury Department declares it to be an account between the United States and the collector from the beginning to the end of the period covered by the bond in suit, and there is nothing on the face of the account which necessarily contradicts this statement. The certificate has the legal effect of making the transcript *prima facie* evidence of the fact of indebtedness which it certifies, unless upon the face of the account it necessarily appears to be otherwise.

But the ruling of the court in excluding the transcript is equally untenable upon the contrary supposition, that the

items on account of which the objection was sustained, were on their face such as could not be charged against the defendants upon the bond in suit. For, rejecting these items, there remained many others with which the collector and his sureties upon his second bond were admitted to be chargeable, and the transcript was clearly admissible in proof of these. The presence of the objectionable items could not prejudice the defendants, for on the supposition, they were separable from the remainder of the account by mere inspection. On the other hand, their presence might be important to the government, as explanatory of corresponding items upon the credit side of the account; particularly in view of the ruling of the court, which rejected the transcript as evidence against the defendants, but required it to remain upon the record as proof against the United States.

For the same reasons the subsequent ruling of the court must be held to be erroneous, by which it excluded the receipts of the collector on form 23½, which constituted the items upon the debit side of the account. Even if the receipts alone were not sufficient in each case to charge the collector with the sums charged as taxes collected upon the assessment lists, nevertheless they were competent evidence which, by other testimony, might be made full proof, until overcome by a successful defence. The ground of the objection was that the form 23½ was a receipt for alphabetical lists, showing in detail the names of persons assessed for taxes and the amounts severally due from each, and that these alphabetical lists were primary and better evidence to charge the collector than the receipt on form 23½, which expressed merely the aggregate amount of the alphabetical lists. But the receipts offered were signed by the collector, on their face constituted a part of his official transactions, and fomed the very basis of the account against him upon the books of the Treasury Departments. The originals would be competent against him, for they are not secondary evidence, although they may show the existence of other documents more in detail. The law gives to a copy certified by the Treasury Department at least the same force in evidence which the original would otherwise have.

The ruling of the court rejecting the original statement signed by the collector, showing the amounts collected and the amounts abated as uncollectible during the month, and those collected on May 18, 1867, was likewise erroneous for the same reasons.

For these errors the judgment of the Circuit Court is reversed, with instructions to grant a new trial; and it is

So ordered.

ROOT *v.* RAILWAY COMPANY.

A., to whom had been assigned letters-patent, filed, after the expiration of them, which took place July 6, 1873, his bill against B., charging that the latter had during their term infringed them by using the patented invention, whereby he realized gains, profits, and savings, which he should be compelled to account for and pay to the complainant. The bill was, on demurrer, dismissed. *Held*, that the decree below is proper, the bill being merely for an account of profits and damages against an infringer, and it not appearing from the case thereby made that any ground of equitable jurisdiction exists, or that A. has not a complete remedy at law whereby damages for the wrongs complained of can be recovered.

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. Albert H. Walker for the appellant.

Mr. George Payson for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Thomas Sayles, as assignee of the letters-patent originally granted to Henry Tanner for an improvement in railroad car brakes, dated July 6, 1852, and which, on July 5, 1866, were renewed and extended for the additional term of seven years, which expired July 6, 1873, filed his bill in the court below on Dec. 9, 1878, against the Lake Shore and Michigan Southern Railway Company. He avers that, by virtue of the assignments to him, he was invested with all rights of action for infringements of the patent which had occurred, and particularly

those of which it was alleged the defendant had been guilty from Aug. 6, 1869, to July 6, 1873, having, as is averred, during that period, used upon its railroad cars the patented brakes, but how many, the bill states, the complainant is ignorant and cannot set forth, but avers that the number so used was large, and that defendant had derived, received, and realized great gains and profits therefrom, but to what amount he is ignorant and cannot set forth.

The prayer of the bill is that the defendant may be compelled to account for and pay to the complainant all the gains, profits, and savings which it derived, received, or realized from or by reason of the use of said brakes.

To this bill a general demurrer was filed, alleging, as grounds thereof, that the bill does not contain any matter of equity on which the court could grant any relief, and that the complainant is not entitled to the relief prayed for, because he had a plain, adequate, and complete remedy at law, and also because it appeared on the face of the bill that the causes of complaint were barred by the Statutes of Limitation both of the United States and of the State of Illinois.

This demurrer was sustained and the bill dismissed. The decree of the Circuit Court was brought here for review. Sayles having died, Charles T. Root was, as his executor, substituted in this court as the appellant.

The propositions mainly relied upon by the appellee in support of the decree, are, —

First, That after the expiration of a patent, equity has no jurisdiction to entertain a bill, merely for an account and the recovery of the profits of an infringer, during its existence, the remedy being at law for damages; and,

Second, That, even if, in certain cases, such a jurisdiction exists, the present does not fall within it.

On the other hand, it is contended on the part of the appellant that, in cases for the enforcement of the rights of patentees, resort may be had, as matter of right, to a court of equity, as a distinct head of its jurisdiction, for the mere purpose of establishing an infringement and ascertaining and recovering the profits of the infringer, upon the independent equity that he is for that purpose a trustee of his gains for the

use of the true owner of the patent and liable to account as such. In support of this contention, we are referred by his counsel to numerous decisions of the Circuit Courts, many of which, it is claimed, are directly upon the point, and to several cases in this court, in which, it is alleged, the same doctrine is either virtually decided or assumed; which, it is further argued, though not supported by the modern decisions of the English chancery, is found in its earlier precedents.

An examination of the practice and opinions of the Circuit Courts undoubtedly shows much diversity, incapable of reconciliation, and makes it necessary, as far as it can be done, by a deliberate judgment of this court, to remove the question out of its present uncertainty, by a settlement upon some basis of principle, in harmony with our system of equity jurisprudence, developed and modified by legislation. To effect this satisfactorily and intelligently, it will be necessary to review the course of legislation, and judicial decision in this court, so far as it bears upon the question from the beginning.

Prior to the passage of the act of Feb. 15, 1819, c. 19 (3 Stat. 481), Congress had passed three laws, in execution of the power conferred by the Constitution itself, and in furtherance of the policy thereby indicated, to secure to inventors an exclusive right of property in their inventions. The first of them, the act of April 10, 1790, c. 7 (1 Stat. 109), gave as a remedy for its violation an action at law upon the case for damages, and forfeited the infringing article. The next was the act of Feb. 21, 1793, c. 11 (1 Stat. 318), which fixed the rule and measure of damages recoverable in an action at law upon the act at three times the price at which the patentee had usually sold or licensed to other persons the use of the invention. This was changed by the act of April 17, 1800, c. 25 (2 Stat. 37), to three times the actual damage sustained by the patentee by reason of the infringement. By neither of these acts, however, was any jurisdiction conferred upon the courts of the United States in equity. In *Livingston* v. *Van Ingen* (1 Paine, 45), Mr. Justice Livingston held that to vest such jurisdiction by reason of the subject-matter, as a case arising under the laws of the United States, to be exercised in controversies between parties, without regard to their citi-

zenship, it required the express authority of an act of Congress; and the parties to that suit being citizens of New York, the bill was dismissed. The controversy was thereupon renewed in the courts of that State; and the Chancellor having refused the injunction asked for, it was brought by appeal into the court for the correction of errors. 9 Johns. (N. Y.) 507. It was there objected that the right in question rested upon statute alone, which prescribed remedies at law for its violation, which, it must be deemed, were intended to be exclusive. But the decision affirmed the jurisdiction. "The principle is," said Kent, C. J. (p. 587), "that statute privileges, no less than common-law rights, when in actual possession and exercise, will not be permitted to be disturbed until the opponent has fairly tried them at law and overthrown their pretension." The same learned judge refers also to the practice of the Federal courts in granting injunctions under the patent law, mentioning two instances, — one, the case of *Morse* v. *Reid*, an injunction bill filed in 1796 to restrain the invasion of a copyright; the other, *Whitney* v. *Fort*, in which an injunction was granted to restrain the violation of the patent for the cotton-gin. Of course, in those cases the jurisdiction of the court depended on the citizenship of the parties.

Congress then passed the act of Feb. 15, 1819, c. 19, which enacted "that the Circuit Courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors secured to them by any law of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

In the case of *Sullivan* v. *Redfield* (1 Paine, 441), which was decided in 1825, Mr. Justice Thompson, who in the Livingston case had sat as one of the judges of the State court, had occasion to consider the nature of the equity jurisdiction in patent

suits. "The equity jurisdiction," he said, "exercised by the court over patents for inventions is merely in aid of the common law, and in order to give more complete effect to the provisions of the statute under which the patent is granted." And in answer to the argument that the act of 1819 gave a peremptory right to an equitable remedy by virtue of the patent itself, he said: "This act does not enlarge or alter the powers of the court over the subject-matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this act it had been held that a citizen of one State could not obtain an injunction in the Circuit Court for a violation of a patent-right against a citizen of the same State, as no act of Congress authorized such suit. This act removed that objection and gave the jurisdiction, although the parties were citizens of the same State. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent-rights the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this act."

The substance of the act of 1819 was incorporated into the seventeenth section of the act of July 4, 1836, c. 357 (5 Stat. 117), so far as it related to inventors, but remained in force, after the passage of the latter act, so far as it gave cognizance to the courts of the United States of cases of copyright. It was under that provision of the act of 1819 that the case of *Stevens* v. *Gladding* arose and was decided. 17 How. 447. That was a bill for an injunction to restrain the violation of a copyright, and prayed for the recovery of the penalties given by the seventh section of the act of Feb. 3, 1831, c. 16, and for general relief. Mr. Justice Curtis, delivering the opinion of the court, said: "There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must, therefore, be rejected. The remaining question is whether there ought to be a decree for an account of the profits. The com-

plainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief. The right to an account of profits is incident to the right to an injunction in copy and patent right cases," citing *Colburn* v. *Simms*, 2 Hare, 554; 3 Dan. Ch. Pr. 1797. "And this court has held, in *Watts et al.* v. *Waddle et al.* (6 Pet. 389), that where the bill states a case proper for an account, one may be ordered under the prayer for general relief."

The seventeenth section of the act of 1836 differs from the act of 1819 in one other particular only. It makes the jurisdiction in patent causes of the court of the United States exclusive.

It was under the act of 1836 that the question arose for the first time, in *Livingston* v. *Woodworth* (15 How. 546), as to the rule for computing the profits of an infringer, upon a decree for such an account. The bill was for an injunction and account. The validity of the patent and the fact of infringement were both admitted by the defendant, who consented to a decree requiring him to account for and pay over the gains and profits made by him, during the infringement, in accordance with the prayer of the bill. The decree confirmed the report of the master, who awarded, not actual gains and profits, but such as he estimated the defendant might have made by due diligence. It was argued, in support of the decree, that where the court has jurisdiction to give the principal relief sought, it will make a complete decree, and give compensation for the past injury, as in bills for specific performance and injunction bills for waste; and that it was a correct rule to hold the party accountable, as an involuntary trustee, for what the patentee might have realized by the same exercise of the right, as a court of equity sometimes forces the character of a trustee upon an intruder, or wrong-doer, or one in possession under color of right, or who takes rents or profits belonging to another, or might have taken them, as in cases of mortgagees; but it was admitted that the case was of first impression. The decree, upon this point, was reversed. The court said: "We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts. . . . If the appellees, the plaintiffs below, had sustained

an injury to their legal rights, the courts of law were open to them for redress, and in these courts they might, according to a practice which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed, not compensation merely, but vengeance, for such injury as they could show they have sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex æquo et bono* is theirs, and nothing beyond this." p. 559. The account was, therefore, restricted to the actual gains and profits of the appellants during the time their machine was in operation.

This rule in relation to the profits recoverable in such suits was followed in *Dean* v. *Mason* (20 How. 198), which was a case of a bill for an injunction and account, in which a decree *pro confesso* had been taken. The final decree was entered, on the report of the master, for the estimated amount of profits which the defendant, with reasonable diligence, might have realized; not what, in fact, he did realize. This was held to be erroneous. The court said: "The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. It takes away the motive of the infringer of patented rights by requiring him to pay the profits of his labor to the owner of the patent. Generally, this is sufficient to protect the rights of the owner; but where the wrong has been done, under aggravated circumstances, the court has the power under the statute to punish it adequately by an increase of the damages."

The important case of *Seymour* v. *McCormick* (16 How. 480) was decided in 1853. That was an action at law. The court below instructed the jury that the actual damages to which the plaintiff was entitled, for an infringement of a patent for an improvement in a machine, might be determined by ascertaining the profits which in judgment of law he would have made, provided the defendants had not interfered with his rights, and that the same rule applied whether the patent covered an entire machine or merely an improvement on a

machine. This instruction this court held to be erroneous, and reversed the judgment on that account. Mr. Justice Grier, in delivering the opinion of the court, referred to the rule of damages, prescribed by the acts of Congress, previously in force, stating that "experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits;" and that it was to obviate this that the Patent Act of 1836 confined the jury to the assessment of actual damages, leaving it to the discretion of the court to inflict punitive damages to the extent of trebling the verdict. He then remarked: "It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, such as vulcanized india-rubber or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, the patentee being himself able to supply the whole demand at his own price, in which cases "the profit of the infringer may be the only criterion of the actual damage of the patentee;" that "one who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement; and where the profit of the patentee consisted neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turnout in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages of the patentee be measured by any known ratio of the profits of the road. . . . It is only where, from the peculiar circumstances of the case, no other rule can be found that the defendant's

profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact." Accordingly it was held in *Corporation of New York* v. *Ransom* (23 How. 487), where the rule in *Seymour* v. *McCormick* (*supra*) was expressly approved, that in an action at law, if the plaintiff rested his case, after proof of infringement merely, he was entitled only to nominal damages. It was also applied in *Jones* v. *Morehead* (1 Wall. 155) which was a bill in equity for an injunction and an account, where a decree for a large sum as profits had been rendered against the defendant, upon an entire machine, in respect to which it appeared as matter of fact that the defendants had not infringed the patent sued on, but had admitted to the contrary in the answer. The court construed this admission by applying it to the smallest number of patented articles, and to the use of any part of the patent found to be valid, and, reversing the decree, ordered one to be entered for a "nominal sum of one dollar for profits."

In *Rubber Company* v. *Goodyear* (9 Wall. 788), which was a bill for an injunction and account, a decree for a large sum was rendered in favor of the complainants, which was affirmed on appeal. "The rule," said Mr. Justice Swayne, delivering the opinion of the court, "is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression. The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."

Mowry v. *Whitney* (14 Wall. 620) was also a bill in equity for an injunction and account. A decree was rendered in favor of the complainant for all the profits on the manufactured article, instead of upon the patented process of manufacture, with interest added. On appeal, this court reversed the decree on that point, saying: "The question to be deter-

mined in this case is, what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits. . . . That advantage is the measure of profits." On the question of interest, Mr. Justice Strong, speaking for the court, said: "We add only that, in our opinion, the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance."

In *Packet Company* v. *Sickles* (19 Wall. 611), which was an action at law, the rule established in *Seymour* v. *McCormick* (*supra*) was reiterated, as "the established criterion of damages in cases to which it was applicable." "In cases where there is no established patent or license fee in the case, or even an approximation to it, general evidence must necessarily be resorted to," as was said by the court in the case of *Suffolk Company* v. *Hayden*, 3 Wall. 315. "And what evidence," said Mr. Justice Nelson, in that case, p. 320, "could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner by the piracy instead of the purchase of the use of the invention." He added that "a recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from the further use of it."

In *Packet Company* v. *Sickles* (*supra*), Mr. Justice Miller said: "The rule in suits in equity, of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the Chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity."

The doctrine of this case was reiterated in *Burdell* v. *Denig* (92 U. S. 716), where Mr. Justice Miller, again delivering the opinion of the court, said: —

"Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based on the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes; a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employés. On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained."

Littlefield v. *Perry* (21 Wall. 205) was one where the patentee, by force of an agreement, held the legal title to the patent in trust for the complainant, in violation of which he was making use of his legal rights. It was held, upon a bill filed for an injunction and account, that it was a case under the patent laws, and the defendant was required to account for the

profits he had made, according to the rule in *Mowry* v. *Whitney*, *supra*. The Chief Justice said, p. 230: "Profits actually realized are usually, in a case like this, the measure of unliquidated damages. Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by wilful infringements."

By the act of July 8, 1870, c. 230, Congress revised, consolidated, and amended the statutes relating to patents and copyrights. 16 Stat. 198. The fifty-ninth section renewed the provision previously in force, that damages for infringement might be recovered by action on the case, and that whenever, in any such action, a verdict shall be rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of the verdict. The fifty-fifth section is as follows: —

"That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the power and jurisdiction of a Circuit Court, or by the Supreme Court of the District of Columbia, or of any Territory; and the court shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case; but all actions shall be brought during the term for which the letters-patent shall be granted or extended, or within six years after the expiration thereof."

These provisions are substantially carried into the Revised Statutes, sect. 59 of the act of 1870, being sect. 4919 of the

latter, and sect. 55 corresponding to sect. 4921 Rev. Stat., except as to the provision in respect to the limitation upon the right to sue, which is not found in the Revised Statutes. But the rights of the parties in the present suit arose while the act of 1870 was in force, and are determinable under it.

In the case of *Birdsall* v. *Coolidge* (93 U. S. 64) it is declared, in reference to the effect of the act of 1870, that "gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent;" in which event the provision is, that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

Mr. Justice Clifford, in the opinion in this case, quotes a passage, slightly altered, from Curtis on Patents, sect. 341 *a* (4th ed.), p. 461, which, taken by itself, might seem to imply that prior to the act of 1870 the owner of a patent had the election to resort to a court of equity for the recovery of profits, or a court of law for damages, irrespective of any other relief of an equitable character; but the language of the passage is to be restrained to mean merely that the option existed to sue at law for past infringement, or seek equitable relief by way of prevention, the damages or profits following, as either jurisdiction is resorted to, each according to its kind. For if this be not so, it follows that since the passage of the act of 1870 an owner of a patent may recover, in a suit in equity, profits and damages in all cases, according to the rule above stated, without seeking any other relief whatever, the effect of which would be to give two remedies, one in equity, the other at law, merely for the recovery of damages for an injury to a legal right, an anomaly not to be found in any other branch of our jurisprudence. And manifestly, upon such a construction, the action at law would soon become obsolete, as completely as if it had been abolished by legislation. The whole force of the change in the statute consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief, which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power

not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone, he would have recovered in another forum, with power to increase the amount of the actual damages, as in courts of law. But as the account of profits, previously, was the incident of the suit, and not its object, so now the power to award damages and to multiply them is added as an incident to the right to an account.

But the difference between the state of the law before and after the act of 1870 finds its best illustration in a comparison between two cases, both of which were decided at the October Term, 1877, *Elizabeth* v. *Pavement Company*, 97 U. S. 126, and *Marsh* v. *Seymour*, id. 348.

In the former the bill was filed before the passage of the act, but prayed, besides an injunction, for both damages and profits. It was held that the court below had rightly decided that a decree for profits alone could be rendered, inasmuch as the jurisdiction of courts of equity to decree damages, as distinct from profits, was first conferred by the statute. Mr. Justice Bradley, delivering the opinion of the court, remarking that the general question of the profits recoverable in equity by a patentee was surrounded with many difficulties, which the courts had not yet succeeded in overcoming, said: —

"But one thing may be affirmed with reasonable confidence, that, if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee in such case is left to his remedy for damages. It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits, — as when it is shown that the use of his invention produced a definite saving in the process of a manufacture. *Mowry* v. *Whitney*, 14 Wall. 434; *Cawood Patent*, 94 U. S. 695. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits, none can be recovered. The

same result would seem to follow where it is impossible to show the profitable effect of using the invention upon the business results of the party infringing. It may be added, that, where no profits are shown to have accrued, a court of equity cannot give a decree for profits by way of damages, or as a punishment for the infringement. *Livingston* v. *Woodworth*, 15 How. 559. But when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy. And in such a case, the defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions. *Rubber Company* v. *Goodyear*, 9 Wall. 788." And these general propositions, he added, will hardly admit of dispute.

Accordingly, in that case, the bill was dismissed as to the city of Elizabeth, which had infringed, because it appeared that it had made no profit from the use of the patented improvement, while a decree was rendered against the contractor, who had laid the pavement which was the subject of the patent, because he was shown to have made profits from the infringement. The municipal corporation, of course, remained liable to respond in damages in an action at law for any loss which the plaintiff could have established by proof.

The cases of *Marsh* v. *Seymour* (*supra*) arose under the act of 1870, and were bills for injunction and account. Decrees were rendered in favor of the complainant, and a reference ordered to a master to state an account of profits. In both cases, the respondents showing that they had made no profits by reason of the use of the invention, the complainant waived his claim for a recovery on that account, and decrees were rendered for damages on the basis of a license fee for the infringing machines which had been sold, and nominal damages for those manufactured but not sold. These decrees were affirmed, the court saying, Mr. Justice Clifford delivering its opinion, that "damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits, as in the case before the court."

In *Parks* v. *Booth* (102 U. S. 96), which was a suit in equity for an injunction, an account of profits and damages, under the act of 1870, a decree was rendered in favor of the complainant, and for profits and damages as found by a master. Under the head of damages there were included items for expenses of conducting the suit, being counsel fees, compensation for the complainant's time, and interest on the profits. The decree was modified on appeal, by striking out all these allowances, except that for the complainant's time, lost in attending to the suit. Interest on profits was, on the authority of *Silsby* v. *Foote* (20 How. 378), disallowed on the ground that profits in such a case are to be regarded in the light of unliquidated damages. No injunction was decreed, as the term of the patent had expired. It does not appear from the report of the case when the suit was begun, but a reference to the original record shows that the bill was filled in April, 1871, before the expiration of the term of the patent.

Hendrie v. *Sayles* (98 U. S. 546) was a bill in equity for an account of profits, filed after the expiration of the patent, the same patent on which the present suit is founded. It was decided upon a single point raised on demurrer to the bill, the question of jurisdiction not being noticed either by counsel or court. A decree for the complainant was affirmed on appeal.

This appears to be the only case of the kind, until the present, that found its way into this court.

Eureka Company v. *Bailey Company* (11 Wall. 488) is no exception to this remark; although in respect to it the observation has been made, that the injunction prayed for in that case was incidental to the account, and not *vice versa*. That, however, is a misconception; for, unless upon the ground of a difference of citizenship, the court would not have had jurisdiction to entertain the bill in that case, if it had not prayed for an injunction. For the mere purpose of enforcing the contract for the royalty, it was not a case arising under the patent laws, so as to give jurisdiction to the courts of the United States. It was because the defendant was guilty of an infringement of the complainant's patent that he was suable in equity in these courts, and to restrain that an injunction was asked until he should pay what he had promised. The object of the

suit doubtless was to collect the royalty; but it was sought by means of, and therefore as an incident to, the jurisdiction of the court, invoked for the purpose of enjoining the continuance of what, until the royalty was acknowledged and paid, was found to be an infringement.

All the acts of Congress relating to patents prior to that of 1870 contained provisions specifying the special defences which might be made in an action at law for an infringement, under the plea of the general issue, notice thereof having been previously given. The sixty-first section of the act of 1870 enumerates the several special matters thus authorized to be proved, and adds, for the first time in the history of this legislation, the clause that "the like defences may be pleaded in any suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect."

The plain and obvious purpose of this provision is to furnish appropriate modes in equity pleading for the trial of all issues, both of fact and law, relating both to the alleged infringement and the validity of the patent, without the necessity of framing special issues out of chancery for trial by jury, or sending the parties to a court of law for the trial of an action in that forum, in order to determine their legal right. It proceeds upon the idea that the court of equity having acquired jurisdiction for the purpose of administering the equitable relief sought by the bill, may determine directly and for itself, in the same proceeding, all questions incidental to the exercise of its jurisdiction, notwithstanding they may be questions affecting legal rights and legal titles.

Although this was the first statutory authority for the practice, it was rather a recognition of what had already been established than its introduction; for the practice had, in fact, originated long before, and was based upon well-known principles of equity jurisprudence. Whatever question may have existed in reference to it previously was settled in the courts of the United States by *Goodyear* v. *Day* (2 Wall. Jr. 283), a case argued by Webster and Choate, and decided by Mr. Justice Grier in 1852. That learned judge on that occasion said: "It is true that in England the Chancellor will generally not grant a

final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal; it is a practice founded more on convenience than necessity. It always rests on the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact or of legal titles." See also *Orr* v. *Merrill*, 1 Woodb. & M. 376.

The distinction in the nature of the two proceedings, of an action at law and a suit in equity, is plainly pointed out in this section of the statute, the former as being an action for an infringement, the latter as a suit for relief against an alleged infringement. And while upon the words used in the fifty-fifth section of the act, it may be, that the jurisdiction in equity which is thereby conferred is not exhausted by the power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, yet the statute immediately says, that it is upon a decree being rendered in any *such* case for an infringement — as though that was the only one — that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.

It is impossible, we think, to maintain the claim that the language of this act, similar in that respect to the previous acts of 1819 and 1836, conferring jurisdiction in patent cases in equity as well as at law, was meant to obliterate the distinctions between these two jurisdictions, or even to confuse the boundaries between them, as it is alleged was done by the decision in the case of *Nevins* v. *Johnson* (3 Blatchf. 80), and perhaps in other subsequent circuit court decisions. Indeed, it is the settled doctrine of this court that this distinction of jurisdiction, between law and equity, is constitutional, to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law. And the doctrine applies in patent cases as well as others. This court said in *Parsons* v. *Bedford* (3 Pet. 433), speaking

of the meaning intended by the framers of that amendment, that "by common law they meant what the Constitution denominated in the 3d article, LAW, not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered." The rule was repeated in *Fenn* v. *Holme* (21 How. 481), in this language: "In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England.

It becomes necessary, therefore, to consider what support there is in the general doctrines of equity for the contention of the appellant.

It is the fundamental characteristic and limit of the jurisdiction in equity that it cannot give relief when there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contract or torts, by awarding damages; for to do that was the very office of proceedings at law. When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but requiring an account of profits, on the ground that if any had been made, it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make a profit out of his own wrong. As was said by Vice-Chancellor Wigram in *Colburn* v. *Simms* (2 Hare, 543), "the court does not by an account accurately measure the damage sustained by the pro-

prietor of an expensive work from the invasion of his copyright by the publication of a cheaper book," but, "as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged."

Whether a bill for an account of profits against a wrong-doer would lie, independently of other equitable grounds for the intervention of the court, is a question, as was said by Lord Chancellor Brougham in *Parrott* v. *Palmer* (3 Myl. & K. 632), "which has been oftentimes agitated, and has, perhaps, never received a clear and a general decision; that is to say, a distinct judgment on the general proposition, with its limitations." He concluded that, "from the whole it may be collected that, although as to timber there exists considerable discrepancy, yet the sound rule is to make the account the incident and not the principal, where there is a remedy at law; but that mines are to be otherwise considered, and that as to them the party may have an account even in cases where no injunction would lie."

The supposed exception in cases of mines seems to rest upon a *dictum* of Lord Hardwicke in *Jesus College* v. *Bloom* (3 Atk. 262), that "it was a sort of trade;" but the reference is to the case of *Bishop of Winchester* v. *Knight* (1 P. W. 406), where the bill prayed for an account of ore dug by the ancestor of the defendant, in respect to which the argument was, that being a personal tort it died with the person. The decision was that the plaintiff was not entitled; but on this point the Lord Chancellor said: "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime and dies, that in this case I would be without remedy. It is true as to the trespass of breaking up meadow or ancient pasture ground, it dies with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer it." It is plain from these observations that the assumed ground of the equity jurisdiction was the absence of any remedy at law. *Powell* v. *Aiken* 4 Kay & J. 343. It is now

clearly established in the English chancery "that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as an incident to an injunction, and that when the plaintiff has no right to an injunction, he has no right to an account, and his remedy is at law alone." Per Sir Wm. M. James, L. J., in *Higginbotham* v. *Hawkins*, Law Rep. 7 Ch. App. 676.

The same rule is applied by the modern decisions in cases of mines, where, as incident to the relief sought by a bill, an account is asked of profits against trespassers. It appears that as to the mode of assessing compensation, in such suits, to an owner of coal which has been improperly worked by the owner of an adjoining mine, a different principle is applicable when the coal is taken inadvertently, or under a *bona fide* belief of title, and when it is taken fraudulently, with knowledge of the wrong. In cases of the latter description, at law, the strict rule of damages laid down in *Martin* v. *Porter* (5 Mee. & W. 351) was to charge the value of the coal without allowing any of the expenses of getting it; but in those of the former description a milder rule was applied in *Morgan* v. *Powell* (3 Q. B. 278) and *Wood* v. *Morewood* (id. 440), which was to give to the plaintiff the fair value of the coals as if the coal-field had been purchased from him by the defendant. This distinction was adopted and the latter rule applied in equity, by Vice-Chancellor Malins in *Hilton* v. *Woods* (Law Rep. 4 Eq. 432), and by Lord Chancellor Hatherley in *Jegon* v. *Vivian* (Law Rep. 6 Ch. App. 742), the latter remarking that "this court never allows a man to make profit by a wrong." This rule was adopted in *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

The same rule applies in England in patent and copyright cases. The Vice-Chancellor Page-Wood, in *Smith* v. *London & Southwestern Railway Co.* (Kay, 408), said: "The true ground of relief in these cases is laid down in *Baily* v. *Taylor* (1 Russ. & M. 73), where Sir J. Leach, M. R., says: 'The court has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case the court will also give him an account, that his

remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.' Unless that primary right to an injunction exists, this court has no jurisdiction with reference to a mere question of damages." The Vice-Chancellor further observed that, as had often been stated by Lord Eldon, as the object of the court in interfering by injunction was the prevention of a multiplicity of suits, which might be rendered necessary by continued infringements of the patent, he was at a loss to see how the jurisdiction could attach or the relief by injunction be arrived at, after the expiration of the patent, unless a case were made out, of a numerous series of past infringements, from which the parties were still deriving advantage. He then referred to *Crossley* v. *Beverly* (Web. P. C. 119) as a case where there was a specific ground for that relief, that the defendants had been manufacturing the patented articles, secretly and fraudulently, for the purpose of pouring into the market the articles so manufactured directly the patent should have expired. In that case the bill was filed before the expiration of the patent, and the right to sue having been thus acquired, the court extended it to restrain using the articles so manufactured after the patent had expired. "Such a case," continues the Vice-Chancellor, "of a fraudulent attempt to evade the patent might occur, as would enable the court to restrain the use of articles made in infringement of the patent and kept back until it expired, even after its expiration, and the plaintiff having thus obtained a right to the injunction, the right to an account would follow."

In the case of *Price's Pat. Candle Co.* v. *Bauwen's Pat. Candle Co.* (4 Kay & J. 727), the bill was dismissed, because the patent having expired *pendente lite*, the relief by injunction could not be granted at the hearing; but in *Davenport* v. *Rylands* (Law Rep. 1 Eq. 302), the same judge retained the bill, under similar circumstances, for the purposes of an inquiry as to damages, because the act of 21 & 22 Vict., c. 27, commonly called Cairn's Act, passed after the former decision, had altered the rule. That statute declared that in all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement,

or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the same court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct, — a provision which no doubt suggested the like extension of the jurisdiction of the court in patent cases, contained in our Patent Act of 1870. But even after the passage of Cairn's Act, it was decided by Vice-Chancellor Sir Wm. M. James, in *Betts* v. *Gallais* (Law Rep. 10 Eq. 392), that the court would not entertain a bill for the mere purposes of giving relief in damages for the infringement of a patent, when the bill had been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. He characterized it as "a mere device to transfer a plain jurisdiction to award damages from the court to which that jurisdiction properly belongs, to this court."

Mr. Kerr, in his treatise on Injunctions, 41, summarizes the result of many decisions, which he cites, under this statute, as follows: "The statute did not transfer to the court the general jurisdiction of common law by way of damages, or extend its jurisdiction to cases where previously to the statute it had no jurisdiction, or could not, consistently with its rules and principles, have interfered. The statute merely empowered the court to give damages in cases involving elements or ingredients of an equitable character. If the case as presented to the court was an equitable one, so that the subject-matter of the application is properly cognizable in equity, the court had jurisdiction under the statute to entertain the question of damages. If, on the other hand, the plaintiff had no equitable right at the time of bringing the action, so that the matter has been improperly brought into equity, the statute had no application. Damages may be awarded under the statute if it appear that at the time of bringing the action there was an equitable case, although the case for an injunction fails, or although an injunction is not competent from circumstances which have occurred since the filing of the bill."

It will be observed that the British statute does not touch

the question of the account of profits by an infringer, leaving that as it stood before the passage of the act. The unavoidable inference is that damages can only be given under the act, in cases in which an account might be decreed; and that the patentee must, as it was expressly decided by the House of Lords, in *De Vitre* v. *Betts* (Law Rep. 6 H. L. 319), in all cases when he has a decree, elect whether he will have an account of profits or an inquiry as to damages, and cannot have both. Under the act of Congress of 1870, he may recover damages in addition to the profits to be accounted for by the defendant; but as the recovery is limited by the act to the actual damages, it is manifest that the recovery of damages and profits is not intended to be double, but that when necessary the damages are to supplement that loss of the complainant which the profits found to have been received are insufficient to compensate, subject to the power of the court as to their increase, as in case of verdicts.

This firm and indisputable doctrine of the English chancery has been recognized and declared by this court, in *Hipp* v. *Babin* (19 How. 271), to be part of the system of equity jurisprudence administered by the courts of the United States, founded not only upon the legislative declaration in the Judiciary Act of 1789, "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," but also upon the intrinsic distinctions between the different jurisdictions of law and equity. In delivering the opinion of the court in that case, Mr. Justice Campbell remarked that "the practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience;" and cited the instances in which "this court has denied relief in cases in equity, where the remedy at law has been plain, adequate, and complete, though the question was not raised by the defendants in their pleadings nor suggested by the counsel in their arguments. He then adds: "And the result of the argument is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy,

without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." It was contended in that case that, notwithstanding this general principle, the bill ought to be maintained, because the complainants, being minors, were authorized to call upon the defendants, who had intruded into possession of their lands, for an account as guardians, and that the Court of Chancery was better fitted to take an account for rents, profits, and improvements, and might decide the question of title as incidental to the account.

In reply to these points, Mr. Justice Campbell remarked that "there are precedents in which the right of an infant to treat a person who enters upon his estate with notice of his title, as guardian or bailiff, and to exact an account in equity for the profits for the whole period of his occupancy, is recognized." "But," he added, "in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown." "Nor can the court retain the bill under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate, and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of the Court of Chancery to decide the title and to adjust the account."

These principles were announced in a case for the recovery of the possession of real estate held adversely, but they are of general application, and embrace, as well, the case of

torts to personalty, and infringements of patent and copy rights.

The distinct ground upon which the opposite view is presented to us in argument is, that the infringer of a patent-right is, by construction of law, a trustee of the profits derived from his wrong, for the patentee, and that a court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief. And in support of this contention we are referred to passages in the judgments of this court in the cases of *Packet Company* v. *Sickles*, *Burdell* v. *Denig*, and *Birdsall* v. *Coolidge*, all of which have been already cited in this opinion, *supra*, pp. 198, 199.

But the inference sought to be drawn from the expressions referred to is not warranted. It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong. All that was meant in the opinions referred to was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which, having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action. The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is, to

require them to refund the amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits. And the particular rule was formulated, as will be seen by reference to the cases already referred to, out of tenderness to defendants in order to mitigate the severity of the punishment to which they might be subjected in an action at law for damages, and because it was thought more equitable merely to deprive them of the actual profits arising from their wrong, than to make no allowances, in estimating damages, for the cost and expense of the business in the prosecution of which they had violated the rights of the complainant. The same reason operated in the establishment of the similar rule acted upon in the cases of *Hilton* v. *Woods* and *Jegon* v. *Vivian*, already cited in a previous part of this opinion, *supra*, p. 209. The rule itself is reasonable and just, though sometimes perverted and abused. It has been constantly acted upon by the courts. But it is a rule of administration and not of jurisdiction; and although the creature of equity, it is recognized as well at law as one of the measures, though not the limit, for the recovery of damages.

The case is not within the principle, according to which, in certain circumstances, a court of equity decrees a wrong-doer to be a trustee *de son tort*, and exerts its jurisdiction over him in that character. Where a defendant has wrongfully intermeddled with property already impressed with a trust, he may be required as a trustee to account for it, as was done in the case of *People* v. *Houghtaling* (7 Cal. 348), because trust property may be followed, wherever it can be traced, into whosesoever possession it comes, except that of a *bona fide* purchaser without notice. It is the character of the property, and not the wrong done in converting or withholding it, that constitutes the wrong-doer a trustee.

Our conclusion is, that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be

sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but, that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule.

The case of *Garth* v. *Cotton* (1 Dick. 183) furnishes an interesting and curious illustration of one of the excepted cases. In that case Lord Hardwicke sustained a bill in equity, in a case of waste, for an account of timber felled and sold, where there could be no injunction, in favor of a complainant unborn at the time of its commission, whose estate was a contingent remainder, supported by a limitation to trustees to preserve it, the defendant being the owner of a prior term of years, and the ultimate remainder-man in fee. The Lord Chancellor proceeded on the ground of collusion between the defendants and a nominal or imputed breach of trust on the part of the trustees to preserve the contingent remainder in permitting the wrong; and distinguished the case from *Jesus College* v. *Bloom* (3 Atk. 262), particularly on the ground that the complainant could have no remedy at law. Another instance of an exception is mentioned by Vice-Chancellor Page-Wood in the extract from his judgment in the case of *Smith* v. *The London & Southwestern Railway Co.* (Kay, 408), contained in a previous part of this opinion.

It does not appear from the allegations of the bill in the present case that there are any circumstances which would

render an action at law for the recovery of damages an inadequate remedy for the wrongs complained of; and, as no ground for equitable relief is presented, we are of opinion that the Circuit Court did not err in sustaining the demurrer and dismissing the bill.

Decree affirmed.

Mr. Justice Gray did not sit in this case, nor take any part in deciding it.

National Bank *v.* Watsontown Bank.

1. The statute of Pennsylvania (*infra*, p. 220), declaring that the stock of a bank shall be transferable only on the books in such manner as the by-laws shall ordain, and that no stockholder shall be authorized to transfer his stock until his debt is discharged or secured to the satisfaction of the directors, does not prohibit the bank from waiving its right, nor the cashier from acting for them, by an authority, either express or implied.
2. A. borrowed money of B., to whom he assigned and delivered his certificate of stock as collateral security, with authority to sell in case of default in payment. On A.'s default B. sent the certificate to the cashier of the bank, who made the requisite entries on the stock ledger which he kept, it being the only book, except the book of certificates, showing the transfers of stock, and it was his practice to keep the account of such transfers without consulting in each case the directors. The latter had adopted no by-law on the subject. On B.'s instructing the cashier to sell the stock, the latter informed him that it would not be necessary to send him a certificate, but to forward a power of attorney, which B. did. Part of the stock was sold, the proceeds were remitted, and the proper entries made on the stock ledger. A. subsequently became insolvent. He was indebted to the bank, and on the directors refusing to approve the transfer B. brought suit to compel the issue to him of the customary certificate of stock. *Held*, 1. That as between A. and B. the title to the stock passed by A.'s delivery of the certificate with the accompanying power of attorney. 2. That the acts of the cashier were binding on the bank, and the transfer by him made on the stock ledger vested in B. a complete and unincumbered title to the stock, and a right to the usual certificate as evidence of his ownership. 3. That had B. acquired merely an equity based on his contract, the legal right of the bank to assert its lien was lost by its own laches, and the enforcement of it would, under the circumstances, operate as a fraud.

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. John A. J. Creswell and *Mr. William H. Armstrong* for the appellants.

Mr. Oscar Foust and *Mr. Robert P. Allen* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a bill in equity filed by the Cecil National Bank, of Port Deposit, Maryland, and Jacob Tome, the appellants, to compel the Watsontown Bank, a corporation of Pennsylvania, to issue a certificate for two hundred shares of its capital stock to the said Cecil National Bank, to which the latter claims to be entitled.

These shares of stock belonged to Powell & Co., a partnership doing business at Williamsport, Pa., as private bankers, the certificate whereof, then held by them, they assigned and delivered to Jacob Tome, president of the Cecil National Bank, as collateral security for two promissory notes of $5,000 each, of which they were makers, discounted for them by that bank, and which it held at their maturity. One of the notes was dated Dec. 4, 1875, at thirty days, the other Dec. 20, 1875, at forty days, and each contained a stipulation authorizing the sale of the stock in case of default.

These notes becoming due and remaining unpaid, the Cecil National Bank, on Jan. 31, 1876, by its president, J. Tome, transmitted the certificate of stock, in a letter to R. B. Claxton, cashier of the Watsontown Bank, requesting a new certificate in his name, and asking what the stock was worth. To this Claxton replied to Hopkins, cashier of the Cecil Bank, on Feb. 1, 1876, acknowledging the receipt of the certificate, stating that a new board of directors had been elected the day before; that they would organize on February 7, when a president would be elected, and when, as he added, "I will forward your stock certificate. Mr. Pardee, our present president, is not here, and I have no signatures on the stock book." He continued: "I think I can find a purchaser for Mr. Tome's stock at from 100 to 102, and possibly more. If you will let me know exact figures I will endeavor to dispose of it promptly, if he so desires." On February 9, Tome answered, authorizing a sale, and directing the proceeds to be remitted to him; and wrote again on February 14, enclosing a power of attorney to sell

and transfer the stock, and stating that it would not be necessary to forward a certificate to him. This letter was an answer to one from Claxton of February 11, asking for the power of attorney from Tome to transfer the stock, and stating that as he intended to sell, it was useless to forward his certificate. He added that he thought he had arranged for the disposition of $1,000 of the stock that day, and would be as prompt as possible in placing the balance. The power of attorney sent by Tome was in the usual form, and authorized R. B. Claxton "to sell, transfer, and assign the two hundred shares of stock of the Watsontown bank standing in my name in the books of said bank," &c.

In point of fact, on February 4 the account of Powell & Co. on the stock ledger of the Watsontown Bank was charged by Claxton, the cashier, with "$10,000 to J. Tome;" and an account opened with J. Tome, on the same book, crediting him, of the same date, "by Powell & Co., $10,000." On February 21 this account is debited with two items: "To Henry Scott $500," and "A. Scott $500;" and the same day Claxton, the cashier, remitted to Tome the proceeds of the sale of these twenty shares of stock. On February 16 he had written acknowledging the receipt of the power of attorney previously requested. The accounts of Henry Scott and of Amos Scott, on the same ledger, are credited with the stock sold to them respectively.

It appears that this stock ledger was the only book kept by the Watsontown Bank showing the transfers of stock, except a book of certificates, the stubs of which showed to whom the corresponding certificate had been issued, and what certificate had been surrendered in lieu of it. The stock ledger was kept by the cashier.

Martin Powell, one of the firm of Powell & Co., was a director of the Watsontown Bank, and R. B. Claxton, Jr., its cashier, was also a member of that firm, and known to be such by the directors of the bank. It was his usual practice, as cashier, to make and keep the account of transfers of stock without consulting in each case with the board of directors.

On March 12, 1876, Powell & Co. failed, and April 13, 1876, made a voluntary assignment for the benefit of creditors.

On the next day, April 14, the Watsontown Bank, by its attorney, addressed a letter to J. Tome, as follows: —

"WATSONTOWN, PA., April 14, 1876.

"MY DEAR SIR, — Some time since you sent to our bank a certificate of stock originally issued to Powell & Co., and by them transferred to you for $10,000. This transfer was never approved by our president or board of directors, and we will not do so, or cannot under the act of assembly regulating banks in this Commonwealth, so long as Powell & Co. are indebted to us, either as drawer, maker, or indorser, for matters due and unpaid. And, as this is the existing state of facts, we cannot permit a transfer to be made until we are secured to the satisfaction of our board of directors for all their (Powell & Co.'s) liabilities."

The statutory provision referred to is sect. 10, art. 10, of an act regulating banks, approved April 10, 1850, and reads as follows: —

"The stock of the bank shall be assignable and transferable on the books of the corporation only, and in the presence of the president or cashier, in such manner as the by-laws shall ordain; but no stockholder indebted to the bank for a debt actually due and unpaid shall be authorized to make a transfer or receive a dividend until such debt is discharged or security to the satisfaction of the directors given for the same."

No by-law on the subject is shown to have been passed by the directors of the Watsontown Bank.

It is assumed that the account between the bank and Powell & Co. shows that the latter was indebted to the former on Feb. 1, 1876, for a balance amounting to $5,215.67.

The Circuit Court rendered a decree denying the relief as prayed for, and requiring the bank to transfer one hundred and eighty shares of the stock, being the original amount less the twenty shares sold to the Scotts, only upon payment of the sum found due to it, from Powell & Co., with interest.

The complainants bring the present appeal to review this decree.

As between Powell & Co. and Tome, representing the appellants, the property in the shares of stock, undoubtedly, passed to the latter without the formality of a transfer on the

books of the Watsontown Bank. As collateral security for the payment of their notes, discounted and held by the Cecil National Bank, and with the power to sell for the purpose of payment, the title passed by the delivery of the certificate, with the accompanying power of attorney. *Johnston* v. *Laflin*, 103 U. S. 800.

The title, however, was unquestionably subject to the lien given by its charter to the Watsontown Bank. That provision, when insisted on and enforced, would be effectual to subject the beneficial interest in the stock to the payment of any indebtedness from the stockholder, making the transfer, to the bank for a debt which, at the time of the proposed transfer, was actually due and unpaid.

According to the terms of this provision the bank was properly represented, in the act of transfer, by its cashier; and he was authorized to bind the bank, in consummating the transaction, by virtue of his office, in the absence of any by-law, according to the usage of the business and the practice of the particular bank, presumed to be known to and approved by the directors. *Case* v. *Bank*, 100 U. S. 446.

The clause which denies to the stockholder the privilege of making a transfer of his stock, while a debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the bank to waive its rights, or prevent the cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business, within the general scope of his official duty, he is their appropriate representative. There is no circumstance which, in our opinion, limits the general and usual authority of the cashier in respect to the transfer of the stock in question. The fact that he was a member of the firm of Powell & Co., whose stock it had been, can have no such effect; for his relation to the parties was well known to the directors of the bank, and he had no interest in the transaction adverse to his official duty. Whether the stock should become the property of the Cecil National Bank, free from the claim of the appellees, or should remain subject to the claim of the latter, was equally indifferent to him, as in either event it served to pay an equivalent amount of debt for which he was liable. It is

not alleged, and is not shown, that the appellants were aware of Claxton's relation to the firm of Powell & Co., or of their indebtedness to the bank whose officers they were, and there is no ground for imputing fraud to, or suspecting collusion with, them.

Our conclusion, therefore, is, as to this point, that the Watsontown Bank was lawfully represented by Claxton, its cashier, in this transaction, and is effectually bound by his acts. It remains to consider the nature and effect of what was in fact done.

A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer, when thus consummated, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law. Accordingly, when the cashier of the Watsontown Bank received from Tome the certificate, with the authority for its transfer to him duly executed by Powell & Co., and, in pursuance of the request to make the transfer, charged it in the account against the former owner, and gave to Tome the corresponding credit, the latter became a stockholder in the bank, invested with the legal title to the stock, and with all the rights, powers, and privi-

leges belonging to that character. Nothing more remained to be done to make the conveyance of title complete and absolute, and, so far as the bank was concerned, it was irrevocable. It had consented to the transfer, and the transfer had been made. Thenceforward the rights of Tome in respect to the stock in question were all they could have been if it had belonged to him by virtue of an original subscription. The claim of the bank upon it, based upon the existing relation with the former owner, ceased when, with its consent and through its act, that relation ceased.

The Cecil National Bank, then, had become the owner of the legal title to the stock which Powell & Co. transferred, and was entitled to demand recognition from the bank of its rights as a stockholder, and to the customary certificate, as evidence of its ownership.

On the supposition that not the legal title, but only an equity, based on an executory contract for a transfer, passed to the appellants, by virtue of the transaction with the cashier of the Watsontown Bank, their right to the relief prayed for is not less clear. Aside from the recognition of the title, as complete, by accepting and acting upon the power of attorney given by Tome to sell and transfer it as his stock, and the sales made to the Scotts under it, whose title is not denied, and yet cannot be better than that of their vendor, which is disputed, the subsequent conduct of the Watsontown Bank raises an equity against it, which is superior to its legal right to insist upon a lien on account of the debt of Powell & Co. When Tome made his claim on behalf of the Cecil National Bank for a transfer of the stock, if the appellee had intended to insist on its legal rights and assert its lien, then was the proper time to do it; for it then, at least, had notice of the interest and the claim of the appellants. If it had done so promptly, the latter might still have had an opportunity to obtain other security, or to enforce by other means their claims against their debtors, who, although in default, do not appear to have been as yet *in extremis*. So far, however, from adopting this course, the Watsontown Bank pursued one exactly the reverse. It permitted the parties by its actual exercise to rest in the belief that their right to dispose of the stock for

the purpose of paying the debt due them would not be questioned, until the failure and assignment of Powell & Co. made any other resort useless; and, having induced them to alter their condition by reliance upon assurances, which were equivalent to a declaration that it had no adverse claim, the appellee cannot now be permitted to assert a lien, lost by its own laches, and the enforcement of which would operate as a fraud.

For these reasons, we conclude that the appellants are entitled to the relief sought by their bill, and that the decree, so far as it denies it, must be reversed and the cause remanded with instructions to modify the decree in accordance with this opinion; and it is

So ordered.

WARREN *v.* STODDART.

1. Where a party, entitled to the benefit of a contract, can, at a trifling expense and with reasonable exertions, save himself from a loss arising from a breach of it, it is his duty to do so, and he can charge delinquents only with such damages as with reasonable endeavor he could not prevent.
2. The contract between the parties (*infra*, p. 225) construed. *Held*, that W. having put an end to it by canvassing on behalf of another party for a rival edition of the same work, and cancelling the orders he had obtained for S.'s reprint, S. was not bound thereafter to furnish him with copies of the work on credit.

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

Joseph M. Stoddart was a book publisher, carrying on business in the city of Philadelphia, under the name of J. M. Stoddart & Co. In 1878 he undertook to reprint and sell in the United States a new edition, consisting of twenty-one volumes, of the Encyclopædia Britannica, which A. & C. Black, of Edinburgh, Scotland, were then bringing out.

His plan was to sell the work by subscription only; the subscriptions were to be obtained by agents and canvassers, to whom certain territory was to be allotted. It was expected

that the work would be printed and published at the rate of about three volumes per year.

Moses Warren was an agent in the city of Chicago for the sale of subscription books; that is, books sold only by subscription. On Feb. 24, 1877, he and Stoddart entered into a contract in writing, which is as follows: —

"PHILADELPHIA, Feb. 24, 1877.

"Agreement entered into this day between J. M. STODDART & Co., of Philadelphia, Pa., and MOSES WARREN, of Chicago, Ill.

"The said J. M. Stoddart & Co. agree to give the said Moses Warren a general agency for the sale of the American reprint of the Encyclopædia Britannica in the following territory."

Here follows a description of the territory, consisting of several States and parts of States, and a list of the prices at which Stoddart & Co. agreed to furnish Warren with the books in various styles of binding. The contract then proceeds: —

"Said J. M. Stoddart & Co. also agree to give to said Moses Warren the exclusive right to sell the Encyclopædia Britannica within the above-named territory, during such time as said Warren shall faithfully perform his part of the agreement as hereinafter stated.

"1st, Said Warren agrees to use his best endeavors to promote the sale of the Britannica in the above-assigned field.

"2d, To send to J. M. Stoddart & Co. a weekly report of the number of orders taken the week previous.

"3d, To fill no orders outside of his assigned field.

"4th, To leave no volumes with booksellers to sell or display in their stores.

"5th, To furnish no volumes at less than the regular retail price.

"6th, To remit on the 7th day of the month one-half the amount of monthly statement for previous month, and to remit on the 26th day of the month the remaining one-half of said monthly statement.

"Witness our hands and seals on the day and date above mentioned.

"J. M. STODDART & Co. [SEAL.]
"MOSES WARREN." [SEAL.]

Warren at once entered upon the performance of this contract, and by April 20, 1878, had obtained and reported to Stoddart subscriptions for 1,733 sets of the work, and had de-

livered to subscribers a portion of the volumes of the work which had been issued up to that time; on an average less than four volumes to each subscriber.

In the latter part of the year 1877 or early in 1878 the Scotch publishers of the Encyclopædia and the house of Scribner & Armstrong, of New York, formed a plan to issue in this country an edition of the Encyclopædia, to compete with the reprint of Stoddart, by striking off sheets from the original stereotype plates and engravings of the Scotch edition and sending them to this country to be bound and sold by subscription, on substantially the same plan as that which had been adopted by Stoddart to put his reprint into circulation.

Sometime in May, 1878, Scribner & Armstrong commenced negotiations with Warren, which resulted in a contract between them, dated May 14, 1878, by which they constituted him their agent, with the exclusive right to sell, until its publication was completed, their edition of the Encyclopædia within the same territory substantially as that mentioned in the contract between Stoddart and Warren, and agreed to furnish him with copies of the Encyclopædia at prices therein named. He stipulated on his part that from and after the date of the contract he would not canvass for any other Encyclopædia, or any other edition of any Encyclopædia, but that he "should have the privilege of completing orders already taken for the reprint edition of Stoddart to all subscribers therefor."

After the making of this contract Warren refused to canvass further for Stoddart's reprint edition. Whereupon Stoddart refused to furnish him, except for cash on delivery, the books with which to fill the orders which he had obtained for Stoddart's reprint edition.

Upon this point the evidence was as follows: On June 5, 1878, Warren sent an order to Stoddart requesting him to forward a certain number of books to be furnished subscribers, to which Stoddart replied by letter, dated June 6, 1878, that "as to all future orders, for the present they will be filled when cash accompanies the orders."

On June 10, 1878, Warren wrote to Stoddart as follows: "I am desirous of delivering reprint fast as possible on my orders heretofore taken for same. If my orders for stock are filled

they shall be paid for according to contract. Do you intend to fill my orders on that basis?"

To this letter Stoddart replied by telegraph as follows: "Will fill order when cash is received in accordance with our letter of June 6." There is no evidence that Stoddart ever refused to fill a cash order; nor was it pretended that Warren, after that date, ever sent an order to Stoddart with the cash to pay for the books ordered.

After the refusal of Stoddart to supply Warren with the books except for cash, the latter induced 1,253 of the subscribers to Stoddart's reprint edition to exchange the subscription to the reprint for a subscription to the Scotch edition, and he claimed that he expended in obtaining their exchange an average of four dollars for each subscription, making a total of $5,012. He also claimed that the Stoddart reprint volumes taken back from said subscribers were worth $12,206 less than the amount paid by him to Stoddart for them, and less than what he could sell them for in the market. Warren also claimed that he lost his profits on four hundred and eighty orders which were not exchanged, amounting to the sum of $20,073.

This suit was brought by Stoddart to recover of Warren the sum of $2,976.53 for books furnished him to supply his subscribers. It was not disputed by Warren that the amount sued for was due and owing from him to Stoddart. But Warren, by way of set-off, averred the making of the contract with Stoddart above set forth, and claimed that he had been damaged by the refusal of Stoddart to perform the contract, in the sum of $30,000.

Upon the trial of the case, the judge instructed the jury that the defendant's claim for damages could not be allowed as against the plaintiff's claim in the suit, and that the plaintiff was entitled to a verdict for the full amount sued for by him and admitted to be due; namely, $2,976.53. The jury returned a verdict accordingly, on which judgment was entered. This writ of error is prosecuted by Warren to reverse that judgment.

Mr. Van H. Higgins and *Mr. Isaac N. Arnold* for the plaintiff in error.

There was no opposing counsel.

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

The only question in the case is whether or not the instruction of the court to the jury, to the effect that, on the facts, the plaintiff in error was entitled to no damages, is correct. This will depend upon the construction which is to be put on the contract between Stoddart and Warren, of Feb. 24, 1877.

The contract is indefinite as to the time during which it was to continue in force. It is probable that the parties supposed the contract would continue until the twenty-one volumes were published, or at least until the territory named in the contract had been thoroughly canvassed. But no time was mentioned in the contract, nor did it make any provision with respect to the unfilled orders in case of its termination before the publication was completed, and we are left to construe it and settle the rights of the parties under it as they have made it.

The complaint of Warren is not that Stoddart refused to furnish him with the books necessary to fill the orders he had taken, nor that he refused to furnish the books at the price fixed by their contract. His sole complaint is that Stoddart refused to furnish the books on a credit of about thirty days, which Warren insists the contract provided for, and demanded the cash.

He claims that after he had stopped canvassing for the reprint of Stoddart, and had made a contract with and entered into the service of a rival publisher of the same work, and had begun in the interest of the rival publisher a canvass of the same territory which had been allotted to him exclusively by his contract with Stoddart, he had the right, upon the refusal of the latter to furnish the books on thirty days' credit, to obtain a cancellation of the orders he had taken for Stoddart's reprint, and substitute therefor orders for the rival edition, and charge the expense of the substitution to Stoddart.

We think it entirely clear that he had no such right. There was no express provision in the contract between Warren and Stoddart which required the latter to furnish the books on credit, and we think that the provision of the contract that

Warren should remit on the seventh day of the month one-half the amount of monthly statement for previous month, and on the twenty-sixth day the remaining half, was not continued in force after Warren had terminated the contract and abandoned the service of Stoddart under it.

Although the contract fixed no time during which it was to continue in force, yet we think when either party terminated it, the other was no longer bound by its provisions. It gave Warren the exclusive right to sell the books within certain territory, and by it Stoddart agreed to furnish them to him at stipulated prices and on stipulated terms. On his part Warren agreed to use his best endeavors to promote the sale of the work in the field exclusively assigned to him. These clauses of the contract were reciprocal, and the performance of one was the consideration for the performance of the other. When Warren ceased to canvass for Stoddart's books, he had no right to demand the books at the prices or the terms mentioned in the contract.

But even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that, upon the refusal of Stoddart to give Warren a credit of thirty days upon the books, the latter could obtain a cancellation of the orders he had taken for Stoddart's reprint and substitute orders for the Scotch edition, and charge the expense of so doing to Stoddart. The claim that upon a simple refusal of Stoddart to allow him a thirty days' credit upon the books as he ordered them, he could go on and substitute other orders for another book and charge Stoddart with the expense of substitution, amounting to $30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to is not to be measured in that way.

The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. *Wicker* v. *Hoppock*, 6 Wall. 94; *Miller* v. *Mariners' Church*, 7 Me. 51; *Russell* v. *Butterfield*, 21 Wend.

(N. Y.) 300; *United States* v. *Burnham*, 1 Mason, 57; *Taylor* v. *Read*, 4 Paige (N. Y.), 561.

The course pursued by Warren was not necessary to his own protection. He might either have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them, on equitable terms. The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this he unnecessarily destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing.

If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages.

But, as we have already said, Stoddart was not bound by the contract to furnish the books on credit after Warren had gone over to a rival publisher and refused to go on under his contract. We think, therefore, that the court below was right in saying to the jury that Warren was entitled to no damages at all.

Judgment affirmed.

CHATFIELD *v.* BOYLE.

1. A person having made an assignment in favor of his creditors, one of them in behalf of himself and such others as would unite with him, filed his bill to set aside as fraudulent a previous conveyance in favor of A., and to exclude from the benefit of the assignment A., who, he alleged, was not a creditor. Several creditors united as complainants. The bill was dismissed, and they appealed. *Held*, that the matter in dispute is not the entire fund, but their distributive shares thereof, and the amount being less than $5,000, this court has no jurisdiction.
2. *Terry* v. *Hatch* (93 U. S. 44) cited and approved.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Western District of Tennessee.

The facts are stated in the opinion of the court.

Mr. John D. McPherson and *Mr. Jeremiah W. Clapp* in support of the motion.

Mr. William M. Ramsey, *contra.*

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

Boyle & Co., a mercantile firm doing business at Memphis, Tenn., being insolvent, made, on the 17th of November, 1876, a general assignment to J. A. Omberg for the benefit of all their creditors. A deed of trust, in the nature of a mortgage, had been previously executed, conveying some of the property of the firm as security for a debt said to be owing to Jefferson Davis. At the time of this assignment, the total indebtedness of the firm to creditors other than Davis and another person who has since been paid out of securities he held at the time, was $17,233.63

The debt claimed to be due Davis was 25,000.00

Making a total of $42,233.63

Chatfield and Woods, creditors of the firm to the amount of $3,440.37, filed a bill in equity in one of the State courts of Tennessee, on the 13th of January, 1877, against Boyle, Davis, and others, the object of which was to set aside the deed of trust in favor of Davis, and also to prevent him from participating in the benefits of the general assignment, on the ground

that he was not in reality a creditor of the firm, but one of the partners. This suit was brought, as alleged, in aid of the assignment and in behalf of all the creditors of the firm who might be entitled to come and join therein. Omberg, the assignee, was also joined as a complainant. As to him, the allegations in the bill are as follows: "Complainant J. A. Omberg, as the assignee in said deed of assignment, comes at the request of the creditors as aforesaid, and claims the benefit of all the matters and circumstances in this bill set up in behalf of all the creditors of Boyle & Co., and especially in behalf of all those creditors who may be hereafter made parties hereto, and may by proper averments and proof make good their claim, to be paid out of the proceeds of the property hereby proceeded against, and asks for them, and each of them, all the relief, under and by virtue and in aid of said assignment, to which they or either or each of them may as creditors be entitled as against defendant Davis or other defendants."

During the pendency of the suit in the State court the property held under the trust for the benefit of Davis was sold with the consent of all parties, and realized $2,951.10, which is now in court subject to any decree that may be finally rendered. The assignee has also disposed of all the remaining property embraced in the assignment, and in the distribution that has been made of the proceeds, $3,403.81 was set apart for Davis, if he shall be adjudged to be a creditor of the firm and not a partner. These two sums, amounting in the aggregate to $6,354.91, constitute the entire fund about which the dispute in the case arises.

On the 16th of March, 1877, the Powers Paper Company, Edwin Hoole, and L. Snider & Sons, also creditors of the firm, were, on their own petition, admitted as parties complainant. Their claims were respectively as follows: —

Powers Paper Company	$2,689.60
Edward Hoole	1,232.61
L. Snider & Sons	1,103.76

On the 23d of March, 1877, the following order was entered in the suit: "In this cause it appearing to the court by a statement of J. A. Omberg that all the creditors who have demanded

of James A. Omberg, the assignee, to join in this litigation, have come in and had themselves made parties therein, it is, therefore, on motion, ordered that this bill be dismissed, so far as said Omberg is concerned, and he go hence without day."

On the next day, March 24, S. A. Tower & Co. and H. B. Graham & Brothers were, on their petition, made parties. Their claims are as follows: —

S. A. Tower & Co.	$887.68
H. B. Graham & Brothers	318.41

No other parties have ever appeared to claim the benefit of the suit. The aggregate of all the several claims represented by all the complainants is $9,672.43.

On the 4th of April, 1877, after Omberg had been dismissed from the case, the remaining complainants united in a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee, which was afterwards effected. Answers were filed and testimony taken in the Circuit Court. Upon final hearing the bill was dismissed. From the decree to that effect all the complainants united in this appeal. The appellees now move to dismiss because the matter in dispute does not exceed the sum of $5,000. In support of this motion two grounds are relied on. They are: —

1. That the claims of the several complainants are separate and distinct, and cannot be united for the purpose of making up the amount necessary to give us jurisdiction. The effort in this connection is to bring the case within the operation of the principle under which motions to dismiss were granted in *Seaver* v. *Bigelows*, 5 Wall. 208; *Rich* v. *Lambert*, 12 How. 347; *Oliver* v. *Alexander*, 6 Pet. 143; *Stratton* v. *Jarvis*, 8 id. 4; and *Paving Company* v. *Mulford*, 100 U. S. 147.

2. That the matter in dispute is not the whole amount of the fund in court which is claimed by Davis, but only so much as would be distributable to the complainants under the assignment, if Davis is adjudged to be a partner and not a creditor. For this *Terry* v. *Hatch* (93 U. S. 44) is relied on.

Without considering the first of these propositions, we think it clear the case comes within the last. These appellants on this appeal represent no one but themselves. Their rights

here are just what Omberg asked for himself, that is to say, such as belong to creditors who in this suit make good their claim to be paid under the assignment out of the fund proceeded against. The complainants do not necessarily represent all the creditors entitled to the benefits of the assignment, neither have they assumed anything of the kind. They ask only for such relief as belongs to those who actually come in according to their invitation. They are in no situation to appropriate to themselves the whole of the fund. The other creditors may certainly abandon their interest and permit it to go to Davis if they choose. The complainants cannot compel them to take it whether they want it or not. By not coming into the suit they, in effect, have elected not to contend with Davis for their share, and to treat him as a creditor rather than a partner. When Omberg went out of the suit all the creditors had come in who wanted him to proceed. Under these circumstances, if the bill had been sustained, no opportunity need have been given other creditors to come in. The court might very properly have said that, as they had stayed out until all risks of liability for costs and expenses were gone, they should not then be admitted. Such being the case, a decree would have been entered in favor of the complainants for their distributive shares of the fund, and no more. The rest would have remained for Davis, the same as though no suit had been begun. The fund is $6,354.91, and the debts entitled to the benefit of the assignment, $17,233.63, of which the complainants represent only $9,672.43. Under this state of facts the whole of the distributive shares of the complainants, if they are successful, will be less than five thousand dollars, not enough to give us jurisdiction. Upon an appeal we will not consider whether others may come in if we reverse the decree. We look only to the parties who are actually before us. The case is, therefore, within the rule stated in *Terry* v. *Hatch* (*supra*), and the motion to dismiss is

Granted.

MR. JUSTICE MATTHEWS, having been of counsel in the court below, took no part in the decision of this motion.

HECHT v. BOUGHTON.

An appeal is the only form of proceeding by which this court can review the judgment or the decree of a territorial court in a case where there was not a trial by jury.

MOTION to dismiss a writ of error to the Supreme Court of the Territory of Wyoming.

Mr. Thomas Turner in support of the motion.
Mr. E. W. Mann, *contra*.

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

This is a writ of error to the Supreme Court of the Territory of Wyoming, to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss, because the case should have been brought here by appeal, and not by writ of error.

The second section of the act of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), 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 appeal:

"*And provided further*, that the appellate court may make any order in any case heretofore appealed which may be necessary to save the rights of parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States, where the record has already been filed."

This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. *Stringfellow* v. *Cain*, 99 U. S. 610. We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances, the form of proceeding to get a review is not of so much importance as certainty about what is to be done.

We cannot agree with counsel for the plaintiff in error that the act of Congress was intended to apply only to those Territories where the distinction between suits at law and suits in equity had actually been abolished. From the preamble it may fairly be inferred that the object of the legislation was to prevent embarrassments growing out of the mingling of jurisdictions; but the statute as it stands clearly applies to all territorial courts.

Motion granted.

DAVENPORT *v.* COUNTY OF DODGE.

1. Where a precinct in an organized county in Nebraska voted, pursuant to the statute of that State approved Feb. 15, 1869, to aid a work of internal improvement, and bonds were, as in this case, issued therefor by the county commissioners (*infra*, p. 238), — *Held*, that, to enforce payment, the holder of them must sue the county, and judgment, if rendered in his favor, will be in form against it, and be collected by a tax upon the taxable property of the precinct.
2. The courts of the United States cannot by *mandamus* compel the collection of a tax to pay such bonds until a judgment upon them shall be obtained. *County of Greene* v. *Daniel* (102 U. S. 187) cited on this point and approved.

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

The facts are stated in the opinion of the court.

Mr. W. H. Munger and *Mr. E. Wakeley* for the plaintiff in error.

Mr. William Marshall for the defendant in error.

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

By a statute of Nebraska, passed in 1869, "to enable counties, cities, towns, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purposes," the legal voters of counties and cities were authorized to vote bonds for such purposes, and upon a favorable vote, the county commissioners in case of a county, and the city council in case of a city, were to issue the bonds as voted, which were to "continue a subsisting liability against said city or county" until paid. It was further made the duty of the proper officer annually to cause to be levied, collected, and paid over to the holders of such bonds "a special tax on all taxable property within said county or city, sufficient to pay" the interest and principal as they fell due. Sects. 6 and 7 of the act are as follows: —

"SECT. 6. Any county or city which shall have issued its bonds in pursuance of this act, shall be estopped from pleading want of consideration therefor, and the proper officers of such county or

city may be compelled, by *mandamus* or otherwise, to levy the tax herein provided to pay the same.

"SECT. 7. Any precinct, in any organized county of this State, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." General Statutes of Neb. 448.

Under the authority of sect. 2 bonds were issued by the county commissioners of Dodge County in the following form:

"UNITED STATES OF AMERICA, }
STATE OF NEBRASKA. }

"It is hereby certified that Fremont precinct, in the county of Dodge, in the State of Nebraska, is indebted unto the bearer in the sum of one thousand dollars, payable on or before twenty years after date, with interest at the rate of ten per cent per annum from date. Interest payable annually on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge County, Nebraska; interest payable at the Ocean National Bank, in the city of New York.

"This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct at a special election held on the 11th day of November, 1870, at which time the following proposition was submitted:—

"Shall the county commissioners of Dodge County, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon-bridge across the Platte River, in said precinct; said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent per annum, payable annually? Which proposition was duly elected, adopted, and accepted by a majority of the electors of said precinct voting in favor of the proposition.

"And whereas the Smith Bridge Company, of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the necessary materials, and to build and construct said bridge referred to in the foregoing proposition:

"Wherefore this bond, with others, is issued in pursuance thereof, as well as under the provision of an act of the legislature of the State of Nebraska, approved February 15th, 1869, entitled 'An Act to enable counties, cities, and precincts to borrow money on their bonds, to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose.'

"In witness whereof we, the said county commissioners of said Dodge County, have hereunto set our hands, this first day of September, A. D. 1871.

"GEORGE F. BLANCHARD,
"A. C. BRIGGS,
"JOHN P. EATON,
"*County Commissioners.*

"Attest:
[SEAL.] "A. G. BRUGH, *County Clerk.*"

Default having been made in the payment of sundry coupons attached to these bonds, Davenport, the plaintiff in error, brought suit against the county for the recovery thereof, in the Circuit Court of the United States for the District of Nebraska. The petition set forth the issue of the bonds according to the facts, and prayed judgment "for the sum of eight hundred and fifty dollars and costs of suit, said judgment to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct at the time said bonds were voted and issued." The county demurred to the petition, and at the hearing the following questions arose: —

"1. Whether upon the allegations of the amended petition filed in said court on the twelfth day of May, 1881, the said county of Dodge is liable to a suit in which judgment can be rendered against said county of Dodge, on the bonds and coupons therein declared upon and set out.

"2. Whether upon the allegations of the said petition the plaintiff is entitled to recover a judgment in form against the county of Dodge, to be satisfied or collected only by levy of

a tax on the taxable property in Fremont precinct, as prayed for in said petition."

Upon these questions the opinions of the circuit justice and district judge holding the court were opposed, and that disagreement has been duly certified here. The opinion of the circuit justice being that the questions should be answered in the negative, the demurrer was sustained and judgment given for the defendant. From that judgment this writ of error has been brought, and the case is now here for determination on the certificate of division.

When county bonds are issued under the statute in question, it is expressly provided that they shall constitute a debt against the county, to be paid by the levy and collection of taxes on all the taxable property within the county. If aid is voted by a precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied on property within a precinct. "As to the several duties of the county commissioners respecting them," says the Supreme Court of Nebraska, in *State* v. *Thorne* (9 Neb. 458, 461), "the law makes no distinction whatever between precinct and county bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts, as well as the times and places of payment, and make provisions therefor, as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners 'upon the property within the bounds of such precinct,' which must be collected in the same manner as is the ordinary county revenue, and through the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the county commissioners directing its application to the object for which it was intended. As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except when

there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants by the county commissioners according to law.'"

A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the Territory as a municipality. *State* v. *Dodge County*, 10 Neb. 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the State. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the Supreme Court of the State, in the case last cited, "enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce." Hence, the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment, and in the other only a part. In both the *mandamus* to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska statute

is somewhat different from that in Missouri, which we were called on to consider in *County of Cass* v. *Johnston* (95 U. S. 360), we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county; but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county.

If there is nothing else in the case, therefore, we think it comes within *County of Cass* v. *Johnston* (*supra*), and that an action at law will lie in the courts of the United States against the county for the recovery of the special judgment asked for. *County Commissioners* v. *Chandler* (96 U. S. 205) was upon coupons attached to some of this same issue of bonds. Judgment had been rendered against the county in the court below, and that judgment was affirmed here. No one seemed to think then that the defence now relied on was good, for it was not mentioned in this court or below. The defence then made related only to the authority of a precinct to vote aid for the building of a toll-bridge.

It is contended, however, that as the statute which authorizes the creation of the liability provides a special remedy for its enforcement, this suit cannot be maintained. The remedy provided is by *mandamus* to compel the proper officers to levy the necessary tax. In *County of Greene* v. *Daniel* (102 U. S. 187), a case similar to this in many of its features, we said a suit to get judgment on bonds or coupons was part of the necessary machinery which the courts of the United States must use in enforcing this remedy, and that the jurisdiction of those courts is not to be ousted simply because in the courts of the State the *mandamus* could be granted without a judgment. In the State courts the liability may, as we understand the case of *State* v. *Dodge County* (*supra*), be determined in the proceedings for the *mandamus*. Such is not, however, the rule in the courts of the United States, where the writ of *mandamus* is only granted in aid of an existing jurisdiction. In those

courts the judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect. *County of Greene* v. *Daniel*, *supra*; *Graham* v. *Norton*, 15 Wall. 427; *Bath County* v. *Amy*, 13 id. 244. As the judgment asked for is special, and will only entitle the plaintiff to payment through the instrumentality of the special tax to be levied, the suit as it now stands is in reality only a way of getting the remedy the statute provides. The only execution that can issue on the judgment will be the *mandamus*.

The Supreme Court of the State, in *State* v. *Dodge County* (*supra*), declined to issue a *mandamus* for the levy of taxes to pay a judgment in the Circuit Court of the United States on some of the coupons attached to this class of bonds, and in the opinion declared the judgment a nullity; but this we must understand to mean a nullity as the foundation of any proceedings in that court for its enforcement. To enable the courts of the United States to afford the remedy which the law has specially provided, such a judgment is a necessary preliminary. In fact, a judgment is but one of the steps in the proceeding to obtain the *mandamus*. The statute has given a remedy by *mandamus*, but has not undertaken to regulate the process by which it is to be secured. That depends on the practice established in the several tribunals from which it is to be obtained. The practice in the State courts requires one mode of proceeding, that in the courts of the United States another; but the result is the same in both, to wit, the order for the levy and collection of the requisite tax.

It follows that each of the questions certified must be answered in the affirmative.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

UNITED STATES v. TYLER.

1. An officer of the army who is "retired from active service" is still in the military service of the United States, and, in addition to the per centum of the pay of the rank on which he was retired, is entitled to the ten per centum allowed by law for each term of five years' service.
2. The ten per centum is to be computed on the sum primarily fixed as such reduced pay, with the increase for each five years previously earned added to that sum, when its increase for any new period of five years is to be computed.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. Richard W. Tyler and *Mr. Robert B. Warden* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The question in this case is, whether the appellee, who, on the fifteenth day of December, 1870, was retired from the army of the United States with the rank of captain, on account of wounds received in battle, is entitled to the benefit of the statute which increases the pay of officers by ten per cent for every period of five years' service.

The law for this increased compensation is thus expressed in the Revised Statutes: —

"SECT. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.

"SECT. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum of their current yearly pay of the grade as prescribed by law."

These sections are taken from the act of July 15, 1870, c. 294, and constituted the law on that subject when the appellee was retired, and their proper construction is the measure of his rights in this controversy. Sect. 1276 of the Revised Statutes was sect. 24 of the same statute, and is in the following language: "Officers retired from active service shall receive sev-

enty-five per centum of the pay of the rank upon which they are retired."

Section 1275 provides that "officers wholly retired from the service shall be entitled to receive upon their retirement one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

There is, therefore, a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.

In the latter case such reward or compensation as Congress thought proper to bestow, namely, one year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended. In the former case the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only.

The question is, therefore, whether an officer thus situated is in the service within the meaning of sect. 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit.

Section 1094 of the revision designates specifically by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is "the officers of the army on the retired list."

They are then by law a part of the army.

Section 1256 enacts that "officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof."

Section 1259 declares that they may be assigned to duty at the Soldiers' Home; and sect. 1260, that they may be detailed to serve as professors in any college.

It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before.

We also hold that the words "current yearly pay," in sect. 1262, require that, when the increased pay for any period of five years is to commence, the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years, constitute the current yearly pay on which said ten per cent is to be calculated.

Judgment affirmed.

BURLEY *v.* FLINT.

A sale under a decree of foreclosure ordering that the mortgaged premises in Illinois be sold without any right of redemption was confirmed by the proper court. After the expiration of the time, within which the defendant was, under the statute, entitled to redeem, he, without leave, filed his bill praying that so much of the decree as excluded that right be reviewed and reversed. *Held*, that the bill was properly dismissed.

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. Francis H. Kales for the appellant.

Mr. E. B. McCagg for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

Flint obtained, on the 19th of October, 1877, a decree foreclosing a mortgage against Kriegh, the mortgagor, Burley, his assignee in bankruptcy, and others. The decree ordered a sale according to the usual course and practice of the court, which, in the case of *Brine* v. *Insurance Company* (96 U. S. 627), we held to mean a sale without any right of redemption. Such a sale was made to Flint. An order confirming it, and for a deed, and the delivery of possession, and expressly cutting off all right of redemption, was entered by the court on the 13th of March, 1878, with a further decree against the assignee for payment, out of assets *pro rata*, of a balance not satisfied by the sale.

On the seventeenth day of October, 1879, Burley filed in the same court, but without leave, a bill of review, seeking to reverse so much of the former decrees of the court as denied the statutory right of redemption given by the laws of Illinois in regard to the land sold under such decrees.

A hearing was had on a motion to dismiss, which, by consent of counsel, as the record states, was to be treated also as a demurrer. The court dismissed the bill, from which order this appeal is prosecuted by Burley.

The appellant in his bill does not seek to reverse the order of sale to satisfy the amount found due to Flint, nor ask that

the sale thereunder be set aside, and a new sale ordered. He does not offer to redeem, by payment of the amount due on the original mortgage, or to pay the amount bid at the sale by Flint, nor tender any sum as assurance that he will do so. He simply and purely asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed.

What will such an order avail him? The decree and the sale under it will still stand good. The time within which a defendant can, by the statute of Illinois, redeem, has long since passed, and he has made no offer to redeem. The sale was made prior to Feb. 23, 1878, the date of the master's report, and the present bill filed Oct. 17, 1879, twenty months afterwards, and at a time when, by the statute, both the defendant and his judgment creditors had ceased to have any right of redemption.

If the appellant had appealed from the original decree to this court his remedy was plain, and the decree would have been reversed. The same result would probably have followed an appeal from the order confirming the sale and cutting off the right to redeem. He did not see proper to follow such a course, but seeks by this bill of review to let the original decree and sale stand, but to have a declaration of the court that the order foreclosing the statutory right of redemption be reversed.

How can this avail him since his time for redemption had expired before he filed his bill? It would be of no use to him unless the court should go further, and make a decree that he *now* has the right to redeem in the same manner as if he had tendered the money within the twelve or the fifteen months which the law allowed for that purpose.

We do not think the court should decree that he may now redeem on payment of the sum bid and interest. If he designed to avail himself of the right of redemption purely statutory, he should bring himself within the terms of the statute.

Such is the view of a case precisely similar taken by the Supreme Court of Illinois.

That court, in the case of *Suitterlin* v. *The Connecticut Mutual Insurance Co.* (90 Ill. 483), while recognizing the doctrine of the case of *Brine* v. *Insurance Company*, holds that the party

seeking to redeem under such a decree and sale as the one before us, can do so by making the offer within the time prescribed by the statute, and cannot do so afterwards. We concur in that view.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

SCHEFFER *v.* RAILROAD COMPANY.

By reason of a collision of railway trains in Virginia a passenger was injured, and becoming thereby disordered in mind and body he some eight months thereafter committed suicide. *Held*, in a suit by his personal representatives against the railway company, that as his own act was the proximate cause of his death, they are not entitled to recover.

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.

Mr. George A. King, with whom were *Mr. Charles King* and *Mr. John B. Sanborn*, for the plaintiffs in error.

Mr. Linden Kent, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland, and Great Southern Railroad Company damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained, and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia, under which the action was brought, is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows: —

"Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children."

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent, — his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plain-

tiffs, we think they both sustain the judgment of the Circuit Court.

The first of these is *Insurance Company* v. *Tweed*, 7 Wall. 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane."

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse, — the one insured, situated across the street from Marshall warehouse, — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

In *Milwaukee & St. Paul Railway Co.* v. *Kellogg* (94 U. S. 469), the sparks from a steam ferry-boat had, through the negligence of its owner, the defendant, set fire to an elevator. The sparks from the elevator had set fire to the plaintiff's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery.

Instead of this, the court submitted to the jury to find "whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circum-

stances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

This court affirmed the ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and the remote causes of a wrong for which a remedy is sought, said: "It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." To the same effect is the language of the court in *McDonald* v. *Snelling*, 14 Allen (Mass.), 290.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.

Judgment affirmed.

MANUFACTURING COMPANY *v.* COWING.

The validity and the infringement of letters-patent No. 117,925, granted Aug. 8, 1871, for an improvement in gas-pumps for oil-wells, having been established, — *Held*, that the case being an exceptional one, inasmuch as the market for such pumps was confined to a particular region, and the demand for them was so limited that, although no other species of pump could successfully compete with them, a single manufacturer could easily and with reasonable promptness fill all orders for them, the patentee is entitled to recover the difference between the cost of the material and labor used by the infringer in making the pumps which he sold and the price which he received for them.

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.

Mr. William F. Cogswell for the appellant.

Mr. Elisha Foote for the appellees.

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

The only questions raised on this appeal relate to the amount which the Goulds' Manufacturing Company is entitled to recover for the infringement of letters-patent No. 117,925, dated Aug. 8, 1871, for an improvement in pumps "specially designed for drawing off the gas from oil-wells and conducting the same to the furnace of the engine." The validity and the infringement of the letters are not disputed here.

After the letters and the infringement were established below, the case was sent to a master to ascertain the damages. He reported that 298 pumps had been manufactured and sold by the defendants, out of which a net profit of $47.71 on each pump had been realized, that being the difference between the cost of the material and labor used in making a pump and the price at which it was sold. Upon this report the court ruled that, as the patent was only for an improvement on an old pump, the profits for which the defendants were accountable must be confined to such as were realized from the manufacture of the patented improvement, and not from the whole pump as improved. For this reason a new reference was ordered to state the account on the proper basis.

The second report was, in its result, substantially the same as the first. The number of pumps made and sold was the same, and the profit on each pump estimated to be $46.46. The mode of calculating the profits was also the same, that is to say, on the second reference as on the first, the defendants were charged with the price at which they sold the pump as a whole, and credited only with the cost of labor and material used in the manufacture. The master on the second reference, however, reported further as follows: —

"I find as further facts from the evidence that the plaintiffs' pump, with their patented improvement, which they had introduced into the market, virtually controlled the market, and had superseded all the other pumps then in use for pumping gas, and the others were literally driven out of the market, as they could not be sold at the places where the plaintiffs' pump had been introduced. The defendants went into the very market where the plaintiffs' pump had been introduced, and where they had sold, and where plaintiffs were then supplying most of their pumps, and the defendants, in fact, went and employed Wenson, the former agent of the plaintiffs, to sell the pumps for them, and he, from being the plaintiffs' agent in the locality, made very ready sale of the same pumps for the defendants, and had not the defendants interfered in urging the pumps which they manufactured upon this local market the plaintiffs would certainly have had the whole market to themselves, and would, beyond doubt, have secured orders and supplied the demand of the market for the same number of pumps more than they did sell, as the defendants furnished, to wit, 298 pumps. The plaintiffs were, by their agent, in the field furnishing pumps in those oil regions, and would have supplied the market demand had not the defendants intervened and supplied to the market these 298 pumps."

This finding as to the facts is, in its general effect, supported by the evidence. Notwithstanding this, however, the court, still adhering to its holding as to the rule of estimating profits, set aside the report, and inasmuch as the company had, on the second reference, failed to show what had been realized upon the principles of accounting prescribed, a final decree was entered in its favor for nominal damages only and

costs. From that decree this appeal was taken by the company.

The rule applicable to this class of cases was well stated by Mr. Justice Strong, speaking for the whole court, in *Mowry* v. *Whitney*, 14 Wall. 620. The subject-matter of that suit was a patent for an improvement in the process of manufacturing car-wheels, and in respect to the profits resulting to an infringer from the use of the patented process, it was said, p. 651: "The question to be determined . . . is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits." It does not necessarily follow from this that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, as was further said in that case, the inquiry is, "What was the advantage in cost, in skill required, in convenience of operation or marketability," gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such, we think, is this case. Pumps for all ordinary, and many extraordinary, uses were very old; but, in the new developments of business, something was wanted to take the gas from the casing of an oil-well, and conduct it safely to the furnace of the engine. "With that special purpose in view," this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to

the value of the old pump, but for the new and special purpose in view, the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use, except in the oil-producing regions of Pennsylvania and Canada. The demand was limited, as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellant kept the control of its monopoly under the patent, it alone had the advantage of this market. Unless the appellees got the improved pump, they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale.

This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellant had, could easily, and with reasonable promptness, fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what has been the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits derived from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the appellant's rights, the appellees obtained the advantage of the increased marketability of their pumps. The action of the court below, therefore, limiting the field of inquiry as to damages, cannot be sustained.

We cannot agree with the master, however, in his estimate of the profits made by the appellees from what they have done. He finds that the pumps sold in the market for eighty dollars

each, while the cost of manufacturing them was only $33.54. It is true there is some evidence to show that pumps could be made for the sum named, but it is clear to our minds that many things were excluded from the estimate which ought to have been included. All the material and labor of men may have been taken into account, but there is nothing for the use of tools, machinery, power, and other facilities employed in the manufacture, and nothing for wastage and expenses of marketing. One of the appellees is reported as testifying that his firm made the pumps for $31.37 each; but this must be an error, because he at the same time stated he could not say that there was any profit at all at the prices for which sales were made. Clearly this could not be, if what only cost the sum named was sold for $80. Annexed to the statement of the testimony of this witness is a detailed estimate of the cost of manufacture, which, without any allowance for general expenses, made the cost of a single pump $91.96. The appellant furnishes some evidence to contradict this estimate, but the bare fact that the pump when finished brought, as is claimed at the shop, $80, shows that the cost must have been much more than the master has reported. Down to the time of this patent the market had been supplied with some device to accomplish what this improvement did. The change in the old pump was not an expensive one. The valves were put outside of the side chambers instead of inside, and the joints had to be carefully fitted. If the old pump only cost as much as is claimed for the new, we cannot believe it would have commanded in the market any such price as the new sold for. We must conclude, therefore, that the cost of production has been much underestimated by the master. The testimony as reported is very unsatisfactory, and we are strongly inclined to think all has not been sent here which was presented. The attention of the parties was evidently directed much more to the rule of estimating the profits than to the detail of the expense of manufacture and sale. Had there not already been two references, we should be inclined to order another. As it is, we have made the best estimate we can from the material furnished in the record, and conclude

that a reasonable allowance for profits will be fifteen dollars on each pump, or $4,470 in all.

The decree will be reversed, and the cause remanded with instructions to sustain the fifth exception to the report of the master, and enter a decree against the appellees for $4,470 and costs; and it is

So ordered.

RAILROAD COMPANY *v.* LOFTIN.

1. Lands in Arkansas, granted by the State to the Memphis and St. Louis Railroad Company, and held for the purpose of raising money to build its road, are not, by its charter, exempt from taxation. *Railroad Company* v. *Loftin* (98 U. S. 559) cited upon this point and approved. *Quære*, Are the lands exempt which were acquired by the company in payment for its increased stock.
2. The swamp and overflowed lands donated by the United States to Arkansas are, unless sooner reclaimed, exempt from taxation for ten years after they have been sold by the State.

ERROR to the Supreme Court of the State of Arkansas.

The facts are stated in the opinion of the court.

Mr. William Y. C. Humes for the plaintiff in error.

Mr. Augustus H. Garland, contra.

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

This was a suit in equity, brought by the Memphis & St. Louis Railroad Company in the Circuit Court of Jackson County, Arkansas, to restrain the collection of taxes imposed under the authority of the State upon certain lands in that county owned by the company. The Supreme Court of the State affirmed the decree of the Circuit Court dismissing the bill on demurrer. The complainant thereupon sued out this writ of error.

Two questions are presented for our consideration: —

1. Whether the State by imposing the tax has impaired the obligation of a contract in the charter exempting the capital stock of the company from taxation; and,

2. Whether it has impaired the obligation of a contract made with the purchasers of its swamp and overflowed lands for exemption from taxation.

1. As to the charter.

The section of the charter relied on is as follows: —

"SECT. 21. The capital stock of said company, with all the immunities and franchises herein specified, and all machinery, cars, engines, or carriages, belonging to said company, together with all their works and property, and all profits which shall arise from the same, shall be vested in the respective stockholders forever, in proportion to their respective shares; and the capital stock of said company, and the dividends, shall be exempted from taxation until a dividend of six per cent is realized upon the capital stock, and the road, with all its fixtures, and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempted from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be levied on said road or its fixtures which will reduce its dividends below ten per cent per annum. Said stockholders shall not be bound or liable for any greater amount than the respective shares of stock which they or either of them own."

The averment in the complaint to bring the lands in question under this exemption is in the following words: —

"And that the said lands were acquired by the plaintiff and are now held by it for the purpose of raising money to build said road, and that it is a part of the property of said company, fully represented by its capital stock and not otherwise, and that said road has not as yet been completed, and that no dividend has as yet been realized on said capital stock, or any part thereof."

In *Railway Company* v. *Loftin* (98 U. S. 559), in passing upon a provision of the charter of the Mississippi Valley Railroad Company, substantially like the section here relied on, this court held that the exemption did not extend to lands granted by the State to the company to aid in the construction of its railroad. Such lands, it was then said, were used in lieu of capital, and to the extent they could be made available relieved the company from the necessity of raising money through stock subscriptions. Like the court below, we are

unable to distinguish the case made by this complaint from that. The only material averment of fact in this connection is that the lands in question are held by the company for the purpose of raising money to build its road. This is entirely consistent with their use in lieu of capital. It is true the complaint alleges that the lands are fully represented by the capital stock, but that is only as a legal conclusion from what was stated before. The facts showing why the lands represented the capital must be set forth. Those which have been stated are not enough, and consequently the legal conclusion which the pleader has drawn from them in the complaint cannot be sustained.

In the elaborate printed argument presented for the plaintiff in error, reference is made to facts not stated in the complaint. These we cannot consider. As the case was submitted on demurrer, only the averments in the complaint are before us. While we may take judicial notice of the several statutes of the State which are relied on, the complaint alone must be looked to for information as to the manner in which the lands were acquired and the purposes for which they are held. While it may be true, as is claimed, that, under sect. 3 of the charter of the company, lands might have been accepted in payment for increased stock, and that the lands in question were acquired in that way, it is not so stated in the complaint. Whether, if the facts as claimed in argument had been stated, the exemption contended for would follow, is not for us now to decide. Upon this branch of the case, as it comes to us, the judgment below was, in our opinion, right, and must consequently be affirmed.

2. As to the swamp lands.

These were part of the swamp and overflowed lands donated by the United States to the State, and the State statute providing for their reclamation and sale contained the following: —

"SECT. 14. *Be it further enacted*, that to encourage by all just means the progress and completion of the reclamation by offering inducements to purchasers and contractors to take up said lands, that the swamp and overflowed lands shall be exempt from taxation for the term of ten years, or until said lands are reclaimed."

That under this section purchasers of the lands acquired a right by contract to exemption from taxation for the stipulated time is not denied, and this court so decided in *McGee* v. *Mathis*, 4 Wall. 143. The only dispute is as to the time the exemption is to continue. The railroad company insists that it is for ten years absolutely, and thereafter until the lands are reclaimed; the State, that it is for ten years, if the lands are not sooner reclaimed, but if they are, that it ceases on the reclamation. The Supreme Court of the State, in *State* v. *County Court of Crittenden County* (19 Ark. 360), as early as January, 1858, gave the statute the construction now contended for by the State, and this decision has never been overruled. It was expressly recognized by the Supreme Court of the State in *McGee* v. *Mathis* (21 id. 40), and by this court in the same case, which came here on writ of error, and is reported in the 4th of Wallace, *supra*. Counsel frankly concede that the language of the statute is ambiguous, and that the grammatical construction is in accordance with what has been ruled. All such exemptions are to be construed strictly. Every doubt is to be resolved in favor of the power to tax. Under such circumstances, if the question were an open one, we should have little difficulty in reaching the same conclusion as the courts of the State have done. Manifestly, therefore, we are not now called upon to overrule what has been settled for nearly a quarter of a century.

It is expressly stated in the complaint that the lands held by the company were sold by the State more than ten years before this suit was begun. Consequently they are not exempt as swamp lands.

Judgment affirmed.

BRANDIES *v.* COCHRANE.

An appeal may be perfected without an order formally allowing it. It is in legal effect allowed when the circuit judge takes the security and signs the citation.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Edwin F. Bayley in support of the motion.
Mr. John S. Monk, contra.

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

This is a motion to dismiss because the appeal was not taken within two years after the entry of the decree.

It appears from the record that the decree was entered on the 2d of August, 1879, and on the same day the complainants prayed an appeal, which was allowed upon their giving bond according to law. No bond was ever given under this allowance, and the case was not docketed here at the October Term, 1879. On the first of August, 1881, the circuit judge approved a bond for an appeal from the decree and signed a citation. The bond was on the same day filed with the clerk, and the citation served on the 18th of August. On the 8th of October the Circuit Court entered an order allowing the appeal *nunc pro tunc* as of August 1. The case was regularly docketed in this court on the 13th of October.

The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary. *Sage* v. *Railroad Company*, 96 U. S. 712; *Draper* v. *Davis*, 102 id. 370. The appeal was, therefore, taken in time. The order of October 8th was not required to give it effect.

Motion denied.

UNITED STATES *v.* RAILROAD COMPANY.

1. The court affirms *Hecht* v. *Boughton*, *supra*, p. 235.
2. A writ of error or an appeal will not lie from the final judgment or decree of the Supreme Court of the Territory of Wyoming, unless the amount in controversy exceeds $1,000, or the decision be rendered upon a writ of *habeas corpus* involving the question of personal freedom.
3. The same provision applies to a suit where the United States is the plaintiff, unless it be brought for the enforcement of a revenue law.

ERROR to the Supreme Court of the Territory of Wyoming.

This was a suit in replevin, brought by the United States in one of the District Courts of the Territory of Wyoming, against the Union Pacific Railroad Company to recover the possession of certain goods intended for the Indian service. It was submitted on an agreed statement of facts, from which it appears that the goods belonged to the United States; that they were intended for the Indian service; that the United States had a contract with Dwight J. McCann for their transportation from New York to the White River Agency in Colorado; that they were put into his hands for transportation under his contract; that he agreed with the railroad company for their tranportation from Omaha to Rawlins; that the company carried them as a common carrier under this agreement to the place of destination, for which its proper charges were $496.86; that on their arrival at Rawlins they were stored in the company's warehouses for a long time; that for this storage the proper charge was $91.30; and that he had never paid any part of these charges.

On the 20th of November, 1877, the United States demanded the goods of the company, but a delivery was refused unless the charges were paid, the company claiming the right to hold the goods under a carrier's lien. The United States thereupon replevied them without having first paid the charges. The only controversy was as to the lien, and it was agreed that if, upon the facts, the court should be of opinion the company had a lien, judgment should be entered in its favor and against the United States for the amount of the charges. If, however, it should be decided there was no lien, judgment was to be entered against the company. The court decided there

was a lien, and gave judgment against the United States for $588.16, which was affirmed by the Supreme Court of the Territory. To review that judgment this writ of error was brought.

The Solicitor-General for the United States.

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

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

Under the decision in *Hecht* v. *Boughton* (*supra*, p. 235), the case should have been brought here by appeal, and not by writ of error. There was no trial by a jury. But there is still another objection to our jurisdiction. Under sects. 702 and 1909 of the Revised Statutes, writs of error and appeals from the final judgments and decrees of the Supreme Court of Wyoming lie to this court only when the amount in controversy exceeds $1,000, or the judgment is on a writ of *habeas corpus*, involving a question of personal freedom. No exception is made in favor of the United States, and this is not an action brought for the enforcement of any revenue law. Consequently the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party. *United States* v. *Thompson*, 93 U. S. 586. The value of the matter in dispute is the amount of the judgment that has been recovered. This is less than $1,000. It follows that we have no jurisdiction, and the writ is

Dismissed.

JAMES *v.* MCCORMACK.

An appeal, dismissed under rule 16, will not be reinstated, unless good cause therefor be shown.

MOTION to reinstate an appeal from the Circuit Court of the United States for the Western District of Virginia.

Mr. John Ambler Smith in support of the motion.

Mr. John W. Johnston and *Mr. John A. Campbell*, *contra.*

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

When the appellant was called and his appeal dismissed, the case had been nearly three years on the docket of this court. He had no brief on file, and was not present, either in person or by counsel. Under these circumstances the appellees were entitled, under Rule 16, to a dismissal. No notice of their intention to enforce the rule was necessary. The appellant has not excused himself for his default, and his case is clearly within that of *Hurley* v. *Jones* (97 U. S. 318), in which we announced our intention to enforce rigidly this salutary rule, and not to set aside defaults growing out of the neglect of counsel or parties, except for very good cause.

Motion denied.

KEYSER *v.* FARR.

1. Where, after the allowance of an appeal, the required *supersedeas* bond was duly approved and the cause entered here, the court below had no longer any control over the decree, and its subsequent order vacating that allowance is void.
2. *Goddard* v. *Ordway* (101 U. S. 745) distinguished.

APPEAL from the Supreme Court of the District of Columbia.

Motion on the part of the appellants for a writ of *supersedeas*, and on the part of the appellees to dismiss.

Mr. A. C. Bradley and *Mr. West Steever* for the appellants.

Mr. W. Hallett Phillips and *Mr. William A. Maury* for the appellees.

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

The decree in this case was rendered on the 26th of October, 1881. The record also shows that the court on the same day entered an order allowing an appeal and fixed the amount of the bond. On the 29th and 31st of October bonds for the appeal and *supersedeas* were executed by all the several appellants, and approved by the Chief Justice of the court. On the last day named the case was docketed in this court, and a transcript of the record filed. Afterwards, on the 14th of November, but during the term at which the order allowing the appeal was entered, the appellees moved the court below to require additional security from the appellants, Keyser, Howard, and Smith. On the hearing of this motion the court entered an order purporting to set aside and vacate the former allowance of an appeal, but at the same time made a new allowance to take effect on that day.

Upon this state of facts, the appellants, fearing that execution may issue notwithstanding their appeal docketed here, move for an order restraining the court below from proceeding to enforce the decree, and the appellees move to dismiss: 1, because the allowance of the appeal has been vacated; and, 2, because the value of the matter in dispute is less than $2,500.

After the acceptance of the bonds for the appeal, and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard* v. *Ordway* (101 U. S. 745), there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In *Draper* v. *Davis* (102 U. S. 370), however, it was decided that, after a bond had been accepted by one of the judges in accordance with such an order of allowance, the jurisdiction was transferred from the court below. Here a bond was not only accepted, but the case was actually entered in this court. In this way clearly the court below was deprived of power to make its order of November 14. It follows that the motion to dismiss, so far as it is based upon the order of the

court below vacating its allowance of the appeal, must be denied, and that the *supersedeas* which followed in law from the acceptance of the bond by the Chief Justice is in force. Such was our ruling in *Draper* v. *Davis* (*supra*), on a similar motion at the last term.

The questions presented by the other branch of the motion to dismiss are important, and have not been directly settled, as we think, by any decision yet made by this court. Their further consideration is postponed until the case is heard on its merits.

THE "S. C. TRYON."

1. The findings of fact which, in admiralty cases in the Circuit Court, the act of Feb. 16, 1875, c. 77 (18 Stat., pt. 3, p. 315), requires are in the nature of a special verdict, and constitute a part of the record. The law arising thereon will therefore be determined here, although no exception thereto was taken.
2. A bill of exceptions is required to reserve for review the rulings below upon questions of law during the progress of the trial.
3. The court in this case, while refusing to dismiss the appeal, grants a motion to affirm the decree, it appearing from the record that the appeal was taken for delay.

MOTION to dismiss an appeal from the Circuit Court of the United States for the District of Maryland, with which is united a motion to affirm.

The Merchants' Steamship Company, of Charleston, South Carolina, as owner of the steamship "Falcon," filed its libel in the District Court of the United States for the District of Maryland, in a cause of collision, civil and maritime, against the schooner "S. C. Tryon," and obtained a decree. The claimants thereupon appealed to the Circuit Court, which found the following facts: —

About 4.30 P. M. on Saturday, the 8th of November, 1870, the steamer "Falcon," then owned by the libellant, being properly officered and manned, and in every way fitted for her voyage, left the port of Baltimore on a voyage to Charleston, South Carolina, with a valuable cargo of merchandise on board.

About 9.45 P. M. on said 8th of November, the said steamer was proceeding on her proper course, S. by E. ¼ E., down the Chesapeake Bay, about eight miles above Cove Point, at the rate of nine miles an hour. All of her lights required by law were properly hung, burning brightly, and visible the prescribed distances. Her second mate, a competent licensed pilot, was in charge of her, standing in the pilot-house, with the man at the wheel.

An able seaman and competent helmsman was at her wheel; a sufficient and competent crew were on duty; two other able seamen were vigilantly occupied as lookouts, stationed far forward in the bow, in the position most advantageous therefor.

About the time last mentioned both of the lookouts saw, and one of them immediately reported, a red light about one point over the port bow of the steamer.

The second mate of said steamer looked with his glasses, saw the said red light in the direction in which it had been reported, and satisfied himself that it was on board a sailing-vessel, a mile and a half or two miles off, coming up the bay with a fair wind.

The man at the wheel then also saw it. It turned out afterwards to be the red light on board of the schooner "S. C. Tryon," coming up the bay, as the second mate supposed. The night was starlight; there was a seven-knot breeze from the southward; fair for said schooner; and there was no necessity for her, then or thereafter, to change her course. If there had been no change in the course of either vessel, they would have passed each other in safety, each on the port side of the other.

As a matter of precaution, however, the helm of said steamer was immediately ported, until she fell off to S., a change of 1¼ points in her course, and causing said schooner to bear about 2¼ points over the port bow of said steamer. The second mate and lookouts of said steamer continued to watch the light of said schooner, seeing all the time only her red light, and said steamer was kept on her new course, about 1¼ points farther to the westward than her original course, until said vessels were about a mile apart; only the red light of said schooner was then visible; although no further change of course

on the part of said steamer seemed then to be necessary, as a matter of further precaution her helm was again ported a little.

When the said vessels were three or four hundred yards from each other, about to pass each other in safety, sufficiently far apart not to justify even the apprehensions of danger, the said schooner, being still to the port of said steamer, and showing only her red light, suddenly, and without any justification therefor, put her helm hard a-starboard, and exhibited to said steamer both of her side lights.

As soon as her green light was visible to those on board of said steamer, it was seen by both lookouts of said steamer, and by one of them immediately reported to the second mate of said steamer.

The helm of said steamer was thereupon immediately put hard a-port, and in a few seconds thereafter her engines were stopped; but said vessels were then so near together that there was not sufficient time to reverse said engines, and the bow of said schooner struck said steamer about midships on her port side, cutting her down to the water's edge, and damaging her so seriously that in about ten minutes she sunk, with all her cargo on board, in water six fathoms deep.

The collision was entirely the result of want of proper care, skill, and seamanship on the part of those in charge of said schooner, and the improper change in her course made in consequence thereof.

Those in charge of said steamer did all in their power to keep out of the way of said schooner to prevent said collision, and to lessen the consequences thereof.

The libellant and the petitioners, and those in whose behalf petitions have been filed, sustained damages by said collision largely exceeding the amount of the stipulation filed for said schooner.

The court found the following conclusions of law: —

It was the duty of the steamer vigilantly to watch the movements of the schooner from the time she or either of her lights was visible to those on board of said steamer, and to take proper measures to keep out of the way of said schooner.

It was the duty of the schooner not to change her course so as to baffle the efforts of the steamer to keep out of her way.

It was the duty of the steamer, even after the schooner had improperly changed her course, to do all she could to prevent a collision, and to lessen the consequences of one, if unavoidable.

The court rendered a decree in favor of the libellant, and the claimants appealed to this court.

Mr. John H. Thomas and *Mr. George Leiper Thomas* for the appellee, in support of the motions.

There was no opposing counsel.

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

A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty under the provisions of the act of Feb. 16, 1875, c. 77 (18 Stat., pt. 3, p. 315). That act expressly provides that the review here shall extend to the determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. At law a bill of exceptions is only used to put into the record that which would not appear without. The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court, whether, when taken in connection with everything else that appears, it is sufficient to support the judgment.

The motion to dismiss must, therefore, be overruled, but on looking into the record we are satisfied the appeal was taken for delay. The only question presented arises on the findings of fact. From these it appears that the collision was due solely to an unjustifiable change of course by the schooner when the vessels were in close proximity, which baffled the steamer in her efforts to pass in safety. It is so well settled that a steamer is not liable for the consequences of a collision occurring in this way, that we do not deem it proper to retain the cause for further consideration.

Motion to affirm granted.

SIMMONS *v.* OGLE.

1. Where, in a suit involving the right to lands, the equities of the respective parties are equal, the legal title must prevail.
2. Against the United States the presumption of a party's claim of right to a tract of public land, growing out of his mere possession of it, is but very slight, and so long as the United States retains the legal title the Statute of Limitations does not run against it, nor does any equity in his favor arise from such possession and the non-assertion of that title.
3. A. recovered in ejectment possession of lands conveyed to him by the United States. The judgment defendant thereupon filed his bill, setting up that B., under whom he claimed, had long previously to the inception of A.'s title duly entered them at the proper office, and praying that A. be compelled to convey the legal title to the complainant. Neither the receipt of the receiver to B. for the purchase-money, nor the register's certificate of purchase entitling B. to a patent, was produced or accounted for, and the defendant's evidence strongly conduced to show that the papers never existed and that the sale was never made. Upon the facts, — *Held*, that the bill should be dismissed.

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

The facts are stated in the opinion of the court.

Mr. John W. Ross and *Mr. Franklin A. McConaughy* for the appellant.

Mr. James L. D. Morrison for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

Simmons recovered, on the seventeenth day of January, 1878, a judgment in ejectment against Ogle, for the possession of the south half of the northeast quarter of section three, township one north, of range nine west, in St. Clair County, Illinois, and under the proper writ was placed in possession of it. The title on which he recovered was a patent to himself from the United States, dated June 12, 1874. Ogle thereupon instituted the present suit in chancery to compel a conveyance of the legal title thus established by Simmons to himself, on the ground that he had a superior equity, by reason of which the title in Simmons should be decreed to be held by him in trust for the benefit of Ogle. After answer, replication, and a full hearing on the evidence, the court granted the prayer of the bill, and from that decree Simmons brings the present appeal.

There is much conflict in the testimony. Some parts of it are irreconcilable, and the result of it in producing any very clear conviction of the true state of the case is unsatisfactory, especially in regard to the foundation of the right of complainant to be the true equitable owner of the land. The fact which he takes upon himself to establish is that, on Dec. 30, 1835, one John Winstanley bought the land of the United States, at the land-office in Edwardsville, and paid for it. The subsequent conveyances and transfers from Winstanley to Ogle are not controverted, and if the purchase and payment now stated and alleged in the bill were satisfactorily established by the evidence, the decree should be affirmed.

The evidence by which this proposition is supported is of two classes.

1. The records of the Edwardsville land-office, now found in the General Land-Office at Washington, where they were removed by law.

2. The conveyances and other proceedings by which, if Winstanley ever had any right, it became vested in Ogle, and the actual possession of the land by Ogle.

As regards the first of these, the records of the Edwardsville land-office show a written application by Winstanley at that office, on the thirtieth day of December, 1835, for the purchase of the land. It is numbered 13,164, and shows the quantity of the land to be 84.46 acres, and the price to be paid $1.25 per acre.

There is, also, an entry on the books of the office, of which the following is a copy, and which is photographed in the record: —

"No. 13,164.

"Dec. 30, 1835, to John Winstanley, of St. Clair County, State of Illinois, for S. $\frac{1}{2}$ NE. $\frac{1}{4}$ section No. 3, township No. 1 north, range No. 9 west of the third principal meridian, containing $84\frac{46}{100}$ acres, at $1.25 per acre. $105.57.

"S. H. THOMPSON, *Register*."

These, it is said, being the original entries made in the records of the local land-office, are sufficient evidence of the purchase and payment for that land by Winstanley, and that no

successful contradiction of them is found anywhere. When to this is added the conveyance by Winstanley to William C. Anderson of the same land, in 1837, and that Anderson's title came to Ogle, who, in 1851, took possession of the land and held it until his removal under the action of ejectment brought by Simmons against him, the case of complainant is substantially stated.

As regards the weight to be given to the possession of Ogle, it is to be considered that whether he had the equitable right or not, neither the Statute of Limitations nor the equitable doctrine of lapse of time could begin to have effect against any one until Simmons purchased of the United States and obtained his patent in 1874, for up to that time the legal title was undeniably in the United States. If this had not been so Ogle would have successfully pleaded the Statute of Limitations against Simmons in the action at law. No laches could be imputed to Simmons, who brought suit very soon after he received his patent. Nor can laches be imputed to the United States, either as a matter of law or on any moral or equitable principles. For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, and such is the impossibility of resisting or ejecting the settlers, or of efficiently asserting the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed.

Nor do the sale and conveyance by Winstanley to Anderson afford any legal evidence of his right to do so, and very little that he believed himself to have such right. He could never be made responsible for more than the purchase-money, and, knowing what entries were on the books of the local land-office, he might well be willing to take the money and the chances. The evidence, therefore, in support of the entries on the books of the land-office do not add greatly to its force, and the complainant's case must rest on the intrinsic probability arising from those two pieces of evidence, that Winstanley bought and paid for the land.

If either of these entries had stated the purchase and payment in words, they are open to the weakness which arises from the fact that in all such completed sales two other documents of superior probative force usually attend the sale, one of them invariably, neither of which is here produced or shown ever to have existed. The most conclusive of these is the patent. There is no pretence here that any patent ever issued to any one on Winstanley's purchase. It is proved that he was a careful business man, much accustomed to dealing in lands, and as he had sold this land, and made himself liable by a warranty deed, he would naturally have made that title secure by procuring the issue of the patent.

It is, however, well known that early purchasers of the public lands were careless about their patents. But as a reason for this, they attached primary importance to the paper issued when a sale was made, and delivered to the purchaser by the register and receiver of the land-office, called a certificate of entry.

This is a paper in two parts, the first of which is signed by the register, giving a description of the land, the amount paid for it, the name of the purchaser, and a statement that on its presentation at the General Land-Office a patent would be issued to the purchaser. The second, signed by the receiver, is a simple receipt for the payment of the price, and a description of the land for which it was paid.

The statutes of almost every State and Territory in which the public lands have been sold provide for the registration of this instrument, and in all actions concerning title or possession declare it to be *prima facie* evidence of title. See Hurd's Rev. Stat. of Illinois, sect. 31, c. 30, p. 271, and sect. 20, c. 51, p. 508. In the estimation of the people generally, and in the practice of the courts, it became the efficient substitute or equivalent of the patent, and in regard to millions of acres of land the patent either was never issued, or if issued never delivered, but remains in the local or the general land-office, subject to the call of the owner.

In the case before us there is no evidence whatever, except presumption, that this certificate of entry ever had an existence. In the absence of the patent, it is the instrument of all others

which it is important to produce, or if it cannot be produced, to account for its loss.

The only effort to do this is an affidavit of Ogle, that he went down to John Winstanley's and examined through all his papers and did not find it. He wrote to the son of Anderson, to whom Winstanley sold it, who replied that he could find no paper of the kind. He went to the Commercial Bank of Cincinnati, which at one time had a mortgage on the land. They said a majority of the papers of the bank had been burned. So he failed to get the certificate, or any information about it. "I do not know where it is, nor have I ever seen it," he says.

This would have been sufficient to authorize the introduction of a copy in evidence, if any copy existed. But no copy is produced, for the reason that no human being has been found who can say that any such paper ever existed, or was ever seen by any one. When we consider the number of persons interested in the property through Winstanley, there being several mortgages and intervening conveyances between him and Ogle, and that the certificate of entry, if ever made, could only have been forty years old when this suit was brought; that many persons must have been alive who had been interested in the title; this total absence of all evidence of its existence, no one ever having seen it, nor any copy of it, nor any record of it under the Recording Acts of Illinois, — the inference that such a paper was made and delivered to Winstanley is very much shaken.

When we turn to the evidence of defendant there is much positive testimony to convince us that no such paper was ever delivered, and no such sale ever made.

There are in pencil mark on the page where the application of Winstanley for this land, numbered 13,164, is found, the following words: "13,164. Changed to NE. ¼ of NW. ¼, 9, 2, N. 9, W. 3d."

The transactions of the local land-offices are forwarded regularly to the General Land-Office at Washington, and accurate copies or duplicates are there found of all the transactions in the local offices, and in the present case the original records of the Edwardsville office, long since closed up, are in the General Land-Office.

Among these are found the following: —

"No. 13,164. LAND-OFFICE AT EDWARDSVILLE, ILL.,
"December 30, 1835.

"It is hereby certified that, in pursuance of law, John Winstanley, of St. Clair County, Illinois, on this day purchased of the register of this office the lot or west half of the northwest quarter of section number nine, of township number two north, in range number nine west of the third principal meridian, containing eighty acres and hundredths of an acre, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred dollars cents, for which the said John Winstanley has made payment in full as required by law.

"Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land-Office, the said John Winstanley shall be entitled to receive a patent for the lot above described.

"S. H. THOMPSON, *Register*.

"No. 13,164. RECEIVER'S OFFICE, EDWARDSVILLE, ILL.,
"December 30, 1835.

"Received from John Winstanley, of St. Clair County, Ills., the sum of one hundred dollars and cents, being in full for the west half of the northwest quarter of section number nine, township number two north, range number nine west of the third principal meridian, containing eighty acres and $_{100}$, at the rate of $1.25 per acre.

"75 B. U. States
"25 Specie.
"$100. ——
"$100 "B. F. EDWARDS, *Receiver*,
"By WM. H. RIDER."

It will be observed that this certificate of entry bears date the same day of Winstanley's application for the other piece of land. That it bears the same serial number as that application throughout, up to the issue of the patent, which is very important, as though it is possible Winstanley might have entered two pieces of land on the same day, they would necessarily have been separate entries and would not have borne the same number.

Upon this certificate No. 13,164 there was issued on the second day of December, 1839, to John Winstanley a patent

for the land there described; for the other land no patent was ever issued to him.

Another circumstance confirming the truth of the pencil memorandum is found in the cash-book or register of receivers' receipts at Edwardsville, now on file in the General Land-Office. In that book, which is kept in tabular form, it is shown that on Dec. 30, 1835, on certificate No. 13,164, there was paid to the receiver, by John Winstanley $100, for the W. ½ NW. ¼, S. 9, T. 2, R. 9, 80 acres; and as the transcript is complete for that day no other receipt of money from Winstanley is shown. The quarterly account of the receiver with the department shows precisely the same thing.

So that we here have the evidence of these records that Winstanley bought and paid for another piece of land on that day, under cover of the same No. 13,164 as to application and entry; that the price was $100, and not $105.46; that no certificate of entry is known to have ever been made for the tract first applied for, no evidence that any money was paid for it, no entry on the cash-book or quarterly account of the receiver of the amount for which the land in controversy could only have been sold; but ample evidence that on that same day, and under the same entry number, Winstanley bought and paid for another piece of land near by, at the same office, for which he received the usual certificate of entry, and for which the patent was issued.

We cannot resist the conclusion, in the presence of what is positively shown by the records, and what is wanting in the evidence of complainant in regard to the existence of a certificate of entry of this land, that the pencil memorandum whenever it was made is true, that on the same day, and before the purchase was finally completed, Winstanley changed his purpose, and bought and paid for the other piece of land, and that the officers omitted to make the requisite change in the application while making the transfer and preserving the original number.

If, however, this were not so clear, the appellant here has the legal title and the possession, without fraud or any unfairness. He found the land subject to entry by the records of the land-office, and he bought and paid for it and has the title. In

such case the maxim applies in all its force, that better is the condition of the defendant. The equities of the parties being equal, the legal title must prevail.

Instead of the weak case made by appellee, the position of affairs required him to make clear and satisfactory proof of his superior equity. This he has signally failed to do.

Decree reversed, and cause remanded with directions to dismiss the bill.

LOUISIANA *v.* PILSBURY.

1. The act of the General Assembly of the State of Louisiana, of Feb. 23, 1852, entitled "An Act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," is not in conflict with article 118 of the State Constitution of 1845, which declares that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." Nor does section 37 of the act (*infra*, p. 279) violate article 127 of that Constitution (*infra*, p. 290), touching equality and uniformity of taxation.
2. That article applied only to State taxes, and required that all the property on which they were levied — not all property in the State — should be taxed according to its value, and conformably to some fixed rate or mode.
3. By accepting the bonds which were issued under that section, and the supplementary act passed the same day, known as No. 72, and which formed the consolidated debt of New Orleans, the creditors of the city, of the municipalities, and of Lafayette entered into a contract with the city, an essential part whereof was the pledge to levy an annual tax of a specified amount for the payment of interest and principal. Although slavery has been abolished, the obligation of the city to raise the required fund by special tax on real estate remains, and the right of the bond-holders to enforce it is not waived by having received for years without objection the stipulated interest raised in another mode than that for which the contract provides.
4. The act of the General Assembly of Louisiana of March 6, 1876, so far as it relates to the consolidated debt, is null and void, inasmuch as it provides for exchanging the debt for premium bonds, each of the denomination of twenty dollars, dated Sept. 1, 1875, the principal and interest to be paid at a time to be determined by chance in a lottery, and prohibits the levying of the stipulated tax to pay the interest due upon that debt. It also attempts to deprive the creditor of the means of enforcing payment which existed when the debt was contracted, and it furnishes no other adequate remedy.

ERROR to the Supreme Court of the State of Louisiana.

This was a petition of the State of Louisiana, on the relation

of the Southern Bank, a corporation created under its laws and doing business in New Orleans, to one of its District Courts, for a *mandamus* to compel the municipal authorities of that city to levy a special tax to pay certain coupons on outstanding bonds issued under an act of the State in 1852, and to purchase the bonds with any surplus remaining of the moneys collected. The history of the issue of the bonds is as follows: The city of New Orleans was originally incorporated by an act of the legislature in 1805, and its charter continued in force until the 8th of March, 1836. An act was then passed which divided the city into three municipalities, each of which was created a distinct corporation, with "such rights, powers, and capacities as are commonly incident" to municipal bodies. This division continued until Feb. 23, 1852, when, by an act known as act No. 71 of that year, and entitled "An Act to consolidate the city of New Orleans and to provide for the government and administration of its affairs," the three municipalities were again united into one. The act of 1836 provided that a proportionate part of the debt of the city should be paid by each municipality, the quota being fixed upon the basis of the amount of taxes and other revenue accruing to it. The separate municipalities subsequently created debts; and the act of Feb. 23, 1852, provided for the issue of bonds for the payment of those debts, and also for the debt of the old city. The thirty-seventh section, which dealt with this subject, is as follows: —

"SECT. 37. *Be it enacted, &c.*, that the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities, whether in the form of bonds, notes, interest coupons, cash warrants, or other species of obligation whatever, shall be assumed and paid by the city of New Orleans, and said city is hereby declared liable therefor. The mayor, comptroller, and treasurer, and chairmen of the finance committees of the two boards of the common council, shall constitute a commission, to be called the commissioners of the consolidated debt of New Orleans; and they shall have power to issue bonds of the city of New Orleans, having not more than forty years to run, with interest payable at such place as may be agreed on between said commissioners and the parties to whom the bonds are issued, in semi-annual coupons,

in exchange for any bonds, obligations, or debts of the old corporation, or of any of the old municipalities, whether matured or not, or to sell the new bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The bonds thus issued shall form a stock to be called the consolidated debt of New Orleans. At the time this act goes into operation, an exact and detailed statement of the indebtedness of the old corporation and of each municipality shall be filed in the office of the comptroller, by the secretary of the board of liquidators and the municipal comptrollers respectively, when the commissioners of the consolidated debt shall proceed to divide the debt of the old corporation between the several municipalities, in proportion to the assessed value of real estate within the limits of each, according to the State assessment roll for 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this act goes into operation, shall constitute the separate debt of each municipality, and shall be known as the debt of municipality No. one, No. two, No. three. The common council shall, annually, in the month of January, pass an ordinance to raise the sum of six hundred thousand dollars, by a special tax, on real estate and slaves, to be called the consolidated loan tax, and the rate per cent of said tax, in each municipality, shall be in proportion to the indebtedness of each. All ordinances, resolutions, or other acts passed by said council, after the first day of January in each year, shall be null and void, unless the ordinance imposing the consolidation loan tax shall have been previously passed. At the end of each and every year, any surplus of the consolidated loan tax remaining in the treasury, after the payment of all the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this act, as have the shortest period to run; and the common council shall have the right of rejecting all bids demanding more than the face of the bonds; for which purpose, public notice shall be given by the comptroller in the official gazette for thirty days, inviting proposals from bondholders for the sale, to the city, of the bonds herein described. From and after the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council, after ten days proclamation by the mayor, in the news-

paper chosen by the common council; and no ordinance creating a debt or loan shall be valid, unless such ordinance shall prescribe ways and means for the punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinances shall not be repealed until principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

By a supplementary act approved on the same day, known as No. 72 of the year, the adjacent city of Lafayette was added to the city of New Orleans, and provision was made for the assumption and payment of its debt. The fifth section of the act is as follows: —

"SECT. 5. *Be it further enacted, &c.*, that the debt of the city of Lafayette shall be assumed and paid by the city of New Orleans, and the said city of New Orleans is hereby declared liable therefor; and the amount of said debt shall be ascertained, and its payment provided for and made in the same manner as the debt of each municipality of New Orleans is ascertained and provided for in the act to which this act is a supplement; and in raising annually the consolidation loan tax for the payment of the debt of New Orleans, an additional sum of fifty thousand dollars shall be raised for the purpose of providing for the debt of the city of Lafayette, now added to that of New Orleans, so that the whole amount of the annual levy of taxes for the payment of the debt of New Orleans shall be six hundred and fifty thousand dollars."

Under these acts, No. 71 and No. 72, the commissioners of the consolidated debt issued bonds of the city of New Orleans, known as consolidated bonds, to the amount of ten million dollars, in exchange for the bonds, obligations, and debts of the old city, of the three municipalities, and of the city of Lafayette. Of this amount bonds exceeding five million dollars have been paid by funds received under the tax levied pursuant to the provisions of the thirty-seventh section of act No. 71 and of the fifth section of act No. 72, beyond what was necessary to meet the annual interest. There remain outstanding bonds for more than four million dollars, with interest since 1876. Of these bonds, with unpaid coupons, the relator owns upward of six hundred, each for the sum of one thousand dollars.

The petition refers to the acts No. 71 and No. 72 of 1852, and cites at length the sections mentioned. It also alleges that the bonds issued under them were negotiable securities; that by reason of the law providing for the payment of the interest and the gradual reduction of their number through a sinking fund, they were negotiated at their par value or above it, and distributed in the markets of Europe and of the United States in the due course of business as a secure, permanent, and trustworthy investment; that the free banks of the State were compelled to invest in them to secure the circulation of their bills, and that individuals and corporations did likewise with confidence in the provisions of sect. 37 of act No. 71, and sect. 5 of act No. 72, for the maintenance and enforcement of which the public faith of the State of Louisiana and of the city of New Orleans was inviolably pledged.

The petition then alleges that, in violation of the provisions of law mentioned, which constitute a contract with the bondholders, binding both upon the State of Louisiana and the city of New Orleans, the legislature of the State, on the 12th of March, 1874, passed an act entitled "An Act to postpone the levy and collection by the city of New Orleans of a tax for a sinking fund for the purchase of its bonds, to authorize the administrators of the city to modify the last budget and tax levy, and to repeal conflicting laws and penalties," the object of which was to relieve the authorities of the city until December, 1876, from the duty of estimating, levying, and collecting any tax for a sinking fund for the purpose of purchasing any of the bonds issued under the acts mentioned.

The petition also alleges that, in further violation of the provisions of the act of 1852, and of the contract with the holders of the bonds, the legislature, on the 6th of March, 1876, passed another act, designed, as stated in its title, to adjust, regulate, and provide for the bonded debt of the city of New Orleans, and authorize the exchange of its bonds for other bonds to be issued on the plan known as the premium bond plan, the avowed object of which was to impair, if possible, the obligation of the contract between the bondholders and the city, and divest the rights acquired by them under it, by prohibiting the city authorities from levying a tax in any year under the pro-

visions of the acts of 1852, by shackling the judicial tribunals in the issue of process, and by repealing the provisions of that act. The seventh section is as follows: —

"SECT. 7. *Be it further enacted, &c.*, that no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections [the premium bonds], shall be levied either for the year 1876, or any year or years thereafter, by the city of New Orleans, and that all existing laws requiring or authorizing the city council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to *mandamus* the officers of said city to levy and collect any interest tax other than that provided in this act, or in case of such *mandamus*, by a receiver or otherwise, to direct the levy and collection of any such tax."

The petition then avers that these acts of the legislature of Louisiana are in conflict with the Constitution of the United States, in that they impair the obligation of the contract between the bondholders and the city; that nevertheless the authorities of the city, its mayor and administrators, in disregard of the provisions of the acts of 1852, and in contempt of their duties and of the rights of the relator and other bondholders similarly situated, have refused to perform the duty imposed upon them by those acts for the years 1874, 1875, 1876, and 1877, to levy a special tax for the payment of the matured coupons and the purchase of bonds; that they have levied upon the property subject to the levy of such special tax for the payment of the consolidated bonds, other taxes to meet other bonds issued by the city in disregard of the prohibitory clauses of sect. 37 of the act of 1852, and the moneys collected have been applied to the payment of those bonds, and other illegal purposes; that the authorities of the city have been notified to levy the special tax required for the years mentioned, but they have refused to discharge their duty in that particular, and, in place thereof, have sought by all sorts of frivolous and unfounded technicalities to contest the validity and integrity of the consolidated bonds; that the relator has demanded payment of the matured coupons held by it, which

was refused, the city authorities answering that there were no funds out of which they could be paid; and that the city and the taxable real estate within its limits are liable for the payment of the matured coupons and for the purchase of said bonds to the extent of $650,000 per annum, for the years 1874, 1875, 1876, and 1877, less coupons paid for 1874 and 1875.

The petitioner, therefore, prays for a *mandamus* and an injunction; the former, commanding the city authorities to levy the special tax of $650,000 for the years named; and the latter, enjoining them from levying any other tax on real estate within the limits of the city which is subject to the special tax for the consolidated debt, until the special tax has been levied.

Upon the petition, an alternative writ of *mandamus* was issued, requiring the city authorities to show cause why they should not comply with its prayer.

The authorities appeared on the return-day and excepted to the jurisdiction of the court to grant the writ, on the following grounds: —

1st, That by the provisions of the acts of the legislature — No. 5 of the extra session of 1870, and No. 31 of 1876 — the courts of the State were prohibited from issuing a writ of *mandamus* to compel the respondents to pay any debt not liquidated by judgment, or to levy and collect any interest tax other than that provided in act No. 31 of 1876 (the premium bond act).

2d, That the duty of the respondents, by the city charter and the sixth section of the act No. 31 of 1876, was limited to the levy and collection of a tax on the assessed value of all property subject to taxation within the city, at a rate not exceeding one and one-half per cent on the dollar, to meet all expenses of the city government, and to pay the interest on its bonded debt.

3d, That the respondents are expressly forbidden, by said act No. 31 of 1876, from levying the tax demanded for the year 1876, or for any year afterwards.

4th, That the legislature, by act No. 53 of 1874, had suspended the levy and collection of any tax for the sinking fund under the act of 1872 until December, 1876, which, the re-

spondents charge, was passed with the assent of the Southern Bank.

And if the exceptions should be overruled, the respondents, reiterating and pleading the matters contained in them as part of their answer, further add: —

5th, That the provisions of the thirty-seventh section of act No. 71 of 1852 are unconstitutional and void, because their object is not expressed in the title of the act, as required by art. 118 of the Constitution of 1845, in force at the time.

6th, That the tax provided by the section mentioned is unconstitutional and void, and in violation of sect. 127 of the Constitution of 1845, and art. 123 of the Constitution of 1852; because, first, it is to be assessed on real estate and slaves, and not on personal property; and, secondly, because the rate per cent of the tax in each municipality is to be in proportion to the indebtedness of each.

By a supplementary answer the respondents reiterated the same objections to the writ in more ample terms.

Various parties, including the State of Louisiana, holders of premium bonds, owners of real estate in the city, and taxpayers, were allowed to intervene under the practice which obtains in Louisiana, and various exhibits produced by them were made part of the case.

In March, 1878, the District Court gave judgment granting a peremptory writ of *mandamus* as prayed, and denying the injunction. On appeal to the Supreme Court of the State this judgment was reversed, and judgment entered that the demand of the relator be dismissed, with costs, in both courts. To review this judgment the case is brought to this court.

Mr. John A. Campbell and *Mr. Edward Bermudez*, with whom was *Mr. Daniel H. Chamberlain* and *Mr. William B. Hornblower*, for the plaintiff in error.

Mr. Benjamin F. Jonas and *Mr. Henry C. Miller* for the defendant in error.

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

As will be seen by the statement of the case, the petition for the *mandamus* proceeds upon the theory that the transac-

tion, authorized by the thirty-seventh section of the act of 1852, and the fifth section of the supplementary act of the same day, when consummated by the issue of the bonds of the city of New Orleans, and their exchange for the obligations of the old city, of the three municipalities, and of the city of Lafayette, constituted a contract between the city and the bondholders, the obligations of which could not be subsequently impaired by State legislation; and that the provision pledging the levy and collection of an annual tax of $600,000, increased by the supplementary act to $650,000, for the payment of the interest on the bonds, and their gradual retirement, was an essential part of that contract.

On the other hand, the city authorities, the respondents here, deny the validity of the act of 1852, on two grounds: 1st, that its object is not sufficiently expressed in its title, under the Constitution of 1845; and, 2d, that in providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, and in proportion to the indebtedness of each municipality, it violates the Constitution of 1845, which requires equality and uniformity of taxation throughout the State. And they also invoke against the issue of the writ the subsequent legislation of the State limiting the taxes which shall be levied upon property in the city, prescribing the purposes to which they shall be applied, prohibiting the levy and collection of any other tax, and depriving the courts of the State of the power to issue a *mandamus* to compel them to pay any debt not liquidated by judgment, or to levy and collect any interest tax other than that provided by the premium bond act of 1876.

Assuming for the present that the act of 1852 is not invalid, for the reasons stated, the first inquiry is as to the character of the transaction authorized by it and the supplementary act. Did it, when consummated, amount to a contract between the city and parties subsequently taking the bonds; and did the pledge to levy the annual tax named form a part of the contract? Unless both of these questions can be answered in the affirmative, it will be to no purpose to inquire into the subsequent legislation of the State respecting the tax, as no inhibition would rest upon its power over the subject.

The acts of 1852 consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette. The new corporation took all the property and interests of the municipalities, and of Lafayette, and consequently became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The legislature recognized its existence, and in consolidating the municipalities and the corporation of Lafayette, declared that the debts of the old corporation, of the municipalities, and of that city, should be assumed and paid by the city of New Orleans, which was declared to be liable therefor. The first of the acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city having forty years to run, with interest coupons payable semi-annually, in exchange for the obligations and debts of the old corporation, and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary act. To meet the interest it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of $600,000, increased to $650,000 by the supplementary act, by a special tax on real estate and slaves, to be called the consolidated loan tax. It also provided that any surplus remaining at the end of each year, after payment of the interest on these bonds, and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The State in effect said to them: The city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that purpose to the amount of $650,000. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated

as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *Hartman* v. *Greenhow*, 102 U. S. 672; *People* v. *Bond*, 10 Cal. 563; *Brooklyn Park Company* v. *Armstrong*, 45 N. Y. 235.

There were other provisions in the act of 1852 besides those stated, which, though not essential to the obligatory form of the contract, were designed to inspire the creditors with confidence in the punctual payment of the interest and principal. It declared that all ordinances, resolutions, or other acts passed by the council after the first day of January of each year should be null and void, unless the ordinance imposing the consolidated loan tax should have been previously passed. It also declared that after its passage no obligation or evidence of debt of any description whatever, except those therein authorized, should be issued by the city or under its authority. Whatever legal force may be ascribed to them, they were intended as solemn asseverations that the pledge of the annual tax should never be violated.

The question then arises, Was the act of 1852 valid? Its

invalidity is asserted, as stated above, on two grounds; the first of which is that its object is not expressed in its title, as required by article 118 of the Constitution of 1845. The title of the act is "An Act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs." The article of the Constitution declares that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." A similar provision is found in several State Constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill incongruous matters, having no relation to each other, or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to forbid the union of several different provisions in the same bill, if they are germane to the general subject indicated by its title. A bill to incorporate a city and provide for its government may, without conflicting with the constitutional clause, contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of peace, good order, and health within its limits, the promotion of its growth and prosperity, and the raising of revenue for its government. So here, under the title of the act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, but to all the varied details into which the general administration of its affairs might lead. The municipalities were in debt at the consolidation, and this was well known to the legislature. A change in their government, and in the administration of their affairs, required some disposition to be made of their debts. Whatever interests were possessed by them were the proper subjects of legislation in the act which took them out of existence as separate municipalities and created a new corporation in their place, with power to deal with their affairs. We hold, therefore, that the act of 1852 was not invalid, on the ground that its object is not sufficiently expressed in its title.

The second ground of objection to the validity of the act of 1852 is, that the tax prescribed is to be levied upon real estate and slaves to the exclusion of personal property, and in each municipality in proportion to its indebtedness; which, as contended, violated the rule of equality and uniformity required by the Constitution of 1845. The language of the act is, that "The common council shall annually, in the month of January, pass an ordinance to raise the sum of $600,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent of said tax in each municipality shall be in proportion to the indebtedness of each." This amount, as already stated, was, upon the annexation of the city of Lafayette, increased to $650,000. On the passage of this act, — Feb. 23, 1852, — the Constitution of 1845 was in force. The Constitution of 1852 was not adopted until July of that year. Article 127 of the Constitution of 1845 is as follows: "Taxation shall be equal and uniform throughout the State. After the year 1848, all property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied; the legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade, or profession."

This article has been frequently before the Supreme Court of the State for construction, and until the decision of the present case the requirement of equality and uniformity in the tax has been held to apply only to taxes levied for State, and not to those levied for municipal, purposes. The first case was *Second Municipality of New Orleans* v. *Duncan*, 2 La. Ann. 182. That municipality had passed an ordinance imposing a special tax of one per cent on all real estate within its limits, for the purpose of paying its debts and providing for the support of schools; and objection was taken to its constitutionality on two grounds: 1st, that the power of taxation was vested exclusively in the legislature, and could not be delegated to the municipality; and, 2d, that the taxation authorized impinged upon the rule that no one species of property should be unduly assessed. Both grounds were supposed to derive support from

the article of the Constitution in question, — the first, because, as contended, the equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the legislature, whose authority was coextensive with the territorial limits of the State; and the second, from the inhibition against taxing one species of property higher than another. But the court replied, speaking through its Chief Justice: "The article by its terms applies to State, and not to municipal, taxes. It provides for equality and uniformity of taxation *throughout the State*. . . . The framers of the Constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses, and their wants; and their corporate existence is recognized and continued, as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left *in statu quo*, with the legislature; and the convention confined itself to providing for the State government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control." And referring to the admission made in the record that there was no special ordinance of the municipality assessing taxes on personal property, the court added: "We know of no reason imperative on the municipality to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

This case was decided in 1847, and it is objected that it arose before that part of the article went into effect, which declares that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied." It is doubtful whether this objection be correct in point of fact, but assuming it to be so, the requirement of equality and uniformity was in force; and the part cited does not require that taxation shall be universal. It simply requires that when different kinds of property are taxed, the rate of taxation shall be the same on all. The construction

given was afterwards affirmed by the same court in *City of Lafayette* v. *Cummins* (3 La. Ann. 673), decided in 1848. There the question was as to the validity of a municipal tax on the trade and occupation of the defendant as a butcher, levied under an ordinance of the city passed in 1847. There were other trades and occupations not embraced in the ordinance, and, consequently, not taxed. It was, therefore, contended that the imposition of the tax was contrary to that clause of the article of the Constitution which provides for the equality and uniformity of taxation throughout the State. But the court replied that "in the case of *Duncan* v. *Second Municipality*, this question, after very thorough argument, was determined by this court, and the article was held applicable only to State, and not to municipal, taxes." It is said in answer to this decision that the language of the court was a mere dictum. We do not so regard it. The point of contention in the case was whether the equality and uniformity applied to taxation on occupations and trades as well as on property. The answer which met the objection to the taxation on real property exclusively was held to meet the objection to taxation on certain occupations to the exclusion of others.

The Constitution of 1852 contained a similar clause, — identical in language, omitting the words "after the year 1848," — and with one exception, subsequently reversed, it has received a similar construction from the Supreme Court of the State. The case referred to was that of *Municipality No.* 2 v. *White and Others*, which arose in 1854. 9 La. Ann. 446. The municipality had imposed a tax on the owners of property contiguous to a newly opened street, to pay the expenses of opening it, under a law which authorized the apportionment of the cost in such cases upon the owners of adjacent property, according to the benefit derived from the improvement. The court was of opinion that the law was liable to the objection that the tax was not equal and uniform, as required by the clause in question, and held it to be unconstitutional. The decision was in conflict with that in Duncan's case, but it was rendered by a divided court; and in *Yeatman* v. *Crandall*, which arose in 1856, it was overruled. In the latter case, the plaintiff sought to enjoin the collection of a levee tax, which was imposed on

certain alluvial lands, on the ground that the statute authorizing it was unconstitutional, in that it violated the rule of equality and uniformity prescribed by the article in question. But the court said: "This article refers to State taxation, in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform throughout the State, it points directly to its object, which is to regulate the mode of filling the State treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden. . . . It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the Constitution infringed by such a state of things." 11 La. Ann. 220.

By this decision the doctrine of the earlier cases, upon the clause in the Constitution of 1845, was re-established; and one of the judges, who had concurred in the decision in the White case, stated that he had been led to reconsider his opinion, and that he yielded his former impressions on this point the more readily, because the Supreme Court which sat under the Constitution of 1845, and five of the seven judges with whom he had sat upon the bench, had concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements.

The doctrine of this case was affirmed the same year in *Surgi* v. *Snetchman* (11 La. Ann. 387), and again in 1859 in *Wallace* v. *Shelton*, 14 id. 498. In its opinion, in the latter case, the court said that the questions in the Yeatman case were decided upon full consideration, after having the aid of the arguments of learned counsel in that case, and also in another case then under consideration on a rehearing, and were subsequently affirmed in the two cases mentioned; and added that, "after these decisions, which were in conformity with those under the Constitution of 1845, we had hoped the question would be considered as at rest."

The objection to the want of equality and uniformity in the taxation authorized by the act of 1852, in that it was to be levied on the property of the different municipalities in pro-

portion to the indebtedness of each, does not strike us as possessing much force. The debts created by the municipalities were separate and different in amounts, and before the consolidation the taxes upon the property in them must necessarily have been assessed at different rates. There was no obligation upon the legislature to relieve either of them from the unequal burdens consequent upon the different amounts of their indebtedness. The subject was one resting in its discretion. Nor was it an unreasonable provision, when authorizing the city to issue its bonds for the indebtedness of them all, to require that taxation to raise the funds for their payment should be thus apportioned.

From the extended reference to the adjudications of the Supreme Court of Louisiana, upon the Constitution of 1845, requiring uniformity and equality in taxation, there can be no serious question as to the validity of the act of 1852, so far as the consolidated bonds of the city of New Orleans are concerned, and the provisions made by it and the supplementary act for the annual levy of a tax of $650,000 to pay the interest and reduce the principal. The decisions upon the clause of the Constitution of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the Constitution of 1845. Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. *Christy* v. *Pridgeon*, 4 Wall. 196, and *Shelby* v. *Guy*, 11 Wheat. 361. The statute as thus

expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglass* v. *County of Pike*, 101 U. S. 677, 687. "The true rule," he observes, "is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." See also *Gelpcke* v. *City of Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa County*, 3 id. 294; *Thomson* v. *Lee County*, id. 327; *Lee County* v. *Rogers*, 7 id. 181; *Chicago* v. *Sheldon*, 9 id. 50; *Olcott* v. *The Supervisors*, 16 id. 678; *Fairfield* v. *County of Gallatin*, 100 U. S. 47.

We refer to this doctrine, not from any doubt as to the correctness of the construction of the article of the Constitution of 1845 given by the Supreme Court of the State, but in answer to the objections of counsel and the position of the court below. We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the constitutions of other States has been adopted by their highest courts. The Constitution of Virginia of 1850 prescribed that "taxation shall be equal and uniform throughout the Commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;"

and the Court of Appeals of the State held that the provision related solely to taxation for purposes of State revenue, and did not apply to taxes by counties and corporations for local purposes. *Gilkeson* v. *The Frederick Justices*, 13 Gratt. (Va.) 577. The Constitution of Arkansas of 1836 provided that "all property subject to taxation shall be taxed according to its value, — that value to be ascertained in such manner as the General Assembly shall direct, — making the same equal and uniform throughout the State;" and the Supreme Court of the State held that the provision was intended to apply to State revenue, and was not applicable to taxes levied for county purposes. *Washington* v. *The State*, 13 Ark. 752. See also *McGehee* v. *Mathis*, 21 id. 40.

That taxation for State purposes, to be equal and uniform within the meaning of the Constitution of 1845, need not have been universal, is a proposition which calls for no argument. It was only necessary that all property on which taxes were levied — not all property in the State — should be taxed according to its value, and in conformity with some fixed rate or mode. *State* v. *Lathrop*, 10 La. Ann. 398; *New Orleans* v. *Commercial Bank*, id. 735.

The validity of the consolidated debt of New Orleans, and the obligation of the city to provide for the payment of the interest and the redemption of the principal, were never questioned by the legislative department of the State until 1876, but were repeatedly and in the most emphatic manner recognized and affirmed. In fourteen acts of the legislature passed prior to that year the consolidated bonds are referred to as valid obligations of the city, though in one of them, it is true, a different mode of raising the tax from that specified in the act of 1852 is required, and in another the levy and collection of the tax are postponed for two years. Thus the act passed in 1856 amending the charter provides that the common council shall in each year levy an equal and uniform tax upon all property in the city, real and personal, but that said tax, added to the consolidated loan tax and other taxes designated, shall not in the aggregate be more than one dollar and a half on one hundred dollars of valuation, except in case of invasion, "provided it be sufficient to pay the interest on the consolidated debt and

railroad bonds issued by the city of New Orleans." In the mode thus prescribed the amount stipulated by the act of 1852 was annually raised and applied until 1874, without objection from the bondholders. Hence it is contended that they waived their right to the special tax mentioned. But no such inference can be justly drawn from their silence. They could not complain so long as the amount prescribed was raised and applied as stipulated. Had the requisite funds been given to the city, and then applied to pay the interest on the bonds, and to purchase with the residue such of them as had the shortest time to run, the bondholders would have been equally without cause of complaint, and would as little have waived by their silence the right to insist upon the special tax if a resort to it should become necessary. Nor is their right in that respect affected by the fact that since 1852 slavery has been abolished, and that there are no longer slaves upon whom taxation can be levied. The obligation of the city to raise the required fund by special tax on real estate still remains. That is no more lessened than it would be by the destruction of any other portion of the taxable property; although the rate of taxation on what is left might be thereby increased.

The act of 1874, which postponed the levy and collection of the tax for a sinking fund for the purchase of bonds of the city until December, 1876, also declared that the act should in no wise be construed to hinder, delay, or affect the prompt payment of the interest on them as they matured. The validity of the consolidation bonds was "recognized in all its integrity, it being the object of the act to afford temporary relief to the taxpayers of New Orleans in the embarrassed condition of its affairs, and not to detract from or impair the rights of the holders of said bonds."

But notwithstanding this declaration of the validity of the consolidated debt, and the inviolability of the provisions for its payment, no tax was subsequently raised to pay the interest, or to retire the principal. And before the time arrived to which the postponement of a levy was made, new light respecting the obligations of the city and the rights of the bondholders had dawned upon the city authorities. Although for twenty-two years all departments of the State government had recog-

nized the validity of the bonds, and the annual interest had been regularly paid, and more than half of them retired, it was then for the first time discovered that the act of 1852, authorizing the issue of the bonds, was invalid, that its object was not sufficiently stated in the title, that the tax prescribed was neither equal nor uniform, and therefore was in conflict with the Constitution. The outcome of these new notions was the Premium Bond Act of March 6, 1876, passed by the legislature at the solicitation of the municipal authorities.

This act is a most remarkable piece of legislation. So far as the consolidated bonds are concerned, it amounts to little less than open repudiation of the city's faith. It admits that the debt of the city as established by law is so large as to require for its liquidation taxation on property within its limits at the rate of at least five per cent, and yet authorizes a tax of only one and a half per cent to pay the expenses of the city government, and to meet the obligations which are offered in exchange for those bonds.

It recites in its preamble that the total debt of the city, bonded and floating, exceeds $23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent per annum to liquidate the debt; that the levying of a tax at so exorbitant a rate will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate practical bankruptcy; and that the council of the city have adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor."

The plan proposed was to exchange all recognized and valid bonds of the city of New Orleans, and of the cities of Jefferson and Carrollton, for bonds to be known as premium bonds of the city; the latter to be of the denomination of twenty dollars, and dated Sept. 1, 1875, each bearing five per cent interest from July 15 of that year, the interest and principal to be paid at the same time and not separately, and that time to be determined by chance in a lottery. One million of these

bonds was to be divided into ten thousand series of one hundred bonds each. The ten thousand series were to be placed in a wheel, and, in April and October of each year, as many series were to be drawn as were to be redeemed, according to a certain schedule adopted. The bonds composing the series thus drawn were to be entered for payment three months thereafter, principal and interest, and were to be receivable for all taxes, licenses, and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series were to be placed in a wheel and 1,176 prizes, amounting to $50,000, were to be drawn and distributed. Under this plan the city was to be released from payment of the principal and interest of its debt, except such portion as might be drawn in the lottery each year. Under this arrangement it would depend upon the turn of a wheel and the drawing of a fortunate number whether a creditor would be paid in one year or in fifty years. The plan completely disregards all the conditions upon which the consolidated bonds were issued, and postpones indefinitely the payment of interest and principal, or rather leaves the time of payment within fifty years to be determined by chance.

The act of 1852, as we have stated, declares that the city council shall, in January of every year, pass an ordinance for the levy and collection of a special tax to be applied to the payment of the interest on the consolidated bonds and to retire the principal. The act of 1876 declares that no tax shall be levied by the city council that year or any year afterwards to pay the principal or interest on those bonds, or on any other than the premium bonds. The act of 1852 declares that all ordinances, resolutions, and acts of the city council of any year shall be null and void, unless the ordinance imposing the special tax designated shall have been previously passed. The act of 1876 declares that all laws requiring or authorizing the city council to levy any tax for bonds or interest on bonds other than premium bonds are repealed; and, as if that was not sufficient evidence of the repudiation of former obligations, it forbids the courts to issue a *mandamus* to the officers of the city to levy and collect any interest tax other than for those bonds.

To meet the interest on them and for all other purposes of the city, the act further provides that a tax of only one and one-half per cent per annum shall be levied; and this limitation of the taxing power of the corporation is "declared to be a contract not only with the holder of said premium bonds, but also with all residents and tax-payers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited."

If the provisions of this act nullifying the pledges of the act of 1852 are valid, the consolidated bonds are virtually destroyed; no taxation is allowed to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble, that the act seeks from the creditors the indulgence necessary "for the public well-being and the maintenance of the public honor," it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: "Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing." The primal duty of the city authorities to fulfil punctually their obligations and maintain good faith is thus proclaimed to be no duty at all.

We do not deny that the power of taxation belongs exclusively to the legislative department of the government, that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the legislature. But, as we said in the case of *Wolff* v. *New Orleans*, decided at the last term, legislation revoking the power is subject to this qualification, which attends all State legislation, that it "shall not conflict with the prohibitions of the Constitution of the United States,

and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded — treated as if never enacted — by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . . However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

The case of *Von Hoffman* v. *City of Quincy*, reported in 4th Wallace, is a leading one on this subject. The court there said, "that when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State, and the corporation, in such cases, are equally bound."

The inhibition upon the courts of the State to issue a *mandamus* for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is, that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of *mandamus*. The holders are denied all remedy. *Louisiana* v. *New Orleans*, 102 U. S. 203–207.

Legislation of a State thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the act of 1852 to pay the interest on the consolidated bonds issued thereunder, and to retire the bonds.

It follows from the views expressed that the judgment of the Supreme Court of the State of Louisiana must be reversed, and the cause be remanded to that court with instructions to reinstate the same and to remand it to the Third District Court of the Parish of Orleans, or its successor, to carry into effect the provisions of the thirty-seventh section of the act of the legislature approved Feb. 23, 1852, and the fifth section of the supplementary act approved the same day, embraced in Nos. 71 and 72 of the acts of that year, as containing a valid contract between the city of New Orleans and the creditors holding the bonds issued under them; and to direct the District Court to issue a *mandamus* to the city of New Orleans and its authorities, annually to levy and collect the tax of $650,000 directed by the acts, and to apply the same in the following order: First, to the payment of the current interest of the year; secondly, to the payment of arrearages of interest of former years until all the arrearages are satisfied; and, thirdly, to the purchase of bonds having the shortest period to run.

Judgment to this effect, and that the defendants pay the costs in this court and in the Supreme and District Courts of Louisiana, will be entered.

RUSSELL *v.* STANSELL.

Where the land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged, and the bill of complaint, filed by a number of them, praying for an injunction against the collection of the assessment, was dismissed, and they appealed here, — *Held*, that the several amounts cannot be united to make up the sum necessary to give this court jurisdiction.

MOTION to dismiss an appeal from the District Court of the United States for the Northern District of Mississippi.

Mr. H. T. Ellett in support of the motion.

There was no opposing counsel.

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

Stansell, the appellee, obtained a decree in the District Court of the United States for the Northern District of Mississippi, in June, 1879, against the Levee Board of Mississippi, District No. 1, for $71,623.67. This decree being unsatisfied, he instituted summary proceedings in the same court, under the provisions of the statute creating the levee board, to obtain an assessment and collection of the charge which was imposed on the lands in the district for its payment. On the 7th of February, 1880, the court entered an order which resulted in an assessment by commissioners appointed for that purpose. In this order it was provided that any person conceiving himself aggrieved by the action of the commissioners might, by petition to the court, present his grievance and obtain such redress as he should fairly be entitled to. On the 1st of February, 1881, D. M. Russell, W. H. Stovall, and H. P. Reid appeared, and as individuals and members of an executive committee appointed at a mass meeting of the several owners of the lands charged with the payment of the assessment, asked an injunction against the collection of the assessment that had been made, setting forth in their petition why the proceedings were illegal and unjust. The amount with which the petitioners, as individuals, were severally charged was as follows: Russell, $7.58; Stovall, $205.14; and Reid, who was assessed only as an

agent or attorney, $229.29. No single individual among all the parties represented by the committee could in any event be made liable for an amount exceeding $2,500. On the presentation of the petition the court granted a preliminary injunction, but on final hearing that injunction was dissolved and the petition dismissed. From the last order this appeal was taken, which the appellee now moves to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment is less than $5,000.

While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. The proceeding on his part was to require each of the several landowners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in *Paving Company* v. *Mulford* (100 U. S. 147), *Seaver* v. *Bigelows* (5 Wall. 208), *Rich* v. *Lambert* (12 How. 347), *Stratton* v. *Jarvis* (8 Pet. 4), and *Oliver* v. *Alexander* (6 id. 143), such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Although the amount due the appellee from the levee district exceeds $5,000, his claim on the several owners of property is only for the sum assessed against them respectively. Any owner can relieve himself and his property from all further liability for the district by paying his part of the assessment.

Appeal dismissed.

SUPERVISORS *v.* STANLEY.

1. The provisions of the statute of 1866 of New York, providing for the assessment and taxation of the stockholders of a bank or banking association on the value of their shares of stock, are in conflict with the act of Congress, so far as they do not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the State the owner of all other personal taxable property can deduct such debts from its value.
2. The statute is not, however, rendered void by reason of such conflict, nor is the assessment thereunder of the shares of stock in national banks of no effect. If the stockholder has no debts to deduct, the prescribed mode of assessment is valid, and he cannot recover the tax paid pursuant thereto; if he has debts, the assessment excluding them from computation is voidable, but the assessing officers act within their authority until they are duly notified that he is entitled to deduct such debts.
3. If the assessing officers proceed after such notice, and act in violation of the act of Congress, he may take the requisite steps to secure that deduction, and, when secured, the residue of the statute remains valid.

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. Rufus W. Peckham and *Mr. Wheeler H. Peckham* for the plaintiffs in error.

Mr. George F. Edmunds and *Mr. Matthew Hale* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Stanley recovered a judgment against the Board of Supervisors of the County of Albany, for taxes exacted and paid under legal process on shares of the stock of the National Albany Exchange Bank. A large number of the shareholders of the bank who had paid this tax made an assignment of their claims to him, and the judgment was for the sum of $61,991.20, with interest and costs.

The ground of this recovery was that the statute of New York, under which the shares were assessed, was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of his shares of stock, in ascertaining the amount for which they should be taxed.

The pleadings in the case set out the sums paid by the stockholders and their names, and their assignment to Stanley, the payment under compulsion of legal process, and a demand for the repayment on the Albany County authorities.

The case was submitted to the court on a waiver of trial by jury, and on the finding of facts and conclusions of law thereon by the court, judgment was rendered for plaintiffs. The facts found by the court are thus stated: —

"*First*, That the allegations of the complaint in regard to the citizenship of the plaintiff, the citizenship and powers and liabilities of the defendant, the organization and capital of the National Albany Exchange Bank, the ownership of the shares of capital stock of the National Albany Exchange Bank, the assessment of the stockholders in said bank, named in said complaint, by the board of assessors of the city of Albany, the names and residences of said stockholders, the collection of taxes from said stockholders, and the payment of the same to the county treasurer of the county of Albany, and the demand made by Chauncey P. Williams, before the commencement of this action of the treasurer of the county of Albany, are true as therein set forth.

"*Second*, That the amounts collected from the said stockholders and paid to the treasurer of the county of Albany, and the times when the said amounts were so paid to said treasurer, were as follows, to wit: —

$907 90	paid	August 11, 1874
127 84	paid	August 11, 1874
1,868 06	paid	May 1, 1875
1,409 33	paid	May 27, 1876
1,202 32	paid	May 3, 1877
1,336 60	paid	April 17, 1878
1,473 02	paid	April 22, 1879
11,604 75	paid	May 1, 1875
8,147 26	paid	May 27, 1876
7,822 34	paid	May 3, 1877
7,357 94	paid	April 16, 1878
6,243 20	paid	April 21, 1879

"*Third*, That the sums above named were not paid voluntarily by said stockholders, but were forcibly collected by the

marshal of the city of Albany, under a warrant issued to such marshal by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the board of supervisors of the county of Albany, by levying upon the property of the said stockholders respectively, as alleged in said complaint.

"*Fourth*, That the said assessments were made and said amounts collected and received by the treasurer of the county of Albany, as above stated, under color of an act of the legislature of the State of New York, entitled 'An Act authorizing the taxation of stockholders of banks, and surplus funds of savings banks,' passed April 23, 1866, being chapter 761 of the laws of 1866, and not otherwise.

"*Fifth*, That the allegations of the complaint with reference to the assignments by the respective stockholders of said bank of their claims against the county of Albany, by reason of the matters alleged in the said complaint, are true as set forth in said complaint, and that the plaintiff, at the time of the commencement of this action, was the holder and owner of all claims against the county of Albany, or against the defendant, arising out of the matters alleged and set forth in said complaint.

"*Sixth*, That the said act of the legislature of the State of New York, chapter 761 of the laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations, in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint, permitted and required by the laws of the State of New York to be made from the value of every kind of personal property and moneyed capital, other than bank stock, in assessing the same for the purpose of taxation.

"*Seventh*, That the allegations in the fourth count of said complaint, as to the presentation to the said board of assessors by said Chauncey P. Williams of the affidavit of his indebtedness, and the request by him for a reduction of his assessment on his bank stock, and the refusal of said board of assessors to make such reduction, and the application by said Williams to the Supreme Court of the State of New York for a writ of

mandamus, and the subsequent legal proceedings thereon, including the decision of the Supreme Court of the United States, are true, as set forth in said fourth count."

It does not appear by this finding of the court that any shareholder, for whose payment of taxes this suit is brought, made affidavit or other application in regard to his indebtedness, that it might be deducted from his assessment, or that he owed anything to be deducted from the assessed value of his shares, except the seventh finding of facts in regard to C. P. Williams.

Unless, therefore, the other shareholders who paid the tax on the shares of their stock were entitled to recover back the sum paid without any evidence that they had made affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to assessment of bank shares as to other personal property, and without any evidence that they owed anything whatever to be deducted from any assessment of their personal property, including bank shares, the judgment in this case cannot be supported.

The judge who decided the case on the circuit found as a conclusion of law that the assessment of all shares of national banks was void, because the statute of New York, under which the assessments were necessarily made, was void, as being in conflict with the act of Congress on that subject, and he declares, in an opinion delivered in the case of *The National Albany Exchange Bank* v. *Hills, Receiver of Taxes*, in a chancery suit, that the assessments in this class of cases are absolutely void, the assessors having acted without any jurisdiction.

If this view of the subject be sound, — if the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or, if there was no law by which in any case they could assess and collect a tax on shares of national banks, — then it is of no consequence to inquire of anything beyond the fact that plaintiff's assignors did pay such a tax under legal compulsion.

On the other hand, if the law is for any p rpose a valid law, and if it can be held to furnish the rule of taxation as to any class of owners of national bank shares, then the *onus* is on plaintiff to show that his assignors are not of that class.

The question here to be decided arises under two statutes of the State of New York in regard to taxation.

The first of these is the act of 1850, relating to the assessment and collection of taxes in the city of Albany. The sixth section of the act requires the board of assessors to prepare an assessment-roll, in which there shall be set opposite the name of each taxpayer, (1) All his real estate liable to taxation and its value; (2) The full value of all his personal property after deducting the just debts owing by him.

Section 9 of the act is as follows: —

"If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In 1866 the State enacted a law concerning the taxation of bank shares, which was evidently intended to meet the requirements of the act of Congress in relation to State taxation of the shares of national banks, and the provision of this statute related only to taxing stockholders in banks, and to the capital invested in individual banks. The first section of this act reads as follows, and it contains no other provision for deductions as the basis of taxation, except what is found in this section: —

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in

the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held to the whole amount of the capital stock of said bank or banking association. *And provided further*, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

In the case of *People* v. *Dolan* (36 N. Y. 59), the question was whether, taking these two statutes together, an owner of shares of stock in a national bank was entitled to deduct from the assessed value of his shares the just debts owing by him. It was argued that into this act of 1866 for the taxation of bank shares there should enter, as part of it, the provision of the act of 1850 which allowed this deduction as to all personal property, and that nothing in the act of 1866 forbade this or was inconsistent with it. It was also insisted that unless the act of 1866 was so construed it would violate the act of Congress which only permitted the shares of national banks to be taxed at the same rate as other money capital of the citizens of the State.

But the Court of Appeals overruled both propositions, and held that the true meaning of the act of 1866 was that no such deduction should be made, and that as thus construed it was not in conflict with the act of Congress on that subject.

In a subsequent case, Williams, a shareholder in the National Albany Exchange Bank, made the affidavit required by sect. 9 of the act of 1850, and presenting it to the board of assessors of the county, demanded a reduction in accordance with it, from the valuation of his bank shares. On the refusal of the assessors to comply with this request, a proceeding was commenced in the courts of the State, in which the Court of Appeals reaffirmed the principles of the case of *People* v. *Dolan*. That case coming into this court by writ of error, it was here held that while we were bound to accept the decision of the

highest court of the State in construction of its own statute the act of 1866 as thus construed was in that particular in conflict with the act of Congress, because it did tax shares of the national banks at a higher rate than other moneyed capital in the State. It is reported in 100 U. S. 539, and there are no words which declare the act of 1866 to be void, but the careful language of the decision is, that "in refusing to plaintiff the same deduction for debts due by him from his shares of national bank stock that it allows to others who have moneyed capital otherwise invested, it is in conflict with the act of Congress." p. 546.

Accepting, therefore, as we must, the act of 1866, as construed by the Court of Appeals of New York, as not authorizing any deduction for debts by a shareholder of a national bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the State, or as to private bankers, of which there no doubt exists a large number of both classes.

What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?

It would seem that if the act remains a valid rule of assessment for shares of State banks, and for individual bankers, it should also remain the rule for shareholders of national banks who have no debts to deduct, and who could not, therefore, deduct anything if the statute conformed to the requirements of the act of Congress.

It is very difficult to conceive why the act of the legislature should be held void any further than when it affects some

right conferred by the act of Congress. If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void, is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.

The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.

In *Railroad Companies* v. *Schutte* (103 U. S. 118), decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. "It is contended," said the court, "that as the provision of the act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law." And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company, in order that the company might get the benefit of the better credit of the State, was accompanied by a mortgage created alone by the statute in favor of the State as her security; and the court, while holding that the exchange of bonds was void, as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid.

This court, in the two cases cited in the brief, *United States* v. *Reese* (92 id. 214) and *Trade-Mark Cases* (100 id. 82), concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. Said the court in the latter case: "While it may be true that when one part of the statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each may stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear." The first case also implies that

there may be unconstitutional provisions which do not vitiate the whole statute or even a single section, because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that in both these cases it was a statute creating and punishing offences criminally which was to be construed in regard to the limited constitutional power of Congress in criminal matters.

Case of the State Freight Tax (15 Wall. 232) arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State. The railroad companies, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. This court held the latter to be void as a tax on inter-state commerce, and did not declare the whole tax or the whole statute void. It said: "It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-state commerce. . . . The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of Aug. 25, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void." The same language is repeated in *Erie Railway Co.* v. *Pennsylvania* (id. 282), decided at the same time. Both cases were remanded to the State court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State and not on inter-state commerce.

This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.

But in a review of the cases in this court on this subject, *Austin* v. *The Aldermen* (7 Wall. 694) will be found most

nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State taxing shares of the national banks as being in conflict with the act of Congress. That act said that such taxes might be assessed *at the place where said bank was located, and not elsewhere.*

The statute directed the assessment and taxation of the shares at the *place where the owner resided.* Austin, having contested the tax on his shares in the courts of the State unsuccessfully, brought the case here by writ of error. This court declined to enter upon the question of the validity of the statute, because the case did not show that he was taxed on his shares in any other place than that where the bank was located.

The argument of counsel in the case before us is that any tax, or a tax on any person on account of his bank shares, is void because the whole of the New York statute is void. If the argument is sound, it was equally applicable to Austin's case, in which the statute, which made no limitation of taxation to the place where the bank was located, must have been held void under any principle which would wholly invalidate the statute of New York, because the latter did not allow the deduction of the owner's indebtedness from his shares. And if in that case the Massachusetts statute was utterly void as to national bank shares, then the tax on Austin's shares in Boston was void, and he had *a right to be protected* against the unconstitutional statute. The court evidently went upon the principle that the statute was only void as against the act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point.

To the same effect are the cases of *People* v. *Cassity*, 46 N. Y. 46; *Gordon* v. *Cornes*, 47 id. 608; *In the Matter, &c., Village of Middleton*, 82 id. 196.

If we examine the statute before us on principle, we shall find but little reason to hold it to be wholly void as regards bank shares. If the statute stood alone, there is nothing in it in conflict with the act of Congress. It is only when we look to the other statute, which permits the deduction of debts from the entire value of personal property, that we discern the dis-

crimination against bank shares. The act declares that bank shares shall be taxed according to their value, after deducting the real estate and other property on which the bank itself pays tax. This is eminently just. It provides for a mode of ascertaining their value, the officers who shall do it, and how the tax shall be collected. In all this the law is valid, except that it does not authorize a deduction for debts of the shareholder. This is a distinct and separable principle. When the shareholder has no debts to deduct, the law provides a mode of assessment *for him*, which is not in conflict with the act of Congress, and the law in that case can be held valid. Under the decision in *Austin* v. *The Aldermen*, it is valid as to him.

If he has debts to be deducted, the case of *People* v. *Weaver* (100 U. S. 539) shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the rest of the law remains valid. In other words, in such a case, so much of the law as conflicts with the act of Congress in the given case is held invalid, and that part of the State law which is in accord with the act of Congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts.

It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted the assessment was valid, and the tax paid under it a valid tax. That in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted.

If they then proceeded in disregard of the act of Congress, the assessment was erroneous, and the case of *People* v. *Weaver* (*supra*) shows how that error could be corrected.

The case before us shows no error in any case but that of Williams, and in that case he has obtained the judicial decision of this court, that the tax he paid was illegally exacted from him. Nor do the facts of his case raise the question whether in a case where the debts of the shareholder do not equal the assessors' value of his shares, the tax is wholly erroneous, or only so much as represent the assessment of his indebtedness that should have been deducted, for his affidavit was that his debts equalled the value of his bank shares. Nor do the findings of fact raise the question whether, without making affidavit and demand on the assessors, a suit can be maintained to recover, when such indebtedness actually existed; for he did make affidavit and demand, and no other taxpayer has shown any such notice or demand, or that he had any indebtedness to be deducted. There is neither finding of fact nor averment in the pleadings on either point as to any other assignors of plaintiff than Williams. It results from these considerations that the judgment of the Circuit Court will be reversed, and that on the finding of facts judgment will be rendered for the plaintiff on the fourth count for the amount of the tax paid by Williams, with interest, and on all the other counts for defendants.

It is so ordered.

MR. JUSTICE BRADLEY dissented.

MR. JUSTICE MILLER delivered, at a subsequent day of the term, the further opinion of the court.

Since the opinion in this case was delivered a suggestion has been made to modify the order of the court for judgment so far as to permit a trial in the Circuit Court on issues not decided by that court in the former trial.

The conclusions of law found by the Circuit Court, if sound, disposed of the whole case, and the facts found were sufficient to meet that view. As our opinion differed in one important point from that on which the Circuit Court acted, it became a question whether the facts found were still sufficient to dispose of the whole case.

In a bill of exceptions, signed by the judge and found in the

record, it is said: "There was evidence given in the case upon the subject of other allegations contained in the complaint, but the court did not pass upon such allegations, as the following admission and the decision of the court herein duly show." Then follows a stipulation, signed by counsel for each party, that the case was decided solely upon the invalidity of the New York statute, and that other allegations contained in the complaint had not been passed on.

Under these circumstances we should have little difficulty in directing the court below to grant a new hearing as to such issues, if we could find in the record any material issue in regard to which the court made no finding.

Attention has been called to the following language, which is a part of each count in the complaint: —

"And the plaintiff also says, upon information and belief, that the assessment of said shares of stock in said banking association by said board of assessors was at a greater rate than was assessed by said board of assessors upon shares of stock in a bank organized under the laws of the State of New York, located in said sixth ward, and was at a greater rate than was assessed by said board upon other moneyed capital in the hands of individual citizens of the State of New York, and that for these reasons said assessment of said shares of stock, and the levy of tax thereunder, were illegal and void."

If this is a *sufficient* allegation of a distinct ground of recovery, it seems just that the plaintiff should have a hearing on it, as the defendant took issue on it and it has not been disposed of.

We have, however, much difficulty in finding a solid ground of recovery in this statement. It is divisible into two parts: 1. That the shares of the national bank were assessed at a greater rate than was assessed on shares of a bank organized under the laws of the State of New York, located in said sixth ward.

We are quite clear that the shares of the plaintiff are not relieved from taxation because a single bank of the State has been favored by mistake or by intention.

For errors of this kind the statutes of New York provide the correction, which should be taken in time, and we should

be very reluctant to hold that, when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated.

That the assessment of the shares of the Exchange Bank "was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York."

If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens as compared with the national banks, we think it is erroneous. But if it is intended to allege that apart from the question of the right of the shareholder to deduct for his debts — a question which, in this case, *was disposed of* and was in issue — it can be proved that the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted.

As we have said, it may be well doubted if plaintiff intended to allege this, or to rely on proving it.

But as it is a question of pleading under the New York code, and as no injustice can occur by leaving the matter to the court below, the judgment will be so far modified as to permit the court below, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleading to present it properly; and it is

So ordered.

HILLS v. EXCHANGE BANK.

1. *Supervisors* v. *Stanley* (*supra*, p. 305) cited and approved.
2. A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on their shares by the State authorities.
3. Where, under the statute of New York, such stockholder has presented to the proper board of assessors his affidavit, by showing that his personal property subject to taxation, including such shares after deducting therefrom his just debts, is of no value, and they refuse on his demand to reduce the assessment of the shares, an injunction should be awarded to restrain them from collecting the tax.
4. Where, in a suit by the bank, it is entirely clear from the proofs that all affidavits and demands of the other stockholders for a deduction from the assessed value of their respective shares, by reason of just debts which they owe, would, for purposes of taxation, be disregarded, and the assessors have evinced a fixed purpose to reject every such deduction, this court, in reversing the case, permits an amendment of the pleadings to allow each stockholder to show the amount of the deduction to which he is entitled.

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.

Mr. Rufus W. Peckham and *Mr. Wheeler H. Peckham* for the appellants.

Mr. Wager Swayne and *Mr. Julien T. Davies* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This appeal presents very much the same questions that were decided in *Supervisors* v. *Stanley*, *supra*, p. 305. That was a common-law action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank. The present suit to enjoin the appellants from collecting a similar tax assessed and yet unpaid for that year, was brought by that bank, suing in right of and as representing all the stockholders. The Circuit Court made a decree perpetually enjoining the collection of all taxes on shares of the bank. Several questions are raised, or rather suggested, which we think have heretofore been decided by this court, such as the right of the bank to maintain a suit on behalf of its shareholders. This was established by the cases of *Cummings* v. *National Bank*, 101 U. S. 153; *Pelton* v. *National Bank*, id.

143. There is, also, an attempt to show that there was a settled rule or purpose on the part of the assessors to value the shares of the appellee bank higher in proportion to their real value than in the case of other banks, bankers, and moneyed corporations. We think the proof fails to establish this in a manner to justify the interference of a court of equity. *National Bank* v. *Kimball*, 103 id. 732.

The bill, however, in its main feature, asserts the right to an injunction, on the ground that the act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares, of the debts honestly owing by the shareholders. And the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must of course be reversed, because as to the larger number of the shareholders whose taxes are enjoined there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are: *First*, That one shareholder owning five hundred and thirty-two shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed one dollar, and presented said affidavit to the board of assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Chauncey P. Williams. *Second*, That other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper reduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases, and from knowledge of the decisions of the Court of Appeals of New York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court enjoining the collecting officers as to all the tax assessed on the shares of this bank must be

reversed, the question arises, what shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction.

With regard to the case of Williams, we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money, and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused, — that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett* v. *Hunter*, 9 Wall. 326; *Tacey* v. *Irwin*, 18 id. 549; *Atwood* v. *Weems*, 99 U. S. 183.

Without elaborating the matter we are of opinion that, considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is, therefore, not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid. And we are of opinion that it is open to the court below when this case returns to permit such amendment of the pleadings as will enable the complainant to make proper allegations on that subject, or by reference to a

master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.

Decree reversed, and cause remanded for further proceedings in accordance with this opinion.

EVANSVILLE BANK *v.* BRITTON.

BRITTON *v.* EVANSVILLE BANK.

1. The taxation of national bank shares by the statute of Indiana, without permitting the owner of them to deduct from their assessed value the amount of his *bona fide* indebtedness, as he may in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.
2. *Supervisors* v. *Stanley* (*supra*, p. 305) and *Hills* v. *Exchange Bank* (*supra*, p. 319) cited, and the rulings there made approved.
3. The points of difference between the New York statute there considered, and the Indiana statute applicable to this case pointed out.

APPEALS from the Circuit Court of the United States, for the District of Indiana.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Asa Iglehart* and *Mr. Thomas A. Hendricks* for the bank, and by *Mr. Jacob S. Buchanan* and *Mr. Benjamin Harrison* for Britton.

MR. JUSTICE MILLER delivered the opinion of the court.

These are cross-appeals from a decree rendered in a suit in chancery, in which the Evansville National Bank was complainant, and Britton, as treasurer of Vanderburgh County, Indiana, was defendant.

The case is in all essential points analogous to that of *Hills* v. *Exchange Bank*, *supra*, p. 319, just decided.

The principal question of law is the same as that discussed

and decided in *Supervisors* v. *Stanley*, *supra*, p. 305. In fact, the three cases were advanced out of their order, and heard consecutively, because they involved important questions concerning taxation by State statutes of the shares of national banks; and the argument, able and exhaustive throughout, has been almost wholly directed, on the part of the banks, to establish the proposition that, where the law of the State either makes or permits a discrimination operating only against a particular class of holders of national bank shares, in the manner of assessing those shares as regards other moneyed capital in the State, all the laws for such assessments are void, and all such assessments are absolutely void, and no tax on national bank shares can be collected in the State.

The brief of counsel in this case in various forms repeats the idea that the bill was brought, not so much to assert the rights of stockholders who may have been injured by the enforcement of the statute, as to obtain a judicial declaration of this court that the act is void, and the attempt to tax the shares of the bank equally so.

Having, in *Supervisors* v. *Stanley*, rejected this proposition, and given our reasons for it, we shall not repeat them here.

The objection made to the Indiana statute is the same as that made against the New York statute; namely, that it permits the taxpayer to deduct from the sum of his credits, money at interest, or other demands, the amount of his *bona fide* indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares.

A distinction is attempted to be drawn between the Indiana statute and the New York statute, because the former permitted the deduction of the taxpayer's indebtedness to be made from the valuation of his personal property, while in Indiana he can only deduct it from his credits. And undoubtedly there is such a difference in the laws of the two States. But if one of them is more directly in conflict with the act of Congress than the other, it is the Indiana statute. In its schedule the subject of taxation from which the taxpayer may deduct his *bona fide* indebtedness is placed under two heads, as follows: —

"1. Credits or money at interest, either within or without the State, at par value.

"2. All other demands against persons or bodies corporate, either within or without this State.

"Total amount of all credits."

The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in *People* v. *Weaver* (100 U. S. 539) on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.

There is in the bill of complaint in this case the usual allegation, apart from the special matters we have just considered, that the assessing officers habitually and intentionally assess the shares of the national banks higher in proportion to their actual value than other property generally, and especially shares in other corporations. It is denied in the answer, and unsupported by proof.

It is also alleged that the bank is taxed a considerable sum for its real estate, and that in assessing the value of the shares no deduction is made on that account. The positive testimony of the assessor shows that such deduction was made.

It is alleged that the capital of the bank is almost entirely invested in the bonds and treasury notes of the United States, and the shares only represent this untaxable investment. *Van*

Allen v. *The Assessors* (3 Wall. 573) settles the principle that under certain limitations the shares of the national banks are taxable with exclusive reference to their value and without regard to the nature of the property held by the bank as a corporation. The very point here made was expressly overruled in that case.

Acting upon these principles the Circuit Court decreed a perpetual injunction as to those shareholders who had proved in the case that at the time of the assessment they owed debts which should rightfully have been deducted. These were four in number, and the appeal of the collector, Britton, is from this injunction. The decree in that respect was right, and must be

Affirmed.

The bank appeals from that part of the decree which dismissed the bill as to all the other shares. This was because no evidence was given that any other shareholders except the four above referred to owed any debts which could have been deducted from the value of the shares. In the case of *Hills* v. *Exchange Bank* we authorized the court on return of the case to permit the bank to show what shareholders had such indebtedness in some appropriate form. It is not necessary to consider whether this case ought to be reversed at the instance of the bank to enable that to be done now, for it is stated by the counsel of the bank in their printed brief that the offer was made to them to have a reference to a master to take testimony on this point before final decree, and they declined to accept the privilege. That branch of the decree is, on the appeal of the bank,

Affirmed.

MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE GRAY dissented.

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE GRAY. I cannot agree to so much of the judgment in this case as affirms that part of the decree below appealed from by Britton, the treasurer. "Credits" are but

one of a number of kinds of moneyed capital. They represent, in the classification of taxable property, the ordinary debts due to a person; and it has been common for so long a time in the States to measure their taxable value by their excess over like debts owing to the same person in the same right, that I cannot believe it was the intention of Congress in its limitation on the power of taxing national bank shares to require a deduction of debts from the value of shares, when such a deduction was only allowed to other persons from this one kind of moneyed capital. The law of Indiana expressly prohibits deductions from the value of any other property than credits. Ample provision is made for the taxation of all other moneyed capital at its value without deduction, the same as national bank shares. In *Hepburn* v. *The School Directors* (23 Wall. 480) this court said "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." In that case, a tax on bank shares was sustained when, by law, mortgages, judgments, recognizances, and moneys owing on articles of agreement for the sale of lands were not taxable. I am unable to distinguish this case in principle from that. The exemption here is partial only, as it was there.

MR. JUSTICE BRADLEY. I dissent from the judgment of the court in these and the two preceding cases, for the reason that, in my opinion, the State laws authorizing the capital stock of national banks to be taxed, without allowing any deduction for the debts of the stockholders, where such deduction is allowed in relation to other moneyed capital, are void *in toto* so far as relates to national banks. To hold the laws valid except as to those who are actually indebted, and actually claim the benefit of the deduction, and actually set it up in a suit brought by the bank for relief, is practically to render the condition of the act of Congress nugatory, and to deprive of its protection the national banks and their stockholders. The tax though laid on the stockholders is required to be paid by the bank itself, which must pay without deduction unless the shareholders give the bank notice of the amount of their debts. This is a most ingenious expedient to avoid such deductions altogether. The

probability that not one in ten of the shareholders will ever have notice of the assessment in time to make the claim, and the natural reluctance they would have (if they had notice) to lay the amount of their debts before a board of bank officers, will effectually secure the State from claims for deduction. And that was, no doubt, the object of the law. But this unequal operation of it, in its practical effect, might not be sufficient to render it void. It is void, in my judgment, because it makes no exception, but is general in its terms, subjecting to taxation the capital stock of national banks without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots. *It is not like the case where a portion of a law, which may be separated from the rest, can be declared invalid without affecting the remainder of the law; nor like the case of a general law which the legislature has power to make, but from the operation of which some individuals may have a legal or constitutional exemption, which they can plead in their defence;* but it is wrong in form, wrong *in toto*. The legislature had no authority or power to make the capital of national banks taxable except in the same manner as other moneyed capital of the State. The practical iniquity of the law is seen in this, that it affects the value of all the stock, whoever holds it. As the law stands, it acts as a prohibition against the purchase of the stock by those who owe debts, and they constitute a considerable portion of every community. It does not help the validity of the law for us to declare that it is *pro tanto* void, and, in fact, make a new law for the State. Its validity must be decided by its actual form and terms. If these cannot stand, the law is void.

INSURANCE COMPANY *v.* BRUCE.

1. Where a city having by statute authority to make an unconditional subscription to the stock of a railroad company, and to deliver its bonds in advance of the construction of the road, issued them, representing in effect by their recitals that they conformed to the statutory requirements, and that its liability thereon was complete, — *Held*, that the bonds are valid in the hands of a *bona fide* holder for value, and that the city is estopped from showing that it had imposed certain conditions upon its liability, although the statute declares that in such an event the bonds should not be binding until such conditions were performed.
2. *Town of Eagle* v. *Kohn* (84 Ill. 292) commented upon and distinguished.

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.

The case was argued by *Mr. Henry Hazlehurst* for the plaintiff in error, and by *Mr. Philip Phillips* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action involves the liability of the town of Bruce, in the State of Illinois, upon sundry interest coupons, attached to bonds, in the ordinary form of negotiable municipal bonds. On the first day of December, 1870, they were delivered by the constituted authorities of the town to the Plymouth, Kankakee, and Pacific Railroad Company in payment of a subscription to the capital stock of the Kankakee and Illinois River Railroad Company. The latter company, after organization, became consolidated with the former, and hence the delivery to the consolidated company. The bonds upon their face recite that they are "issued by virtue of the law of the State of Illinois, entitled 'An Act to incorporate the Kankakee and Illinois River Railroad Company,' approved April 15, 1869, and 'An Act to fund and provide for paying railroad debts of counties, townships, cities, and towns, in force April 16, 1869;' and we, the supervisor and town clerk of the township of Bruce, do hereby certify that a special election was held in said township on the seventh day of September, 1869, at which special election a majority of the legal voters, participating at the same, voted 'for subscription' to the capital stock of the Kankakee and Illinois River Railroad Company in the sum of $25,000,

and to issue bonds of said township therefor; and said special election was by the proper authorities then and there duly declared carried 'for subscription,' and that all the other requirements of the law in relation to said special election were duly complied with."

The act of April 15, 1869, is the charter of the railroad company. By the sixteenth section thereof it is made the duty of the supervisor or clerk of any town or township, declaring by a majority of its voters in favor of subscription to the capital stock of the railroad company, to make the subscription, receive the proper certificates, and execute bonds therefor, which shall be delivered to the president or secretary of said railroad company for the use of said company, and shall be a pledge upon the revenue of said territories respectively. Sess. Laws Ill., 1869, vol. iii. p. 1.

The coupons in suit, before their maturity, to wit, on the 19th June, 1871, together with the bonds to which they are severally attached, were purchased by the American Life Insurance Company, the plaintiff in error, from one Alexander Whillden, the lawful and *bona fide* holder thereof, for the sum of $9,500 cash in hand paid. Neither Whillden nor the insurance company had any notice, at the time, of any irregularity, invalidity, or informality in the making, issuing, or delivery of the bonds.

It is not seriously disputed, either in the pleadings or in argument, that the acts of assembly referred to in the bonds gave ample authority for subscription by the town to the capital stock of the Kankakee and Illinois River Railroad Company, to be paid for in bonds of the town, provided a majority of legal voters, at an election previously called and held for that purpose, expressed their approval of such subscription and its payment in that mode. But the contention of the town is: 1st, That by the seventh section of the act of April 16, 1869, it is provided that "any county, township, city, or town shall have the *right*, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions, or donations shall not be valid and binding until such conditions precedent

shall have been complied with:" 2d, That, in pursuance of the authority thus given, the town voted to make a subscription of $25,000, to be paid for in bonds, subject to the following conditions, distinctly set forth in the notice under which the election was held, and assented to by the railroad company, viz.: that the road be so constructed as to pass through the town, making Streater a point in a northwesterly direction towards Bureau Junction; that a depot be located and maintained in the town of Bruce; that the bonds be delivered in sums of $1,000 for every mile of road graded, as the work progresses, and $1,000 for every mile of ties laid, and the balance when the road-bed is ready for the iron; and that no further calls or assessments shall be made upon the town or upon the subscription to stock over the amount aforesaid; provided, nevertheless, that the subscription be void and of no effect unless an agreement by the railroad company for said iron and rolling-stock with responsible parties shall be made on or before one year from the day of the election, and the railroad company shall have formed satisfactory arrangements to connect said railroad with some eastern terminus: 3d, That the conditions thus prescribed have never been complied with in these respects; more than one year elapsed after the election and yet no agreement had been made on or before Sept. 7, 1870, by the original or consolidated company, with any party for the iron or the rolling-stock of the railroad; the road was never so constructed as to pass through the town of Bruce; it was not constructed when the bonds were issued, and has never been constructed at any time since; no depot has ever been located or maintained in the town; the ties were never laid for any one mile of the railroad within the town; and no part of the railroad for the line of railroad of the Kankakee and Illinois River Railroad Company, or of the original line of the original Plymouth, Kankakee, and Pacific Railroad, has ever been constructed.

These facts are set out in detail in the special plea of the town. Do they constitute a defence against a *bona fide* holder, for value, of the bonds and their coupons? Or to state the question more distinctly, can the town, after the bonds have been signed, sealed, and delivered by its constituted

authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions or some of them imposed by popular vote have not been complied with upon the part of the railroad company?

The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in advance of the construction of any part of the road. But when conditions were prescribed, good faith, and the obligations which everywhere arise out of negotiable securities, required — if the town intended to rely upon them — that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right to impose conditions upon its liability. The officers both of the town and the railroad company knew, however, that bonds could not have been negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals, full of everything necessary to induce the public to buy the bonds. The statement, on the face of the bonds, that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869, — the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions, — and the further statement that the people had voted for subscription *and to issue township bonds therefor*, fairly imported that nothing

remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers. Under these circumstances, the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defence inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed.

But this conclusion, it is contended, is in the face of the express declaration in the act of April 16, 1869, that subscriptions or donations made and bonds issued, upon conditions, "shall not be valid and binding until such conditions precedent shall have been complied with." And in support of that contention counsel cite *Town of Eagle* v. *Kohn* (84 Ill. 292), in which case one of the justices dissented and another did not sit. That case involved the liability of the town of Eagle upon certain coupons of bonds issued to the same railroad company. The defence was there, as here, non-compliance with certain conditions which had been attached by popular vote to the subscription. The court, construing that act, held that there was *no want of power* to make the subscription and issue bonds; that, if the town so willed, *the subscription could be made and bonds issued in advance of the compliance with any condition imposed by the popular vote;* that, aside from the statute, innocent purchasers for value would enjoy the protection accorded to *bona fide* holders of negotiable paper, and would not be affected by non-compliance with such conditions; that such holders could not be required to take notice of the conditions or of any resolution relating to them upon the records of the railroad company; but that, in view of the express provision of the statute that the bonds should not be "valid and binding until such conditions precedent shall have been complied with," non-compliance therewith is a good defence, even against purchasers in good faith for value. The decision in that case was made

several years after the bonds had been put on the market, but being a construction of a local statute, it is insisted that the Federal court is bound to accept it as controlling in the present case. We waive discussion as to the soundness of the conclusion reached by the State court, or any extended examination of the authorities bearing upon the general question whether the Federal court is concluded by the construction given by the State court to a local statute, under which rights have accrued to citizens of other States before that construction was given. We do this because the present case is distinguishable from *Town of Eagle* v. *Kohn* in this, that it does not appear, from the report of the latter case, that the town had, by the recitals in its bonds, estopped itself from asserting, as against a *bona fide* holder, the non-performance of conditions imposed by popular vote. Had the town of Eagle represented, in express words, upon the face of the bonds, that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the State court would not, we suppose, adjudge that the town, as against a *bona fide* holder, could take shelter behind the statutory provision in question. In the present case, the town of Bruce did not make, in express terms, a representation of that character. But, in effect, by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conformity to law, and that nothing remained to be done which was essential to its liability thereon. The town having power, under the statute, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, what was said in *Brooklyn* v. *Insurance Company* (99 U. S. 362) may be repeated here: "It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise."

Judgment reversed, with directions for further proceedings in conformity with this opinion.

MR. JUSTICE MATTHEWS and MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

SULLIVAN *v.* BURNETT.

1. By the laws of Missouri in force in 1866 an alien was capable of taking by descent lands in that State, and of holding and alienating them, if he either resided in the United States, and, by taking the oath prescribed by the act of Congress, had declared his intention to become a citizen, or resided in Missouri, although the ancestor through whom he claimed was, at the time the descent was cast, an alien, who, by reason of his non-residence, was incapable of inheriting.
2. The statute of 1855, which gave to a non-resident alien the right within a limited period to sell and convey the lands whereof the intestate died seized, applied only where at the time of his death there was no person capable of taking them by descent.
3 The statute of March 30, 1872 (*infra*, p. 336), has no retrospective operation.

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

This action, under the local law equivalent to an action of ejectment, involves the title to certain real estate in the city of St. Louis, of which Edward Sullivan, a naturalized citizen of the United States, who died intestate in the year 1866, was seized in fee at the time of his death.

Both parties claimed under him. The court below specially found that Emily Sullivan, one of the plaintiffs, was his sister, and that Jeremiah Sullivan, the other plaintiff, was a son of his deceased brother.

It was admitted on the trial that the plaintiffs were then, and always had been, non-resident aliens, and that neither had made a declaration of intention to become a citizen of the United States.

The court below held that under the laws of Missouri in force at the death of Edward Sullivan, the plaintiffs were incapable of acquiring the real estate in dispute, especially as there were several aliens resident in this country who had declared their intention to become citizens, and also a resident alien in Missouri, to whom the real estate would descend subject to the limitations mentioned in those laws.

Under the foregoing view of the case, the court found it unnecessary to pass upon the other facts and questions of law presented by the defendants.

Judgment was rendered for the defendants, and the plaintiffs sued out this writ.

The remaining facts are stated in the opinion of the court, and the statutes therein mentioned are as follows: —

"GENERAL STATUTES OF MISSOURI, 1865. TITLE XXVIII. CHAPTER 110.

"SECT. 1. All aliens residing in the United States, who shall have made a declaration of their intention to become citizens of the United States, by taking the oath required by law, and all aliens, residents of this State, shall be capable of acquiring real estate in this State, by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States.

"SECT. 2. It shall be lawful for every alien, who, except for his alienage, would be capable of acquiring real estate by devise or descent from any person thereafter dying, capable of holding, at the time of his death, real estate in this State, to sell and convey, in the manner provided by law for the conveyance of real estate, any real estate which he may acquire by virtue of this section, to any other person capable of holding real estate by virtue of the laws of this State; and such sale and conveyance, when executed and delivered in the manner provided, shall have the effect to pass all the title to any real estate which such alien may have acquired to the same, by descent or devise.

"SECT. 3. All such sales and conveyances shall be null and void, unless made in good faith within three years next after the final settlement of the estate of the ancestor or devisor: *Provided*, that if such real estate be in litigation between such alien and any other person, then such real estate, or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation.

"CHAPTER 129, id.

"OF DESCENTS AND DISTRIBUTIONS.

"SECT. 1. When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower,

in the following course: First, to his children or their descendants in equal parts; second, if there be no children or their descendants, then to his father, mother, brothers, and sisters and their descendants in equal parts; third, if there be no children or their descendants, father, mother, brother, or sister, nor their descendants, then to the husband or wife; if there be no husband or wife, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts; fourth, if there be no children or their descendants, father, mother, brother, sister, or their descendants, husband or wife, grandfather, grandmother, uncles, aunts, nor their descendants, then to the great-grandfathers, great-grandmothers and their descendants in equal parts; and so on in other cases without end, passing to the nearest lineal ancestors and their children and their descendants in equal parts."

"SECT. 8. In making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is, or has been, an alien.

"ACT OF MARCH 30, 1872.

"SECT. 1. Aliens shall be capable of acquiring, by purchase, devise, or descent, real estate in this State, and of holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States, and residents of this State.

"SECT. 2. Any female born in the United States, owning real estate or any interest therein in this State, who shall marry an alien and reside in a foreign country, may, at any time, notwithstanding such marriage or residence, convey such real estate, or any interest therein, by deed, or may at any time devise the same by last will: *Provided*, the same be done in either case in conformity with the general laws of this State concerning the conveyance of real estate by deed and the making of wills.

"SECT. 3. Chapter one hundred and ten of title twenty-eight of the General Statutes of Missouri, being chapter five of Wagner's Missouri Statutes, and an act entitled 'An Act to amend chapter one hundred and ten of title twenty-eight of the General Statutes concerning real property and its alienation,' approved March 13, 1867, are hereby repealed.

"SECT. 4. This act shall take effect on the fourth day of March, in the year eighteen hundred and seventy-two."

Mr. Leroy B. Valliant and *Mr. Willoughby N. Smith* for the plaintiffs in error.

Mr. Gustavus A. Finkelnburg for the defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

At the death of the intestate, as well as at the commencement of this action, the plaintiffs — his sister and the son of his deceased brother — were residents of Ireland and subjects of the United Kingdom of Great Britain and Ireland. The defendants, it is sufficient to say, hold whatever title passed to a female lunatic, foreign born and a first cousin of the intestate, residing, at his death, in Maryland, but who, so far as the record discloses, never made a declaration of her intention to become a citizen of the United States; also, whatever title passed to the children of Annie Murta and Mary Murta, foreign-born first cousins, who, like the plaintiffs, resided, at his death, in Ireland, and were subjects of the United Kingdom of Great Britain and Ireland. But their children, also foreign born, were, at his death, naturalized citizens of the United States, one of them a resident of the State of Missouri.

The controlling question relates to the claim of the plaintiffs to an interest in the property in controversy.

The statutes to which, as bearing upon the case, our attention has been called, are chapter 110 of the Revised Statutes of Missouri, 1865, sections 1 and 8 of chapter 129 of the same revision, and an act of the General Assembly of that State, approved March 30, 1872. The first section of chapter 110 is a reproduction of statutory provisions which had been in force from a very early period after the admission of Missouri into the Union. Rev. Stat. Mo., 1825, p. 126; id. 1835, p. 66; Rev. Code of Mo., 1845, p. 113. It conferred upon two classes of aliens the same capacity of acquiring by descent or purchase real estate in Missouri, and of holding and alienating it, as is enjoyed by citizens of the United States, — those residing in this country who had made a declaration of intention to become citizens of the United States, by taking the required oath, and those, whether they had made such declaration or not, who resided in that State. Aliens not belonging to one

or the other of those classes were left subject to the operation of the common-law rule — recognized as in force in Missouri — that an alien, for the want of inheritable blood, could not take land by descent. *Wacker* v. *Wacker*, 26 Mo. 426; 2 Bl. Com., 249; *Orr* v. *Hodgson*, 4 Wheat. 453. The second and third sections, as to their substantial provisions, are brought forward from an act approved Feb. 22, 1855, which declares it to be "lawful for every alien who, except for his alienage, would be entitled to any real estate by devise or inheritance from any person hereafter dying, capable at the time of his death of holding real estate situate in this State, to legally sell, for his own use, and convey the title thereof to any person capable of holding real estate situate within this State: *Provided*, he make such sale and conveyance within three years next after the death of him from whom he shall claim such devise or inheritance." When the minor is an alien, his guardian is authorized to make such sale and conveyance. Sess. Laws Mo., 1855, p. 4.

It is quite clear that, upon the death of Edward Sullivan, neither of the plaintiffs took by descent any interest in his real estate, for the reason suggested by the very words of the statute, and fortified by the policy which dictated its enactment, that they were and are alien non-residents of the United States. This construction must be adopted, unless the object of the act of 1855 was, for purposes of descent, to obliterate all distinction between aliens residing in, and those residing out of, the United States. But no such interpretation is admissible, especially in view of the fact that the statute of 1855, upon this general subject, as well as that enacted previously thereto, was embodied in the same chapter of the general revision of 1865. The section declaring it lawful for an alien to sell and convey, within a prescribed time, to one capable of holding, real estate which, except for his alienage, he would have been capable of acquiring by devise or descent, has reference to cases not embraced by the first section of chapter 110; that is, to cases in which the property would vest at once in the State for the want of some person who could, at common law or under the statute, inherit. Aliens of the class described in the first section of chapter 110 could not

inherit at common law, but by statute they were permitted to take by descent or purchase, holding, or selling and conveying, as it suited their convenience to do the one or the other. In all those respects, aliens embraced by that section were placed upon the same footing of equality with citizens of the United States. But to an alien who did not have capacity to inherit by virtue of residence in Missouri, or of residence in the United States accompanied by a formal declaration, under oath, of intention to become a citizen, the right was given by the act of 1855, continued and enlarged in section 2 of chapter 110 (not to inherit and hold, as a native or naturalized citizen could, but), to take and sell and convey to one who could hold. Until the law of 1855 was enacted, the right of the State to take the real estate of one who left no person in existence capable of acquiring it, by descent, accrued immediately upon the death of the owner. Impelled by a sense of justice, or to meet the hardships of cases likely to arise in a new State receiving large accessions to its population from Europe, Missouri, as a partial waiver or suspension of its rights, and for no other purpose, declared by the act of 1855 that an alien who did not reside in Missouri, or in this country with an intention to become a citizen of the United States, and who could not, therefore, inherit, might, within a limited period, sell and convey to one who could take and hold.

That statute, plainly, had no reference to those aliens upon whom had already been conferred, by statute, the capacity to inherit and hold, or to sell and convey, in the same manner as citizens of the United States.

But the contention of counsel for the plaintiffs is, that the children of Annie and Mary Murta could not take this property, nor any interest in it, because their alien non-resident mothers, through whom they traced relationship to the deceased, were alive at his death; and since the parents were incapable of taking, for the reasons we have given, their children could not take. Upon the basis of that conclusion, counsel advance to the further proposition, that, if neither the plaintiffs nor the Murta children could take by descent, the property upon the death of the intestate escheated to the State, and the right of the plaintiffs to take as the nearest of kin was subsequently rec-

ognized and established by the first section of the act of March 30, 1872.

Although that statute was enacted within three years after the final settlement of Edward Sullivan's estate, and although its object was, undoubtedly, to remove the disabilities of aliens of every class, whether resident or non-resident, to acquire real estate in Missouri by purchase, descent, or devise, we are of opinion that neither of the propositions just stated can be successfully maintained. The Murta children, we have seen, were naturalized citizens of the United States, one of them being also a resident of Missouri. At the time descent was cast they were the nearest of kin of the class of aliens who, by the first section of chapter 110, were capable of acquiring real estate in Missouri by descent or purchase. Their right to take by descent was not, as we think, affected by the fact that their respective mothers were, when the intestate died, alive, and alien non-residents of this country, incapable themselves of inheriting the estate. The eighth section of the chapter (129) on descents and distributions declares that "in making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the estate is or has been an alien." This language would seem to embrace as well the case of one whose alien progenitor, through whom is traced relationship to the intestate, was living when descent was cast, as the case where such progenitor was then dead. This view is controverted by the plaintiffs, on the authority of *McCreery's Lessee* v. *Somerville* (9 Wheat. 354), where this court had occasion to determine the meaning of the statute of 11 & 12 William III. c. 6, which, it is claimed, is, upon the present point, identical with the foregoing section in the Missouri statute of descents and distribution. It was there ruled that the English statute (in force in Maryland, from which State the case came) removed the common-law disability to claim title through an alien ancestor, but did not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common law if the ancestor were a natural-born subject. We remark, in reference to that case, that the English statute is not accurately quoted in the opinion of the court, as an examination of 10 British Stat. at Large, 319

(Pickering's ed.), will show. But without deciding that the words omitted ought to have produced a judgment different from that rendered, we are of opinion that the present case is not governed by *McCreery's Lessee* v. *Somerville*. The statute of Missouri which permits the demandant to inherit from an intestate, notwithstanding his ancestor, through whom he derives his descent, is or has been an alien, must be interpreted with reference as well to other provisions conferring upon aliens the capacity to inherit real estate, as to the public policy which manifestly induced such legislation. These provisions, in terms, make an alien resident in Missouri, or an alien resident elsewhere in this country, intending to become a citizen, capable of inheriting real estate by descent or purchase. In making title by descent it may be that his ancestor is or was an alien, without inheritable blood, either at common law or by statute. That fact would ordinarily constitute an insuperable difficulty in the way of his taking or holding the estate. But the statute elsewhere interposes in his behalf, and says that he shall not be barred in tracing his descent from the intestate, by reason of the fact that *any* ancestor either *is* or has been an alien, — language broad enough, as we have suggested, to include a living as well as a dead progenitor.

Unless the statute be so construed, it would result that, while an alien residing in Missouri, having no purpose to become a citizen of the United States, could, under the then existing law, if the nearest of kin, inherit and hold as fully as if he were a citizen of the United States, a naturalized citizen, actually residing in Missouri, would be barred from taking and holding by the fact — wholly unimportant in view of the policy of the State — that his parent or ancestor, through whom he must trace relationship to the intestate, was, when descent was cast, alive and an alien non-resident of the country, or a resident of the United States, outside of Missouri, with no intention to become a citizen. We are not satisfied that such an interpretation of the statute would be consistent with the intention of the legislature, and we therefore reject it as unsound.

But should we be in error in this construction, there is

another ground upon which the claim of the plaintiffs must be denied.

We have ruled that, when descent was cast, neither of the plaintiffs had capacity to inherit, and if, as contended, the Murta children were also barred by the fact that their respective alien mothers were then living, it would result, as counsel concede, that the property escheated to the State immediately upon the death of Edward Sullivan. This upon the ground that the legal title could not be in abeyance. 2 Fearne, 20. In that contingency, neither the plaintiffs nor the defendants could claim any interest in the property, by virtue of the act of 1872. The Constitution of Missouri forbids the General Assembly from passing any law retrospective in its operation. Art. 1, sect. 28. And if that inhibition does not prevent the State from releasing, under the authority of a statute and for the benefit of individuals, any right of property it may have acquired by escheat, it is sufficient to say that the act of 1872 contains no language clearly indicating an intention to make it retrospective. It is, consequently, applicable alone to future acquisitions by aliens of real estate in Missouri.

Judgment affirmed.

OTTAWA *v.* NATIONAL BANK.

1. *Hackett* v. *Ottawa* (99 U. S. 86) cited, and the doctrines therein set forth reaffirmed.
2. Municipal bonds in Illinois, payable to a person therein named or bearer, are transferable by delivery without indorsement, and the holder may sue in his own name to recover their contents.
3. Where, without express legislative authority, they are payable at a place in another State, *quære*, What law should govern in determining the rights of the holder who claims them by delivery only.

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. C. B. Lawrence for the plaintiff in error.

Mr. G. S. Eldredge for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bonds in suit constitute a portion of the issue of $60,000 referred to in *Hackett* v. *Ottawa*, 99 U. S. 86. Like those held by Hackett, they were purchased before maturity, and without notice of any circumstances or facts impeaching their validity.

As in that case, so here, the bonds recite that they are issued in virtue of the power conferred by the charter of the city, upon its council, — the majority of voters, attending at an election for that purpose, assenting, — to borrow money on its credit and to issue bonds, pledging its revenue for the payment thereof; and also, in pursuance of two ordinances of the city council, one, passed June 15, 1869, entitled "An Ordinance to provide for a loan for municipal purposes," duly ratified by popular vote, and the other, entitled "An Ordinance to carry into effect the ordinance of June 15, 1869, entitled 'An Ordinance to provide for a loan for municipal purposes.'" The defence in the Hackett case was, that the bonds were not issued to effect a loan for municipal purposes, but were issued and delivered as a donation to one Cushman or to the Ottawa Manufacturing Company, a private corporation, to be used in aid of a merely private enterprise, and not for legitimate municipal purposes. Upon that ground, it was contended that they were void for the want of authority to issue them. Waiving any direct decision of the question, much elaborated by counsel, as to what, under the Constitution of the State, as interpreted by the Supreme Court of Illinois in numerous cases, is to be regarded as a municipal or corporate purpose, for which the city can lawfully exercise the power of borrowing money and issuing bonds, we there adjudged the defence to be insufficient, for these reasons: The city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes; if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances provided for a loan for municipal purposes; such a representation, by the constituted authorities of

the city, would naturally avert suspicion of bad faith upon their part, and induce purchasers to omit an examination of the ordinances themselves; and, consequently, the city was estopped, as against a *bona fide* holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. Upon these grounds, the main defence in this suit must, also, be adjudged insufficient.

There is, however, one question raised in this case which was not made or determined in *Hackett* v. *Ottawa*. The bonds in suit are made payable at the St. Nicholas National Bank in the city of New York to W. H. W. Cushman or bearer, and, without his written assignment or indorsement, were taken by the First National Bank of Portsmouth, New Hampshire, the defendant in error. The city paid the interest maturing on the second days of August, 1870 and 1871.

The contention of counsel is that an assignment or indorsement of the bonds by the payee named therein, although they are also made payable to bearer, is, by the laws of Illinois, where the original contract was made, a prerequisite to pass the legal title, and to authorize a suit by the holder in his own name. This precise question arose in *Roberts* v. *Bolles* (101 U. S. 119), involving the validity of certain municipal bonds, payable to a railroad company or bearer, and on which there appeared no assignment or indorsement by the company. Upon examination of the decisions of the Supreme Court of Illinois, we there reached the conclusion that, by the repeated adjudications of that learned tribunal, municipal bonds payable to bearer, or to some named person or bearer, were excepted from the rule announced in *Hilborn* v. *Artus* (4 Ill. 344) and *Roosa* v. *Crist* (17 id. 450), in which it was, in effect, held that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name.

Counsel in the present case insist that our ruling in *Roberts* v. *Bolles* resulted from a misapprehension of the settled course of decisions in the State court; and we are asked to reconsider the question in connection with some cases in that court to which our attention was not then called. Those specially relied on to establish the error of our conclusion in that case are

Garvin v. *Wiswell*, 83 Ill. 215, and *Turner* v. *Peoria & Springfield Railroad Co.*, 95 id. 134.

The first of those cases related to a county order executed by a board of supervisors, directing the treasurer of the county, on a day named, to "pay to John Murphy or bearer" a certain sum "out of the funds appropriated for bounties to volunteers, with interest at the rate of eight per cent per annum from this date, upon the presentation of the annexed coupons," — an instrument of writing not negotiable, in the sense of the law merchant, so as to exclude defences or evidence of invalidity, even when held by a *bona fide* purchaser. *Wall* v. *County of Monroe*, 103 U. S. 74.

The case in 95 Ill. relates to a certificate of indebtedness issued by a receiver appointed in a suit against a railroad company, and which certificate, the State court expressly held, did not possess the qualities of negotiable or commercial paper. It also appears, in that case, that the certificate was made payable to a named person "or bearer," when the order of court, printed thereon, directed it to be made payable to such person "or order."

The language of those two cases must be construed in connection with the particular kind of instrument to which the court referred. While in each may be found general statements which seem to justify the position of counsel, we do not understand those cases to determine anything necessarily inconsistent with the conclusion reached in *Roberts* v. *Bolles*, viz. that by the law of Illinois municipal bonds, whether payable to bearer, or to some person *or* bearer, are negotiable by delivery, so that the holder, even in the courts of Illinois, can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee.

Notwithstanding the criticism by counsel of the opinion in *Johnson* v. *County of Stark* (24 Ill. 75), we are not satisfied that the Supreme Court of Illinois has intended, in any subsequent case, to qualify what was there said by Walker, J., in reference to municipal bonds and coupons issued to railroad companies: "It seems to be the well-settled doctrine that State, county, city, and other bonds and public securities of this character are negotiable by delivery only, without in-

dorsement, in the same manner as bank-bills, especially when they are payable to bearer." In that case, the coupon was not payable either to order or to bearer, but the promise was to pay the amount named "on this coupon." The court ruled that the holder of the coupon could sue and recover in his own name.

The bonds in suit, it will be observed, are payable at a bank in New York. According to the general rules of commercial law, as recognized in that State, the holder of negotiable securities, payable to a named person or bearer, whether they are indorsed or not by such payee, acquires, by delivery merely, the legal title, and the consequent right to sue thereon in his own name. 3 Kent, Com. 78; *Brush* v. *Administrators of Reeves*, 3 Johns. (N. Y.) 439; *Dean* v. *Hall*, 17 Wend. (N. Y.) 214. Whether the nature and extent of the rights acquired by the bank are determinable by the law of New York, the place of performance, or whether the general rule that a contract is to be expounded by the law of the place where it is to be executed (6 Pet. 200; 13 id. 77; 1 How. 169), can be applied to an Illinois municipal corporation whose bonds, without express legislative authority, have been made payable elsewhere than at its own treasury (19 Ill. 406; 22 id. 151; 24 id. 91; 31 id. 531; 68 id. 535), are questions which need not be now determined. It is sufficient in this case to say that the ground first alluded to, upon which the plaintiff denies the right of the bank, the holder for value of its bonds, to sue in its own name, cannot be maintained.

Judgment affirmed.

MANCHESTER *v.* ERICSSON.

It is error to withdraw from the jury the determination of a disputed fact in issue. *So held*, where, in a suit against a city for damages sustained by a party who fell at night from a causeway erected within the city limits by an incorporated bridge company, but which was not provided with a proper guard or protection, although it extended from the company's bridge to the level of a street, the question of fact as to whether the city had treated the causeway as a street, and assumed such a control of the *locus in quo* as to incur a liability for its condition, was withdrawn from the jury, and the court instructed them that if the injury was caused by the absence of such a guard or protection the city was liable.

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.

Mr. Christopher C. McRae and *Mr. William A. Maury* for the plaintiff in error.

Mr. Charles V. Meredith and *Mr. George K. Macon* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Ericsson recovered a judgment against the city of Manchester, Virginia, for injuries received by a fall from a public way, of which the city had been negligent, in regard to protecting the sides of a high embankment. The laws of the State authorize a recovery in such a case.

The chief controversy on the trial was whether the city or a bridge company was responsible for the condition of the street in such a manner as to incur liability for negligence in the care of it. That part of it where the accident occurred constituted also the approach to a bridge across the James River, between Manchester and Richmond, and both the bridge and this approach to it had been built, at least nominally, by an incorporated company called the James River Bridge Company, and the contention of the defendant below was that this corporation, and not the city, was the responsible party.

That point was much pressed in argument before us, and it seemed to be assumed that if the company was liable, the city

was not. We do not think that this necessarily follows, for the company may be liable for negligence in regard to the *locus in quo* as an approach to and part of their bridge, while the city may also be liable for like negligence regarding it as a street for the care of which it is responsible. The question in this case is whether the *city* is liable.

This depends, in our opinion, not so much on the question whether the place where the injury occurred was, by law, placed under the exclusive control of the city, as whether the city authorities had so far assumed the care of it as one of the streets of the town as to incur an obligation to be diligent and watchful in the performance of that duty.

The judge, in his charge to the jury, attached much importance to the fact that the bridge was built by money advanced by Richmond and Manchester, and assumed that the company was a mere matter of form, and though chartered by the legislature, was only an agency of the two municipal corporations to connect them by a bridge spanning the river which runs between them.

We are not satisfied of the soundness of this view, though it appears that the two cities owned all the stock and advanced the money. It still remains that the company was the legal entity which owned the bridge; that if it had borrowed money, or created debts, the cities would not have been liable for them without an express agreement to that effect. And if the negligence by which plaintiff suffered was solely the negligence of the bridge company and its officers, the city of Manchester would not have been liable because of the stock held by it in the company or the money advanced to it.

But testimony was submitted to the jury tending to show that after the bridge and this approach to it had been built, or commenced, the limits of the city of Manchester had been extended so as to include this part of the bridge or approach, and that the city did work on it as a street, or extension of the street into which it ran, and in many ways assumed such control of it as it did of other streets.

This testimony is in the record, and was proper evidence to sustain the proposition that the city authorities had so acted in regard to this part of the highways of the city as to make it

responsible for a more careful attention to the dangerous condition of it than was given by them.

The counsel of defendant prayed several instructions in regard to the sufficiency of this evidence, which was refused by the court, and instead of those asked it gave the following: —

"There are three questions for the jury, namely: —

"1st, Whether a proper guard or protection had been provided at the point where the accident to the plaintiff occurred; if there was not —

"2d, Whether the accident was in consequence of the absence of such proper guard or protection; and,

"3d, If so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of damage to him.

"If the jury believe from the evidence that a proper guard or protection to the highway was not provided, that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident, then the court instructs the jury that the city of Manchester is liable for the damage, unless it proves that the plaintiff sustained his injury through his own negligence or want of care."

It will be seen that the court here takes from the jury entirely the question whether the city was responsible for the want of the guard or protection which was absent, and instructs them peremptorily that if such protection was wanting, and the accident was caused by its absence, the city was liable.

We think it was for the jury to decide whether the city had made itself responsible.

The evidence on this subject had been properly submitted to the jury. Whether the city had assumed such control of the *locus in quo* as to make it responsible was an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court.

This evidence consisted of various things done by order of the authorities of the city of Manchester, such as paying the money on condemnation of the land for the use of the bridge, regulating the grade of the approach to the bridge and of the neighboring streets, continuing the pavement of the street into and upon this approach, depositing cinders on it, building

a fence on the side of it, and otherwise expending money on it.

In our opinion, though strongly persuasive of the proposition that the city had assumed charge of the place, the evidence was not necessarily conclusive. The inference was one of fact and not of law, and was to be made, if at all, by the jury, under such proper instructions on the matter as the court should give, and not by the court alone. It was a mixed question of law and fact, proper for the jury, aided by the court.

For this error the judgment of the Circuit Court will be reversed, and the case remanded with instructions to set aside the verdict and grant a new trial; and it is

So ordered.

INSURANCE COMPANY *v.* FOLEY.

1. When sued upon a life policy, the company set up that in applying for it the insured did not make true answers to questions touching his habits. The evidence in regard to them was conflicting. The court refused to charge the jury that when "witnesses testify, from their own knowledge of the party and his habits, that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits." *Held*, that the refusal was proper.
2. If the habits of the insured in the usual, ordinary, and every-day routine of his life were temperate, his representations that he was and always had been a man of temperate habits were not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence.

ERROR to the Circuit Court of the United States for the District of South Carolina.

In January, 1872, Foley obtained from the Knickerbocker Life Insurance Company of the city of New York a policy of insurance for $5,000, on the life of one Badenhop, his debtor to that amount. The premium required at the time and the stipulated annual premiums were paid. The profits arising upon them entitled the assured, in May, 1873, to a further insurance on the life of his debtor, to the amount of $36.03;

and in June, 1874, to the amount of $39.36; and policies for these sums were issued to him.

Badenhop died in January, 1875; but the assured, being ignorant of the fact, paid the next annual premium. The present action, to recover the amount of the policies and of the premium overpaid, with interest, was commenced in a court of the State, and, upon application of the company, removed to the Circuit Court of the United States. The complaint alleges the issue of the policies, the interest in them of the plaintiff, the death of Badenhop, the proof thereof furnished to the company, the fulfilment by the plaintiff and the deceased of "all the conditions" of the policies, the amount due, and its non-payment. It also alleges the payment of the annual premium after the death of the insured. A copy of the policies is annexed to the complaint. The first policy declares that it is issued upon the express condition that the application on file in the office of the company is an express warranty of the truth of the answers and statements contained in it, and that, if they are in any respect untrue, the policy is to be void and of no effect to any one. The additional policies declare that they are subject to the same conditions as the first.

In its answer the company sets up, among other things, as a defence, that the plaintiff and the insured did not make true and correct answers and statements to certain questions contained in the application for the first policy, in this, that to the questions, "Is the party of temperate habits? Has he always been so?" the answers given were "Yes," — when, in fact, he was a man of intemperate habits, thus concealing by the answer his true habits, and making a false statement concerning them; whereby the policy became void.

On the point thus raised, whether the answers given as to the habits of the insured were true or false, the testimony offered was conflicting. On the part of the company, one witness testified that in 1871 and in the early part of 1872 he was the family physician of Badenhop; that at that time Badenhop was drinking hard; that during that year he had attended him for *delirium tremens*, and once or twice for indisposition, produced, "as he thought," from the excessive use of intoxicating drink; and that he "regarded" him as a man of

intemperate habits. But, on his cross-examination, he admitted that he did not know Badenhop intimately, had no relations with him other than professional, and saw him only when he attended him professionally, or met him occasionally in the street. Two other witnesses testified for the company, — one, that he was intimate with Badenhop; the other, that he had known him for several years, and that he was a very intemperate man; that they had frequently seen him under the influence of liquor; but neither of them stated when his acquaintance commenced, whether before or after the policy was issued.

On the part of the plaintiff several witnesses were called, who had known Badenhop intimately for many years, their acquaintance with him commencing before the policy was issued and continuing afterwards, and one of whom had been his partner in 1869 and 1870; and they all testified unqualifiedly to his being a man of temperate habits.

The defendant requested the court, among other things, to instruct the jury, "That where, in a question whether the party assured is one of temperate habits at the time when he seeks to be insured, and has always been so, witnesses testify, from their own knowledge of the party and his habits, that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits."

This instruction the court refused to give, and an exception was taken. The court, among other things, instructed the jury that all the representations in the application for the policy of insurance are warranties that such representations are true, and that if they find from the evidence that the habits of the insured, at the time of, or at any time prior to the application, were not temperate, then the answers made by him to the questions, "Are you a man of temperate habits?" "Have you always been so?" were untrue, and the policy is void; but that if they find that his habits in the usual, ordinary, and every-day routine of his life were temperate, then such representations were not untrue within the meaning of

the policy, although they may find that he had an attack of *delirium tremens* resulting from an exceptional indulgence in drink prior to the issue of the policy; and that the burden of proof is upon the defendant to show the breach of any warranty in the policy. To the charge the defendant excepted. The jury found for the plaintiff, and, upon the verdict, judgment was entered; to review which the case is brought to this court on a writ of error.

Mr. A. G. Magrath for the plaintiff in error.
Mr. J. P. K. Bryan for the defendant in error.

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

The instruction requested by the defendant, treating it as applicable to the case at bar, and not as containing a mere abstract proposition of law, is open to several objections.

In the first place, it assumes that there was a difference in the sources of knowledge of the witnesses in the case; which was not the fact. All of them testified from their observation of the conduct of the deceased; and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the witnesses as to their knowledge, but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the manner in which those opportunities had been improved. No witness testified, from his own knowledge, that the deceased was of intemperate habits at the time he applied for the insurance, and that he had always been so. No instruction should be given which thus assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof. *New Jersey Mutual Life Insurance Co.* v. *Baker*, 94 U. S. 610.

In the second place, the instruction requested does not present the law with entire accuracy. Whether the testimony of the persons alleging knowledge is entitled to greater consideration than that of persons asserting opinions, mainly depends upon the subjects with respect to which the testimony is given. If the subject be, as in this case, the habits of a party, affirmations of knowledge will be weighed with reference to the opportunities of the witnesses to obtain the knowledge they

assert. If they are not intimate with him, and see him only occasionally, the assertion of knowledge of his habits, however strong, will amount to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extended acquaintance.

In the third place, the instruction requested omits the consideration of the character of the witnesses, as an element in determining the weight to be given to their testimony. The force of testimony often depends as much upon the intelligence and judgment of the witnesses, disclosed by their manner of testifying, as upon confidence in their general veracity.

The charge given by the court, as stated above, correctly presented the law of the case. The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. Ray, in his treatise on Medical Jurisprudence, says, that, though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those who are not habitually intemperate as well as in those who are. Sect. 545. In the American Encyclopædia, under the head of "Delirium Tremens," it is stated that it "sometimes makes its appearance in consequence of a single debauch;" though commonly it is the result of protracted or long-continued intemperance. Vol. v. p. 782.

When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if

the habits of the insured, "in the usual, ordinary, and every-day routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of the witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate.

Judgment affirmed.

BENNECKE *v.* INSURANCE COMPANY.

A party whose life was insured died at a place south of a certain parallel of latitude, his visit to which at that season of the year, without the consent of the company, worked a forfeiture of the policy. A relative, ignorant of his death, paid the customary price for a permit to go South to the local agent of the company, who transmitted to its State agents the money, and requested them to obtain the permit and forward it to him. It was not issued, and the agent, shortly after hearing of the death of the insured, tendered the money he had so received. *Held*, that the facts did not constitute a waiver of the forfeiture, and if they did, it was not, under the circumstances, binding.

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

This was an action of assumpsit brought by Amelia Bennecke to recover of the Connecticut Mutual Life Insurance Company the sum of $2,000 upon a policy of life insurance.

The parties having waived a jury, the issues, both of fact and law, were submitted to the court, which made a special finding, from which the following facts appear: —

On Jan. 29, 1878, Adolph Bennecke procured from the Connecticut Mutual Life Insurance Company, through John Ansley, its agent at Bloomington, Ill., a policy of insurance

on his life, for $2,000, for the benefit of Amelia Bennecke, his wife. It was an ordinary life policy, and contained, among other conditions, the following: —

"3d, That the said insured is under this policy freely permitted to reside in any civilized abode in the western hemisphere, lying north of the thirty-second parallel of north latitude in the United States, and lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the eastern hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich, and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits without the consent of this company previously given in writing in each or either of the foregoing cases, then this policy shall become and be null and void.

"4th, That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect to the same shall be forfeited to the company."

After the signatures of the secretary and vice-president of the company and on the margin at the bottom of the policy appears the following: —

"☞ Agents of the company have no authority to make, alter, or change any condition of the policy, nor to waive forfeiture thereof."

The annual premium of $46.24 required by the terms of the policy was duly and fully paid.

Bennecke left his home at Bloomington, Ill., on Sept. 26, 1878, and went to New Orleans, La., where he remained until his death, which occurred Oct. 15, 1878. He died of yellow fever.

Ansley had been the agent of the Connecticut Mutual Life Insurance Company, at Bloomington, Ill., from 1863, up to and including October, 1878. On Oct. 16, 1878, he first heard that Bennecke had gone to New Orleans. On October 17, he called on Haker, the assured's brother-in-law, to whom he stated that he had heard that Bennecke was then in New Orleans, and that on account of this violation of the condition

of the policy the insurance was forfeited. He advised Haker to pay, on behalf of Bennecke, twenty dollars, the price of a Southern permit. Haker at first said he knew nothing about it, and refused to pay the money. He then said he would look into the matter. The same day, after a consultation with Mrs. Bennecke, he went to Ansley's office, paid him twenty dollars, and took from him a receipt, as follows: —

"$20. AGENCY AT BLOOMINGTON, ILL., Oct. 17, 1878.

"Received from Christ. Haker, twenty dollars, being the amount required for a southern permit on policy of Adolph Bennecke in the Connecticut Mutual Life Insurance Company, of Hartford, Conn., No. 52,242.

"Amount of policy $2,000.

"JOHN ANSLEY, *Agent.*"

At the time of taking this receipt, neither Haker, Ansley, nor Bennecke's wife or friends knew that Bennecke was dead.

Ten dollars per thousand was the customary price fixed by the company as the extra premium for a permit to go south of the thirty-second parallel between the 1st of July and the 1st of November. Ansley recollected having received money for three or four such permits, possibly more, at that rate. In such cases he simply received the money for the permits, forwarded it to the State agents of the insurance company at Chicago, and requested them to get permits from the insurance company at Hartford, Conn., and send them to him for delivery. He enclosed the twenty dollars received from Haker to the State agents of the insurance company at Chicago, in the following letter, the receipt of which they acknowledged: —

"AGENCY AT BLOOMINGTON, Oct. 17, 1878.

"Messrs. STEARNS, DICKINSON, & Co.

"GENTS, — Herein please find draft for $20, less ex., for which please get and send me a southern permit for A. Bennecke, insured by policy 52,242; amount $2,000. He went to New Orleans about ten days ago, and will probably remain there during the balance of the month. Please give this immediate attention, and get permit here as soon as possible. This twenty dollars paid this day.

"Yours truly, JOHN ANSLEY."

Ansley never received a permit from the insurance company for Bennecke. On the 6th of November, 1878, he having become satisfied that Bennecke was dead at the time the money was paid for the permit, of his own motion took twenty dollars of other money belonging to the company and tendered it to Haker, stating as a reason therefor that Bennecke was dead at the time the money was paid. Haker refused to receive it. Ansley had no authority to issue policies of insurance, but after they were issued he turned them over to the parties on payment of the premium. He received no word from the company or the State agents about Bennecke's death up to the time he tendered the money to Haker. On the 26th of October he addressed a letter to those agents, in which he informed them that Bennecke had died on October 17, in New Orleans, of yellow fever. From all that appears this was the first information received by them of Bennecke's death.

Ansley knew what was the price required for a permit, and had never applied for one without getting it. But he never applied for one when yellow fever was prevailing in the forbidden region. Proofs of loss, dated the 6th of December, 1878, were furnished the insurance company, and on the trial it offered to return the money received by Ansley for the permit.

Suit on the policy was begun in the Circuit Court of McLean County, Illinois, on the eighteenth day of April, 1878, by a declaration on the policy. The general issue only was pleaded, and on the petition of the defendant the case was transferred to the Circuit Court of the United States. It was admitted by the company that there was no other defence in the case than what arose from the forfeiture of the policy by reason of the fact that Bennecke had gone south of the thirty-second parallel of latitude between the first of July and the first of November, without the consent of the company previously given in writing; and on the foregoing facts it occurred as a question whether the forfeiture had been waived by the company, on which question the judges were opposed, and the presiding judge being of opinion that the forfeiture had not been waived, judgment was entered for the defendant.

Whereupon, and on motion of the defendant, by its counsel,

it was ordered that the state of the pleadings, and the facts found, and the question on which the judges differed, be certified according to the request of the defendant, and the law in that case made and provided, to this court to be finally decided.

The cause has accordingly been brought to this court by writ of error.

Mr. William A. McKenney for the plaintiff in error.
Mr. Edward S. Isham for the defendant in error.

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

It is not disputed by the plaintiff, that, upon the facts found, the policy of insurance had been forfeited. It is not insisted that the company by its agent formally waived the forfeiture, or issued any permit to Bennecke, from which such waiver could be inferred.

But the plaintiff contends that, after the forfeiture of the policy, Ansley, the agent of the company at Bloomington, having on October 17 received the sum usually charged for a permit to reside south of the thirty-second parallel, between the 1st of July and the 1st of November, and sent it on the same day to the agents of the company at Chicago, its receipt by them, and the fact that they never returned it to the person by whom it was paid, are sufficient to establish the company's waiver of the forfeiture.

It does not appear from the findings that either the agent at Bloomington, or those at Chicago, had any direct authority to waive a forfeiture. But even if it were shown that they had such authority, and had waived the forfeiture, or that the company itself had waived it, the waiver would not, under the circumstances of this case, be binding on the company.

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written

agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. *Darnley (Earl)* v. *London, Chatham, & Dover Railway Co.*, Law Rep. 2 H. L. 43.

The same rule applies to the ratification by the principal of the unauthorized acts of his agent.

"It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent." *Combs* v. *Scott*, 12 Allen (Mass.), 493.

And it has been declared by this court that "no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." *Owings* v. *Hull*, 9 Pet. 607. See also *Diehl* v. *Adams County Mutual Insurance Co.*, 58 Pa. St. 443; *Bevin* v. *Conn. Mutual Life Insurance Co.*, 23 Conn. 244; *Viall* v. *Genessee Mutual Insurance Co.*, 19 Barb. (N. Y.) 440.

There is no pretence in this case that the company was advised of the material facts, when its supposed waiver of the forfeiture of the policy and its ratification of the acts of its agent took place. The contention of the plaintiff is that a forfeiture was waived when the company was totally ignorant that it existed. And the waiver is inferred from a permit, which is itself deduced from the fact that an agent, himself ignorant of the material facts, agreed to apply to the company for it, and received and forwarded the money to pay therefor.

The very purpose for which a permit was asked shows that both parties were ignorant of the facts which should have been communicated to the company and its agents before any effect could be given to its alleged waiver of the forfeiture. Permission was asked that Bennecke might reside and travel south of a certain parallel. This implied that he was living and able to travel. But the findings show he was dead when the permit was applied for. If the company had given him a formal permit in writing to reside and travel south of the thirty-second parallel, he being dead at the time, and the company ignorant of the fact, it would be a complete *non sequitur* to hold that this amounted to a waiver of a forfeiture of the policy unknown to the company, and consequent upon his doing the act for which a permit was asked, and which was in violation of a condition of the policy.

The case may be thus stated: The right of the plaintiff to a recovery rests on a waiver by the insurance company of the forfeiture of the policy. But there has been no direct waiver. The waiver is deduced from the permit. But there has been no formal permit. The permit is inferred from the fact that Ansley, a local agent, who had no knowledge of the death of Bennecke, applied for a permit to other agents also ignorant of the death of Bennecke, and remitted to them the money therefor which they retained, but which Ansley tendered back, using for the tender other moneys of the company; the company itself, the principal of these agents, being all the time ignorant that Bennecke had forfeited his policy by a violation of its conditions, or that he had died in consequence of such violation, or that after his death a permit to allow him to reside and travel in the forbidden region had been applied for, or that any money had been handed to its agent to be paid over as the consideration for such permit.

The case of the plaintiff is not aided by the facts found by the court in relation to the retention by the agents of the company of the money paid for the permit. It is unnecessary to decide what inference might be drawn if the company or its agents, with full knowledge of the death of Bennecke, had retained the money and never tendered it back. It does not appear that Ansley was informed of the death of Bennecke

until October 26. On November 6, eleven days thereafter, he tendered back to Haker the money advanced by him to pay for the permit. Under the circumstances of this case we do not think this lapse of time sufficient to show that Ansley intended to waive the forfeiture of the policy, even if he had been clothed with authority to do so.

If the company was bound by the act of Ansley in receiving the money for the permit, it was entitled to the benefit of his act in tendering it back. One tender was sufficient. That made by Ansley was never disavowed by the company. On the contrary, the company renewed it upon the trial of the cause in the Circuit Court.

Under the circumstances of this case, the contention that the insurance company waived the forfeiture of the policy is without support.

Judgment affirmed.

ASYLUM *v.* NEW ORLEANS.

An institution in the city of New Orleans for the relief of destitute females and helpless children of all religious denominations was incorporated April 29, 1853, by an act of the General Assembly of the State of Louisiana, which declares that from and after its passage all the property, real and personal, belonging to the institution "is hereby exempted from all taxation either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding." By means of donations the institution erected an asylum, and has always fulfilled the objects for which it was established. In the year 1874 certain property — a cotton-press — was devised to it, the revenues of which have been faithfully applied to enable it to carry on its work. Under a statute enacted in pursuance of article 118 of the State Constitution of 1868 (*infra*, p. 364), the city in 1876 imposed upon that property a tax, the validity of which was sustained by the court below. *Held*, 1. That imposing the tax without granting any compensation or indemnity was not a legitimate exercise of the power of dissolving corporations which is reserved in a provision of the Code of Louisiana. 2. That the statute and the provision, as they were construed and applied to the circumstances of this case, are in violation of the tenth section of the first article of the Constitution of the United States.

ERROR to the Supreme Court of the State of Louisiana.

The facts are stated in the opinion of the court.

Mr. Edwin T. Merrick and *Mr. George W. Race* for the plaintiff in error.

Mr. Henry C. Miller, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case comes before us for the purpose of reviewing the judgment of the Supreme Court of the State of Louisiana, which sustained the validity of a certain tax imposed by the authorities of the city of New Orleans upon the property of the plaintiff in error, the "St. Anna's Asylum for the relief of destitute females and helpless children of all religious denominations," a charitable institution which was incorporated by an act of the legislature of Louisiana, approved April 29, 1853, for the purposes indicated by its name. The charter gave it perpetual succession and power to take, purchase, possess, and enjoy all kinds of property whatever, real or personal, by gift, grant, sale, bequest, exchange, or by any other mode of conveyance or transfer whatsoever, and the same to sell, convey, or dispose of under the restrictions therein provided, and directed that it should administer the same for the furtherance of the object of the incorporation and in accordance with the conditions of the charter; with a provision, that all acceptances of immovable property, and all alienations of immovable property and stocks, should be signed by the president and treasurer, after the declared will of a majority of the board of directors had been duly inscribed on the minutes of the corporation. It appointed a first board of directors, and provided for annual elections thereafter, and for the appointment of a president and other officers, and declared that the president and directors should superintend, manage, and control the affairs and interests of the corporation.

The sixth section declared as follows: —

"SECT. 6. *Be it further enacted, &c.*, that the said corporation shall enjoy the same exemption from taxation as was enacted in favor of the 'Orphan Boys' Asylum of New Orleans' by the act approved March 12, 1836, entitled, 'An Act for the relief of the Orphan Boys' Asylum of New Orleans.'"

The act relating to the "Orphan Boys' Asylum of New Orleans," referred to in this section, declared as follows: —

"That from and after the passage of this act all the property, real and personal, belonging to the Orphan Boys' Asylum of New Orleans be and the same is hereby exempted from all taxation either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding."

The proofs show that under the charter thus granted the corporation was duly organized, and, by means of donations, erected an asylum, and has always fulfilled the objects of its organization. The property on which the tax in question was imposed was procured in 1874, and was assessed in the tax-list at $90,000. The following admission with regard to it appears in the record: —

"Now, therefore, it is admitted (as was done in the lower court) that the defendant acquired said cotton-press mentioned in the tax-bill and answer filed by defendant, after 1874, by devise, bequest, and legacy, from Dr. W. N. Mercer, and that they were the owners of the same when said assessment of $1,350 of city taxes was made by the city. That no inmates of the asylum are kept upon the premises, and that the revenues of the cotton-press on which said assessment is made are applied to the keeping and maintaining the objects of charity mentioned in the defendant's act of incorporation, viz. to the support and maintenance and relief of destitute females and helpless children of all religious denominations, as intended by the charter, and that said asylum is, and has been since its organization, in active and efficient operation (as shown by the evidence) in the city of New Orleans."

The proofs further show that the corporation largely relies on the rents of this property for enabling it to carry on its benevolent work.

The tax in question was imposed in 1876 under the supposed authority of the Constitution of 1868, and legislation adopted in pursuance thereof. Article 118 of that Constitution declared as follows: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes."

In conformity with this provision the legislature of Louisiana, in 1871, passed a law delaring that all taxes levied by the city of New Orleans shall be assessed equally upon every description of property, both real and personal; but, by another act, passed at the same session, it was declared that public hospitals, asylums, poor-houses, and all other charitable institutions for the relief of indigent and afflicted persons, and the lots of ground appurtenant thereto and used therewith, and all their furniture and equipments, so long as the same shall be used for that purpose only, shall be exempt from taxation.

The corporation resisted the payment of the tax, and the usual proceedings for its collection were instituted in the Third District Court for the Parish of Orleans. The corporation filed an answer setting up the exemption from taxes contained in its charter, and claiming that it was a contract, and contended that the Constitution of 1868, and the statute passed in pursuance thereof, impaired the obligation of said contract, in violation of the tenth section of the first article of the Constitution of the United States. The court below gave judgment in favor of the city, and an appeal was taken to the Supreme Court of Louisiana, and the judgment was affirmed. We are now called upon to review this decision.

The language of the exemption is so explicit and so broad, and comes in after so many allusions to property which it is supposed the corporation might acquire, other than that which would be directly used for food and shelter to the destitute and helpless persons under its care, that no doubt can be entertained as to its literal application to all the property of the society which it would be lawful and proper for it to possess. The funds on which it relies for carrying on its work, however invested, whether in stocks, real estate, or otherwise, no less than the asylum building itself, are clearly embraced in the terms of the exemption; and to exclude them from its operation would require the insertion or addition of words which the legislature did not see fit to express. Undoubtedly, if the corporation should acquire property not needed or used for carrying on the institution, it would be an act outside of the objects and purposes of the charter, and

ultra vires; and, as to such property, it could not, in its own wrong, justly claim the benefit of the exemption. But the property in question is not obnoxious to this objection; it directly contributes to the support of the institution, and is held for that purpose alone.

Indeed, it is not on any assumption that the language of the exemption does not extend to the property taxed that the Supreme Court of Louisiana bases its judgment. The main ground upon which it relies is, that the charter was granted and accepted under a standing law of the State, by which the legislature was authorized to abrogate the charter of any corporation; and it was argued that the power to abrogate included the lesser power to alter and amend. This law is contained in article 438 of the Civil Code adopted in 1825, being a modification of a similar article in the Code of 1808, book i. tit. 10, c. 3. In the Code of 1825 it reads as follows: —

"Chapter III. *Of the dissolution of corporations.* (Art. 438.) A corporation legally established may be dissolved: 1. By an act of the legislature, if they deem it necessary or convenient to the public interest; provided that when an act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it cannot be repealed without providing for the reimbursement of the advances made, or making full indemnity to such individuals; 2. By the forfeiture of their charter, when the corporations abuse their privileges, or refuse to accomplish the conditions on which such privileges were granted," &c.

The counsel for the plaintiff in error contends that this article has reference only to the absolute dissolution of a corporation and not to a mere alteration of its charter; and, from its correlation to other parts of the title, this seems to be a very probable view of its office. But if it be construed in the large sense contended for by the counsel of the city, the qualification with which it is accompanied in the proviso is very important and not to be ignored. This qualification requires reimbursement or indemnity to those who have made advances upon the faith of the charter of incorporation. Nothing of the kind has been attempted in this case. As the corporation has not been dissolved, but is continued in existence, and still

represents those who contributed to its establishment, the corporation itself is the only proper party to receive indemnity; and no indemnity short of the amount of the tax imposed would be adequate. The indemnity and the tax would mutually balance or neutralize each other. In other words, proper indemnity would require a revocation or nullity of the tax.

It is suggested, however, by the Supreme Court, in its opinion, that the reserved power contained in the code has no application to this case, because the property upon which the tax in question was imposed was acquired by gratuitous donation after the adoption of the Constitution of 1868, and consequently (as the court infers) after the repeal of so much of the charter as exempted from taxation the property not employed within the limits of exemption allowed by that Constitution. "When a case of prior acquired property," says the court, "presents itself, it will be time enough to express our opinion thereon." But this argument presupposes the existence of a right to repeal the provisions of the charter as to future acquisitions, without qualification or condition. This seems to us a begging of the question at issue. The contract did not apply only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted, but to all that might afterwards be acquired in the due fulfilment of the purposes of the institution. If the present asylum should be destroyed, and a new one erected on a different piece of ground, the argument of the court would be equally applicable to such newly acquired property as to the property in question. The Constitution itself did not exempt any property. It only gave the legislature the power (to be exercised, or not, in its discretion) to exempt property actually used for church, school, and charitable purposes. The legislature has seen fit to make this exemption; but it was not obliged by the Constitution to do so. The argument of the Supreme Court would go to the extent of declaring that the abrogation of the contract, effected by the Constitution of 1868, was valid as to all after-acquired property, whether indemnity was provided or not; and this amounts to saying that the legislature or people of Louisiana

had absolute power to pass a law impairing the obligation of the contract, without any condition or qualification whatsoever.

We cannot concur in this view. We think that the power of abrogation, or alteration, was qualified by the duty of providing indemnity to the full extent of the damage or burden caused by such change. This conclusion seems to us so obvious as to require no extended argument in its support.

This opinion might be extended by an examination of authorities. We might refer to *Home of the Friendless* v. *Rouse* (8 Wall. 430), which is almost on all-fours with the present case. We might go back to the case of *Dartmouth College* v. *Woodward*, and the cases since decided, and review all the reasons on which they were grounded; we might dilate on the legislative reasons for granting immunity from taxes to such charitable institutions as that of the plaintiff in error, prominent among which would doubtless be the fact that the support and maintenance extended to the objects of the charity relieves the State from a burden which would involve a much larger amount of taxation than that which it waives by granting the exemption. But such a review would be but a repetition of what has been said before, and much of it would be out of place.

It is proper, however, that we should notice one or two cases which the counsel for the city suppose to be favorable to their views, and on which they place considerable reliance. These are *Tucker* v. *Ferguson*, 22 Wall. 527, and *West Wisconsin Railway Co.* v. *Board of Supervisors*, 93 U. S. 595. We think that they do not apply to the case now under consideration. In the first place, the Constitutions of Michigan and Wisconsin, in which States those cases arose, reserved to their legislatures, respectively, the power to alter, amend, and repeal charters of incorporation. In the next place, in those cases, the exemption granted was held to be gratuitous on the part of the State, no consideration passing therefor from the companies. It was no part of their charters of incorporation, and, therefore, formed no consideration for their acceptance. Whereas, in the present case, the exemption was expressed in the charter itself, and was one of the inducements offered for

its acceptance, and for making donations for the establishment of the institution.

It is also said that, in order to constitute a contract, the grant ought to be clear and free from all ambiguity and doubt, and not susceptible of a different construction. We think it is so in this case. The contract is not a matter of inference or presumption. It is distinctly expressed in the act of incorporation. Indeed, a clearer case could hardly be made. The addition of a declaration, that the exemption given should not be withdrawn, would not have added to its force.

We are well aware of the forcible language which has been used in previous cases in reference to the importance to the State of the governmental function of taxation; the caution that ought to be exercised in maintaining a claimed exemption from taxes; the clearness and certainty which the grant should exhibit. We concur in all that has been said by this court and many State courts on the subject. But where the language is clear, and the intention to grant the exemption apparent, the court has never hesitated to give it force and effect. And, as before said, we think it difficult to conceive a grant more clearly expressed than that in the present case; and unless we are disposed to reverse the previous decisions of this court, we cannot hesitate what judgment we ought to give.

We are of opinion that the imposition of the tax in question, contrary to the express terms of the charter, and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution reserved in the code; and that sect. 118 of the Constitution of 1868, and the legislative act by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the tenth section of article 1 of the Constitution of the United States.

Our conclusion is that the judgment of the Supreme Court of Louisiana must be reversed, and that the cause be remanded with instructions to reverse the judgment of the Third District Court of the Parish of Orleans, and to render judgment in conformity with this opinion.

So ordered.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, dissenting.

I dissent from this judgment, because I understand that no statute shall be held to grant exemption from taxation unless its language imperatively requires it.

I do not think that the language of the statute under which the exemption is claimed in this case requires that all property acquired by the institution after the passage of the act shall be exempted, especially in regard to a cotton-picking machine, which can only be of value as it is used in a business operation in competition with others who must pay heavy taxes.

COUNTY OF MOULTRIE *v.* FAIRFIELD.

1. The charter of the Decatur, Sullivan, and Mattoon Railroad Company, which took effect March 26, 1869, authorized the board of supervisors of the county of Moultrie, Illinois, to subscribe to the capital stock of that company to an amount not exceeding $80,000, and also, should it be sanctioned by a popular vote, to make a donation in aid of the company, and in each case to issue the requisite amount of county bonds.
2. Where, before the adoption of the Constitution of Illinois of 1870, a donation in aid of a railroad company had, pursuant to law, been voted by a county, bonds to pay that donation might be thereafter issued.
3. That vote cannot be held for naught, although in the notice of, and the petition for, the election at which it was cast the company is misnamed, if it sufficiently appears that the company was meant.
4. In this case the power to levy a tax was conferred, the company performed all the conditions which, by the vote cast Nov. 2, 1869, entitled it to receive the donation bonds, and they were delivered Nov. 1, 1871, reciting the law authorizing their issue. *Held*, that, in a suit by a *bona fide* holder of the coupons cut therefrom, a recovery cannot be defeated upon the ground that, in order to pay the principal and interest and the county expenses, the assessment must exceed the limitation imposed by sect. 8, art. 9, of the Constitution of 1870.
5. *Quære*, Is there any limit upon the power of taxation to raise means to meet the indebtedness of which the bonds in question are the evidence.

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

This action was brought by Fairfield against the county of Moultrie, upon the common counts, for money lent, money had

and received, and money due on account stated, with notice that he would give in evidence coupons detached from certain bonds of the county issued in satisfaction of its respective donations in aid of the Bloomington and Ohio River Railroad Company, and the Decatur, Sullivan, and Mattoon Railroad Company. Plea, *non assumpsit*, under which, by agreement, the county was allowed to offer any evidence and make any defence that would be competent under any special plea well pleaded. The parties submitted the issues of fact as well as of law to the court; and a special finding of facts was made, upon which judgment in his favor was rendered, to reverse which the county brought this writ of error. The material facts are set forth in the opinion of this court.

Mr. John R. Eden for the plaintiff in error.

Mr. Shelby M. Cullom and *Mr. E. S. Bailey* for the defendant in error.

Mr. Justice Woods delivered the opinion of the court.

We shall first consider the objections raised by the plaintiff in error to the recovery upon the bonds of the county of Moultrie issued to the Decatur, Sullivan, and Mattoon Railroad Company. The charter of this company took effect March 26, 1869. The ninth section provides as follows: "The several incorporated towns, cities, counties, and towns organized under the township organization law, along or near the route of said road, or that are in any way interested therein, may, in their corporate capacities, subscribe to the stock of said company or make donations thereto to aid in constructing or equipping said railroad." Then follows a proviso making subscriptions to the stock and donations conditional upon a vote of the people and prescribing the mode of holding elections, &c.

Section 10 declares: "The board of supervisors of Moultrie County are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding eighty thousand dollars, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent per annum, said bonds to be issued in such denominations and to mature at such time as said board of supervisors may determine: *Pro-*

vided, that the same shall not be issued until said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

It appears from the records of the board of supervisors, as stated in the findings of the court, that on Nov. 2, 1869, an election was held according to law in the county, at which a majority of the votes cast was in favor of a proposition to donate to the company the sum of $75,000, to be paid in the bonds of the county when the road should be completed and in running order through it; and that, in pursuance of the vote, the board, Dec. 19, 1869, passed an order that there be donated by the county to the company the sum of $75,000, and that when the road should be completed through the county there be issued and delivered to the company the bonds to that amount payable in ten years, in satisfaction of such donation; and that on Nov. 1, 1871, the chairman of the board of supervisors and the clerk of the county issued and delivered to the company seventy-five bonds of $1,000 each in satisfaction of the donation. These bonds recite on their face that they are "issued by said county of Moultrie by virtue of a vote of a majority of the legal voters of said county voting at an election held in said county of Moultrie on the second day of November, 1869, which election was authorized by, and conditioned according to the provisions of, an act of the General Assembly of the State of Illinois, approved March 26, 1869, entitled an act to incorporate the Decatur, Sullivan, and Mattoon Railroad Company."

The court further found that Fairfield was a *bona fide* purchaser for value before maturity of the bonds issued to the company, from which the coupons offered in evidence were detached.

The facts above stated as found by the court, and the authority conferred by the charter of the company to issue the bonds, establish *prima facie* their validity and the right of Fairfield to recover.

The county insists, however, that there are other facts set forth in the findings which show the invalidity of the bonds. These are that, at the December special term, 1869, of the board of supervisors of Moultrie County, an order was passed

that the county subscribe to the capital stock of the company, by authority of sect. 10 of its charter, above recited, the sum of $80,000; that said subscription was then and there made; and that on Dec. 31, 1872, the road being then open for traffic between Decatur and Sullivan, the bonds of the county were issued and delivered to the company in payment of its subscription of stock.

The contention of counsel for the county is that the board of supervisors having, in December, 1869, subscribed to the capital stock of the company the sum of $80,000, by authority of sect. 10 of the charter of the company, it had given all the aid to the railroad company which the law authorized. In other words, it is insisted that the county could not subscribe the full amount of stock authorized by sect. 10, and also make a donation under sect. 9; that it could only do one of these two things. The inference which is drawn from this position is that the bonds issued in satisfaction of the donation, voted for by the people of the county and subscribed by the board of supervisors, were issued without authority, and are, therefore, void.

We cannot, for several reasons, concur in his views. *First*, it is conceded that the board could either subscribe any sum not exceeding $80,000 to the stock of the company, under sect. 10 of its charter, and issue the bonds of the county in payment thereof, or it could make a donation, under sect. 9 of the charter, of any amount which had been voted for by the voters of the county, and issue the bonds of the county in satisfaction thereof. As the county sets up as matter of defence against the donation bonds issued to the company, the fact that a subscription of stock had also been made, in payment of which the county had issued its bonds, it stands it in hand to show that the obligation of the county to issue bonds in payment of its subscription antedated its obligation to issue bonds to satisfy its donation. This the findings fail to show. They do not show which was first voted by the board, the donation or the subscription. They do show, however, that before any action was taken by the board in reference to either, to wit, on Nov. 2, 1869, the electors of the county had voted in favor of the donation. They further show that the county agreed to issue its

bonds in satisfaction of its donation when the company had completed its road through the county, and to issue its bonds in payment of its stock when the railroad should be open for traffic between the city of Decatur and the town of Sullivan; that the road was completed through the county as early as Oct. 20, 1871, and that the donation bonds were issued and bore date Nov. 1, 1871; that the road was not open for traffic between Decatur and Sullivan until Dec. 31, 1872; and that on that day, fourteen months after the issue of the donation bonds, the subscription bonds were executed and issued. If either class of bonds, therefore, has any advantage over the other on the question of authority for their issue, it would seem to be the donation bonds. *Secondly*, as there was authority for the issue of the donation bonds, which is recited on their face by reference to the law from which it was derived, the purchaser before maturity was not bound to look further. The county having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether the county had issued more bonds than the law authorized. *Lynde* v. *The County*, 16 Wall. 6; *City of Lexington* v. *Butler*, 14 id. 282; *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Humboldt Township* v. *Long*, id. 642. *Thirdly*, we are clearly of opinion that under sect. 10 of the charter of the company the county might subscribe for stock to an amount not exceeding $80,000, and issue its bonds in payment thereof, and under sect. 9 of the same charter make a donation to the same company, and issue its bonds in satisfaction thereof.

It is clear, and it is conceded in the brief of plaintiff in error, that the county is included within the terms of sect. 9, which applies to counties along or near the route of the road, or that are in any way interested therein. It is also clear that, independently of the provisions of sect. 10, the county might, upon a vote of the people authorizing it, make a donation of any amount to the company.

Section 10, which authorizes a subscription to the stock within certain limits, and without any vote of the people, does not preclude a donation under sect. 9. The obvious construction of the two sections, taken together, is that any county along

the line of the railroad, upon a vote of the people, may, without limit, either subscribe to the stock of the company or make it a donation to be paid for in bonds, and that the county of Moultrie may subscribe to the stock of the company, without a consenting vote of the people, any sum not exceeding $80,000. We must give this construction to the two sections if we allow both to have their full effect; and, if possible, they should be so construed as to give full effect to both, without any limitation or condition not incorporated in them by the legislature. The authority granted to Moultrie and other counties by sect. 9 to make donations is not restrained or repealed because authority is granted to Moultrie County, by another section and upon different conditions, to subscribe stock. One section is not inconsistent with the other, and therefore does not repeal it.

The next reason upon which the invalidity of the bonds and coupons under consideration is based, is the section of the Constitution of Illinois of 1870, which declares: "No county, city, town, or 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 under existing laws." First additional section.

The proviso of this section has been construed by the Supreme Court of Illinois — and this court has followed that construction — to extend to donations as well as subscriptions of stock. *Chicago & Iowa Railroad Co.* v. *Pinckney*, 74 Ill. 277; *Middleport* v. *Ætna Life Insurance Co.*, 82 id. 562; *Lippincott* v. *Town of Pana*, 92 id. 24; *Fairfield* v. *County of Gallatin*, 100 U. S. 47.

According to the findings of the court below, the records of the board of supervisors of the county of Moultrie show that before the adoption of the Constitution of 1870 an election was held whereby the donation was authorized, which the bonds in suit were issued to satisfy, and we have already seen that

such election was authorized by sect. 9 of the charter of the railroad company. The prohibition of the Constitution does not, therefore, extend to the donation made in this case, or the bonds issued in satisfaction thereof.

An attempt is, however, made by the plaintiff in error to show that no election by which said donation was authorized was ever held; because in the petition for the election, and in the notice of the election, the railroad company to which the donation was to be made was designated as the Mattoon, Sullivan, and Decatur Railroad Company, and not by its true name, to wit, the Decatur, Sullivan, and Mattoon Railroad Company. And the contention is that as there was no vote of the people which authorized the donation in question to the Decatur, Sullivan, and Mattoon Railroad Company, the power of the county to make the donation was cut off by the Constitution of 1870.

There can be no doubt to what company the people intended to make their donation. The statute-books of the State of Illinois will be searched in vain to find an act incorporating a railroad company by the name of the Mattoon, Sullivan, and Decatur Railroad Company. There can be no question that in the petition for, and the notice of, the election, the company intended was that known and chartered as the Decatur, Sullivan, and Mattoon Railroad Company; for the petition and notice designated the route upon which the road was to be built, and afterwards was built, and they refer to the provision of the charter of that company, which authorized the donation upon the making of which the voters were to express their will.

But a conclusive circumstance against the county to show to what company the donation was voted, is found in the records of the board of supervisors, set out in the findings of the court, in which it is distinctly stated that the petition for the election requested that an election be held in pursuance of an act entitled an act to incorporate the "Decatur, Sullivan, and Mattoon Railroad Company," to decide whether a donation of $75,000 should be made to that company, and that such election was held on Nov. 2, 1869, and resulted in favor of donating the sum of $75,000 to that company. It was

therefore ordered that said sum be donated to the Decatur, Sullivan, and Mattoon Railroad Company, and when said company should have completed its road through the county, that the bonds of the county should be delivered to it in satisfaction of such donation.

These records show what the understanding of the representative body of the county was in respect to the company to which the donation was voted. There can, therefore, be no doubt about the identity of the company which the voters of the county had in view when the election was held. It is certain that on Nov. 2, 1869, an election was held by the voters, and a donation of $75,000 voted to some railroad company. The circumstances to which we have adverted do not leave the least doubt that it was the Decatur, Sullivan, and Mattoon Railroad Company. Upon such a state of facts the law is well settled.

Even a contract is not avoided by misnaming the corporation with which it is made. *Hoboken Building Association* v. *Martin*, 2 Beas. (N. J.) 427. And if a corporation is misnamed in a statute, the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant. *Chancellor of Oxford's Case*, 10 Rep. 53.

"Although the names of corporations are not merely arbitrary sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politick is well named, though the words and syllables are varied from." Bacon's Abr., tit. Corporation, C. 2. And it has been held by the Supreme Court of Illinois that the transposition of words comprising the name of a corporation is unimportant, if it be evident what corporation is intended. *Chadsey* v. *McCreery*, 27 Ill. 253.

We are, therefore, of opinion that in the petition for and notice of the election the transposition of two of the words of which the name of the corporation to which the aid was to be voted was in part composed, cannot render the election invalid and void.

It is, therefore, clear that the donation voted for at that election is taken out of the operation of that clause of the Constitution of the State which declares that no municipality shall

make donations to, or loan its credit in aid of, any railroad or private corporation. In our opinion none of the objections which we have noticed, to the validity of the bonds under consideration, are well taken.

The remaining objection to their validity is also urged against a recovery on those issued to the Bloomington and Ohio River Railroad Company, and is the only ground of defence against the last-named bonds. This objection we shall now consider. It is based on sect. 8 of art. 9 of the Constitution of Illinois, which declares: "County authorities shall never assess taxes, the aggregates of which shall exceed seventy-five cents per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county."

To show the applicability of this provision to the question in hand, the plaintiff in error offered evidence in the court below, on which the court made the following findings: —

"That at the time of the issuing of said bonds the indebtedness of said county, including said bonds, was two hundred and seventy-five thousand dollars, and the valuation of the taxable property of said county was two million two hundred and seventy-nine thousand and eighty-four dollars, and that the sum of ten thousand dollars per annum was required to defray the necessary ordinary expenses of said county; and that at the time of the rendition of the judgment in this cause the indebtedness of the county, including accrued interest, was three hundred and seventy-five thousand dollars, and the valuation of the taxable property therein was three million five hundred and eighty-nine thousand two hundred and fifty-one dollars, and that it required twelve thousand dollars per annum to defray the necessary ordinary expenses of said county.

"That to enable said county to pay the indebtedness created by said donations to said Bloomington and Ohio River Railroad Company, and to said Decatur, Sullivan, and Mattoon Railroad Company, evidenced by said bonds still outstanding, the interest coupons upon which were sued on and offered in evidence in this case, will require the annual assessment of taxes, which

will exceed 75 cts. per $100 valuation of the taxable property in said county of Moultrie."

The argument of the plaintiff in error is that the indebtedness evidenced by the bonds issued by the county of Moultrie, in aid of the two railroads mentioned, does not fall within the exception found in sect. 8 of art. 9 of the Constitution, and that the above-recited findings of the court below show that the authorized tax of seventy-five cents on the one hundred dollars would not be sufficient to pay the expenses of the county and the principal and interest on the bonds. And it is, therefore, contended that the bonds are void.

The authority cited to sustain this position (*Loan Association* v. *Topeka*, 20 Wall. 655) merely decides that the bonds are void where there is no power in the legislature to authorize a tax in aid of the purpose for which they were issued.

But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds. They cannot, therefore, be void. *Marcy* v. *Township of Oswego*, *supra*.

Moreover, it appears from the findings of the court that at the time the bonds in question were issued a levy of seventy-five cents on every hundred dollars valuation of the taxable property of the county would produce a sum sufficient to pay the ordinary expenses of the county, and leave a surplus of over $7,000 to be applied to the payment of the bonds, and that at the commencement of this suit such annual surplus, by reason of the increase in the taxable property of the county, would amount to nearly $15,000, — a sum almost sufficient to pay the judgment rendered in this case. So that the defence now under consideration is reduced to this, that because the whole judgment cannot be at once collected, there should be no judgment at all.

But it nowhere appears in the record that the county has not ample means out of which the judgment could be collected besides its revenues derived from taxation. We know from the record that the county at one time owned $80,000 of the stock of the Decatur, Sullivan, and Mattoon Railroad Company, and it does not appear that it is not still the owner of this stock, and that it may not now be subjected to the payment of the judgment recovered in this case, or that the

county may not have other similar assets sufficient to pay all its debts.

Therefore, even if the county, by reason of the limit on its taxing power, could not levy a tax to pay these bonds, nevertheless, they having been authorized, the holder is entitled to judgment on them, and to collect it out of any property of the county which could be subjected to the payment of its debts.

Whether the indebtedness evidenced by the bonds which are the basis of this suit falls within the exception of sect. 8, art. 9, of the Constitution of Illinois, so that taxation for their payment is without limit, is a question which does not necessarily arise upon this record, and which we are not now required to decide.

We are of opinion that there is no valid defence against a recovery on the coupons sued on. The people of the county almost unanimously voted for the issue of the bonds. The conditions upon which the donations were made were fully performed. The railroads which they were intended to aid were completed and in use before they were executed, and they were regularly and honestly issued by the public officers charged with that duty. They are in the hands of *bona fide* holders for value. Common honesty demands that the county should apply its available means to their payment, and there is no obstacle to a recovery upon the coupons.

Judgment affirmed.

THE "FRANCIS WRIGHT."

1. The act of Feb. 16, 1875, c. 77, whereby the appellate jurisdiction of this court in admiralty causes is limited to the determination of questions of law arising on the record is constitutional.
2. Where the court below, when thereunto requested, refuses to give any finding upon an ultimate disputed fact, established by competent evidence and which is involved in the cause, and material to its determination, or where, against remonstrance, it finds such a fact, in the absence of all evidence, the ruling, if excepted to at the time, and incorporated in a bill of exceptions which states the alleged error and the ground relied on below to sustain the objection presented, may, as a question of law, be reviewed here.
3. The court condemns the practice of drawing up bills of exception, which, so far from being "prepared as in actions at law," are framed as, if possible, to secure here a re-examination of the facts.
4. The court, upon the facts found, affirms the decree below.

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

Duncan & Poey, the libellants, entered into the following charter-party with Woodhouse & Rudd, the claimants: —

"This charter-party, made in the city of New York this thirteenth day of September, in the year one thousand eight hundred and seventy-two, between Messrs. Woodhouse & Rudd, owners of the steamer 'Francis Wright,' of New York, of the burthen of 600 tons or thereabouts, now lying in the harbor of New York, of the first part, and Messrs. Duncan & Poey, merchants of Philadelphia, of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, does covenant and agree on the freighting and chartering of the said vessel to the said party of the second part for the term of six months, to run between Philadelphia or New York and Galveston, or any intermediate safe port in the United States, or any foreign port not prohibited by the insurance.

"It is further understood and agreed, that the said parties of the second part are to have the privilege of cancelling this charter at the expiration of three months, upon giving the parties of the first part fifteen days' notice, and the payment of fifteen hundred dollars bonus on the terms following, viz.:

"*First*, The said party of the first part agrees the said vessel, in and during the said voyage, shall be kept tight, stanch, well fitted, tackled, and provided with every requisite for such a voyage.

"*Second*, The said party of the first part further agrees the whole of the said vessel (with the exception of the necessary room for the sails, cables) shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid.

"*Third*, The said party of the first part further agrees to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part, or their agents, may think proper to ship.

"And the said party of the second part, in consideration of the covenants and agreements to be kept and performed by the said party of the first part, do covenant and agree with the said party of the first part to charter and hire the said vessel, as aforesaid, on the terms following, viz.: To man, coal, and victual steamer, and pay all expenses of every nature (including port charges, &c.) connected with running of the steamer, except insurance on vessel and repairs, and to pay to the said party of the first part, or their agent, for the charter or freight of said vessel, during the voyage aforesaid, in manner following, viz.: Eighty-five ($85) dollars per day, United States currency, due daily, but payable at the expiration of each and every month, in New York; vessel to be returned to the owners at the expiration of this charter, in the same order and condition as she is now in, less the ordinary wear and tear. Charterer to take and deliver the steamer at New York; owners to nominate and charterers to appoint chief engineer, to be paid by charterers at rate of one hundred and twenty-five ($125) dollars per month. Charterers to appoint captain subject to the approval of the owners. It is also agreed that this charter shall commence at New York on the 18th of September, 1872.

"If from any derangement of machinery steamer is delayed, the time lost is not to be paid for by charterers, and in case such derangement, if any, owners to have privilege of cancelling charter. In case of any wreckage, towage, or salvage, accruing to the vessel whilst under this charter, one-half of said earning to be paid to the owners of the steamer. To the true and faithful performance of all the foregoing covenants and agreements the said parties do hereby bind themselves, their heirs, executors, administrators, and assigns, and also the said vessel, her freight and appurtenances, and the merchandise to be laden on board each to the other in the penal sum of estimated amount of this charter.

"In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

"WOODHOUSE & RUDD.

"DUNCAN & POEY.

"Sealed and delivered in presence of

"W. H. STARBUCK, witness to both signatures."

The libel filed in the District Court alleges that, in accordance with the terms of the charter-party, Sherman was appointed chief engineer of the steamer, and Denison her captain; that the libellants took her to Philadelphia, where they fitted her with refrigerators and other appliances for bringing a cargo of fresh beef from Galveston to Philadelphia, and then despatched her to Galveston; that on the outward voyage the vessel gave signs of unseaworthiness in the blowing and leaking of some of her boiler-tubes, by which the time of the voyage was fourteen instead of ten days, the usual time; that at Galveston the chief engineer was notified by the libellants to make repairs, &c., but he refused, whereby she, having taken a cargo of about seventy tons of fresh beef, was, Oct. 31, 1872, being then four hours at sea, out of the port of Galveston, compelled to put back there for repairs by reason of the boiler-tubes again blowing out and leaking, and was detained at Galveston seven days for repairs, leaving there again Nov. 7, 1872, and was fifteen days making the passage to Philadelphia, owing to the unseaworthy and defective condition of the boiler; and that by reason of these detentions and of the unseaworthy condition of the boiler, and also of the hot water which escaped from the boiler-tubes and was negligently allowed to run into the steamer's bilge and melt the ice in the refrigerators where the fresh beef was stowed, the beef became spoiled and entirely lost, to the damage of libellants $30,000, which they claim to recover.

The steamer was attached, but was subsequently released, upon the claimants entering into the usual stipulations conformably to the rules and practice of that court. The claimants answered, admitting the making of the charter-party, the appointment of the chief engineer and captain, and the libellants' taking possession of the steamer. They deny all the other material allegations of the libel, and aver that she, as far

as they were bound to do, was kept as required by the contract.

The District Court dismissed the libel, and the Circuit Court entered a decree of affirmance. The libellants excepted to certain of the findings of fact and to the refusal to find certain facts by them requested and to the conclusions of law. They thereupon appealed here. The bill of exceptions is incorporated in the record.

The remaining facts appear in the opinion of the court.

Mr. Robert D. Benedict and *Mr. Benjamin Harris Brewster* for the appellants.

Mr. William Allen Butler, *contra.*

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

Three questions have been presented on the argument of this appeal: —

1. Whether Congress has the constitutional power to confine the jurisdiction of this court on appeals in admiralty to questions of law arising on the record;

2. Whether, upon the bill of exceptions, the court below erred in refusing to find certain facts which, as is claimed, were established by uncontradicted evidence, and in finding others which had no evidence at all to support them; and,

3. Whether, on the facts found, the decree below was right.

1. As to the jurisdiction.

If we understand correctly the position of the counsel for the appellants, it is precisely the same as that which occupied the attention of the court in *Wiscart* v. *Dauchy*, decided at February Term, 1796, 3 Dall. 321. There the question was, what, under the Judiciary Act of 1789, could be considered on a writ of error bringing to this court for review a decree in admiralty. The decision turned on the construction to be given the twenty-second section of the act, and Mr. Justice Wilson, in his minority opinion, said: "Such an appeal," that is to say, an appeal in which all the testimony is produced in this court, "is expressly sanctioned by the Constitution; it may, therefore, clearly, in the first view of the subject, be considered as the most regular process; and as there are not any words in the

judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Even, indeed, if positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision." Mr. Chief Justice Ellsworth, however, who spoke for the majority of the court, said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply whether Congress has established a rule for regulating its exercise." And, further on: "It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it is to be exercised, still, I say, we are bound to pursue that mode, and can neither make, nor adopt, another." And again: "But surely it cannot be deemed a denial of justice that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the Circuit Court has been made final, no denial of justice can be imputed to our government; much less can the imputation be fairly made, because the law directs that, in case of appeal, part shall be decided by one tribunal and part by another, — the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England."

This was the beginning of the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. As was said by Mr. Chief Justice Marshall in *Durousseau* v. *United States* (6 Cranch, 307, 314), "The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on

the subject." The language of the Constitution is that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." Undoubtedly, if Congress should give an appeal in admiralty causes, and say no more, the facts, as well as the law, would be subjected to review and retrial; but the power to except from — take out of — the jurisdiction, both as to law and fact, clearly implies a power to limit the effect of an appeal to a review of the law as applicable to facts finally determined below. Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals. Whether the one form of proceeding is to be used or another depends ordinarily on the character of the suit below; but the one as well as the other brings into action the appellate powers of the court whose jurisdiction is reached by what is done. What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right. The Constitution prohibits a retrial of the facts in suits at common law where one trial has been had by a jury (Amendment, art. 7); but in suits in equity or in admiralty Congress is left free to make such exceptions and regulations in respect to retrials as on the whole may seem best.

We conclude, therefore, that the act of Feb. 16, 1875, c. 77, is constitutional, and that under the rule laid down in *The*

Abbotsford (98 U. S. 440), and uniformly followed since, our inquiries are confined to questions of law arising on the record, and to such rulings, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law.

2. As to the questions arising on the bill of exceptions.

It is undoubtedly true that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court. But this rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends.

In the present case the ultimate fact to be determined was whether the loss for which the suit was brought happened because of the insufficient refrigerating apparatus, or the unseaworthiness of the vessel. It is found in express terms that the loss was "caused by the defective construction and working of the refrigerating room and apparatus connected therewith, either from inherent defects in said apparatus, or from not using a sufficient quantity of ice, and not by any fault of the claimants." As to this both the Circuit and District Courts agree. This fact being established, it was unimportant to inquire whether the vessel was seaworthy or not. If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages.

But if it be conceded that the case depended on the seaworthiness of the vessel, we think the exceptions which have been taken cannot be considered here. The only unseaworthiness alleged was in respect to the boiler, and as to this the court has found that the boiler was a tubular one; that tubular boilers are liable to leakage in the tubes; that such leakage does not necessarily interfere with the capacity or fitness of the boiler for the purposes of navigation; that this particular boiler had one hundred and forty-four tubes; that some of these tubes gave out from time to time and were plugged up; that when the vessel arrived at Philadelphia at the end of her voyage, twenty-six of the tubes had been plugged up, but that the boiler was still efficient and seaworthy. It was also found that the voyage from Galveston to Philadelphia was two days longer than was usually occupied by well-equipped steamers, and that the vessel put back for repairs, by which an additional week's time was lost at Galveston.

The complaint now made is, that the court refused to state in its findings that there was leakage in the tubes and stoppage for repairs while the vessel was on her voyage from Philadelphia to Galveston, and while she was lying in the harbor at Galveston taking in her cargo, and that when the vessel put back to Galveston the engineer had not sufficient tools with which to make his repairs. All these are mere incidental facts, proper for the consideration of the court in determining whether the boiler and the vessel were actually seaworthy or not. It is not pretended that the question at issue was to be determined alone by the probative effect of these circumstances. They were part only of the evidence on which the ultimate finding depended, and occupy in the case the position of testimony rather than of the facts to which the law is to be applied by the judgment of the court. The refusal of the court to put such statements into the record, even though established by uncontradicted evidence, cannot properly be brought here by a bill of exceptions, unless it also appears that the determination of the ultimate fact to be ascertained depended alone upon the legal effect as evidence of the facts stated. Such, clearly, is not this case.

There is another equally fatal objection to this bill of exceptions. An evident effort has been made here, as it has been before, to so frame the exceptions as, if possible, to secure a re-examination of the facts in this court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below. The bill of exceptions sets forth that at the trial the pleadings were read by the respective parties, and the testimony then put in on both sides. This being done, the libellants presented to the court certain requests for findings of fact and of law. These requests were numbered consecutively, sixteen relating to facts and three to the law. Afterwards, six additional requests for findings of fact were presented. It is then stated that the court made its findings of fact and of law and filed them with the clerk, together with an opinion in writing of the circuit justice who heard the cause. The libellants then filed what are termed exceptions to the findings and the refusals to find. In this way exceptions were taken separately to each and every one of the facts found and the conclusions of law, and to the refusal to find in accordance with each and every one of the requests made. The grounds of the exceptions are not stated. Many of the requests of the libellants are covered explicitly by the findings as actually made, some being granted and others refused.

We have no hesitation in saying that this is not a proper way of preparing a bill of exceptions to present to this court for review rulings of the Circuit Court such as are now complained of. A bill of exceptions must be "prepared as in actions at law," where it is used, "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. Bac. Abr., Bill of Exceptions; 1 Saund. Pl. & Ev. 846. Every bill of exceptions must state and point out distinctly the errors of which complaint is made. It ought also to show the grounds relied on to sustain the objection presented, so that it may appear the court below was properly informed as to the point to be decided. It is needless to say that this bill of exceptions meets none of these requirements. From anything which is here presented no judge would be presumed to understand that the specific objection made to any one of his findings was that no evidence what-

ever had been introduced to prove it, or to one of his refusals, that the fact refused was material and had been conclusively shown by uncontradicted testimony. No ground whatever is stated for any one of all the exceptions that have been taken. To entitle the appellants to be heard here upon any such objections as they now make to the findings, they should have stated to the court that they considered the facts refused material to the determination of the cause, and that such facts were conclusively proven by uncontradicted evidence. Under such circumstances it might have been permissible to except to the refusal and present the exception by a bill of exceptions, which should contain so much of the testimony as was necessary to show that the fact as claimed had been conclusively proven. And so if the exception is as to facts that are found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated into the bill of exceptions. In this way the court below would be fairly advised of the nature of the complaint that was made in time to correct its error, if satisfied one had been committed, or to put into the bill of exceptions all it considered material for the support of the rulings.

From this it is apparent we cannot on this appeal consider any of the rulings below which have been presented by the bill of exceptions.

3. As to the sufficiency of the facts found to support the decree.

Upon this branch of the case we have had no more difficulty than upon the others. The case made may be generally stated as follows: —

The libellants, being about to engage in the business of transporting fresh beef by the use of a newly patented process, applied to the claimants for a charter of their steamer for six months, to be put into that trade. The claimants knew for what business the vessel was engaged, and the libellants knew that she was furnished with a tubular boiler. Such boilers are liable to leak, but that does not necessarily interfere

with their capacity or fitness for the purposes of navigation. The charter-party contained this clause: —

"*First*, The said party of the first part agrees the said vessel, in and during the said voyage, shall be kept tight, stanch, well fitted, tackled, and provided with every requisite for such a voyage."

The charter-party makes no mention of the special business in which the vessel was to be engaged. She was chartered generally for six months to run between Philadelphia and New York and Galveston, or any intermediate safe port in the United States, or any foreign port not prohibited by the insurance. The only complaint made as to her seaworthiness, is in respect to her boiler, and about this it is found that though to some extent leaking, as boilers of that class are liable to be, it was still efficient and seaworthy. The libellants fitted the vessel with the necessary apparatus for the use of their patented process, and with a full knowledge that her boiler was apt to leak, put a cargo of fresh beef on board to be taken from Galveston to Philadelphia. The vessel was twenty-three days in making that voyage instead of fourteen, which was the usual time of well-equipped steamers. The beef was spoiled before it got to Philadelphia, but it is expressly found that this was because of the defective construction and working of the refrigerating room, and the apparatus and machinery connected therewith, for which the claimants were in no respect responsible.

Upon these facts the court below dismissed the libel, which we think was clearly right. That the vessel was in fact seaworthy is settled by the findings. All the claimants covenanted for was, that she was provided with every requisite for safe navigation. While they knew that her charterers intended to use her in connection with their contemplated business, it is neither found nor insisted that any higher degree of seaworthiness was required for that kind of transportation than any other, much less that the claimants knew it. Under these circumstances the language of the charter-party is to be construed only as an agreement that the vessel was seaworthy for the purpose of navigating such a voyage as she was chartered to make, without any regard to what she was to carry.

The claimants did not contract that their vessel was in a condition to make her voyages in any particular time, but only to make them safely. They were not applied to for a vessel suitable for carrying fresh beef, but for one suitable for navigation generally between the designated ports and places. Such a vessel according to the findings they got. It was their fault alone if they did not apply for what they wanted. They took all the risks of the undertaking, except such as arose from the general unseaworthiness of the vessel when she was delivered into their possession, for after they got her she was to be subject to their entire control within the terms of the charter. If repairs were necessary to keep her in a seaworthy condition, while under the charter the claimants might be chargeable with the expense of making them, it would be the duty of the charterers to see that they were made, or to notify the claimants of what was required. The provision that the claimants were to nominate and the charterers appoint the engineer, and that the appointment of the captain by the charterers should be subject to the approval of the claimants, did not affect the relation of the parties in this particular. Delays growing out of derangement in the machinery were to be deducted from the charter time, and the pay for the use of the vessel correspondingly reduced, but beyond that the owners were not to be bound if the vessel was actually seaworthy when delivered into the possession of the charterers under the charter.

Affirmed.

HEWITT *v.* PHELPS.

1. From the decree of a State court rendered in 1874 an appeal was in 1876 taken to the Supreme Court, where, in 1877, the decree was reversed and the cause remanded, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion" of the court. On the day after the mandate was received in the court of original jurisdiction the defendant filed his petition, praying that, by reason of the citizenship of the parties, the cause be removed to the proper Circuit Court of the United States. *Held*, that neither the date when, nor the stage of the cause at which, the petition was filed precluded the removal under the act of March 3, 1875, c. 137. *Jifkins* v. *Sweetzer* (102 U. S. 177) distinguished.
2. A., and B., his wife, conveyed her separate property to a trustee upon trust for her use during her life, and in remainder in fee for the use of her children living at the time of her death. The deed reserves to her the power to sell and exchange the property, and declares "that the trustee is to permit A., as agent for the trustee, and as agent and trustee for said B. during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control the property for the benefit of all concerned." The trustee was not to be responsible for the acts or conduct of A. The latter was, however, for the purposes of the deed, to be a co-trustee, but neither had power to charge the property for any future liability beyond the support of A. during his life. A. survived B. and died insolvent. A bill was filed against the trustee and the child of B., alleging that upon A.'s order the complainant had advanced moneys and furnished supplies which were used for the benefit of the trust estate, and praying that it be subjected to the payment of the claim. *Held*, that the bill was properly dismissed.

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 L. Nugent for the appellants.

Mr. James Z. George, *Mr. Charles W. Clarke*, and *Mr. E. Jeffords* for the appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Hewitt, Norton, & Company, the appellants, filed their bill in equity, April 17, 1869, in the Chancery Court of Washington County, Mississippi, against Phelps and wife, the appellees, and Jonathan Pearce, praying that certain real estate in that State, which had been conveyed by Sarah Vick to Pearce upon

certain trusts, and of which Mrs. Phelps was the sole beneficiary, be charged with certain sums, which the appellants allege they had advanced to the trustee, and for which they claimed that the trust estate was liable.

The appellees were served with process; Pearce was brought in by publication. The cause having been put at issue, the bill was, for want of equity, dismissed on final hearing, Nov. 7, 1874. From this decree an appeal was taken, but not until March 30, 1876, when it was thus removed to the Supreme Court of the State. It was disposed of in that Court May 21, 1877, by a decree reversing the decree of the court below, and remanding the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion" of the court, which is to be found reported under the name of *Norton* v. *Phelps*, 54 Miss. 467. The mandate of the Supreme Court was filed in the Chancery Court of Washington County, June 7, 1877, and on the same day a petition for the removal of the cause to the Circuit Court of the United States for that district was presented by Phelps and wife, on the ground that at the time of the commencement of the suit they were citizens of Kentucky, and had continued so to be at all times since, the plaintiffs during the same period being citizens of Louisiana, which was granted, bond given and approved, and transcript filed in the Circuit Court on Aug. 4, 1877. On Nov. 20, 1877, the appellants moved to remand the cause, which the Circuit Court refused to do. This ruling of the court is first assigned for error under the present appeal.

The contention of the appellants is that the Circuit Court had no jurisdiction to proceed with the cause, because, first, the suit was not pending at the time of the passage of the act of March 3, 1875, c. 137, nor thereafter brought, and, therefore, not within the purview of that act; and, second, because, at the time the removal was effected, the trial of the cause in the State court had already taken place, or at least begun and was in progress, whereas the act requires that the petition for removal shall be filed before the trial thereof.

In our opinion neither of these positions is tenable. Whe-

ther, after final decree and before appeal is perfected, a purchaser of the subject of the suit is affected with the notice of *lis pendens* may be a question; although a distinction in this respect is made by some of the authorities between an appeal in equity and a writ of error, the latter being considered a new proceeding, not pending until service of citation, while the former is regarded as a step in the progress of the cause. But, in contemplation of the act above mentioned, there are and can be but two classes of suits: one, those pending at the time of its passage; the other, those thereafter brought. Of course, a suit terminated has ceased to be a suit. Confessedly the present is a suit, and could not be said, at the time the act was passed, to have ended, although the decree was final in respect to the Court of Chancery which had rendered it, and would have become so between the parties if no appeal had been taken within the time limited by law. But until that period had elapsed it was still a *lis pendens*, in the sense that the party against whom the decree had been rendered had the right by an appeal further to prosecute it. It was not the beginning of a new suit: it was but one additional step in the progress of an existing one.

The second ground of exception to the removal of the cause is maintained in argument upon the authority of *Jifkins* v. *Sweetzer* (102 U. S. 177); but that case does not govern this. That decision turned upon the fact that the judgment of the Supreme Court of the State "disposed of the case finally upon its merits, and nothing remained to be done but to continue the hearing already begun until the necessary accounts could be taken, and the details of a final decree settled." But here, although the Supreme Court of Mississippi passed in its opinion upon the merits of the case, as disclosed by the record then before it, nevertheless, in remanding the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony," the whole matter was open and at large, as though the cause had never been at issue; and the clause providing "for an account to be taken in accordance with the views contained in the opinion rendered herein," must be understood as qualified by the previous part of the order, and as obligatory upon the Court of Chancery only as a declaration of general

principles, to be applied as the facts should thereafter appear. It was not a judgment which operated as an estoppel between the parties. It was neither final nor conclusive. In point of fact, after the removal of the cause into the Circuit Court the parties availed themselves of the leave granted, and filed new and amended pleadings. The cause then stood in that court just as it would have stood in the State court, but for the removal; *i. e.*, for a rehearing upon the merits, and not for the purpose of merely executing the judgment of the appellate court, as in the case of *Duncan* v. *Gegan*, 101 U. S. 810. Being properly removed, the parties are subject to that administration of law which is approved in the judicial tribunals of the United States, whose jurisdiction is thus invoked, as was held in *King* v. *Worthington*, 104 id. 44.

The Circuit Court having acquired jurisdiction, on final hearing, upon demurrer, dismissed the bill. We are now required by the appeal to review that decree.

The allegations upon which the alleged equity of the appellants is supposed to arise are, in substance, as follows: —

On May 4, 1850, Sarah Vick and Henry W. Vick, her husband, executed and delivered to Jonathan Pearce a deed, conveying to him all the property which she then owned as separate property, including a plantation, slaves, utensils, and stock in Washington County, Mississippi, the subject of the present suit, upon trust, nevertheless, for her sole and separate use during her life, and in remainder in fee for the use of her children living at the time of her death. It was provided that the proceeds of the property in Washington and Issaquena Counties, and such parts of it as might be sold, should be applied to the payment of a debt due to the Bank of the United States, after the payment of which, the proceeds, over what was necessary to support the plantation and family, were to be invested for the benefit of all her children living at the time of her death. It was also provided that she should retain possession of the property during her life, with power to sell or exchange any part, but any property received in exchange to be subject to the trusts; "provided further," the deed continued, "that said trustee is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah

Vick, during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control said property for the benefit of all concerned: said Henry W. Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and apply the proceeds to the payment of the debt due to the trustee of the Bank of the United States; or, if the said debt is paid, the proceeds of the debt to be reinvested and be subject to the trusts of this deed." Provision is then made for applying a fund due to her from property in the hands of Colonel Durden, held by him in trust for creditors of Colonel Vick, to the payment of certain debts due from Henry W. Vick, but, it is added, "all the debts (aforesaid) to be paid by Colonel Vick, if he is able to do so, and it is only in case he is not able that it is to be paid out of said fund; provided, further, that said property is always to stand charged for the payment of such amount for the liberal support and maintenance of the said Henry W. Vick during his natural life." The concluding clause in the deed is as follows: "My intention is, that said Henry W. Vick shall be regarded for the purposes of this deed, not merely as an agent, but also a co-trustee, and I desire he may be required to give no security for the performance of his duties, and the said Jonathan Pearce is not in any manner to be responsible for the acts or conduct of said Henry W. Vick."

Henry W. Vick carried on the business of the plantation until he died in 1861, when Pearce, as trustee, took possession of the trust property; Mrs. Vick, having previously died, leaving no issue surviving her, except Mrs. Phelps, one of the appellees.

Hewitt, Norton, & Co., commission-merchants in New Orleans, claim a balance due to them from Pearce, as trustee, of $7,631.16, which they insist is a charge in equity upon the trust estate. From statements of the account, contained in the bill and amendments and exhibits, it appears that the whole of this balance resulted from transactions with H. W. Vick, while conducting the business of the plantation, prior to April 25, 1861. In a petition addressed by Pearce to the judge of the Probate Court of Washington County, Nov. 28, 1865, and made

an exhibit to the original bill, he states those transactions as resulting in a balance of $6,145.99, due to the appellants, which, with $4,231.82, accruing from transactions with himself as trustee, make $10,377.81, the amount of the balance of the account which they state as due them June 30, 1862. The subsequent credits were all for moneys received from Pearce, and reduced the balance, Oct. 3, 1866, to the amount claimed in the bill, being less than the amount due at the death of Vick, with interest added. This analysis of the accounts shows that the whole claim is covered by the transactions with Vick, and is not embraced in those had with Pearce, all the debts incurred by the latter being cancelled by payments made by him. It is alleged, however, that the balance due at Vick's death was carried forward in account with Pearce as a charge against him, with his consent and approval; and that when he took possession of the trust estate he received and used for the benefit of the estate, clothing, provisions, and other supplies which had been furnished or paid for by the firm upon Vick's orders; and it is charged in the bill "that all the items charged in your orators' said account for money loaned and supplies furnished were necessary and proper under the deed of Sarah Vick, and the said money and supplies were applied to the use and benefit of the trust estate, and upon a settlement of the accounts of the said Jonathan Pearce he would have had the right to charge the same against the said estate, and the balance due to him by said estate would have been and would now be, equal in amount to the debt now claimed by your orators," &c. It is also alleged that Henry W. Vick, at the date of the deed, was a man of no means, property, or credit; that he continued in the same condition until his death; and that Pearce, when he took possession, was in the same financial condition, and a resident citizen of the State of Kentucky.

At the death of Mrs. Vick her daughter, now Mrs. Phelps, was unmarried and a minor, and Jonathan Pearce became her guardian. On Nov. 28, 1865, he filed his final account as guardian and trustee in the Probate Court of Washington County, showing a balance due to the estate from him of $2,939.40, and reporting, as heretofore stated, the account

between himself, as trustee, and the appellants. His account as guardian was settled by an order of the court in January, 1866, and he received credit for an allowance by way of compensation for his services in excess of the balance due from him. It is charged in the bill that at this settlement Pearce admitted the balance to be due to the appellants as claimed, and that he surrendered possession to Phelps and wife upon an understanding and agreement with them that the debt should be paid out of the cotton crop then growing on the lands.

It is manifest that the deed of trust from Mrs. Vick to Jonathan Pearce does not confer upon him or upon Henry W. Vick any power to charge the estate directly with the payment of any sums of money for any purpose whatever, with the single exception of a personal support and maintenance for the latter. The grantor charges it with the payment of certain specified obligations, and there is no evidence of an intention to permit it to be incumbered by the trustee or by Vick.

It is to be noted also that Jonathan Pearce is a trustee merely of the title, without any active duties in regard to the estate. The power to sell or exchange during his own lifetime the grantor reserves to herself, and after her death directs that it be exercised solely by her husband surviving her. All powers to superintend, possess, manage, and control the property are conferred exclusively upon Henry W. Vick, "as agent for said trustee and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death;" but to be regarded for the purposes of this deed, not merely as an agent, but also as a co-trustee. "And the said Jonathan Pearce is not in any manner to be responsible for the acts or conduct of said Henry W. Vick." So that, while Pearce was trustee of the title merely, Vick was a co-trustee, having no title or estate in the property, but charged with all the active duties of management. After the death of Mrs. Vick, Pearce's sole duty in regard to the trust estate was to convey the title to the surviving children. By these provisions the power of either to create a charge upon the trust estate seems to be effectually excluded.

It follows also from these provisions of the deed of trust, and the facts recited as to the origin and nature of the appellants'

account, that no equitable charge against the estate can be established through the supposed liability of Pearce. It is quite plain that he was never personally answerable for the obligations created by Vick, and his alleged assumption of the account may be rejected as incompetent to create any such liability upon his part. Neither his admission nor that of the appellees could, in contemplation of law, create any charge upon the estate; and, as trustee, he could not establish it as necessary to his own exoneration.

The appellants, then, can reach the estate only, if at all, through their claim against Vick. For this purpose he may be regarded as an independent trustee, authorized to do whatever was necessary and proper in the performance of his duty to superintend and manage the trust property. He was undoubtedly personally bound for all his contracts made in that character. The question is, Does his insolvency create an equity in behalf of the appellants, to reach the estate, for the benefit of which the advances are admitted to have been made?

On this point the law prevailing in Mississippi, and governing the case, was well declared, we have no doubt, by the Supreme Court of that State in *Norton* v. *Phelps*, 54 Miss. 467, 471: "In the case of *Clopton* v. *Gholson* (53 id. 466) we announced the principles applicable to this case. These are, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But, while this is the rule, there are exceptions to it; and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery."

The ground and reason for this rule are, that the trustee has an equity of his own, for reimbursement for all the necessary expenses to which he has been put in the administration of his

trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee, upon a principle of equitable substitution or attachment, for his own security. It would not apply against the trust estate in this case for the enforcement of a debt created by Vick, for the reason that he had no title to the property; but adopting it and applying it as though he had, it is equally plain that the appellants have established no right to the relief prayed for. What, at the time of his death, may have been the state of the account between the trust estate and Henry W. Vick does not appear. There is no allegation on the subject in the record. For aught that appears, he may have had in his hands means enough belonging to the estate to satisfy all demands against it; he may, indeed, have been largely in debt to it. The case, in any of its aspects, clearly is not within the rule; and the effort to reach the estate through Pearce, instead of Vick, for the reasons already stated, must fail.

These are the grounds upon which the Circuit Court proceeded in the decree complained of. We find no error in the record, and the decree is accordingly

Affirmed.

HAUSELT *v.* HARRISON.

A. entered into a written contract with B., whereby, in consideration of moneys advanced by the latter for the purchase of skins, he agreed that he would tan, finish, and deliver them to B. B., in consideration of a commission on sales, and a further percentage to cover insurance, storage, and labor, agreed to sell them, and put the proceeds, less his commissions and advances, at the disposal of A. It was further agreed that all the skins, whether green, in the process of tanning, tanned, or tanned and finished, should be considered as security for refunding the moneys advanced. The business was, for about six months, carried on until A. became unable, from sickness and financial embarrassment, to proceed with it, and he was then indebted to B., who was aware of his condition. They, in order to carry out the first contract, entered into another, whereby B. was to take possession of A.'s tannery, and run and use it with such materials there as would be necessary to finish and complete the skins, and sell them, the net proceeds to be put to the credit of A. after

deducting advances and expenses. A., four days thereafter, filed his petition in bankruptcy. B. took possession of the tannery, and A.'s assignee in bankruptcy brought replevin for the skins. *Held*, 1. That A. had not an unqualified property in them, but they were subject to a charge in the nature of a mortgage in favor of B., which was binding on the parties and A.'s assignee in bankruptcy. 2. That the second contract was not fraudulent, within the meaning of the bankrupt law.

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

The facts are stated in the opinion of the court.

Mr. Lewis Sanders for the plaintiff in error.

Mr. M. F. Elliott and *Mr. H. C. Parsons* for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action of replevin, brought Feb. 20, 1875, by Jefferson Harrison, assignee in bankruptcy of Edward Bayer, against Charles Hauselt and Charles Korn, to recover possession of certain tanned skins, part finished and part unfinished, and bark, which, it is alleged, had been transferred by Bayer to them, in fraud of the bankrupt law. There was a judgment in his favor, to reverse which this writ of error is prosecuted.

Bayer, who, upon his own petition, filed Nov. 10, 1874, was adjudicated a bankrupt Jan. 18, 1875, owned and was possessed of a tannery at Tioga, Pa., at which he had been conducting the business of a tanner; and Hauselt was a leather-merchant in New York.

On the day of its date, they entered into an agreement in writing, as follows: —

"Articles of agreement entered into this twenty-ninth day of May, 1874, between Edward Bayer, of Brooklyn, New York, party of the first part, and Charles Hauselt, of New York City, party of the second part, witnesseth: —

"In consideration of certain moneys advanced, at the rate of seven per cent per annum, to the party of the first part, for the purchase of veal and kip skins to be tanned, curried, and finished by one Charles Korn, the party of the first part hereby agrees to send all the skins so tanned, curried, and finished by the said Charles Korn, said skins to be labelled and stamped with a label and stamp

bearing the name of said Charles Korn, the skins to be in every way so finished as those now known in the New York market as the 'Korn skin,' exclusive to the party of the second part, he being sole agent for the so-called 'Korn skin' in the United States, in consideration of a commission of five per cent of proceeds of all sales and a further one per cent to cover fire insurance, storage, and labor; the said party of the second part agrees to sell all such skins to be sent him at the best market prices, the wholesale or case price only to be taken as an average in account sales, small sales to be taken to own account at same price; the party of the second part further agrees to place all proceeds of sales of said skins, after deduction of aforementioned commission and advances for the purchase of veal and kip skins, at the disposal of the party of the first part, for his own use and benefit.

"And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced by the party of the second part, and that all the skins shall be insured for their full value in good companies only.

"Signed, sealed, and delivered on the day and year above written.

"EDW'D BAYER.
"CHARLES HAUSELT,
By E. HAUSELT, *Att'y.*

"Witness:
"FREDERICK E. SHEARER."

The business contemplated by this contract was carried on, according to its terms, until Nov. 6, 1874. During that time Hauselt had made large cash advances and had received some tanned hides, but on that date was largely in advance, in excess of receipts, and in excess of the value of the property replevied. Bayer, having become broken in health and financially embarrassed, informed Hauselt of his condition, and that, in consequence, he could proceed no further in the execution of the contract between them, and could not otherwise repay his advances. Thereupon the parties entered into the following agreement: —

"This agreement, made the sixth day of November, 1874, between Edward Bayer, of the city of Brooklyn, State of New York, party of the first part, and Charles Hauselt, of the city, county, and State of New York, party of the second part, witnesseth: —

"That whereas an agreement was entered into by the parties hereto on the twenty-ninth day of May, 1874, whereby the party of the first part was, among other things, to tan, finish, and deliver to the party of the second part veal and kip skins purchased in the raw by moneys advanced by the party of the second part; and whereas the party of the first part has become ill and physically unable to complete the tanning and finishing the skins now on hand at the tannery of the party of the first part, and in order that said contract or agreement may be carried out, it is hereby agreed, and the party of the second part is hereby authorized to take immediate possession and sole control of tannery, buildings, and outhouses connected therewith, of the party of the first part, in Tioga Township, Pennsylvania, and run and use the same, together with such of the materials on hand as may be necessary to finish and complete said skins now on hand in said tannery, &c., and to take possession of and sell said skins in any state as may be to the best advantage of the parties hereto, all sales guaranteed by the parties of the second part, the net proceeds of all said sales to be passed to the credit of the party of the first part, after deducting advances and expenses of finishing said skins as per the terms of said agreement.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"EDW. BAYER. [SEAL.]
"CHARLES HAUSELT. [SEAL.]
"T. H. BRORMAN, *Att'y.*

"Signed, sealed, and delivered in the presence of
"C. H. SEYMOUR."

In pursuance of this arrangement, Hauselt immediately took possession of the tannery and held the property replevied at the time this action was brought.

It may be assumed that at the date of the second contract Hauselt had knowledge of Bayer's insolvency and of his intention immediately to file his petition in bankruptcy.

The court below charged the jury, in substance, as follows: That the property in the skins purchased by means of the advances under the contract of May 29, 1874, was in Bayer; that Hauselt had no right to the possession of them at any time while they were in the process of manufacture; that the only security given by the contract was the personal obliga-

tion of Bayer to consign them to Hauselt for sale, when the manufacture was complete; that the contract of Nov. 6, 1874, and the possession delivered and taken in pursuance of it, was a transfer, to which Hauselt was not entitled, and constituted a preference within the meaning of the bankrupt law; that if it was made to make and obtain payment of the whole of the debt to Hauselt, Bayer being in fact insolvent, and Hauselt having reasonable cause to believe him to be so, the transaction was fraudulent and void, and the verdict should be for the plaintiff.

These charges were duly excepted to and are now assigned for error.

Notwithstanding the differences between the contract of May 29, 1874, and that considered in *Powder Company* v. *Burkhardt* (97 U. S. 110), it must be conceded that the legal title to the skins purchased with the money advanced by Hauselt vested in Bayer. But it was not an unqualified property. We cannot agree with the Circuit Court in the construction, that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligation to deliver the skins when tanned would still remain. The clause providing for security must be held to mean something; and it declares that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale, shall be considered as security.

It was decided in *Gregory* v. *Morris* (96 U. S. 619) that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.

Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins,

whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement.

"Indeed," says Story (Eq. Jur., sect. 1231), "there is generally no difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice. For it is a general principle in equity that, as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

If, in consequence of his bankruptcy, the property had come into the possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him. *Cook* v. *Tullis*, 18 Wall. 332. In *Yeatman* v. *Savings Institution* (95 U. S. 764) it was held to be an established rule that, "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title, subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. . . . He takes the property in the same 'plight and condition' that the bankrupt held it. *Winsor* v. *McLellan*, 2 Story, 492." In *Stewart* v. *Platt* (101 U. S. 731), it was held that, although the chattel mortgages, involved in that litigation, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the parties.

Mr. Justice Harlan, delivering the opinion of the court, said: "The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. . . . The latter [the assignee] representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee."

It follows that, Bayer becoming a bankrupt while in possession of the skins purchased, and in the tannery, under the contract of May 29, 1874, if his assignee in bankruptcy had taken possession of them, he would have done so, subject to the terms of that contract; and Hauselt would have had the right to require, either that he should perform the contract to its termination, so far as the skins then on hand were concerned, by finishing them, and forwarding them for sale; or that he should surrender possession to Hauselt, under some arrangement, mutually beneficial, whereby the enterprise might be wound up, under his management, such as that actually made by Bayer, on Nov. 6, 1874; or if the assignee sold the property in the condition in which he received it, that he should account to Hauselt specifically for the proceeds of the sale, and recognize him as a creditor for the remainder of his advances, not thereby refunded.

Such being the mutual rights of the parties, the transaction of Nov. 6, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauselt the benefits of the contract of May 29, 1874, was legitimate, and did not constitute, as was held by the Circuit Court, an unlawful preference in fraud of the bankrupt law. It is quite true that Hauselt could not have compelled Bayer, by an action at law, to deliver to him possession of his tannery and its contents; nor could he have recovered possession of the skins, tanned or untanned, by force of a legal title; but it is equally true that, in equity, he could, by injunc-

tion, have prevented Bayer from making any disposition of the property, inconsistent with his obligations under the contract; and upon proof of his inability or unwillingness to complete the performance of his agreement the court would not have hesitated, in the exercise of a familiar jurisdiction, to protect the interests of Hauselt, by placing the property in the custody of a receiver for preservation, with authority, if such a course seemed expedient, in its discretion, to finish the unfinished work, and ultimately, by a sale and distribution of its proceeds, to adjust the rights of the parties.

For these reasons, we think the court below erred in its charges to the jury. The judgment will, therefore, be reversed, with instructions to grant a new trial; and it is

So ordered.

HANNIBAL *v.* FAUNTLEROY.

In a suit upon city bonds, which recite that they are issued to pay its subscription, the validity of which depended on its ratification "by a majority of the taxpayers," the plaintiff offered in evidence, 1, the poll-books of an election held for that purpose and to elect city officers, for whom no person other than a taxpayer could lawfully vote, and which contain the name of every voter, with the record of his vote on the question, and show a majority of votes cast in favor of the ratification; 2, the proceedings of a meeting of the city council, whereat that fact was shown to their satisfaction by the certificate of the officers of the election, and the bonds ordered to be issued. *Held*, that the offered evidence is competent, and that the plaintiff was not bound to sustain the record by proof that each person voting was thereunto lawfully entitled.

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. Chester H. Krum, with whom was *Mr. J. M. Krum*, for the plaintiff in error.

Mr. James Grant for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action brought by Fauntleroy, the defendant in error, a citizen of Virginia, against the city of Hannibal, a

municipal corporation of Missouri, to recover the amount of principal and interest alleged to be due on certain bonds and coupons. The bonds are dated April 1, 1858, for $1,000 each, and are payable twenty years after date to A. O. Nash, auditor of said city, or bearer, at the American Exchange Bank, New York, for value received, without defalcation, with interest at the rate of ten per cent per annum, payable semi-annually, on the first day of October and April in each year, upon presentation of the annexed coupons severally, until the payment of the principal sum. They purport on their face to have been issued by the city to pay calls on subscription for stock in the Pike County Railroad, Illinois. They contain no other recitals. They were issued, it is claimed, under the authority of an act of the legislature of Missouri, passed Feb. 27, 1857, to amend the charter of the city, the third section of which reads as follows: —

"SECT. 3. Said city council shall have power to subscribe for and take stock in any railroad terminating at the city of Hannibal or upon the bank of the Mississippi River opposite to said city in the State of Illinois. But before such subscription shall be valid, it shall be ratified by a majority of the taxpayers, at a poll to be opened for that purpose."

The second section of the same act provides that "said council shall also have power to borrow on the credit of the city and to pledge the revenues and public property for the payment thereof; but a greater rate of interest than ten per cent shall not be paid on any sum borrowed, unless two-thirds of the qualified voters of said city, at polls to be opened for that purpose, shall instruct the payment of a greater rate."

It is, therefore, not denied that the bonds are binding obligations upon the municipal corporation, provided the subscription to the stock of the Pike County Railroad, in payment of which they were issued, was lawfully made; and no question is made as to the validity of this subscription, except that it was not ratified, as is claimed, by a majority of the taxpayers, in accordance with the provisions of the third section of the amended charter.

It appears that, at a called meeting of the city council

of the city of Hannibal, held on Oct. 22, 1857, an ordinance was duly passed authorizing and directing the subscription of $100,000 stock in the Pike County Railroad, as follows: —

"Be it ordained by the city council of the city of Hannibal, as follows: —

"SECT. 1. That the mayor of the city of Hannibal be, and is hereby, authorized and directed to subscribe for and take for the city of Hannibal, one hundred thousand dollars stock in the Pike County Railroad, having its western terminus on the bank of the Mississippi River, at a point in the State of Illinois opposite the city of Hannibal, within a one-half mile of the western terminus of Suy Carty Plank Road; said stock to be paid for in the bonds of the city of Hannibal at their par value, which bonds are to be made payable not exceeding twenty years from the date of their issue, and are to bear ten per cent interest per annum, payable semi-annually.

"SECT. 2. That the mayor be, and is hereby, directed to cause a poll to be opened in said city of Hannibal for the purpose of obtaining the ratification of the foregoing said subscription of one hundred thousand dollars stock in said Pike County Railroad by the taxpayers of said city of Hannibal, in accordance with the provisions contained in the third section of an act passed by the General Assembly of the State of Missouri, entitled 'An Act to amend the charter of the city of Hannibal,' approved February 27th, 1857.

"SECT. 3. This ordinance to take effect from and after its passage."

On the trial of the cause in the Circuit Court, the plaintiff, recognizing his obligation to prove affirmatively that the bonds in question had been issued under the authority of the law, introduced in evidence the poll-books of an election held at voting places in the three wards of the city, on the first Monday (the second day) of November, 1857, for the purpose of electing a mayor, marshal, recorder, and attorney for said city, three councilmen for each ward, and for the ratification of the subscription of $100,000 of stock in the Pike County Railroad. These poll-books contain the name of every voter, with a record of his vote, whether for or against ratification, and are authenticated by the certificate of the

judges and clerks of the election, stating the result, and specifying in their return, under the head "for ratifying the subscription of $100,000 stock in Pike Co. Railroad," the number of votes cast in favor of and against the ratification. The result as shown by these poll-books, in the aggregate, was that three hundred and sixteen votes were cast in favor of, and thirty-two against, the ratification. At a called meeting of the city council of the city, on Nov. 4, 1857, it is recorded, that the clerk read to the city council the certificate of the mayor and one judge of the election from each ward in the city, whereby it was shown to the satisfaction of the council that at the municipal election held in the several wards on Monday, Nov. 2, 1857, certain persons named therein had been duly elected to the several offices therein specified, and thereupon it was resolved that certificates be made out and delivered to the officers elect, and at the conclusion of the entry upon the record there is the statement, — "for ratification, three hundred and sixteen votes; against, thirty-two votes."

At a regular meeting of the city council on Dec. 7, 1857, it is recorded, that, "on motion of Mr. Dowling, resolved, that the mayor be, and he is hereby, authorized and instructed to issue the bonds of the city to the Pike County Railroad, in accordance with calls on the capital stock made by order of the board of directors, and in pursuance of an ordinance approved October 22d, 1857."

The stock subscribed for was duly issued to the city, and is still held by it; and the corporation has continuously exercised the privileges of a stockholder, though it is admitted that the stock has no pecuniary value.

It was also proven that, in various ways, prior to the institution of this suit, the city had admitted her liability upon these bonds by making arrangements for the payment of coupons as they fell due, receiving them in payment of taxes, permitting judgment to be rendered on account of unpaid coupons, once by consent and once by default; but the city objected to the whole evidence on the ground that it was insufficient to establish such liability, because it failed to show a ratification of the subscription by a vote of a majority of taxpayers at an election called and held for that purpose.

The answer to this objection, however, is found in the provisions of art. 1, sect. 10, of the charter of 1851, of the city (Laws of Missouri, 1851, p. 327), admitted to have been in force at the time, which defined the qualification of voters as follows: —

"SECT. 10. All free white male citizens, who have arrived at the full age of twenty-one years, and who shall be entitled to vote for State officers, and who shall have resided within the city limits at least six months next preceding any election, and, moreover, who shall have paid a city tax or any city license according to ordinance, shall be eligible, and entitled to vote at any ward or city election for officers of the city."

It thus appears that no person could lawfully vote at the election held Nov. 2, 1857, for city officers, except taxpayers; and assuming that the list of names contained in the poll-books as having voted for or against the ratification of the subscription to the stock in the Pike County Railroad are those of the same persons who voted for city officers, it follows that they must all have been taxpayers, on the presumption, which certainly must be applied, that they were all legally entitled to vote.

It is argued that the legislature used the word "taxpayers," in the third section of the act of 1857, in a sense designedly differing from that of "qualified voters," in the second section, who are to decide upon the question of the rate of interest on money borrowed in excess of the ten per cent per annum. We see no evidence, however, of such an intention. On the contrary, that supposition would necessitate the conclusion that by the word "taxpayers" the legislature meant to include persons not otherwise qualified to vote; for example, not free white male citizens, minors, women, married and unmarried, and non-residents. The reasonable interpretation is, that the question of ratifying the subscription should be submitted to the vote of the taxpayers of the city, having the qualification otherwise of lawful voters; and this included, as we have seen, all the qualified voters of the city.

To allow the present objection to prevail would require the plaintiff, not only to show that the persons voting to ratify the

stock subscription were all taxpayers, but also that they had all the other requisite qualifications of persons entitled by law to vote. In our opinion, the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial, that the corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters. Whether each voter was lawfully such, was a question in the first place, in the present case, for the judges of the election, who were appointed under the law, for the express purpose of receiving and deciding upon their votes; and, in the second place, for the city council, to whom the official return of the election and of its result was made, as required, and who were authorized to act upon that result as certified to and verified by themselves, in the very matter of consummating the subscription, which was the subject of the vote. It would be impracticable for any purchaser of the bond, put on inquiry, as to the authority of the city council to make the issue of the bonds in question, to make inquisition into the facts of the election, beyond these returns and records; and it is but reasonable to permit him safely to rest his rights upon them, as they appear. They show the fact, that the subscription to the railroad stock was ratified by a majority of the voters, presumed to be qualified to vote, because permitted by the authorities controlling the election to do so, at an election held for the purpose, among other things, of deciding that question; and that fact constitutes the condition on which the authority to issue the bonds, by law, depends, and is the guarantee of their validity.

Judgment affirmed.

UNITED STATES *v.* EMHOLT.

1. At the hearing in the Circuit Court of an appeal from the District Court, the district judge who rendered the decision appealed from cannot, under sect. 614 of the Revised Statutes, give a vote, even by consent of parties, when another judge is present; and the case cannot be brought to this court upon a certificate of division of opinion between him and the other judge.
2. An information for a forfeiture under the internal revenue laws cannot be brought from the Circuit Court to this court by appeal.

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

This was an information, for the forfeiture of the right, title, and interest of Severin Schulte in certain real estate on which he carried on the business of a distiller, without having given bond as required by law, and with intent to deprive the United States of the tax on the spirits distilled by him.

In the District Court, held by Judge Bunn, Bernard Emholt and Eliza Bergener appeared and answered as claimants of the real estate under mortgages from Schulte. Upon the trial it was found by special verdict that Schulte was guilty as charged in the information, and that he held the legal title to the real estate, subject to a mortgage to each of the claimants; judgment was given that the mortgages constituted no lien or incumbrance against the United States, and that all the real estate be forfeited; and the claimants appealed to the Circuit Court.

In the Circuit Court, held by Mr. Justice Harlan and Judge Bunn, the judgment was reversed; and a certificate, signed by Mr. Justice Harlan only, was entered of record, stating that the hearing upon the special verdict found in the District Court was, by consent of parties, had before the circuit justice and the district judge, and that they were divided in their opinion on the question whether, upon the facts found in the special verdict, the United States was entitled to judgment forfeiting the property described in the information to the use of the United States, except subject to the interest and claim of the claimants, as set out in their answers.

From the judgment of the Circuit Court the district attor-

ney, on behalf of the United States, claimed an appeal to this court, which was allowed.

The Solicitor-General for the United States.
Mr. George C. Hazelton and *Mr. S. U. Pinney*, *contra.*

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

This court has no jurisdiction of the question certified. The office and object of a certificate of division of opinion are to bring to this court for determination a question of law upon which the opinions of two judges, competent to take part in the judgment of the Circuit Court, are opposed to each other. By the provisions of sect. 4 of the act of Sept. 24, 1789, c. 20, and of sect. 5 of the act of April 29, 1802, c. 31, re-enacted in the Revised Statutes, sect. 614, upon the hearing in the Circuit Court of an appeal from a judgment of the District Court, the district judge who rendered the decision appealed from, although he may, for the information of the Circuit Court, assign his reasons for that decision, is prohibited from voting or taking part in the judgment of the Circuit Court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified. The provision of sect. 2 of the act of March 2, 1867, c. 185, also incorporated in the same section of the Revised Statutes, which, in order to prevent failure or delay of justice, permits such a case, by consent of parties, to be heard and disposed of by the district judge when alone holding the Circuit Court, has no application when another judge is present. And the provisions of sect. 6 of the act of April 29, 1802, c. 31, and of sect. 1 of the act of June 1, 1872, c. 255, embodied in sects. 650, 652, 693, 697, of the Revised Statutes, do not enlarge the authority of the district judge in this respect. It necessarily follows that the case cannot be brought to this court upon a certificate of division of opinion between the judge who is qualified and the judge who is disqualified to take part in the judgment. *United States* v. *Lancaster*, 5 Wheat. 434; *Nelson* v. *Carland*, 1 How. 265.

The case cannot be treated as before this court on the appeal from the Circuit Court, without regard to the certificate of division, because it is on the common-law side of that court.

If it is to be considered as a civil action, the proper mode of bringing it up is by writ of error, and not by appeal. *Bevins* v. *Ramsey*, 11 How. 185; *Jones* v. *La Vallette*, 5 Wall. 579. If, according to *Clifton* v. *United States* (4 How. 242, 250), it should be treated as in the nature of a criminal proceeding, it is hard to see how it could be brought to this court at all, except upon a certificate of division of opinion. *Ex parte Gordon*, 1 Black, 503.

Neither the consent of parties nor the allowance of the appeal in the court appealed from can enable this court to review the judgment of that court in any other form of proceeding than the law prescribes. *Kelsey* v. *Forsyth*, 21 How. 85; *Callan* v. *May*, 2 Black, 541.

This court having no jurisdiction of the case, the appeal must be dismissed, and the case

Remanded to the Circuit Court.

HITCHCOCK v. BUCHANAN.

1. A bill of exchange, headed "Office of Belleville Nail Mill Co.," and concluding, "charge same to account of Belleville Nail Mill Co., A. B., Pres't, C. D., Sec'y," is the bill of the company, and not of the individual signers; and a declaration thereon against the latter as drawers, setting forth the instrument, and alleging it to be their bill of exchange, is bad on demurrer.
2. A statute prohibiting defendants, in an action upon a written instrument, from denying their signatures, except under plea verified by affidavit, does not apply to a case in which they demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves.

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

This was an action of assumpsit by Hitchcock as indorsee, against Buchanan and Waugh as drawers, of the following bill of exchange: —

"OFFICE OF BELLEVILLE NAIL MILL CO., BELLEVILLE, ILLS.,
"$5,477.13. Dec. 15th, 1875.

"Four months after date, pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dol-

lars, value received, and charge same to account of Belleville Nail Mill Co.

"WM. C. BUCHANAN, *Pres't.*
"JAMES C. WAUGH, *Sec'y.*

"To J. H. PIEPER, *Treas.*, Belleville, Illinois."

The declaration alleged that the defendants, on the 15th of December, 1875, "at the office of Belleville Nail Mill Co., Belleville, Ills., made their certain bill of exchange" (describing it), and, after it had been accepted by the drawee, delivered it to the payee therein named, and he indorsed it to the plaintiff, and the bill at maturity was presented for payment, and payment refused, and the bill protested for non-payment, and the defendants, knowing that it would not be paid by the acceptor, had omitted to provide funds for its payment. A copy of the instrument above set forth, and of the acceptance and indorsement thereon, was filed with the declaration.

The defendants, after oyer craved and had, severally filed general demurrers to the declaration, which were sustained by the Circuit Court, and judgment given for the defendants, on the ground that the instrument declared on was the bill of exchange of the Belleville Nail Mill Company, and not the bill of the defendants.

Mr. Thomas G. Allen for the plaintiff in error.
Mr. C. W. Thomas for the defendants in error.

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

The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all these signs of being the contract of the principal cannot be held to bind the agents personally. *Sayre* v. *Nichols*, 7 Cal. 535; *Carpenter* v. *Farnsworth*, 106 Mass. 561, and cases there cited.

The allegation in the declaration, that the defendants made "their" bill of exchange, is inconsistent with the terms of the

writing sued on and made part of the record, and is not admitted by the demurrer. *Dillon* v. *Barnard*, 21 Wall. 430; *Binz* v. *Tyler*, 79 Ill. 248.

The provision of the statute of Illinois (ed. 1877, title Practice, sects. 34, 36) prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer, and the only issue is one of law.

Judgment affirmed.

UNITED STATES *v.* RINDSKOPF.

1. The court condemns the practice of setting out in the bill of exceptions the entire charge of the court below, instead of confining it to such parts as are the subject of exception.
2. Suit on a distiller's bond, the breach assigned being his non-payment of the tax due on a specified number of gallons of spirits alleged to have been distilled at his distillery between certain dates. *Held*, that *prima facie* proof of his liability is furnished by the assessment of the Commissioner of Internal Revenue; but it may be overcome by evidence showing either that the tax was paid, or that the whole or a part of the spirits in question was not distilled, within the period mentioned.
3. The point in controversy being as to the quantity of spirits produced upon which the tax was not paid, the court below erred in charging the jury that the assessment must stand as an entirety or be wholly rejected.

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

This is an action against Lewis Rindskopf, the principal, and Raphael Reichmann and Elias Rindskopf, sureties, on a distiller's bond for $7,000, executed March 23, 1875. The principal was then engaged in the business of a distiller within the first collection district of Wisconsin. The condition of the bond provided, among other things, that he should "comply with all the provisions of law in relation to the duties and business of distillers." The complaint alleges as a breach of these conditions the non-payment of the tax due on 3,640 gallons of spirits distilled by him at his distillery between the 25th of April and the 1st of May, 1875, amounting to $3,276. It also alleges that the Commissioner of Internal Revenue assessed the tax

against him on the special list for October of that year; and that the assessment was returned to the collector of the district, who demanded payment of the tax, which was refused.

The answer contained a general denial, and also set up as a special defence that on the 1st of November, 1875, the Commissioner of Internal Revenue made an assessment upon the distiller to the amount of $7,117.70, for spirits alleged to have been manufactured at his distillery in the month of April, 1875, and removed therefrom without payment of the tax thereon, and with intent to defraud the government; that this assessment was returned to the collector of the district, who demanded payment of the tax; that afterwards, in May, 1876, the plaintiffs brought a suit in equity to enforce its collection; that the distiller was served with process and answered the complaint, averring that the assessment was illegal and void; that that suit was still pending; and that the assessment mentioned in the complaint here was upon the same spirits for which the above assessment of $7,117 was made.

A supplemental and amended answer repeated these allegations, and added that the equity case was heard in April, 1879, when the assessment was adjudged to be illegal, and the bill dismissed. The answer pleads the decree entered in bar of the present action.

The case was tried at the January Term of the court in 1880. There is no statement of the evidence or of its purport in the record, except as appears in the charge given to the jury. The bill of exceptions states that the plaintiffs offered evidence tending to maintain the issues on their part, "as is generally stated in the charge of the court hereinafter contained;" and that the defendants offered evidence tending to maintain the issues on their part, "as is in like manner stated in the charge of the court." Then follows the charge at length, at the end of which particular parts of it are indicated to which exceptions were taken, and among others the following: "To all that portion of said charge which defines and sets forth the legal force and effect of an assessment, and the means whereby it may be attacked and overcome; to all of that portion of said charge which touches the entirety of the assessment and affirms that the plaintiffs must recover the exact amount of the assess-

ment or nothing." That portion of the charge to which reference is thus made is found in different passages, which are as follows: After speaking of the power of the Commissioner of Internal Revenue to make an assessment, the court said:—

"When, therefore, an assessment has been made by this officer, it is to be presumed, until such presumption is overcome by proof to the contrary, that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the commissioner acted should be laid before the jury. In other words, the jury have a right to presume until the contrary appears that when the commissioner made the assessment in question he had before him proofs which were sufficient to satisfy a just and fair-minded person that such assessment ought to be made; and before the jury can disregard the assessment they should be convinced by the evidence that the commissioner acted in making it in a manner unjust to the defendant distiller, and unwarranted by the actual facts. Such an assessment is not, however, conclusive evidence of the liability of the distiller; it is open to attack; it is *prima facie* proof only of such liability, and *prima facie* evidence is such evidence as is sufficient when unassailed to establish a given fact, and it remains sufficient for that purpose until it is rebutted and overcome. . . . Upon introduction of the assessment in evidence a *prima facie* case of liability on the part of the defendant Lewis Rindskopf is made. The burden of proof then falls upon the defendants, who may proceed to introduce evidence to overcome the assessment by showing that the defendant Lewis Rindskopf did not, during the period covered by the assessment, manufacture and remove from his distillery spirits upon which the tax was not paid.

"And upon it being so made to appear, the burden of proof then shifts to the plaintiffs, and it then becomes incumbent on the plaintiffs to maintain and establish the correctness of the assessment by sufficient and competent evidence. . . . The order of proof which has been maintained upon the trial is in consonance with the rules of law applicable to such a case, which have just been stated."

And, after commenting upon the general character of the evidence in the case, the court further said:—

"In passing upon the validity of this assessment, and in determining the question of liability on account of it, it is to be taken and considered in its entirety: Either the government is entitled to recover the exact amount of the assessment, namely, the sum of $3,276, or it is not entitled to recover any sum whatever. The court and jury, upon an investigation of the justness and validity of the assessment, have no right to exercise the powers committed to the commissioner, but our right is limited to an inquiry into the question as to whether the assessment which has been made embraces or represents a just and valid demand against the defendant distiller, and, as the result of such investigation, it must either wholly stand or wholly fall."

In support of the special defence, founded upon the decree in the equity case, that the assessment of November 1 was invalid, the defendants produced the record of the assessment and of the suit, which was admitted in evidence against the objection of the attorney of the government, — the court stating that proper instructions would be given to the jury in relation to the same. No proof was offered that the assessment covered the spirits for which the first assessment was made; and the court instructed the jury that without such proof the record would not be a bar to the prosecution of this action.

The jury found for the defendants, and upon their verdict judgment was entered; to review which the case is brought to this court on writ of error.

The Solicitor-General for the United States.

Mr. Jedd P. C. Cottrill and *Mr. Charles E. Mayer* for the defendants in error.

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

The bill of exceptions in this case sets forth the charge of the court below in full, in disregard of our frequent condemnation of this practice. Only the parts to which the exceptions relate should have been given; all else is unnecessary, and produces only inconvenience. We repeat of this practice what we said of another practice not uncommon, and equally objectionable, — that of inserting the entire evidence in the record:

"If counsel will not heed our admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions." *Lincoln* v. *Laflin*, 7 Wall. 132, 137.

The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; but every material fact upon which his liability was asserted was open to contestation. He and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due. The court, therefore, erred in instructing the jury that the assessment was to be taken and considered in its entirety, and that the government was entitled to recover the exact amount assessed, or not any sum. In other respects the charge, as given above, correctly presents the law.

There may undoubtedly be cases where an assessment must stand as an entirety, or not at all; as where an erroneous rate has been adopted by the officer; or where it is impossible to separate from the property assessed the part which is exempt from the tax; or where its validity depends upon the jurisdiction of the commissioner. The present case does not fall within either of these classes. Here the question is as to the quantity of spirits produced on which taxes were not paid.

The decree in the equity suit was properly held not to be a bar to the prosecution of this action in the absence of proof that the assessment which it adjudged invalid covered the spirits upon which the assessment here was made. The instruction to the jury deprived it of any weight as evidence with them.

Judgment reversed, and cause remanded for a new trial.

MARCHAND *v.* FRELLSEN.

1. Where an order directing the seizure and sale of lands in Louisiana, whereon the vendor retained his lien and privilege, has been made in a proceeding to enforce the payment of an instalment of the purchase-money, and an appeal is taken, the surety on the bond is liable for the claim sued on.
2. The pendency of proceedings on appeal does not render void an order of another court of competent jurisdiction for the seizure and sale of the lands to satisfy a subsequent instalment, nor does the payment of the first bond satisfy that given on appeal from the second order.
3. The application of the proceeds of the sale under the first order to satisfy, pursuant to its requirements, the several instalments *pro rata*, does not discharge the surety from the payment of the unpaid balance, for which he was otherwise liable.

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

On Dec. 31, 1863, Frellsen sold to Fairex a plantation in St. Charles Parish, in the State of Louisiana, for the consideration of $133,000, of which Fairex paid $3,000 in cash, and the residue he agreed to pay in annual instalments, bearing interest and falling due respectively on the first day of May in every year for eleven years. He executed and delivered to Frellsen his promissory notes for the principal of these deferred payments, and also notes for the interest to accrue thereon. In the authentic act by which Frellsen conveyed the property to Fairex he reserved his vendor's privilege.

On May 19, 1869, Frellsen applied to the Seventh District Court of the Parish of Orleans for an order of seizure and sale, to be directed against the plantation, to satisfy the two notes given for the instalment of the purchase-money which fell due on May 1, 1869, — one for $11,000 principal money, and the other for $5,390 interest. The writ as prayed for was issued, but its execution was suspended by an appeal taken by Fairex to the Supreme Court. The bond for the appeal was in the penalty of $26,000, and Marchand was the surety. The condition of the bond was as follows: "Now the condition of the above obligation is such that the above-bound Daniel Fairex shall prosecute this appeal and shall satisfy whatever judgment

may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said Marchand, surety, shall be liable in his place." The Supreme Court affirmed the order of the Seventh District Court directing the writ of seizure and sale to issue, and gave judgment against Fairex for ten per cent on the amount of the two notes which were the basis of the writ of seizure and sale, on account of his frivolous appeal.

While the appeal was pending, the two notes, one for $11,000, principal, and the other for $4,620, interest, maturing May 1, 1870, became due and were not paid. Thereupon, to satisfy them, Frellsen, on May 18, 1870, obtained from the Fifth District Court for the Parish of Orleans, on his petition, an order of seizure and sale directed against the plantation. On May 26, 1870, Fairex appealed to the Supreme Court from this order, and gave bond with Marchand, as surety, for the appeal in the penalty of $23,000. It was conditioned precisely as that on the former appeal.

Fairex died Aug. 26, 1871, and the administratrix of his estate was made party to the appeal in the Supreme Court.

On Jan. 19, 1874, the Supreme Court made the following decree upon this appeal: "The court, therefore, orders that the plaintiff and appellee recover from the defendant five hundred dollars as damages for a frivolous appeal, and that the appeal be dismissed at the costs of the appellant."

While the appeal from the Fifth District Court was pending in the Supreme Court, that court having affirmed the order of seizure and sale made by the Seventh District Court, Frellsen, on Nov. 28, 1871, applied to the last-named court for an *alias* order of seizure and sale, to satisfy the two notes which matured May 1, 1869, the amount due on which was $16,390. The court directed the writ to issue, and by virtue of it the plantation was sold by the sheriff to Frellsen, the original vendor, for $40,000. This sum, by order of the court, was applied *pro rata* on all the notes for the purchase-money of the plantation remaining unpaid. After the notes which were the basis of the proceedings in the Fifth District Court were thus credited, there remained due thereon $8,595, and after

the credit was applied to the notes which were proceeded on in the Seventh District Court, there remained due thereon $13,342.

On May 21, 1872, a rule was taken on Marchand in the Seventh District Court to hold him liable upon the bond for the appeal taken from that court. Judgment was demanded against him on the bond for the balance, $13,342, due on the notes which had been proceeded on in that court; and for $1,639, the judgment for damages for the frivolous appeal, rendered by the Supreme Court. Upon the trial of this rule the Seventh District Court entered judgment against Marchand for $1,639, the damages for the frivolous appeal, and for interest and costs, amounting to $1,900, and dismissed the rule as to the residue of Frellsen's demand. Marchand paid, Dec. 3, 1873, the sum of $1,900, which he was condemned to pay, and it was accepted by Frellsen in full satisfaction of the judgment rendered as aforesaid.

After all these proceedings, on May 8, 1876, a rule in the Fifth District Court was taken against Marchand by Frellsen, who alleged that on the demand upon which he had obtained the order for seizure and sale in that court, a balance of $8,595 was due, with interest at the rate of eight per cent per annum from Feb. 3, 1872; that the property, subject to executory judgment, had been sold pursuant to an order and judgment of the Seventh District Court; that Fairex had no other property which could be found by the sheriff to satisfy the demand; and that he was dead and his estate insolvent. Marchand was required to show cause why he should not be condemned, by reason of his suretyship on the bond for the appeal from the order of seizure and sale made by that court, to pay that balance with interest, and $500, the damages adjudged for a frivolous appeal. This suit was removed by Marchand to the Circuit Court of the United States for the District of Louisiana, where the rule was made absolute, and judgment rendered against him for $8,595, with interest thereon, and also for the sum of $500, the abovementioned damages.

This writ of error is prosecuted by Marchand to review that judgment.

The cause was argued by *Mr. Charles W. Hornor* for the plaintiff in error, and by *Mr. Philip Phillips* and *Mr. W. Hallett Phillips* for the defendant in error.

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

The first contention of the plaintiff in error is that the court below erred in the construction which it gave to the appeal-bond executed by him for the appeal taken from the order of the Fifth District Court. He insists that the obligation which he thereby assumed was to pay for the use and detention of the property pending the appeal, just damages for delay, costs of suit, and costs and interest on the appeal, and that he did not bind himself to pay the debt to satisfy which the writ of seizure and sale had been ordered.

We find no warrant for this construction of the bond in the decisions of the Supreme Court of Louisiana, which interpret the articles of the code by virtue of which the bond was exacted.

Bonds for appeal from an order directing a writ of seizure and sale are given by virtue of the provisions of articles 575 and 579 of the Louisiana Code of Practice. *Alley* v. *Hawthorn*, 1 La. Ann. 122; *Cottman* v. *Ratliff*, 20 id. 179; *State, ex rel. Bankhead*, v. *Judge of the Fourth District Court*, 22 id. 116.

These articles are as follows: —

"ART. 575. If the appeal has been taken within ten days, not including Sundays, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and all other proceedings until definitive judgment be rendered on the appeal: *Provided*, the appellant gives his obligation with good and solvent security, residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one-half the amount for which the judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken. . . .

"ART. 579. In the appeal-bond it must be set forth in substance that it is given as security that the appellant shall prosecute his ap-

peal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise, that the surety shall be liable in his place."

It is evident from an inspection of the bond, which is the basis of this suit, that it was given under these articles.

The authentic act whereby Frellsen conveyed the plantation to Fairex, and the latter agreed that the plantation should be subject to the vendor's lien for the payment of the notes given for the purchase-money, imported a confession of judgment in favor of Frellsen by Fairex for the amount of said notes respectively as they severally fell due. When, therefore, Fairex, the mortgagor, appealed from an order of the court directing a writ of seizure and sale to satisfy such of the notes as were then due and unpaid, he suspended the execution of a judgment against him, and the surety on the appeal-bond became bound for the debt. That such is the effect of the bond for appeal in cases of this class has been repeatedly decided by the Supreme Court of Louisiana.

In *Whann* v. *Irwin* (27 La. Ann. 706), that court said: "It is contended that the proceeding against the surety was premature, as only the property mortgaged had been sold under the writ, and no execution had been issued against the judgment debtor, and returned *nulla bona*. If this proposition be correct, to require a bond for an appeal from an order of seizure and sale is an idle form.

"Article 575 of the Code of Practice, and article 37 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued, was issued and returned not satisfied. The requirements of the law were substantially complied with. The surety knew that under the executory process no other property could be sold except that which was included in the mortgage, and when he stopped that by signing the appeal-bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

"By reason of the nature of the judgment no execution could be taken out, after the return of the order of seizure and

sale, which could reach the property of the debtor, and, therefore, the plaintiff had the right to proceed against the surety on the appeal-bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation."

The rule thus laid down was reaffirmed in the case of *Landry* v. *Victor*, 30 La. Ann., Part 2, 1041.

So in *Thompson* v. *Grow*, not reported, it was held that the surety on a bond given for a suspensive appeal from an order of seizure and sale is liable for the amount of the mortgage claim sued on. See Louque's Digest, title Appeal, III. e. 4, p. 39. We have been able to find no conflicting decisions.

This interpretation of the local law and of the construction of bonds executed pursuant to its provisions is binding on this court, and leaves no ground for the contention now under consideration to stand on.

It is next insisted by the plaintiff in error that all the proceedings in the Fifth District Court, in which the bond sued on in this case was given, were absolutely void, and, therefore, that the bond was also void.

The reason for this contention is stated to be that Frellsen having begun his proceedings for seizure and sale in the Seventh District Court on the notes which matured May 1, 1869, the institution of a similar proceeding on other notes of the same series, subsequently falling due, in the Fifth District Court, was an illegal and oppressive act. It is asserted that "all the proceedings in the Seventh District Court were regular and legal, whilst all those in the Fifth District Court were null and void on account of the error produced in the minds of the judges of the Supreme Court and the Fifth District Court by the action of Frellsen in withholding from them knowledge of the pendency of the suit in the Seventh District Court."

It is not disputed that the subject-matter of the proceedings in the Fifth District Court was within its jurisdiction, and that the parties were before it. Its proceedings, therefore, however erroneous, cannot be null and void. In passing upon this point it is only necessary to apply the rule laid down by this court as an axiom of the law, that the validity of a judgment cannot be questioned collaterally for errors which do not affect

the jurisdiction of the court which rendered it. *Cooper* v. *Reynolds*, 10 Wall. 308.

The complaint seems to be this: that in the proceeding in the Fifth District Court, Frellsen, on whose appeal-bond Marchand became surety, had a good defence against the order or judgment rendered in that case, if he had only taken the trouble to make it. But the fact that he did not make it, and that his antagonist did not make it for him, does not render the judgment void, the court having unquestioned jurisdiction to make orders for seizure and sale, and the mortgagor being present in court to resist it.

It is further insisted that the payment by Marchand of the judgment for $1,900, rendered against him by the Seventh District Court upon the appeal-bond given for the appeal from the order of that court, is also a satisfaction of any claim on the appeal-bond signed by him in the Fifth District Court for the appeal from the order of that court allowing the writ of seizure and sale for the satisfaction of other notes of Fairex.

If, as decided by the Supreme Court of Louisiana, the appeal-bond in such cases is a security for the payment of the notes on which the application for the order of seizure and sale is based, it is plain that the satisfaction of a bond for an appeal on one note cannot be a satisfaction of another bond for another appeal on a different note. Each note is a separate cause of action, and the satisfaction of one does not necessarily imply the satisfaction of another.

Lastly, article 3061 of the code of 1870 is relied on for a reversal of the judgment below.

That article declares, "The security is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety."

The defence founded on this article is thus set forth in the answer filed by Marchand to the rule taken on him in the Fifth District Court: "Said plaintiff has by his acts made it impossible and placed it beyond the power of respondent to satisfy the alleged order of seizure and sale herein, or the alleged decree on appeal therefrom; that said plaintiff, without respondent's consent, has, by his said acts, impaired respon-

dent's rights to subrogation, and respondent is thereby released from any liability, if any existed, which is denied."

It is sufficient to say in reply to this contention, that the mortgage to which Marchand claims the right of subrogation has been enforced, and the proceeds of the mortgaged property applied *pro rata* to the satisfaction of the claim for which he is surety. If he had been actually subrogated to the rights of Frellsen, under the mortgage, he could have secured nothing more. He has not been injured. He has lost nothing by the foreclosure of the mortgage. It has resulted to his advantage in the reduction of the debt for which he is surety, and is no ground for his discharge from the unpaid balance.

Judgment affirmed.

DOWELL *v.* MITCHELL.

MITCHELL *v.* DOWELL.

Where a note for the debt of a firm was made by its surviving member, who, to secure its payment, executed a mortgage on real estate, which was the individual property of his deceased partners, — *Held*, that on the ownership being shown on the hearing of the foreclosure suit brought against him and their heirs the bill should be dismissed without prejudice, the ground of equitable relief not having been made out, and the complainant having a complete remedy at law to enforce the payment of the note.

APPEALS from the Circuit Court of the United States for the Eastern District of Arkansas.

These are cross-appeals from the same decree. The original bill was filed Aug. 22, 1877, by John H. Dowell and H. M. Mandeville, late partners under the name of J. H. Dowell & Co., against Askew, as administrator of the estate of Claiborne S. Barron, deceased, Margaret Barron, his widow, his three children, and William H. Brazell. Askew resigned pending the suit, and C. E. Mitchell, the administrator *de bonis non*, was made a party defendant in his stead.

It appears from the evidence that the complainants were cotton-factors and commission-merchants in St. Louis, and in that capacity acted for Barron and Brazell, who, Oct. 4, 1873,

formed a partnership under the name of Barron & Brazell, to continue two years. On Oct. 4, 1875, the day upon which the partnership expired by its own limitation, Barron died, the firm being then indebted to the complainants for advances in the sum of $15,989. Brazell as surviving partner was left in possession of the assets of the late firm, with which he continued business in the firm name, and on April 15, 1876, he had an accounting and settlement with the complainants, to whom there was found to be due $8,456. Thereupon he, in the name and as surviving partner of the late firm, made to them three notes, in the aggregate amounting to that sum, and to secure them executed a mortgage on a parcel of real estate in the town of Hope, in the State of Arkansas, the legal title to which was in Barron at the time of his death. The bill was to foreclose the mortgage. The defences were: (1) That there was nothing due from the late firm of Barron & Brazell on the notes; and (2) That neither Brazell nor the firm had any title to the real estate, but that it was the individual property of Barron, and that the mortgage was, therefore, void.

Upon final hearing the Circuit Court was of opinion that the amount specified in the notes was due to the complainants from Brazell and the estate of Barron, his late partner; that the real estate described in the bill, and alleged to be the property of the late firm, had never been its property, but belonged to Barron at the time of his death; that the title thereto was in his heirs; and that Brazell, as surviving partner, "had no right or authority to execute said mortgage on said property, and that said mortgage deed was void and of no effect."

Thereupon the court decreed that "so much of complainants' bill as prays a decree of foreclosure of said mortgage be denied," and rendered a decree against the administrator of Barron's estate and Brazell for the amount due on the notes purporting to be secured by the mortgage.

The complainants and the administrator appealed from this decree.

Mr. Augustus H. Garland and *Mr. W. F. Henderson* for Dowell.

Mr. Solomon F. Clark and *Mr. Samuel W. Williams*, *contra.*

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

Without going into a discussion of the evidence on the subject, we declare our opinion to be that the Circuit Court was right in holding that the title to the property described in the mortgage executed by Brazell in the name of the late firm of Barron & Brazell had never been either in the late firm or in Brazell, but was in Barron, the deceased member of the firm, at the time of his death, and that at the date of the mortgage the title of the mortgaged premises was in his heirs.

When this fact was established by the evidence, the court below, sitting as a court of equity, had no jurisdiction to proceed in the cause. There was nothing on which it could act but the promissory notes, and to enforce their payment the complainants had a plain, adequate, and complete remedy at law.

The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell* v. *Clarke*, 7 Cranch, 69; *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, 4 Kay & J. 727; *Bailey* v. *Taylor*, 1 Russ. & M. 73; *French* v. *Howard*, 3 Bibb (Ky.), 301; *Robinson* v. *Gilbreth*, 4 id. 183; *Nourse* v. *Gregory*, 3 Litt. (Ky.) 378.

We are of opinion, therefore, that the decree of the Circuit Court should be reversed, and the cause remanded with directions to dismiss the bill without prejudice to an action at law on the notes which the invalid mortgage purported to secure; and it is

So ordered.

RUSSELL *v.* FARLEY.

1. Where an injunction is granted to a party without requiring him to give bond or other undertaking, the Circuit Court has no power to award damages to the injured party, except by such a decree in the matter of costs as may be deemed equitable.
2. In the absence of either an act of Congress, or a rule of court on the subject, the Circuit Court can, before granting an injunction, impose terms, and it can relieve therefrom whenever it would be oppressive or inequitable to continue them.
3. Where neither the bond given, nor the statutes, nor any rule of court, prescribes a specific mode of assessing damages, and the condition of the bond is simply to pay such as the adverse party may sustain by reason of the injunction, if the court finally decides that the party to whom it was granted is not entitled thereto, — *Semble*, that the court may, as an incident to its jurisdiction, cause them to be assessed under its own direction, or leave the party to his action at law.
4. The court decreed that this was not a case for damages. *Held*, that its action in the premises approaches so nearly to an exercise of discretion, that a very clear showing must be made to induce this court to reverse it.

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

The case is fully stated in the opinion of the court.

Mr. Richard L. Ashurst and *Mr. Thomas H. Hubbard* for the appellant.

Mr. Henry J. Horn for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case comes before us by appeal from a decree in a case in equity wherein Jesse P. Farley, as receiver of certain branch lines of the St. Paul and Pacific Railroad Company, and of all lands and other property appurtenant thereto, was complainant, and the firm of De Graff & Co., the Northern Pacific Railroad Company, the Lake Superior and Mississippi Railroad Company, B. S. Russell, G. W. Cass, receiver of the Northern Pacific Railroad Company, and C. W. Mead, general manager of said company, were defendants. The complainant was appointed receiver Aug. 1, 1873, in a foreclosure suit brought by John S. Kennedy and others, trustees under a mortgage given by the St. Paul and Pacific Railroad Company to secure fifteen millions of dollars of bonds issued by a subsidiary

corporation called the First Division of the St. Paul and Pacific Railroad Company, which had a contract to build the railroad, and a lease of the road for ninety-nine years. Amongst the assets supposed by the receiver to be subject to this mortgage was certain railroad iron, which had been purchased in England with the money raised by the sale of the bonds, to wit, 1,700 tons lying at Glyndon, on the line of the road, and 1,000 tons at Duluth, claimed by De Graff & Co., and 1,860 tons at Duluth, claimed by B. S. Russell, — that at Duluth being mostly held in the custom-house for unpaid duties, but some of it being about to be reshipped. The bill in this case was filed by the receiver in the State District Court for the county of Ramsey on the 21st of June, 1875, seeking to set aside the respective transfers of iron by virtue of which De Graff & Co. and Russell claimed to hold it, and for an injunction to restrain them from removing it, or taking it from the custom-house.

By a statute of Minnesota it is declared that, "when no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than two hundred and fifty dollars, executed by him or some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct." 2 Bissell's Statutes, 806, sect. 121.

On filing the bill in this cause, the complainant (the said receiver) obtained a temporary injunction upon giving to the defendants a bond in the penalty of $10,000, with the following condition, to wit: "Whereas the said plaintiff is about to apply to this court for a temporary injunction enjoining and restraining the defendants, and each of them, from shipping, removing, selling, hypothecating, transporting, interfering, or intermeddling with 4,560 tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof: Now, therefore, if the plaintiff will pay the parties enjoined by such

writ, or detained thereby, such damages as they or either or any of them may sustain by reason of the writ, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

De Graff & Co. having by consent rebonded 1,000 tons of the iron claimed by them, the court, on the 11th of August, 1875, required a further bond from the complainant in the sum of $79,000, the condition of which was as follows, to wit: "Whereas an injunction has heretofore been granted in this court enjoining and restraining the said defendants, and each of them, from shipping, removing, selling, hypothecating, transferring, or interfering, or intermeddling with 4,500 tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof; and whereas said injunction is still in force and effect except as to one thousand tons of said iron, claimed by said De Graff & Co., at Duluth, aforesaid; and whereas the said court has ordered, as a condition for the continuance of said injunction, that the plaintiff execute to the defendants herein a bond in the sum of seventy-nine thousand dollars, in addition to the bond for ten thousand dollars heretofore given by the plaintiff on the issuance of the injunction: Now, therefore, if the plaintiff will pay the parties enjoined by such injunction, or detained thereby, such damages as they, or either or any of them, may sustain by reason of such injunction, if the court finally decide that the party was not entitled thereto, the above obligation shall be void, else of full force and virtue."

The defendants severally answered the bill, and on the 1st of March, 1876, on application of the complainant, the cause was removed to the Circuit Court of the United States for the District of Minnesota. After taking a large amount of evidence, it was brought to a hearing, and on the 13th of October, 1877, a final decree was made dismissing the bill as to De Graff & Co., without costs to either party. As to the defendant Russell, who was charged with holding 1,860 tons of the iron, it appeared that he was acting as agent for William G. Morehead, who was trustee or agent for the First Division Company in procuring the iron and carrying on the work of construction, and who had sold to De Graff & Co., sub-contractors, the iron claimed by them, in part payment of moneys due them for

work; and had pledged a portion of the 1,860 tons of iron (claimed by Russell) to pay Jay Cooke & Co. for advances of money, and Jay Cooke & Co. had pledged and sold it to the United States (the Navy Department) for a debt due to it. Some 1,090 tons of the 1,860 tons in question remained at Duluth unsold, and this was claimed by Edward M. Lewis, trustee in bankruptcy of Morehead; but the court held that it was subject to the mortgage, and that the receiver was entitled to it. The decree on this part of the case was as follows, to wit: —

"It is also further ordered, adjudged, and decreed that the said Farley, as receiver, as against the defendant B. S. Russell, and against the defendant Edward M. Lewis, trustee in bankruptcy of William G. Morehead and others, is entitled, for the benefit of the trust which he represents, to all the iron rails in controversy herein not sold to De Graff & Co., and not pledged and sold to the Navy Department; which said iron rails, subject to the customs duties to the United States, thus decreed to the said Farley as receiver, he is authorized to use in the construction of the said extension lines, or to sell at the best prices and on the best terms practicable, and apply the net proceeds thereof to the credit of the mortgage, dated April 1, 1871, executed by the St. Paul and Pacific Railroad Company to Horace Thompson, George L. Becker, and William G. Morehead, trustees, who in the said trust have been succeeded by the said Wetmore, Pearsal, and Denny, as trustees, and which mortgage is now being foreclosed in this court, neither party as against the other to recover costs or damages. It is further adjudged and decreed that all transfers of the 1,860 tons of iron in controversy herein claimed by defendant Russell from William G. Morehead to said Russell, except transfers relating to the iron pledged to the Navy Department, are null and void, and that said Russell has no right, title, or interest therein as against the said Farley and said trustees. It is further ordered, adjudged, and decreed that said Farley has no right, title, or interest in the iron transferred to the Navy Department, and which is claimed herein by defendants Russell and Lewis; and it is further adjudged that neither the plaintiff nor the defendant Russell is entitled to costs or damages herein."

Russell alone appealed from this decree, and appealed only from that portion of it which declared that neither party as against the other is entitled to costs or damages.

That an appeal does not lie from a decree in equity as to the costs merely, is well settled. *Canter* v. *American & Ocean Insurance Co.*, 3 Pet. 307; *Elastic Fabrics Company* v. *Smith*, 100 U. S. 110. But it is contended by the appellant that the Circuit Court had no power to decree that he was not entitled to damages, thereby precluding him from recovering damages on the injunction bond; and, if it had any power to make a decree on the subject of damages, the decree denying him damages in this case is erroneous.

Had the cause remained in the State court, there can be no doubt that that court, under the Minnesota statute which required an injunction bond to be given, could have determined the question of damages. The statute expressly declares that "the damages may be ascertained by a reference, or otherwise, as the court shall direct." But the Circuit Court of the United States is not governed in its practice in equity by the laws of the State in which it sits, but by the rules of practice prescribed by this court and by the Circuit Court not inconsistent therewith; and, when these are silent, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied. Equity Rule 90. The injunction bond taken by the State court, it is true, comes into the Circuit Court with the other proceedings in full force; but the power of the Circuit Court to deal with it depends upon the principles which govern the practice of that court, the same as if it had been originally taken by its direction.

The question then arises whether the Circuit Courts have any power to make a decree on the subject of damages arising from an injunction, where an injunction bond has been required. Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just. Has it any such power, or any power over the subject, where such a bond has been given?

For a solution of this question it will be proper to advert briefly to the history and object of this kind of obligations.

It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial. The older authorities refer to numerous instances in which it has been exercised. Chief Baron Gilbert in his Forum Romanum, p. 196 (repeated in Bacon's Abridgment, title Injunction, C), speaking of the course where an answer is put in, denying the equity of the bill, followed by a rule *nisi* to dissolve the injunction, says: "The plaintiff must show cause either upon the merits, or upon filing of exceptions; if upon the merits, the court may put what terms they please upon him, as bringing in the money, or paying it to the party, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to *give security* to abide the order on hearing, or the like." See also Newland's Ch. Pract., 223, 224; Kerr, Injunctions, 212, 622; Story, Eq. Jur., sects. 958 *b*, 959 *d*. In *Marquis of Downshire* v. *Lady Sandys* (6 Ves. Jr. 107), A. D. 1801, Lord Eldon said if there was a real doubt on the subject in controversy, he would direct an issue, "taking care that if in the result of such a direction the defendant should be prejudiced by not being permitted to cut in the mean time [trees claimed to be orna-

mental], the plaintiff should undertake to pay the value if the decision should be against him." In a similar case, in 1825, the same judge made an order that the plaintiff should go before the master and give such security as would in the master's judgment secure to the defendants the value of all the trees which they should be prevented from cutting by the injunction, in case it should finally turn out in the judgment of the court that they ought not to have been enjoined in equity. *Wombwell* v. *Belasyse*, id. 110, note.

Mr. Kerr, in his treatise on Injunctions, says: "In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. . . . The defendant may be required to do such acts, or execute such works, or otherwise deal with the same as the court shall direct; or to enter into an undertaking to refrain from doing in the mean time the acts complained of by the bill, or to abide the order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff. . . . So, on the other hand, as a condition of granting an injunction, [the court may] require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favor of the defendant, and the injunction proving to have been wrongly granted." Kerr, Injunctions, 212. Again, in another place, he says: "In doubtful cases where damage may be occasioned to the defendant in the event of an injunction or interim restraining order proving to have been wrongly granted, the court will require the plaintiff, as a condition of its interference in his favor, to enter into an undertaking to abide by any order it may make as to damages." Kerr, 622. In *Wilkins* v. *Aikin* (17 Ves. Jr. 422), where a bill was filed to prevent the infringement of a copyright; but it being doubtful whether the defendant did more than make allowable extracts from the plaintiff's

work, Lord Eldon said: "The proper course in this instance will be to permit this work to be sold in the mean time; the defendant undertaking to account according to the result of the action." p. 426.

The same practice has prevailed in this country, in some cases in pursuance of statute, and in others, by the action of the court itself. As early as 1723 a law was passed in Maryland, that any person desiring to proceed in equity against a verdict or judgment rendered against him in the County Court, should be required to give security in double the amount of the debt for the due prosecution of the injunction and payment of debt and all costs and damages that should accrue in the Chancery Court, or should be occasioned by the delay, unless the Court of Chancery should decree to the contrary, and in all things obey such order and decree as the court should make. In 1793 an additional law was passed, to the effect that whenever application should be made for an injunction to stay proceedings at law, the Chancellor should have power and discretion to require the applicant to give a bond to the plaintiff at law, with condition to perform such order or decree as the Chancellor should finally pass in the cause.

Similar laws were passed in Virginia in 1787, and in New Jersey in 1799, and no doubt in other States at an early date. Their object was, where an adjudication had already been had at law, to make it compulsory on the Chancellor to require security before granting an injunction. The jealousy of the courts of law at the interference of the Court of Chancery with their judgments is a matter of historical notoriety. But these laws did not interfere with the Chancellor's discretionary power to require a bond in all other cases.

Regulations substantially similar to those above adverted to were prescribed by general rule of the Court of Chancery of New York prior to the adoption of the Revised Statutes. In 1828 they were codified, with amendments, in that revision. But the rule, as well as the statute, only related to injunctions for staying proceedings at law.

In 1830, the Chancellor of New York, for the first time, made a general rule (No. 31), that where no special provision was made by law as to security, the *vice-chancellor*, or *master*,

who allowed an injunction out of court, should take from the complainant, or his agent, a bond to the party enjoined, either with or without sureties in the discretion of the officer, in such sum as might be deemed sufficient, not less than $500, conditioned to pay such party all damages he might sustain by reason of such injunction if the court should decide that the complainant was not entitled to the same; and that the damages might be ascertained by a reference or otherwise, as the court should direct. 1 Hoffman, Ch. Pr. 80; 1 Barb. Ch. Pr. 622; 2 Paige (N. Y.), 122. The object, no doubt, was to prevent hasty and oppressive injunctions from being issued by subordinate officers.

This rule, enlarged and made applicable to all courts and judges, was copied in the New York Code of Procedure of 1848, sect. 195 (now sect. 222), and has been followed in other codes and systems of practice in other States. See 2 R. S. Wisconsin, 748; also Laws of Illinois, Iowa, Colorado, &c. It was substantially adopted in the Chancery Rules of New Jersey in 1853, except that it was left to the discretion of the officer to require a bond or not. It was copied in the statutes of Minnesota, under which the bonds in the present case were taken, as may be seen by comparing it with the section of said statutes already cited.

But no act of Congress or rule of this court has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity. To these we have already adverted so far as concerns the power to require security or impose terms before granting an injunction. It remains to notice the control which a Court of Chancery may exercise in relieving from or modifying such terms during the progress or at the termination of the cause, and of enforcing and carrying out the conditions imposed or the undertakings entered into.

Since the discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the

court should have the power to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them. Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. Where the fund is security for a debt or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not unfrequently occur that injustice would result from keeping property impounded in the court. On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed.

Against this view, however, the appellants have strenuously urged the case of *Novello* v. *James* (5 De G., M. & G. 876), in which an injunction against the sale of certain compositions of Mendelssohn in violation of a copyright was obtained on an

undertaking of the plaintiff to abide the order of the court as to damages. After a three years' litigation the case was decided against the plaintiff. The legal title having been a doubtful one, the plaintiff moved that his bill might be dismissed without costs, and the defendant moved that the plaintiff might be decreed to pay him damages sustained by reason of the injunction. The Vice-Chancellor decided that the proper damages would be the costs of the suit. Upon appeal, this order was reversed upon the ground that the defendant, under the circumstances, had a right to insist on having his damages ascertained either by reference to an officer of the court, or by a trial at law. The Lords Justices thought that it would be unjust to the defendant to disregard, or not to give effect to, the undertaking which was the price at which the plaintiff accepted the injunction; and that there was not sufficient evidence before the Vice-Chancellor to enable him to decide what the defendant's damages amounted to, or whether the costs, supposing him not otherwise entitled to them, were a just measure of the damages.

It is evident, from a careful reading of this case, that the decision was based on the merits; and that the Lords Justices were of opinion that the defendant was entitled to damages; not as a matter of course because an undertaking had been given, but as a matter of justice and equity, which the undertaking would enable him to enforce. They held, therefore, that evidence of the damages should have been taken; and that the decree of the Vice-Chancellor was erroneous, because made without any such evidence. We do not perceive that this case is at all adverse to the view which we have taken.

When the court sees no just cause for superseding or suspending the effect of an injunction bond, or undertaking, it should be enforced in pursuance of its terms; and the party for whose benefit it was given will be entitled to an assessment of damages.

But then arises the question (not essential, however, to be decided in this case), how the damages should be assessed, and on this point different opinions have been entertained. Sometimes the form of the bond itself, or the order requiring it, or the statute or rule of court under which it is given, prescribes

the mode of assessment, as by a reference, or otherwise, as the court shall direct. This is the ordinary course in England, and is that prescribed in Chancellor Walworth's order, which, as before stated, is followed in several State statutes, and, amongst others, in the statute of Minnesota. In such case no question can arise as to the authority of the Court of Chancery to cause the damages to be assessed under its own direction.

But where, as in the present case, no specific provision is made either in the bond, or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction if the court finally decide that the party was not entitled thereto, as before stated some difference of opinion exists as to the power of the Court of Chancery to assess the damages, and whether the only proper method is not an action at law on the bond. The appellants insist that the latter is the only proper and legal course. In the case of *Bein* v. *Heath* (12 How. 168, 179), Mr. Chief Justice Taney made this remark: "A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction." In that case, an injunction bond had been given to stay proceedings on an executory process in the Circuit Court for the District of Louisiana, and, in an action on the bond, that court had given judgment against the sureties, not merely for the damages arising from the delay caused by the injunction, but for the whole debt, interest and costs, in accordance with the law of Louisiana, where injunction bonds are binding to that extent, and where judgment is usually given against the sureties as parties to the cause, on dismissing the injunction, similar to the proceeding against stipulators in admiralty. This court held that the circuit courts sitting in equity could not take such a bond, or give it such effect, and reversed the judgment. The remark that the bond must be prosecuted at law was a mere passing remark; it was so prosecuted in that case; but from the great experience of the Chief Justice, it undoubtedly expressed the prevailing practice with regard to ordinary

injunction bonds given under the Maryland statute in cases of injunctions to stay proceedings at law. Whether the remark can be understood as having a wider scope is doubtful.

A decision on the point, however, was made by Mr. Justice Curtis, on the first circuit, in the case of *Merryfield* v. *Jones*, 2 Curtis C. C. 306. That was a patent case in which an injunction had been issued upon condition of entering into bond to pay the defendant any damages he might suffer by reason of the injunction if finally determined not to be rightful. On dismissal of the bill, motion was made to refer to a master the question of damages. Mr. Justice Curtis denied the motion, holding that the party's remedy was an action at law, but he only referred to the case of *Bein* v. *Heath*. The opinion is brief, and it does not appear that the question was very fully examined. The learned justice seemed to think that, inasmuch as the bond gave a legal action, the court sitting in equity had no jurisdiction over the question of damages.

Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power; and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the States) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to

be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one.

In the present case, however, the court did not attempt to assess any damages which the defendants may have sustained in consequence of the injunction and proceedings in the cause, but decreed that it was not a case for damages; in other words, that the bond ought not to be prosecuted. That damages were sustained is very probable. Such a litigation as this was could hardly fail to result in damage to all the parties engaged in it. But it is generally *damnum absque injuria.* The question before the court, or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered. Its decision was, that none ought to be recovered; or, in effect, that the bond ought not to be prosecuted. In view of what has already been said, we think that the court had power to decide this question.

But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to be reversed on the merits. On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below pass so directly under the inspection of that court, as to give it many advantages which no other court can possess, for forming a correct decision on the question, whether any extra damages should be allowed for the issuance of the injunction. Nevertheless, we have looked at the case with the view of ascertaining whether injustice has been done. And at the very threshold of the inquiry we are met by the prominent fact that the injunction has never been entirely dissolved, and it has never been decided that the complainant was not entitled to it, at least for a portion of the iron claimed by the appellant. The

latter strenuously defended the suit as to the whole; but it turns out, on the final hearing, that as to more than half of it his claim is unsupported, and that the injunction was properly issued. A decree was made accordingly, from which no appeal has been taken. We must presume that it was equitable and just. This fact alone would make a *prima facie* case for the decree in relation to damages. We have not been able to find anything in the record which leads us to think that it was erroneous or improper.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

THE "S. S. OSBORNE."

1. Where, to the next Circuit Court, the District Court sitting in admiralty allowed an appeal from its decree, although the same was not, in accordance with its rules, prayed for in writing, the jurisdiction of the Circuit Court at once attached, notwithstanding the failure of the clerk of the District Court to deliver within twenty days, as required by its rules, to the clerk of the Circuit Court the appeal and record.
2. A cross-appeal to this court must be prosecuted as any other appeal, or it will be dismissed.

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

William G. Winslow and Hezekiah J. Winslow filed their libel in the proper District Court against the schooner "S. S. Osborne," alleging that they were the owners of the schooner "American Union," and that while she was on her voyage on Lake Michigan the "S. S. Osborne," ran into her, whereby she suffered damage, and that the collision was caused solely by the negligence and improper conduct of the "S. S. Osborne."

The "S. S. Osborne" was seized, but was subsequently released, on Bliss O. Wilcox, the claimant, entering into the requisite stipulations. He answered the libel by denying its material allegations, and filed a cross-libel against the "American Union," claiming that she was wholly in fault, and that by the collision

the "S. S. Osborne" was damaged. The answer to the cross-libel was filed, and, Dec. 26, 1877, the District Court dismissed the cross-libel and rendered a decree against the "S. S. Osborne," from which on the same day Wilcox appealed. The entry in relation thereto is inserted in the opinion of this court. The Circuit Court, both parties appearing therein, rendered a decree, from which each appealed. The remaining facts are stated in the opinion of this court.

Mr. Jacob D. Cox and *Mr. S. Prentiss* for the claimant.
Mr. H. A. Terrell and *Mr. Albert G. Riddle*, *contra.*

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

The question presented by the appeal of the Winslows is, whether the Circuit Court erred in taking jurisdiction of the appeal of Wilcox from the District Court. Sect. 631 of the Revised Statutes provides that from all final decrees of the District Courts in causes of equity or of admiralty and maritime jurisdictions, except prize causes, where the matter in dispute exceeds fifty dollars, appeals shall be allowed to the Circuit Court next to be held in such district, and the Circuit Court is required to receive, hear, and determine such appeal. It is not declared in this section what shall constitute an appeal from the District to the Circuit Court, any more than it is in sect. 692 what shall be an appeal from the Circuit Court to this court. Admiralty Rule 45 of this court provides that appeals from the District to the Circuit Courts, in admiralty cases, must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specifically made in a particular suit, or, in case no such rule or order is made, then within thirty days from rendering the decree; and, Rule 46, that in cases not provided for by the rules of this court, the District and Circuit Courts may regulate their own practice.

The District Court for the Northern District of Ohio provided by rule that appeals in admiralty to the Circuit Court should be taken within ten days from the date of the decree, unless further time was given by a special order of the judge; that the appeal should be in writing and specify particularly

from what part of the decree, if less than the whole, it was taken; whether it was intended to make any new allegations or proofs, and, if so, what; whether it was intended to pray for any other relief, and, if so, what; and further providing that on the trial the appellant should be strictly confined to the specifications in his appeal. The rule also required that the appeal should be filed with the clerk, and from that time, security having been given, it should be considered perfected. It was then made the duty of the clerk, within twenty days, unless a longer time should be allowed by the judge, to prepare and deliver to the clerk of the Circuit Court, together with the appeal, the record required by the fifty-second rule of this court, and that when this was done so much of the case as was appealed should be in the exclusive control of the Circuit Court.

In the present case the date of the decree in the District Court was Dec. 26, 1877. At the foot of the decree, and as part of it, is the following: —

"And thereupon said Bliss O. Wilcox, claimant of said schooner 'S. S. Osborne,' gave due notice of his intention to appeal this cause to the next Circuit Court, which said appeal is allowed, and bond therefor is fixed at eight thousand dollars. And it is further ordered that the time within which said appeal shall be perfected shall be extended for the period of twenty days from this date."

It does not appear that any formal appeal in writing was ever filed with the clerk of the District Court, but within the time fixed bond for an appeal was given and duly accepted. The record was not filed in the Circuit Court, neither was the cause docketed there until Feb. 27, 1878. This was during the term of the Circuit Court which began on the 15th of January, and which was the term next held after the decree in the District Court. With the record there was filed in the Circuit Court an appeal in writing, such as the rule required. On the 11th of March the Winslows moved the Circuit Court to dismiss the suit, because no appeal in writing had been made, as the rules of the District Court required, and also because the suit had not been docketed in the Circuit Court in time. This motion was denied. The ruling of the Circuit Court to that effect is now assigned for error by the Winslows.

An appeal in admiralty from the District to the Circuit Court must be to the term of the Circuit Court held next after the decree, and it must be made while the District Court is sitting, or within the time required by the general rules or a special order. These requirements are jurisdictional. They are prescribed either by the act of Congress or by the rules of this court, promulgated under the authority of an act of Congress, and having the force of law. All except this is mere procedure in either the District or Circuit Court. The rule of the District Court, requiring an appeal to be in writing and filed with the clerk, could certainly be dispensed with by that court. It simply prescribed a mode of proceeding to get an appeal, and while it continued in force the court might properly refuse to allow an appeal or accept security until what was required had been done. But if the District Court allows an appeal without the writing, the appellee cannot object to the jurisdiction of the Circuit Court on that account. Here it distinctly appears that Wilcox claimed his appeal while the court was sitting, and that his claim was formally allowed by the court. In this way any further appeal in writing was dispensed with, and when afterwards the bond was given and accepted, the appeal was as clearly perfected as it would have been if a writing, such as the rule required, had been filed with the clerk. From that time the jurisdiction of the Circuit Court attached, and could not be taken away by any act or requirement of the District Court.

The provision in the rule of the District Court, that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days, cannot prevent the Circuit Court from entertaining the cause if for any reason this is not done. The appeal, when once made, continues during the whole of the next term of the Circuit Court, unless sooner dismissed by that court for want of prosecution or otherwise, in accordance with its own practice. It follows that, so far as the appeal of the Winslows is concerned, the decree must be affirmed.

When the decree of the Circuit Court was rendered, both the Winslows and Wilcox appealed to this court. The Winslows filed the transcript and docketed their appeal here on the 19th of September, 1879; but Wilcox neither entered his

appearance as an appellant in this court, nor did anything to make himself an actor in reference to his own appeal, until March 23, 1882, the day before the cause was called for hearing. Under these circumstances we must decline to consider his appeal. *Grigsby* v. *Purcell*, 99 U. S. 505. Rule 9 of this court requires every plaintiff in error or appellant, on docketing his cause, to have the appearance of counsel entered; and Rule 10, that he secure the costs. Cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him.

Decree affirmed. The appeal of Wilcox dismissed for want of prosecution.

EX PARTE SLAYTON.

The owner of a vessel may, before he or it is sued, institute appropriate proceedings in a court of competent jurisdiction, to obtain the benefit of the limitation of liability provided for by sects. 4284 and 4285 of the Revised Statutes.

PETITION for a writ of prohibition.

The facts are stated in the opinion of the court.

Mr. Alfred Russell for the petitioner.

Mr. J. H. McGowan, contra.

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

We are of opinion that, notwithstanding Admiralty Rules Nos. 54, 55, 56, and 57 of this court, the owner of a vessel may institute appropriate proceedings, in a court of competent juris-

diction, to obtain the benefit of the limitation of liability provided for by sects. 4284 and 4285 of the Revised Statutes, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. As was said at this term in *The Scotland* (*supra*, p. 24), our rules were not intended to prevent an owner from availing himself of any other remedy or process which the law itself entitled him to adopt, but to aid him in bringing into concourse those having claims against him arising from the acts of the master or crew.

Section 4284 expressly allows the owner to institute appropriate proceedings in any court, that is to say, any court of competent jurisdiction, for the purpose of apportioning among the proper parties the sum for which he is liable. Sect. 4285 provides, that it shall be deemed a sufficient compliance on his part with the requirements of the act if he shall transfer all his interest in the vessel and freight to a trustee, appointed by the court for the persons who may prove to be legally entitled thereto. Any court, therefore, which gets actual possession of the things to be transferred, and about which the concourse of claimants is to be had, is a court of competent jurisdiction to try the questions that will properly arise upon the apportionment to be made. Even though he should institute proceedings before he or his vessel is sued, the courts will either follow our rules as far as practicable, or do something which is equivalent, to obtain jurisdiction of the thing about which the litigation is to be had. No monition can properly issue either under the operation of our rules, or otherwise, until this jurisdiction of the thing has been in some way secured.

On looking into the return of the district judge in this case we find that the proceedings were instituted by the owner of the steamer "Alpena" in the district where the port is situated, to which the steamer was bound, at the time the loss occurred, on one of her regular trips between Grand Haven, Mich., and Chicago, Ill.; that the steamer lies sunk in Lake Michigan; that some portions of the wreck were washed ashore in Michigan between Grand Haven and Chicago; that on filing the petition an order was entered by the court appointing a trustee, such as was provided for in the statute, and requiring the owner to transfer to him all its right, title, and interest to

whatever remained of the steamer, her tackle, apparel, and furniture, and the pending freight; that such a transfer was made, and freight, admitted to be pending, amounting to $196, actually paid over, and that when this was done the monition issued. It is true the return does not expressly show that the remnants of the wreck, scattered on the shores of the lake, have actually been gathered together and brought within the northern district of Illinois; but it is stated that the transfer has been made and the freight-money paid over. This is not denied. Such being the case, we cannot say the court (upon the showing here made) has not acquired jurisdiction of the thing about which the litigation arises, to wit, the fund to be apportioned among the parties who may prove to be legally entitled thereto. It has the freight-money in its possession, and its trustee is in a condition to gather up the remnants of the vessel if it has not already been done. The jurisdiction of the court is not dependent at all on the amount, but on the rightful possession of that which is to be divided.

We cannot, on an application for a writ of prohibition, determine what shall be the effect of any judgment of the District Court while exercising its rightful jurisdiction, neither are we to determine in this form of proceeding what persons, or what classes of persons, are entitled to the fund in hand. All these are questions to be settled in some other way than by prohibiting the court from proceeding under the jurisdiction it has acquired by getting possession, in an appropriate manner, of that which, according to the claim of the owner, represents the extent of his liability, or that of his vessel. Whether it does so or not is to be settled between the parties when the case is tried. With the possession and control of the property the court has jurisdiction.

Petition denied.

LOUISIANA *v.* TAYLOR.

1. The court again decides that section fourteen of the eleventh article of the Constitution of Missouri of 1865 (*infra*, p. 456) did not withdraw or curtail any authority which a municipal corporation then possessed to subscribe for stock in, or loan its credit to, a railroad company.
2. The charter of the Louisiana and Missouri River Railroad Company, granted by the act of the General Assembly of Missouri, approved March 10, 1859, conferred upon the city of Louisiana power to subscribe to the stock of that company. By its act of incorporation, passed June 12, 1866, the city was authorized to pay for its subscription by the issue of bonds, if the ordinance providing therefor was approved by a majority of the votes cast at any general election held in the city, or at one expressly ordered for the purpose.
3. The power thus conferred was not affected by the general railroad law of 1866.

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. James O. Broadhead and *Mr. David P. Dyer* for the plaintiff in error.

Mr. Clinton Rowell and *Mr. Thomas K. Skinker* for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Taylor, a citizen of Illinois, brought this action against the city of Louisiana, a municipal corporation of Missouri, to recover the amount alleged to be due upon certain bonds and coupons issued by the latter in payment of a subscription to the capital stock of the Louisiana and Missouri River Railroad Company, a corporation authorized by law to construct, and which has constructed in pursuance thereof, a railroad from the city of Louisiana to the Missouri River. The bonds sued on were dated, some in September, others in October and in November, 1869. They matured on Jan. 1, 1876, 1877, and 1878, and, together with the coupons, falling due since January, 1876, remain unpaid. All coupons maturing previously, together with the principal of a portion of the whole issue of bonds, had been paid by taxes regularly levied and collected by the proper authorities of the city, from the year 1867 to 1876.

Certificates of the stock in the railroad company were issued in pursuance of the subscription, and were accepted by the city, which has ever since exercised its rights as a stockholder.

The defence was that the bonds were void for want of power in the municipal corporation to issue them.

There was a judgment in favor of the plaintiff below, to reverse which this writ of error is prosecuted.

Each of the bonds sued on contains a recital that it "is issued by the city of Louisiana under authority of the General Assembly of the State of Missouri, entitled 'An Act incorporating the Louisiana and Missouri River Railroad Company,' approved March 10, 1859; also an ordinance of the city council of the city of Louisiana, No. 502, passed June 12, 1866."

The reference to the railroad charter is to the twenty-ninth section of the act of incorporation, which reads as follows: —

"SECT. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any city, town, or incorporated company may subscribe to the stock of said railroad company and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of said city, town, or incorporation."

The tenth section of the act incorporating the city of Louisiana, passed Feb. 16, 1865, was as follows: —

"The city shall have power to subscribe for stock in any incorporative railway company connecting with the city of Louisiana, or give any bonus to any institution of learning, by submitting an ordinance making the appropriation, or authorizing the issue of bonds for any such purpose, to a vote of the qualified voters of the city, at any general election held in the city, or at any special election expressly ordered, at which election the majority of the votes cast shall be for such ordinance: *Provided*, the debt of the city shall never exceed one hundred and fifty thousand dollars."

In pursuance of this provision of the city charter, the city council, on June 12, 1866, passed ordinance No. 502, recited in the bonds in suit, providing for an election to be held on the first Tuesday in July, 1866, on the proposition to subscribe for stock in the Louisiana and Missouri River Railway Company for an amount not exceeding $50,000.

The election provided for by this ordinance was in fact held, the result of which was, that 176 votes were cast in favor of the proposition and 46 against it.

Thereupon, the city council passed an ordinance authorizing the subscription of $50,000 to the capital stock of the railway company, and the issue of bonds for the payment of the same. The subscription was made and the bonds were delivered.

The Constitution of Missouri that went into operation July 4, 1865, sect. 14 of art. 11, contains the following provision: "The General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

Section 3 of article 2 is as follows: "All statute laws of this State now in force, not inconsistent with this Constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly."

At its first session after the adoption of this Constitution, the General Assembly of Missouri passed a general railroad law (Rev. Stat. Missouri, 1865, p. 372), which it is claimed went into effect March 19, 1866, and which contained the provision following, to wit: "It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such city, county, or town, in, or to loan the credit thereof to, any railroad company duly organized under this or any law of this State: *Provided*, that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription."

At the same session of the legislature, it was also enacted

(Rev. Laws of Missouri, c. 224, sect. 6, p. 882) that "all acts and parts of acts of a private, local, or temporary nature, or specifically applicable to particular cities or counties, in force on the first day of November, A. D. 1865, not repealed by or repugnant to the provisions of the General Statutes or some act of the present General Assembly, shall continue in force or expire, according to their respective provisions or limitations."

These are all the statutory provisions, supposed by counsel for the respective parties to have any material bearing upon the question at issue.

The power to subscribe to the capital stock of the railroad company is expressly given to the city of Louisiana by the twenty-ninth section of the charter of the former. Whether that grant of power carries with it the incidental authority to pay its subscription by an issue of bonds, or whether, upon a fair construction of the terms of that section, the exercise of such an authority is within the meaning of the law, it is not necessary for us to discuss or decide; for whatever might be a proper construction of the section, if it stood by itself, we think it must, at the time when the bonds in suit were issued, be interpreted in connection with the tenth section of the city charter, which had in the mean time been enacted. That section, in explicit terms, recognized and thereby conferred upon the city, the power to issue bonds in payment of its subscription to the stock of any railway company connecting with it, upon condition, however, of the approval of the ordinance authorizing the issue, by a majority of the votes cast at an election held for that purpose; and we think that limitation must be taken, thereafter, as imposed upon the power granted to the city in the railway charter. Such was, in fact, the construction put by the city upon its own powers, for the bonds in suit purport to be issued in pursuance of authority conferred by a majority of the votes cast at such an election, approving the ordinance passed to that end.

The ordinance submitted to the vote of the electors at that election, authorizing the issue of the bonds, was, we think, in all respects in conformity with the law, and sufficient. But it is contended by the plaintiff in error that the provision of the city charter, in accordance with which it was passed, had

been repealed before the vote was taken, and the subscription made.

It has been repeatedly held by the Supreme Court of Missouri, in decisions approved and followed uniformly by this court, that such repeal is not the direct and immediate result of the Constitution itself; that, on the contrary, the prohibition contained in that instrument is a limitation merely upon the power of the legislature for the future, so that it should not thereafter grant to municipal corporations authority to become stockholders in companies except upon the terms expressly mentioned, and that all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. *County of Callaway* v. *Foster*, 93 U. S. 567; *County of Scotland* v. *Thomas*, 94 id. 682; *County of Henry* v. *Nicolay*, 95 id. 619; *County of Ray* v. *Vansycle*, 96 id. 675; *County of Schuyler* v. *Thomas*, 98 id. 169; *County of Cass* v. *Gillett*, 100 id. 585.

It is argued, however, that the repeal of the provision in question was effected by the seventeenth section of the general railroad law, which it is claimed took effect March 19, 1866, before the passage of the ordinance No. 502, June 12, 1866.

But this position, in our opinion, is also untenable. The act in question is an enabling statute, passed in execution of the powers authorized by the Constitution, then recently adopted. It was general in its provisions, conferring power upon any county, city, or town to take stock in, or to loan its credit to, any railroad company, duly organized under any law of the State, upon the assent of two-thirds of the qualified voters thereof. It does not revoke any previous grants of similar authority. It repeals no existing provisions of law. It contains no words of prohibition. The sixth section of chapter 22 of the same session, "of the general statutes and their effect," &c. (Rev. Stat. Mo. 882), expressly continues in force "all acts and parts of acts of a private, local, or temporary nature, or specifically applicable to particular cities or counties, in force on the first day of November, A. D. 1865, not repealed by or repugnant to the provisions of the General Statutes or some act of the present General Assembly," until they expire, according to their respective provisions or limitations. There

is no repugnancy between the tenth section of the charter of the city of Louisiana and the seventeenth section of the general railroad law. One is a definite, express, and special provision, in reference to such railways only as connect with the city; the other has relation to possible proposals for subscription to the stock of any railroad company, whether its railroad connected with the city or not. The subjects of the two statutes are not the same; and there is no such inconsistency between them as that both may not stand and operate. It would not be legitimate to construe the seventeenth section of the general railroad act as if it forbade everything it did not authorize; and it is only by such a construction that the repugnancy with the tenth section of the charter of the city can be made to arise.

The very question mooted here was decided by the Supreme Court of Missouri at the October Term, 1867, in the case of the *State, ex rel., &c.*, v. *Macon County Court*, 41 Mo. 453. It was there said by the court: "There is no such inconsistency between the acts that they may not both stand and be carried into operation. A general prohibition against subscribing for stock in any corporation may well subsist with a permission to subscribe for stock in a particular corporation. Besides, the seventeenth section of the general railroad law, with which the enabling act is supposed to conflict, uses no negative words. It uses words to express and permit future acts, and there is nothing to show that it intended to operate on existing or past laws even by implication. It was framed after the Constitution was adopted, and the conclusion is undeniable that it was intended simply to make the law conform to and carry out the fourteenth section of the eleventh article of that instrument."

This decision is upon the very point, and is a judgment of the Supreme Court of the State in a case which, in its circumstances, we find it impossible to distinguish from the present. Its authority was confirmed by the same court in *Smith* v. *County of Clark*, 54 id. 58.

This view of the case disposes of all objections to the judgment of the Circuit Court. It is accordingly

Affirmed.

TELEGRAPH COMPANY *v.* TEXAS.

1. In respect to its foreign and inter-state business, a telegraph company is, as an instrument of commerce, subject to the regulating power of Congress, and, if it accepts the provisions of title 65 of the Revised Statutes, it becomes an agent of the United States, so far as the business of the government is concerned.
2. Where it has accepted those provisions, State laws, so far as they impose upon it a specific tax on each message which it transmits beyond the State, or which an officer of the United States sends over its lines on public business, are unconstitutional.

ERROR to the Supreme Court of the State of Texas.

The Western Union Telegraph Company is a New York corporation engaged in the business of transmitting telegrams at fixed rates of compensation. Its lines extend into and through most of the States and Territories of the United States, and to Washington, in the District of Columbia. It has availed itself of the privileges and subjected itself to the obligations of title 65 of the Revised Statutes relating to telegraph companies, and its lines connect with those owned and established by the government of the United States for public purposes. It has one hundred and twenty-five offices in the State of Texas, and is in close communication with other telegraph companies doing business in this country and abroad.

By sect. 1 of art. 8 of the Constitution of Texas the legislature is authorized to "impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in the State;" and by art. 4655 of the Revised Statutes, enacted under that provision, every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate. This tax is to be paid quarterly to the comptroller of the State on sworn statements made by an officer of the company. In addition to this, taxes must be paid on the real and personal property of the company in the State.

Between Oct. 1, 1879, and July 1, 1880, the company sent over its lines from its offices in Texas 169,076 full rate, and

100,408 less than full rate, messages. A large portion of them were sent to places outside of the State, and by the officers of the government of the United States on public business. The company neglected to pay the tax imposed, and a suit was brought in one of the courts of the State for its recovery. In defence it was insisted that the law imposing the tax was in conflict with the Constitution and laws of the United States, and, therefore, void. The Supreme Court of the State, on appeal, sustained the law, and directed a judgment against the company for the full amount claimed, allowing no deductions for messages sent out of the State, or by government officers on government business. To reverse that judgment this writ of error was sued out.

The case was argued by *Mr. Wager Swayne* for the plaintiff in error.

Mr. J. H. McLeary, Attorney-General of Texas, and *Mr. Philip Phillips* appeared for the defendant in error.

The following is an abstract of their argument: —

The act of Congress "to aid in the construction of telegraph lines" confers the right to construct them over the public domain and along the military or post roads of the United States, and for this purpose authorizes the companies to use stone, lumber, and other materials found on the public land. It then provides that as to the companies acting under the provisions of the act, the messages sent by the government "shall have priority over all other business, at such rates as the Postmaster-General shall annually fix," the government reserving the right to purchase their lines.

This company, by accepting the act, was, therefore, bound to give the messages of the government priority over all other business, at such rates as should be determined by the Postmaster-General; but it incurred no other obligation. The act contains no provision inconsistent with the exercise of the taxing power of the States, and if Texas has the right to impose the tax in question on a company that had not accepted the act, this company cannot by accepting it elude that power.

The use of the line by the government for the transmission of messages does not constitute the company such an agency as to exempt it from State taxation. *Osborn* v. *Bank of the*

United States, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Company* v. *Peniston*, 18 id. 5.

Is the act under consideration void as being in conflict with the power vested in Congress to regulate commerce among the States?

A State, while it cannot regulate either foreign or interstate commerce, may do many things which more or less affect it. It may tax a vessel used in commerce, and the stages employed in the transportation of the mail. But this does not regulate commerce or the conveyance of the mail. And yet, in both instances, the tax on the property in some degree affects its use. This tax may enhance the cost of messages, many of which are transmitted beyond the State, but the statute imposing it is not an attempted regulation of commerce.

If the tax had been a specific sum for carrying on the business of telegraphy, or on an assessment of the property of the company, or upon its gross receipts, no argument in keeping with the decisions of this court could successfully assail its validity.

We then have a question touching the relation of the States to the general government involving the vital power of taxation, reduced to an inquiry into the mere phraseology of the act levying the tax.

Let it be admitted that the tax is on the message and not on the company. Are telegraph messages to be regarded as articles of commerce passing through the State? Many of them doubtless relate to commercial transactions, as an order to buy or an order to sell; but such an order is not an article of commerce, nor is it property in the sense we are now considering it. The tax is not, however, laid on the message, but on the company for the number of messages sent. It is, by the very terms of the act, payable quarterly, on the statement of the company, so that it was collected long after they were sent. It is, in effect, a tax upon the company's quarterly business.

In sustaining the tax in *State Tax on Railway Gross Receipts* (15 Wall. 284), the court said: "The tax is not levied until the expiration of each half-year, and until the money received for freights and other sources of income has actually

come into the company's hands. Then it has lost its distinctive character as freight by having become incorporated into the general mass of the company's property." If the tax in this case had been confined to messages between points within the State, no argument could be made to invalidate the act. This being so, as the act makes no discrimination, its legality cannot be impeached on the ground that a portion of the messages were sent through and beyond the limits of the State.

Osborne v. *Mobile* (16 Wall. 479) is decisive of this case. It was tried on an agreed statement of facts, from which it appears that the express company was engaged in a business extending beyond the limits of the State in carrying merchandise of every kind, including articles of commerce, between different States, as well as goods and merchandise from foreign countries, and articles imported in the original packages; that the company was at times employed by the officials of the United States in transporting the funds of the government; that the company, which was incorporated by the State of Georgia, was subject to and had paid city and county taxes on its property, and the tax levied by the United States.

The tax complained of as unconstitutional was levied by virtue of a city ordinance, which provided that "every express company, or railroad company, who shall do business in the city of Mobile, and whose business extends beyond the limits of the State, shall pay an annual license of $500, if within the limits of the State $100, and if within the limits of the city $50." The act, it was maintained, was void because of the nature of the business on which the tax was imposed. The Chief Justice delivered the unanimous opinion of the court sustaining a license tax for the privilege of doing an express business, the company being engaged in inter-state commerce, notwithstanding the record showed that the company was taxed upon its property. That case was decided at the term when *Case of the State Freight Tax* and *State Tax on Railway Gross Receipts* were disposed of. The point of decision in each is referred to, and the decision thus concludes: —

"The license tax was upon a business carried on within the city of Mobile. The business licensed included transpor-

tation beyond the limits of the State, or rather the making of contracts within the State for such transportation beyond it. It was in reference to this feature of the business that the tax was in part imposed; but it was no more a tax upon inter-state commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State."

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

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (96 U. S. 1), this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and inter-state business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to government business, companies of this class become government agencies.

The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and inter-state commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its

occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States.

In *Case of the State Freight Tax* (15 Wall. 232) this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax "on each two thousand pounds of freight carried," without regard to the distance moved, or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and inter-state commerce. In this the court but applied the rule, announced in *Brown* v. *Maryland* (12 Wheat. 419), that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are *Welton* v. *State of Missouri*, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 id. 566; and *Webber* v. *Virginia*, 103 id. 344. Taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers, in *Passenger Cases*, 7 How. 283; *Crandall* v. *State of Nevada*, 6 Wall. 35; and *Henderson* v. *The Mayor*, 92 U. S. 259. Taxes on vessels according to measurement, without any reference to value, were declared to be taxes on tonnage. *State Tonnage Cases*, 12 Wall. 204; *Peete* v. *Morgan*, 19 id. 581; *Cannon* v. *New Orleans*, 20 id. 577; and *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than

full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and inter-state commerce and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in *McCulloch* v. *Maryland* (4 Wheat. 316) and has never been doubted since.

It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review.

The judgment of the Supreme Court of Texas will be reversed, and the cause remanded with instructions to reverse the judgment of the District Court, and proceed thereafter as justice may require, but not inconsistently with this opinion; and it is

So ordered.

THATCHER *v.* ROCKWELL.

After suit brought, proceedings were instituted wherein the plaintiff was duly adjudged to be a bankrupt and assignees were appointed. *Held*, that his bankruptcy cannot be set up by the defendants to bar its further prosecution in his name, if either the assignees expressly consent thereto, or the claim sued on was, four months before the proceedings, transferred by him in good faith and for a valuable consideration to a party for whose use and benefit the suit was brought.

MOTION to dismiss a writ of error to the Supreme Court of the State of Colorado, with which is united under Rule 6 a motion to affirm the judgment.

On the 10th of June, 1875, Rockwell, the defendant in error, brought an action of assumpsit against Thatcher & Standley, the plaintiffs in error, in a State court of Colorado. The declaration on which the trial was had contained the common counts only. The original pleas were the general issue, payment, and set-off; but on the 26th of March, 1877, a supplemental plea was filed, to the effect that on the 26th of May, 1876, Rockwell had been adjudicated a bankrupt, and on the 14th of July, 1876, an assignee appointed, to whom the claim in suit passed under the operation of the bankrupt law; wherefore the defendants "prayed judgment if said plaintiff could longer have or maintain his action against them." To this plea a replication was filed confessing the bankruptcy and the appointment of an assignee, but averring that the claim in suit had been assigned to Kate Rockwell and L. C. Rockwell in November, 1875, and did not pass to the assignee. It was also averred that the suit was prosecuting for the use and benefit of the persons to whom the transfer had been made, and that the assignee in bankruptcy claimed no interest whatever therein. To the replication the defendants rejoined, denying the assignment to the Rockwells.

Upon this issue, among others, a trial was had, and at the conclusion of the testimony the defendants asked the court to instruct the jury, "That if they believe from the evidence that the plaintiff, after the commencement of the suit, filed his petition in bankruptcy and was adjudged a bankrupt, and an assignee in bankruptcy was appointed, then the plaintiff

cannot recover in this action; for if he had any legal claim against the defendants at the time the assignee in bankruptcy was appointed, the same vested in the assignee in bankruptcy."

This instruction was refused, and the court charged: "That if the jury believe from the evidence that Watson B. Rockwell, previous to his bankruptcy, assigned the claim now in suit to his wife Kate and L. C. Rockwell, one-half to each, for a valuable consideration, that this suit is well maintained in W. B. Rockwell's name for their use and benefit, notwithstanding you may believe from the evidence that Rockwell was adjudged a bankrupt in May, A. D. 1876.

"That the defendants cannot avail themselves of the bankruptcy of the plaintiff if the jury believe from the evidence that the money claimed was assigned to the said Kate Rockwell and L. C. Rockwell four months before Rockwell's petition in bankruptcy was filed, and even if there had been no assignment of this claim the defendants could not avail themselves of the bankruptcy, if it appeared from the evidence that the assignee in bankruptcy expressly consented that the plaintiff might continue to prosecute the claim in his own name in this court."

Exceptions were taken in due form and incorporated into the record. The case is here on a writ of error to the Supreme Court of the State for the review of a judgment overruling these exceptions.

Mr. J. Q. Charles and *Mr. James B. Belford* in support of the motion.

Mr. Henry M. Teller, *contra.*

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

By the exceptions to the charge a Federal question is undoubtedly presented upon the record. The court was asked to decide that the proceedings in bankruptcy were a bar to the further prosecution of the suit in the name of the bankrupt. This was refused, and the jury were told that they might bring in a verdict for the plaintiff notwithstanding the bankruptcy, if they found in his favor on the other issues, and the claim

had been assigned, as alleged in the replication, more than four months before the petition in bankruptcy was filed. We must, therefore, overrule the motion to dismiss, but what the court did was so clearly right, that we are not inclined to retain the cause for further consideration on its merits. An assignment in bankruptcy only transfers to the assignee such property as the bankrupt had when the petition in bankruptcy was filed. If in point of fact the claim in suit had been transferred by the bankrupt more than four months before the proceedings in bankruptcy were begun, the assignee in bankruptcy had no interest whatever in the suit that was pending, because, from the time of the transfer the transferees became entitled to the benefit of any recovery that might be had.

The suit, though in the name of the bankrupt, was in fact for and on account of the transferees, whose trustee the bankrupt became when the transfer was completed.

The further charge of the court to the effect that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defence, was also right. By sect. 5047, Rev. Stat., the assignee may prosecute or defend suits pending in the name of the bankrupt at the time of the bankruptcy, but there is nothing which renders it necessary for him to make himself a party on the record to do what is thus allowed. What was said in *Herndon* v. *Howard* (9 Wall. 664) must be construed in connection with the case then under consideration, which was an application by an assignee to be substituted in this court for the original appellant, who had become bankrupt after the appeal was taken. The true rule is stated in *Eyster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 id. 179; *Norton* v. *Switzer*, 93 id. 355; *Jerome* v. *M'Carter*, 94 id. 734; *M'Henry* v. *La Société Française, &c.*, 95 id. 58; and *Davis* v. *Friedlander*, 104 id. 570. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any

other party acquiring an interest *pendente lite*. It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor.

The motion to dismiss is denied, but that to affirm

Granted.

BRIDGE COMPANY *v.* UNITED STATES.

1. Congress, in the exercise of its power over the navigable waters of the United States, which is derived from the commerce clause of the Constitution, gave, by resolution (*infra*, p. 473), its assent that a bridge across the Ohio at Cincinnati might be constructed in accordance with the terms of a charter conferred by State laws; but in case the free navigation of the river should at any time be substantially and materially obstructed by the contemplated bridge, the right to withdraw such assent, or to direct the necessary modifications and alterations, was reserved. While the bridge was erecting, in compliance with the provisions of law, Congress, by statute (*infra*, p. 473), declared that it should be unlawful to proceed therewith, unless certain specified changes should be made. The company made them, and completed the bridge according to the altered plan. *Held*, 1. That in view of the legislation of Congress the resolution is the paramount law by which the rights involved are to be determined, and that the company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress deemed fit to impose. 2. That the withdrawal by Congress of its assent is, for the purposes of this case, equivalent to a positive enactment that, notwithstanding State legislation, the further maintenance of the bridge according to the plan first prescribed was unlawful. 3. That Congress, by requiring changes and modifications to which the company conformed, incurred no liability to the latter.
2. Congress could withdraw its assent whenever it determined that in regard to the construction of the bridge other requirements than those originally prescribed were essential to secure due protection to the navigation of the river.

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

On the 5th of February, 1868, the General Assembly of Kentucky passed an act to incorporate the Newport and Cin-

cinnati Bridge Company, with power to build a bridge across the Ohio River between Newport and Cincinnati. This charter provided "that the said bridge shall be constructed so as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize."

On the 3d of April, in the same year, the General Assembly of Ohio enacted a statute authorizing the creation and organization of corporations to build bridges across the same river. This act, in order that the bridges to be built might not obstruct navigation, provided that they should be erected "in accordance with the provisions of an act of Congress approved July 14, 1862, entitled 'An Act to establish certain post-roads,' or of any act that Congress may hereafter pass on the same subject." Its eleventh section is as follows: —

"SECT. 11. That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio River: *Provided*, that the span of any such bridge be not less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge in the centre of the span over the main channel shall not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high-water mark as may be provided in any act of Congress now in force, or which may hereafter be passed; but this section shall not apply to any bridge built with a draw, in accordance with the provision of an act of Congress approved July 14, 1862, entitled 'An Act to establish certain post-roads,' or any act that Congress may hereafter pass upon the subject."

On the same day this act was passed, the Newport and Cincinnati Bridge Company was organized under it in Ohio to build a bridge between Cincinnati and Newport. Afterwards, on the 16th of April, 1868, the Kentucky and Ohio companies, pursuant to provisions in their respective charters, were consolidated, and became one corporation, with the general powers which the divisional companies originally possessed.

The material provisions of the act of July 14, 1862, c. 167, entitled "An Act to establish certain post-roads" (12 Stat. 569), are as follows: —

"SECT. 3. *And be it further enacted*, that it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio River above the mouth of the Big-Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

"SECT. 4. *And be it further enacted*, that any bridge erected under the privileges of this act may, at the option of the company or companies building the same, be built either as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, that if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation than ninety feet above low-water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge covering the main channel of the river be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall be parallel with the current of the river as near as practicable: *And provided also*, that if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two huudred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or first pier of the draw: *And provided also*, that said draw shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or

trains are passing over said bridge, or when passenger trains are due; but in no case shall unnecessary delay occur in the opening of said draw after the passage of said engines or trains."

On the 3d of March, 1869, Congress passed a resolution entitled "A resolution giving the assent of the United States to the construction of the Newport and Cincinnati bridge." 15 Stat. 347. It is as follows: —

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* that the consent of Congress be, and the same is hereby, given to the erection of a bridge over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio: *Provided*, that said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled 'An Act to establish certain post-roads,' approved July fourteenth, eighteen hundred and sixty-two. That said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

After the passage of this resolution, the consolidated company began the erection of a drawbridge with a pivot draw, and expended a large amount of money in the undertaking, but before it was completed, Congress passed the act of March 3, 1871, c. 121, the fifth section of which (16 id. 572) is as follows:

"SECT. 5. That it shall be unlawful for the Newport and Cincinnati Bridge Company, or any other company or person, to proceed in the erection of the bridge now being constructed over the Ohio River, from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, and the approaches thereto, unless the said bridge shall be so constructed that the channel span of four hundred feet, as now located, shall have under said span a clear headway at low

water, of one hundred feet below any point of said channel span, and in such case no draw shall be required in said bridge; all the other spans of said bridge, which cover the Ohio River to low-water mark, shall have a clear headway of not less than seventy feet above low-water mark; and the other spans of the said bridge, extending to each shore, may be made of less elevation than seventy feet above low-water mark, to accommodate a regular grade for the approaches to said bridge. And when the foregoing requirements shall have been complied with by the said Newport and Cincinnati Bridge Company, the location of said bridge, its structures and approaches, shall thereupon be deemed to be legalized, and declared to be lawful structures, and shall be recognized and known as a post-route. The plans for changes in such bridge made necessary by this act shall be submitted by said company to the Secretary of War for his approval. And in the event of the bridge company making the changes provided for in this act, it shall be lawful for the said company, after they shall have made the changes in said bridge, and the approaches thereto, as herein provided, to file their bill in equity, against the United States in the Circuit Court of the United States for the Southern District of Ohio, and full jurisdiction is hereby conferred upon said court to determine: First, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as substantially to comply with the provisions of law relating thereto; and, second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made, and if the said court shall determine that the United States is so liable, and that said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this act to be made. And the said court is hereby further authorized and required to proceed therein to final decree, as in other cases in equity. And it shall be lawful for either party to the said suit to appeal from the final decree of the said Circuit Court to the Supreme Court of the United States, as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case, and make a final decree therein; and thereupon, if such decree shall be in favor of said company, the Secretary of the Treasury of the United States shall, out of any

moneys in the treasury not otherwise appropriated, pay to the said company such sum of money as shall by the said Supreme Court be so decreed to be paid to the said company: *Provided, nevertheless*, that no money shall be paid by the Secretary of the Treasury to the said company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said company."

The company promptly yielded to these new requirements, and, having completed its bridge on the altered plan, brought in the court below this suit in equity against the United States to recover the increased cost. After hearing, the court dismissed the bill, and from that decree this appeal was taken.

Mr. William M. Ramsey for the appellant.

The Attorney-General and *the Solicitor-General* for the United States.

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

The first question which presents itself is, whether, on the face of the several acts of Congress, any liability rests on the United States to pay the bridge company the cost of the change that was directed in the plan of its bridge. It cannot be denied that but for the act of 1871 a bridge built according to the original plan would have been a lawful structure which the company could have maintained until Congress withdrew its assent, or required alterations to be made. The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *State of Pennsylvania* v. *Wheeling, &c. Bridge Co.*, 18 How. 421; *Gilman* v. *Philadelphia*, 3 Wall. 713; *The Clinton Bridge*, 10 id. 454; *Railroad Company* v. *Fuller*, 17 id. 560; *Pound* v. *Turck*, 95 U. S. 459; *Wisconsin* v. *Duluth*, 96 id. 379. That the Ohio is one of the navigable rivers of the United States must be conceded. It forms a boundary of six States, and the commerce upon its waters is very large.

No question can arise in this case upon what the States have done, for both Ohio and Kentucky required the company to

comply with the regulations of Congress. Neither are we called on to determine what would have been the rights of the company if in the original license no power of future control by Congress had been reserved. The resolution on which the company relies contains this distinct provision: "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." An examination of the legislation of Congress in reference to the bridging of streams shows this to have been at that time a new provision. It had appeared but once before, and then in the act of Feb. 19, 1869, c. 37 (15 Stat. 272), passed at the same session of Congress, authorizing a bridge across the Connecticut at Middletown.

The first enactment by Congress on this general subject is found in sects. 6 and 7 of the act of Aug. 31, 1852, c. 111, making appropriations for the Post-Office Department (10 Stat. 112), which declared the bridge across the Ohio at Wheeling then existing to be a lawful structure. This act simply gave the bridge company leave to maintain a bridge already built, and reserved no power of future control. Next followed, ten years after, the act of July 14, 1862, c. 167 (12 id. 569), which legalized a bridge then in the course of construction across the Ohio at Steubenville, and contained the general provisions as to bridging the Ohio above the mouth of the Big Sandy, referred to in the resolution of March 3, 1869. In this act, also, there was no reservation of power by Congress. The next was the act of Feb. 17, 1865, c. 38 (13 id. 431), by which the act of July 14, 1862, was amended so as to authorize the erection of a bridge across the Ohio at Louisville. In this, too, there was no reservation of power, but specific directions were given as to the height of the bridge, the number and location of draws, and the length of spans, and it was expressly provided that all should be so constructed as not to interrupt navigation. The same day another act was passed, c. 39 (id. 431), by which a bridge across the Ohio between Cincinnati and Covington, then being built in accordance with

the laws of Ohio and Kentucky, was declared to be a lawful structure, and no power reserved. There was no further legislation of this character until the act of July 25, 1866, c. 246 (14 Stat. 244), which authorized eight bridges across the Mississippi at and above St. Louis, and one across the Missouri. This act provided that, "in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches;" and sect. 13 was as follows: "That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved." The act of Feb. 27, 1867, c. 98 (14 id. 412), legalized the Clinton bridge across the Mississippi, and by the act of Feb. 21, 1868, c. 10 (15 id. 37), the act of July 25, 1866, was extended so as to include a bridge over the Mississippi at La Crosse. By the act of July 6, 1868, c. 134 (id. 82), a bridge across Black River in Ohio was authorized. Afterwards, by the act of July 20, 1868, c. 179 (id. 121), two other bridges were authorized across the Missouri. In all these acts the power of alteration and amendment was reserved in the exact language employed in the act of 1866.

This brings the history of congressional legislation on the subject of bridging the public waters of the United States down to the session of Congress when the resolution in favor of the Newport and Cincinnati Bridge Company was passed, and when, as has already been seen, the peculiar form of reservation which appears in that resolution was for the first time introduced. Two licenses were granted at that session, — one by the act of Feb. 19, 1869, c. 37 (id. 272), to cross the Connecticut, and the other by the resolution now in question, and both contained this reservation. On the same day the resolution was adopted Congress passed the act of March 3, 1869, c. 139 (id. 336), to legalize the bridge across the East River, between New York and Brooklyn, in which "power at any time to alter, amend, or repeal" was in express terms and without any limitation reserved.

From this it seems to us clear that the peculiar language of

the reservation now in question was intended to have a special signification. It had been considered enough before to provide that, "to prevent or remove all material obstructions to navigation," the "right to alter or amend," expressed in the usual form, be reserved. But when power was given to build below the Big Sandy a bridge such as had before only been built above, it was deemed expedient, in the interest of commerce, to be more specific, and by reserving the power to withdraw the assent of Congress to what might prove to be an obstruction to navigation, to imply at least a reservation of power to make that unlawful which, while the assent continued, would be lawful. That this is what was intended by the language used may fairly be inferred from earlier legislation on the same general subject. Thus, as early as by the act of March 2, 1805, c. 30 (2 Stat. 330), Congress, in authorizing the grant of leave to a bridge company to build a bridge across a mill-pond and marsh in the navy-yard at Brooklyn, N. Y., provided, "that if at any future time it shall appear to the President of the United States that the property of the United States is injured by such bridge, he may revoke the permission granted by him for erecting the same." Afterwards, by the act of March 3, 1855, c. 198 (10 id. 675, 680), the Secretary of the Navy was authorized to permit another bridge company to connect its bridge with the navy-yard at Kittery, Me., and to have a right of way through the yard to the bridge, but it was provided that the bridge and the right of way might be discontinued at any time by the Secretary. It surely could not be claimed that if, under the power reserved in these cases, the President had revoked the permission given in respect to the bridge at the Brooklyn yard, or the Secretary had discontinued that at Kittery, the United States would be either legally or morally bound to make good the loss sustained by the companies, or either of them, on that account. And the reason is, that the language in which the power reserved was expressed clearly implied that all the risks of revocation and discontinuance were to be assumed by those to whom the grants thus limited were made. So here, in assenting to an untried experiment, and one which might prove to be materially detrimental to the navigation of an important stream, Congress thought proper to reserve the right to

withdraw its assent, — revoke its permission, — if what might possibly happen should, in fact, come as the consequence of the new authority which was granted. To "withdraw assent" is the same as to "revoke permission," and what would be implied from one form of expression will be, under like circumstances, from the other. It is true, in the case of the navy-yards, Congress had absolute jurisdiction, and the States were excluded altogether. But the power of Congress in respect to legislation for the preservation of inter-state commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference. In the present case, both the Ohio and Kentucky divisional companies were, by express provisions in their respective charters, subjected to this paramount controlling power. The consolidated company was, therefore, prohibited from obstructing navigation more than the laws of the United States authorized, and was required to build its bridge in accordance with the provisions of the act of 1862, or any other law that Congress might thereafter pass on the subject. Hence the resolution of 1869 became, by the operation of both congressional and State enactments, the law on which the rights of the company depend. It was the paramount license for the erection and maintenance of the bridge; and the company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress saw fit to impose.

From this we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge, when properly made, is, for all the purposes of this case, equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several States upon the subject. If modifications are directed, assent is, in legal effect, withdrawn, unless the required changes are made.

It is contended, however, that under the terms of the reser-

vation the assent of Congress could not be withdrawn until it had been in some way judicially ascertained that the bridge, as authorized, either did in fact, or would if built, substantially and materially obstruct free navigation. Such, we think, is not the fair meaning of the language employed. In *State of Pennsylvania* v. *The Wheeling, &c. Bridge Co.* (13 How. 518), it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but when afterwards Congress, in the exercise of its constitutional authority to regulate commerce, legalized the structure by a legislative enactment, the court held (18 How. 421) that this act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the legislative department of the government, the obstruction which had been erected was no more than those interested in navigation should submit to for the general good. It is to be observed that the question now under consideration is not whether the bridge company has failed to comply with the requirements of the resolution, but whether those requirements are all that the due protection of free navigation demands. The first is undoubtedly a proper subject for judicial inquiry, but the last, as we think, belongs to the legislature. Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and inter-state commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government. As Congress can exercise legislative power only, all its reservations of power, connected with grants that are made, must necessarily be legislative in their character. In the present case the reservation is of power to withdraw the assent which was given, and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the resolution made sufficient provision for the protection of

commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn, and as the withdrawal involved an act legislative in its character, the necessary presumption is that the inquiry on which it was to be predicated would be legislative also. No provision is made for instituting proceedings to have the question determined judicially, and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure. This is evident from the *Wheeling Bridge Case*, where, as has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this court requiring the abatement of what, but for this assent, would have been, in the judgment of the court, a public nuisance. The withdrawal of assent, therefore, has been left to depend on the judgment of Congress in the exercise of its legislative discretion. For this purpose Congress must make its own inquiries, and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the power which was reserved as a condition of the original grant made.

It is next insisted that if in the judgment of Congress the public good required the bridge to be removed, or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation. In the present case the bridge company asked of Congress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the company got from Congress was the grant of a franchise, expressly made defeasible at

will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created. In the use of the franchise thus granted, the company might, and it was expected would, acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever in the judgment of Congress it could not be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon.

We are aware that this is a power which may be abused, but it is one Congress saw fit to reserve. For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature.

What has been done seems to have been with due regard to the rights of all concerned. The Constitution made it the duty of Congress to protect all commerce which extends beyond State lines against obstruction by or under the authority of the States. Two States had been applied to for leave to bridge an important national river. They gave the leave, but made it subject to the constitutional control of Congress. Congress, when applied to, assented to what was wanted, but in express terms reserved to itself the power to revoke what had been done, or require alterations to be made, in case experience proved that the structure which was to be put up

substantially and materially interfered with navigation. Under this authority work was at once begun. The next year, by the act of July 10, 1870, c. 240, sect. 5 (16 Stat. 227), making large appropriations for the improvement of rivers and harbors, the Secretary of War was required to detail three engineers to examine all the bridges erected or in the process of erection across the Ohio, and report to the next Congress whether, in their opinion, such bridges, or any of them, as constructed or proposed to be constructed, did or would interfere with free and safe navigation; and if they did or would so interfere, to report what extent of space and elevation above water would be required to prevent obstruction, and an estimate of the cost of changing the bridges built, and in the process of building, so as to conform to what was recommended. At the next session the act was passed which required the Newport and Cincinnati Company to alter its bridge, and allowed this suit to be brought for the purpose of determining whether any liability for pecuniary damages had been incurred by the United States to the company for what was done. In this way Congress recognized fully the obligation resting on every government, when it is guilty of a wrong, to make reparation. Exemption from suit does not necessarily imply exemption from liability. Here Congress gave the courts jurisdiction to determine whether a wrong had been done, and, if so, to award compensation in money by the payment of the cost of what had been improperly required. In our opinion Congress did no more than it was authorized to do, and there is no liability resting on the United States to answer in damages.

It is next insisted that by the terms of the statute authorizing the suit the liability of the United States is established, if it shall be determined that the bridge, as far as it had progressed, was "constructed so as to substantially comply with the provisions of law relating thereto." We do not so understand the statute. The language is as follows: "Full jurisdiction is hereby conferred upon said court to determine: *first*, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as substantially to comply with the provisions of law relating

thereto; and, *second*, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made, and if the said court shall determine that the United States is so liable, and that said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures," &c.

The rule of damages has been fixed by the statute. As to that the court has no discretion beyond ascertaining the excess of cost. But before damages can be given, it must appear both that the United States was, in law, liable, and that the bridge had been constructed in accordance with the requirements of the law, down to the time the change of plan was directed. That the liability of the United States was not made to depend entirely on the fact that the law in respect to the form of the structure had been complied with is apparent, because if such had been the intention of Congress it would have been entirely unnecessary to submit the second question for determination. But the second is as clearly submitted as the first. Damages are not to be given if either is found in favor of the United States. No matter whether the United States was, in law, liable or not, if the bridge had not been constructed so as substantially to comply with the law, there could be no recovery. That is expressly declared. If, however, it had been properly built, the determination of the question of legal liability became important, and that, in our opinion, depended entirely on the right of Congress, under the Constitution and laws of the United States, to require the change without making just compensation in money.

Decree affirmed.

MR. JUSTICE MATTHEWS did not sit in this case, nor take any part in deciding it.

MR. JUSTICE MILLER, MR. JUSTICE FIELD, and MR. JUSTICE BRADLEY dissented.

MR. JUSTICE MILLER. I dissent from the decree of the court in this case, and as I cannot agree to all the grounds on which my brother Field dissents, I will state very briefly the

reasons which have seemed to me to require the reversal of the decree of the Circuit Court.

Congress gave its assent in the most solemn form, by the resolution of 1869, to the erection of a bridge over the Ohio River by the appellant company, the character of which was described in the resolution. It reserved the right to withdraw the assent thus given in case the free navigation of the river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct necessary modifications and alterations of said bridge. The Circuit Court finds that up to the third day of March, 1871, the bridge company had proceeded in the erection of their bridge, "in all respects constructing the same so as substantially to comply with the provisions of the law relating thereto."

On that day Congress passed the act under which this suit is brought; and it is upon the construction of this act in connection with the resolution of 1869 that the decision of this case must turn.

It will be observed that the resolution reserved to Congress a right to interfere and assert its power only in case the bridge of the appellant should at any time *substantially and materially* obstruct the free navigation of the river; and, in that event, the reservation was that Congress might withdraw the assent so given to the erection of the bridge, *or* direct the necessary modifications and alterations of said bridge. It is not necessary to inquire whether Congress could do both these things or not, for it did not, as I understand the language of the act of March 3, 1871, c. 121, withdraw or intend to withdraw its assent previously given.

It did exercise the alternative power given by the joint resolution, and "direct the necessary modifications and alterations of said bridge."

The legislation by which this is done is the fifth and last section of an act making appropriations for the service of the Post-Office Department.

It is important to observe that it contains no declaration that the bridge, as then constructed or in process of construction, would either partially or substantially obstruct the navigation

of the Ohio River, nor does this court base its decree on the existence of that fact. Nor do counsel in the argument before us insist that this was proved, or that it was a necessary condition to the exercise of the power which Congress assumed in passing the statute requiring alterations in construction of the bridge, costing over $200,000.

Why did not Congress declare as a reason for the exercise of this power that the bridge as originally authorized by it was or would be an obstruction to navigation? and why did it not content itself with making that declaration and withdrawing its assent, as it would then have a right to do?

The best answer to this question, the most reasonable one to be made, and the one most consistent with the evidence in this record, is that either the fact did not exist, or was not so apparent, that Congress was willing to found any action on it.

But Congress, with this view of that question, and entertaining also a just view of its powers and obligations as regards the appellant and the bridge, determined to exercise such power as it had, for the purpose of changing the structure from a drawbridge, to a bridge so high above the water that no draw was necessary.

It did this; but in the same section which prescribed this change and forbade the company to proceed in any other mode of construction, it provided equitable relief for the injury which this somewhat arbitrary act of power inflicted on the Bridge Company.

I repeat that it was competent for Congress to have declared that the bridge, as it was in process of construction, had proved to be a substantial and material obstruction to the free navigation of the river, and for that reason the assent of Congress to its erection was withdrawn. Or that it would be such an obstruction unless certain modifications of the plan were made, which Congress could prescribe, and require them to be made. But it did neither. It based no action on the assumption that the bridge was or would be an obstruction to navigation; but it determined to change the bridge from a low bridge with a draw, to a high bridge without a draw. The difference in these two is well known to every one who has travelled over

our Western rivers, and I myself am familiar with no less than ten drawbridges across the Mississippi built under acts of Congress, which are not substantial or material obstructions to the navigation of that great river.

Congress, therefore, never intended to act on the reservation contained in the resolution. No reference is made to that resolution in the act of 1871 requiring this total change of plan.

Nothing is more reasonable, therefore, than that Congress, resorting to its high prerogative of requiring a structure which would not only be no *substantial* or *material* obstruction to navigation, — words well understood, — but one which would impose no delay in passing it, nor interfere in the slightest possible manner with navigation, should see that equity and justice required compensation for the loss inflicted by this change.

It *did* see this, and provided for the situation. Until the structure was completed, no one could tell the cost of the changes required. When completed, the safest tribunal, as Congress thought, to determine this was a court. And that the court might not be restricted by the rigid rules of a court of law, it referred the matter to a court of equity, with instructions to proceed as in other cases in equity. It required the court to determine "the actual and necessary costs and expenditures reasonably required to be incurred in making the changes ordered," and it instructed the Secretary of the Treasury to pay the amount so found.

It required the court to ascertain, "first, whether the bridge, according to the plans on which it has progressed at the passage of this act, has been constructed so as to substantially comply with provisions of law relating thereto." The court found that the bridge was in conformity to law, including, of course, the joint resolution giving the assent of Congress. "Second, the liability, if any there be, of the United States to said company by reason of the changes by this act required."

The whole argument of the opinion of the court is founded on the potentiality of this, "*if any there be.*" And the whole scheme and purpose of the joint resolution, its assent with qualified power of withdrawal, the failure of Congress to

declare the existence of the condition on which this right of withdrawal was to be exercised, the fact that the law required the court to find whether the appellant had proceeded according to law, and that the court found it had so proceeded; the great loss which the appellant was compelled to bear, and the reference of the whole matter to a *court of equity*, are all ignored, that we may throw ourselves back on the general and absolute power of Congress, over navigable waters, to defeat this eminently just claim for losses, growing out of the exercise of that power. It is impossible for me to believe that Congress went through all this tedious legal machinery to have the court decide upon its *right* to exercise such a power without responsibility. It is not the habit of that body to refer intentionally the question of its constitutional power to the courts of the country.

Nor is such construction of the words "if any there be" necessary. There were two contingencies in which Congress might have acted, as it did, without incurring any just obligation to make compensation. One of these was that the bridge might not have been built in conformity to the terms of the joint resolution, and in that event the company was in no condition to complain of the action of Congress requiring a change. The act required this fact to be ascertained by the court, and it evidently meant that no damages should be awarded unless it was found that the law was complied with.

Congress might, also, while declining to ascertain for itself whether the bridge, as authorized, was likely to prove *a substantial and material* obstruction to navigation, have made compensation for the change they ordered to depend upon the existence or non-existence of that fact, and left it to the court to determine.

This court refuses to inquire into this latter question, and notwithstanding the fact, which the court was expressly required to find, is found in favor of the appellant, it proceeds on what I think is a fallacious view of the statute, namely, that Congress intended to refer to the court the question of its constitutional power to change the character of the bridge, and it decides in favor of that power, thus disregarding the whole

structure of the two acts on which the right to compensation is based.

I think Congress intended to waive that question, and in favor of justice and fair dealing to pay for the losses incurred under the very act which gave the compensation, if it was found that the bridge, as far as it had progressed, was in conformity to law, and would not be a substantial and material obstruction to navigation if completed on that plan.

MR. JUSTICE FIELD. I am not able to agree with the majority of the court in their judgment in this case, nor in the reasons assigned for it. Their opinion proceeds upon a theory of the power of Congress over bridges crossing navigable waters to which I cannot assent. Its power to authorize the construction of such bridges not being conferred in express terms by the Constitution, must, if it exist, be deduced from the power to regulate commerce with foreign nations and among the several States. This latter power authorizes Congress to prescribe rules by which commerce in its various forms may be conducted between our people and those of other countries, and between the people of different States; and also to adopt measures to facilitate and increase it. When the Constitution was adopted, commerce with foreign nations and even between the several States was carried on principally by means of vessels. Its regulation, therefore, required such control over our harbors, bays, and navigable streams connecting them or different States, as might be necessary to keep navigation free from unnecessary obstructions; and might legitimately extend to making such improvements as would facilitate the passage of vessels, render their anchorage safe, and expedite the discharge of their cargoes and the landing of their passengers and crews. To this extent its power over navigable waters goes, under the commercial clause; no further. Unless, therefore, the free navigation of the public waters is impeded by what a State may do or permit, Congress cannot interfere with its action. And what is meant by their free navigation I shall hereafter explain. The doctrine of a paramount power in Congress over bridges crossing navigable streams — either to authorize their construction, or regulate them, that is, control them when con-

structed — derives no support from its power to protect the free navigation of such streams. If a bridge, for example, built under the law of a State, should cross a navigable stream, at so high a point, and in such a way, as in no manner to obstruct its free navigation, Congress could not interfere with the structure. Its permission would not authorize the building, nor its command authorize the removal, of the bridge. And while Congress may declare that bridges of particular height and dimensions shall not be deemed an obstruction to the free navigation of the streams, it cannot interfere with bridges of a different size and character, unless they prove to be an impediment to such navigation.

Of course, should Congress undertake the construction of a road for the postal service, or other national purposes, it might authorize the erection of a bridge over navigable streams, to connect the road on opposite sides. But it is not of such works, or of bridges connecting them, that we are speaking; but of bridges built under the law of a State, and of the power which Congress has to interfere with and control them.

This view of the limits of the power of Congress will be more clearly apparent, if we consider it in connection with the construction of docks, wharves, and piers. Some of our bays and harbors are miles in width. Such is the size of the bays of New York and of San Francisco; and some of the streams upon which piers and wharves are built, like the Mississippi and the Hudson, are over a mile in width. The several States own the soils under tide-waters within their limits. Speaking on this subject with reference to lands under the tide-waters of the bay of San Francisco, this court said: "Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide-waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

The same doctrine was previously asserted in *Pollard's Lessee* v. *Hagan*, 3 How. 212; in *Martin* v. *Waddell*, 16 Pet. 367; in *Mumford* v. *Wardwell*, 6 Wall. 423, 436; and subsequently in *McCready* v. *Virginia*, 94 U. S. 391. The State of California, exercising her right of disposition of such soils, granted in 1851 to the city of San Francisco a large tract of land covered by the tide-waters of the bay; and since then the tract has been filled up, and wharves, piers, streets, and blocks of buildings of the most permanent and costly character have been constructed upon it. The bay being miles in width, its free navigation is in no way impeded by the new blocks of buildings and streets, where vessels once floated and cargoes were discharged.

Now, the control of Congress over the bay is as complete and unrestricted as over the navigable streams of the State. Could it in the exercise of its commercial power, that is, in its control over navigation, direct the destruction of the wharves, the buildings, and streets, which have been built where, in 1850, the tide-waters of the bay flowed? I doubt whether any jurist could be found who would hazard his reputation by giving an affirmative answer. And why not? Simply because until the free navigation of the bay for purposes of commerce is impeded, Congress has no power to interfere with the buildings and wharves constructed.

There are wharves and piers constructed, under State authority, at New York City, where the waters of the Hudson once flowed. There are wharves and piers in all our bays and harbors which are built in their waters. But as these structures do not interfere with the free navigation of the river in the one case, nor of the bays and harbors in the other cases, no judge or jurist has ever ventured to assert a power in Congress to order their removal at its pleasure; and simply because the right of interference on its part does not arise until the free navigation of the waters is obstructed. On what possible ground, then, can Congress order the removal of bridges built over navigable streams, under authority of the States, when they do not interfere with the free navigation of the streams? With the most careful consideration I can give to the subject I am unable to find any. To me it seems clear that no such arbitrary power exists.

The power of the State over its internal commerce must also be considered in treating of this subject. While the Constitution vests in Congress the power to regulate commerce among the several States, it leaves with each the regulation of its internal commerce. "Comprehensive," says Mr. Chief Justice Marshall, "as the word 'among' is, it may be very properly restricted to that commerce which concerns more States than one," and "the completely internal commerce of a State, then, may be considered as reserved for the State itself." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195. The jurisdiction of the State over the navigable waters within its limits, so far as may be necessary for the regulation of its internal commerce, is as complete as the jurisdiction of Congress over them for the regulation of inter-state or foreign commerce. On this subject we said, in *County of Mobile* v. *Kimball*: "The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce, and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation, as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States, for the purposes and within the limits mentioned, does not infringe upon the commercial power of Congress." 102 U. S. 691, 699.

It follows, I think, from what has been said, that the position of the majority of the court, as to the paramount power of Congress over bridges crossing navigable streams, is not tenable. Congress cannot invade the rights of a State, nor can a State impede the exercise of the just powers of the Federal government. The conclusion I draw is, that a bridge constructed by the authority of a State, if it does not interfere with the free navigation of the stream, is a lawful structure, and can neither be taken nor destroyed by Congress or by the State, except as other private property may be thus taken, that is, for public purposes upon making just compensation.

It must also be borne in mind that the power to regulate

commerce with foreign nations and among the several States, extends to such commerce on land as well as to that on navigable waters. There are highways on land in every State, on which a far greater commerce, both inter-state and foreign, is conducted, than that which is borne upon its navigable waters. Congress can require that this commerce shall be as free from unnecessary obstruction as that on navigable waters connecting two or more States or leading to the sea. There is nothing in the Constitution which in any respect distinguishes the regulation it may exercise in either case. Its power, in all its extent and with all its limitations, is the same in both. The fact that navigable waters are natural highways, and roads, railways, and canals are of artificial construction, does not affect the power. That is one of regulation of inter-state and foreign commerce by whatever channels conducted. If bridges crossing natural highways cannot be constructed without the consent of Congress, because it is vested with the power to regulate commerce with foreign nations and among the States, for like reason bridges cannot be constructed without such consent over artificial highways on land. The argument for the necessity of the consent in the one case is equally good in the other, and is equally unsound in both. In nearly every county of every State, bridges have been constructed under State authority over railways, — the great highways of commerce in modern times, — and it has never been suggested that the consent of Congress to their construction was at all necessary.

Nor do I find in the previous decisions of this court any recognition of a power in Congress to authorize the construction of bridges over navigable streams within or bordering on the States, in the sense that its permission will justify their construction, and that without it such construction would be unlawful, — excepting, of course, bridges which are parts of works undertaken for national purposes, — or of a power to regulate them, that is, to control them, after they are constructed. There are expressions in the opinions of the judges in the *Wheeling Bridge Case*, in the 18th of Howard, that, under the power to regulate commerce, Congress may declare what shall and shall not be deemed in judgment of law an obstruction to navigation. But these expressions, in their

generality, were not called for by the case before the court. That only called for a determination of the question whether a structure adjudged by the court to be unlawful as an obstruction to the navigation of the river could afterwards be legalized by Congress. The court held that it could be legalized, which amounted to no more than declaring that it should not thereafter be treated as interfering with the public right of navigation of the river, so far as that right was under the protection of Congress. This is a very different thing from asserting a power to declare that a structure, lawful when erected, and in no way interfering with the navigation of the river, is an unlawful structure, removable without compensation to the owner. I cannot admit that there is any such arbitrary power under our government. I find no warrant for it in the Constitution; on the contrary, all the guarantees which that instrument contains for the security of property negative its existence. Yet out of this assertion of a power to legalize a structure, which without such sanction would be deemed an obstruction to navigation, has grown up the doctrine of an independent power in Congress to authorize the construction of bridges over navigable streams without the permission of the States, and to control them when constructed. In this we are furnished with a striking illustration of the facility with which power is assumed from expressions, loosely or inadvertently used, apparently recognizing its existence. From the use of the word "assent" to the erection of a bridge over a navigable river, or the declaring of one already erected a lawful structure, the transition has been easy and natural to the assumption of an affirmative power in Congress to authorize, independently of the action of the States, the construction of such bridges, and to control them. From the authorities cited, and the reasons assigned, it is evident that Congress possesses no such power. In the *Wheeling Bridge Case*, Mr. Justice Nelson, who delivered the prevailing opinion said: "The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce." 18 How. 430. Mr. Justice McLean, while dis-

senting from the asserted power of Congress to declare a bridge to be a lawful structure, which had been adjudged by the court to be a public nuisance as an obstruction to navigation, spoke with emphasis against the existence of any authority in Congress to construct bridges, and, of course, to authorize their construction, and his views do not appear to have met with any dissent from the other judges. "If," said he, "under the commercial power, Congress may make bridges over navigable waters, it would be difficult to find any limitation of such a power. Turnpike-roads, railroads, and canals might on the same principle be built by Congress. And if this be a constitutional power, it cannot be restricted or interfered with by any State regulation. So extravagant and absorbing a Federal power as this has rarely, if ever, been claimed by any one. It would, in a great degree, supersede the State governments by the tremendous authority and patronage it would exercise. But if the power be found in the Constitution, no principle is perceived by which it can be practically restricted. This dilemma leads us to the conclusion that it is not a constitutional power."

Such, also, has been the uniform doctrine of the Supreme Courts of several States declared by judges, some of whom were justly distinguished for their learning and ability. Thus, in *The People* v. *Rensselaer & Saratoga Railroad Co.*, in the Supreme Court of New York, Chief Justice Savage, in delivering its opinion, said: "I think I may safely say that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the State legislatures, before the delegation of power to the Federal government by the Federal Constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains, then, in the State legislatures, or it exists nowhere. It does exist, because it has not been surrendered any farther than such surrender may be qualifiedly implied; that is, the power to erect bridges over navigable streams must be considered so far surrendered as may be neces-

sary for a free navigation upon those streams." 15 Wend. (N. Y.) 113, 131.

If weight is to be given to these authorities, and to the reasons on which they rest, it must follow that the sovereignty and jurisdiction of the States over their navigable waters, which were as absolute upon the adoption of the Constitution as over their roads, still continue; except that they are to be so exercised as not to obstruct the free navigation of the waters, — so far as such navigation may be required in the prosecution of inter-state and foreign commerce. And by "free navigation" is not meant a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free, when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian States. In this country, the navigation of a river is deemed to be free, when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws; and such occasional tolls as may be levied to meet the expenses of improving its navigation. The delays attendant upon the necessary transit of persons and property, or the enforcement of quarantine and health laws, or the exaction in exceptional cases of tolls, are not deemed to be inconsistent with the free navigation of the river in the legal sense of those terms. Thus, bridges with draws of sufficient width for the passage of vessels are allowed on rivers in Europe, like the Rhine, whose navigation is declared to be free. So, in this country, such bridges do not destroy the free character of the navigation, any more than ferries, though, like them, they may cause more or less delay to vessels. In *Palmer* v. *Commissioners of Cuyahoga County*, application was made to the Circuit Court of the United States, sitting in Ohio, for an injunction to prevent the construction of a drawbridge over the Cuyahoga River, on the ground that it would obstruct the navigation of the river and injure the property of the plaintiff in its vicinity. It was founded upon the fourth article of the ordinance of 1787 respecting the Northwestern Territory, which declares

"that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said Territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor." The court, refusing the injunction, said that this provision "does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river, which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass, with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A drawbridge across a navigable water is not an obstruction. As this could not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the State to make the bridge."

In the *Wheeling Bridge Case*, the bridge was held to be an unlawful obstruction because it entirely prevented the passage of steam vessels with high chimneys; and the court ordered that it should be elevated in a manner, and to an extent indicated, so as to afford a free passage for the steamers; or that some other plan should be adopted by a day designated which would relieve the navigation from obstruction. Upon a suggestion that the obstruction to the navigation might be avoided by making a draw in the bridge, or in some other manner equally convenient to the public and less expensive than by elevating it, the matter was referred to an engineer; and upon his report the company was allowed to make an attempt to obviate the obstruction by improving another channel of the river and constructing a draw in the bridge over it. Some

slight delay would be caused by the draw, and an increased distance would have to be run in passing the new channel; but the court did not consider these circumstances as constituting a material objection to the plan. See also Cooley, Const. Lim., pp. 591–594, and authorities there cited.

The considerations to which I have referred and the authorities cited lead to a ready solution of the questions raised by the case at bar.

The construction of a bridge over the Ohio River was authorized by the legislation of Kentucky and Ohio. The legislation of Kentucky, adopted in 1868, provided that the bridge "should be so constructed as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize." The legislation of Ohio, adopted the same year, authorized the construction of a bridge "either with a single span or with a draw," as the company (incorporated for that purpose) might determine; but in either case, in order that said bridge might not obstruct the navigation of said river, the same should be built in accordance with the act of Congress of July 14, 1862, or of any act that Congress might thereafter pass on the subject; which, of course, meant before the bridge was built. The only regulation of Congress to which the erection of the bridge was made subject by the States, was such as had been prescribed or might be prescribed previously to the execution of the work. The bridge was not surrendered to any further disposition or control of the general government. The companies organized under the laws of the two States for the construction of the bridge were authorized to consolidate themselves into one company. They were consolidated under the name of the Newport and Cincinnati Bridge Company.

On the 3d of March, 1869, Congress passed a resolution giving its consent to this company to erect a bridge over the Ohio River from Cincinnati to Newport, provided it be built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier, over the main channel of the river, and in all other respects in accordance with the conditions and limitations of an act entitled "An Act to establish certain post-roads," approved July 14, 1862; and the resolution declared that the bridge, when completed in the manner

specified, should "be deemed and taken to be a legal structure," and should be "a post-road for the transmission of the mails of the United States." It also had this clause: "*But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge.*"

The act of July 14, 1862, provided that any bridge erected under it might, at the option of the company building the same, be constructed either as a drawbridge with a pivot, or other form of draw, or with unbroken or continuous spans; and specified the width of the spans and the elevation of the bridge.

In March, 1869, the company commenced the construction of a bridge across the river according to a plan, which met all the conditions imposed by the legislation of the States and of Congress, and the work was prosecuted until March, 1871, when it was nearly completed, the actual cost then incurred being about $807,000. The whole cost, when completed at contract prices, would have been about $1,110,000. On the 3d of March of that year, while the company was in the prosecution of the work, Congress passed an act declaring that it would be unlawful for the company or any other person to proceed with the erection of the bridge without making various alterations, including a wider span and a higher elevation, which should be submitted to the Secretary of War for his approval.

The company immediately suspended work, adopted a new plan, submitted it to the Secretary of War, obtained his approval, and then proceeded with the bridge and completed it. The additional work, and the necessary changes in that already done, required by the act of Congress, caused an additional expenditure of over $300,000. The act also provided that, in the event the company made the changes, it should be lawful for it to file a bill in equity against the United States, in the Circuit Court for the Southern District of Ohio, which should have jurisdiction to determine, *first*, whether the bridge, according to the plans on which it had progressed at the passage of the act, had been constructed so as substantially to comply

with the provisions of law relating thereto; and, *second*, the liability of the United States, if any there were, to the company, by reason of the changes required; and if the court should determine that the United States were so liable, and that the bridge was so being built, then the court should further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the bridge and its approaches, in excess of the cost of building the bridge and approaches according to the original plan. The court was further authorized and required to proceed therein to final decree as in other cases in equity.

Under this act the present bill was filed, and it was clearly shown at the hearing that when the act was passed the bridge had been constructed substantially in compliance with all the provisions of law in relation thereto; that so far as constructed it did not materially obstruct the navigation of the river, and would not have done so had it been completed according to the original plan. Yet the court below held, and this court sustains its ruling, that for the enormous expenditures forced upon the company the United States are in no way responsible. This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute; and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.

I do not think that the assent of Congress to the erection of the bridge was at all essential to its character as a lawful structure. That depended upon the legislation of Kentucky and Ohio, and upon the contingency of the bridge not interfering with the free navigation of the river. The assent of Congress, as already stated, only removed all ground of complaint of the structure as interfering with the public right of navigation, so far as that right was under the protection of the Federal government. No one could afterwards complain that the bridge, if built in conformity with the directions specified, constituted a public nuisance, because interrupting the free navigation of the river as secured under the laws of Congress, and proceed to obtain its abatement. The authority of the States

to build it, coupled with the assent of Congress, if constructed in the manner prescribed, placed the work, whilst in the process of erection and when completed, beyond the reach of legal proceedings for its abatement or modification. It could not, when completed, be taken for public purposes by the general government, nor be materially changed in its form and structure whilst in the process of erection, under compulsion of the legislation of Congress, without compensation to its owners. The legislative declaration, made when it was nearly completed, that its further construction would be unlawful without a change of plan, which necessitated very costly alterations, or an abandonment of the bridge, was a taking from its owners of a portion of their work as effectually as its absolute appropriation. If not, in the strict constitutional sense, a taking of private property for public uses, it was an enforced expenditure of labor and materials by the company, not required by the work undertaken or the conditions on which assent to its construction had been given; and for such labor and materials the government should, on every principle of justice, indemnify the company. A legislative decree commanding such an expenditure is within the spirit, if not the letter, of the constitutional provisions which inhibit depriving one of his property without due process of law, and taking it from him without compensation. The wrong inflicted is as great in the one way as in the other. As the provisions were designed to secure the individual from the arbitrary spoliation of his property, their purpose could be readily evaded if a special act could exact for the protection of his property an expenditure of money or labor, which was neither exacted when the property was acquired, nor permitted by the terms of its acquisition.

This view was taken by the Court of Appeals of Virginia, in *Crenshaw* v. *Slate River Company*, reported in 6th Randolph. There it was held that after a mill had been established and a dam erected according to a law granting to the mill-owner the use of the water for grinding, a subsequent act of the legislature, which imposed on him the burden of erecting locks through his dam, keeping them in repair, and giving them attendance so as to admit the passage of boats, and on his failure, vested in a company the power to abate the dam as

a nuisance, without full indemnification and equivalent for the injury thus done to his vested rights, was contrary to the Constitution of the State, and void, as a taking of private property for a public use without compensation.

There are many ways of taking property other than by occupation or appropriation, which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned. Such is the purport of the decision in *Pumpelly* v. *Green Bay Company* (13 Wall. 166), a decision which has attracted much attention from its enlarged views of the redress afforded by the constitutional provision for injuries to property effected under authority of law, which permanently and materially impair its value. It was there held that the backing of the water of a river in Wisconsin by a dam authorized by law, so as to overflow the land of an individual, thus destroying its usefulness to him, was a taking of the property within the meaning of the Constitution. Mr. Justice Miller, in delivering the opinion of the court, very justly observed that "it would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to an extent, — can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

It is not necessary, however, in order to charge the government with the expenditures forced upon the company, to rely upon this provision of the Constitution, further than to show the general spirit which should control the government in its legislation affecting the property of individuals. There is a general principle of justice pervading our laws, and the laws of all free governments, which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money or labor or materials for the protection and preservation of his property, shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individuals; and wherever suits can be brought in the tribunals of the country, such indemnity can be enforced. Here the government waives exemption from suit which its sovereign character gives, and submits the question of its liability to the judgment of its tribunals, thus admitting a readiness to indemnify the owners of the bridge, if it has disregarded its pledge and dealt unfairly with them in the premises.

The resolution of Congress giving its consent to the erection of the bridge specified its character and form, and the right to withdraw the consent or to direct necessary modifications and alterations of the bridge was reserved to be exercised only in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge. The reservation clause is to be read as though written thus: "But Congress reserves the right to withdraw the assent hereby given [or to direct the necessary modifications and alterations of said bridge] in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution." The right to withdraw the assent or to direct alterations was thus made to depend upon the same contingency; and the resolution amounts to a pledge of the government, that neither should be done unless the contingency happened. Congress said to the constructing company in substance thus: "You are empowered by the States of Kentucky and Ohio to build a bridge over the Ohio River, of certain height and dimensions, provided it be so constructed as not to obstruct the navigation

of the river further than the present laws of the United States authorize, and in accordance with the act of July 14, 1862. Now, we consent to the erection of the bridge, that is, we declare that, if constructed in the manner prescribed, it shall not be deemed an obstruction to the free navigation of the river; but we reserve the right to withdraw this assent, or to direct alterations to the bridge, if hereafter the free navigation of the river should be substantially and materially obstructed by it."

The general government, through Congress, thus bound itself not to interfere with the construction of the bridge, nor with the bridge when completed, except on the contingency of its proving a material obstruction to the free navigation of the river. Such contingency had not occurred when the act directing the alterations was passed; it has never occurred. So the proofs in the case show, and independently of this circumstance, whether or not the contingency had occurred, was not a fact to be arbitrarily determined by the legislature. It was to be ascertained judicially upon proofs and after hearing the parties, like any other disputed fact upon the establishment of which rights of property depend. This doctrine, as well as other positions advanced in this opinion, is well illustrated by the case of *Commonwealth* v. *The Proprietors of New Bedford Bridge*, 2 Gray (Mass.), 339. There the act chartering the corporation authorized the building over a navigable stream in Massachusetts of a toll-bridge with two suitable draws, which were to be at least thirty feet wide, — one on the west side of the river in the channel way, and the other on the east side in the most suitable place there. A bridge with such draws was accordingly built. A subsequent act of the legislature required the corporation to make and maintain, in lieu of one of these two draws, a new draw of not less than sixty feet in width, — the westerly abutment of which was to be eight feet further to the eastward than the westerly abutment of the existing draw. The bridge proprietors, not making the changes required, were indicted for obstructing the navigation of the river by their bridge. They justified under their act of incorporation. In deciding upon their liability the court held that the original act of incorporation, when accepted, consti-

tuted a contract between them and the State, by the terms of which both parties were equally bound; that the proprietors could not, without the consent of the legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act; nor could the legislature, without the assent of the proprietors, in any way affect or impair the original terms of the charter by annexing new conditions or imposing additional duties onerous in their nature or inconsistent with a reasonable construction of the contract; that by its terms the proprietors were to erect "suitable draws, which were to be not less than thirty feet wide;" and that the question whether the draws already made were suitable, that is, constructed so as not unreasonably or unnecessarily to obstruct or impede the navigation of the river, was not a question to be determined absolutely by the legislature or by the proprietors, when disputed between the parties. "Like all other matters involving a controversy concerning public duty and private rights," said the court, "it is to be adjudged and settled in the regular tribunals where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." The same doctrine is also well illustrated in the case of *Mayor of Baltimore* v. *Connellsville & Pittsburg Railroad Co.*, decided in the Circuit Court of the United States by the late Mr. Justice Grier. The charter of the Pittsburg and Connellsville Railroad Company, a corporation of Pennsylvania, contained the following provision, viz.: "If the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation." Under this clause the legislature passed an act, in 1864, revoking and resuming all the rights and privileges granted to the company, so far as it authorized the construction of a line southwardly or eastwardly from Connellsville. But the court held that when the right to revoke was to be exercised only in case the corporation should misuse or abuse its privileges, the fact of such misuse, if denied by the corporation, should be established by competent proceedings; and that an act declaring a revocation without the establishment of such fact was unconsti-

tutional. In giving its opinion Mr. Justice Grier said: "If in the act of incorporation the legislature retains the absolute and unconditional power of revocation for any or no reason; if it be so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked; or if this contract be that the legislature may repeal the act whenever in its opinion the corporation has misused or abused its privileges, then the contract constitutes the legislature the arbiter and judge of the existence of that fact. But the case before us comes within another category. The contract does not give an unconditional right to the legislature to repudiate its contract, nor is the legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse." 4 Am. Law Reg. N. S. 750.

A consciousness seems to have pervaded Congress that it was disregarding its pledge to the company, when it directed the alterations which proved so expensive, before the contingency mentioned had happened; and that it might turn out that the bridge completed as designed would not substantially and materially obstruct the free navigation of the river; and that, in that case, it would be justly chargeable with the commission of an injury to the company. For this reason, I think we may assume it intended that the court should award compensation to the owners for the alterations made, if, upon proof, it appeared that, so far as the bridge had been constructed, when they were required, the provisions of the law relating thereto had been substantially complied with; and it should also appear that, if completed as originally designed, the bridge would not have substantially and materially obstructed the free navigation of the river. Congress did not intend that heavy expenditures should be imposed by its will upon the company without at the same time offering, if they were illegally exacted, to reimburse them. Congress intended to be just, and I cannot resist the conclusion, that the court, in its decision, has defeated its intentions.

MR. JUSTICE BRADLEY. I dissent from the judgment of the court in this case, and will briefly state my reasons. The central reason is, that the bridge, as it stood, nearly completed when the

act of March 3, 1871, c. 121, directing it to be taken down or altered, was passed, was a lawful structure, and in the lawful possession of the appellants as their private property; and, being such, I think that Congress could not constitutionally require its demolition, or reconstruction, without providing for compensation to the owners. By virtue of its plenary power to regulate commerce among the several States, as well as with foreign nations, Congress may undoubtedly require the removal of all nuisances and unlawful obstructions in the navigable rivers of the United States, without giving compensation to any persons who may be incidentally affected. It also has the power to improve the navigation of such rivers; but in making or authorizing improvements, other than the removal of unlawful obstructions, it cannot take private property without complying with that clause of the Fifth Amendment to the Constitution which declares, "Nor shall private property be taken for public use without just compensation." This proposition would be conceded where property taken for that purpose consists of lands, houses, buildings, or other structures standing on the natural banks of a river; but I think that it is equally true where erections are made on the margin of a river, or where a bridge is constructed across it, in accordance with the laws of the State and with the consent of Congress. Such structures are lawful and are private property, entitled to the constitutional protection. That which is lawful is not a nuisance, and cannot be prostrated or removed as such without compensation.

I should not have much difficulty in holding, if it were necessary to the decision of the case, that such structures made in conformity with the laws of the State, if not prohibited by any act of Congress, and not materially interfering with navigation, would be equally lawful, and entitled to the protection of the Constitution. There is a vast amount of property of this sort in this country. The wharves which have been extended below low-water mark, the flats covered by shallow water which have been reclaimed, and the many bridges which have been erected over navigable streams, are nearly all of this class. Navigation has rarely been materially interfered with in these works, the States themselves being deeply interested

in preserving it free from obstruction. It would be strange if Congress could destroy this species of property without any compensation whatever.

But the bridge in question had not only the sanction of the States of Kentucky and Ohio, which it was intended to connect, but it had also the sanction of an act of Congress. If that of the States was not sufficient to make it a lawful structure, that of Congress, in addition, certainly made it so. I cannot yield to the argument that the reservation in the resolution of 1869 made the bridge any the less lawful than it would have been if no such reservation had been made. After authorizing the bridge to be erected in the manner it was, the resolution went on to say "that the said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States;" then comes the reservation referred to, as follows: "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." The power thus reserved was merely declaratory of the power which Congress would have had without reserving it; but there is no stipulation or condition that it might be exercised without providing for compensation to the proprietors of the bridge; and inasmuch as the bridge became a lawful structure, — was, in fact, expressly declared such by the resolution of 1869, — it cannot be presumed that this reserved power was to be exercised in any other than the constitutional mode. Hence, when the act of 1871 required the bridge to be taken down, and constructed on a different plan, if constructed at all, we should expect what we find was done, that provision would be made in the same law for ascertaining the damages to which the appellants would be put by the alteration, and for the payment thereof out of the treasury of the United States. It is true that the law required the tribunal to which the matter was referred to ascertain the liability of the United States, "if any there be;" thus qualifying the provision for compensation by a prelimi-

nary inquiry as to the government's liability. This inquiry was probably directed to be made from the fact that doubts may have existed in the minds of some members of the legislative body whether the reservation referred to did not exonerate the United States from any obligation to make compensation. In my opinion it did not. I think, therefore, that the appellant was entitled to a decree in its favor, and that the decree of the Circuit Court dismissing the bill should be reversed.

FRENCH *v.* GAPEN.

SPEARS *v.* GAPEN.

The legislation of the State of Indiana touching the water-power of the Wabash and Erie Canal, and the rights of certain parties thereto acquired under that legislation, considered. *Held*, 1. That the contractor who, pursuant to his bid under the act of Jan. 9, 1842 (*infra*, p. 510), performed the work, acquired, until he should be fully paid therefor, a property right in the rents of the water-power which he rendered available, and the State became a trustee to collect and pay them to him. 2. That by his contract (*infra*, p. 514) the mill-owner secured, without payment of rent, the right to draw water to his mill from the canal, as long as the latter yielded a surplus beyond the amount required for navigation and for furnishing the earlier leases. 3. That the title to the property, which the State conveyed to the board of trustees of the canal, was subject to the rights so acquired and secured. 4. That where, by a decree rendered in a suit whereto the board and the holder of the certificates of stock provided for in the conveyance of the State to the trustees were parties, the part of the canal to which those rights attached was sold and the fund brought into court, the contractor and the mill-owner can intervene in order that their respective rights, either upon the fund or against the purchaser, may be ascertained and determined.

APPEALS from the Circuit Court of the United States for the District of Indiana.

The facts are fully stated in the opinion of the court.

The cases were argued by *Mr. John Morris*, *Mr. Ralph Hill*, and *Mr. Samuel Shellabarger* for the appellants, and by *Mr. Solomon Claypool* and *Mr. R. S. Taylor* for the appellees.

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

The State of Indiana constructed the Wabash and Erie Canal from La Fayette, on the Wabash River, through Delphi and Fort Wayne, to the Ohio State line. To meet the expense of this undertaking a large bonded debt was created, and secured in a general way by statutory provisions of a character similar to those contained in sect. 5 of an act of Jan. 9, 1832, authorizing the first issue of bonds, and which is as follows: —

"That for the payment of the interest, and the redemption of the principal of the sums of money which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be, and are hereby, irrevocably pledged and appropriated all the moneys in any manner arising from the lands donated by the United States to this State for the construction of said section of canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee." Acts 1832, p. 2.

From the beginning, the use of water for hydraulic purposes, when not needed for navigation, seems to have been contemplated, and ample provision was made by statute for acquiring the necessary land and effecting leases of power. With a view to this end, the following "Act relative to water-power at the town of Delphi" was passed and approved Jan. 9, 1842: —

"SECT. 1. *Be it enacted by the General Assembly of the State of Indiana*, that it shall be the duty of the engineer, or other person having charge of the Wabash & Erie Canal, on or before the first day of May next, to let by contract, to the lowest bidder, the clearing out and removing all obstructions from the bayou which extends from the canal, at the said town, to the Wabash River, for the purpose of creating water-power upon the said canal at that place.

"SECT. 2. *Be it further enacted*, that said engineer or other person, before letting the said work, shall give public notice of the

terms, conditions, and also the time of the said letting, by publishing the same in the newspapers printed in the said county, for two months, at least, previous to the time of said letting: *Provided*, that the said works shall be finished within six months from the time of said letting.

"SECT. 3. *Be it further enacted*, that the said engineer, or person having charge of that part of the canal, shall cause the work to be estimated when the same is completed, and shall give to the person doing the same a draft or other evidence of indebtedness, specifying what the same was given for, and the amount due him as by the said contract, and for the purpose of paying for the said work, the rents that may be received by the State for water-power created by this act shall be appropriated for that purpose, and to no other purpose; and the person or persons doing the said work shall look to the said rents for their pay, and to no other source whatever; and as fast as the said rents may be due or received, they shall be expended in paying for the said work until the whole amount is paid.

"SECT. 4. *Be it further enacted*, that so soon as the said work is let to some responsible person, it shall be the duty of the said engineer, or other person, to lease out a portion of the water-power by this act created, not exceeding in all what would be sufficient to propel thirty run of stones, at the same prices and upon the same terms and conditions as water-power under similar advantages is leased at other places upon the said canal, and it is made the duty of the said engineer, or other person, before leasing the same, to give at least two months' notice of the time, terms, and conditions upon which the same will be leased, in the newspapers published in the said county.

"SECT. 5. *Be it further enacted*, that it shall be the duty of the said engineer, or other person, as the agent on behalf of the State, for the purpose of securing to the State the advantages by this act contemplated, to purchase of the owner or owners of land lying adjacent to the place where said water-power is to be located, such real estate, not exceeding in all four acres, as may be necessary to carry into effect the provisions of this act, at such reasonable prices as may be agreed upon by the said agent and the owner or owners thereof; and in case of disagreement at such prices as may be fixed by persons chosen by the said agent and the said owners: *Provided*, that in no case shall the prices paid by the State for such land exceed what has heretofore been paid for such property under the same or similar advantages, and for such real estate so purchased the said agent shall take a conveyance to the State by deed in fee-

simple: *And provided further*, that nothing in this act contained shall be so construed as to authorize any interference whatever with the navigation of said canal.

"SECT. 6. *Be it further enacted*, that this law shall be in force from and after its passage."

Under the authority of this act, James Spears and Reed Case entered into a contract with the State to do the work required upon the terms proposed, and before the 1st of December, 1843, had it all done. On the 19th of January, 1846, another act was passed, by which it was made the duty of the officer having charge of the canal east of Tippecanoe to settle as soon as possible with the contractors, and give them a certificate for the amount found their due, to be paid out of the rents derived from the power created by what had been done, and also providing that the certificate should draw interest from the time the contract was completed until paid.

The settlement contemplated by this act was effected on the 29th of September, 1847, and the following certificate issued: —

"DELPHI, Sep. 29, 1847.

"I hereby certify that Spears & Case have performed work to the value of $\$10{,}354\frac{20}{100}$ in cleaning out the bayou which extends from the canal at Delphi to the Wabash River, estimating according to the terms of a contract between said Spears & Case and S. Fisher, commissioner of the W. & E. Canal, dated May 1, 1842, made in pursuance of an act entitled 'An Act relative to water-power at the town of Delphi, in Carroll County, approved January 20, 1842.' And according to the provisions of an act entitled 'An Act authorizing a settlement with Spears & Case for work done on the side cut at Delphi, in Carroll County, approved January 19, 1846,' the said Spears & Case are entitled to receive interest on said sum until paid. And I certify also that said work was performed prior to the first day of December, 1843.

"S. FISHER,
"*Gen'l Sup't W. & E. Canal.*"

On the twenty-ninth day of May, 1846, the State leased to George Robertson, at an agreed rent, a sufficient amount of power made available by the work done by Spears & Case to propel three run of stone. Of this lease Enoch Rheinhart is the present assignee and owner. He still uses the water.

All the rents derived from this lease down to Nov. 1, 1875, have been paid and accounted for to Spears & Case.

In the construction of the canal it became necessary to take the water from the St. Joseph River, near Fort Wayne. In doing this the power which supplied certain mills that had been erected on that river by Henry Johns was taken away, and on the 11th of February, 1843, the following statute was passed for his relief: —

"AN ACT for the relief of Henry Johns.

"WHEREAS, Henry Johns, of the county of Allen, previous to the commencement of the Wabash & Erie Canal, was the owner of a valuable mill privilege or water-power on the St. Joseph River, and had erected valuable mills thereon; and whereas, the State of Indiana did afterwards erect a feeder-dam, to supply with water the summit level of the Wabash and Erie Canal, above the mills erected by said Johns, on the St. Joseph River, thereby abstracting from the mills aforesaid about 5,000 cubic feet of water per minute, which, in low stages of water, is all the water contained in the said river St. Joseph, and renders wholly useless the mills erected by said Johns; therefore —

"SECT. 1. *Be it enacted by the General Assembly of the State of Indiana*, that the commissioner of the Wabash and Erie Canal be, and is hereby, directed to cause to be supplied to the said Henry Johns, his heirs and assigns forever, from the Wabash and Erie Canal, at the town of Fort Wayne, in the county of Allen, on land now owned or to be purchased by said Johns, a sufficient quantity of water to propel three pair of burr millstones free of any toll or water-rent, and continue to supply the same for the use of said Johns, his heirs and assigns forever, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams, or required for the purpose of navigating said canal: *Provided*, that the said Johns shall, for himself, his heirs and assigns, release to the State of Indiana all claims against the State for the abstraction of water from the St. Joseph River to supply the Wabash and Erie Canal, and shall also credit in full any or all awards or judgments that shall have been recovered by said Johns against the State for the abstraction of any water-power.

"SECT. 2. This act shall take effect and be in force from and after its passage."

In accordance with the provisions of this statute, and to carry it into effect, the following agreement was entered into between Johns and the State on the 6th of July, 1843: —

"This agreement, made this sixth day of July, 1843, between the State of Indiana, party of the first part, by S. Fisher, commissioner of the Wabash and Erie Canal, thereto duly authorized by law, and Henry Johns, of the second part, witnesseth:

"That said party of the first part, in consideration of the covenants and releases hereinafter contained, and upon the express condition that the party of the second part shall at all times comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of the agreement by said party to be performed, agrees to lease to said party of the second part forever, subject to the restrictions, limitations, and conditions hereinafter contained, the use and occupation of so much of the surplus water (not required for purposes of navigation, or to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams), at the town of Fort Wayne, to be used on lot number nine (9) of the county addition to said town, as will be sufficient, when properly applied on an overshot wheel of sixteen feet diameter, with the proper gearing, to be approved by the commissioner of said canal, to propel three run of four-and-a-half-feet millstones, grinding at the rate of five bushels per hour each, to be applied to such manufacturing purposes as the said second party may choose. It is understood that the second party to this agreement is entitled to the same quantity of water, whenever there is a surplus in the canal as above, that Allen Hamilton and Jesse L. Williams are entitled to under the lease bearing date 29th of November, 1842. The water will be taken by a head-race from the canal, at the place above described, and after passing over the wheel will be conducted by a suitable tail-race, into the St. Mary's River. The flow of water to the wheel will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the commissioner of the canal, to be built in every respect according to his directions, as not to endanger the safety of the canal in any manner whatever. And it is understood that the necessary regulating weir, head-race, and trunk to conduct the water to the wheel, and the tail-race to pass it from the wheel as above specified, are to be constructed by the party of the second part at his own expense and

according to the direction of the commissioner aforesaid, and to be kept in good repair, so as to prevent the waste of water; and if at any time during the continuance of this lease any breach or other injury shall occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury; and if the said party of the second part shall refuse or neglect to rebuild, repair, or strengthen said regulating weir or other works necessary to the security of the canal, after being notified in writing by the commissioner, superintendent, or other proper agent of the State that such removal is necessary for the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease at the option of the commissioner or other agent of the State thereto duly authorized.

"It is expressly understood by the parties hereunto that the first party does not agree to furnish water to the second party except at such times as there is a surplus over and above what is required for purposes of navigation and to supply existing contracts with Samuel Edsall and Hamilton & Williams. And the right is also reserved by the first party to draw the water from the canal whenever it may be necessary to repair or prevent breaches, take out bars, or make any repairs whatever.

"And the second party, for and in consideration of the right to the use and occupation of said water, agrees to release, and does hereby release, for himself, his heirs and assigns forever, all claim or claims against the State of Indiana for damages heretofore done or that may hereafter be done to any property now or heretofore owned by him, the said Henry Johns, in consequence of diverting water from the St. Joseph River to supply the Wabash and Erie Canal and the mills erected or to be erected thereon or supplied therefrom.

"And the said Henry Johns hereby releases to the State of Indiana all his right and title to the water flowing in the St. Joseph River whenever the same may be necessary for the supply of the canal and mills aforesaid.

"And the said Henry Johns acknowledges the foregoing lease as being in full payment for all awards of damages heretofore made and for all damages done or hereafter to be done by diverting the water as aforesaid.

"And it is understood by the parties hereto that the second

party is to pay no rent other than releasing the first party from the payment of damages as above; and this agreement is made in pursuance of and with a view to carry out an act of the legislature, entitled 'An Act for the relief of Henry Johns,' approved Feb. 11, 1843.

"In testimony whereof we, the parties to this agreement, have hereunto set our hands and seals the day and year first above written.

"S. FISHER, [SEAL.]
Com. W. & E. Canal.
"HENRY JOHNS. [SEAL.]

"Signed and sealed in presence of—
"ALEX. MCCULLOCH."

All the rights conferred by this agreement or grant are now owned by French, Hanna, & Co.

The State having become embarrassed by reason of its large indebtedness, growing out of the construction of this canal and other public improvements, passed an act, on the 19th of January, 1846, to provide for the liquidation of the debt, by which new certificates of State stock were to be issued. One of these certificates, representing one half the debt, was to be provided for by taxation in the usual way, and the other, representing the other half, out of the lands, tolls, and revenues of the canal. As an instrument for carrying into effect the arrangement in respect to the half of the debt payable out of the tolls, &c., the board of trustees of the Wabash and Erie Canal was created and constituted a body corporate, to which, on the 30th of July, 1847, a conveyance was executed as provided for in sect. 8 of the act, which is as follows:—

"SECT. 8. So soon as said trustees shall have been elected or appointed as aforesaid, it shall be the duty of the governor, in the name and under the seal of the State, to execute and deliver to said trustees, by the corporate name of the board of trustees of the Wabash and Erie Canal, a deed or patent for the bed of the Wabash and Erie Canal, and its extensions, finished and to be finished, from the Ohio State line to Evansville, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water-power, and structures, and all materials provided or collected for its construction; and all the property, right, title, and interest of the State in and to the same, with all its appurtenances; and also all the

lands and lots (not sold or disposed of) heretofore given, granted, or donated by the general government to the State, to aid in the construction of said canal, or any part of it, or which may be hereafter acquired under or by reason of any existing grant, and all moneys due and to grow due, and remaining unpaid on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due or to grow due on account of any existing leases of any water-power or other privilege on said canal, its side-cuts, feeders, basins, or other appurtenances; said board of trustees to have, hold, possess, and enjoy the same as fully and absolutely as the State can or could do; subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of, or in relation thereto; and the same to be held by said trustees in trust and security for the uses and purposes following, that is to say —"

It is unimportant in this case to notice the specifications in respect to the trust any further than to say that the trustees were given no power to sell the canals.

The trustees took possession under this conveyance, and on the 5th of July, 1852, executed to Spears, Case, and James P. Dugan a lease of water at Delphi equivalent to three mill-stone power, reserving a certain agreed rent. This lease is now owned and the power used by Abner H. Owen, and the trustees accounted to Spears & Case for all rents collected under its provisions down to Nov. 1, 1875.

On the 19th of November, 1874, Jonathan K. Gapen, a holder of certain of the certificates of stock provided for in the conveyance to the trustees, filed a bill in equity in the court below, against the trustees, in behalf of himself and the other holders of the same class of securities, setting forth, in substance, that by reason of the failure of revenues from the canal it was impossible to keep it in a condition for use; that the trust was insolvent and the trust property rapidly falling into decay, and praying "that the pledge and appropriation recited in said stocks shall be effectuated and the said canal and its appurtenances and lands may be decreed to be sold in such manner and on such terms as the court may deem best for the interests of those entitled to share in the proceeds thereof, and so as to bring the highest price therefor, and so as to

vest title in the purchaser or purchasers thereof, with the right and duty to impose, maintain, and operate the same and receive and enjoy the future tolls and revenues thereof as fully in all respects as the State might originally have done, and on such sale being made and the proceeds brought into court, your orator prays that the said fund may be divided among himself and all other holders of said canal stocks according as their several ownerships, amounts, and priorities may be from time to time established to the satisfaction of the court and so decreed."

To this suit neither Spears & Case, nor Johns, nor any one representing their interests, was made a party. The trustees of the canal were the only defendants, and on the 24th of December, 1875, a decree was made "that the Wabash and Erie Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, rights of way, locks, dams, water-powers, and structures, together with all its appurtenances; also all lands and lots . . . belonging to the trust and vested in the trustees of the Wabash and Erie Canal," be sold. Under this decree all that part of the main line of the canal from the western boundary of the city of Lafayette to the Ohio State line was sold to William Fleming for $85,500. This sale was confirmed on the 12th of February, 1877.

On the 7th of July, 1877, before any final distribution of the proceeds of the sale had been made, Spears, for himself and as surviving partner of the late firm of Spears & Case, and the widow and children of Case, who had before that time died, filed an intervening petition, called in the record a cross-bill, in which they set forth their connection with the water-power at Delphi, substantially as has been already stated, and alleged that there was still due them from the State, on the certificate which they held, the sum of $24,678.86. They then averred that the purchasers of the canal had collected the water-rents under the leases owned by Rheinhart and Bowen that fell due after Nov. 1, 1875, and refused to account to them, and that there was sufficient surplus water in the canal at Delphi to supply power for the stipulated amount of thirty run of stone, which the trustees had declined to lease previously to the sale.

The prayer of their petition is as follows: —

"That upon the final hearing of this cause the court will order, adjudge, and decree that the sum which shall be found to be due to the plaintiffs shall be paid by the said Samuel B. Gookins, as such receiver, out of the funds now in his hands; or if the court shall be of opinion that the plaintiffs are not legally entitled to any relief hereinbefore prayed for, then they pray that it shall be ordered, adjudged, and decreed by the court that they be entitled to demand and receive from the said lessees and their assigns all sums of money due from them for the rent of the water-power, as aforesaid, or that may accrue from the first day of May, 1877; that a receiver be appointed to take charge of the said water-power, manage and control the same, and collect the rents therefrom, and apply the same to the payment of the claim of the plaintiffs until the same is fully paid, and that the said receiver shall be authorized and empowered to make such additional leases of the said water-power as can be safely done without interfering with the navigation of the said canal, but not to exceed thirty run of stone; that the said purchasers and owners of the said canal from the city of Logansport to the city of Lafayette, as aforesaid, be required to keep and maintain the dam, lock, and canal in good condition; to preserve and maintain said water-power at the said city of Delphi, and that the said receiver be required to compel the lessees of the said water-power to keep and perform the stipulations contained in the leases aforesaid, as to making of repairs of the said canal; and for all other and further relief to which the plaintiffs are entitled by virtue of matters and things hereinbefore stated."

On the 15th of May, 1878, French, Hanna, & Co., as assignees of Johns, filed their intervening petition in the cause, also called in the record a cross-bill, in which they set forth the facts in relation to the power granted to Johns, substantially as has already been stated, and then averred as follows: —

"Your petitioners further show that, in expectation of the permanent enjoyment of said water-power, they have erected large and extensive woollen mills on said lot nine (9) in Fort Wayne, at a cost of $25,000, and for many years have been operating the same by means of said water-power on said

canal so granted to said Johns, and thence conveyed to them; that the part of said canal in Allen County, including that supplying said water-power, is still kept up by said purchasers. That said water-power is of great value to your petitioners, as was the grant made by said Johns on the river for the same; that the annual value of said water-power is at least $1,500, and the aggregate value of the same is not less than $25,000, and in the sale of said canal the water-power so granted to said Johns and now owned by petitioners added at least $20,000 to the price paid, and to the fund now in court. Your petitioners further show that by said sale so made of said canal property, of every nature and description, a large fund, to wit, $150,000, has been realized, and is now in the custody of this court, and that of said fund at least $50,000 has been derived from the sale of that part of said canal which is supplied with water only by the feeder constructed to divert the water, and from the water in fact diverted from the St. Joseph River above the mill of said Johns, as aforesaid, and which was so ceded by said Johns to the State, as aforesaid, and that of said $50,000 so realized, at least four-fifths was derived from the sale of the water-powers on said canal made by the water so diverted from the mill of said Johns and ceded to the State, as aforesaid, as the condition for the grant of said perpetual water-power to him; that said purchasers contend that said property was sold to them absolutely free and clear of all claims of your petitioners; while it is, on the other hand, pretended by the receiver and said trustees that your petitioners have no claim whatever on said funds, whereas your petitioners insist that, as they had a claim in the nature of a personal liability against said State, that the same was assumed by said trustees, and that their said claim was and is a charge not only on said fund, but that it also follows said property into whosesoever hands it passes."

The prayer of the petition is as follows: —

"But insomuch as there is great danger that, from the abandonment of said canal as a public highway, it may go to ruin, and your petitioners' claim upon the property itself become of little value, and by reason of your petitioners' manifest equity in the premises, and forasmuch as this large fund, so derived from the sale of said property, is now in the custody of this

court for distribution to all parties equitably interested therein, and forasmuch as all the parties, as well the purchasers as the original complainants and defendants herein, are still before the court for the settlement of all equities in the premises;

"Your petitioners pray that they have leave to file this their intervening petition; that said parties to this original suit, the said Samuel B. Gookins, as such receiver, and the said William Fleming, John H. Bass, Oscar A. Simons, James Lillie, George J. Bippus, and Robert Simonton, as purchasers, and each of them, be required to make full and true answer in the premises, and show, if they can, why your petitioners should not be paid out of said fund any damages which they may sustain by reason of the abandonment of said canal by the State and by said trustees, and why the estate of said purchasers in said property shall not be declared to be servient to that of your petitioners, and upon the hearing will your Honors grant to your petitioners all such relief as may be just, equitable, and proper."

In each of the petitions it was stated that Fleming, the original purchaser, had transferred a part of the property to others. All these purchasers, as well as Fleming, the trustees of the canal, Gapen, and Gookins, who in the progress of the cause had been appointed receiver, were named in the petitions as defendants, and they all appeared and filed demurrers. These demurrers were sustained below and the petitions dismissed. From the decrees to that effect the present appeals were taken.

The first questions to be settled relate to the rights of Spears & Case, Johns, and the trustees of the canal respectively, under their several contracts with the State.

1. As to Spears & Case.

To our minds it is clear that the effect of what was done with these parties was to convey to them a property right in the rents produced by leasing the water-power made available through their work, to continue until the compensation stipulated for was paid in full. The State assumed no pecuniary obligation in the contract that was made, and Spears & Case agreed to look only to the rents for their pay. To this end, the State "appropriated," that is to say, set apart, the rents for the use of Spears & Case, and made itself a trustee to col-

lect and pay them over as fast as received. No other reasonable construction can be given to the language of the statute on which the rights of the parties depend. In effect the State said to the contractors, "If you will do the work necessary to create the power, or, in other words, if you will make the water in the canal available for power at the place designated, you shall have the revenues which accrue from the use of the power so created and made available, until you are paid for your work at the agreed rate." The undertaking on the part of the State was not to pay out of a particular fund, but that the fund when raised should belong to the contractors. The debt was in reality not a charge against the State, but against the water-power. The language of this statute is even more explicit than that of the fifth section of the act of 1832, which this court held, in *Trustees of the Wabash & Erie Canal Co.* v. *Beers* (2 Black, 448), created, as security for the bonds that were issued, a lien on the canal, its lands and revenues, which could not be divested by any subsequent legislation. Here the very statute which authorized the creation of the power "appropriated" the revenue to be derived from the power primarily to the payment of the expense of its creation, and expressly provided that payment of such expense should not be made in any other way. Not only did the contractors agree to look alone to the rents for their compensation, but the State appropriated the rents to their use. The giving and taking operated, at least in equity, as a complete transfer.

Our conclusion then is, that from the time Spears & Case completed the work under their contract, the State held the water-power made available by what they had done to the extent of the amount required to propel thirty run of stone, in trust to lease on the terms and conditions specified, whenever it could be done without detriment to navigation, and pay over the rents as received to Spears & Case until their claim was satisfied. In fact the State never became the beneficial owner of the power that was created. From the time of its creation it belonged in equity to Spears & Case until their charge upon it was paid. The State held the legal title coupled with authority to make the contemplated leases, but this was to be for the use and benefit of Spears & Case so long as anything

remained due to them for what they had done. Such was the manifest intention of the parties, and that, in a court of equity, is enough. *Ketchum* v. *St. Louis*, 101 U. S. 306. It is no doubt true that Spears & Case in their contract assumed the risk of a loss of the power by the decay or destruction of the canal, and that the State was under no binding obligation to keep up the repairs so as to supply the power; but that is not the case presented by this demurrer, for it is expressly averred that the canal is still maintained, and that the water is being furnished to the different lessees under their respective leases. For all the purposes of the present appeal, we must take that averment as true. If the facts are otherwise, it may, perhaps, be shown in defence.

2. As to Johns and his assignees.

Here, we think, was an absolute grant, for a valuable consideration, by the State to Johns, of the right to draw water from the canal for the purpose and on the terms and conditions specified. It was not a grant of the lands on which the canal was built, but of the right to draw water from the canal to be used in lieu of that which had been taken away. Originally Johns took the power directly from the river to his mill. Under his grant he was allowed to draw it through the canal, subject to the limitations and restrictions provided for. The only substantial difference between his rights and those of the other lessees of power was, that they were to pay rent at stated periods for the water they used, while he was to draw without payment of rent, in consideration of his release of the damages he had sustained by the diversion of the water from the river to the canal. What he got was the grant of a right to enter on the canal and draw water therefrom to his mill whenever and so long as there was a surplus over what was wanted for navigation and the supply of the earlier leases. This was a property right, and the legitimate subject of grant. *De Witt* v. *Harvy*, 4 Gray (Mass.), 486. Johns could not, any more than Spears & Case, compel the State to keep the canal in repair so as to give him the water; but as long as the canal was maintained and the water furnished, he had the right to draw. In this petition, as in that of Spears & Case, it is expressly averred that the canal is still maintained and supplied with water.

3. As to the trustees of the canal.

By an express provision in the grant to the trustees their title was made subject to all existing rights and equities against the State on account of the property conveyed, or any part thereof, and to all liabilities of the State growing out of or in relation thereto. In other words, the State conveyed all its remaining interest in the canal, and the trustees took what they got, charged with the same trusts, and incumbered by the same liabilities that rested on it when the grant was made. It follows that whatever property rights Spears & Case or Johns had in the canal before the grant, they retained after it. All that the State was bound to do in respect to them before, the trustees must do afterwards. As the State was the trustee of the power at Delphi for the benefit of Spears & Case when the transfer was made, the trustees took the title, subject to the same trust, and became bound in respect to its management in the same way and to the same extent the State had been until that time. Rents collected after the transfer were as much the property of Spears & Case, in the hands of the trustees, as they were in the hands of the State. So, too, in respect to Johns. Whatever water he could draw from the canal before the transfer he was entitled to draw afterwards. All that the State could be required to do for his benefit at the time of the transfer, the trustees were bound to do while they held the property. The obligations of the trustees in respect to both these parties were precisely the same as those of the State; no more and no less.

It only remains to consider whether the petitioners are entitled to relief in this suit and under the form of proceeding they have adopted.

They were not originally parties to the suit. No sale of the trust property could be made in their absence which would dispose of their rights. All that could pass under such a sale would be that which was conveyed by the State to the trustees; to wit, the canal, &c., subject to the prior rights of the petitioners. No decree binding on the petitioners could be rendered, defining what their rights actually were. A purchaser would take only what the trustees held, and be left to settle with the petitioners as best he could.

But while the petitioners were not in fact parties, they might with propriety have been made such, and there cannot be a doubt that if they had intervened before the decree of sale, and asked to be made defendants, it would have been within the power of the court, with the consent of the complainants, to take them in. The case did go on without them, presumably because it nowhere appeared until their intervention that there were any such outstanding rights as they claim. The decree, as entered, is broad enough on its face to authorize a sale of the property free of all incumbrances. The purchasers, acting on the idea that they bought all the water-power in the canal, and that the rights of the several petitioners had been extinguished, claim the rents under the Delphi leases as their own, and threaten to cut off the supply of water to the assignees of Johns unless rent is paid for what is used. In this condition of things, and while the purchase-money was under the control of the court, the petitioners intervened and asked to have their rights in the premises determined before any final distribution of the money was made. To their intervention no exception is taken by any of the parties. They are, therefore, to all intents and purposes, now to be treated as though they had originally been made defendants and set up their demands. It seems to us eminently proper that before the money paid under the sale is put beyond the control of the court it should be determined what, under the new developments, the rights of the several parties in respect to the property in question really are. From what appears, it is clear that the court expected to sell, and the purchasers supposed they were buying, the whole property free of all incumbrances. If that be so, the money in the hands of the court may not, perhaps, improperly be treated as representing what it was supposed would pass by the sale, rather than what actually did pass as the parties stood when the decree was entered. The petitioners, in their intervening petitions, state in terms their willingness to treat the sale as binding on them, if they can be paid from the proceeds what in equity represents the value of their interest in the property sold. As the case now stands, we see no reason why this may not be done. But we have only part of the record in the original suit here, and it may be that under

all the circumstances such relief would not be just to the complainants. In that event, it may be proper for the court to consider whether the facts connected with the sale were such as to make it inequitable to hold the purchasers to their purchase subject to the rights of the petitioners, in case they shall elect not to be bound.

Without deciding what upon the final hearing should be the form of relief afforded the petitioners, we are clearly of opinion that upon the facts stated in their petitions they are entitled to have their rights in the premises ascertained and something done in their behalf. The prayer of the petition of Spears & Case is for alternative relief. If it shall be determined that their interest in the property passes by the sale, they ask to be paid its value from the proceeds. If it does not, then they seek to have their rights, as against the purchasers, specifically ascertained and determined; the rents which have accrued and which may hereafter accrue from the Delphi leases paid over to them, and the proper steps taken to make the unused power at that point available for the liquidation of what is still due on their certificate. French, Hanna, & Co., the assignees of Johns, ask to be paid the value of the power which was granted to them, and for general relief. Under this prayer for general relief the court will be authorized to establish their right to the use of the water as granted, free of rent, in case it shall be determined they are not entitled to be paid the value of their power from the proceeds of the sale.

Without pursuing the inquiry further, we conclude the court was wrong in sustaining the demurrers and dismissing the petitions. The decrees dismissing the petitions will, therefore, be reversed, and the causes remanded with instructions to overrule the demurrers and proceed thereafter as justice may require, and in accordance with this opinion; and it is

So ordered.

MR. JUSTICE GRAY did not sit in these cases, nor take any part in deciding them.

TRUSTEES *v.* GREENOUGH.

1. An appeal lies from a decree in equity for costs when they are directed to be paid, not by a particular party, but out of a fund in the hands, or under the control, of the court.
2. A decree made by a Circuit Court of the United States, directing that the complainant be paid his costs and expenses out of a fund in court, — the fund, in the mean time, remaining in the court in course of administration, — is *pro tanto* a final decree from which, if their amount be sufficient, an appeal will lie.
3. A trust estate must bear the necessary expenses of its administration.
4. One jointly interested with others in a common fund, who, in good faith, maintains the necessary litigation to save it from waste and secure its proper application, is entitled in equity to the reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportionate contributions from those who receive the benefit of the litigation.
5. Where bonds issued by a corporation are secured by a trust fund which the trustee is wasting or misapplying, or which he refuses or neglects to apply to the payment of them, a holder of a portion of them who, in good faith, files a bill to secure a due application of the fund, and succeeds in bringing it under the control of the court for the common benefit of the bond-holders, is entitled to be paid from the fund before its distribution his costs, counsel fees, and necessary expenses of the litigation, that is to say, his costs as between solicitor and client. A claim, however, for his private expenses, such as travelling fares and hotel bills, or for his own time or personal services, cannot be allowed.
6. The practice of allowing to trustees, complainants, and receivers, and their counsel, large and extravagant counsel fees and commissions payable out of trust funds under the control of the court, commented on and disapproved.

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

The facts are stated in the opinion of the court.

The case was argued by *Mr. Charles W. Jones* for the appellants, and by *Mr. Jefferson Chandler*, with whom was *Mr. C. D. Willard*, for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The question in this case is one of costs, expenses, and allowances awarded to the complainant below out of a trust fund under the control of the court. Ordinarily a decree will not be reviewed by this court on a question of costs merely in a suit in equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of

the cause on appeal from the final decree. But it was held by Lord Cottenham, in *Angell* v. *Davis* (4 Myl. & Craig, 360), that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. Lord Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed; and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval; and in the case of *Taylor* v. *Dowlen* (Law Rep. 4 Ch. App. 697), the court declared that they were not disposed to extend the case of *Angell* v. *Davis;* and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund.

But these discussions in the English courts arose under a system in which appeals from interlocutory orders are allowed. We can only entertain an appeal from a final decree; and supposing the objection to the appeal on the ground of its being from a decree for costs only is untenable, as we think it is, then arises another question, whether the orders appealed from amount to a final decree.

The principal suit was commenced in 1870, by a bill filed by Francis Vose, a large holder of bonds of the Florida Railroad Company, on behalf of himself and the other bondholders, against Harrison Reed and others, trustees of the Internal Improvement Fund of Florida, and against the former members of the same board, and against the board itself as a corporation, and sundry other corporations alleged to be in complicity with them. That fund consisted of ten or eleven million acres of lands belonging to the State, including certain proceeds of the sale of some of them, and was pledged for the payment of the interest accruing on the bonds and instalments of the sinking fund for meeting the principal, which were largely in arrear. The charge of the bill is to the effect that the trustees were wasting and destroying the fund by selling at nominal

prices the lands by the hundred thousand and even million acres, and failed and refused to provide for the payment of interest or sinking fund on the bonds. The bill prayed that the fraudulent conveyances be set aside, and the trustees enjoined from selling more lands, and that a receiver be appointed to take care of the fund.

The litigation was carried on with great vigor and at much expense, and in fact a large amount of the trust fund was secured and saved; the management of the fund was taken out of the hands of the trustees; agents were appointed by the court to make sales of the land, and made a large number of sales; a considerable amount of money was realized, and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. In 1875 he filed a petition, setting forth these advances and the efforts made by him, and prayed an allowance out of the fund for his expenses and services. In December, 1876, an order was made by the court referring it to a master to ascertain: 1. What and by whom the necessary expenditures have been incurred in bringing the moneys already received into court. 2. What necessary expenditures have been made, and by whom, in protecting the landed and sinking fund from which this money has been and will be realized. 3. What personal services have been rendered, and by whom, in said work, and the value thereof. 4. What amount of same have been charged to Francis Vose by the receiver, instead of being paid out of the common fund in his hands.

Vose presented his account and vouchers before the master, and testimony was taken on the subject. In 1877 the master made a report, in which, amongst other things, he stated as follows: —

"*First*, After consideration of the proofs as submitted to me, I find and report that the moneys which have already been received, whether upon account of the internal improvement fund or of the sinking fund, have been brought into court at the instance and the suit and by the sole efforts of

Francis Vose, the petitioner, through himself, his solicitors and his agents, and by the instrumentality more directly and especially of his proceeding in equity against the Trustees of the Internal Improvement Fund *et al.*, as they appear in the records which are made evidence in this case."

The master further reported a statement of expenditures made by Vose in the cause, and declared that they were necessary expenditures, being for fees of solicitors and counsel, costs of court, and sundry small incidental items for copying records and the like, the whole amounting to $34,192.62. He also stated and allowed sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands, amounting in all to $19,745.68. He also reported in favor of an allowance to Vose for his personal services and expenditures, as follows: —

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and the sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained, and by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders.

"I consider and report that the charge embraced in his itemized account, and numbered forty-two (42), for $25,000 principal, and $9,625 interest, is reasonable and just.

"I also find that the charge in his itemized account, numbered forty-one (41), for personal expenditures of $15,003.35, is reasonable and just. Total $40,003.35."

The first of these items consisted of an allowance of $2,500 a year for ten years of personal services; the second was for railroad fares and hotel bills paid by the complainant.

The proceedings before the master were opposed; but, on a hearing upon the report and the evidence submitted therewith,

the court confirmed it to the extent of $27,835.34, allowing generally the fees of the officers of the court, and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client; at the same time disallowing certain fees paid to advisory counsel and other items not directly connected with the suit, and referring the remainder of the report for further evidence and hearing. In December, 1879, after additional evidence had been taken, a final order was made, allowing sundry expenses for looking after and reclaiming the trust lands, and also allowing for the personal expenses and services of Vose embraced in the two items before referred to; the total amount allowed being $60,131.96.

The appeal to this court is taken from these orders of the court below; and it is contended that they were illegal, because Vose was not before the court in the character of a trustee, and therefore not entitled to reimbursement of his expenses beyond taxable costs; and because the allowances were not lawful if he had been such trustee. The objections to the orders are not expressed in this precise form; but this is the substance of them.

The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.

As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and cannot be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond

taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings, — if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*, and to have secured its proper application to their use. There is no doubt, from the evidence, that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution. And such charge cannot be justly complained of by the trustees of the internal improvement fund, because, however fair may have been the conduct of the present trustees, who were elected to their positions since the acts complained of were committed by their predecessors, those acts, as the event of the cause shows, furnished abundant ground for instituting the proceedings.

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a com-

mon interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus, in *Attorney-General* v. *The Brewers' Company* (1 P. W. 376), Lord Chancellor Cowper allowed costs to the relators out of the improved rents which they received for the charity, "for that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds debt which was claimed against them." In *Attorney-General* v. *Kerr* (4 Beav. 297), it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered.

The same rule was followed in *Attorney-General* v. *Old South Society*, 13 Allen (Mass.), 474.

Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee-bill. This difference is pointed out in the case of *In re Paschal*, 10 Wall. 483, 493.

The same rule is applied to creditors' suits, where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple-contract creditor who recovers a fund for the general benefit is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the balance of his costs, as between solicitor and client, are to be paid either out of the fund or *pro rata* by all the creditors who partake of the benefit of the suit. This was the judgment in *Stanton* v. *Hatfield*, 1 Keen, 358; followed in *Thompson* v. *Cooper*, 2 Col. C. C. 87. In the latter case Vice-Chancellor Knight Bruce said: "Having come in and proved, and obtained the benefit of the suit which was instituted on their behalf, as well

as that of the plaintiff, it cannot be just that in such a suit — a suit instituted for the benefit of all the creditors — one alone should bear the burden, when others have the benefit." To the same purport are *Tootal* v. *Spicer*, 4 Sim. 510; *Larkins* v. *Paxton*, 2 Myl. & K. 320; *Barker* v. *Wardle*, id. 818; *Sutton* v. *Doggett*, 3 Beav. 9.

The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In *Worrall* v. *Harford* (8 Ves. Jr. 4), Lord Eldon said: "The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed." This rule has been followed by the District Courts of the United States. See a forcible opinion of Judge Bryan, *In re Williams* (2 Bank. Reg. 28), in the District Court of South Carolina; and *In the Matter of O'Hara* (8 Law Reg. N. S. 113), in the western district of Pennsylvania. In a case in Massachusetts before Judge Lowell the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of Judge Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. "A petition *in invitum*," says he, "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor, nor any three or four of of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money

if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. . . . The strong equities of the petitioner's case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee-bill of 26th February, 1853 (10 Stat. 161), which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee-bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. . . . I have been referred to the record of a case in equity in the Circuit Court in which Judge Sprague, since the passage of the fee-bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in *Ex parte Plitt*, 2 Wall. Jr. 453. These decisions, and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand."

The views here expressed with regard to the application of the fee-bill to cases of this sort are undoubtedly correct. The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of Feb. 26, 1853, c. 80,

10 Stat. 161; Rev. Stat., sect. 823. And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

This court, in the case of *Cowdrey* v. *Galveston, &c. Railroad Co.* (93 U. S. 352), sustained an allowance of $5,000 for counsel fees to be paid to counsel out of the proceeds of a railroad mortgage, foreclosed in the Circuit Court for the District of Texas, — being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the Circuit Court in the same case for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review.

In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are

interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.

The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the notes to the case of *Robinson* v. *Pett*, 2 White & Tudor's Leading Cases in Equity, 238, American edition, pp. 512–600; and see Perry on Trusts, sects. 894, 910, 912.

It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the Circuit Court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by the appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made.

But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. The reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to

accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

We are of opinion, therefore, that the allowance for these purposes was illegally made, and that to this extent the orders should be reversed. We refer to the allowance in the last order, of $15,003.35 for private expenses, and of $34,625 for personal services. As to those items the said last order will be reversed, and in all other respects both of the orders appealed from will be affirmed; and it is

So ordered.

MR. JUSTICE MILLER dissenting.

While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day; namely, the absorption of a property or a fund which comes into the control of a court, by making allowances for attorneys' fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation.

This system of paying from a man's property those engaged in the effort to wrest it from him can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than protest against the doctrine.

JOHNSON *v.* RAILROAD COMPANY.

1. Reissued letters-patent No. 4870, bearing date April 16, 1872, granted to Asa Johnson and Thomas S. Sandford — the latter being the assignee of an interest therein — for an alleged new and useful improvement in fastening sheet metals to roofs, are void, inasmuch as several of the devices essential to the combination described in the original letters are omitted, and the remaining parts, for which a separate claim is made, operate in a different way and for a different purpose.
2. Contrivances substantially the same as that set forth in the second claim of the reissued letters (*infra*, p. 544), for fastening metals together, wherein, by the use of slotted side-plates and an adjusting bolt, allowance is made for their contraction and expansion caused by changes in temperature, were in use before the issue of the original letters.

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

On May 19, 1857, letters-patent were granted to Asa Johnson, the inventor, and William Higbie and Henry Link, his assignees, "for an improved mode of fastening sheet metal on roofs," &c.

The specification declares the invention to be "a new and useful mode of self-adjusting fastenings for fastening metallic coverings to buildings, and in any and all other places where metals require fastening and their contraction and expansion demand accommodation;" and there are appended to it five figures.

Fig. 1 is a side elevation of a buiding.

Fig. 2 is an end elevation or section cut through the roof in the line x x, Fig. 1.

Fig. 3 is an end elevation of the self-adjusting fastener.

Fig. 4 is a side elevation of the same.

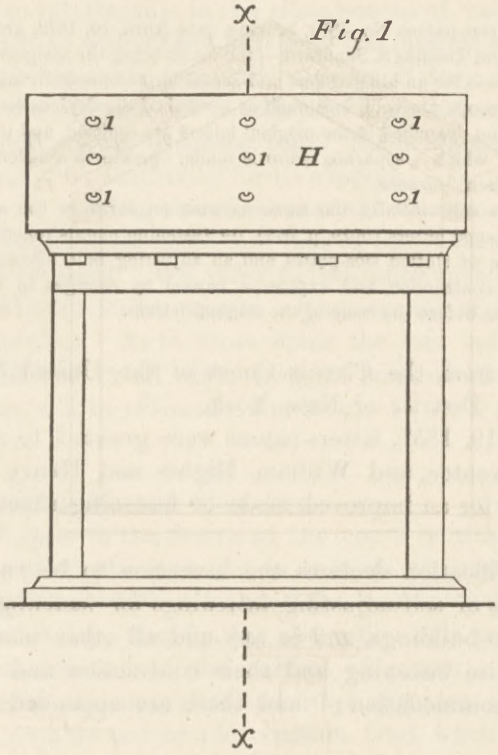
Fig. 5 is a plan view of the bottom-plate.

The specification then proceeds as follows: —

"In the operation of my invention, after sheeting the roof, if the boards do not exceed an inch in thickness, I bore a hole at the point where I wish to insert the stud, about the size as seen in vertical dotted lines in Fig. 2. The holes may be made larger or smaller to allow for contraction and expansion, so that the studs can move freely in any direction required.

"The bottom-plate is then screwed firmly to the boards by the screws (*s*) (*s*) seen in Figs. 2 and 4, and the screw 1 passes through

Fig. 1



the metallic covering into the stud 2, thus firmly fastening the covering K to the stud, as seen in Fig. 2.

"It will be further seen that the cord 7 passes through the stud 2, Fig. 4, and then through the bottom-plate, and is fastened together as at *g*, in said Fig., thus always keeping the stud in an erect position until attached to the metal.

"If the covering contract on a line parallel with the connecting-pin S, the adjustable connecting-rod 2 will move on it towards one of the flanges 4, when it expands it will move towards the opposite flange, thus moving towards the point of contraction, and from the point of expansion with this metallic covering.

"The adjustable stud, in addition to its parallel and longitudinal movement, is capable of a diagonal movement, thus accommodat-

ing itself to any direction required by the metal contracting or expanding.

Fig 2.

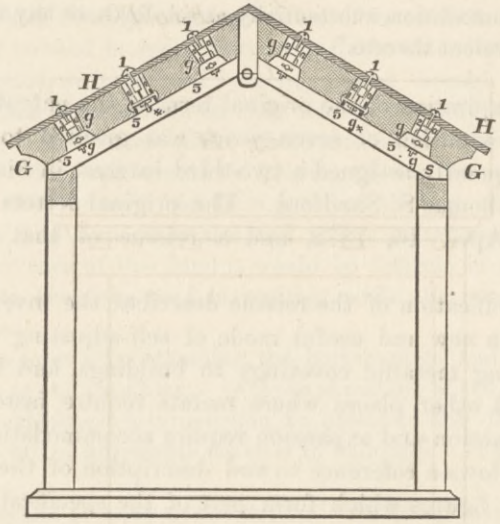


Fig. 3.

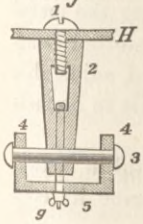


Fig. 4.

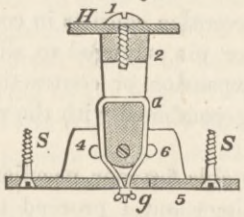
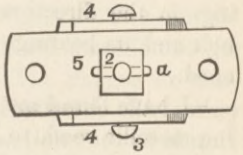


Fig. 5.



"I contemplate using them as general fasteners when it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only. I may find, in using my adjustable fasteners, it necessary to make some of them, those that are in parallel lines with the flanges, to fit up close to the sides of the studs, as seen at 1, 1, in Fig. 2, allowing them to move in but one direction on the pin 3, which slides in the slots in the flanges 4, 4."

The claim is thus set forth: —

"In the self-adjusting fastener as described, for the purpose of attaching metallic coverings to buildings and accommodating itself to the contraction and expansion of the metal, and for fastening metals in all other places when the contraction and expansion demand accommodation, substantially as set forth, or any mechanical device equivalent thereto."

At the expiration of the original term of the patent, fourteen years, an extension of seven years was granted to Johnson, who subsequently assigned a two-third interest in his extended letters to Thomas S. Sandford. The original letters were surrendered April 16, 1872, and a reissue of that date was granted.

The specification of the reissue describes the invention generally as "a new and useful mode of self-adjusting fastenings for fastening metallic coverings to buildings, and for use in any and all other places where metals require fastening, and their contraction and expansion require accommodation."

Then follows a reference to and description of the same five illustrative figures which form part of the specification of the original patent.

The specification then proceeds as follows: —

"The principle of my invention consists in connecting the metal to be fastened with a bolt or pin arranged to slide in slotted bearings in the direction of expansion or contraction, said adjustable bolt and its bearings being combined with the materials to be fastened.

"I have found my adjustable fastener peculiarly useful in fastening metallic roofs to buildings, and I proceed to describe its construction and use.

"In using my self-adjusting fastener for fastening metallic roofs to buildings I connect the sliding bolt or pin with the roof by means of a stud fastened to the same, and I form the side-plates, which contain the bearings for the sliding-bolt, in connection with and as flanges of a bottom-plate, which is secured fast to the under side of the wooden sheathing of the building.

"In the drawing, 1 indicates the screws for attaching the metallic roof to the stud, 2 is the stud, 3 is the adjusting bolt or pin, to which the metallic roof is connected by the stud and screw, said bolt passing through the stud 2 and through the slots of the side-

plates or flanges. 4 4 are the side-plates or flanges, provided with slots, which form the bearings of the adjusting-bolts. 5 is a bottom-plate, used as a convenient means of attaching the side-plates to the wooden sheathing of the building. 6 6 are the slots in the side-plates in which the adjusting-bolt slides. 7 is an india-rubber cord which may be used in applying the adjustable fastener to buildings. It is connected with the stud by being passed through an opening in it. It then passes down on each side of the stud and through an opening in the bottom-plate, where it is fastened, as indicated at *g* in the drawing, and is used for keeping the stud in an erect position until after the stud had been inserted through the sheathing from below, and until it is attached to the metal roof. Without some contrivance of this kind it would be difficult in the position indicated to keep the stud in position while the connection was being made.

"S S are screws for attaching the bottom-plate, and with it the side-plates, to the sheathing. G is the sheathing of the roof greatly enlarged in thickness in proportion, to illustrate the details of the connection of the adjustable fastener to buildings. H is the metallic roofing.

"The method of using the invention in attaching metallic roofing to buildings is as follows: After sheathing the roof, a hole is bored in the sheathing, at the point where the adjustable fastener is to be used, of sufficient size to allow the connecting-stud to move in the same with the expansion or contraction of the metallic roof. These holes receive the slotted flanges or side-plates 4 4, and they are indicated in the drawing by the letter *a*. (See Fig. 2.) They should be of the shape and size required by the extent and direction of the contraction and expansion to be allowed for. The flanges or side-plates are inserted in the holes, and the bottom-plate is then firmly secured to the boards or sheathing G by the screws S S, as seen in Fig. 2. Where the sheathing is sufficiently thick, a hole may be bored into it to receive the fastener from above. The side-plates 4 and adjusting-bolt 3 are thus connected with the building. The connection with the metallic roof is then effected by holding the stud in an erect position by means of the rubber cord, and attaching the stud to the roofing by means of the screw 1. Both the wooden sheathing and the metallic roof are thus connected to the self-adjusting mechanism, consisting of the slotted side-plates and the bolt which slides in them.

"It is obvious that if the metal of the roofing contracts or expands in a line with the slots in the side-plates that the bolt will

adjust itself to such contraction or expansion by sliding in the slots in the proper direction.

"On the other hand, in cases where the line of contraction or expansion may be diagonal, or at right angles to the line of the slots in the side-plates, the connecting-stud is arranged to slide upon the adjusting-bolt, as it is shown it may do in Figs. 2 and 3. Where, however, the movement is only sensible in the direction of the slots, the side-plates are made to fit up close, as seen at Fig. 2 in the illustrations marked *, where the side-plates or flanges are seen in cross-section, so that the only practical adjustability shall be in the direction of the slots.

"I contemplate using my invention as a general fastener where it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only."

The first claim of the reissue is substantially identical with the one claim of the original patent. The second claim of the reissue is as follows: —

"I claim, in combination with the adjusting-bolt and slotted side-plates, suitably connected to and combined with the materials to be fastened together for the purpose of accommodating the expansion and contraction of such materials with reference to each other, substantially as specified."

The bill in this case was filed by said Johnson and Sandford to restrain the Flushing and North Side Railroad Company from infringing the second claim of the reissued letters-patent, by using what is commonly known as the fish-plate joint for uniting the ends of railroad rails. It consists of two iron plates of proper shape and size to fit the "web," which is the upright portion of the rail between its head and base. The plates are fastened one on each side of and near the ends of two abutting rails by means of bolts and nuts, the bolts passing through corresponding holes formed in both the plates and rails. In order to permit the rails to expand and contract with the changes in temperature, their ends are not allowed to form a close joint, and the holes, either in the fish-plates or in the rails, are made larger than the bolts, and are elongated in the direction of the length of the rails. By these means the expansion and contraction of the rails is "compensated" without injury to the joint.

The answer denies the alleged infringement, and sets up as defences the invalidity of the reissued letters, because, as was alleged, the original were not lawfully surrendered, and the want of novelty in the invention covered by the second claim of the reissue.

The Circuit Court dismissed the bill, holding that the reissued letters were void because they were not for the same invention as that described in the original, and the complainants appealed.

The facts are stated in the opinion of the court.

Mr. Benjamin F. Butler and *Mr. Thomas Bracken* for the appellants.

Mr. Andrew McCallum and *Mr. S. D. Law* for the appellee.

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

The appellee insists that the invention covered by the second claim of the reissued patent, of which infringement is charged, is neither described in the specification nor claimed in the claim of the original patent, and that the reissue is therefore broader than the original patent, and consequently void.

It takes but slight comparison of the patents to show that this contention is well founded. The original patent was for a complicated contrivance, consisting of a number of old devices combined, and specially adapted to the fastening of metallic coverings to buildings, and for use in all other places where metals require fastening and their contraction and expansion require accommodation. To make the invention of any practical value for the purpose suggested in the specification, and for use in the "other places" referred to, all the parts of the device therein described, except, perhaps, the rubber cord, which is only for temporary use in applying the device, are absolutely essential. Nowhere in the specification is it indicated or suggested that any part of the device described can be dispensed with. It is perfectly clear that the stud and bottom-plate of the contrivance are absolutely necessary to the only specific use mentioned in the specification. If these are left out there is no connection between the two materials to be fastened together; namely, the metal roof and the wooden

sheathing under it. As the declared purpose of the invention is the fastening of these two materials together, it is difficult to see how the parts of the device essential to the fastening can be discarded, and the invention still remain perfect and unchanged.

On recurring to the second claim of the reissued patent, we find that the metal roof to be fastened, the stud, the bottom-plate, and the screw which fastens the metal roof to the stud, are all eliminated from the invention, and there is nothing left but the adjusting-bolt (3) and the slotted side-plate (4 4). As thus left, it is impossible to apply in a practical manner the device to the fastening of sheet-iron to a roof, or the fastening of any sheet metal to anything whatever.

If the second claim of the reissued patent, as insisted by appellants, covers the fish-plate joint used by the appellee, it must cover a combination of (1) the two materials to be fastened together; (2) two slotted side-plates on opposite sides of the materials to be fastened, which serve as clamps to hold such materials in position; (3) the adjusting-bolt. The claim is so interpreted by the expert witness of appellants. Under the original patent the materials or things to be fastened together are the metallic covering of the roof and the under surface of the wooden sheathing on which it is laid. The slotted plates or flanges are fastened to the under side of the sheathing by the bottom-plate, which connects the flanges, and they form a support for the adjusting-bolt; but the slotted flanges do not embrace or clamp any part of the wooden sheathing or any part of the metallic covering of the roof, much less do they embrace or clamp at the same time the sheathing and the metallic covering, which are the things to be fastened together. But in the reissued patent the slotted plates not only furnish bearings for the bolt, but perform a new and essential function, of furnishing a strong lateral support to the materials to be fastened together by clamping the same between them.

We find, therefore, that in the reissued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent.

It is, therefore, perfectly clear that the second claim of the reissued patent was not covered by the original patent. It describes another device operating in a different way and for a different purpose.

Under the circumstances of this case there can, in our opinion, be but one conclusion, and that is, that the second claim of the reissued patent is void.

There was no error in the original patent caused by inadvertence, accident, or mistake, which could have escaped the notice of the patentee and his associates for fifteen years. It is not open to dispute that the fish-plate joint, precisely such as the appellants claim is covered by their reissued patent, was in general use during nearly the entire life of the original patent. Why did not the patentee earlier discover that all this use of the fish-plate joint was really an infringement on his patent and apply for a reissue and assert his rights? He has rested supinely until the use of the fish-plate joint has become universal, and then, after a lapse of fifteen years, has attempted by a reissue to extend his patent to cover it. We think it is perfectly clear that the original patent could not be fairly construed to embrace the device used by the appellee, which appellants insist is covered by their reissue. If the reissued patent covers it, it is broader than the original, and is, therefore, void. *Giant Powder Co.* v. *Cal. Vigorit Powder Co.*, 6 Sawyer, 508; *Powder Company* v. *Powder Works*, 98 U. S. 126; *Ball* v. *Langles*, 102 id. 128; *James* v. *Campbell*, 104 id. 356.

Even if the patentee had the right to a reissue if applied for in seasonable time, he has lost it by his laches and unreasonable delay. *Miller* v. *Brass Company*, id. 350.

The defence of want of novelty set up in the answer is, in our opinion, also sustained by the evidence. The testimony shows that the device of employing slotted plates and bolts to allow of expansion and contraction caused by changes in temperature was applied in the manufacture of locomotives long before the year 1843, the earliest date at which Johnson, the original patentee, claims to have conceived his invention. By this contrivance the expansion and contraction of the boiler of the locomotive upon its frame, caused by alternate heating and

cooling, were accommodated. This device was in common use before the year 1843, and it much more nearly resembles the fish-plate joint used for uniting the iron rails of a railroad than it does the contrivance described in the original patent of Johnson.

Many other instances of the application of the principle of this device prior to the date of Johnson's original patent are shown by the evidence. Among these were the use by the Newcastle and Frenchtown Railroad Company, in 1837, of iron rails embodying substantially the present fish-plate joint, and the use of the same device by the Oswego and Syracuse Railroad Company in 1848. In the first of these instances but one plate was used for each joint, and there was an oblong hole in one end only of every rail. In the second instance two plates were used to every joint, and the holes in both ends of the plates were oblong.

There are other instances of the use of this device for joining iron rails, which the record discloses. The evidence leaves no doubt upon our minds that the device now used by the appellee and which is alleged to be an infringement on appellants' patent, was well known and publicly used for several years before the application of Johnson for his original patent in 1857.

An attempt is made to elude the force of the testimony on the question of novelty by introducing evidence to show that Johnson, as early as the year 1843, made a small model of a device similar, as is claimed, to the present fish-plate joint, and also some drawings upon the fly-leaf of a book, of the same contrivance, and these it is claimed show that Johnson was the first inventor of the fish-plate joint, and that his patent, afterwards obtained in 1857, cut off the claims of intermediate inventors, if any such there were.

We have examined the model referred to, and cannot see that it contains any suggestion of the fish-plate joint. It is simply an oblong strip of sheet-iron, having its sides bent over so as to form flanges, and with four oblong holes in each flange corresponding with similar holes in the other, and a bolt to pass through the corresponding holes in the flanges. The model is a single piece of sheet-iron, supposed to represent an

iron rail. There is no suggestion that it is to be connected with any other rail, and there are no plates or bars with which to make the connection. If the model suggests anything, it is simply the use of a bolt in slotted holes, which, as the testimony in this case shows, was a device in common use in many ways long before the year 1843.

It is alleged that the model spoken of was made by Johnson when he was about twenty years of age. It does not appear that at this time he had ever seen an iron rail such as those to which a fish-plate joint can be applied, or that he had ever seen a railroad. According to his testimony the model when finished was placed by him upon the plate under the eaves of a woodhouse, where it remained unseen by any one for thirty-three years, until the spring of 1876, when he returned to the place where he had lived in 1843, and got the model for the purposes of this suit.

It is sufficient to say that the proof fails to show that he, in 1843, or at any time before the fish-plate joint for uniting iron rails came into use, was the inventor of that device, or that he ever invented it at all. It was not described in his original patent, and he never set up any claim to it until the year 1872, when its use had become universal wherever railroads were constructed.

On both grounds, therefore, the invalidity of the reissued patent and want of novelty in the invention which appellants contend was covered by the original patent, we are of opinion that the Circuit Court was right in dismissing the bill.

Decree affirmed.

GUIDET *v.* BROOKLYN.

Reissued letters-patent No. 4106, bearing date Aug. 23, 1870, granted to Charles Guidet for an improved stone pavement, are void, as before his application there were in use pavements consisting of rough blocks of the same form, and arranged in substantially the same way, as that described in his specification. His claim is for rougher side surfaces than those found in the old pavements, although he does not state the degree of roughness required, and the change being only in degree, is not patentable.

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

This is a bill in equity, filed Jan. 29, 1874, by Charles Guidet, against the city of Brooklyn, wherein he alleges that the defendant was then making and using a stone pavement which, in whole or in part, was substantially the same in construction and operation as that for which reissued letters-patent No. 4106, bearing date Aug. 23, 1870, were granted to him. The prayer of the bill is for an injunction and account.

The answer of the city denies the alleged infringement of the letters, and sets up that the pavement, which is their subject-matter, was, with Guidet's knowledge and consent, in public use for more than two years before the date of his original application, and that he was not the original and first inventor of it, the same having before that date been described in various publications, and publicly used in certain specified localities of a number of cities in the United States.

Upon final hearing the court dismissed the bill, and Guidet appealed here. The remaining facts are stated in the opinion of the court.

Mr. George Harding for the appellant.

Mr. William C. De Witt and *Mr. George Gifford* for the appellee.

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

The invention of Guidet covered by his reissued patent may fairly be stated thus: "Take stone blocks in the form of

parallelopipeds, with the ends sufficiently smooth, and the sides sufficiently rough, and put them together in a street pavement so that the ends will be parallel to the street, and the sides at right angles." How large the blocks should be, how smooth the ends, or how rough the sides, is nowhere stated. All that is left to the judgment and skill of him who does the work.

The evidence leaves no doubt whatever in our minds that pavements made of blocks of stone broken into the general form of parallelopipeds, and set on edge with their ends parallel to the street, and their sides across it, were in use long before the date of Guidet's invention. This is conceded, in fact, both in the original patent and the reissue; for in the original it is said, "I do not claim broadly, as my invention, a pavement composed of blocks made in the form of parallelopipeds;" and in the reissue, "I am aware that pavements have been produced of blocks made in the form of parallelopipeds." The difficulty had been, undoubtedly, that the spaces between the sides of the blocks, in ordinary use before his invention, were not sufficient to furnish a firm foothold for draught animals, especially after the surfaces had been worn smooth. How to remedy this defect was the problem to be solved. Formerly it had been done, as is said in the reissued patent, by interposing between the adjoining blocks thin strips of wood or stone. As a substitute for this, he chamfered the edges of the broad sides, and thus got the advantage of placing the blocks close against each other, and keeping the pavement firm while he secured on the surface the necessary open joint to furnish a good foothold. That, as it seem to us, was all there was of his invention, and we are by no means inclined to hold it was not patentable to him. By taking the block of stone in ordinary use, and substituting the chamfered edge on the broad side for the narrow strip of wood or stone, he got the space needed for the joint, and he solidified the pavement by bringing firmly together the stones that furnished the surface to be used for travel.

But after he had obtained his patent, he seems to have found that, by selecting blocks sufficiently rough on their sides, the joints could be made open enough for all practical purposes

without chamfering, and so in his reissue he abandoned that feature of his patent, and claimed for rough side surfaces only. In this way, as it seems to us, he left the field of invention, and entered that of mechanical skill only. Pavements of stone in the form of parallelopipeds being confessedly old, he has really done no more than suggest the best kind of stone to be used in that way. The pavements in Rochester and Buffalo, which it is agreed antedated his invention, were laid in all substantial respects like his. The quality of the stone was different, and the side surfaces were comparatively smoother than his, though to some extent they were rough. He, as has already been seen, does not say what degree of roughness is required. The effect of his specification and claim is, that if blocks are selected with their sides rough enough, joints can be made that will furnish a suitable foothold without the use of strips, and without chamfering. It is true that in Rochester and Buffalo sand may have been used to some extent to keep the blocks apart, but that was only another way of doing what it is agreed had been done before. What he did was to show that if stone were used with rougher side surfaces than those found in the old pavements, all artificial means of keeping the transverse joints open might be abandoned, and the requisite surface secured. This was simply carrying forward the old idea, and doing what had been done before in substantially the same way, but with better results. The change was only in degree, and consequently not patentable. Clearly the reissued patent cannot be sustained.

Decree affirmed.

GORDON v. BUTLER.

A., wishing to borrow money of B., offered by way of security a mortgage upon his real estate containing sandstone quarries, which had not been sufficiently worked to show their extent and value. He furnished, however, the certificate of two other persons, setting forth, each for himself, that he had for more than twenty years resided in the neighborhood of the quarries, and was acquainted with them, and giving, in his best judgment, their value, which was one hundred and fifty per cent more than the amount of the loan. B. took the mortgage and lent the money, which was not paid. Upon a sale under a decree of foreclosure, the land brought less than one-sixth of the amount loaned. B. thereupon sued A. and the other parties to recover damages for the loss sustained, and he charged that they had conspired to defraud him by a false and fraudulent certificate. *Held*, that the action will not lie, the defendants not being liable for an expression of opinion, however fallacious, in regard to property the value of which depends upon contingencies that may never occur, or developments that may never be made.

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. Leslie W. Russell for the plaintiffs in error.

Mr. Harry Bingham and *Mr. A. X. Parker* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action for alleged fraud upon Butler, the plaintiff below, in obtaining from him a loan of $10,000 upon insufficient security. The facts of the case, so far as necessary to present the questions involved for our consideration, are briefly as follows: —

Near the town of Potsdam, in New York, there are sandstone quarries, situated on the west bank of Racket River. The land containing them, when the loan was made, was divided into lots, varying in size from seven to thirty-six acres. Previously to 1873 the quarries, although generally supposed to consist of stone valuable for building and other purposes, had not been opened sufficiently to show their extent and value. A quarry similar in external appearance, situated on the river below and adjoining them, called the Parmeter quarry, had been worked for thirty or forty years, and fur-

nished stone of a valuable quality in large quantities. For some years prior to 1872 the defendant, Gordon, a resident of Potsdam, had been assiduously trying to get possession of the quarries, in the belief that on development they would prove valuable, like the Parmeter quarry. His letters to Butler, the plaintiff, written at the time, indicated a confident belief that a fortune was to be made out of them; and he invested in them whatever means he could raise.

The plaintiff, prior to 1872, had frequently visited Potsdam, where he became acquainted with Gordon, a lawyer in practice there, and often employed him professionally. During these visits he learned something of the quarries, and that Gordon desired to obtain possession of and develop them. In that year there was much correspondence between them on the subject. Gordon expressed a strong conviction that the stone would be very valuable, and find a ready market, and stated what he had heard of the buildings on which it had been used, and of those for which it would probably be wanted. He desired to organize a stock company to work the quarries, and to have the plaintiff join in the enterprise. Failing to secure his co-operation, and being advised by him that he had better work the quarries himself, Gordon applied for a loan for that purpose. After much correspondence and negotiation, the plaintiff promised to loan him $10,000, to be secured by mortgage on some of the lots, and advised him against investing a larger sum in them. The plaintiff, as is manifest from the correspondence, was fully aware at the time of the slightly developed condition of the property; but an estimate of its probable value was furnished by the following certificate obtained by Gordon from the defendants Watkins and Foster, well-known gentlemen of the place, and sent to him: —

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence Co., New York, and acquainted with the sandstone quarries south of Potsdam village; that he is acquainted with the quarry lots there owned by S. B. Gordon, and situate on the westerly shore of Racket River; that said lots are roughly represented on the annexed diagram; have on them the buildings, and in his

best judgment contain the quantity of land, and are worth the sums severally below cited, to wit:

"No. 1 — Falls Lot	about	8	acres, worth	$8,000
" 2 — Orchard Lot	"	4	" "	5,000
" 3 — Cox "	"	16	" "	8,000
" 4 — Hicks "	"	15	" "	5,000
" 5 — Meacham " house and barn	"	7	" "	5,000
" 6 — Hale Lot	"	10	" "	1,000
" 7 — Parmeter Lot 2 houses and barns	"	17	" "	8,000
" 8 — Train Lot	"	26	" "	8,000
Total, 8 lots.		103		$48,000

"Dated Potsdam, Dec. 12, 1872.

"H. WATKINS.
"E. W. FOSTER."

No oral representations on the subject were made to the plaintiff by Watkins or Foster. Their connection with the loan consisted merely in furnishing this certificate at the request of Gordon. The loan was made on the first of the following January, and a mortgage taken as security for it upon four of the lots mentioned in the certificate, the aggregate value of which, as there stated, being $26,000. Watkins and Foster were at the time interested in the proposed enterprise; and their estimate of value was placed upon the lots, not as agricultural lands, but as lands containing sandstone quarries not yet opened.

After receiving the loan Gordon proceeded to open the quarries, and his operations had not progressed far when the financial crisis of 1873 came, and in it his enterprise was engulphed. The work on the quarries was stopped, and the value of the property rapidly depreciated. The mortgage to the plaintiff contained a clause declaring that the whole amount of the loan should at once become due if the interest was not punctually paid. Taking advantage of this clause, he commenced proceedings to foreclose the mortgage, and pressed them to a decree under which the premises were sold and bid in by him for the sum of $1,500. He then commenced the present action against

Gordon, who had obtained the loan, and Watkins and Foster, who had given the certificate as to the value of the property, to recover damages for the loss sustained by him. In his complaint he alleges that these parties conspired to defraud him by obtaining the loan upon a false and fraudulent certificate as to the value of the property.

The defendants pleaded the general issue. On the trial the plaintiff produced the correspondence between him and Gordon, which resulted in the loan. He also offered the testimony of geologists, experts, and laborers as to the probable character and value of the material in the quarries. The whole, including the correspondence, covers many pages of the record, but its substance and purport, so far as it is at all material, we have stated. When it was closed, the defendants requested the court to direct the jury to find for them on several grounds, and, among others, that, upon the whole proof, no cause of action had been established against them. The court refused to give this direction, and an exception was taken. Testimony was then produced by the defendants; and, after instructions from the court, the case was submitted to the jury, who found for the plaintiff.

We do not deem it important to comment upon this testimony, or to notice the rulings of the court upon matters which were objected to, nor upon its instructions to the jury. It is enough to observe that if the testimony did not weaken, it did not strengthen, the case against the defendants. The question then is whether, upon the proof furnished by the plaintiff, a cause of action was established against the defendants; for, if not, the motion to direct the jury to find in their favor should have been granted. Upon this question we have no doubt. The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for the loan. The certificate of Watkins and Foster is that, *in the best judgment* of each, the lots were worth the sums severally stated. To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of

the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value.

The case of *Holbrook* v. *Connor*, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. 60 Me. 578.

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which

may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.

For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong. It falls within the class first mentioned.

It follows from these views, that the court below should have directed the jury, upon the close of the plaintiff's testimony, to find a verdict for the defendants; for, from the nature of the subject, in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint.

The judgment of the court below must, therefore, be reversed, and the cause remanded for a new trial; and it is

So ordered.

PACKET COMPANY *v.* CATLETTSBURG.

1. A town situate upon navigable waters may, without infringing the Constitution of the United States, erect wharves, collect reasonable wharfage proportioned to the tonnage of vessels, and forbid them, under a penalty, to land within the corporate limits at any point other than the public wharf or landing.
2. The ordinances of the town of Catlettsburg (*infra*, p. 560), adopted pursuant to the power conferred by its charter, are not unconstitutional, and this case shows no such abuse of that power as entitles the complainant to relief.
3. Congress has not prescribed the rules touching the landing and departure of vessels, wharfage, and other matters relating thereto, which are enforced at points upon the navigable waters of the country where the amount of commerce requires them; and if they may be justly regarded as regulations of commerce, they are such as the States may respectively adopt, until that body deems it expedient to act.

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

The facts are stated in the opinion of the court.

Mr. David Stuart Hounshell for the appellant.

There was no opposing counsel.

MR. JUSTICE MILLER delivered the opinion of the court.

This was a suit in chancery brought by the Cincinnati, Portsmouth, Big Sandy, and Pomeroy Packet Company against the Board of Trustees of the Town of Catlettsburg.

The bill is very inartificially drawn, and its allegations very imperfectly present some of the questions which, by the brief of counsel, it is supposed to have raised. It alleges the complainant to be a corporation, owning a large number of steamboats engaged in the navigation of the Ohio River, and making frequent landings at the public wharf of the town of Catlettsburg, on the Kentucky side of that river. That upon each of said landings they were subjected to an illegal tax proportioned to the tonnage of each of said boats, amounting, between Jan. 1, 1870, and April 30, 1877, to an aggregate sum of $5,092. Parts of the ordinance of the town under which this tax was collected, and of the statute of Kentucky supposed to authorize the ordinance, are set out in the bill. This ordinance is alleged to be void as a regulation of commerce, and as laying a

duty of tonnage forbidden by section ten of the first article of the Constitution. The bill then alleges that the tax is excessive and beyond a reasonable charge for the use of the wharf by the boats of the complainant, and that the amount already collected exceeds the cost of erecting and preserving the wharf.

An amended bill was also filed, which does not materially affect the matters in issue.

The thirty-first section of the act of the Kentucky legislature of Jan. 28, 1868, incorporating the town of Catlettsburg, authorizes the board of trustees "to erect, make, and repair wharves and docks, and to regulate and fix the rate of wharfage thereat; to regulate the stationing or anchoring of vessels or boats or rafts within the town limits, and the depositing freight or lumber on the public wharves."

The ordinances of the town complained of are the following, enacted Feb. 23, 1871: —

"The following rates are established as charges upon steamboats and other water-crafts landing at the public landing of Catlettsburg, Ky.: On transient steamboats, $1 for every landing; on the largest-sized regular packets, over 100 tons, custom-house measure, $1 for each landing; and on all steamboats under 100 tons burthen, fifty cents for each landing; for all store-boats or trading-boats, $1 for each landing, and if they remain more than one day, fifty cents per day for each day they remain; and for each wharf-boat used for the purpose of wharfage and commission, $10 per month."

And another, adopted by said board of trustees May 5, 1873, in the following words: —

"That the public landing on the Ohio River, between Division and Main Streets, is hereby appointed and established as a steamboat landing, and all steamboats arriving at the town of Catlettsburg shall land at the wharf situate as aforesaid between Division Street and Main Street, and at no other point within the corporate limits of the town of Catlettsburg, except by the written consent of the wharfmaster of said town.

"That for any violation of the foregoing section the owners, controllers, or masters of any boat so violating shall be jointly and severally liable to pay a fine of $10 for each offence, which may be recovered by warrant in the name of the Commonwealth of Ken-

tucky, for the use of the Board of Trustees of the town of Catlettsburg.

"It is hereby made the duty of the wharfmaster to enforce this ordinance, and to report and prosecute all violations thereof."

The prayer of the bill is for an injunction restraining the defendants from the collection of all taxes from the complainant's boats while landing at the natural and unimproved shore of the Ohio River, and at points other than the improved landing of the defendants, between Division and Main Streets, and from the collection of all excessive taxes while landing at *any* point within the corporate limits, and from the enforcement of the ordinance requiring them to land at the defendants' improved wharf, between Division and Main Streets; and the original bill prayed a decree for the sums improperly exacted of complainant.

The court below held, on demurrer to the original bill, that there could be no recovery in this suit for the amount illegally exacted and paid, because an action at law was the appropriate and adequate remedy for that purpose, and in that the court was probably right.

If, however, the bill presents no ground for the injunction prayed, the prayer for recovery of a moneyed decree becomes immaterial.

The framer of the bill seems to have labored under a misapprehension of the nature of the transaction in calling the demands made of the complainant taxes. We can see nothing in the ordinances intended to impose a tax upon anybody. The bill, as we have said, is not very clear in its statements of the manner in which this money was paid or collected. It must, however, have been paid for the use of defendants' wharf or improved landing-place, in which case it is complained of as an excessive charge, or it must have been paid as a penalty for landing at other points than between Division and Main Streets in violation of the ordinance. In neither case is there anything in the nature of a tax.

The effort of the pleader undoubtedly is to bring the case within the constitutional prohibition of a tax upon tonnage.

If, however, the trustees of the town had a right to compensation for the use of the improved landing or wharf which they

had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage. *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 id. 423; *Guy* v. *Baltimore*, id. 434.

Still less ground exists for holding that the penalties imposed for a refusal to obey the rules for places of landing, and the orders of the wharfmaster on that subject, are taxes on tonnage.

Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce. See cases above cited.

There remains to be considered the validity of the ordinance which forbids the landing of vessels, except by the permission of the wharfmaster, at any other point within the town than between Division and Main Streets, and the question of excessive charges for the use of the wharf.

There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce.

On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it, and the points at which they may discharge cargo, both as relates to the streets, shores, houses of the town, and other vessels landing at the same time.

The protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist.

Small vessels, without steam, rafts, flat-boats, keel-boats, loaded to their very utmost capacity, and liable to be sunk by the waves which accompany the landing of large steamboats, have the same right to land at the shore that steamers have, and they have a right to protection against their powerful competitors for trade. This can best be secured by appropriate regulations prescribing places for the landing of each, and in some instances placing the matter under the control of a wharfmaster or other officer, whose duty it shall be to look after it.

Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the existence of this power cannot be doubted.

We are not aware that in any instance Congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing-places, can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so. *Cooley* v. *Board of Wardens*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crandall* v. *State of Nevada*, 6 id. 35; *Pound* v. *Turck*, 95 U. S. 459.

There is probably not a city or large town in the United States, situated on a navigable water, where ordinances, rules, and regulations like those of the town of Catlettsburg are not made and imposed by authority derived from State legislation, and the long acquiescence in this exercise of the power, and its absolute necessity, are arguments almost conclusive in favor of its rightful existence.

We are of opinion that there is nothing in the ordinances of the town of Catlettsburg complained of, authorized as they clearly are by the statute of Kentucky, which is repugnant to the Constitution of the United States.

But while the authority to make such regulations may exist

in the trustees of that town, it must be conceded that an oppressive abuse in the exercise of that power may present a case in which the proper court could give relief. If, for instance, while forbidding all boats to land elsewhere than at a designated and limited part of the shore, that space was too small to permit the landing at the same time of vessels whose business required it; or if, having assumed the obligation of providing appropriate and sufficient wharf accommodations and forbidden boats to land at any other place, there was in fact no proper landing-place provided, a court would find some remedy for such oppressive and arbitrary conduct.

But nothing in this bill implies that the landing-place pointed out by the ordinance is insufficient in dimensions or wanting in proper means of accommodating the business of the vessels using it.

So, also, while the statute authorizes the trustees to establish the rates of wharfage, if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive, and an abuse of the power thus conferred, the courts could in some way give appropriate relief, and it is this part of appellant's case which presents the only difficult question for our consideration.

We do not feel justified, however, on the allegations of this bill, in reversing the order of the Circuit Court, sustaining a demurrer to it, for several reasons.

In the first place, the bill is manifestly founded on the idea of the unconstitutionality of these ordinances, and an injunction is asked to restrain defendants from interfering with the landing anywhere within the city limits of appellant's boats, and in general from enforcing the obnoxious ordinances. There is, it is true, a prayer to restrain them from the collection of all *excessive taxes* while their boats are landing within the corporate limits; but what is excessive or what is reasonable is not shown, and, as we have already said, the money collected is not taxes in any sense whatever.

In the next place, the bill does not show how or why the sums paid for the use of the wharf, or for landing at other places, is excessive. The one reason for so charging which is given is evidently fallacious; namely, that the town has already

raised enough money from the use of the wharf to pay for its construction and preservation.

The compensation which either the city or private owner of a wharf is entitled to receive is not to be based exclusively on a reimbursement of the cost of the wharf, and no such criterion can govern in the matter.

The ordinance establishing these rates and penalties is given in the bill, and has been copied in this opinion. It is by no means apparent that they are excessive. When it is considered that the wharf needs constant repair and care; that the compensation of a wharfmaster, who must be always ready to locate the vessels and collect the charges, is to be paid; and that the character and extent of the improvements are not shown, it would seem that something more than characterizing those rates as excessive is needed to invoke the restraining power of a court of equity. It is not alleged that they are oppressive, or an abuse of the power confided to the trustees. No statement is made of what would be reasonable in the premises, and, consistently with the bill, the charge may be so little in excess of a just compensation as not to call for equitable relief.

There is no hindrance to trying this question in an action at law, where the verdict of a jury or the judgment of the court in one or two cases would establish what is reasonable under the circumstances; and this being once established by the appropriate tribunal, the court of equity could restrain the excess.

We concur with the circuit judge, that no such case of oppressive use or clear abuse of the power properly conferred on the trustees in regard to wharfage charges is alleged by this bill as to justify the interposition of a court of equity.

Decree affirmed.

PACKING COMPANY CASES.

PACKING COMPANY *v.* PROVISION COMPANY; SAME *v.* BEEF-CANNING COMPANY; SAME *v.* SAME.

1. Reissued letters-patent No. 6370, bearing date April 6, 1875, granted to William J. Wilson "for improvements in processes for preserving and packing cooked meat," are void, all the elements therein described being old, and the aggregation of them bringing out no new product, nor any old product, in a cheaper or otherwise more advantageous way.
2. The first and third claims of reissued letters-patent No. 7923, bearing date Oct. 23, 1877, granted to John A. Wilson "for improvement in sheet-metal cases," are void for want of novelty.

THE first case is an appeal from the Circuit Court of the United States for the Northern District of Illinois, and the second and third are appeals from the Circuit Court of the United States for the Southern District of Illinois.

By stipulation of the parties these cases were argued together as one case.

The bills of complaint were filed by the Wilson Packing Company, Arthur A. Libbey, Archibald McNeil, and Charles P. Libbey, and they charge the Chicago Packing and Provision Company, the St. Louis Beef-Canning Company, and the other defendants with the infringement of several reissued letters-patent of the United States, of which the complainants are the assignees and owners.

Only two of these letters are relied on. *First*, reissued letters-patent No. 6370, granted to William J. Wilson, dated April 6, 1875, upon an application filed April 2, 1875, "for improvements in processes for preserving and packing cooked meat;" and, *second*, reissued letters-patent No. 7923, granted to John A. Wilson, dated Oct. 23, 1877, upon an application filed Oct. 15, 1877, for "improvement in sheet-metal cases." The bills were dismissed on final hearing, and the complainants appealed.

The original patent to William J. Wilson bears date March 31, 1874. The specification is as follows: —

"Be it known that I, Wm. J. Wilson, of Chicago, in the county of Cook, and State of Illinois, have invented certain new and useful

improvements in processes for preserving and packing cooked meats, and I do hereby declare that the following is a full, clear, and exact description thereof.

"The nature of my invention consists in a process for packing cooked meats for transportation in a compressed form, while heated with cooking, into an air-tight package, so as to preserve the meat in its integrity and retain all the natural juices and nutritious qualities of the meat.

"In carrying out my invention, the meat is first cooked thoroughly at a temperature of 212° Fahrenheit, so that all the bone and gristle can be removed, and the meat yet retain its natural grain and integrity. The meat is then in proper condition for eating, and is wholesome and palatable. A measured quantity of this cooked meat is then, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. The box or case is then closed air-tight upon the meat.

"The meat is thus packed and compressed in its natural state, — that is, without disintegration or desiccation, — and it retains all the juices and nutritious qualities of the meat, the compression only removing the superfluous moisture. The meat thus put up is available at all times, even when cooking is impracticable, as it is already cooked before it is packed. It is more economical, as it is compressed and reduced in weight one-half from the uncooked weight, being free from bone and gristle, and put up in a compact, portable shape for transportation, rendering the usual expensive cooperage unnecessary. Besides this, there is a great saving in the cost of transportation. A barrel containing two hundred pounds uncooked meat weighs, gross, three hundred and twenty pounds, meat, salt, brine, and barrel, while by my process it would weigh only one hundred and ten pounds, gross, making a saving in cost of freight alone of nearly two-thirds.

"The box or case may be made of wood or metal, or both combined, of any suitable form or shape, and of any desired dimensions."

The claim is thus stated: —

"1. The within-described process for packing cooked meats for transportation, by compressing the same into an air-tight package, so as to preserve the meat in its integrity, and retain all the nat-

ural juices and nutritious qualities of the meat, substantially as set forth.

"2. As a new article of merchandise, cooked meat put up in solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, as set forth."

The differences between the specification and claim of the reissued and those of the original patent of William J. Wilson are these: *First*, the second clause of the specification of the reissued patent omits the words "*while heated with cooking*," contained in the corresponding clause of the original; *second*, "*preferably*" in the third clause of the specification is inserted before "*while yet warm with cooking;*" *third*, the first claim of the reissued patent omits "*while heated with cooking*," contained in the first claim of the original patent. In all other respects the specifications and claims are identical. Therefore his patents are the same, except that the reissue covers the process of packing the meat cold if preferred, while the original requires that it shall be packed while warm with cooking.

There is nothing in either patent in regard to the boiling or to any preliminary corning or curing of the meat.

On Oct. 26, 1880, while the cases were pending below, and after the testimony-in-chief of the defendants had been taken, the patentee and the complainants filed in the Patent Office a disclaimer of the word "preferably" where inserted in the specification of the reissued patent, and also of any process described and claimed by which meat in any other than a warm or heated condition is to be compressed into the packages.

On the same day they filed a disclaimer of any interpretation or legal construction of the specification of the reissued patent broader than is conveyed by the words, "the meat is first cooked thoroughly by boiling it in water, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity."

The claim was thus restored to what it was originally, except in the original patent it is limited by the second disclaimer to the packing of meat cooked by boiling. As amended by the disclaimers the claim of the reissued patent is as follows: —

First, The within-described process of packing, for transportation, meats cooked by boiling, by compressing the same while heated with cooking into an air-tight package, so as to preserve the meat in its integrity, and retain the natural juices and nutritious qualities of the same.

"*Second*, As a new article of manufacture, meat cooked by boiling, put up while heated with cooking, so as to form a solid cake in the package in its natural state, without disintegration or desiccation, in hermetically sealed packages, as set forth."

It will be seen that the invention, after the disclaimers were made, is a process consisting of the following elements: —

1. The thorough cooking of the meat by boiling in water at a temperature of 212° Fahrenheit, and the removing of the bone and gristle.

2. The pressing of the meat while warm with cooking into a box or case with sufficient force to remove the air and superfluous moisture, so as to make the meat form a solid cake.

3. The closing of the box or case air-tight upon the meat.

It also covers the product of this process as described in the second claim.

The defence sets up want of novelty, and avers that the process described in the reissued letters-patent of William J. Wilson is also described in prior English, French, and American patents, which are specified, and that it was practised by many persons whose names and residences are given, at various dates prior to his application.

The specification in John A. Wilson's letters-patent declares that the "invention relates to hermetically sealed cans used in packing meats or other articles, and it consists in a pyramidal-shaped can having rounded corners, and both ends slightly flaring to form shoulders against which the head or end pieces rest.

Figure 1 is a perspective view of the can. Figure 2 is a transverse vertical section of the same, reversed.

"*a* represents the body of my can made in the form of a truncated pyramid with rounded corners, and with any desired number of sides, though I prefer to make it with four sides. Both ends of the body are made slightly flaring so as to form interior shoulders of offsets *a*, against which the heads B and C are to rest. The edges of these heads are turned outward, as shown, *a*, *b*, and the

flaring edge *d* of the end of the can is turned over the flange *b*, and the three thicknesses of metal pressed together by machinery, with or without solder, so as to make air-tight joints."

"In packing cooked meats it is done by means of a plunger through an aperture in the large head B, which opening is afterwards hermetically sealed by means of a cap or plate D.

"The can is to be opened at the larger end at or near the shoulder *a* by means of a suitable can-opener, so that when the can is reversed a slight tap on the smaller head C will cause the solidly packed meat to slide out in one piece, so as to be readily sliced as desired."

Fig 1.

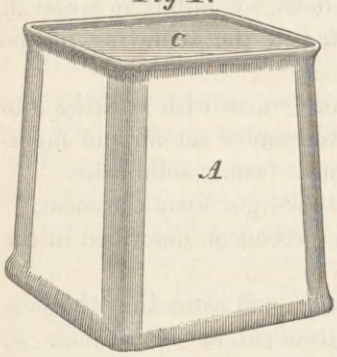
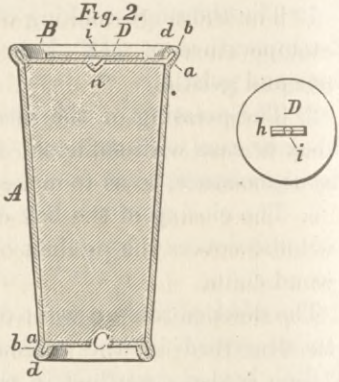


Fig. 2.



The claims which are in controversy in this case are the first and third, which are as follows :—

"A can for packing food, hermetically sealed, and constructed of pyramidal form, with rounded corners, and offset ends to support the heads, said heads being secured as shown and described."

"3. An improved article of manufacture, solid meat compressed and secured within a pyramidal case or can, so that said can forms a solid mould for the meat, and permits its discharge as a solid cake, substantially as described."

The cases were argued by *Mr. William Henry Clifford* and *Mr. John N. Jewett* for the appellants, and by *Mr. Lewis L. Coburn* and *Mr. John W. Noble* for the appellees.

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

The patent granted to William J. Wilson does not specify

what kind of box or case was required, nor what kind of meat was to be used in its processes, whether corned or fresh, nor in what manner or by what process it was to be compacted in the case or box, provided sufficient force was used to remove the air and all superfluous moisture and make the meat form a solid cake, nor the degree of warmth necessary in the meat when it was put in the case or box. Neither does it state the method by which the case is to be sealed up. It is simply required to be "closed air-tight upon the meat," the air having first been excluded from the case by cramming the latter full of meat.

The patent, therefore, apparently covers only the process of cooking meat by boiling, and while it is still warm pressing it compactly in cases and sealing it up air-tight.

The second disclaimer of Wilson is a substantial admission that his patent only covers the process in which the boiling of the meat is one of the elements. That is to say, any one may pack cooked meat for transportation by compressing it while heated with cooking into air-tight hermetically sealed packages, so as to preserve it in its integrity and retain all its natural juices and nutritious qualities, substantially as set forth in the patent, and not infringe the patent, provided he does not cook the meat by boiling. If any other method of cooking the meat should be adopted, there would be no infringement.

The patentee and the complainants, it appears, were induced to make this disclaimer by the evidence introduced by the defendants in this case, especially the patent of A. S. Lyman, dated June 22, 1869, "for an improved mode of preparing and pressing roast meat in a condensed and concentrated form," and it amounts to an admission that they could not sustain the process covered by their patent, except as applied to boiled meats.

We are clearly of opinion that a change in the mode of cooking the meat from broiling, roasting, or steaming to boiling, all the other parts of the process remaining unchanged, cannot be called invention, and does not entitle the party who suggests the change to a patent for the process. "All improvement is not invention, and entitled to protection as such. Thus

to entitle it, it ought to be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art." *Pearce* v. *Mulford*, 102 U. S. 112. See also *Rubber-Tip Pencil Company* v. *Howard*, 20 Wall. 498; *Hotchkiss* v. *Greenwood*, 11 How. 248; *Stimpson* v. *Woodman*, 10 Wall. 117.

If meat cooked by roasting or steaming, and put up in a given mode, formed a valuable article of commerce, the cooking of the meat in other ways, as, for instance, by boiling, would naturally occur to any one engaged in the business of packing such food for the market.

But we think there is nothing new in the process covered by the patent under consideration. Clearly, all its separate elements are old and well known, and have been long used. This is not controverted. The evidence shows that the process of boiling meat, packing it while warm in cans, and sealing it air-tight, had long been used before the original application of Wilson. There is, it is true, much conflict in the evidence, but, taken all together, it leaves no doubt in our minds that the process of cooking meat, lobsters, and other articles of food by boiling, and, while warm from the cooking, compacting them in cans, which are then sealed up air-tight, was practised in many places and for many years before his application.

Complainants, however, insist that there are two elements in their process which, taken in connection with the others above mentioned, form a combination never used before the date of his patent.

The first of these is the subjecting of the cases, after they are packed and sealed air-tight, to what is known as the Appert process. This consists of placing in hot water the cans, after they have been filled and sealed up, and thereby heating them. They are then removed and punctured, and the heated air and gases in the cans are allowed to escape. The puncture is immediately closed by a drop of solder.

The contention is that all this is made a part of the process covered by the Wilson patent, by the description of the new article of merchandise covered by the second claim as "cooked meat" "in hermetically sealed packages." It is insisted that the term "hermetically sealed packages" implies among those

dealing in canned goods, that the packages have been subjected to the Appert process.

We think that this is an unwarrantable stretch of the meaning of that claim. The article of merchandise which it covers is produced by the process disclosed by the specification and first claim. The second claim expressly states that it covers cooked meat put up in solid form, &c., "in hermetically sealed packages, as set forth."

Recurring to the specification and first claim, we are not left in doubt about what, as there set forth, is the process of sealing the cases or cans hermetically. The invention is declared to consist in a process for packing cooked meats into an air-tight package. The method of doing this is thus described: "A measured quantity of this cooked meat is, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case with sufficient force to remove the air and all superfluous moisture and make the meat form a solid cake. The box or case is then closed air-tight upon the meat." The process is simply to exclude the air from the case by filling it compactly with cooked meat still warm, so that the cover, when applied, will rest on the meat, and then closing the case by fitting on the cover air-tight.

There is no suggestion here of anything further to be done to make the package a hermetically sealed one. The process described leaves it hermetically sealed. There is no hint that the Appert process is to be subsequently applied as a part of the process covered by the patent. On the contrary, that idea is excluded by the terms of the second claim, "hermetically sealed, as set forth."

It is further contended by the appellants that the process disclosed by the patent includes the cooking of the meat to be canned by plunging it into water already heated to the boiling-point. That is, the process of cooking is commenced by placing the meat in water already heated up to 212° Fahrenheit. By this method of cooking, it is said that the meat is preserved in its integrity, and all its natural juices and nutritious qualities are retained.

We think that the plan of beginning this process of cooking, by putting the meat in water already heated to the boiling-

point, is not set forth in the specification or claims. The conditions that they prescribe would just as well be filled by placing the meat in cold water which is then heated to the boiling-point, and allowing the meat to remain in it until cooked thoroughly. No person, on reading them, could extract the idea that there was any advantage to be gained by heating the water to the boiling-point before placing the meat in it to be cooked, or that any such method was in the mind of the inventor. This part of the process is clearly an afterthought, and not intended by him to be covered by his patent when he applied for it. It is evident that the part now under consideration is nowhere described in the specification in full, clear, and exact terms, as required by law. On the contrary, it is not described at all.

The Appert process, and the cooking of meats by plunging them into water already heated to the boiling-point, may be of great advantage to the canned meats put up by the complainants, and their alleged superiority to the products of other parties may be attributed to these practices. But the trouble with complainants' case is that these elements are not included in the process disclosed by the patent which they allege is infringed by the defendants.

Our conclusion is, therefore, that there is nothing new in the process described in the patent. All the elements of the process are old. They are merely aggregated, and the aggregation brings out no new product, nor does it bring out any old product in a cheaper or otherwise more advantageous way. This disposes of the first claim of the patent under consideration. If that claim cannot stand, it follows that the second claim, which is for the product made by the employment of the process described in the first claim, is also invalid.

We are of opinion, therefore, that the patent is void for want of invention and for want of novelty in the process described therein.

We shall next consider that branch of the case which rests on the letters-patent to John A. Wilson for improvements in metallic cans for containing cooked meats.

The defences set up to this branch of complainants' case are,

that the devices covered by the patent are not new, and that the defendants do not infringe.

The evidence clearly shows that none of the defendants use cans "with offset ends to support the heads, said heads being secured as shown and described" in the patent. The cans which they use are made by turning a flange of the head down over the outside of the shell of the can, and fastening the head in place with solder. This method of fastening the heads and bottoms of the cans was practised by Gibbie and Perl before the date of Wilson's application for his patent. It was also described in the fifth addition of the French patent of Emile Peltier, dated April 1, 1859.

All, therefore, that is left to consider is whether the shape of the can described in the patent is new, and whether the defendants use it.

The shape of the can described in the patent is pyramidal, with round corners, and with four or more sides.

It is admitted on the record by counsel for the complainants that, prior to the date of the Wilson patents, conical tin cans were made and used for canning alimentary substances, and sealed air-tight.

If it be conceded that the change of a conical can to a pyramidal can, with rounded corners, involves invention, the complainants are met with distinct and unequivocal evidence that cans used for containing preserved food, and closed air-tight, having four or more sides and pyramidal in form, with rounded corners, were mentioned in the fifth addition to the patent of Emile Peltier, before referred to, and that the machinery for making them was therein described.

The cans used by the defendant the St. Louis Beef-Packing Company, and by the defendants Robert D. Hunter and others, and the Chicago Packing and Provision Company, are all included in the descriptions of the Peltier patent. The defence of want of novelty set up by the defendants against the first claim of the patent must therefore prevail.

What has been said leaves nothing for the third claim of the patent to rest on.

There is nothing new either in the shape, construction, or material of his cans. There is in the record abundant evidence

that, long before the date of his patent, cooked meat was packed in cans, so that they served as a mould for the meat, and the meat formed a solid cake. The use of a pyramidal can, which was old, for the purpose of receiving the meat cake, which was also old, involved no invention.

The use of vessels with flaring sides, as receptacles and moulds for edible substances, is as old as the art of cookery.

Our conclusion is that both the first and third claims of the patent are void for want of novelty.

The result of the views expressed is that the action of the court below dismissing the bills of complaint was right.

Decrees affirmed.

NOTE. — *Packing Company* v. *Clapp*, appeal from the Circuit Court of the United States for the Northern District of Illinois, was argued at the same time with the cases disposed of in the foregoing opinion, and by the same counsel. It involved the validity of both claims of the reissued patent of William J. Wilson, and the first and third claims of the reissued patent of John A. Wilson. Upon these questions the opinions of the judges of the court below were divided, and a decree dismissing the bill was thereupon entered in accordance with the opinion of the presiding judge.

MR. JUSTICE WOODS, in giving the opinion of the court, remarked, that the views expressed in the foregoing cases disposed of this case.

Decree affirmed.

CORBIN v. VAN BRUNT.

Where, in a suit in a State court for the recovery of lands, and damages for the detention of them, the whole controversy, so far as the title to them is concerned, is between the plaintiff, a citizen of the State where the suit is brought, and such of the defendants as are citizens of that State; and the case of the other defendants is a mere adjunct of the principal dispute, the pleadings presenting no separate claim or question. *Held*, that under the act of March 3, 1875, c. 137, the case is not removable to the Circuit Court.

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

The case is fully stated in the opinion of the court.

Mr. Randall Hagner for the plaintiffs in error.

Mr. J. J. McElhone and *Mr. Joseph K. McKammon* for the defendants in error.

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

This was a suit begun in a State court of New York by the Van Brunts, defendants in error, citizens of New York, against Corbin, Dow, and Burnap, also citizens of New York, the New York and Manhattan Beach Railway Company, a New York corporation, Keefer, a citizen of Ohio, and McKinnie, a citizen of Indiana, to recover the possession of certain lands, and damages for the detention thereof. The complaint alleges title in the Van Brunts, and an unlawful withholding of possession by all the defendants, who are now plaintiffs in error. Each of the defendants answered separately. The answer of Dow is a general denial of all the allegations of the complaint. The other defendants deny the title of the Van Brunts, and allege that the railway company is in possession. The railway company, Keefer, McKinnie, and Burnap set up title and seisin in fee in the company, and deny explicitly that either Keefer, McKinnie, or Burnap is in possession. After the answers were all in, the defendants united in a petition for the removal of the suit to the Circuit Court of the United States for the proper district, on the ground "that there is a controversy herein which is wholly between citizens of different States, and which can be fully determined as between them."

The suit having been docketed in the Circuit Court, the Van Brunts moved to remand. The motion was granted, and from the order to that effect this writ of error was brought.

The real controversy is about the right to the possession of the land in dispute. So far as the title is concerned, it is apparent from the pleadings that citizens of New York are the only parties interested. They occupy both sides of that part of the controversy. The citizen of Ohio and the citizen of Indiana claim for themselves neither title nor possession. It is true that, as the case stands, if the Van Brunts establish their title against the other defendants, and it appears that Keefer and McKinnie were actually in possession and wrongfully kept the rightful owners out, there may be a recovery against them jointly with the railway company of damages for the detention. But there can be none separately, because the company admits a possession which, if the Van Brunts have title, cannot be maintained. There is neither in the complaint nor the answers

any claim of separate right, either to the possession or the property. The whole case depends on the question of title between the Van Brunts on one side and the New York defendants on the other. This controversy was not removable. That of the other defendants is a mere adjunct of the principal dispute. It cannot exist separately.

The case is, therefore, within the principle of *Removal Cases*, 100 U. S. 457, decided after the order now under review was made, *Blake* v. *McKim*, 103 id. 336, and *Hyde* v. *Ruble*, 104 id. 407. In no just sense can it be said that the pleadings present separate controversies, such as admit of separate and distinct trials. If they do not, there could be no removal under the second clause of the act of March 3, 1875, c. 137, any more than under the first.

The order to remand is

Affirmed.

EX PARTE HOARD.

After the Circuit Court has denied a motion for an order remanding a cause to the State court, whence it was removed, a *mandamus* will not lie compelling it to make such order.

PETITION for a *mandamus*.

The case is stated in the opinion of the court.

Mr. J. Holdsworth Gordon for the petitioners.

Mr. William J. Robertson, *contra.*

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

The Chesapeake and Ohio Railroad Company began a suit in a State court of West Virginia to appropriate lands for the use of its road. To this suit the present petitioners, with others, were parties. The company, at a certain stage of the proceedings, filed a petition under the act of March 3, 1875, c. 137, for the removal of the suit to the District Court of the United States for the District of West Virginia, having Circuit Court powers. After the petition was filed and security given

according to the requirements of the law, a copy of the record of the suit in the State court was filed in the District Court, and the case docketed there. This having been done, the present petitioners moved the District Court to remand the cause, and strike it from the docket, as to them and each of them. The motion, having been argued and considered, was denied. The petitioners now ask this court for a writ of *mandamus* requiring the District Court to grant their motion.

Before the act of 1875, it was held, in *Insurance Company* v. *Comstock* (16 Wall. 258), followed in *Railroad Company* v. *Wiswall* (23 id. 507), that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by *mandamus* from this court "to compel the Circuit Court to proceed to a final judgment or decree," and not by writ of error or appeal. This was on the authority of *Ex parte Bradstreet* (7 Pet. 633), in which Mr. Chief Justice Marshall delivered the opinion. No case can be found, however, in which a *mandamus* has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or a writ of error can be taken; and in *Ex parte Bradstreet* it was stated, as the reason for allowing the *mandamus*, "that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of two thousand dollars," now, of course, five thousand. If the cause be retained, it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If it be improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in *Railroad Company* v. *Koontz*, 104 U. S. 5. It is of no importance that the value of the matter in dispute may be less than $5,000. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The act of 1875 has given an appeal or a writ of error to this court for the review of orders to remand,

without regard to the amount involved. *Babbitt* v. *Clark*, 103 id. 606. The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final. *Ex parte Ferry Company*, 104 id. 519. It is an elementary principle that a *mandamus* cannot be used to perform the office of an appeal or a writ of error. *Ex parte Loring*, 94 id. 418.

Without determining, therefore, whether the case was properly removed or not, the writ is

Denied.

LOOM COMPANY *v.* HIGGINS.

1. A specification in letters-patent is sufficiently clear and descriptive, when expressed in terms intelligible to a person skilled in the art to which it relates.
2. Evidence is admissible to show the meaning of terms used in letters-patent, as well as the state of the art.
3. If an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine: the letters-patent are to be read as if the machine and its appendage were present, or in the mind of the reader, and he a person skilled in the art.
4. *Quære*, whether the defence of insufficient description can be set up without alleging an intent to deceive the public.
5. A new combination of known devices, producing a new and useful result (as that of greatly increasing the effectiveness of a machine), is evidence of invention, and may be the subject of letters-patent.
6. William Webster's improvement in looms for weaving pile fabrics, consists of such a new combination of known devices as to give to a loom the capacity of weaving fifty yards of carpet a day, when before it could only weave forty, — *Held*, that the improvement is patentable, and that letters-patent No. 130,961, dated Aug. 27, 1872, granted to him therefor are valid.
7. Of the two original inventors, the first will be entitled to letters-patent, unless the other puts the invention into public use more than two years before the application for them.
8. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it.
9. Though the defence of prior invention ought to be set out in the answer, yet if the omission to set it out is not objected to at the proper time in the court below, it cannot be objected to here.

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. Edward N. Dickerson for appellant.

Mr. George Gifford and *Mr. William M. Evarts* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The bill in this case was filed by the Webster Loom Company to obtain relief for an alleged infringement by the defendants of certain letters-patent for improvements in looms for weaving pile fabrics, &c., granted to one William Webster on the twenty-seventh day of August, 1872, and numbered 130,961, to which the plaintiff deraigns title. The defences set up in the answer are, 1st, a denial of infringement; 2d, a denial that Webster was the first inventor of what was patented to him, under which denial various prior letters-patent are specified as containing the invention or material parts thereof, including a patent granted to Erastus B. Bigelow in March, 1849, reissued in 1857, a patent granted to E. S. Higgins as assignee of William Weild in August, 1868, and a patent granted to E. K. Davis in February, 1869; 3d, that the invention was used by and known to E. K. Davis in the city of New York, and Thomas Crossley in New York and Bridgeport, Conn.; 4th, that the description in Webster's patent is obscure, and not sufficient to enable one acquainted with the art to which it belongs to construct or use the loom therein attempted to be described; 5th, that there is no description in the patent of the combination principally claimed and relied on. The answer also sets up an agreement between Webster and the defendants whereby they claim a right to use the alleged invention of Webster. Proofs having been taken and the cause heard, the bill was dismissed by the Circuit Court. From the decree of dismissal the company appealed.

The patent, as before stated, is for improvements in looms for weaving pile fabrics, &c., and the nature and object of the invention are set forth in the specification as follows: —

"The first part of my invention relates to the combination and arrangement of the reciprocating or driving-slide, sliding-bar, with-

drawing and inserting devices, and trough in such a manner that the trough shall be capable of oscillating between the points of withdrawal and insertion of the wire, the sliding-bar receiving a horizontal motion at the same time that the pushing-slide is being reciprocated on the trough by the driving-slide. The advantage of this part of my invention is that a shuttle-box, rigidly connected with the lay, may be used. The second part of my invention relates to the means for preventing the wire from bounding back from its position in the wire-box, and consists in a spring attached to the inner end of the wire-box, and fitting indentations or openings in the heads of the wires. The third part of my invention relates to the combination of the vibrating trough directly with the lay. The fourth part of my invention relates to a modification of the mechanism, and consists in having the oscillating-trough and reciprocating-slide pathway combined or made in one piece, and having the withdrawing and pushing devices combined or connected and reciprocated thereon by power applied directly thereto; the object of this part of my invention being to dispense with the driving-slide and stationary-slide pathway and sliding-bar. The fifth part of my invention consists in the combination, with a lay having a rigid shuttle-box, of a pivoted vibrating wire-trough, a reciprocating driving-slide, and latch, the latter being operated by the wire-box to release the wire, and the slide and latch moving on the trough, all as set forth."

The specification then proceeds to describe the mechanism of the invention by a description and reference to drawings, which exhibit a front view of the improvement, a top view, a wire-head, a sectional part and end view of the wire-box, the oscillating trough connected to the shuttle-box or lay of a loom, the same connected to the breast-beam of a loom, &c., — all which would be incomprehensible to a person unacquainted with looms for weaving pile fabrics, but very plain to one who understood their construction and operation at the date of the patent. A person skilled in the art of constructing or using such looms in their most advanced and improved form, such as those known as the Bigelow loom and the Weild loom, and having one actually before him, or in his mind, would readily appreciate the meaning of the terms and the character of the improvement described.

In weaving pile fabrics, such for example as Brussels car-

pet, the pile or loop is formed by inserting a wire alternately with the filling between the threads of the warp, immediately under the woollen, or worsted, threads, and afterwards withdrawing it from the web of cloth. At first, these wires were inserted and withdrawn by hand, by the aid of an assistant, which made the process a very slow one, so that only a few yards could be woven in a day on a single loom. The first great improvement was introduced about 1840–50 by Erastus B. Bigelow, of Massachusetts, who invented a mechanical apparatus attached to the side of the loom which automatically inserted the wires in the shed, or opening between the warps, and withdrew them from the web. About a dozen wires were used, and after they had all been inserted, the device invented by Bigelow would vibrate forward and seize the head of the first wire, withdraw it from the web, and then vibrate back to the shed, and at the proper moment insert it; and so it would go on to operate as long as the loom was kept in motion. Its various motions were given and timed by means of cams of proper size and shape placed in connection with the principal movements of the loom itself. This attachment to pile-fabric looms became generally known as the wire movement; and by its aid twenty-five yards a day could be woven on a single loom without the aid of any assistant. It is seldom that such a complete revolution in one of the useful arts is made at a single jump. Improvements, however, have been made on Bigelow's invention. Amongst others, one William Weild, of Manchester, England, in or about the year 1855 effected a decided improvement, which, after being perfected by succeeding improvements, enabled him to weave thirty or forty yards a day on a single loom. The means by which this was accomplished was the placing of a horizontal trough, or grooved bar, called a wire-trough, or wire-bar, for the wire to rest on when drawn out of the web and thrust into the shed. In Bigelow's loom the wire simply rested on a fork placed close to the loom; and when it was fully drawn out by the clamp, or dog's head, which seized it for that purpose, being slender and flexible, it would sag in the middle, and, if driven rapidly into the shed, the forward end would spring upward and get entangled in the upper warp threads. This rendered a slow movement necessary,

which impeded the rapidity of the work. By giving it a trough, or grooved bar, to lie in, and keeping it straight, as was done by Weild, a quicker motion could be given to it, and a much larger amount of work could be done in the same time. The only difficulty in the way of operating with the trough as arranged by Weild was, that a certain part of the apparatus, called a pusher, which was a cross-bar or yoke, extending across and connecting the breast-beam and the wire-bar, and which was employed to push the wire into the shed, extended so far back towards the lathe, or lay, which carries the reed and shuttle-box, as to come in contact with it and interfere with its motion. Weild obviated this difficulty by sawing off (so to speak) the outer end of the lay containing the shuttle-box, which being thus detached from the rest of the lay could be separately kept back whilst the reed was driving up the filling, and was thus prevented from striking the wire-trough and pusher. But, of course, this detached portion of the lay required additional cam work, and complicated the machinery. There was also another matter that interfered with the perfect efficiency of Weild's loom. The pusher, after the wire was drawn out by a hook attached, did not seize the head of the wire, but simply pushed it forward into the shed. If this was done with too rapid a motion, the impetus given to the wire would throw it forward too far in case the loom had to be suddenly stopped on account of a broken thread or other cause. This made it necessary to work the loom more slowly than the other operations required.

This seems to have been about the state of the art when Webster began to devote his attention to the improvements which he claims to have invented, and which it is clearly shown, whether invented by him or some one else, resulted in giving to a loom the capacity of weaving fifty yards a day. The Bigelow looms were well known and in extensive use. The Weild looms were also well known. Some improvements, not necessary to notice, had also been made on both. Webster's first conception of his invention occurred, and his original drawing was made, in the winter of 1865–66; but he did not apply for his patent until June 21, 1870; and it was not issued until Aug. 27, 1872. Prior to that time the defendants, who had a

large establishment in the city of New York, and were using Bigelow's loom under a license, had procured the control of Wield's patents in this country, and had applied Wield's improvements, with some modifications made by E. K. Davis, to a large number of their Bigelow looms. Davis was their head machinist, and in 1868 he obtained a patent for an improvement on Wield's loom, by which, instead of detaching the whole outer end of the lay, he only detached the shuttle-box and caused it to slide back on the lay so as to make room for the wire-trough. He also adopted instead of the wire-trough a pair of parallel bars between which to move the wire, the latter resting on a pin between the bars, near to the loom. The loom itself was old. Every part of it was familiar to every loom manufacturer and to every weaver. Its lathe, its treddles, its breast-beam, its shuttle-boxes, and shuttle-slide were as well known to all those concerned in the weaving of pile fabrics, as the plow or the cultivator is to the farmer. The wire motion had also become well known. Its mode of attachment to the loom; the means of giving motion to its different parts; the parts themselves; the vibrating wire-support, whether a fork or a trough, and whether pivoted to the breast-beam or to a post or to the frame or floor; the reciprocating driving-slide; the dog's head for holding, and the pusher for driving, the wires; the wire-box that kept the wires in place; the rigid lathe; the lathe whose outer end was detached; and the lathe with a detached shuttle-box, — all these things were as well known as the alphabet to all those skilled in the art of pile weaving, as it then stood. With this mass of previous knowledge and nomenclature in their minds (as we must suppose it to have been), the language, the explanations, the drawings, and the claims of Webster's patent must have been perfectly intelligible to them. When an astronomer reports that a comet is to be seen with the telescope in the constellation of Auriga, in so many degrees of declination, and so many hours and minutes of right ascension, it is all Greek to the unskilled in science; but other astronomers will instantly direct their telescopes to the very point in the heavens where the stranger has made his entrance into our system. They understand the language of their brother scientist. If a mechanical engineer invents an im-

provement on any of the appendages of a steam-engine, such as the valve-gear, the condenser, the steam-chest, the walking-beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings.

Applying these remarks to the specification before us, and recurring to the extract already made, setting forth the nature and object of the invention, it is easy to conceive that its meaning may be plain to those for whose use it is intended. They know at once what is meant by the terms, "reciprocating or driving slide," "sliding-bar," "withdrawing and inserting devices," "trough," "wire," "wire-box," "lay," &c. They also understand the movements referred to, and the objects to be attained by each device.

In like manner, if we follow the specification in its description of the invention in detail, with the references to the drawings, and the closing summary of the patentee's claims, the same method of interpretation will be applicable. And as it cannot be expected that the court will possess the requisite knowledge for this purpose, it becomes necessary that it should avail itself of the light furnished by the evidence to enable it to understand the terms used in the patent and the devices and operations described or alluded to therein. This evidence, of which the record in this case furnishes an abundance, being resorted to, we have no difficulty in comprehending the patent, or the nature of the invention therein described.

A great deal of testimony was introduced by the defendants to show that the patentee had failed to describe his invention in such full, clear, and exact terms as to enable persons skilled in the art to construct and use it. It seems to us that the attempt has failed. When the question is, whether a thing can be done or not, it is always easy to find persons ready to show how not to do it. But it stands confessed that the thing has

been done, that is to say, the contrivance which Webster claims in his patent has been applied, and very successfully so, to pile-fabric looms, and, as the appellant's counsel well remarks, no one except Webster has ever appeared to claim a patent for doing it. If the thing could not be understood without the exercise of inventive power, it is a little strange that it should have been so easily adapted to the looms on which it has been used with such striking results.

It is worthy of remark, in this connection, that the defendants, in their answer, state it as a fact, that, prior to the alleged invention of Webster, looms containing lays having shuttle-boxes rigidly attached were publicly known and described in certain English patents, which they specify; and that all the other parts and elements mentioned in the fifth claim of Webster's patent (being the claim relied on) were described in another English patent of one Birkbeck; and they aver and insist, as will be more fully noticed hereafter, that the application and use of the two things together, that is, the parts described in Birkbeck's patent, with the rigid lay and shuttle-box described in the other patents, were obvious and required no invention; and that, therefore, the alleged invention of Webster was well known, and constituted a part of the known state of the art. This averment in the answer, which of course is sworn to, does not seem to tally very well with the allegation that Webster has failed to point out, in his patent, how to use and apply his invention, and that it requires further invention to use and apply it.

The appellants, indeed, have raised the question whether evidence to show that the invention is not described in the patent in such full, clear, and exact terms as to enable a person skilled in the art to construct and use it, is admissible, unless the defence is specially set up in connection with a charge that the description in the patent was made defective for the purpose of deceiving the public. The twenty-sixth section of the act of 1870, under which the patent in question was issued, declares, "that before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the commissioner, and shall file in the Patent Office a written description of the same, and of the

manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out, and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." Such a specification must be filed before the inventor shall receive a patent, the law says; and the appellant's counsel argues that if it is the duty of the commissioner to see that such a specification as the law requires is filed before granting a patent, not only is the patent, when issued, proof that he has done so, but his decision on the point cannot be questioned except in the manner allowed by the law; else, instead of one tribunal for deciding a matter on which conflicting testimony can always be found, we shall have as many tribunals as there are courts and juries called upon to try patent causes. On turning to the section which provides for certain defences that may be made to an action for infringement, we find it declared "that in an action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect;" then follows a statement of other special matters. In view of this specific defence allowed by the statute, in reference to a defective specification, it is argued that no other is admissible under that head: and reference is made to some decisions under the former statutes bearing on that subject, namely, *Whittemore* v. *Cutter*, 1 Gall. 429; *Lowell* v. *Lewis*, 1 Mason, 182; *Gray* v. *James*, Pet. C. Ct. 394; *Grant* v. *Raymond*, 6 Pet. 218; this court, in the last case, holding, contrary to the decisions of Judges Story and Washington in the other cases, that it was not necessary

to aver a fraudulent intent unless the defendant desired to avoid the patent, — a result which was provided for in the law of 1793. The court held that the plea of insufficient description was good as a defence without alleging a fraudulent intent, — but not good as a ground for avoiding the patent. The laws of 1836 and 1870 omitted the clause for annulling the patent, but still retained, in the definition of the defence allowed to be set up, the qualification of fraudulent intent. Counsel argues that, as the law now stands, the plea of insufficient description cannot be made unless made with that qualification; because the only purpose it has, under the present law, is that of a defence to the action, and it still requires the allegation of fraudulent intent to deceive the public.

There is plausibility in this argument, and if it were necessary to the decision of this case, it might give us some embarrassment. But as we are satisfied that the terms of the patent are sufficiently clear and full in the description of the invention, we make no decision on the point.

Turning now to the invention claimed by Webster, and described in the patent under consideration, we find that, although it produced a great improvement in the art of weaving pile fabrics, yet, as actually exhibited in conception and accomplishment, it seems simple. The thing to be done was to combine the advantages of Bigelow's rigid lathe, divested of some of its defects, and his constant command of the wire, with Weild's trough, or wire-bar, for supporting the wire. This Webster, or, if not Webster, some other person, effected by the devices and mechanism described in the patent. Stated in brief as therein set forth, aided by the explanatory testimony before referred to, the problem was solved by substituting for Weild's pusher a latch which rides on the wire-bar, or trough, without projecting beyond it, and which receives a reciprocating motion backward and forward on the bar, either by being connected with a driving-slide moving on the breast-beam, or by being directly connected with an upright reciprocating lever. The latch, when the end of the wire-bar next to the loom oscillates or vibrates to the front of the wire-box, drops upon a wire-head into a nick or notch made therein, and withdraws the wire into the trough, and then, when the latter oscillates back to the

shed, without releasing its hold of the wire-head, drives the wire into the shed, and is then lifted out of the notch by striking the edge of the wire-box, sloped up for that purpose, and releases the wire; and then oscillates forward again to seize another wire; and so on. The lathe, in the mean time, works backward and forward without meeting any obstruction, and without any detachment or separation of its parts. Very little modification had to be made in the cams, and the whole apparatus, or wire movement, as it is called, seems more simple than it was before, either in Bigelow's or Weild's loom. This contrivance, when actually applied to the looms, worked to perfection, and enabled the weaver to drive his loom to its utmost capacity.

The patent points out and the drawings illustrate various ways of arranging the wire-bar and the reciprocating-slide which carries the latch. Thus, the outer end of the wire-bar having to be pivoted to some centre for its oscillating motion, it is shown that it may be pivoted to the outer end of the lay or shuttle-box, or to the outer end of the breast-beam, or to a vertical shaft or post, — all these devices except the first being in common use in the Bigelow or Weild looms, and being mechanical equivalents of each other. So it is shown that the pushing-slide, which carries the latch, and rides on the wire-bar like a saddle, may be operated either by being connected with a driving-slide on the extension of the breast-beam by means of a cross-bar passing through a mortise in the driving-slide, or by being directly connected with the arm or lever producing the reciprocating movement.

The patent has five claims, only the fifth of which is relied on in this case, which is as follows: —

"In combination, the lay and its rigid shuttle-box, the pivoted vibrating wire-trough, the reciprocating driving-slide, and the latch moving thereon, the latter being operated by the wire-box, the combination being and operating substantially as described."

With the explanation of the invention already given, the meaning of this claim is quite obvious. If any explanation of it is needed, it can be readily derived from the body of the specification. The combination contains five elements: 1, the rigid lay and shuttle-box; 2, the pivoted oscillating or vibrat-

ing trough; 3, the reciprocating-slide riding on the trough; 4, the latch for taking and holding the wire; 5, the operation or lifting of the latch by striking the wire-box.

Nothing further is necessary to be said in order to dispose of the defence which was strenuously urged, and to which the court below attached much importance, that the specification was insufficient in its description of the invention sought to be patented, and failed to show any means of applying it to existing looms; and that independent invention would have to be exercised to make it a practical working apparatus as an attachment of such looms. We shall, therefore, dismiss that branch of the argument.

It is further argued, however, that, supposing the devices to be sufficiently described, they do not show any invention; and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known; and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed, — one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skilful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who *was* the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make

a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.

The next contention of the defendants which we shall consider is their allegation that Webster was not the first and original inventor of the thing patented, but that he was anticipated therein by E. K. Davis.

On this point, we think it very clearly made out, though we shall not go into much detail in commenting upon the evidence, that the whole substance of the invention was conceived by Webster, and exhibited by him in a drawing as early as the winter of 1865–66, long before Davis entertained any idea of it. The original of this drawing is in existence, and was produced in evidence, and is well authenticated. It exhibits the rigid lay; the wire-trough pivoted in two different positions, on a post near the extremity of the breast-beam, and to an arm projecting from the extremity of the lay; the driving or pushing slide, riding on the trough, with a projection indicating the latch, or other device for operating the wire; and even the cams to give the requisite movements. It also shows the wire-box, and the position of the end of the trough in relation thereto, the same as exhibited in the patent. In March, 1868, Webster exhibited this drawing to Davis and others, and explained it to them as representing a lay having a rigid shuttle-box, a driving-slide and latch moving upon a vibrating trough, the latch being operated by the wire-box. Davis was about that time engaged in making an improvement on the Weild loom before referred to, with a sliding shuttle-box, and parallel bars instead of a trough for the wire to slide between, and a pin for it to rest on. In July, 1868, he applied for a patent for this improvement, and obtained a patent in February, 1869. In that year Webster sent drawings to Weild, in England, to get out a patent for his invention in that country; but Weild declined to undertake it. These drawings show the entire invention in detail. In November, 1869, Webster having heard that the defendants were going to alter their Bigelow looms to Weild looms, sought an interview with them in order

to induce them to adopt his improvement. He met one of the defendants and showed his original drawing, but without result. In April, 1870, he had another interview with them, and also with Davis, at their carpet works in New York. He exhibited his original drawing and the drawings which he had prepared for England. Davis advised the defendants that Webster's plan was no improvement on the Weild loom. He was evidently anxious that they should adopt his improvement, for which he had already got a patent. Further interviews took place; but the defendants declined to adopt Webster's improvement, and adopted Davis's in part, — so much of it, at least, as the sliding shuttle-box. It is clear from the facts that up to this time Davis did not pretend to be the inventor of Webster's arrangement. But in the spring of 1870 Davis commenced to make a new loom, which he did not get into complete operation until the latter part of 1871. This is called the Sterling loom, and was made for the defendants. When completed it had in it the improvement claimed by Webster, and shown in his patent. At what time this particular form was adopted is not shown.

It is contended by the defendants that Davis had conceived the idea of using a rigid lathe with his wire-bar in the early part of 1868, and that, in the model which he prepared at that time for obtaining his patent, he exhibited the same latch devised by Webster, and operated in the same way by contact with the wire-box; and that he showed to the witness Crossley, by pinning his sliding shuttle-box fast to the lay, how it could be used with a rigid lay and shuttle-box. Then, why did he not claim the whole device when Webster exhibited it to him? Why did he advise the defendants that Webster's arrangement was no improvement on Weild's? But, if it were true that he did show these things in his model, and had he shown a trough instead of parallel bars; and if it were true that he regarded the idea as anything more than a possibility; and that he did, in fact, contemplate it as a perfected and practicable arrangement, so as to amount to invention, — the question would still remain, whether he or Webster was the first inventor. Both may have been original inventors, but only one of them could be the first. If Davis had put the invention into practical

form and operation more than two years before Webster applied for his patent, then the patent would be void by reason of prior use. But the evidence is conclusive that he never undertook to put it into practical form until he made the Sterling loom, which was only commenced in 1870. Webster's application for his patent was made in June, 1870. Though this was proved without objection, and substantially conceded, the defendants say that it does not appear what the application was, nor how much it was altered before the patent was issued. This argument cannot avail, for the application is a public record, the contents of which the defendants and all others are presumed to know; and since they had it in their power to produce it, and did not, it must be presumed that it would not have served their purpose, but corresponded with the patent. The defence of prior use for two years, therefore, is not sustained; and the question comes back to simple priority of invention. Conceding that Davis was an original inventor, the earliest point of time that he can be regarded as such was in the spring of 1868. But Webster had invented it before that time, and had made a drawing of it which, in March, 1868, he exhibited and explained to Davis. An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it. There is no doubt that Davis understood Webster's drawing; and he did not then claim that the invention belonged to himself.

The evidence relating to loom No. 50 leads in the same direction. This was a loom of the defendants which they commenced to alter in the latter part of 1870. Davis was not employed to make the alterations on this loom. According to Webster's testimony, which must, of course, from his relation to the case, be received with caution, but which seems to be corroborated by subsequent circumstances, Davis informed Webster at the latter's house, on Christmas day, 1870, that loom 50 had been taken down to be changed to what they had seen and explained to them in the office, — referring to Webster's previous explanation of his drawings, — and that he, Davis, had told Higgins that if he took that loom down and

changed it to what they had seen Webster have, and explained in the office, it would be a Webster wire motion. In April Webster called, as he says, at the defendant's store, and saw N. D. Higgins, and they talked about this loom, and Webster claimed it as his invention, and told Higgins that he (Higgins) had seen the drawing of it at his house and mill. It is not seriously denied that this loom was made substantially on Webster's plan.

Another circumstance seems to us as having much weight in this connection. It was found that the loom No. 50, and the Sterling loom, when completed in 1871, worked with wonderful success; sometimes as many as sixty yards being woven on one loom in ten hours. If Davis was the inventor of the wire motion applied to these looms, why did he never apply for a patent for it? He was already a patentee of a different and inferior apparatus. He knew all about the method of going about to get a patent. He belonged to a profession which is generally alive to the advantages of a patent-right. On the hypothesis of his being the real inventor his conduct is inexplicable.

There is a great deal of evidence *pro* and *con* to which we have not adverted. It must suffice to say that we are satisfied, from the examination we have given to it, that Webster is entitled to the claim of being the first inventor.

The appellants' counsel has raised the question whether the defence of prior invention can be set up under the answer, which does not state it in the manner required by the statute. It denies, generally, it is true, that Webster was the original and first inventor of the improvement claimed in the patent; and specifies certain letters-patent issued in this country and in England in which it is alleged that the said invention, or material and substantial parts thereof, was described before any invention made by Webster, which is sufficient foundation for adducing such patents in evidence; but it does not give the name and residence of any person alleged to have invented the thing patented prior to Webster; it only states that it was used by and known to Davis. It is possible that this objection to the evidence would have been available if it had been taken in season. But we are not referred to anything to show that

it was taken in the court below, or before the examiner when the witnesses were examined. In *Roemer* v. *Simon* (95 U. S. 214, 220), we held that the failure to interpose such objection before the final hearing is a waiver of the required notice in an equity suit.

It remains to consider the question of infringement. The defendants deny that they infringe the fifth claim of the patent, which is relied on by the complainants.

At the commencement of the cause, when a preliminary injunction was applied for, the defendants put in affidavits contesting the charge of infringement, but upon a very different ground from that on which the defence is now based. Then they relied on a non-user of the last element of the combination, — the operation of the latch by contact with the wire-box; now they rely on a different construction of the third element (the reciprocating driving slide) from that given to it by the complainants. They say that they do not use that element, construed as they construe it. The position originally taken is abandoned.

Nevertheless, it will throw light on the subject to see what the defendants said on the occasion referred to. It will at least bring their present position to the test of a first judgment formed by themselves at a time when it was very much to their interest to find discrepancies between what they used, and what the patent contained. Two affidavits were put in by the defendants at that time, one made by both the defendants jointly, and one by their superintendent, Mr. Duckworth. A previous suit brought on Webster's patent against the New Brunswick Carpet Company, in which the defendants, or at least their machinist, Davis, had taken much interest, had just terminated in a decree sustaining the patent, rendered by Judge Nixon in the Circuit Court for the District of New Jersey. The defendants in their affidavit, dated June 24, 1874, say: "That at the time defendants procured the looms referred to in the affidavits on the part of complainants in this suit, and used thereon tops of wire-boxes, as cams, to disengage the latches from shoulders on the heads of the wires, they did not know or suppose that Wm. Webster, or any one else except themselves and E. K. Davis, had a patent covering any part,

or combination of parts, contained in said looms. . . . The Stirling loom, the No. 50 loom, and the three other Bigelow looms, mentioned in the affidavits on the part of the complainants, were all procured and put in operation with the tops of the wire-boxes, as cams to disengage the latches from the wire-heads, a long time prior to the issuing of the Webster patent, on which this suit is brought, and before defendants knew that said Webster had applied for said patent. The first that said defendants knew or supposed that there was anything in any of said looms covered by letters-patent granted to said Webster was during the progress of this suit against the New Brunswick Carpet Company, referred to in said affidavits; and while the testimony was being taken therein, when they heard that a claim of that kind was being made, and on further inquiry were informed that said Webster would probably sustain his right to the combination mentioned in the fifth claim of his patent, on which said suit was pending, and that the use of the top of the wire-box as a cam to disengage the latch from the shoulders of the wire-heads was one of the elements or parts of that combination. After consulting counsel on the subject, they concluded that to avoid any question of doubt on that subject they would have all their looms which contained such tops to the wire-boxes altered by having such tops entirely removed, and having other provision made for operating the wires. They accordingly had such alterations made, which were all completed by the middle of May, 1874, since which time they have not had any looms, or used any looms, employing the top of the wire-box as a cam to disengage a latch from a wire-head, or for opening a latch to disengage from a wire-head, or to support a latch away from, or out of contact with, the wire-heads in its journey from one end of the box to the other, or to permit a latch to descend and catch a wire-head in any way, or for any other purpose. That they have not since the time of said alterations used, in any loom or looms, the top of a wire-box to lift or support, or to in any way operate or participate in the operation of a latch, and that they do not expect to use any such top of a wire-box hereafter, but intend not to do so."

The fact that this mode of resisting the charge of infringe-

ment is now abandoned furnishes very fair presumptive evidence of two things: first, that the substituted device for operating the latch was a mere equivalent of the wire-box in that regard; and, secondly, that the construction of the fifth claim on which they now take their stand could not have been a very obvious one.

That construction is, that the third element in the combination of the fifth claim of Webster's patent, and which is there called "the reciprocating driving-slide," refers, not to the slide which rides upon the trough or wire-bar and carries the latch (which they do use), but to the slide which rides upon the breast-beam and communicates the reciprocating motion to the other (which they do not use). It is undoubtedly true that in the body of the specification, where the patentee is describing the joint use of these slides, he does designate the slide on the breast-beam as the reciprocating or driving slide, and that on the trough as the withdrawing and pushing slide. But it is apparent that both of these slides are, in fact, reciprocating and driving slides. The one on the trough has a reciprocating motion and drives the wire into the lay. And when, as the patent points out, the other slide is not used, — that is to say, when the slide on the trough is directly connected with the motive power, or device, which gives the reciprocating motion, — it takes the place of both. The specification states this in so many words. It says: "Fig. 4 represents a modification of the invention. The withdrawing and pushing slide B^1 in this case becomes the driving-slide." Again: "Figure 7 represents a side view of the driving-slide B^1, its pin B^2, to which power is applied, and the withdrawing and transfer latch C and pusher C^1, attached to the slide." These figures relate to that form of the invention in which the slide on the breast-beam is not used.

Now, if we examine the language of the claim, it seems to us that all doubt as to its meaning is removed. It reads thus: "In combination, the lay and its rigid shuttle-box, the pivoted wire-trough, *the reciprocating driving-slide, and the latch moving thereon*, the latter being operated by the wire-box," &c. Obviously the reciprocating driving-slide here referred to is that slide on which the latch moves, and that is the slide which

rides on the trough, and which is the only slide used in one modification of the invention. It can hardly be supposed that the patentee intended to make the other slide, which he showed could, at any time, be dispensed with, an indispensable element in his claim. It would have rendered the claim a practical nullity. The important thing was the slide which rides on the trough.

The argument of the defendants' counsel on this subject is very ingenious and plausible; but we are forced to the conviction that the slide intended in the combination is that which is indispensable to the operation of the apparatus. And this must have been the conviction of the defendants themselves, as well as of their counsel, when they made the affidavit before referred to.

In conclusion, our judgment is, that Webster invented the combination described in the fifth claim of the patent; that the invention is sufficiently described in the specification to meet the requirements of the law; that it was not anticipated by any prior patent or invention; that it was never in public use or on sale for more than two years before the patent was applied for; and that the defendants have infringed it.

The decree of the Circuit Court must be reversed, and the cause remanded, with instructions to enter a decree in favor of the complainants, and to take such further proceedings as law and justice may require; and it is

So ordered.

MR. JUSTICE BLATCHFORD did not sit in this case, nor take any part in deciding it.

NEW ORLEANS *v.* MORRIS.

1. The water-works of a city are not subject to sale for its ordinary debts under execution.
2. A city which owned such works conveyed them to a corporation formed for the purpose of maintaining and enlarging them, and received therefor shares of stock, which the statute authorizing the conveyance declared should not be liable to seizure for the debts of the city, but should be reserved for the benefit of the holders of the bonds that had been issued by the city to raise the means wherewith to construct the works. *Held*, that the statute does not, by thus exempting those shares from seizure, impair the obligation of any contract, as they merely represent the city's ownership in the water-works which was, before the enactment of the statute, exempt from seizure and sale.
3. The city may, by a suit in equity, restrain its execution creditors from selling those shares.

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. E. Howard McCaleb for the appellant.

Mr. William Wirt Howe and *Mr. John A. Campbell* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree, dismissing, on a plea of the defendants, the bill of the city of New Orleans.

The substance of the bill is that the defendants, having several judgments on the law side of the court below, had caused executions to be issued and levied upon shares of the stock of the New Orleans Water-Works Company; that the marshal had advertised and was about to sell them; that prior to March 31, 1877, the city was the sole and absolute owner of the water-works now owned and held by the corporation known as the New Orleans Water-Works Company; and that on that day the legislature of Louisiana enacted a law creating that corporation, with a capital of $2,000,000. Of this sum the corporation, as soon as organized, was to "issue to the city of New Orleans stock to the amount of $606,600, full paid and not subject to assessment, and in addition thereto one similar share for every hundred dollars of water-works bonds which the city

has taken up heretofore and extinguished by payment, exchange, or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of water-works bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this act."

The bonds here referred to were issued by the city while sole owner of the water-works, in aid of their construction and extension.

The seventh section of this act reads as follows: "*Be it further enacted*, that the stock owned by the city of New Orleans in said water-works company shall not be liable to seizure for the debts of said city."

It was under this statute, and especially under the section just recited, that the city invoked the restraining power of the court to prevent the sale of its stock in the company.

To this bill the defendants interposed a plea to the effect that, so far as the provision of the statute, exempting the stock of the city in the water-works company from sale under execution, relates to their judgments, it is void by the Constitution of Louisiana and the Constitution of the United States, each of which forbids the enactment of laws impairing the obligation of contracts; and that the contracts on which their judgments were obtained were made before the passage of the act of 1877.

The court held this plea good, and, as we have already said, refused the injunction, and dismissed the bill.

The first point raised in argument which requires our attention is that, whether the court below was right or wrong in its decision of the case on its merits, the bill must still be dismissed for want of equity, on the ground that there is an ample remedy at law by a motion to the court to compel the marshal to release his levy, because the stock was not liable to be sold on the execution.

It will be observed that no such objection was made in the court below, and although one of the defendants filed a general demurrer to the bill which might have raised it, he afterwards withdrew his demurrer and joined in the plea on which the case was decided.

This plea was a defence on the merits of the case, and was to be held good or bad on precisely the same principles,

whether pleaded to a declaration at law or a bill in chancery. We should, under such circumstances, have great hesitation to permit the party who, by tendering this issue, had waived the question of the special jurisdiction of the court in equity, to raise that point for the first time on appeal.

We are of opinion, however, that the bill does show on its face a sufficient ground of equitable jurisdiction in its allegations that are sustained by the provisions of the statute, which create a trust in favor of the holders of the old water-works bonds of the city, and of other creditors of the city, which is not shown in any way to have been released or discharged.

Notwithstanding, therefore, the opinion of this court in *Van Norden* v. *Morton* (99 U. S. 378), that in the ordinary case of a wrongful levy of an execution on property not subject to be seized under it, the proper remedy is by motion to have the levy discharged, we think there is in this bill other sufficient grounds for the equitable jurisdiction of the court.

The question to be decided on the merits is, shortly, this: Is a statute of a State legislature which, in the act authorizing a city to convert its ownership of a large and valuable property, held for the use of the public, such as this, into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, an impairment of the obligation of existing contracts within the meaning of the Constitution?

The learned counsel, in the oral argument and in the brief, substantially concedes that the water-works themselves, in the hands of the city, were not liable to be sold for the debts of the city. And if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity, that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city.

There is nothing in the nature of this legislation which directly impairs the obligation of the city's contract with the appellees. The courts recognized the binding force of those contracts by rendering judgments against the city after the

passage of the act complained of, just as they would before, and there is no pretence but that the moral or legal obligation of the city to pay those judgments remains undiminished.

The force of the argument for holding the statute void rests on certain decisions of this and other courts in regard to laws which attempted to exempt from the liability to seizure under execution property which, at the time the contract was made, was by law so liable to be seized and sold in enforcement of the contract. The cases of most importance so relied on are *Green* v. *Biddle*, 8 Wheat. 1; *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 id. 608.

But these cases do not go so far as the argument in this case requires. Indeed, they fall far short of it. They simply hold that an act of the legislature, passed after a contract is made, which withdraws property then liable to be seized and sold, in enforcement of that contract, from the power of the courts to seize and sell it, impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property *not* subject to sale for enforcement of the contract, cannot, in providing for a change of the form of the title by which the debtor holds it, continue the exemption from forced sale of that which represents in the hands of the same owner the property so exempt. That is the case before us.

The water-works were not liable to execution for judgments against the city. The legislature intended to change the form of the city's ownership of that property into that of shares of the capital stock of a company, of which it was at first to be sole owner. These shares represented the water-works of the city. They represented nothing else. The city owned the shares, and the legislature continued in this property, in the hands of the city as shares of stock, the same exemption which belonged to the property represented by these shares. In doing this no right of the creditors, at the time they made their contract or the passage of the act, was impaired. No property to which they then had a right to look for payment of their debt, or as a means of enforcing their contract, has been withdrawn from the force of its obligation. They are placed by this law in no worse condition than they were before.

They were not obstructed or impaired in the exercise of any

remedy which they had when the contract was made. Nothing subject to their debt, — not by way of lien, for such debts created no lien, — but subject to execution after it might be issued, was withdrawn from that subjection. The shares were evidence of title in property which had never been liable to execution, and the statute continued this exemption in the ownership of these shares so long as it remained in the city.

But it is said that a creditor has, by his contract, the same right to enforce its performance out of property acquired after his debt is created as he had against that which the debtor owned when the contract was made. In a general sense there can be no doubt of the truth of this proposition. But there are two answers to it in the present case. In the first place, the property in question is not other and different property from that held and owned by the city at the time of the contract, and which was then exempt from execution. It has only changed the form and evidence of ownership. The shares represent in the hands of the city the same interest which it had before in the water-works.

In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as the law stood. It could not have put it into a joint-stock company without the aid of a new law. The legislature, in authorizing the change in the form of the ownership of the water-works, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new property or not, that such ownership should continue exempt from execution.

As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts.

We are of opinion, therefore, that the plea of defendants was bad.

Decree reversed, with directions to overrule the plea, and for such further proceedings as are not inconsistent with this opinion.

OGLESBY *v.* ATTRILL.

1. Where the action of a corporation is lawful, the motives therefor, or the expediency thereof, is not a subject of judicial inquiry.
2. A compromise, as the term is defined by the code of Louisiana, is as binding on the interested parties as a judgment, and cannot be collaterally assailed.

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

The petition of the plaintiff alleges that he had become the sole owner of all the capital stock of the Crescent City Gas-Light Company, a corporation created by an act of the legislature of Louisiana, approved April 20, 1870; that the stock was divided into 30,000 shares, of $100 each; that, in March, 1875, he entered into negotiations with the New Orleans Gas-Light Company, another corporation created under the laws of that State, for an amalgamation of the two companies, pursuant to an act of the legislature of the previous year; that the negotiations resulted in an agreement for amalgamation between the two companies, through their responsible boards of directors; that the agreement was ratified by the requisite number of stockholders on the 9th of April following; that on the ensuing day the agreement was deposited with the secretary of state, as required by law; that, under the agreement, the consolidated company retained the name of the New Orleans Gas-Light Company, and its full-paid stock was divided into 37,500 shares, of $100 each, — of which 12,500 shares were allotted to the plaintiff as owner of all the stock of the Crescent City Gas-Light Company, and the residue, 25,000 shares, were allotted to the owners of the stock of the original New Orleans Gas-Light Company.

The petition further alleges that on the 10th of April, 1875, about the time of the consummation of the agreement of consolidation, the defendants Oglesby and Cassard, the former representing himself as entitled to 3,550 shares, and the latter to 1,150 shares, of the stock of the Crescent City Gas-Light Company, united with one Hernandez in a letter addressed to the president of the New Orleans Gas-Light Company, which was as follows: —

"NEW ORLEANS, April 10th, 1875.

"JAMES JACKSON, *President Gas Company.*

"By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Company. We, the undersigned, hereby notify you that, at the commencement of the litigation with your company, we were the owners of the shares in the Crescent City Gas Company attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of said company; and that we intend to prosecute our claim to the same, and hereby notify you that any compromise or adjustment you may make with the said Crescent City Gas Company will be subject to our rights, to the extent above stated, and that legal proceedings will be instituted to enforce our said rights.

"J. H. OGLESBY, 3,550 shares.
"JULES CASSARD, 1,150 do.
"J. HERNANDEZ, 400 do."

The petition avers that this letter was written with the malicious intent to embarrass the plaintiff in the exercise of his rights under the agreement to consolidate; that the claim made was groundless; that, on the 7th of April, 1873, the directors of the Crescent City Gas-Light Company had levied an assessment on the stock of the company of one and one-half per cent; and, under it, the defendant Oglesby was bound to pay $6,075, as owner of 4,050 shares, and the defendant Cassard was bound to pay $1,725, as owner of 1,150 shares; that they refused to pay this assessment, and on the 6th of May, 1873, instituted suit in conjunction with other shareholders to enjoin the directors from proceeding to enforce its payment, and set up as grounds therefor "frauds and machinations of the officers of the said company;" that, on the 14th of that month, the company brought suits against Oglesby and Cassard to enforce payment of the assessment; and that, on the following day, May 15, Cassard transferred his shares to one Phipps, and on the 22d of the month Oglesby transferred to him 3,550 shares of his stock and disposed of the residue to other parties; that these transfers were made in settlement and compromise of the rights of the respective parties, in pursuance of which an indorsement was made on them to the effect that the company

assented thereto, although only fifty cents per share had been paid, and released Oglesby and Cassard from all past, present, and future assessments thereon; and that thereupon the respective suits were dismissed, those by the company against Cassard and Oglesby, and the one by them against the company.

The petition further avers that the notification above mentioned has operated to impair the absolute control of the plaintiff of a large amount of stock in the consolidated company; and that the claim set up by the defendants throws a cloud over the title of a large portion of the shares allotted to him, and, from the nature of the claim, causes a confusion which impairs and depreciates the value of the entire number of his shares to his damage of $200,000. He, therefore, prays that the defendants may be severally cited, and, after due proceedings, be condemned *in solido* to pay to him that sum, with interest and costs.

The petition was filed in the Fourth District Court of the Parish of Orleans, of Louisiana, but, on application of the de fendants, was removed to the Circuit Court of the United States. They then filed an answer, and a petition in reconvention, making what is termed a reconventional demand or counterclaim. The substance of this petition is, that the assessment levied upon the stock of the Crescent City Gas-Light Company was unnecessary; that the directors of the company had made no arrangement to purchase property or to build gas-works, or to lay pipes for gas, and had no serious design of doing so; that the charter of the New Orleans Gas-Light Company of 1835 contained a provision authorizing a sale of its gas-works to the city of New Orleans; and that the defendants and other corporators of the Crescent City Gas-Light Company "had in contemplation an arrangement so beneficial to the city of New Orleans that they had no doubt they would be able to buy from it the pipes, gas-works, and other property" which it might thus acquire, and that it was the design and object of the corporators to wait "until time should develop whether they could purchase from the city of New Orleans or should be compelled to build for themselves;" that the directors were put into office through the influence of

the plaintiff, and were completely under his control; that the assessment levied was instigated by him to induce the stockholders to part with their stock, and to enable him to purchase it for a mere nominal sum; that the plaintiff and the directors confederated together to make the assessment to carry out this scheme, although they agreed among themselves that no assessment of their stock should be made; and that they used the process of the courts to compel the defendants to submit to their arbitrary and unnecessary exactions.

The defendants admit that suits were brought against them to enforce the payment of the assessment levied on the shares held by them, and that they made the compromise stated in the petition; but allege that inasmuch as the assessment levied, and others threatened, involved the payment of enormous sums, and inasmuch as they had reason to believe that neither of them would derive any benefit therefrom, they were compelled to make the compromise to prevent their ruin; and that the agreement to surrender their stock in consideration of being released from liability for the assessment, and the dismissal of the suits against them, were made in ignorance of the fact that Phipps, to whom they transferred their stock, was an agent of the plaintiff to combine with the other directors to compel the stockholders to sacrifice their stock; and that they did not know at the time, nor until within six months past, of the conspiracy between the plaintiff and the other directors as above charged, and but for "said error of fact" they would have defended the suits brought against them, and would not have surrendered their stock; and that they have ascertained within six months that the plaintiff and other capitalists at the North had furnished Phipps and others with the means to buy up the stock so soon as it could be forced on the market by the proceedings of the directors.

The defendants then allege that each share of the Crescent City Gas-Light Company is worth not less than $100; that they are severally entitled to the stock which they respectively owned as mentioned; that they were illegally and cunningly deprived of it by the plaintiff, who has converted it to his own use; and that he is accountable to each of them for its value, namely, to the defendant Oglesby for $355,000, and to the de-

fendant Cassard for $115,000; and to pay said amounts they pray that he may be condemned.

To this reconventional demand the plaintiff excepted, on the ground that it was prescribed by one year, and also on the ground that it disclosed no cause of action against the plaintiff. The court overruled the exceptions, and the case was tried by a jury, who found against the claim of the plaintiff and that the reconventional demand should be dismissed. The case comes here on a writ of error taken by the defendants. The plaintiff abides by the judgment entered on the verdict.

Mr. Richard De Gray and *Mr. Henry Kelly*, with whom were *Mr. Charles B. Singleton* and *Mr. Richard H. Browne*, for the plaintiffs in error.

Mr. Thomas J. Semmes and *Mr. S. Teakle Wallis* for the defendant in error.

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

We do not deem it necessary to consider the rulings of the court upon the admission of evidence, nor the instructions given to the jury, nor those refused. The affirmance of the judgment may be rested on the compromise made between the defendants — the petitioners in reconvention — and the company, assuming that in its absence the petition in reconvention discloses a cause of action against the plaintiff below. They allege that a fraud was practised on them by the directors of the company at his instigation; that he joined in a conspiracy to get possession of their stock at a nominal price; and that in order to carry out this scheme an assessment was levied which was unnecessary for any immediate purpose of the company, and that others were threatened. But they do not allege that the assessment was in excess of the powers of the directors, nor that it would have been unnecessary if the company had intended at the time to purchase or build gas-works required for its business, or to raise money for other corporate purposes; but that under the circumstances then existing it would have been good policy to wait for future proceedings on the part of the city of New Orleans. As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it,

the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful. *Bailey* v. *Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 12 Beav. 433.

The supposed fraudulent intentions of the officers in levying the assessment, which are now alleged as grounds for treating it as invalid, were urged by the defendants as reasons for enjoining its enforcement in the suit they instituted; and any claims arising from that clause were covered by the compromise admitted in the pleadings. A compromise, by the code of Louisiana, is defined to be "an agreement between two or more persons, who, for promoting or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing" (art. 3071); and has, between the interested parties, a force equal to the authority of a thing adjudged. It cannot be attacked on account of any error in law or any lesion. Art. 3075.

The suits between the defendants and the Crescent City company involved the validity of the assessment which they, on account "of frauds and machinations of the officers," sought to enjoin, whilst the company sought to enforce its payment. The compromise concluded embraced the dismissal of the several suits, — of those brought against the defendants, and the one brought by them against the company, — the transfer of their stock, and their release from present and future assessments thereon. There is no averment that it was induced by any false representations of the plaintiff or of the directors, or that the assessment was not a genuine one, or that the agreement of the directors that no assessment should be levied on their stock was carried into effect; or that there was any concealment of the affairs of the company; and of the value of the stock the defendants were as competent to judge as any others in the market. Their ignorance that its purchase by Phipps was made for the plaintiff does not in any respect affect the

character of the transaction. It was of no moment to them who became the purchaser, nor did they so regard it, for the transfers of their stock were made in blank. The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition in reconvention; that is, "the frauds and machinations of the officers of the company" in levying the assessment. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly between the company and the defendants, it protects from further suit those who advised, equally with those who levied, the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as doers of it. No allegations of fraud, in addition to those made at the settlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. *Adle* v. *Prudhomme*, 16 La. Ann. 343. In the face of the compromise, the reconventional demand cannot be sustained.

Judgment affirmed.

UNITED STATES *v.* CARLL.

An indictment on sect. 5431 of the Revised Statutes, alleging, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely made, forged, counterfeited, and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited, and altered, is insufficient, even after verdict.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

This was an indictment, found in the Circuit Court, on sect. 5431 of the Revised Statutes, by which it is enacted that "every person who, with intent to defraud, passes, utters,

publishes, or sells any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years."

Each count of the indictment alleged that the defendant, at a certain time and place, "feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter, and publish upon and to the said Bank of the Metropolis a falsely made, forged, counterfeited, and altered obligation and security of the United States" (which was set forth according to its tenor), against the peace, and contrary to the form of the statute.

The defendant, having been tried before Judge Benedict, and convicted by the jury under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of uttering the obligations, knew them to be false, forged, counterfeited, and altered, moved in arrest of judgment for the insufficiency of the indictment. At the hearing of this motion before Judge Blatchford and Judge Benedict, they were divided in opinion upon the question, stated in various forms in their certificate, but in substance this: Whether the indictment, setting forth the offence in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited, and altered, was sufficient, after verdict, to warrant judgment thereon.

The Solicitor-General for the United States.
Mr. William C. Roberts for the defendant.

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

In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court

to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Simmons*, 96 id. 360; *Commonwealth* v. *Clifford*, 8 Cush. (Mass.) 215; *Commonwealth* v. *Bean*, 11 id. 414; *Commonwealth* v. *Bean*, 14 Gray (Mass.), 52; *Commonwealth* v. *Filburn*, 119 Mass. 297.

The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offence at which it is aimed is similar to the common-law offence of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

This indictment, by omitting the allegation contained in the indictment in *United States* v. *Howell* (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of sect. 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be

Answered in the negative.

LINCOLN *v.* FRENCH.

1. The presumption that a trustee performed his duty by reconveying to his grantors the title to land, when the conditions became impossible upon which he was to execute the trust declared in their deed to him, is a disputable one, and may, therefore, be overcome by opposing evidence.
2. The outstanding title in the trustee bars ejectment by the grantors.

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

This was an action for the possession of a tract of land containing three hundred and twenty acres, situated in the town of Sutter, county of Sacramento, and State of California. The complaint is in the usual form for the recovery of land under the system of procedure which obtains in California. As originally filed in November, 1866, it embraced thirty-one defendants; but by amendments to the pleadings and other causes the number has since been reduced to seven. Various defences were set up by them, which it is not necessary to state to understand the questions to be considered. It is enough to say that they were sufficient to put in issue the title of the plaintiff and his right of possession.

The case was first tried in 1867, before a jury, by whom a general verdict was rendered for the defendants; upon which judgment was entered in their favor. The question on the trial, upon which the case turned, related to the validity of a deed of the sheriff of the county, executed to one of the defendants upon a sale of the property for taxes. The Circuit Court held the deed valid, and instructed the jury to find for the defendants. The case being brought here, the judgment was reversed and the cause remanded for a new trial, this court holding that the sale was invalid, as the sheriff had not conformed to the provisions of the statute, in that he offered the whole property to the highest bidder instead of selling the smallest quantity which any purchaser would take and pay the judgment rendered for the taxes and costs. *French* v. *Edwards*, 13 Wall. 506.

The case was again tried in 1872, this time by the court, without the intervention of a jury, upon the stipulation of the

parties. The court found as facts, that, on the 1st of March, 1862, Robert H. Vance was the owner in fee of the lands in controversy, and on that day conveyed the same to the plaintiff, Ira G. French; and that, on the 9th of January, 1863, French and Vance, with several others, joined in a deed conveying the lands to Edward Martin and Francis E. Lynch, upon trust to sell the same in lots of such size and for such prices as should be directed by a committee of four persons, or a majority thereof, to be selected in a manner indicated; and, immediately upon the receipt of the proceeds of the sales, to distribute them in specified proportions, to the several grantors, and to a certain company, thereafter to be organized, to construct and maintain a railroad connecting the town of Sutter with the Sacramento Valley railroad, the portion of this company to be paid when the connecting road was completed. The deed provided that no conveyance should be made by the trustees until the road was commenced in good faith, and if it was not built within one year from its date that the deed of trust itself should be void, unless the iron for the road should be lost or detained on its transit; in which case the road was to be built within two years.

The court also found as facts that the contemplated company was never incorporated, nor the road commenced; and that the defendants, who appeared in the action, were, at its commencement, in the exclusive adverse possession of the premises; and as conclusions of law, (1) that the plaintiff, French, acquired title in fee to the premises in controversy by the deed from Vance on the 1st of March, 1862; and (2) that his title was conveyed by the deed to Martin & Lynch on the 9th of January, 1863; and did not revest on failure of the conditions mentioned in the deed, without a re-entry for condition broken, or other act manifesting an intention to avoid the deed on that ground, but remained in the trustees at the commencement of the action; and that, therefore, the defendants were entitled to judgment in their favor. The case was again brought to this court (21 Wall. 147), and the judgment was again reversed, on the ground that a reconveyance from the trustees to French should have been presumed by the court below, from the lapse of time after the deed of trust was made, and from the fact

that the conditions upon which the trust was to be executed had never arisen, and had become impossible.

The case was tried a third time, in October, 1878, before the court without a jury. Among other things, the court found the same facts which it found on the second trial, as to the execution of the trust deed to Martin & Lynch; the non-incorporation of the contemplated railroad company mentioned in it; the non-construction of the road; and the further fact, that the trustees never executed any instrument reconveying or purporting to reconvey to the plaintiff any part of the premises covered by the trust deed, either before or after this action was commenced. But construing the decision of this court as indicating that the presumption of reconveyance, arising from the facts stated, was indisputable and conclusive, it held that the presumption could not be overthrown by evidence that no such reconveyance was actually executed. It accordingly found that the title was in the plaintiff from the presumed reconveyance by the trustees, and judgment was rendered in his favor. To review this judgment the case was again brought to this court.

Mr. Jonas H. McGowan and *Mr. John H. McKune* for the plaintiffs in error.

Mr. Sherman O. Houghton and *Mr. John Reynolds* for the defendant in error.

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

In giving its decision when the case was last here, this court was led into an error in the statement of a fact. It says in its opinion that the action was begun in November, 1872, more than eight years after the time limited when the trust deed to Martin & Lynch was to lose its efficacy, when, in reality, it was commenced in November, 1866, less than three years after the time mentioned within which the road was to be completed. Although the duty to reconvey arose when by the terms of the trust deed the time had passed within which the work was to be done, and the conditions upon which the trust was to be executed had become impossible, a reconveyance was to be presumed only in the absence of proof to the

contrary. Like other presumptions, it was sufficient to control the decision of the court if no rebutting testimony was produced. But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown.

While in its opinion the court, speaking through Mr. Justice Swayne, expressed itself as being clear that the case, as then presented, was one in which a presumption of reconveyance was to be indulged, and quoted, with approbation, the language of Sir William Grant in such cases, that "what ought to have been done should be presumed to have been done," and that "when the purpose is answered for which the legal estate is conveyed it ought to be reconveyed," it added: "If it had been one of the facts found by the court below that the title was still in the trustees, the case would have presented a different aspect. It is stated only as a conclusion of law arising upon the facts found." It is plain, therefore, that this court only considered that the conclusion of law of the lower court, that the title was still in the trustees, was not warranted by the facts found, and that the case would have been differently decided had what was thus stated as a conclusion of law been one of those facts. It was not the intention of this court to hold that the presumption was a conclusive one, not open upon a retrial to rebuttal, because it was considered to properly arise upon the facts then presented by the record. When the case went back upon our decision for further proceedings, — which, this being an action at law, were necessarily those of a new trial, — the fact as to a reconveyance was open to proof, and was not to be taken as conclusively established from the force of the presumption that it had been made. Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.

The fact having been established, against the presumption mentioned, that the trustees never reconveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right of possession. Judgment should, there-

fore, have been ordered for the defendants. It follows that the judgment of the Circuit Court must be reversed, and the cause be remanded with directions to enter judgment in their favor; and it is

So ordered.

BRIDGE *v.* EXCELSIOR COMPANY.

The claim for which Esek Bussey secured, July 18, 1876, letters-patent No. 180,001, is confined to an automatic device for raising up and letting down a hinged oven-shelf, and they are not infringed by constructing and operating a shelf as described in letters-patent No. 205,704, granted Jan. 9, 1878, to E. C. Little and D. H. Nation. The devices in both letters, though in some respects different, operate upon a principle which has been long used in other contrivances by which the same general effect is produced.

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

The case is stated in the opinion of the court.

Mr. Robert H. Parkinson for the appellants.

Mr. Samuel S. Boyd for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a bill in equity, founded upon certain letters-patent dated July 18, 1876, and numbered 180,001, granted to one Esek Bussey for an improvement in cooking-stoves. The appellants, as his assignees, sue the Excelsior Manufacturing Company and the other appellees for alleged infringement, and pray an injunction, an account of profits, and an assessment of damages. The appellees filed an answer, denying infringement, and alleging the patent to be invalid by reason of certain older patents and of the prior public use of his alleged invention. The patent relates to an oven-shelf placed on a level with the bottom of the oven when the door is open, and outside of the oven, to serve as a shelf for pans and other vessels to rest on, when drawn out of, or shoved into, the oven. The claim is not for the shelf, as that is admitted to be old, but for an automatic device for raising the shelf upright and enclosing it within the door when the latter is closed,

and letting it down to a horizontal position when the door is opened. The device is a cam attached to the door, which passes under the edge of the shelf, and gradually raises it to a nearly perpendicular position as the door shuts. The shelf falls back of its own weight when the door opens, resting on the cam. The claim of the patent is as follows: —

"What I claim, and desire to secure by letters-patent, is —

"In combination with a stove-oven, a hinged shelf, fitted to fall outward and down automatically when the oven-door is opened, and to be raised up by closing the oven-door, adapted to operate upon it for that purpose substantially in the manner and for the purposes herein set forth."

The defendants made and sold stoves containing oven-shelves constructed and operated as described in letters-patent granted to E. C. Little and D. H. Nation, dated July 9, 1878, and numbered 205,754. This shelf also has an automatic movement, being raised when the door shuts, and lowered when it opens. But the device by which this is accomplished is different from that of Bussey. A cam, or arm, is used on the door, it is true; but it does not operate under the shelf, but upon a projection attached to the upper side of it, so arranged in relation to the arm on the door as to raise and lower the shelf. Both devices operate upon the same principle precisely as that which has been used for a long time in raising and lowering a carriage-step by shutting and opening the door, and in other contrivances by which the same general effect is produced. Cam movements, and others of like character, producing simultaneous operations according to the needs of the case, such as opening valves in a steam-engine as the piston ascends and descends, and a thousand other things, are in such common use, that it requires but very little invention to adapt them to a particular case, like the one under consideration. We think, with the court below, that the patentee, if entitled to anything, is only entitled to the precise device which he has described and claimed in his patent; and as the defendants use a different device, they are not guilty of infringement.

Decree affirmed.

UNITED STATES *v.* SMITH.

1. A paymaster in the army, from whom public funds had been stolen, the amount of which he subsequently paid to his chief paymaster, pursuant to the order of the Paymaster-General, filed his petition in the Court of Claims for relief, under sects. 1059 and 1062 of the Revised Statutes. *Held*, that the limitation of six years prescribed by sect. 1069 is applicable to the case.
2. *United States* v. *Clark* (96 U. S. 37) distinguished.

APPEAL from the Court of Claims.

The case is stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. George A. King for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an action in the Court of Claims under the third clause of sect. 1059 and sect. 1062 of the Revised Statutes, to establish a right to relief for public money stolen from the claimant, who was a paymaster in the army. The case turned in the court below, as it does here, on the question of the applicability of the Statute of Limitations as found in sect. 1069; and the claimant relies upon the opinion in *United States* v. *Clark*, 96 U. S. 37.

That case differs materially from this. The United States were suing Clark, in a court of general jurisdiction, on his bond, to recover the sum whereof he alleged that he had been robbed. He had refused to pay, and had never paid it or accounted for it, and he sued in the Court of Claims to establish that set-off. In the present case, the sum in controversy had been paid by the claimant to the proper officer, and the United States had no claim on him for it, and no right of action against him on that account. If the United States, in any action brought against Smith on his official bond, should include the sum now in controversy, it would be a perfect answer to the demand that Clark had paid it to his chief paymaster under the order of Paymaster-General Brice, their common superior.

And if Smith should, in his accounts with the government, fall behind, so that a balance as large as the sum now in con-

troversy was due, and there had been a change of sureties on the bond, those who were sureties when this payment was made could insist on that sum being applied to their exoneration *pro tanto*.

Nor does it appear that there was any balance of money of the government in the hands of Smith either when he brought suit or when he obtained judgment, on which it could be applied as a credit.

It is, therefore, a case in which the judgment amounts to a recovery of the sum once paid by claimant, and as the statute gives no authority to make this effectual by repayment out of the treasury, it is to be collected by permitting him to retain it out of a future balance in his hands.

In Clark's case the money had never been paid by him to the treasury, nor did it appear that there had been any final refusal by the accounting officers of the treasury to allow the claim.

The reasons why this court held that the Statute of Limitations, which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's action, have direct relation to the differences we have noticed between that case and this. The court there said that until the accounting officers had refused to allow the claim in his accounts there was no occasion to establish it in the Court of Claims. There being no denial of his right, the statute did not run. This was founded on the conditions of the officer's bond to pay when demanded.

It sufficiently appears in this case that claimant's right was authoritatively denied when he was ordered by the paymaster-general to pay the money, and that then was the proper time to apply for the protection of the Court of Claims by asking its decree that he should be credited on his account with that sum.

The court in Clark's case gave as another reason why the statute did not apply, that so long as the United States could sue for this money and did not do so, the right of the claimant to this defence to that action could not be barred by the Statute of Limitations. And as Clark was then sued for that money by the government in a court where the defence could not be tried, but where it would not be barred by the limitation, if

the court had had jurisdiction to hear the defence, it was not barred in the only court which had jurisdiction to establish the defence.

In the present case, the money having been paid by the officer, he was liable to no action by the government to recover it.

It cannot be permitted that, the initiative in regard to a judicial determination of his right remaining solely with him, he can claim to be free from the law of limitation governing actions in that court as long as he chooses. Nor can he, without regard to the Statute of Limitations, proceed to obtain a judgment which is in effect for the repayment of money had and received to his use by the government.

We think the action in this case is barred by the Statute of Limitations.

Judgment reversed.

GUARANTY COMPANY *v.* BOARD OF LIQUIDATION.

The State of Louisiana provided for funding her bonds at reduced rates and on certain terms. A subsequent statute prohibits the funding of all questionable obligations, among which are specially designated those issued in aid of the construction of a certain canal, until, by a final decree of the Supreme Court, "they have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the Constitution of this State, or of the United States, and for a valid consideration." A., a holder of the canal bonds, filed his bill praying for such a decree. The court decided that the statute did not allow them to be funded, they not being valid obligations in the hands of the first taker, and that the latter occupied as good a position as a *bona fide* holder. *Held*, that this not being an action to recover the contents of the bonds, and A. having the same right to enforce payment as he ever possessed, the statute as thus construed does not impair the obligation of any contract.

ERROR to the Supreme Court of the State of Louisiana.

The case is stated in the opinion of the court.

Mr. William Wirt Howe and *Mr. William Allen Butler* for the plaintiff in error.

Mr. Gustave A. Breaux and *Mr. James Lingan* for the defendant in error.

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

The Federal question which this case involves rests on the following facts: —

On the 8th of March, 1869, the General Assembly of the State of Louisiana, passed act No. 116, of 1869, to authorize an issue of negotiable State bonds to aid in the construction of the Mississippi and Mexican Gulf Ship Canal. Special provision was made in the act for taxation to meet any liability that might be incurred in this way. Bonds to the amount of $480,000 were put out, purporting on their face to have been issued under the authority thus granted, and the New York Guaranty and Indemnity Company, for all that appears to the contrary, became the *bona fide* holder of $250,000 of this amount.

On the 24th of January, 1874, act No. 3, of 1874, was passed, to provide for funding the obligations of the State by an issue, if necessary, of $15,000,000 of "consolidated bonds of the State of Louisiana." To accomplish this a "board of liquidation" was created, with power to execute the new bonds and exchange them for old at the rate of sixty cents of the new for one dollar of the old. If the board rejected any bond offered for exchange, the holder could apply by petition to some proper court for relief, and if on that petition final judgment should be rendered in his favor against the board, he would be entitled, on giving up his old bond, to get one of the new on the terms proposed.

On the 14th of March, in the same year, 1874, act No. 55, of 1874, was passed, which purported to prohibit all State officers from levying or collecting any tax to pay the principal or interest falling due after Jan. 1, 1874, of any of the State debt, unless such levy and collection were specially authorized by some law of the State subsequently adopted, and also prohibiting the setting apart of any funds in the treasury for any such payment. The same law purported to take away from the courts of the State all power or jurisdiction to arrest or impede its operation by *mandamus*, injunction, or otherwise.

On the 17th of March, 1875, act No. 11, of 1875, was passed, to prohibit the board of liquidation from funding, under act

No. 3, of 1874, questionable and doubtful obligations of the State, "until said bonds . . . shall first, by final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the Constitution of this State or of the United States, and for a valid consideration." In this act the bonds issued in aid of the Mississippi and Mexican Gulf Ship Canal Company were specially designated as questioned and of doubtful validity.

After this act was passed, the New York Guaranty and Indemnity Company, being desirous of funding its bonds under the provisions of act No. 3, filed its petition in the Fifth District Court of the Parish of Orleans, praying that the bonds "be decreed to have been issued in strict conformity to law, and not in violation of the Constitution of this State or of the United States, and that they be declared legal and valid obligations against the State of Louisiana, and issued for a valid consideration." No other judgment was asked than such an one as was necessary under act No. 11, of 1875, to secure the benefit of act No. 3, of 1874, — the funding act. This petition got in due course of procedure to the Supreme Court of the State, and it was there decided that the suit thus begun was not one for the recovery of the money due on the bonds, but was rather in the nature of an inquisition to determine whether the bonds in question were of the class which the State had determined to include in its funding scheme. For this reason the court held that for the purposes of such an inquiry the petitioner, as a *bona fide* holder, occupied no better position than the first taker. Because of this ruling the present writ of error has been brought by the company.

This statement of the case is sufficient, as we think, to show that the question below was not whether, in an action against the State, properly authorized, to recover the amount due upon the bond, act No. 11 permitted the State to prove, as against a *bona fide* holder, that the bond was invalid, but whether the *bona fide* holder of an invalid bond was entitled to the benefit of the scheme of compromise which the State had offered to the holders of its securities that were valid in the hands of the first

taker. Such being the case, no obligation of the original contract has been impaired. Every legal right which the original taker acquired when the bond was put out still remains. The Guaranty Company may enforce all such rights now in any appropriate manner. All the court below has said is, that as between the State and the first taker the bonds were not valid obligations, and that, consequently, they are not entitled to the privileges of the funding laws. The obligation of the State to pay the bonds in money to the *bona fide* holders in accordance with the original promise still remains. The judgment, which has been rendered, and which we are now reviewing, is no bar to any proper proceeding for that purpose. The suit which was authorized, and the suit which was actually begun, only related to the right of the holder to come into the compromise which the State offered to certain classes of its creditors. The judgment is that the bonds do not belong to any of the designated classes. The question here is, not whether, if that inquiry were open to us, we should be of the same opinion, but whether the obligation the State is under to the company has been impaired by act 11, of 1875, as thus construed. We think the State had the right to say, when it proposed a scheme for the compromise of its debts, what creditors should be included. That, in our opinion, is all that has been done.

It follows that the Federal question was decided right below, and the judgment is consequently

Affirmed.

MR. JUSTICE BLATCHFORD did not sit in this case, nor take any part in deciding it.

LEATHERS *v.* BLESSING.

1. The term "torts," when used in reference to admiralty jurisdiction, embraces not only wrongs committed by direct force, but such as are suffered in consequence of negligence or malfeasance, where the remedy at common law is by an action on the case.
2. The jurisdiction in admiralty is not ousted by the fact that, when the wrong was done on the vessel by the negligence of her master, she had completed her voyage and was securely moored at the wharf where her cargo was about to be discharged.

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

The case is stated in the opinion of the court.

Mr. John G. Carlisle for the appellants.

Mr. Charles W. Hornor for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the respondents in a suit in admiralty *in personam* from the decree therein. Leathers was the master of the steamboat "Natchez," and he and the other respondent were the owners of that vessel. The suit was brought in the District Court to recover damages for personal injuries received by Blessing, the libellant, on board of that vessel, and he had a decree in that court against the respondents *in personam*, and as owners of the vessel, and *in solido*, for $5,758.50, with five per cent interest from judicial demand till paid, and costs of suit. The respondents appealed to the Circuit Court. That court found the following facts: "1. That on the twenty-sixth day of December, A. D. 1873, the defendant therein, Thomas P. Leathers, was the master, and he and Mary Meeha, wife of Anthony Pauly, were the owners of the steamboat 'Natchez.' 2. That about 1 o'clock P. M. of said day the said steamboat 'Natchez' was lying at the wharf on the Mississippi, near the foot of Canal Street, in the city of New Orleans, securely moored to said wharf, and with at least one of her gangplanks out and resting on the shore, which afforded ingress and egress between the lower deck of said steamboat and the wharf.

3. That on the day and at the hour above mentioned the said steamboat had recently arrived at the port of New Orleans from a trip up the Mississippi River, having on board a large number of bales of cotton, and that the trip of said steamboat was completed, but her cargo was still to be discharged. 4. That a part of said cargo of cotton was stowed on the forward deck several tiers high, and a passageway was left from the end of the gang-plank to the foot of the stairs. This passageway was covered with bales of cotton piled on the bridging, and persons on shore who desired to go to the cabin or office of the steamboat could only do so by going along this passageway to the stairs, and up the stairs to the cabin and office. 5. That, after the landing of said boat, and after her gang-plank had been run ashore, so that persons could go from shore to said steamboat, the libellant went aboard of said steamboat, along said gang-plank, with the purpose of going up into her cabin or to her office. 6. That the master and officers of said steamboat were accustomed to permit persons expecting to find on said steamboat freight consigned to them, as soon as she had landed, and her gang-plank was out, to go aboard of her to examine the manifest or transact any other business with her master or officers. 7. That the libellant had business on said steamboat when he went aboard of her as aforesaid, he was expecting a consignment of cotton-seed by said steamboat, and went aboard to ascertain whether it had arrived. 8. That, when libellant was going through said passageway, and when near the foot of the stairs, on his way to the cabin or office of said steamboat, a bale of cotton fell from the upper part of said passageway against and upon the leg and ankle of libellant, causing a compound fracture of the bones of his ankle and leg. 9. That said bale of cotton was carelessly and negligently stowed, and was left in such a position that it was liable to fall upon persons going along said passageway to the foot of the stairs of said steamboat, and its position was known to the master of said steamboat. 10. That libellant was in no manner negligent or in fault, whereby he contributed to his said injury. 11. That the fracture of libellant's leg and ankle was such as to render amputation of his leg necessary, and his leg had to be and was amputated in consequence of the injury sustained by him

as aforesaid. 12. That, at the time of his injury aforesaid, the libellant was thirty-eight years of age, and was earning in his business, which was buying cotton-seed, as agent for the Louisiana Oil Company, the sum of $750 per year. 13. That, at the time of said injury, the libellant was in good health, with a good character for sobriety and integrity. 14. That, in consequence of the injury sustained by him as aforesaid, the costs and expenses incurred by libellant for treatment, surgical services, and in and about his care and cure, amounted to the sum of seventeen hundred and seven dollars and fifty cents. 15. That the other damage resulting to libellant from said injury, consequent upon loss of time and the permanent disability caused by the loss of his leg, amounted to the sum of four thousand dollars." As a conclusion of law from the foregoing facts, the court found that the libellant ought to recover from the respondents the aggregate amount of said costs, expenses, and damage, with interest thereon, as additional damage, from the date of judicial demand, and it gave a decree in favor of libellant against the respondents for the said sum of $5,707.50, with interest at the rate of five per cent per annum from the date of judicial demand till paid, and costs of suit. From that decree this appeal was taken by the respondents.

The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the District Court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the Circuit Court did not find that the libellant was an officer, seaman, passenger, or freighter, or that he had any connection with the vessel or any business upon her or about her, except that when he went on board of her he was expecting a consignment of cotton-seed by her, and went on board to ascertain whether it had arrived; and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence was at the time in control of a vessel which had been previously engaged in navigating waters within the jurisdiction

of the admiralty courts of the United States, cannot give jurisdiction to such courts.

Although a suit might have been brought in a common-law court for the cause of action sued on here, the District Court, sitting in admiralty, had jurisdiction of this suit. The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf, and had communication with the shore by a gang-plank, did not make her a part of the land or deprive her of the character of a water-borne vessel.

The findings state that the master and officers of the vessel were accustomed to permit persons expecting to find on the vessel freight consigned to them, as soon as she had landed and her gang-plank was out, to go on board of her to examine the manifest or transact any other business with her master or officers; that the libellant had business on her when he went on board of her under the circumstances set forth in the findings; that he was expecting a consignment of cotton-seed by her; and that he went on board to ascertain whether it had arrived. These findings show that not only did the libellant go on board for a purpose proper in itself, so far as he was concerned, but that he went substantially on the invitation of those in control of the vessel. It is not found that he knew of the custom referred to, but it is found that he was acting in accordance with such custom, and it is not found that he did not know of such custom. With the added fact that his business was that of buying cotton-seed, it is properly to be inferred that he went on board to inquire whether the vessel had brought the cotton-seed which he was expecting, because he knew of such custom. This makes the case one of invitation to the libellant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circum-

stances, the relation of the master and of his co-owner, through him, to the libellant, was such as to create a duty on them to see that the libellant was not injured by the negligence of the master. On the facts found there was a breach of that duty by the negligence of the master, constituting a maritime tort, of which the District Court had jurisdiction in this suit. Not only does the jurisdiction of courts of admiralty in matters of tort depend entirely on locality, but since the case of *Waring* v. *Clarke* (5 How. 441, 464), the exception of *infra corpus comitatus* is not allowed to prevail. Nor is the term "tort," when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common-law is by an action on the case. *Phila., Wil., & Balt. Railroad Co.* v. *Phil. & Havre de Grace Steam Towboat Co.*, 23 id. 209, 214, 215.

The decree of the Circuit Court will be affirmed, with costs and interest on the principal sum of $5,707.50 decreed by the Circuit Court, to be computed at the rate of five per cent per annum from the date of judicial demand in the District Court, till paid; and it is

So ordered.

THE "POTOMAC."

1. Upon a libel in admiralty for a collision, the libellant may be allowed damages for the loss of the use of his vessel while laid up to repair the injuries thereby suffered; and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of the allowance.
2. A vessel being insured on two-thirds of her valuation by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for account of the insurers, if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages suffered by a collision. The insurers paid the libellant two-thirds of that damage, and

released and assigned to the owners of the libelled vessel all their right in any damages growing out of the collision. It appearing that the collision was owing to the fault of both vessels, the libellant could recover only half of the damages sued for. *Held*, that one-third of the sum paid by the insurers must be deducted from the amount to be recovered.

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

The case is stated in the opinion of the court.

Mr. Timothy D. Lincoln for the appellant.

Mr. William Wirt Howe, *contra.*

MR. JUSTICE GRAY delivered the opinion of the court.

This is a libel in admiralty for collision, filed by the owner of the steamboat "Robert E. Lee" against the steamboat "Potomac." In the District Court, and in the Circuit Court on appeal, both vessels were found to have been in fault, and therefore, according to the settled rule in admiralty, affirmed and established by this court in *The Catherine* (17 How. 170), the amount of the damages to each vessel, being $19,411.27 to the "Robert E. Lee," and $7,330.52 to the "Potomac," was equally divided between the two. The Circuit Court having found and stated the facts, and stated its conclusions of law, its finding of the facts is conclusive, and the questions of law so stated upon the record are open for revision in this court upon appeal, without any bill of exceptions. Stat. Feb. 16, 1875, c. 77, 18 Stat. 315; *The S. C. Tryon*, *ante*, 267; *The Francis Wright*, *ante*, 381.

Both the questions of law presented by the record relate to the amount of the damages that the libellant is entitled to recover.

One question is as to the sum to be allowed for the detention of his vessel while repairing the injuries suffered by the collision. The rules of law governing this question are well settled, and the only difficulty is in applying them to the peculiar facts of the case.

In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price

for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libellant to prove the extent of the damages actually sustained by him. *Williamson* v. *Barrett*, 13 How. 101; *Sturgis* v. *Clough*, 1 Wall. 269; *The Cayuga*, 2 Benedict, 125; 7 Blatchf. 385; 14 Wall. 270; *The Gazelle*, 2 W. Rob. 279; s. c. 3 Notes of Cases, 75; *The Clarence*, 3 W. Rob. 283; s. c. 7 Notes of Cases, 579.

The report of the commissioner, which was approved in this respect by both courts below, states that the "Robert E. Lee" was engaged in a certain, permanent, and lucrative trade, making weekly trips on the Mississippi River between New Orleans and Vicksburg and intermediate ports; and states one item of the damage to her thus: "Demurrage allowed for loss of three trips in her established trade, being the profits which, according to the average of her whole business for the season, she would have realized on said trips, $7,173.48." The reason given by the Circuit Court for allowing such profits, instead of the charter value of the vessel during the time of her detention, was that "being engaged in a regular established line, and being peculiarly fitted for that line, her charter value could not be satisfactorily ascertained; and other vessels which could be procured to supply her place were not equally fitted for the service." The commissioner's report, and the deposition of the clerk of the boat, which was made part of that report, show that the amount allowed was ascertained by taking the average of the profits of the trips performed by her within six and a half months next before the collision, deducting only the expenses as ascertained at the end of each trip, and deducting nothing for insurance, or for wear and tear, or for necessary repairs at the end of the season. But as the clerk testified that she was in no need of repair at the time of the collision, and there was neither suggestion nor evidence before the commissioner that the premiums of insurance were lessened while she was laid up for repairs, a majority of the court is of opinion

that it cannot be said, as matter of law, that the sum allowed for her detention was excessive.

The only other question argued at the bar is whether certain sums paid to the libellant by underwriters on his vessel should be deducted from the damages which he is entitled to recover in this suit. The determination of this question depends upon the effect of the following facts: —

At the time of the collision, the "Robert E. Lee" was insured in various sums, amounting to $50,000 in all, against perils of the sea, river, and fire, by concurrent policies in different insurance companies, each of which valued her at $75,000, and contained this provision: "Whenever this company shall pay any loss, the assured agrees to assign over to said company all right to recover satisfaction therefor from any other person or persons, town or other corporation, or the United States government, or to prosecute therefor at the charge and for account of the company, if requested. And the said company shall be entitled to such proportion of said damages recovered as the amount insured by them bears to the valuation of said vessel."

The insurance companies paid to the libellant in the aggregate, for the loss sustained by his vessel by the collision, the sum of $7,429.52, which was arrived at by assuming the damage to her at $14,347.34, including about $2,000 for wages and expenses during her detention, instead of profits lost, then deducting one-third of the repairs, new for old, amounting to $3,203.06, and charging the assured with one-third of the balance, as his portion of the risk assumed, not covered by the insurance.

After the filing of this libel in the District Court, the insurance companies executed and delivered to the claimants an instrument in writing, by which, after reciting the collision, the payment of the insurance money, and that they had never authorized the bringing or prosecution of this suit, and desired no suit brought on their account, they released, discharged, and set over to the owners and master of the "Potomac" "any and all right which they have in and to any damage, or claim of damage, if any there be, whether legal or equitable, growing out of the said collision, and authorize them to use the same, by way

of defence or otherwise, in and to the said suit." There was no evidence that the insurance companies had ever authorized this suit to be brought, or that the claimants had paid any consideration for the release and assignment.

The claimants, under apt allegations in their answer and cross-libel, contended that the amount so paid by the insurance companies should be deducted from the libellant's damages, before bringing them into account with him. The District Court so held, and deducted the whole of that amount from the moiety of the damages to the "Robert E. Lee" which the libellant was entitled to recover against the "Potomac." The Circuit Court, on the other hand, held that no part of that amount should be deducted. This court is of opinion that neither of these decisions was correct.

The mere payment of a loss by the insurer does not indeed afford any defence, in whole or in part, to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrong-doer, or other party responsible for the loss, and may enforce this right by action at common law in the name of the assured, or, when the case admits of proceeding in equity or admiralty, by suit in his own name. *Hall & Long* v. *Railroad Companies*, 13 Wall. 367; *Comegys* v. *Vasse*, 1 Pet. 193; *Fretz* v. *Bull*, 12 How. 466; *The Monticello*, 17 id. 152; *Garrison* v. *Memphis Insurance Co.*, 19 id. 312. See also *The Sarah Ann*, 2 Sumn. 206; *The Ann C. Pratt*, 1 Curt. C. C. 340; *Clark* v. *Wilson*, 103 Mass. 219; *Yates* v. *Whyte*, 5 Scott, 640; s. c. 4 Bing. N. C. 272; 1 Arnold, 85; *Simpson* v. *Thomson*, 3 App. Cas. 279.

This right of the insurer is not contingent upon the loss having been total, or upon its having been followed by an abandonment, but rests upon the ground that his contract is in the nature of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them. Phil. Ins., sect. 1723; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 371; *White* v.

Dobinson, 14 Sim. 273; *Quebec Assurance Co.* v. *St. Louis*, 7 Moo. P. C. 286; *Dickenson* v. *Jardine*, Law Rep. 3 C. P. 639, 644; *Simpson* v. *Thomson*, 3 App. Cas. 284, 293; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.

By the express terms of each of the policies upon the "Robert E. Lee," the insurers, upon payment of a loss, were entitled to demand from the assured an assignment of his right to recover damages against the "Potomac" for the loss so paid for, or to bring suit for such damages in his name, and to hold to their own use such proportion of those damages as the amount insured bore to the valuation of the "Robert E. Lee" in the policy. And that valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance. *North of England Insurance Association* v. *Armstrong*, Law Rep. 5 Q. B. 244.

The amount which, by the effect of the contract of insurance, and of the payment of a loss under it, the insurers had the right to recover to their own use from the "Potomac" and her owners, they had the right to release and assign, if they saw fit, to those owners. The claim of the latter to a deduction on this account from the damages to be recovered against them does not arise out of any right of their own, but out of the right so derived from the insurers. The Circuit Court therefore erred in holding that no part of this amount should be deducted from the libellant's damages.

But the insurers are entitled only to damages to be recovered for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies. As the amount insured was only two-thirds of the valuation, leaving the owner to stand his own insurer for the remaining third, and as the damages to be recovered in this suit are for the injury to his whole interest, whether insured or uninsured, it is quite clear that the insurers had no right to more than two-thirds of the damages so recovered.

Besides, the insurance applied to all injuries caused to the insured vessel by collision, whether the collision was owing to unavoidable accident, or to negligence on the part of the other vessel, or to negligence of the master and crew of the vessel

insured. Phil. Ins., sects. 1049, 1099; *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351. The insurers therefore, within the limit of their policies, were responsible to the assured for the entire damage to his vessel, and not merely for the moiety thereof, which, because of the fault on her part as well as on the part of the other vessel, was all that he could recover against the latter; and the sum paid to him by the insurers is equally applicable to that portion of the damage for which he cannot recover against the other vessel and her owners, as to that portion for which he can so recover.

The necessary consequence is, that only one-half of two-thirds, or one-third, of the sum paid to the libellant by the insurers can be treated as paid on account of the damages which he can recover in this suit, and, therefore, under the claim made in the answer and at the argument, that third only can be deducted from those damages.

The result is, that the decree of the Circuit Court, awarding to the libellant the sum of $6,040.37, being one-half of the excess of the damages sustained by the "Robert E. Lee" over the damages sustained by the "Potomac," must be reversed, in so far as to deduct from that sum the sum of $2,476.51, being one-third of the sum paid to him by the insurance companies, and must in other respects be affirmed; and it is

So ordered.

VENABLE *v.* RICHARDS.

1. Section 643 of the Revised Statutes, providing for removal from State courts of civil suits against revenue officers, is not superseded by the act of March 3, 1875, c. 137.
2. The tax on snuff is thirty-two cents per pound. Granulated tobacco is not snuff, within the meaning of the statute.

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.

Mr. William P. Burwell for the plaintiffs in error.

The Solicitor-General for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Section 643 of the Revised Statutes provides, among other things, for the removal into the Circuit Court for the proper district, upon petition by defendant to that court, without bond, and without reference to the amount in dispute, of any civil suit, or criminal prosecution, "commenced in any State court against an officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of such revenue law." Similar provisions are to be found in sect. 67 of the act of July 13, 1866, c. 184, and in sect. 3 of the act of March 2, 1833, c. 57. 14 Stat. 171; 4 id. 633.

The present suit — commenced in one of the courts of the Commonwealth of Virginia, and thence removed, in the mode prescribed by the above section, into the Circuit Court of the United States for the Eastern District of Virginia — is clearly embraced by the terms of that section. Its object is to recover from the defendant, Richards, certain sums, aggregating more than $5,000, which, it is alleged, he, as a collector of internal revenue, illegally exacted and collected, as taxes, upon snuff manufactured by the plaintiffs, Venable & Son. The court below denied a motion to remand the cause to the State court. Its action, in that particular, is now assailed, upon the assumption that the act of March 3, 1875, c. 137, at least as to all cases removable under it, superseded sect. 643 of the Revised Statutes. The present suit is, undoubtedly, one arising under the laws of the United States, and as the matter in dispute, exclusive of costs, exceeds the sum of $500, it could, consistently with the language of that act, have been removed before or at the term at which it could have been first tried, upon petition filed in the State court, accompanied by the required bond. But it does not follow that a removal of suits, described in sect. 643 of the Revised Statutes,

could not be effected in some other mode than that defined in the act. The latter, neither in terms nor by necessary implication, abrogates previous laws providing for the removal of causes from the State courts. It repeals only such acts and parts of acts as are in conflict therewith. We fail to perceive any necessary conflict between the two enactments. Sect. 643 provides for the removal of both civil and criminal prosecutions of a limited class, arising under the laws of the United States, without regard to the amount involved, while the act of 1875 provides for the removal of all civil suits arising under the laws of the United States, where the matter in dispute exceeds the sum or value of $500. Certainly so much of the section as relates to criminal prosecutions is unaffected by the act. And the same thing may be said of civil suits, of the class described in the section, where the matter in dispute, exclusive of costs, is less than the sum of $500. But looking at the policy which underlies all the legislation providing for the removal from State courts of civil suits against officers, appointed under, or acting by authority of, any revenue law of the United States, we cannot suppose that Congress intended to deny to such officers, when sued for amounts exceeding $500, exclusive of costs, the benefit of the liberal provisions which are confessedly accorded to them when sued for less than that sum. "If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be." *State* v. *Stoll*, 17 Wall. 425, 431. We are of opinion that effect will be given to the intention of Congress by holding, as we now do, that sect. 643 of the Revised Statutes, not being in conflict with the act of 1875, is in full force as to all cases embraced by its terms; and, consequently, that the act, so far as it embraces suits, arising under the laws of the United States, does not preclude a removal of a suit of the class defined and in the mode prescribed by that section.

This brings us to a consideration of the case upon its merits. The amounts which the plaintiffs claim were illegally exacted as taxes upon snuff manufactured by them were paid from August, 1872, to May, 1875, both inclusive. During all that period they were assessed, upon snuff, at the rate of thirty-two

cents per pound, which was, as they contend, in excess of the rate established by law.

We are of opinion that the snuff manufactured by the plaintiffs was taxable at the rate of thirty-two cents per pound. A careful examination of sect. 61 of the act of July 20, 1868, c. 186, sect. 31 of the act of June 6, 1872, c. 315, sect. 3368 of the Revised Statutes, and sect. 2 of the act of March 3, 1875, c. 127, will show that during the period in question the tax upon snuff of all descriptions, when prepared for use, and manufactured of tobacco or any substitute of tobacco, was thirty-two cents per pound. The only basis for a different construction of the statutes exists in the fact that the act of 1872, substituted for the third and fourth paragraphs of sect. 61 of the act of 1868, a single paragraph which, among other things, prescribes a tax of twenty cents per pound upon granulated tobacco. The substituted paragraph was carried into the Revised Statutes, and is the second paragraph of sect. 3368. The conclusion attempted to be drawn from these facts has no foundation whatever upon which to rest. The act of 1872 left untouched the same paragraph of sect. 61 of the act of 1868, which expressly provided that "upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes: On snuff manufactured of tobacco, or any substitute of tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff flour, when sold, or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff."

And this provision was reproduced in sect. 3368 of the Revised Statutes, of which the paragraph prescribing a tax of twenty cents on granulated tobacco is also a part. The plaintiffs concede that the article which was taxed in their hands was commonly known as snuff, but they insist that snuff is granulated tobacco within the meaning of the act of 1872, and of the Revised Statutes. If so, it results that, while granulated tobacco was subject, since the passage of the act of 1872, and up to March 3, 1875, to a tax of twenty cents per pound, and, by the act of the latter date, to twenty-four cents per pound,

there was in force, during the same period, another provision specifically taxing snuff, manufactured of tobacco or any substitute for tobacco, of all descriptions, at the rate of thirty-two cents per pound. Any such construction of the statute is inadmissible. The bill of exceptions stated that there was no evidence to show that the term "snuff" was synonymous with "granulated tobacco," and that while the plaintiffs' witnesses knew what was meant by snuff, they did not know what granulated tobacco was, in the trade in Virginia, nor what the statute meant by that phrase. It will not, therefore, be expected that this court will judicially know what granulated tobacco is, or in what respect, if in any, it resembles snuff. All that we decide is, that the article manufactured of tobacco, or any substitute for tobacco, known in the trade and prepared for use as snuff, is, within the meaning of the statute, snuff upon which, when sold or removed for consumption or use, was imposed, during the period in question, a tax of thirty-two cents per pound.

Judgment affirmed.

UPTON *v.* MCLAUGHLIN.

1. Section 5057 of the Revised Statutes (*infra*, p. 642) does not, in the cases therein mentioned, declare that the court, wherein the suit is brought more than two years after the cause of action accrued, shall not have jurisdiction thereof. It is merely a statute of limitations, and, as such, should be construed and enforced.
2. If, in a suit by an assignee in bankruptcy, it does not appear that the defendant raised in some appropriate form, in the court of original jurisdiction, the question as to the application of the statute of limitations, he is precluded from so doing in the appellate court
3. The Code of Civil Procedure of the Territory of Wyoming is not in conflict with this ruling.

ERROR to the Supreme Court of the Territory of Wyoming.

The facts are fully stated in the opinion of the court.

Mr. Homer Cook for the plaintiff in error.

Mr. William R. Steele for the defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought in the District Court of the First Judicial District of the Territory of Wyoming, in and for Laramie County, by the assignee in bankruptcy of the Great Western Insurance Company, to recover from Daniel McLaughlin the sum of $800, with interest at twelve per cent, from the fifteenth day of August, 1872, as the amount due and unpaid on a subscription for ten shares of the capital stock of the company, owned by McLaughlin. The company was a corporation of the State of Illinois. In February, 1872, it was adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, and on the 11th of April, 1872, the plaintiff was appointed its assignee, and an assignment of all its property was executed to him. On the 5th of July, 1872, the bankruptcy court made an order that the entire amount unpaid of the capital stock of the company be paid to him on or before the 15th of August, 1872, at his office in Chicago, and that, in default thereof, he proceed to collect the same. The amount claimed in this suit is eighty per cent on $1,000, being on ten shares of $100 each. The suit was commenced by a petition filed April 8, 1876. McLaughlin put in an answer consisting of four several defences. The fourth defence set up, as a cause of action against the company, and as a set-off to the claim on which the suit was brought, that the company, before it was adjudged bankrupt, was indebted to him on a balance due upon an account, in a specified sum, which was still due, and for which sum he prayed judgment against the plaintiff. The plaintiff demurred, by one demurrer, to the second, third, and fourth defences. The District Court overruled the demurrer as to the second and third defences, and sustained it as to the fourth defence. To such ruling against the defendant he excepted. The case was tried by a jury, and a verdict rendered for the plaintiff, assessing his damages at $1,008. Thereupon a judgment was entered that the assignee recover from McLaughlin $1,008, and the costs of the action. McLaughlin, by a petition in error to the Supreme Court of the Territory, alleging thirty-two several errors made by the District Court, prayed for a reversal of the judgment. The Supreme Court en-

tered a judgment that the judgment of the District Court must be reversed and held for naught, and then stating, that "the court, further proceeding to render such judgment as the said District Court ought to have rendered, find that said court had no jurisdiction of said cause," and that it should have rendered judgment in favor of McLaughlin and against the assignee, and that judgment be rendered in favor of McLaughlin and against the assignee, and that McLaughlin recover from the assignee $59.25 costs, and that such judgment be remanded to the District Court for execution, and that a special mandate be sent to said court therefor. The assignee has brought the case into this court by a writ of error to the Supreme Court of the Territory of Wyoming.

The grounds on which the court proceeded in holding that the District Court had no jurisdiction, and in reversing the judgment of that court, are shown by its opinion, which is found in the record. The opinion proceeds upon the view that, because of the provisions of sect. 5057 of the Revised Statutes of the United States, the District Court had no jurisdiction of the suit. That section is as follows: "No suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." The view taken in the opinion is, that this statute is not a statute merely limiting the remedy, but imposes an absolute limit; that, after two years, the assignee can neither sue nor be sued, but his office, for the purpose of commencing any suit, must be regarded as having expired; that no court has power to admit him to a status within the court; and that such want of power is want of jurisdiction. The opinion delivered by Mr. Justice Miller in *Bailey* v. *Glover* (21 Wall. 342), is cited and interpreted as holding that the statute (then sect. 2 of the act of March 2, 1867, c. 176, 14 Stat. 518) is an absolute jurisdictional limitation, and thus, as an adjudication of the question, furnishing the rule which governs this case. This

is an entire misconception of that decision. It established the contrary proposition. It was a suit in equity, in which the assignee, more than three years after the date of his appointment, filed a bill against three relatives of the bankrupt, to set aside conveyances made to them by the bankrupt of all his estate in fraud of his creditors. It alleged that the bankrupt and the defendants kept secret their fraudulent acts, whereby the assignee and the creditors were prevented from obtaining any sufficient knowledge or information thereof until within two years before the filing of the bill. The defendants demurred to the bill, on the ground that the suit was not brought within two years from the appointment of the assignee. The demurrer was sustained by the Circuit Court. The plaintiff appealed to this court. The report of the case shows that the defendants contended here that the case was not one of an ordinary statute of limitation, but that the statute was imperative and admitted of no exceptions as to any tribunal. If such contention had been regarded as correct, the decision of the Circuit Court would necessarily have been affirmed. But this court held that the statute in question was a statute of limitation, and one of such a character as not to set up an absolute bar of two years from the mere lapse of that time, but to require the application to it of the principle that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him. On this view this court reversed the decree below. This was a plain decision that the statute in question does not impose an absolute limit of two years after the appointment of the assignee, in respect to transactions which occurred before such appointment, and that there is no want of power in the court to entertain a suit after such two years have elapsed. This view was recognized and applied in *Gifford* v. *Helms* (98 U. S. 248), although there it was held that, on the facts, the assignee's right of action commenced at the time of his appointment. It is, therefore, clear that no support for the decision

below is to be drawn from *Bailey* v. *Glover*. The question is not to be treated as one of power or jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally.

This being so, the record shows that no question as to the application of the statute to the case was raised in the District Court of the Territory by the defendant, either in pleading or on the trial, or before judgment. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court. This principle is always applied to questions which are not questions of jurisdiction. *Storm* v. *United States*, 94 U. S. 76, 81.

It is, however, contended by the defendant that the question of the bar by the statute was presented in the Supreme Court of the Territory, by the record from the District Court, because the petition did not state facts sufficient to constitute a cause of action, and could have been demurred to for that cause. Sect. 85 of the Code of Civil Procedure of the Territory provides that the defendant may demur to the petition when it appears upon its face either that the court has no jurisdiction, or that the petition does not state facts sufficient to constitute a cause of action. Sect. 87 provides that the objection to the jurisdiction of the court, and the objection that the petition does not state the facts sufficient to constitute a cause of action, shall not be deemed to be waived by not taking them by either demurrer or answer. It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation, is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defence of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so barred, and thus as not stating facts sufficient to constitute a cause of action.

The petition in this case sets out facts which show that the

cause of action sued on accrued to the assignee more than two years before the bringing of the suit. Assuming the suit to be such a suit as is mentioned in sect. 5057, it is held by the Supreme Court of Wyoming, in *Bonnifield* v. *Price* (1 Wy. 172), that the rule is well established in that Territory, that where from the face of the petition it is apparent, without any further showing, that the claim is barred by a statute of limitation, a defendant may take advantage of such bar by a special demurrer to the petition. The same rule prevails in Ohio, *Sturges* v. *Burton* (8 Ohio St. 215); *McKinney* v. *McKinney* (id. 423); in Kansas, *Zane* v. *Zane* (5 Kan. 134); and in Nebraska, *Peters* v. *Dunnells*, 5 Neb. 460. The rule is founded on the view that in such a case the petition does not state facts sufficient to constitute a cause of action. But if, in the court of original jurisdiction, the defence of a statute of limitation is not raised by either demurrer or answer, and is not brought to the attention of the court which tries the cause, by some objection taken in a proper manner, before judgment, it cannot, under sect. 87 of the Code of Wyoming, be raised for the first time in an appellate court. The effect of that section is only to permit the defendant to make the objection after demurrer or answer, and before judgment. Under such a statutory provision it has been held that at the trial, and even after the evidence is all in, the objection may first be made, *Coffin* v. *Reynolds* (37 N. Y. 640); *Zane* v. *Zane* (5 Kan. 134); and that it may be made by stating it distinctly as a ground of objection to the introduction of evidence. *Zane* v. *Zane*, *ubi supra*. But unless it appeared by the record which was before the Supreme Court of Wyoming in this case, that the objection had been taken in some proper manner in the District Court, the Supreme Court could not notice it. That court has power (Code, sect. 513) to reverse a judgment of the District Court for errors appearing on the record, and the petition in error (sect. 514) must set forth the errors complained of. Neither in the bill of exceptions, nor in the twenty-eight errors specified in the motion for a new trial in the District Court, nor in the thirty-two errors specified in the petition in error, is there any allusion to the statute of limitation.

The defendant contends that as the District Court sustained

the demurrer to the fourth defence in the answer, and the defendant excepted to the ruling, the question as to whether the petition was sufficient as a pleading was thereby brought up, because the District Court ought to have given judgment against the party which committed the first fault in pleading. But we are of opinion that the record must show that the question as to whether it appeared by the petition that the action was barred by the statute was distinctly presented to and raised before the District Court. This does not appear, as before stated.

The defendant also contends that various objections and exceptions taken by him to the admission of evidence, and to instructions to the jury, and various grounds of error stated in the motion for a new trial, raised the question referred to. It is sufficient to say that the objections to the admission of evidence merely state that the evidence is incompetent, immaterial, and irrelevant, without suggesting the question of the statute of limitation; and that the exceptions to the instructions to the jury and the grounds of error set forth in the motion for a new trial make no allusion to that question, nor is there any allusion to it in the record sent from the District Court. Under such circumstances the question cannot be raised in the appellate court. *Mays* v. *Fritton*, 20 Wall. 414, and cases there cited; *Beaver* v. *Taylor*, 93 U. S. 46; *Wheeler* v. *Sedgwick*, 94 id. 1.

Because the Supreme Court of Wyoming held that the District Court had no jurisdiction of this suit, it did not examine any of the questions raised by the defendant in the bill of exceptions taken by him. As it improperly reversed the judgment of the District Court, its judgment must be reversed; and as it passed on no other question but the jurisdiction of the District Court, the case must, under the provisions of sects. 701 and 702 of the Revised Statutes, be remanded to it, with directions to hear and determine the questions raised by the petition in error, and to take such further proceedings as may be in conformity with law and not inconsistent with the opinion of this court; and it is

So ordered.

NOTE. — *Upton* v. *Kent*, error to the Supreme Court of the Territory of Wyoming, was submitted at the same time as the preceding case, and was argued by

the same counsel for the plaintiff in error, and by *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* for the defendant in error.

MR. JUSTICE BLATCHFORD, in delivering the opinion of the court, remarked that the facts and the questions raised were essentially the same in both cases. The same judgment was entered in this case as in *Upton* v. *McLaughlin.*

EX PARTE BOYD.

1. A party in whose favor judgment is rendered in a common-law cause, by a court of the United States sitting in the State of New York, is, in order to reach the property of the judgment debtor, entitled to the remedy provided by the statute of that State, and known as proceedings supplementary to execution.
2. Section 916 of the Revised Statutes which authorizes, as a matter of procedure, the resort to that remedy is not in conflict with the Constitution.

PETITION for a writ of *habeas corpus.*

The facts and the statutes bearing upon the question involved are set out in the opinion of the court.

Mr. Roger M. Sherman for the petitioner.

The Solicitor-General for the United States.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

It is made to appear, by this application, that a judgment was recovered in the Circuit Court for the Southern District of New York, in favor of the United States against Robert Boyd, the petitioner, and Francis O'Rourke, on which execution was issued and returned unsatisfied, except in the sum of $200, leaving due thereon $8,128.92. It was thereupon ordered by the court, on motion of the plaintiff's attorney, that the matter be referred to Joseph M. Deuel, Esq., a commissioner of the court, "to examine the said Robert Boyd and Francis O'Rourke, and take answers on oath concerning their property, and to reduce such answers and examination to writing, and also to examine on oath, concerning such property, such witnesses as may be offered by the respective parties, and reduce such examination to writing, and report such answers and examination, and all his proceedings under and by virtue of this order, to this

court with all convenient speed, and the said Deuel is hereby appointed a referee in this action for the purpose aforesaid. And it is further ordered that the said Robert Boyd and Francis O'Rourke do appear before the said referee at his office in the Post Office building, New York City, on the 22d of May, 1879, at eleven o'clock A. M., to answer before said referee concerning their property as aforesaid; and for that purpose to appear before the referee from time to time as he shall direct and appoint."

The petitioner moved the court to vacate this order, for illegality, which motion was denied. Being required to submit to the examination, he refused to take an oath to testify under said order, whereupon, on motion of the attorney for the United States, the Circuit Court ordered that he be attached and committed to the custody of the marshal, as punishment for a contempt of the court in so refusing to be sworn. From that imprisonment the petitioner seeks to be discharged, and to that end prays for a writ of *habeas corpus*.

The grounds on which the right to this relief is founded are set forth in his petition, as follows: —

"Your petitioner is informed and believes that proceedings supplementary to execution, wherein your petitioner is restrained of his liberty, are not, by the laws of the State of New York, a remedy in common-law causes to reach the property of the judgment debtor allowed in actions at law in the courts of the United States by sect. 916 of the Revised Statutes of the United States; but, on the contrary, that these proceedings are, by the laws of the State of New York, prescribed as part of a code to abolish common-law causes, as such, and to amalgamate and indiscriminate common-law causes and suits in equity, and to confer upon the courts of that State, indifferently, in the same action powers in actions at law and in equity. Your petitioner is informed and believes that the application of this provision of that code to the courts of the United States is not authorized by any act of Congress, and is in conflict with the provisions of Article III., sect. 2, of the Constitution of the United States, which preserves and establishes the distinction between relief at law and in equity. Your petitioner, therefore, avers and charges that the said Cir-

cuit Court was and is wholly without jurisdiction in the premises, and that, therefore, all its proceedings therein are null and void."

The material portions of the present statutes of New York referred to, and which were in force at the time of the adoption of the Revised Statutes of the United States, are as follows: —

"PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

"SECT. 292. (1.) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, . . . is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court . . . requiring such judgment debtor to appear and answer concerning his property, before such judge at a time and place specified in the order, within the county to which the execution was issued. . . .

"(3.) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

. . . . . .

"(5.) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

"SECT. 295. Witnesses may be required to appear, and testify in any proceedings under this chapter, in the same manner as upon the trial of an issue.

"SECT. 296. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath.

"SECT. 297. The judge may order any property of the judgment

debtor, not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

. . . . . .

"SECT. 298. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to sect. 244*. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer, or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court of the county where the judgment-roll in the action . . . is filed; and the said clerk shall record the order in a book to be kept. . . . A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded. . . . But before he shall be vested with any real property of such judgment debtor a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor, sought to be affected by such order, is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

"SECT. 299. If it appear that a person, or corporation, alleged to have property of a judgment debtor, or indebted to him, claims an interest in the property adverse to him or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the judge may, by order, forbid a transfer, or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and to prosecute the same to judgment and execution;

but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

"SECT. 300. The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

"SECT. 302. (1.) If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. (2.) And in all cases of commitment under this chapter . . . the person committed may, in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just."

Section 916 of the Revised Statutes, which repeats, in this respect, the provisions of sect. 6 of the act of June 1, 1872, c. 255, "to further the administration of justice," is as follows: "The party recovering a judgment in any common-law cause, in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court, and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This provision of the Revised Statutes merely embodies and extends the principle contained in the fourteenth section of the act of Sept. 24, 1789, c. 20 (1 Stat. 81), which, with the subsequent legislation of Congress in furtherance of it, has been repeatedly the subject of consideration in this court. *Palmer* v. *Allen*, 7 Cranch, 550; *Wayman* v. *Southard*, 10 Wheat. 1; *Bank of the United States* v. *Halstead*, 10 id. 51; *Boyle* v. *Zacharie*, 6 Pet. 648; *Beers* v. *Haughton*, 9 id. 329; *Ross* v. *Duval*, 13 id. 45; *United States* v. *Knight*, 14 id. 301; *Duncan* v. *Darst*, 1 How. 301; *McCracken* v. *Hayward*, 2 id. 608; *Homer* v. *Brown*, 16 id. 354.

It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several States, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to *all proceedings thereupon*. As in *Beers* v. *Haughton* (*supra*), where it was held to include proceedings on the part of the judgment debtor, for his exoneration under insolvent laws of the State from imprisonment under a *ca. sa.*, and the consequent discharge from liability of the special bail.

It is contended, however, on behalf of the present petitioner, that the proceedings under which he has been committed to the custody of the marshal and restrained of his liberty, in their origin and nature are of equitable jurisdiction exclusively, as distinguished from proceedings at common law, which, by the prohibitions of the Constitution of the United States, Congress cannot lawfully authorize the courts of the United States to administer except by bill in chancery.

The jurisdiction of the courts of chancery in New York, exercised prior to the adoption of its present code, which authorized a discovery of assets from a judgment debtor in aid of an execution, was statutory. It was conferred and defined by sects. 38 and 39 of tit. 2, art. 2, 2 Rev. Stats. of New York, 173–174. It was therein provided that "whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money, or thing in action due to him or held in trust for him; and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining

due on such judgment out of any personal property, money, or things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not."

It is said in argument, by Mr. B. F. Butler, in *Mitchell* v. *Bunch* (2 Paige (N. Y.), 606), that these provisions of the Revised Statutes were passed in affirmance of the doctrine of *Hadden* v. *Spader*, 20 Johns. (N. Y.) 554. That case, however, did not go upon any idea that a bill in equity would lie against a judgment debtor for a general discovery of assets, but merely upon the ground of a jurisdiction to discover and apply equitable assets specifically described; the question being, as it was put by Woodworth, J., "whether a debtor who has placed his funds in the hands of a trustee, where they cannot be reached by an execution at law, can put his creditor at defiance and enjoy the benefit of these funds, which ought to be appropriated to the payment of his debts."

This case was preceded by the decisions of Chancellor Kent in *Hendricks* v. *Robinson*, 2 Johns. (N. Y.) Ch. 283; *Brinkerhoff* v. *Brown*, 4 id. 671; and *McDermutt* v. *Strong*, id. 687.

In *Hendricks* v. *Robinson* (*supra*), the Chancellor said: "I have no doubt that this court can and ought to lend its aid, whenever that aid becomes requisite to enforce a judgment at law, by compelling a discovery and account, either as against the debtor or as against any third person who may have possessed himself of the debtor's property and placed it beyond the reach of an execution at law. The preliminary step which seems to be required is, that the judgment creditor should have made an experiment at law, and bound the property, by actually suing out execution;" citing *Angell* v. *Draper*, 1 Vern. 399; Lord Nottingham, cited in 1 P. W. 445; *Stileman* v. *Ashdown*, 2 Atk. 477; *Shirley* v. *Watts*, 3 id. 200.

In *Brinkerhoff* v. *Brown* (*supra*), he said that it was the settled rule in chancery that the plaintiffs must show that they have taken out execution at law and pursued it to every available extent against the property before they can resort to that court for relief; that the presumption is that the court which renders judgment is competent to enforce it; that, "if he seeks

aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels." The opinion cites the case of *Taylor* v. *Hill* (1 Eq. Cas. Abr. 132, pl. 15), before Lord King in 1705, where the bill having been filed before execution for discovery of particular specified effects of the judgment debtor in the hands of a third person, a demurrer was allowed; but the Chancellor said it would not lie against the debtor himself, nor against a third person, to have a general discovery. And in *McDermutt* v. *Strong* (*supra*), the Chancellor said: "I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution, and cause it to be levied or returned, so as to show thereby that his remedy at law fails, and that he has also acquired by that act of diligence a legal preference to the debtor's interest."

It is quite apparent from this review of the decisions upon the point in New York, prior to the adoption of the provisions of the Revised Statutes of that State on the subject, that the latter gave a much more extensive remedy than was supposed to exist by virtue of the customary jurisdiction of the Chancery Court, particularly in requiring, when sought, from a judgment debtor, a general discovery of assets, legal and equitable, for the purpose of enabling the judgment creditor to apply them to the payment of his judgment.

In *Mitchell* v. *Bunch* (*supra*), Chancellor Walworth seemed to regard the jurisdiction of chancery, independent of the statute, as equally extensive, and refers to the case of *Edgell* v. *Haywood and Dawe* (3 Atk. 352), decided by Lord Chancellor Hardwicke in 1746, as a direct authority in support of the bill in the case before him, and as a decision which had never been questioned; but the case before Lord Hardwicke was not that of a bill for general discovery, but for a discovery in respect to assets alleged to be in the hands of the co-defendant as executor, applicable to the payment of a legacy which belonged to the judgment debtor under a will, and which the complainant was entitled to have appropriated to the payment of his

judgment, by virtue of the provisions of the act of 10 Geo. II. c. 26, for the relief of insolvent debtors, under which the debtor's person had been discharged, as an insolvent, from liability to be taken in execution. The right to the remedy in equity in that case was put distinctly upon the ground that the method by which the judgment creditor might have reached the property of his debtor, by proceeding at law against his person, having been taken away by the statute, the choses in action were equitable assets which a Court of Chancery would appropriate to the benefit of his creditors.

Mr. Hare, in his Treatise on Discovery (c. 5, sect. 3, p. 84, ed. 1876), states that "there are some early cases which appear opposed to the rule which has been stated in the preceding sections, that a discovery will only be given to be used as evidence at a trial," but adds that "the cases which are cited in support of a jurisdiction of this nature seem to be chiefly bills for relief raising a different and substantive equity." He refers, however, to *Mountford* v. *Taylor* (6 Ves. Jr. 788) as a case where Lord Eldon seems to have acted upon the doctrine of a general right of the creditor to a discovery, in order to make his judgment available, in consequence of the admission of its correctness by counsel. That was the case of a bill by judgment creditors, who had sued out elegits for a discovery of freehold estates, charging that the defendant, upon his election as a member of Parliament, previously to the judgment, gave in his qualification, and that, if the estates composing it were conveyed away since, it was without consideration. The Lord Chancellor remarked on the hearing that he was not quite clear that such a bill must not allege that, at a given time, the defendant was seized of given lands (not simply suggesting, as a fishing bill, that at some time or other he had some land); and that he conveyed those lands away fraudulently to put them out of the reach of this creditor. Afterwards he overruled the demurrer, saying: "But the bill charges that the defendant delivered in a schedule of the particulars of his estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution, as they may be unquestionably. Upon that I think he must answer."

It thus appears that the proceeding in aid of execution, in its present form in New York, as well as that in which it was administered under the Revised Statutes by the Court of Chancery, was a statutory process, and did not form any part of that jurisdiction in equity which, as vested in the courts of the United States by the Constitution, is assumed to be inalienable. And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as, whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether, by the adoption of that instrument, all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.

The conclusion will be not less clear, however, if we concede that the proceeding in question belongs historically, as to its form, to the administration of chancery courts. If we regard its nature, it will be perceived that it is, so far as it relates merely to the discovery of the debtor's assets, a collateral and auxiliary remedy. If the discovery results in ascertaining the existence of property, subject to levy under execution, then the remedy at law is perfectly restored. Or if, by lawful power over the person of the debtor, he may be compelled by a court of law to apply his property to the payment of his creditor's claim, the satisfaction is complete. If, on the other hand, other parties with adverse claims are revealed, or obstacles to the pursuit of the legal rights of the judgment creditor are brought to light, or the interests to be subjected are not cognizable at law, or the equities require to be marshalled, it may be that relief can only then be had in a court of equity, where all parties can be made to appear, all conflicting claims adjudicated, and the complete remedy moulded to fit the circumstances of the case.

But here we have nothing to do with any question but that of discovery. The only relief sought is, knowledge of property belonging to the debtor, applicable, either at law or in equity, to the payment of the creditor's judgment. What shall be done, after that knowledge has been acquired, is to be deter-

mined upon the circumstances as they may then appear, and cannot now be considered. For the proceeding for discovery is distinct and entirely separable from the subsequent relief, if any shall then be sought.

Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story (Eq. Jur., sect. 1495), that "courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is, of itself, competent to grant the same relief; for in such a case the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending." It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or a defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right.

But even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of Congress to make parties to a suit competent witnesses, or to confer upon courts of law power to compel the production of books

and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization, improvements in procedure, first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious coexistence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results.

There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate, as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located, by legislative authority, to meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the Constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts of whatever description.

Petition denied.

CORBIN *v.* COUNTY OF BLACK HAWK.

1. As a suit to compel the specific performance of a contract, or to enforce its other stipulations, is a suit to recover the contents of a chose in action, it was not, under sect. 629, Rev. Stat., maintainable in the Circuit Court by an assignee, if it could not have been prosecuted there by the assignor, had no assignment been made.
2. The paper writing (*infra*, p. 661) is sufficient in form to assign the contract therein mentioned; and where the assignee of such contracts, each executed for a separate parcel of school lands in Iowa, by the proper county officer to a different assignor, tendered the amount due on them and brought suit for a deed of conveyance for the lands, — *Held*, 1. That his assignors, who claim an interest in the respective tracts, are, with the county and its officers, necessary parties, although by the terms of the contract the governor of the State was to execute the conveyance. 2. That the value of the matter in dispute between the complainant and the county is the amount so tendered.

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

The case is stated in the opinion of the court.

Mr. James D. Campbell for the appellant.
Mr. Galusha Parsons for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This case comes into this court on an appeal by the plaintiff below from a decree dismissing the amended and substituted bill of complaint, on demurrers thereto for want of jurisdiction. The defendants are the county of Blackhawk, in the State of Iowa, the auditor and the treasurer of that county, and thirty other individuals. The original bill was filed in November, 1874. The citizenship of the plaintiff, as a citizen of New York, and of all the defendants, as citizens of Iowa, is properly alleged. The bill avers that, in 1857, one John Kerr, as school commissioner of the county, being thereunto duly authorized by the laws of Iowa, made eleven several contracts in writing in respect to the sale of land, — four with one person, and one with each of seven other persons. A copy of one of the contracts is made part of the bill, each being averred to be in like

words and figures, except the name of the purchaser, the description of the land, and the amounts of money mentioned. It is in these words: —

"SCHOOL-FUND COMMISSIONER'S OFFICE,
"BLACK HAWK COUNTY, July 10, 1857.

"Contract made and entered into between John Kerr, as school-fund commissioner for the county of Black Hawk, Iowa, and Abraham Carey, of the county of Black Hawk and State of Iowa, to wit: —

"The said John Kerr, school-fund commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell, to the said Abraham Carey the following-described tract or parcel of land, being a portion of section numbered sixteen (or lands in lieu thereof), granted to the State for the use of schools by an act of Congress entitled 'An Act supplemental to the act for the admission of the States of Iowa and Florida into the Union,' approved March 3, 1845, to wit: Lot No. 10, being the west ($\frac{1}{2}$) half of the southeast ($\frac{1}{4}$) quarter section sixteen (16), township eighty-nine (89) north, of range fourteen (14) west, containing eighty acres.

"The price agreed upon is nine and $\frac{5}{100}$ dollars per acre, amounting to the sum of seven hundred and twenty-four dollars, the one-fourth part of which, to wit, one hundred and eighty-one dollars, has been paid in cash to the said school-fund commissioner, and the balance, to wit, five hundred and forty-three dollars, secured by a promissory note bearing even date herewith and payable on or before ten years from date, bearing interest at the rate of ten per centum per annum, payable annually, on the first day of January, at the office of the said school-fund commissioner, in Black Hawk County.

"Now, if the said Abraham Carey, his heirs, executors, or administrators, shall pay or cause to be paid the interest on said note as the same falls due, together with the principal, within the time specified, then he will be entitled to receive from the governor of the State of Iowa a patent for the land herein described. In case of failure to make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the school-fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner.

"In testimony whereof the parties have hereunto set their hands and seals the day and year first above written.

"(Signed) JOHN KERR, [L. S.]
"School-Fund Commissioner of Black Hawk County.
"ABRAHAM CAREY.

"In presence of—
"D. J. COLEMAN."

The bill alleges that the cash payment specified in each contract was made; that the promissory note specified in each contract was made and delivered; that a record of each sale was duly made, as provided by law; that each of the several persons to whom the lands were sold "made divers payments of money," which were credited upon their several notes by the proper officers of the county, but the plaintiff cannot set forth particularly the dates and amounts of the payments; that the notes and the amounts due thereon are held by the county as valid claims against their makers; that by the said premises the several purchasers became the owners of the several tracts of land; that the legal title to the lands remained vested in the county; that on the payment of the balance of said moneys the county was bound to cause the lands to be conveyed to the several purchasers, or their assigns; that afterwards the several purchasers, for money considerations, respectively made and delivered to the plaintiff certain "conveyances," a copy of one of which is made part of the bill, each of the others being averred to be in like substance and effect, except the name of the grantor and the description of the lands conveyed; that the "conveyances" were duly filed in the office of the auditor of the county; and that thereby the plaintiff became the owner of the several contracts and the several tracts of land. Such copy is in these words: —

"Know all men by these presents, that I, Wm. H. McClure, in consideration of the sum of one hundred dollars in hand paid to me by Austin Corbin, of Kings County, State of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin all the interest in the following-described land, viz.: Lots numbers (3) three, eleven (11), and twelve (12) being the north half of the northeast quarter, and the east half of the southeast quarter of section sixteen (16), township eighty-nine

(89) north, of range number fourteen (14) west of the fifth principal meridian, in Black Hawk County, Iowa, which was conveyed to me by contract, now on file in the office of the county auditor of Black Hawk County, Iowa, made by and between John Kerr, school-fund commissioner of said county, and Wm. H. McClure, for the conveyance of said lands, and I hereby sell and assign to said Corbin all my rights under said contract, covenanting with him that I have not sold, assigned, or transferred the same to any person or persons.

"In witness whereof I have hereunto set my hand this first day of July, 1871.

"WM. H. MCCLURE.

"In presence of—

"DAN'L W. FOOTE."

Indorsed on back as follows: —

"This assignment filed in my office this first day of July, A. D. 1871.

"D. W. FOOTE, *Auditor*."

The bill further alleges the willingness of the plaintiff to pay to the county the amount remaining unpaid on the notes, being the balance of the purchase-money of the several tracts of land; that in January, 1872, he offered to pay it to the auditor of the county; that in October, 1874, he tendered to the auditor and to the treasurer $16,197.69, as and for the payment of the balance remaining unpaid on the purchase-money of the several tracts of land, and all interest thereon; that said sum was more than sufficient to pay the balance; that said officers failed to accept the money so tendered, and refused to state whether they accepted or refused to accept it; that he then and there became entitled to demand the issue of certificates of the payment of the moneys provided to be paid in said several contracts, and then and there did demand the issue of the same, which was refused; that he brings into court for the use of the defendants the amount so tendered, to wit, $16,197.69, for the purpose of completing and perfecting the said tender, and to enable the defendants to accept the same, if they elect so to do, at any time; that, in case said moneys should be found insufficient in amount for said purposes, he offers to pay and bring into court such further sum as may be found to be necessary; that the said several contracts are valid

and subsisting; that the county has never undertaken to rescind them, or given notice of an intention to do so, or commenced suit to enforce payment of the purchase-money, or to foreclose the equities of the plaintiff or of his grantors; that no forfeiture of the contracts could lawfully be made by said county; that the defendants other than the county and its said two officers severally claim to have some title to or interest in the lands, or some part thereof; that pursuant to said last-mentioned sales, patents haye been issued for the lands, or some of them, to the defendants, or some of them, by the governor of the State of Iowa, but the plaintiff cannot more particularly state the facts in respect to the issue of the patents; that the plaintiff is the lawful owner of the several tracts of land; and that the issue of said patents has vested the legal title to said premises in the patentees therein named. The prayer of the bill is that the subsequent sales of the several tracts of land, and the patents, and all conveyances of the lands by the patentees, be decreed to be void and of no effect as against the estate of the plaintiff; that his title to said premises be forever quieted as against the defendants claiming any interest in the lands; that each of them be enjoined from setting up any interest in said premises under the sales and the patents issued thereunder; that the said patentees, and their several grantees, be decreed to hold the legal title to said lands, as the trustees of and for the plaintiff; and that they be compelled to convey the same to the plaintiff upon such terms as to the court may seem just and equitable. Three separate demurrers were filed to the amended bill, one by the county of Black Hawk, one by its auditor and its treasurer, and one by the remaining defendants. In each of the demurrers one of the causes of demurrer assigned is, that it does not appear upon the bill that the Circuit Court has jurisdiction of the alleged causes of action or of the parties, or that the plaintiff's several assignors could have maintained actions in the Circuit Court against the demurring defendants upon the said several contracts. The court states in its decree that it had heard argument upon the question of jurisdiction, and upon no other, and that it dismissed the amended bill upon the ground that it had no jurisdiction of the cause.

The first point taken by the appellees is, that the appeal ought to be dismissed for want of jurisdiction in this court, on the ground that the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs. The view urged is that the interest of each of the appellees who is alleged to have an interest in some of the lands in question is several; that each several interest is not shown to exceed the value of $5,000; and that the county of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true, for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the governor of the State, the notes and the amounts due thereon are held by the county, the money is to be paid to the county, and the tender was made to the officers of the county who are defendants. The matter in dispute between the appellant and the county is the sum of $16,197.69, which he tendered to its officers, and which they did not accept. Under the contracts the purchaser is entitled to receive a patent from the governor only on paying the notes, which are alleged to be held by the county. To obtain the relief asked for in the bill the plaintiff must first pay that sum to the county in discharge of the notes. His title cannot be quieted as prayed for, as against the adverse claimants of the lands, until his contract obligations to the county are fulfilled. Therefore, the county and its said officers are real parties to the suit, and the matter in dispute as to them is the sum so tendered.

Although the amended bill in the record was filed in July, 1878, the counsel for the respective parties have stipulated in this court, in open court, that the suit in the Circuit Court was originally begun in November, 1874. The question of the jurisdiction of the Circuit Court is, therefore, to be determined under that clause of sect. 629 of the Revised Statutes which provides that "no Circuit Court shall 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." There can be no doubt that the

original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land, and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. The only question for consideration is, whether the suit is one to recover the contents of the contracts.

The appellant contends that the suit is not one to recover the contents of a chose in action; that it is not even founded upon the contracts; and that it is only a suit to determine the validity, force, and effect of certain transactions which occurred subsequently to the making of the contracts, whereby certain rights adverse to those existing under the contracts are claimed to have arisen. It is urged that the appellant does not prosecute the suit in his character of assignee, but prosecutes it because a cause of action has accrued to him through the act of the county officers in refusing to accept the tender, and through the assertion by the other individual defendants of an adverse title to the lands. But we cannot take this view of the case. The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of sect. 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money, contained in a promissory note, is all that there is of the note. A suit to enforce the payment of the money is a suit to recover

the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money stipulated in these contracts to be paid by the purchasers, as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise, and, therefore, is a suit to recover the contents of the contracts. This principle was settled in the early case of *Sere* v. *Pitot* (6 Cranch, 332), under sect. 11 of the act of Sept. 29, 1789, c. 20, which is re-enacted in sect. 629 of the Revised Statutes. There the plaintiffs were the general assignees of the effects of an insolvent debtor, by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word "contents" did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments, as well as suits in virtue of legal assignments, and to exclude from the Federal courts the assignee of all the open accounts of a merchant, as well as the same person when the assignee of a particular note. The court say: "The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The 'contents' of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account." Following out this principle, the obligation or the promise contained in a contract is its contents, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents.

In *Deshler* v. *Dodge* (16 How. 622, 631), it is said by the court, that the statute in question applies to cases "in which the suit is brought to recover the contents or to enforce the contract contained in the instrument assigned;" and that where the suit is brought to enforce the contract contained in the chose in action, the assignee is disabled, unless the suit might have been brought in the court if no assignment had been made. Again, in *Bushnell* v. *Kennedy* (9 Wall. 387), it is suggested by the court that the restriction applies to rights

of action founded on contracts which contain within themselves some promise or duty to be performed, and that such contracts may be properly said to have contents.

The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made; and it is well settled that this is necessary. *Turner* v. *Bank of North America*, 4 Dall. 8; *Mollan* v. *Torrance*, 9 Wheat. 537; *Bank of United States* v. *Moss*, 6 How. 31; *Bradley* v. *Rhines' Admrs.*, 8 Wall. 393.

We are, therefore, of opinion that the Circuit Court had no jurisdiction of this suit. Its decree will be affirmed, with the modification that the dismissal of the bill is without prejudice to the right of the plaintiff to bring any suit he may be advised, in the proper court; and it is

So ordered.

POST *v.* SUPERVISORS.

AMOSKEAG BANK *v.* OTTAWA.

1. Whether a seeming act of the legislature is or is not a law, is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.
2. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.
3. An act of the legislature of a State, which has been held by its highest court not to be a statute of that State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence between different parties, to be a law of the State, although referred to in later statutes of the State as an existing law, and assumed to be such in earlier cases in the State court, in which its validity was not, and by the settled practice of that court could not be, controverted.
4. The act of the General Assembly of Illinois of Feb. 18, 1857, purporting to authorize the issue of certain municipal bonds, is of no force or effect, by reason of its not appearing by the legislative journals to have been passed as required by the Constitution of 1848.
5. Under the statute of Illinois of Feb. 12, 1849, copies of the original daily journals kept by the clerks of each house of the legislature, made by persons contracted with or employed for the purpose, in well-bound books fur-

nished by the secretary of state, and afterwards deposited and kept in his office, are official records, copies of which certified by him are competent evidence.

6. The printed journals of either house of a legislature, published in obedience to law, are competent evidence of its proceedings.

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. Sanford B. Perry, *Mr. David T. Littler*, and *Mr. George S. Eldredge* for the plaintiffs in error.

Mr. T. Lyle Dickey and *Mr. Philip Phillips* for the defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

These actions are brought upon municipal bonds, purporting to have been issued under an act of the General Assembly of Illinois of Feb. 18, 1857. The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October Term, 1876, and the principles then affirmed must control the present decision. See *Town of South Ottawa* v. *Perkins* and *Supervisors of Kendall County* v. *Post*, 94 U. S. 260. Those principles may be summed up as follows: —

First, By the law of the State of Illinois, as often declared by the Supreme Court of that State, before as well as after the execution of the bonds in suit, the provisions of the Constitution of 1848, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void.

Second, Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

Third, The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

Fourth, An act of the legislature of a State, which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State.

Fifth, That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued.

It was accordingly held that the act of the General Assembly of Illinois of Feb. 18, 1857, under which the bonds in suit were issued, having been adjudged by the Supreme Court of that State in 1870 in the cases of *Ryan* v. *Lynch* (68 Ill. 160) and *Miller* v. *Goodwin* (70 id. 659), upon proof that the journals did not show it to have been enacted in conformity with the requirements of the Constitution, to have never become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States.

The weight of those decisions as authoritative expositions of the Constitution of the State is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. *Township of Elmwood* v. *Marcy*, 92 U. S. 289; *Township of East Oakland* v. *Skinner*, 94 id. 255.

Nor is it of any importance that the act of 1857 had been assumed to be an existing law in *Dunnovan* v. *Green* (57 Ill. 63), and in *Force* v. *Batavia* (61 id. 99); for in each of those cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the journals could be considered on appeal, which had not been produced and made part of the case in the court below. *Illinois Central Railroad Co.* v. *Wren*, 43 Ill. 77; *Bedard* v. *Hall*, 44 id. 91; *Grob* v. *Cushman*, 45 id. 119. See also *People* v. *Dewolf*, 62 id. 253, 256; *Binz* v. *Weber*, 81 id. 288, 291.

The copies of the journals, certified by the secretary of state, and the printed journals, published in obedience to law,

are both competent evidence of the proceedings in the legislature.

By virtue of the statute of Illinois of Feb. 12, 1849,[1] the copies of the original daily journals kept by the clerks of the two houses, made by persons contracted with or employed for the purpose as authorized and directed by that act (though not sworn public officers), in well-bound books furnished by the secretary of state, pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which certified by him are admissible upon settled rules of evidence, as well as by the decision of the Supreme Court of Illinois in *Miller* v. *Goodwin*, above cited; and neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes.

The remark of the judge delivering the opinion in *Illinois Central Railroad Co.* v. *Wren* (43 Ill. 79), "We are not aware of any law which makes the printed journal evidence of the contents of the original," was but *obiter dictum* (for the case was decided upon the ground that no copy whatever of the journal had been made part of the case before the court), and is in conflict with the general current of decision in that court and in this. *People* v. *Campbell*, 8 id. 466; *Prescott* v. *Trustees of Illinois & Michigan Canal*, 19 id. 324; *Happel* v. *Brethauer*, 70

[1] By the Constitution of Illinois of 1848, art. 3, sect. 39, "the General Assembly shall provide by law that the copying, printing, binding, and distributing the laws and journals shall be let by contract to the lowest bidder."

By the statute of Jan. 16, 1836, in force at the time of the adoption of that Constitution, the journal of each house of the General Assembly was required to be "kept in well-bound volumes;" the clerks of each house were required to furnish daily to the public printer "a copy of the journal kept by them respectively," and after the final adjournment to "deposit the original journals kept by them respectively, with the secretary of state;" and the secretary of state was required to "superintend the printing of the journals." Statutes of Illinois of 1839, p. 551; Revised Statutes of Illinois of 1845, c. 84, sect. 3.

By the statute of Feb. 12, 1849, the secretary of state was required, before the meeting of the General Assembly, to publish an advertisement "inviting proposals for copying the laws, joint resolutions, and journals of the General Assembly," and to "give the contract to the lowest competent responsible bidder," and was also required "to furnish a well-bound book, in which the journals shall be copied," and, in case the person contracting for the copying should fail to perform his contract, to cause the same to be done by some competent person. 2 Statutes of Illinois (Scates ed.), p. 734.

id. 166; *Watkins* v. *Holman*, 16 Pet. 25, 55, 56; *Bryan* v. *Forsyth*, 19 How. 334; *Gregg* v. *Forsyth*, 24 id. 179.

For these reasons, the act of Feb. 18, 1857, under which all the bonds in suit purport to have been issued, must be held to be of no force or effect, and the plaintiffs can maintain no action on the bonds. Upon the attempt made at the argument to support their validity in the first case under the statute of Nov. 6, 1849, and in the second case under the statute of March 6, 1867, it is enough to say that there is nothing in the record to show that either of those statutes was ever complied with by the defendant in issuing the bonds, or relied on by the plaintiff in purchasing them.

Judgments affirmed.

HARVEY v. UNITED STATES.

1. The rules touching the effect of the findings of fact by the Court of Claims do not apply to the hearing of an appeal from its adjudication on a claim whereof it took cognizance under a special act of Congress, which required it to exercise equity jurisdiction. This court, on such an appeal, must determine the facts as well as the law applicable thereto.
2. The advertisement by the officer in command of the arsenal of the United States at Rock Island, Illinois, inviting proposals, and the written bid in connection therewith which he accepted, constitute the terms agreed on by the United States and the successful bidder, for building the masonry of the piers and abutments of the bridge at Rock Island. It appearing that the formal contract subsequently drawn up was intended to embody only those terms, but that by accident or mistake it varied essentially therefrom, — *Held*, 1. That it was competent for the Court of Claims, proceeding as a court of equity jurisdiction under the authority of the act of Aug. 14, 1876, c. 279 (*infra*, p. 680), to reform the contract, and then determine and adjust the accounts of the parties thereunder arising. 2. That the accepted bid did not embrace the coffer-dam work.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Enoch Totten for the appellants.

The Solicitor-General, with whom was *Assistant Attorney-General Simons*, for the United States.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 12th of May, 1869, General Rodman, in command of the United States Arsenal at Rock Island, Illinois, caused to be published the following advertisement, in pursuance of law:—

"PROPOSALS FOR BRIDGE MASONRY.

"Sealed proposals will be received at this arsenal up to 10 o'clock A. M. on the twenty-fifth day of May, 1869, for the construction of the piers and abutments of the railroad and wagon-road bridge to be built to connect the island of Rock Island with the city of Davenport. It is proposed to build, say, five common piers, one draw-pier, and two abutments. The stone and cement required for the work will be furnished on railroad cars, on arsenal switch, near the island end of the proposed bridge, and the sand required for the cement will be furnished by the United States at or near the same point. All the masonry must be of the best quality of bridge masonry, the stones in each course must be well banded, and each course well secured by dowels to the course below under cut-water, and at lower end of piers, and the foundation courses must be fairly bedded and well secured to the rock-bed of the river, the work as it progresses being subject to the inspection and approval of the commanding officer of the arsenal, or such other officer or person as may be designated by proper authority. Detailed information with regard to the general form and dimensions of the piers and abutments, and a profile of bed of river, can be obtained by personal application at the arsenal. The total amount of masonry is estimated at about 10,000 cubic yards. All the piers and abutments will be required to be completed prior to the first day of December, 1869. Parties making bids will state the price per cubic yard of solid masonry at which they are willing to complete the work, the United States furnishing the stone, cement, and sand, as above stipulated, and nothing more. They will also make a bid stating separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing the stone, cement, and sand, as above, and the price at which they will agree to put in the necessary coffer-dams with their protections. Proposals will be indorsed 'Proposals for Bridge Masonry,' and addressed to the undersigned. The United States reserves the right to reject any bid not deemed satisfactory.

"T. J. RODMAN,

"*Lt. Col. and Bvt. Brig. Gen. U. S. A., Commanding.*"

The appellants put in the following proposal: —

"ROCK ISLAND, May 25th, 1869.

"We propose to build the masonry of piers and abutments of the Rock Island bridge, as per annexed advertisement: —

Small piers and abutments, per yard	$11 00
Draw-pier, per yard	13 00

"HARVEY & LIVESEY,
"Madison, Wisconsin."

The only other proposal put in was one by Reynolds, Saulpaugh, & Co., as follows: —

"ROCK ISLAND, ILL., May 25th, 1869.

"Brig.-Gen'l T. J. RODMAN, *Com'd'g Rock Island Arsenal.*

"SIR, — We respectfully propose to build your piers and abutments for the rail and wagon road bridge between the island of Rock Island and the city of Davenport, in accordance with the terms of your advertisement of May 12, 1869, at prices as follows:

"Solid masonry at $19.10 per cubic yard in the work complete, the United States furnishing the stone, cement, and sand, as stipulated, and nothing more. This price is based on 10,000 cubic yards of masonry in the work when completed. Or, as per your second plan, at prices as follows: —

"Solid masonry at $12.70 per cubic yard in the work complete, the United States furnishing the stone, cement, and sand, as above, and build the coffer-dams at prices as follows: —

For pier No. 1, dam 18 feet high	$7,800
For " 2, " 15 "	34,900
For " 3, " 13 "	6,000
For " 4, 5, & 6, 12 "	15,000
	$63,700

"The above prices for dams include the protections to the same, complete.

Respectfully yours,
"REYNOLDS, SAULPAUGH, & Co."

The bid of the appellants was accepted. A contract was then drawn by a clerk of General Rodman's. A rough draft of it was submitted to the appellants, and, on their returning it as satisfactory, the engrossed copies were prepared for signature, and the contracts were executed and interchanged, bear-

ing date June 1, 1869. The following are the provisions of the contract which are material to this case: "The parties of the first part do hereby contract and engage with the said United States to construct the piers and abutments for the new rail and wagon bridge, to be built to connect the island of Rock Island with the city of Davenport, in accordance with such plans and specifications as may be fixed by proper authority acting for the United States; the United States to furnish stone, cement, sand, and all necessary templets required for the work, and nothing more; the stone and cement to be delivered in cars at the government switch on the island, near the site of the work. . . . The character of the work to be daily inspected as it progresses by such officer or other person as the commanding officer of the Rock Island arsenal or other authority appointed by the United States, may designate; such inspector to have full authority to give any directions with regard to the character or manner of conducting the work. The whole work to be completed prior to the first day of December next, provided that the stone shall be delivered at the rate of 2,000 cubic yards per month; and, in case of any failure on the part of the United States to deliver this amount of stone, then the work to be completed as soon after the first day of December next as practicable. . . . Payment in such funds as the Treasury Department may provide, at the rate of thirteen (13) dollars per cubic yard for all masonry in the draw-pier, and at the rate of eleven (11) dollars per cubic yard for all other masonry. . . . It is further stipulated and agreed, that if any default shall be made by the parties of the first part in the performance of their work specified in this contract, of the quality and at the times and places therein provided, that then, in that case, the United States shall have the right to take entire and exclusive charge of the work, and to complete it in accordance with the conditions prescribed by this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completing of the work."

On the 14th of December, 1870, the appellants filed a petition in the Court of Claims praying a judgment against the United States for $200,400. The petition set forth that the con-

tract was one for doing the masonry work in and about the construction of the piers and abutments; that proposals were invited for said work, and also separate proposals for putting in the necessary coffer-dams and their protections, but the petitioners bid only for said masonry work in the construction of said piers and abutments; and that their bid, being the lowest one for said masonry work, was accepted, and the contract was awarded thereon. The petition made the following claims, by items, against the United States: 1. For damages incurred by reason of the unreasonable delay caused by defendants from June 7, 1869, to Sept. 4, 1869, $25,000; 2. For putting in coffer-dams and protections, for pumping the water therefrom, and for preparing the beds for the piers and abutments, $75,000; 3. For loss of profits incurred by the unlawful reduction of the dimensions of the piers and abutments, $33,600; 4. For increase in the cost of the work, by having been compelled to do it in cold weather, $15,000; 5. For constructing 4,400 cubic yards of masonry, at, say, $12 per yard, $52,800; 6. For loss caused by neglect of defendants to furnish materials and locate piers and abutments, whereby the plaintiffs, their workmen and tools, were kept idle, $15,000; 7. For loss of machinery, vessels, and tools, caused by the ejectment of the plaintiffs from the work, $25,000; 8. For dressing coping and corners of abutments, and dressing noses of piers under water, not required by contract, $5,000. This made a total of $246,400, on which $46,000 was credited as paid, leaving a balance of $200,400. The petition contained allegations bearing upon each one of the eight items claimed, but it is not necessary here to refer to any but those in respect to items 2 and 3, which allegations were as follows: "That about the thirteenth day of September, 1869, the United States having furnished materials sufficient to commence the construction of said piers and abutments, the petitioners requested the agent of the defendants to put in, or cause to be put in, the necessary coffer-dams and to pump the water therefrom, and prepare beds for said piers and abutments, to enable petitioners to proceed with the performance of their contract. But the United States refused to put in such coffer-dams and pump the water therefrom, and refused to prepare said beds, pretending that petitioners were bound, under said contract, to

put in said coffer-dams. The petitioners thereupon protested against such wrongful construction of said contract, but, at the special request of the defendants, and relying upon the good faith of the United States, they undertook to and did put in the necessary coffer-dams and protections, and pump the water therefrom, and did prepare the beds for said piers and abutments. That the labor and materials expended in putting in said coffer-dams and protections, and pumping water and preparing beds as aforesaid, was reasonably worth, and they are entitled to recover for the same from the United States, the sum of seventy-five thousand dollars. That they were informed by the United States, prior to the making of said proposal, that the draw-pier would be four hundred and seventy-four feet long and fifty-six feet wide, and that the five common piers would be each seventy-four feet long and fourteen feet wide, and that, with the abutments, there would not be less than ten thousand cubic yards of masonry work, and that petitioners based their estimates for said work upon such information, and made their said proposal in the belief that said piers and abutments would be constructed according to such dimensions. But they allege that the defendants, on or about the twenty-second day of July, 1869, transferred the supervision of said work from the Ordnance Bureau to the Bureau of Engineers, and that the petitioners, although they were at all times ready and anxious to proceed with said work, were kept waiting from the seventh day of June, 1869, until September 7th, 1869, as aforesaid, and that, on or about the said seventh day of September, 1869, the defendants marked out the location for one pier and one abutment only, and wrongfully reduced the dimensions of all the said piers and abutments, so that, instead of measuring ten thousand cubic yards, they measured only about six thousand five hundred; and that, by reason of said reduction, by said defendants, in the dimensions of said piers and abutments, the petitioners have been damaged in the full sum of thirty-three thousand six hundred dollars."

Subsequently the petitioners amended their petition as to item 5, so as to make it read as follows: "For handling, cutting, preparing, and setting stone for and in the piers and abutments, $82,000." The United States, by answer, denied every

allegation in the petition, and set up a counterclaim for $33,-681.35, alleging that, under the contract, the petitioners being in default, the United States took charge of the work and completed it, and charged the petitioners with the entire cost of completing it, $142,457.17, and credited them with the amount per cubic yard stipulated in the contract to be paid them for completing the work, $108,775.82, leaving a balance due to the United States from the petitioners of $33,681.35.

Proofs were taken, and the case was heard by the Court of Claims. It awarded to the petitioners $20,068 in respect of items 1 and 6. As to item 2, the court found that it was necessary, in order to the laying of the abutments and piers, that a coffer-dam should be built for each abutment and pier, and the water pumped out of it, and the bed of the river prepared for laying the masonry of the abutment or pier thereon; that without such coffer-dams it was impracticable to construct any of the abutments or piers; that the petitioners, on the 13th of September, 1869, requested the United States to forthwith construct the requisite coffer-dams, exhaust the water therefrom, and prepare the bed for the piers and abutments where necessary for the commencement of the work; that the United States, on the next day, refused so to do, on the ground that, under the contract, it was the business of the petitioners to do the work; that on the next day the petitioners protested against such refusal, and notified the United States that they should proceed at once to build the dams, pump the water therefrom, and prepare the beds, and should hold the United States for the payment of the costs and expenses of the same; that on the next day General Warren, in charge of the construction of the bridge, consented, in order not to delay the work, to its going on until the matter could be referred to the Attorney-General of the United States, but stated that in such consent it must be considered that nothing was admitted in favor of the claim of the petitioners to their interpretation of the contract; that, immediately upon such refusal of the United States, the petitioners proceeded to build the requisite coffer-dams; and that all that was required in that respect while the work was in their hands was done by them. But the court found, as a conclusion of law, that the contract did not require the United States, but

required the petitioners, to do the work named in item 2. As to item 3, the court found that about the 17th of July, 1869, General Rodman was relieved from the charge of the construction of the bridge by General Warren, of the corps of engineers; that General Warren, on the 22d of August, 1869, caused notice to be given to the petitioners that the position of the abutment and first pier of the bridge, on the Iowa side, was determined and marked, ready for them to commence their construction; that, when proposals were so invited by advertisement, General Rodman had prepared certain plans of the bridge, intended to show the general forms and dimensions of the piers and abutments, and a profile of the bed of the river; that those plans were seen and inspected by the petitioners before they sent in their said proposal; that the dimensions of the piers of the bridge which were fixed upon on the 22d of August, 1869, and those which were, after that date, from time to time fixed upon, were less than the dimensions indicated in the plans prepared by General Rodman and shown to the petitioners before they made their said proposal; but that there was no reduction of the sizes which were fixed upon on the last-named day, nor was there any reduction of the sizes thereafter adopted. The court found, however, as a conclusion of law, that the reduction made in the dimensions of the piers and abutments of the bridge, as originally projected, was not, by the legal construction of the contract, wrongful to the petitioners. As to item 4, the court found that the petitioners were not subjected to any increase in the cost of the work by having been compelled to do it in cold weather. The court also found that on the 6th of October, 1870, the petitioners were notified in writing by the officer in charge of the work on the bridge, that in consequence of complaints which had reached the chief of engineers of the United States army, of the tardy progress of the work on the masonry of the bridge, the said officer had been required to take suitable and efficient measures to expedite the work, and that, in view of that requirement, he would take the work as it stood and carry it on under the provision of the contract which contemplated such a change; that on the next day the petitioners, in writing, refused to give up the work, whereupon, on that day, the said officer

notified them in writing that he would on the next day take possession of the work for the government, which he did, against the assent and protest of the petitioners; and that thenceforward the work was prosecuted by the officers of the government. In regard to item 5, as amended, the court found that the petitioners, before their ejectment from the work, had done work upon and for the bridge, under the contract, to the amount of $76,344.47, and had been paid on account of said work $54,105.98, leaving due to them under item 5, $22,238.49. As to item 7, the court found that the petitioners did not sustain any damage by reason of the idleness of their tools, machinery, and vessels, after Oct. 8, 1870, which they would not have sustained had they on that day completed their work under the contract, or which was not incident to the termination, at any time, of their work under the contract. As to item 8, the court found that the petitioners were paid in full for all the extra work they did on or about the abutments and piers of the bridge. The court awarded to the petitioners $42,306.49, being $20,068 on account of items 1 and 6, and $22,238.49 on account of item 5, and rejected their claims under items 2, 3, 4, 7, and 8.

The opinion of the Court of Claims, in deciding the case, is found in 8 Ct. of Cl. 501. From that it appears that, in regard to item 2, the court held that neither the advertisement nor the bid could be invoked to interpret the contract; and that the proper construction of the contract was that it was the duty of the petitioners to build the coffer-dams, pump the water therefrom, and prepare the bed of the river for the piers and abutments which they were bound to construct. In regard to item 3, the court held that under the contract the officer in charge had the power to make the alterations in the dimensions of the piers which made the profits to the petitioners less.

The Court of Claims having no equitable jurisdiction to reform a contract, the petitioners acquiesced in the decision made, so far as not to take an appeal to this court, and to receive payment from the United States of the amount of the judgment for $42,306.49; but they applied to Congress, and procured the passage of the act of Aug. 14, 1876, c. 279 (19

Stat. 490), which provides as follows: "That the claim of James W. Harvey and James Livesey for alleged labor done and materials furnished under their contract with the United States for the building of the masonry-work for the piers and abutments of the bridge across the Mississippi River from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby, referred to the Court of Claims, for hearing and adjudication; and to that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States, as a court of equity jurisdiction; and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require."

On the 30th of August, 1876, the petitioners filed in the Court of Claims a petition, which recites the former proceedings, and the judgment, and its payment, and the contents of the said act of Congress, and then proceeds as follows: "The plaintiffs allege that there is still justly due to them from the United States a large sum of money for damages and for work and materials, and, in addition to the charges made in the aforesaid original petition, they say that connected with the pivot-pier of said bridge there were large walls of stone masonry and crib-work, connecting the upper and lower rests of the pivot-pier with the pivot thereof, which were constructed mainly of irregular or rip-rap masonry, and that, to finish the abutment on the Iowa shore, wing-walls, constructed of 'rip-rap' masonry, were necessary, all of which was a part of the plaintiffs' work under the contract; that, this work being cheap and easily done, the officers in charge of said work in behalf of the United States refused to permit the plaintiffs to do it, and employed laborers and constructed the same for the United States, and thus unjustly and unlawfully deprived the plaintiffs of large profits, which they otherwise would have made. They allege that they could have made, on the said work, the sum of $51,000 in profits. The plaintiffs aver that there is justly and equitably due to them from the United States, on account of the premises, and in addition to the

amount already paid to them, the sum of $239,600, with interest, according to the following specifications, to wit: 1. For labor done, and materials furnished by the plaintiffs, in constructing the coffer-dams, and in performing the work necessarily connected therewith, and, preliminary to the masonry-work for said piers and abutments, $75,000; 2. For loss and damages resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract, $33,600; 3. For loss of machinery, vessels, and tools, caused by taking from the plaintiffs the work under their contract, $25,000; 4. For extra work, dressing coping and corners of abutments, and dressing noses of piers under water (this work not being required by the contract), $5,000; 5. For the profits they could have made had they been permitted to build the cross-walls and crib-work connecting the upper and lower rests with the pivot (part of the contract), $48,000; 6. For profits they might have made had they been permitted to construct the wing-walls for the Iowa shore abutment; these walls were 'rip-rap,' and a part of the work under the contract, out of which liberal profits could have been made; the agents of the United States performed the work, $3,000; 7. For profits they might have made had they been permitted to complete the work according to the intention of the parties and the terms of the contract, in addition to the foregoing charges, $50,000; 8. For interest on the amount found due to the claimants on an equitable adjustment of accounts between the parties, from October 6th, 1870, until the date of the judgment of this court, at the rate of six per centum per annum. The petitioners therefore claim judgment against the United States for the sum of $239,600, with interest thereon at six per centum per annum; and they pray the court to reform the said contract, if the same be necessary, so as to make the same conform to the intention of the parties and to be in consonance with justice and equity, and for such other and further or general relief as in justice and right they may be entitled to have." The United States demurred to this petition on the ground that it did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and gave leave to the petitioners to amend the peti-

tion. 12 Ct. of Cl. 141. One of the grounds on which the court proceeded was, that so far as the demands covered by the new petition are legal demands, under the contract, enforceable in a suit at law founded on the contract, such demands cannot, under the special act of Congress, come under the cognizance of the court. This view is, in our judgment, correct. The court further held, that there were no averments in the petition showing a title to equitable relief founded on the view that the written contract did not set forth the true agreement, and no facts alleged showing a right to recover on the reformed agreement. It was held that the court was to proceed simply "as a court of equity jurisdiction," and that the accounts which it could adjust and the relief which it could give must be limited to matters which, because of its inability to sit as a court of equity, it could not and did not before determine.

A comparison of the new petition with the first petition shows that items 1, 2, 3, and 4 in the new petition are severally reproductions of items 2, 3, 7, and 8 of the first petition; that items 5, 6, 7, and 8 in the new petition are entirely new; and that items 1, 4, 5, and 6 in the first petition are not reproduced in the new petition, an award having been made in the judgment in respect of items 1, 5, and 6 in the first petition, and item 4 therein being abandoned.

The petitioners proceeded, under the leave granted, to amend their petition in equity, by adding thereto the following allegations: "The contract mentioned in the original petition in this cause was intended to carry out and execute the specifications and agreements contained in a certain advertisement or invitation for proposals for constructing the piers and abutments of the said bridge, published by the defendants, and in a bid made in pursuance thereof by the plaintiffs. The agents of the United States, by said advertisement, requested the persons bidding in pursuance thereof to state (1) the price per cubic yard of solid masonry at which they were willing to complete the work; (2) the price per cubic yard of solid masonry at which they were willing to build the piers and abutments; and (3) the price at which they were willing to put in the necessary coffer-dams and protections. The said invitation for proposals also apprised the bidders that detailed information as to the

general form and dimensions of the piers and abutments, and a profile of the bed of the river, would be exhibited to them at the arsenal. In pursuance of that part of the said invitation which referred to the work of building the solid masonry of the piers and abutments, and after having first obtained from the defendants' agents detailed information touching the form and dimensions of the proposed piers and abutments, and after having examined the profile of the bed of the river exhibited by the defendants, the plaintiffs, on the twenty-fifth day of May, 1869, submitted to the proper officers of the United States a proposal in writing, whereby they offered to build (only) the masonry of the said piers and abutments, upon the terms following, to wit, the small piers and abutments at and for the sum of eleven dollars per yard, and the draw-pier at and for the sum of thirteen dollars per yard. The said proposal was accepted by the defendants, and the said contract, in the original petition described, was prepared in the office of the agent of the United States, by a clerk therein employed, but, in consequence of accident and mistake, the said contract was so drawn as to depart from the intention of the parties and from the terms and specifications in said invitation and proposal contained. Instead of requiring the plaintiffs to perform the labor and furnish the materials contemplated by the said invitation and proposal, and in the manner specified therein, the language employed in said contract inequitably required the plaintiffs 'to construct the said piers and abutments in accordance with such plans and specifications as may (might) be fixed by proper authority acting for the United States.' The plaintiffs did not discover the peculiar language of the said contract until long after the work had been in progress, nor did they ever believe that they were bound by said contract to do any more work, or furnish any more materials, or that they were obliged to perform the work in any other manner, than as specified and contemplated in the said invitation and proposal, until the judgment of this court compelled them to submit to said construction. When the officers of the defendants first claimed for the said contract the strict construction aforesaid, the plaintiffs protested, and refused to proceed any further with the work, but the said officers, by promises (which they never

kept), induced the plaintiffs to go on, notwithstanding the dispute, and they accordingly did proceed, and they were required by the agents of the United States to construct the coffer-dams and do all other work and furnish all other materials preliminary to building the solid masonry for said piers and abutments, and to construct said piers and abutments on very materially different plans and in different localities from those contemplated by the parties at the time of making said proposal, and said piers and abutments so built were, in consequence of the alterations in the form and locality thereof, much more expensive to the plaintiffs, for which no allowance has ever been made to them. Through the error and mistake aforesaid, the defendants were given an unfair and unconscionable advantage over the plaintiffs, and have obtained the materials, labor, and skill of the plaintiffs, of great value, and have paid nothing for them. The labor performed and the materials furnished by the plaintiffs for the United States, in putting in said coffer-dams and furnishing the other materials and performing the other work preliminary to building the masonry of said piers and abutments, were reasonably worth the sum of seventy-five thousand dollars; and the work done and materials furnished by them for the United States in and about the masonry of said piers and abutments were reasonably worth, in consequence of the change of locality and of plans and specifications unlawfully made by the defendants under the erroneous provisions of said contract, the sum of thirty-three thousand and six hundred dollars, over and above the sums which the plaintiffs have already been paid therefor. The plaintiffs, therefore, pray that the said contract may be so reformed as to correspond with the intention of the parties, and that they may be paid for the labor and materials by them performed and furnished upon the said bridge. They further pray that they may have such other and further relief, and be paid such other and further sums of money, as may be agreeable to equity and good conscience, and as the provisions of said act of Congress may authorize and require."

By leave of the court, the petitioners filed a second amendment to the petition in equity, stating as follows, in addition to what was contained in said petition and the first amendment

thereto: "*First*, By the terms of the advertisement inviting proposals, the proposal of the plaintiffs, and the acceptance thereof by the defendants, as alleged in the original petition herein and the amendment thereto, a preliminary agreement was made between the plaintiffs and the defendants, by which the plaintiffs agreed to build the masonry-work of the piers and abutments of the said bridge at Rock Island, for the prices stated in the said original petition and the amendment thereto, and according to certain plans showing the general form and dimensions of the piers and abutments and their locations in the river, and according to a profile showing the bed of the river at the place where the work was to be done, which plans and profile were, before the making of the proposal, exhibited by the defendants to the plaintiffs, and were by them inspected, to enable them to prepare their estimates for making their said proposal. And the United States thereby agreed to furnish the stone, cement, and sand for said masonry, and also to erect and put in the necessary coffer-dams, with their protections, and to perform the preliminary work necessary to enable the plaintiffs to build the said masonry-work according to their said proposal and according to said general plans, and at the location in the river indicated by said plans and profile. *Second*, For the purpose and with the intent and design of carrying into effect said agreement thus made as aforesaid, a formal contract was prepared by officers of the United States, which was afterwards signed and delivered by both parties; but, by accident and mistake, the said contract did not conform to the terms of said previous agreement, nor to the intention of the parties. The said contract was, by such accident and mistake, so drawn as to impose upon the plaintiffs the burthen and expense of constructing and putting in the necessary coffer-dams with their protections, and of performing the preliminary work connected therewith, instead of requiring the United States to put in said coffer-dams and perform said preliminary work, as had been previously agreed upon, and as was intended by the parties. The cost of constructing and putting in said coffer-dams with their protections and doing the preliminary work connected therewith, was as great if not greater than the cost of building the masonry-work, and, in consequence of the said

accident and mistake, the United States obtained an unconscionable advantage over the defendants, and compelled them to do work and furnish materials which they never intended to do, and for one-half the compensation the said work and materials were really worth. And the said contract, through accident and mistake, was so drawn as to require the plaintiffs to build the said piers and abutments in accordance with such plans and specifications as might be fixed by the officers of the United States, instead of requiring the United States to provide plans, and the plaintiffs to do their work, according to the general plans and profile exhibited to the plaintiffs, as aforesaid, and at the location in the river agreed upon, as was the intention of the parties, and as had been previously agreed upon by the parties. And the defendants, through said accident and mistake, have obtained an inequitable and unconscionable advantage over the plaintiffs, and, in the construction of the said bridge, changed its locality further down the river and into deep water, and reduced the dimensions of the piers and abutments as prescribed by said original plans, in such a manner as to preserve the cut-stone or expensive portion of the work, and to greatly reduce the quantity of rough, inexpensive work, through which alone profit could be derived by the plaintiffs, and thereby inflicted great injury upon the plaintiffs. The petitioners submit to the court that they are entitled to have said contract reformed, so as to make it conform to the intention and to the agreement of the parties, as expressed in the said invitation for proposals and the bid of the plaintiffs submitted in response thereto, and the acceptance thereof by the defendants, and to have the same judgment and relief as to the said coffer-dams and the work of constructing the piers and abutments as if the said formal contract had conformed to the said preliminary agreement and had contained the necessary provisions requiring the defendants to construct and put in the necessary coffer-dams and to perform the preliminary work connected therewith, and so as to conform in all things in reference to the construction of the said bridge and piers and abutments, to the said original and general plans of said bridge, and to the profile of said river-bed, and to the location thereby indicated. And the petitioners claim such other and further

relief in the premises as their case may require, and as may be authorized by the terms of the said act of Congress passed for their relief."

The United States, by answer, denied all the allegations of the petition and the amendments. The evidence in the first case was used as evidence in the second case, and no new evidence was taken. The court entered a general finding in favor of the defendants and dismissed the petition. From the decree of dismissal the petitioners have appealed to this court.

The reasons assigned for that decree are contained in the opinion of the Court of Claims, which is a part of the record, and is also reported in 13 Ct. of Cl. 322. The court says, that because of the decision on the demurrer it regards the present proceedings as relating only to the claims for the cost of the coffer-dams and for the loss of profits resulting from the reduction of the dimensions of the piers and abutments, being items 1 and 2 in the new petition. In regard to item 1, the decision is that the petitioners have not shown that the written contract does not express the intent of both parties as to the coffer-dams; and that even if the court were satisfied that the petitioners executed the contract in mistake of their rights, there is no evidence that the defendants shared the mistake. In regard to item 2, the decision is that the court would be disposed to regard the case, on the facts, as one for equitable interposition for the purpose of further inquiry, and the ascertainment of the rights of the parties in equity, if it had jurisdiction; but that the statute does not authorize it to entertain those considerations, because in these proceedings it can hear and determine only claims for labor done and materials furnished by the plaintiffs under their contract with the defendants.

In regard to the coffer-dams, it seems clear to us that the ruling of the Court of Claims was erroneous. The advertisement begins by inviting proposals for the construction of the piers and abutments of the bridge. Standing alone, this would involve proposals to make coffer-dams, and do and furnish everything else necessary to finished work. But this is qualified by what follows. The advertisement goes on to say that parties making bids will state (1) the price per cubic yard of

solid masonry at which they are willing "to complete the work," the United States furnishing the stone, cement, and sand, "and nothing more." "To complete the work" there means to construct the piers and abutments complete, including the making of coffer-dams and doing and furnishing everything necessary for completed work, except furnishing stone, cement, and sand, the United States furnishing those, and furnishing nothing more. Then parties making bids are "also" to make a bid stating (2) separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing stone, cement, and sand; and "also" to make a bid stating (3) separately the price at which they will agree to put in the necessary coffer-dams, with their protections. Here are three distinct classes of bids: bid 1 for the whole work, including all that is embraced in the work specified in bids 2 and 3; bid 2 for a part of the whole work specified in bid 1 and excluding what is embraced in bid 3; and bid 3 for another part of the whole work specified in bid 1 and excluding what is embraced in bid 2. There is no implication in the advertisement from the use of the word "also," or from any other language, that a bidder could not make bid 2 or bid 3 unless he likewise put in a bid for bid 1; or that he could not bid for the specified parts of the work unless he should bid for the whole complete. The appellants did not make a bid for the work complete, or say in their bid that they were willing to complete the work. They bid only under bid 2. They stated separately, in their bid, the price per yard at which they would build the masonry of the piers and abutments. They excluded bid 3 and the coffer-dams, and they excluded bid 1 and the coffer-dams in it. This is quite enough to determine the question. The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. *Garfielde* v. *United States*, 93 U. S. 242; *Equitable Insurance Co.* v. *Hearne*, 20 Wall. 494. The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bid. If the formal contract is suscep-

tible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the government were under a mistake. It is shown that the work of making and putting in the coffer-dams, and doing whatever else was necessary, in connection with them, before the laying of the masonry could be commenced, was so expensive as to make it impossible that the prices named in the bid of the appellants could have covered that expense and the laying of the masonry also. There is no evidence to show that the parties intended to alter the terms of the bid as to work and prices. There are other considerations dwelt upon in the dissenting opinion of Judge Nott in the Court of Claims, and to which it is necessary only to refer, which enforce the conclusion thus reached. One of those considerations is, the terms of the only other bid, as showing by the prices therein named for bid 1, bid 2, and bid 3, each separately, that the appellants could not have been bidding for the work complete. The evidence on the point in question on the part of the appellants is largely in documents, while that relied on by the United States is oral, and some of it consists of recollections of conversations with the appellants, who are debarred by statute from being witnesses in their own behalf. We are of opinion that by the actual contract between the parties the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly.

We are also of opinion that the Court of Claims placed too limited a construction upon the special act of Congress. The act speaks of the claim of the appellants as a claim "for alleged labor done and materials furnished under their contract with the United States for the building of the masonry-work for the piers and abutments of the bridge," giving the date of the contract. The Court of Claims had rejected item 2 in the first case because the formal written contract required the petitioners to do the work named in it. It had rejected item 3 because that contract gave the government power to reduce the dimensions of the piers and abutments. It was to obtain equitable relief in respect to those two items that the appellants applied to Congress. Their claim had been made in the

eight items embraced in their petition in the first case. It had been made as a claim under their contract. It cannot be properly inferred, unless there is language necessarily leading to a contrary conclusion, that the claim referred to the Court of Claims by the act is to embrace less than what was embraced in items 2 and 3 in the first case, although item 3 is made out as for "loss of profits." The act refers "the claim" "under the contract," for hearing and adjudication; and jurisdiction is conferred on the court to proceed in the adjustment of "the accounts" between the persons making the claim and the United States, as a court of equity jurisdiction. The court had decided that it could not take cognizance of item 3 because it was not a court of equity jurisdiction, and, therefore, could not proceed to adjust the accounts any further than it had adjusted them. One object of the act was to remedy this defect. There is nothing in the use of the words "for alleged labor done and materials furnished," or of the words "to that end," which can limit or control the scope of the act, as above explained. That scope is still further shown by the enactment that the court "may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require." The words "for alleged labor done and materials furnished" are, in view of the language of the entire act, not words of limitation, but words of description. The court is authorized to adjust "the accounts" between the parties, so far as they were not legal demands, and so far as they were equitable demands, unadjusted or unadjudicated, growing out of the contract, as a court of equity, and, for that purpose, to reform the contract, according to the principles of equity, and then render judgment upon it as reformed. This power of the Court of Claims, under the act, extends to reforming the contract in respect to permitting the officers of the United States to materially vary the plans for the piers so as to essentially change the obligations of the parties.

As to items 3 and 4 in the new petition, which are the same as items 7 and 8 in the former case, not only were they legal demands, but they were adjudicated upon fully in that case and

cannot be reopened. As to items 5, 6, and 7 in the new petition, they cannot, in view of the principles laid down in this opinion, be considered by the Court of Claims. The question of interest, under item 8, remains for that court to consider.

It is contended on the part of the United States that this court cannot, under its rules, hear this appeal, because there is not, in the record, any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts. But the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and, in such a case, where an appeal lies and is taken under sect. 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts.

Judgment and decree reversed, and the case is remanded with directions to proceed in it according to law and in conformity with the opinion of this court.

SWIFT COMPANY *v.* UNITED STATES.

1. Under the act of July 14, 1870, c. 255, the proprietor of friction-matches, who furnished his own dies, was entitled to a commission of ten per cent, payable in money upon the amount of adhesive stamps over $500 which he at any one time purchased for his own use from the Bureau of Internal Revenue.
2. The provisions of the statute being clear to that effect, he is entitled to recover pursuant thereto, although a different contemporaneous construction of them was given by the bureau, it not appearing that he acquiesced therein.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. George H. Williams for the appellant.

The Solicitor-General for the United States.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The Swift and Courtney and Beecher Company filed its

petition Jan. 20, 1879, in the Court of Claims, for the recovery of certain commissions alleged to be due to it on purchases of proprietary stamps under the internal revenue laws.

It alleged that it was, during the period covered by the transactions set out, the proprietor, manufacturer, and vendor of friction-matches; that, as such, at the beginning of its business, it furnished to the Commissioner of Internal Revenue its own die for stamps, to be used especially for its own proprietary articles; that, during said period, from time to time, and continuously on different days of each and every month, it sent to him sums of money from $1,000 to $10,000 as suited its convenience, and that he transmitted to it stamps, as it needed and ordered; so that in the account between it and him as to its stamps the creditor side showed moneys received by him in certain sums and at certain dates, but showed the receipt of no sum less than $1,000, and the debtor side of said account showed that stamps were sent by him to it in different sums and at different dates, but never in amounts less than $1,000.

It is further averred that upon the whole amount of stamps purchased, during the period referred to, the company was entitled to a commission of ten per cent in money, amounting to $389,720.40, which he has refused to allow; and has allowed in lieu thereof $354,291.27 in stamps at their face value; insisting such to be the long-established practice of the office, to which he must adhere, till changed by legislation or judicial decision. The company, in the petition, in reference to this practice, avers "that the allowances made to it from time to time between May 6, 1870, and Dec. 24, 1878, have been in accordance with the uniform practice of said internal revenue office from its organization, but petitioner avers that at different times prior to 1866 protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction-matches against such a construction of the statute by him, by which only ten per cent commissions in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of ten per cent upon the whole amount of stamps purchased, and that such facts are and have always been known to petitioner."

It is also averred that the company gave the required security for a credit of sixty days upon its purchase of stamps, as provided for in the act of June 30, 1864, c. 173 (13 Stat. 218, 295), which enacts, "That the Commissioner of Internal Revenue may from time to time furnish, supply, and deliver to any manufacturer of friction or other matches, cigar lights, or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without pre-payment therefor, on a credit not exceeding sixty days, requiring in advance such security as may be judged necessary to secure payment therefor, to the Treasurer of the United States within the time prescribed for such payment."

The defendant filed a general demurrer, which was sustained, and judgment rendered dismissing the petition. To review this judgment the present appeal is prosecuted by the company.

Section 102 of the act of July 1, 1862, c. 119 (12 Stat. 477), authorized the Commissioner of Internal Revenue to sell to and supply collectors, deputy collectors, postmasters, stationers, or any other persons, at his discretion, with adhesive stamps, upon the payment at the time of delivery of the amount of duties said stamps represent, and thereupon to allow and deduct from the aggregate amount of such stamps the sum of not exceeding five per cent as commission, with the proviso, "that any proprietor or proprietors of articles named in schedule C, who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following discount, namely: on amounts purchased at one time of not less than fifty nor more than five hundred dollars, five per centum; on amounts over five hundred dollars, ten per centum."

By the act of March 3, 1863, c. 74 (12 Stat. 714), the word "commission" was substituted for "discount" in this proviso.

This section as thus amended was re-enacted as sect. 161 of the act of June 30, 1864, c. 173 (13 Stat. 294), and schedule C enlarged so as to include friction-matches. p. 302.

Section 4 of the act of July 14, 1870, c. 255 (16 Stat. 257), continued in force the same provision, directing that proprietors of articles named in schedule C, who shall furnish their own dies, shall be allowed commissions, on amounts over five

hundred dollars, "ten per centum on the whole amount purchased."

It will be perceived, on examining this legislation, that while, in respect to adhesive stamps sold, other than those to proprietors of articles named in schedule C from their own dies for their own use, the rate of the commission to be allowed to the purchaser shall not exceed five per cent, but within that limit, is subject to the discretion of the Commissioner of Internal Revenue; while, in respect to those of the latter class, including stamps on friction-matches, the rate is fixed by the statute itself, and in the form as expressed in the act of 1870, where the amounts of purchases are over $500, the commissions are established at ten per cent on the whole amount purchased. So that, while in the sale of adhesive stamps of the former description, in the exercise of his discretion as to the rate, he might lawfully provide that the commissions should be paid only in stamps at their face value, yet, in the sale of stamps to proprietors of friction-matches, he was not authorized to diminish the commission by any such regulation, but was required to allow and pay in money ten per cent calculated on the amount of stamps purchased on all sales exceeding $500 in amount.

In the present case the commissions were allowed to the company not on the whole amount of stamps furnished to it, nor in money, but in stamps at their face value, calculated on the amount of money paid by it. This suit was brought to recover the difference between the amounts, resulting from these two modes of calculating and allowing commissions.

There is no serious question raised as to the proper construction of the internal revenue acts upon the point, it being virtually admitted that the contention on the part of the appellant upon the provisions of the statutes is correct.

It is met, however, in the opinion of the Court of Claims, and in argument on behalf of the government here, that the contrary construction, to pay these commissions in stamps at their face value, has been acted upon by the Commissioner of Internal Revenue from the beginning; has been acquiesced in by purchasers and dealers; and has never been changed by Congress; and as an official practice has thus acquired the

force of law; or if not, then, at least, it was a course of dealing, well known to the appellant, and acquiesced in, by which it accepted stamps at their face value in payment of its commissions, which it is not at liberty now to open, question, and reverse.

The right construction of the internal revenue acts, upon the point of the allowance of commissions to dealers in proprietary articles, purchasing stamps made from their own dies, and for their own use, is too clear to bring the case within the first alternative. The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt. *Edwards's Lessee* v. *Darby*, 12 Wheat. 206; *Smythe* v. *Fiske*, 23 Wall. 374; *United States* v. *Moore*, 95 U. S. 760; *United States* v. *Pugh*, 99 id. 265.

We are of opinion that the averments of the petition, admitted by the demurrer, do not bring it within the operation of the principle invoked in the second alternative. The case made by the petition is not that of successive and independent purchases of stamps, settled for, at the time, when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings, of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account. Money was paid on account of stamps furnished or to be furnished, in sums, differing in amount, but not less in any case than $500; and stamps were supplied in varying quantities, as ordered, without reference to corresponding and equivalent payments of cash; a bond with satisfactory security, in pursuance of law, having been given and accepted, to secure the government against loss, in consequence of purchases on credit. The dealing is, undoubtedly, evidence that the appellant was willing to purchase stamps, to be paid for by a credit on account, in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not

only to show facts, from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding. The allegations in the petition, in our opinion, do not constitute such a bar to the recovery sought, and the demurrer interposed should not, therefore, have been sustained.

For this error, the judgment of the Court of Claims will be reversed, and the cause remanded for further proceedings in accordance with law; and it is

So ordered.

EX PARTE MASON.

1. Where, by a general military court-martial, a person then in the military service of the United States was found guilty of an offence, and sentenced to be discharged from that service, and be imprisoned at hard labor in the penitentiary, — *Held*, that he cannot, under a *habeas corpus*, be discharged from imprisonment if the court had jurisdiction to try him for the offence and was authorized to render the sentence whereof he complains. *Sed quære*, can this court order in his behalf the issue of that writ?
2. A., a soldier of the army, while on duty in 1882 at the jail in Washington City, maliciously attempted to kill a prisoner who was, by the authority of the United States, there confined. No application was made for the delivery of A. to the civil authorities, but he was, on a charge of having violated the sixty-second Article of War, tried by a general court-martial, and sentenced to be imprisoned in the penitentiary for the term of eight years, and to be dishonorably discharged from the service, with the forfeiture of his pay and allowance due and to become due. *Held*, 1. That the fifty-eighth and fifty-ninth Articles of War have no application to the case. 2. That the act being a breach of military discipline as well as a crime against society, the court-martial had jurisdiction to try A., and to pronounce the sentence, inasmuch as he was, by the statute in force in the District of Columbia, subject, on conviction, to imprisonment for that period in the penitentiary, and the court could, in its discretion, inflict the other penalties.

PETITION for a writ of *habeas corpus* and a *certiorari*.

The case is stated in the opinion of the court.

Mr. James M. Lyddy for the petitioner.

Mr. Asa Bird Gardner, *contra*.

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

This is a petition for a writ of *habeas corpus* to release John

A. Mason, the petitioner, from confinement in the Albany penitentiary under a sentence by a general court-martial. The facts are these: Mason was a sergeant in Battery B of the Second Regiment of Artillery, in the army of the United States. He was tried by a general court-martial on the charge of violating the sixty-second Article of War, in that "having been ordered with his battery from Washington Barracks for guard duty at the United States jail, in the city of Washington, D. C., and having arrived at said jail for said duty," he "did thereupon, with intent to kill Charles J. Guiteau, a prisoner then confined under the authority of the United States in said jail, wilfully and maliciously discharge his musket, loaded with ball-cartridge, at said Guiteau, through a window of said jail, into a cell then occupied by the said Guiteau." Upon a trial duly had he was found guilty of the charge according to the specification, and sentenced "to be dishonorably discharged from the service of the United States, with the loss of all pay and allowances . . . due and to become due to him, and then to be confined at hard labor in such penitentiary as the proper authorities may direct for eight years." The Albany penitentiary was designated in due form as the place of confinement under this sentence.

A question which presents itself at the outset is whether this court has jurisdiction to issue such a writ as is asked, inasmuch as it has no power to review the judgments of courts-martial. Upon this question there is not entire unanimity of opinion among the members of the court, and we purposely withhold any decision at this time in respect to it. We all agree, however, that if a writ might issue, there could be no discharge under it if the court-martial had jurisdiction to try the offender for the offence with which he was charged, and the sentence was one which the court could, under the law, pronounce.

The sixty-second Article of War, under which Mason was tried, is as follows: —

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general,

or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of the court."

The offence charged in this case was clearly one to the prejudice of good order and military discipline.

The offender was a soldier in the army of the United States. As such, according to the specifications of the charge made against him, he was ordered on guard duty at the United States jail, in Washington, and while on duty he wilfully and maliciously discharged his musket, with intent to kill a prisoner confined in the jail under the authority of the United States. The gravamen of the military offence is that, while standing guard as a soldier over a jail in which a prisoner was confined, the accused wilfully and maliciously attempted to kill the prisoner. Shooting with intent to kill is a civil crime, but shooting by a soldier of the army standing guard over a prison, with intent to kill a prisoner confined therein, is not only a crime against society, but an atrocious breach of military discipline. While the prisoner who was shot at was not himself connected with the military service, the soldier who fired the shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting. It follows that the crime charged, and for which the trial was had, was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard.

In our opinion the fifty-eighth and fifty-ninth Articles of War have no application to the case. The fifty-eighth is as follows: —

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offence by the laws of the State, Territory, or District in which such offence may have been committed."

The object and purpose of this article were elaborately considered in *Coleman* v. *Tennessee*, 97 U. S. 509. As it is to operate only in time of war, it neither adds to nor takes from the powers which courts-martial have under the sixty-second article in time of peace.

Article 59 is as follows: —

"When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

It is not pretended that any application was ever made under this article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offence committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial, he can be again tried in the civil courts is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction.

It is objected that the sentence is in excess of what the law allows. The ninety-seventh Article of War is as follows: —

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States or by some statute of the State, Territory, or

District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such imprisonment."

Under this article, when the offence is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true when the offence, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. The sixty-second article provides that the offender, when convicted, shall be punished at the discretion of the court, and the ninety-seventh article does no more than prohibit the court from sentencing him to imprisonment in a penitentiary in a case where, if he were tried for the same act in the civil courts, such imprisonment could not be inflicted.

It is also claimed that the sentence is in excess of the jurisdiction of the court, because in addition to imprisonment in the penitentiary for the full term allowed by the laws of the District of Columbia for the offence of an assault with intent to kill, it subjects the offender to a dishonorable discharge from the army and a forfeiture of his pay and allowances. As has already been said, under the sixty-second article the punishment is to be at the discretion of the court. The ninety-seventh article only limits this discretion as to imprisonment in the penitentiary, and it has been nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict.

"Cases arising in the land or naval forces" are expressly excepted from the operation of the Fifth Amendment of the

Constitution, which provides that "no person shall be held to answer a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The limitation as to "actual service in time of war or public danger" relates only to the militia. *Dynes* v. *Hoover*, 20 How. 65.

Petition denied.

WURTS *v.* HOAGLAND.

IRON COMPANY *v.* HOAGLAND.

1. The time within which a writ of error must be served, in order that it may operate as a *supersedeas*, must be computed from the date of the judgment which is the subject of review.
2. The writ of error did not in either of these cases operate as a *supersedeas*, as the required bond was filed Oct. 27, 1881, and the judgment of the Supreme Court of New Jersey was affirmed by the Court of Errors and Appeals July 18, 1881, and the record remitted Aug. 31, 1881.

RULE to show cause why an attachment should not issue against the defendant in error, for having sued out executions upon the judgments below after *supersedeas* bonds in due form and approved security had been filed within the prescribed time.

Mr. Theodore Little in support of the rule.
Mr. Jehiel G. Shipman, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The controversy in these cases arose out of an assessment of benefits for the drainage of lands in New Jersey. It was decided by the Supreme Court of that State, Dec. 1, 1880.. The Court of Errors and Appeals affirmed the judgment on the 18th of July, 1881, and the record was remitted Aug. 31, 1881. On receiving the *remittitur* on that day, the Supreme Court entered a rule ordering it to be filed and the cause to be proceeded with according to law. Writs of error from this court to the Supreme Court of New Jersey were allowed and bonds approved Oct. 27, 1881, and on the following day were filed in the clerk's office of the latter court. The writs of error were properly directed to the Supreme Court, because at that time

the record had been transmitted to it, and was then in its possession. See *Atherton* v. *Fowler*, 91 U. S. 143, 148. But at any time before the *remittitur* the writs might have been directed to the Court of Errors and Appeals, because the judgment of that court was the final judgment in the cause, and until the *remittitur* was made it had possession of the record in contemplation of law. It is that judgment which is the subject of revision here. The plaintiff in error insists that the action of the Supreme Court, on receiving the *remittitur*, was the final judgment. But this is not correct. Such action was not necessary to the jurisdiction of this court. A number of instances might be cited in which, without any *remittitur*, a writ of error from this court has been directed to the Court of Errors and Appeals of New Jersey. This was the course in the noted cases of *State of New Jersey* v. *Wilson*, 7 Cranch, 164; *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116; and *New Jersey* v. *Yard*, 95 U. S. 104.

In those States where the highest court does not have possession of the record, and does not render a judgment, but decides questions certified by the inferior courts, and merely issues a rescript directing the latter what judgment to render, the case would perhaps be different. But in New Jersey the record itself, or a transcript which stands for the record, is removed to the Court of Errors and Appeals, and a regular judgment is there rendered. For certain purposes, as in England on writs of error from the House of Lords, the judgment of the inferior court pending proceeding in error is supposed to be in existence. Action upon it may be brought, and, on failure to give proper bail in error, execution may be issued. But for all other purposes, when a writ of error goes to an inferior court, the Court of Errors and Appeals obtains possession of the cause and renders a formal judgment therein. If the judgment of the inferior court is reversed, the Court of Errors usually renders such judgment as ought to have been rendered, though it has the power to direct the court below what judgment to give. It is only necessary to open a book of New Jersey reports, containing decisions of the highest court, to ascertain its jurisdiction in this behalf. Thus, in 2d Zabriskie, 623, is a judgment in the case of *Demarest* v. *Hopper*,

reversing the judgment of the Supreme Court in an action of ejectment, and rendering judgment for the plaintiff; and in the same book, p. 725, is another judgment of reversal in the case of *Hopper* v. *Hopper*, coupled with a judgment for the demandant in an action of dower, with a direction to the Supreme Court to award a writ of inquiry to assess the damages, and to issue execution therefor.

We think that the final judgment in these cases was rendered on the eighteenth day of July, 1881, being the judgment rendered by the Court of Errors and Appeals; and that as the writs of error were not issued and served until the 28th of October, more than sixty days thereafter, they were too late to operate as a *supersedeas*. The rules to show cause must therefore be

Discharged.

STEVENSON *v.* TEXAS RAILWAY COMPANY.

1. Judgment creditors who cause an execution to be levied upon lands of the defendant in Texas acquire a lien superior to that of his unrecorded mortgage, whereof, at the date of the levy, they had no notice.
2. A purchaser at the sale under that execution is entitled to all the rights of the creditors, and takes the lands freed from the mortgage, although it be recorded before such sale.

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

The facts are stated in the opinion of the court.

Mr. William S. Herndon and *Mr. Anthony Q. Keasbey* for the appellant.

Mr. Walter D. Davidge and *Mr. James Lowndes* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

In the view which we have taken of this case, it becomes necessary to decide but a single question. The facts necessary to its determination may be summed up as follows: —

The Texas and Pacific Railway Company is a corporation

created by acts of Congress, for the purpose of constructing, maintaining, and operating a line of railway, from a point at or near Marshall in Harrison County, Texas, by way of El Paso, to the Pacific Ocean. By the terms of its charter, it was authorized to purchase the stock, land grants, franchises, and appurtenances of, and, on such terms as might be agreed on, consolidate with, any railroad companies theretofore chartered by congressional, State, or territorial authority, on the route prescribed, but not with any competing company; and thereupon all such interests and rights should vest in the Texas and Pacific Railway Company, the latter assuming any indebtedness of such companies, as they might agree, and the consolidation and purchase not impairing any lien which might exist thereon.

The Southern Pacific Railroad Company was a corporation of the State of Texas, and, being thereunto duly authorized, became consolidated with the Texas and Pacific Railway Company, on March 21, 1872, the latter becoming thereby the purchaser, in consideration of $3,000,000 paid to the former, of all its property, rights, and franchises.

The Southern Pacific Railroad Company, which made this sale to, and became consolidated with, the Texas and Pacific Railway Company, was the successor in law of the Texas Western Railroad Company, in the following manner: The original company was chartered in 1852 to construct a railroad from a suitable point on the eastern boundary of the State to El Paso on the Rio Grande. In 1856, its name was changed by the legislature of Texas to that of the Southern Pacific Railroad Company. Prior to September, 1859, this company had completed twenty-five miles of road west from Marshall, and had earned, it is claimed, about 256,000 acres of land, granted to it by the State. Having become insolvent, it was sold under execution upon a judgment at law, on Sept. 6, 1859, to R. V. Richardson, under the provisions of the fifth section of the act of Feb. 7, 1853, Paschal's Digest, art. 4912, which is as follows: —

"The road-bed, track, franchise, and chartered rights and privileges of any railroad company in this State, shall be subject to the payment of the debts and legal liabilities of said company, and may

be sold in satisfaction of the same; but the said road-bed, track, franchise, and chartered powers and privileges shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of the State; and the said purchaser or purchasers, and their associates, shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip, and work the road, upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this State."

As authorized by this law, Richardson and his associates reorganized the Southern Pacific Railroad Company by the creation of a new capital stock, — the largest part of which was subscribed and owned by Richardson himself and Jeptha Fowlkes, — and the election of a board of directors and officers, as provided by their by-laws, on Oct. 3, 1859.

On Aug. 25, 1860, the Southern Pacific Railroad Company, as thus reorganized, executed to R. V. Richardson and Vernon K. Stevenson, as trustees, two mortgages, which were acknowledged Sept. 10, and proved in New York before a Texas commissioner Sept. 12, 1860, and recorded in Harrison County, Texas, March 1, 1861. One of them was to secure a proposed issue of bonds, to the amount of $25,000,000, for purposes of construction and other necessary expenses, payable Jan. 1, 1883, with interest at the rate of seven per cent per annum, and it embraced all the property of the company, including its land grant from the State. The other covers one million acres of the land grant, to be selected by the company for sale, to meet the accruing interest on the same bonds.

The complainants claim to be holders for value of about two hundred of the bonds secured by these mortgages, out of about three hundred and fifty, which was the whole number issued. Their bills were filed for the foreclosure of the mortgages, and

the sale of the mortgaged property, for the payment of the amount due on account of the bonds and accrued interest.

Against the lien of these mortgages the appellee, the Texas and Pacific Railway Company, claims a paramount title. This title rests, primarily, upon a judicial sale of the same property and rights, then vested in the Southern Pacific Railroad Company, as it existed under the Richardson reorganization. The sale was made by the sheriff of Harrison County, Texas, on Sept. 3, 1861, to H. S. Fulkerson, of the whole road and franchises of the company, as an entirety, under the provisions of the foregoing article 4912, upon executions levied under four judgments at law, as follows: —

1. Judgment in favor of J. W. Saunders, April 6, 1859, for $300.09 and costs, $74, in all $374.09, upon which was credited before sale $277, leaving due a balance of $97.09. Execution was levied under this judgment Aug. 9, 1860.

2. Judgment in favor of Henry Wickland, Sept. 26, 1860, for $3,500 and costs. Execution issued and levied July 11, 1861.

3. Judgment in favor of Amelia Swanson, Oct. 27, 1860, for $2,480.50 and costs. Execution issued Nov. 22, 1860, levied Jan. 3, 1861.

4. Judgment in favor of J. B. Williamson, Oct. 23, 1860, for $1,000 and costs. Execution issued Nov. 23, 1860, levied Jan. 3, 1861.

The purchase-money at the sheriff's sale to Fulkerson was $7,500, which was just enough to satisfy the executions.

It will be observed that of these judgments the first alone was recovered prior to the date of the execution and delivery of the mortgages, but all of them were recovered, and the executions issued upon the first, third, and fourth were levied before March 1, 1861, the date of the record of the mortgages.

There is neither judgment, claim, nor proof that at the time of the levy of these executions the plaintiffs had any notice of the existence of the then unrecorded mortgages to Richardson and Stevenson; and it is conclusively established as the law of Texas that the purchaser at such sale acquires a title superior to that of such mortgagees.

Article 4988, Paschal's Digest, reads as follows: "All bargains, sales, and other conveyances whatever, of any lands, tenements, and hereditaments, whether they may be made for passing any estate of freehold or inheritance, or for a term of years; and deeds of settlement upon marriage, whether land, slaves, money, or other personal thing, shall be settled or covenanted to be left or paid, at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and lodged with the clerk, to be recorded according to the directions of this act, but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding."

And art. 4994, Paschal's Digest, provides that "Every conveyance, covenant, agreement, deed, deed of trust, or mortgage in this act mentioned, which shall be acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid, as to all subsequent purchasers, from the time when such instrument shall be so acknowledged, proved, or certified, and delivered to such clerk to be recorded, and from that time only."

These statutory provisions were construed by the Supreme Court of Texas in the case of *Grace* v. *Wade*, 45 Tex. 522. In that case the only question was "whether a vendee of land, who claims title by an unrecorded deed or bond for title, or the purchaser, with notice of such deed or bond, at execution sale on a judgment against the vendor, where the creditor has no notice of the title or claim of the vendee, at the date of the levy of the execution, has the better title." The court affirmed the two propositions, that the lien acquired by a creditor without notice by the judgment and levy of execution is superior to the unrecorded deed of the vendee, and that a purchaser under the execution, with notice, is entitled to all the rights of the creditor. The court said: "Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is absurd

to say that the creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed. And it would be equally as absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured, can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser."

The case of *Price* v. *Cole* (35 Tex. 461), to the contrary, is directly overruled, the court saying: "We conclude by saying, that while the judgment in *Price* v. *Cole* is not warranted by the previous decisions in our own courts or elsewhere, and must therefore be overruled, we adhere to and sustain the doctrine to be deduced from the case of *Ayres* v. *Duprey* (27 Texas, 593), that one who purchases at sheriff's sale may claim protection under the statute as a purchaser, even when the judgment creditor himself is not, as creditor, within its protection, and *vice versa*. While he cannot bring himself within its provisions in the character of a purchaser, he or others subrogated to his rights may be entitled to its protection as creditor."

This decision has been followed and approved in *Grimes* v. *Hobson*, 46 Tex. 416; *Catlin* v. *Bennatt*, 47 id. 165; and *Mainwarring* v. *Templeman*, 51 id. 205; and we adopt it as the law of Texas applicable to and governing the present case.

It follows that the legal title of the Texas and Pacific Railway Company, derived through its purchase from and consolidation with the Southern Pacific Railroad Company, which duly succeeded to the title of Fulkerson, is superior to that of the mortgages under and through which the appellants claim as holders of the bonds. It is urged, however, on behalf of the appellants, that the circumstances of the execution sale to Fulkerson were such as to fasten upon him a constructive trust in their favor as creditors of the company; but, in our opinion, if that were conceded, there is no ground apparent on the record upon which that equity could be successfully asserted

against the Texas and Pacific Railway Company, a purchaser for valuable consideration, having notice, it may be, of the existence of the mortgages to Richardson and Stevenson, but without notice of any facts which in equity would subordinate to them the rights acquired by the sheriff's sale to Fulkerson.

For these reasons the decree of the Circuit Court is

Affirmed.

MARSH *v.* MCPHERSON.

1. The recital in the contract (*infra*, p. 711), that the vendors "hereby deliver said machines at the places named in the list" to the vendee, passes to him the title and right of possession, but does not prove a delivery of actual possession.
2. If the machines were not delivered at the stipulated time and places, or were not then in a proper condition, proof that they were subsequently delivered, or that the vendee, after accepting them, permitted the vendors to make the requisite repairs and additions thereto, is admissible to reduce his damages for a breach of the contract.
3. In case of a total failure by the vendors to perform the contract, the vendee is entitled to recover the amount wherewith he, at the time of the breach, could have purchased machines of equal value; if those delivered were defective, the measure of his damages is the actual cost of supplying the deficiency.

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

The case is stated in the opinion of the court.

Mr. Jefferson H. Broady for the plaintiffs in error.

Mr. John L. Webster for the defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought Jan. 15, 1878, by John McPherson, against James S. Marsh and Elisha C. Marsh, to recover damages for the breach of a contract under seal for the sale of certain real and personal property. On Oct. 16, 1877, a written agreement was entered into, by which he, in consideration of their covenants, agreed to sell and convey to them certain described real estate in Nebraska, and, in addition thereto, one-half the stock of goods in a store belonging to him, on a

parcel of the real estate. They covenanted on their part to pay for the real estate as follows: For one parcel, $18,190.37, in combined reapers and mowers and self-rakers, known as the Valley Chief, to be taken, those designated as No. 1 at $175 each, and No. 2 at $170 each, to be delivered, eighty-six machines of No. 1, and twenty of No. 2, at certain named points in different parts of the State and in Kansas, "all the said machines to be delivered in good condition, and free of all incumbrances, of taxes, and of charges for freight, each machine to have two smooth sickles and one sickle-edge sickle." In the agreement, the freight on each machine from the manufactory at Lewisburg, Penn., was estimated at $25, and in all cases when it fell below that sum the difference was to be accounted for and paid. The store property was to be paid for in cash and notes, and the remainder of the real estate at $3,600, in machines of another description at $175 each, "to be delivered in good condition, free of incumbrances," as before in respect to the others, at certain other named places, being eleven machines at Beatrice, Neb., and the remainder of this lot on board of cars at the factory at Lewisburg, consigned to him or to his order.

At the time of the execution of this agreement, the machines, it is alleged by the plaintiff in his petition, were in the possession of the agents of the defendants at the various points; that they were in bad condition, and subject to incumbrances and charges; that the defendants failed and refused to deliver them, although he had fully performed his covenants, by conveying the real estate and delivering the goods; and that the machines, in the condition required by the contract, were worth the agreed value of $21,775. To recover this amount, with an additional sum for an ascertained difference of freight, the suit was brought in the State court. By reason of the citizenship of the parties, it was, on the petition of the defendants, removed for trial into the Circuit Court.

The defendants, in their answer, admit the execution of the agreement set out in the petition, but allege that it was fully executed, fulfilled, and superseded by a subsequent agreement in writing between the parties, indorsed on it, and dated Nov. 5, 1877, in the words following, to wit: —

"BROWNVILLE, NEBRASKA, November 5th, 1877.

"The above contract is this day executed by the said parties thereto as follows: The within-named real estate is conveyed by said first party (McPherson) to said second parties (Marsh and Marsh); also one-half of said stock of goods at an invoice in the sum of four thousand and two hundred and forty-three and 10-100 dollars, making price of the half, four thousand two hundred and forty-three and 10-100 ($4,243.10) dollars, is delivered by McPherson to said parties, Marsh and Marsh.

"The said second parties, Marsh and Marsh, hereby acknowledge payment of all said machines named in the list within named, aggregating eighty-six number ones, twenty number twos, and hereby deliver all thereof to said first party at the places named in said within list (except there is two instead of one at Donnebrag, and three instead of four at Wahoo, which change is consented to by the parties) free and clear of all liens, charges, or taxes, up to and including taxes for the year 1878, as per within contract. Said second parties also hereby deliver to said first party eleven of said machines within named, called Marsh number four, as provided for within and on the within-named terms therefor, at Beatrice. On this, eleven machines, number four, there is two hundred and seventy-five dollars freight in favor of said second parties, to whom said first party shall account therefor as hereinafter stated.

The balance of $259.63 on the said list of number ones and number twos, and the said eleven number fours, amounting to $1,925, is applied on the purchase price of said lands in Sonora Island, leaving balance of $1,415.37, for which said second parties shall deliver, as provided for within, eight of said machines number four on board the cars in Pennsylvania, at place within named, leaving still a balance on said purchase price of island real estate of $15.37 in favor of said first party, to whom the second parties shall account. As soon as the amount due said first party on freights of said number ones and twos are ascertained, the same, with the said $275 due second parties, and said $15.37 due said first party, shall be settled and adjusted by the parties. Said eight number fours to be delivered within thirty days after notice to second parties. Said second parties hereby warrant that said eighty-six number ones and twenty number twos and eleven number fours are now at the places above named in condition for delivery as above and within provided for, and that said eight number fours shall be delivered

as above stated, and shall stand good to said first party for any breaches or failures of such warranty and promise.

"On said store goods one thousand dollars is paid to said first party, the receipt of which is hereby acknowledged, and the balance shall be paid according to the within contract.

"JOHN MCPHERSON.
"JAMES S. MARSH.
"E. C. MARSH."

On the contract is the following indorsement by the plaintiff: —

"Received of said second parties, Marsh and Marsh, in full payment and settlement of said balance due for said store goods, after said payment of one thousand dollars, the following described notes of this date, made by James S. Marsh, to my order, to wit, one for $1,056.44, one for $915.72, one for $685.47, and one for $585.47, in all four several promissory notes for said amounts, all due December 1, 1877, with interest at ten per cent per annum after maturity.

"November 7, 1877.

(Signed) "JOHN MCPHERSON.

"Witness: WM. H. HOOVER."

The defendants also allege performance of the contract, and aver that the said transactions between the plaintiff and them were neither sales of his lands and goods nor of their machines, "but were barters of the property of one in exchange for the property of the others, in which the prices fixed were largely in excess of cash prices, so much so that neither would have bought the property of the other for cash at such prices, and that the naming of the prices in the transaction was nothing more than a matter of convenience in executing the exchange." They further aver as to the eight Marsh No. 4 reapers to be delivered on board cars at Lewisburg, Penn., three had been delivered, and that as to the remainder, they have been ready and willing to do so, on the order of the plaintiff, but that he has neglected to do so, but that they hold the same for him.

The answer also contains the following: —

"Defendants admit that after the making of said agreement in November, 1877, defendants told plaintiff that they (the

defendants) would visit each of the points named in said writing where said machines then were, and at which places they were delivered as stated in said writing, and if any agents were not settled with, or any liens or charges were claimed against any of said machines, would make settlement with their said agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all unpaid claims and liens of any and every kind and sort upon each and all of said machines, and put in good repair each and all of the said machines, so as to have the same conform to the conditions of said agreement and warranty in writing, but deny that they ever so stated until after said writing of November, 1877, or that they told plaintiff that they would do so at once, but aver that they stated that they would do so in a reasonable time to have them so repaired and in good condition for the first season and time for selling reapers and mowers; which season, defendants aver, was the latter part of the spring of 1878, continuing from thence through the summer of 1878, and aver that said promise was to so repair and fit up said reapers and mowers ready for the harvest of small grains in the year 1878, and for the sales for such harvest, which time commenced about May, 1878, and continued during such harvest; all of which was agreed to between the parties hereto as satisfactory, as making good the warranty of defendants in said agreement dated Nov. 5, 1877, all of which said promises these defendants have fully performed and complied with, and have previous to said time and previous to the commencement of the reaper and mower trade for 1878, and previous to April, 1878, visited each of the points named in said writing, dated Oct. 6, 1877, where said machines then were, and made settlements with their agents then and there having charge of said agricultural machines, where settlements had not already and heretofore been made with such agents, and paid off and discharged all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and repair each and all of said machines, wherever any such claim or liens were unpaid, and wherever any of said machines were not in good condition or were out of repair, and had all said machines as aforesaid discharged of all claims and

liens of any and every sort, and in good repair and condition for the 1878 market, in due time for such market and pursuant to such promise."

The cause was tried by jury, and there was a verdict for the plaintiff. Judgment was rendered thereon, to reverse which this writ of error is prosecuted.

There are thirty-three assignments of error, based on exceptions to the rulings of the court upon questions of evidence, and upon instructions to the jury, either given, or asked and refused; but it will not be necessary to refer to them in detail.

The chief issues between the parties, raised by the pleadings and maintained in evidence, were, whether there had been a delivery of possession of the machines by Marsh and Marsh to McPherson, and whether there had been a breach of the warranty, that they were in a good condition at the places named, and free from all liens and charges.

Upon the point whether there had in fact been a delivery of actual possession by the defendants to the plaintiff, of all or of any of the machines, there seems to be some confusion. The bill of exceptions, of course, and properly, does not set out all the evidence, but the court, in its general charge, stated to the jury, "that the plaintiff admits that all the machines had been delivered to him." From the context, it would appear that the contract of Nov. 5, 1877, is treated as an admission to that effect, as to all machines that were in fact at the places named, without respect to their condition; based, no doubt, upon the expression contained in the instrument, by which it is declared that said second parties, Marsh and Marsh, hereby acknowledge payment of all said machines, &c., and hereby deliver all thereof to said first party at the places named in said within list, &c., free and clear of all liens, charges, or taxes, &c. The contract undoubtedly had the effect to pass the title to the machines from Marsh and Marsh to McPherson, and the right of possession; but whether the purchaser obtained actual possession could not be conclusively inferred from the contract merely. If the declaration in that instrument of the fact of delivery could have that effect, it would be equally conclusive that they were free of incumbrances, for that is also stated in

the same connection. It might have been that the machines were in the places mentioned in the contract and in the condition required; yet the defendants might have refused to deliver actual possession; if so, they would, of course, be liable in damages.

The bill of exceptions recites that "during the trial, evidence having been admitted tending to prove that many of the machines named in the contracts copied in the pleadings were not in as good condition as called for in the said contracts, and were not supplied with all the pieces specified in the contracts, and that in some instances the whole machine was missing, and what the values of such deficient or impaired machines in the condition in which they then were and the difference in their values, in such condition, and the condition called for by the contract, and also on the part of the defendants that defendants had made repairs on some machines and supplied deficiencies and missing machines since the commencement of this action, and the value thereof," the court, at the request of the plaintiff, gave to the jury the following instruction: —

"The jury is instructed that they are not permitted to take into account or make any allowance or reductions from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after Nov. 5, 1877, all such acts on their part being without authority; and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made."

This charge is clearly erroneous. In the first place, it assumes the fact that the acts referred to, of making repairs and furnishing supplies, were without authority. It cannot be denied that, if authorized, they would have to be considered; and whether authorized or not was, at least, one of the questions of fact involved in the issues to be tried, on which it was the duty of the jury to pass. For the defendants had set up in their answer what they claimed to be an agreement with the plaintiff, by which they were to have until the spring of 1878 in which to make good their warranty as to the condition of the machines. Whether this agreement for an extension of time, not acted on, could be pleaded as a bar to the action for a breach of the contract, is not the question. It was, if proved,

and if repairs were actually made in pursuance of it, certainly good as proof that they were made with the consent and authority of the plaintiff. And as the bill of exceptions recites that evidence was offered to maintain the issues, by both parties, it is not to be assumed that there was none in support of this claim.

But independently of this alleged agreement, it was certainly competent for the defence to show that, after the date of the second contract, the machines were put in the good condition required by it, and were then delivered to and accepted by the plaintiff; for if he accepted the machines after the time when they should have been delivered, or if, after receiving them, he permitted repairs to be made or supplies to be furnished, and accepted the benefit of them, he certainly cannot claim that he has been damaged by a breach of the contract to the same extent as if nothing had been done to make good his loss.

It is a rule of law, without exception so far as we are aware, that any circumstance, otherwise competent in evidence to reduce the damages, may be proven on the trial for that purpose, although it may not have come into existence until after the commencement of the action.

The court, also, at the request of the plaintiff, gave to the jury the following charges: —

10. "The jury is instructed that the plaintiff is entitled to recover for any machines which were not at the places named at the time of the making of the contract of Nov. 5, 1877, the price of said machines as fixed in the contract; and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Penn., after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machines." And, also, 11. "On such machines as were delivered to the plaintiff, he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were and the contract price."

And refused to give, on the request of the defendants, the following: —

"The jury are instructed that if they find there was any breach of the warranty named in the contract of Nov. 5, 1877,

that the measure of damages for such breach is the difference in the value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such warranty."

During the trial the defendants offered to prove the market value of such machines in good condition for cash, and the difference between that and the value of the machines in the condition in which they were delivered; but this offer was rejected.

In its general charge, the court stated the rule of damages very clearly and correctly, in the following language: "The extent of the damages in this case will be the difference that it would cost to put the machines in good condition, so as to comply with the contract, and also the value of those that were not then at the time and place stated in the contract." Standing alone, this instruction would have been unexceptionable. But in the rulings noted above, in giving the tenth and eleventh instructions, asked by the plaintiff, and refusing to give that asked by the defendants, and in rejecting the evidence offered on the point, there was substantial error.

The price fixed in the contract, at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property, at assumed valuations, or as a purchase and sale for money, is not conclusive, between the parties, upon the question of damages, recoverable for a breach. If there had been a total failure on the part of the defendants to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which, at the time of the breach, he could have supplied himself by purchase from others, with the same number of similar articles of equal value. If the market price had in the mean time advanced, the recovery would be for more, or, if it had fallen, it would be for less, than the contract price; the rule to measure the loss, in such cases, being the difference between the contract and the market price. The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs; and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between

the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. *Benjamin* v. *Hillard*, 23 How. 149, 167.

For these errors, the judgment of the Circuit Court will be reversed, and the cause remanded with instructions to grant a new trial; and it is

So ordered.

FLANDERS *v.* SEELYE.

Cotton seized under color of the act of March 12, 1863, c. 20, was by A., the deputy general agent of the treasury, consigned, subject to freight and charges, to B., supervising special agent of the treasury at New Orleans. It was there received by a firm who paid the charges on A.'s order, to hold "the amount against the cotton." Shortly thereafter A. directed B. to deliver the cotton to C., the claimant, upon his giving a bond of indemnity. C. gave the required bond, to save harmless the government, the seizing agent, and the officers and agents of the treasury, on account of the seizure and detention of the cotton, and, on paying freight and charges, he, by order of B., received the cotton. He subsequently sued the firm for the amount so paid, and recovered judgment, which a member of the firm paid, and then brought this action against A. for the money. *Held*, 1. That A., being neither a party nor a privy to the suit of C. against the firm, and it not appearing that notice of its pendency was ever given to him or any agent of the government, he is not bound by the judgment there rendered. 2. That the court below having in this action given a certificate of probable cause, as provided by sect. 989, Rev. Stat., it appears that A. could have successfully defended the suit brought by C., and been protected by the bond given by the latter.

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

The facts are stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

Mr. H. N. Ogden for the defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought in the Sixth District Court for the Parish of Orleans, in the State of Louisiana, by Seelye, the defendant in error, against Flanders, the plaintiff in error, in November, 1871, and was removed by *certiorari*, before issue joined, into the Circuit Court of the United States for the District of Louisiana. In his petition filed in the State court, Seelye claimed to recover from Flanders the sum of $6,233.61, with legal interest from judicial demand. The grounds of the claim, as set forth in the petition, were, that, in March, 1866, 178 bales of cotton were delivered at the pickery of the firm of Seelye & Atwood, in New Orleans, of which firm Seelye was a member, under the instructions of Flanders, who was at that time acting supervisor and special agent of the Treasury Department of the United States; that the firm received from Flanders, at the same time, a written order to pay the charges on the cotton, amounting to $5,907.45; that the firm, in obedience to those instructions, received the cotton and paid the charges; that, in April, 1866, the firm received an order from one Burbridge, supervisor and special agent of the Treasury Department of the United States, directing them to deliver said cotton to one Harrison, but to retain the charges and expenses on said cotton; that, in obedience to said order, the firm delivered the cotton to Harrison, and received from him the amount of charges originally paid by them, and their own charges for storage of the cotton, being in all $6,063.81; that the amount was paid by Harrison under protest, and he subsequently sued Seelye and another person, as composing the firm, and recovered a judgment against them in the Circuit Court of the United States, for $4,661.45, with interest from June, 1866, to July, 1871, and costs, making in all $5,891.44; that that sum was paid by Seelye to Harrison in satisfaction of that judgment; that he also paid, as costs of court in that suit, $92, and for counsel fees in defending the suit $250; and that these sums, with the amount of the judgment, make the $6,233.61. The petition alleges that all that Seelye so did in the premises, and all that he was so finally compelled to pay, was the direct result of the written orders received by the firm

from Flanders, and claims that Flanders is bound to reimburse to him the entire amount so paid, either in direct obedience to his orders or as the necessary result of that obedience. In January, 1872, Flanders filed exceptions in the Circuit Court to the petition, which were overruled by the court in April, 1872. These exceptions raised the questions that Seelye had no right of action alone, and that the court had no jurisdiction. After the overruling of these exceptions, Flanders filed a pleading combining exceptions with an answer. The exceptions related to the defences of prescription and want of jurisdiction. The answer set up that when Seelye received the cotton from Flanders and paid the charges, he knew that Flanders had taken the cotton in his said official capacity acting under the act of Congress of March 12, 1863, c. 20 (12 Stat. 820); that the charges directed by Flanders to be paid were a legal charge on the cotton under the provisions of said act; that they were refunded by Harrison to the firm as an admitted claim; that Harrison then brought the said suit to recover back the amount he had so allowed and paid; that the defendants in said suit set up in their answer therein that they received the cotton from Flanders, acting as such special agent, and paid by his orders the charges thereon, and the same were lawful charges thereon, and were acquiesced in by Harrison and reimbursed to them; that after judgment in the suit the defendants in it sued out a writ of error to this court, which writ they failed to prosecute, and it was, therefore, dismissed by this court in December, 1870; that in July, 1871, they voluntarily paid the judgment; that the defence set up in the suit was, if founded in fact, a good and valid one, and their neglect to prosecute it cannot be allowed to operate to the prejudice of Flanders; that the Circuit Court had no jurisdiction in the suit; that Seelye lost all recourse against Flanders, if any he ever had, by reason of his failure to plead to the jurisdiction of the Circuit Court in the suit, and because of his failure to prosecute said writ of error; and that Flanders is not responsible for the costs incurred by Seelye in the suit, or for his counsel fees therein. The answer concluded with these words: "And for all such matters and things in plaintiff's petition contained as are not herein replied to, respondent for answer pleads the general

issue, and prays to be hence dismissed with costs." The suit was tried by a jury in the Circuit Court in April, 1873. On the 19th of March, 1874, the court set aside the verdict and granted a new trial. On the 27th of March, 1874, an exception was filed, alleging, as a peremptory exception to the petition and the action, that the allegations in the petition, if true, as pleaded, are insufficient in law to entitle the plaintiff to any recovery against the defendant, "for the same do not disclose any cause of action in behalf of said plaintiff against said defendant." The suit remained in this condition for nearly five years, when, in January, 1879, the defendant pleaded all applicable prescriptions as a peremptory exception. Then the parties filed a written stipulation agreeing to waive the intervention of a jury, and submitting the cause to the court "upon the issues of fact as well as of law. The findings and the judgment of the Circuit Court are embraced in one paper. It states that the court, "having heard the evidence and the arguments of counsel, overrules all the exceptions taken by defendant to the plaintiff's petition." It then specially finds the facts, and awards judgment to the plaintiff for $6,233.61, with interest and costs. It also grants a certificate of probable cause for the seizure of the cotton, and for all the doings of Flanders in the premises, as deputy general agent of the Treasury Department of the United States, and directs that no execution shall issue on the judgment. There is no bill of exceptions in the record. As the findings are special, the review by this court may extend to the determination of the sufficiency of the facts found to support the judgment.

The following facts were found by the Circuit Court, only those being stated here which are material in the view we take of the case, although some others were found: The 178 bales of cotton while in the possession of Harrison were, under color of the above-cited act, seized by an assistant special agent of the Treasury Department of the United States. They were shipped from Shreveport, consigned to one Burbridge, supervising special agent of the Treasury Department at New Orleans, subject to charges and freight amounting to $5,907.45. Seelye's firm received the cotton from a steamboat and gave a receipt for it, which stated that they held it subject to the

order of the collector of the port of New Orleans. The firm paid the amount of freight and charges to the steamboat, on an order signed by Flanders, as deputy general agent, reading thus: "Seelye & Atwood's press will pay the within charges and hold the amount against the cotton." This was in March, 1866. On the 18th of April, 1866, Flanders, as such deputy general agent of the Treasury Department, issued an order to Burbridge, as such supervising special agent, directing him to release the cotton to Harrison, on his giving a bond in $25,000, to save harmless the government of the United States for seizure, detention, or damage. On the same day Harrison executed his bond in that amount, in which he bound himself to save harmless the seizing agent, and all other agents and officers of the Treasury Department, and also the government of the United States, on account of the seizure and detention of the cotton and on account of any damages they might sustain by reason of said seizure. On the next day Burbridge issued an order, directing Seelye & Atwood to deliver the cotton to Harrison, on his paying all proper and legitimate charges, including the charges for transportation to Shreveport. The firm delivered the cotton to Harrison on the 23d of April, and he then paid them the $5,907.45, claimed as charges on the cotton, and they gave him a receipt for it, which stated that he reserved "all rights or claims not relinquished under order of the treasury agent who released said cotton to him." Shortly afterwards Harrison sued the firm in a court of the State to recover back the amount so paid by him. The firm removed the suit into the Circuit Court of the United States, and filed their answer, averring that they received the cotton by order of Flanders, special agent of the Treasury Department, and by his order paid the charges on the same, which were reimbursed to them by Harrison on the delivery of the cotton, and that the same were lawful charges on the cotton, acquiesced in and paid by Harrison on the delivery of the cotton, and further pleading a general denial. In February, 1868, a final judgment was rendered in favor of Harrison against the firm for $4,661.45, from which the firm sued out a writ of error to this court, which was, in December, 1870, dismissed, with costs, for want of prosecution. In July, 1871, Seelye paid, out of his indi-

vidual means, to Harrison, $5,891.44, in full satisfaction of said judgment and costs. In defending the suit Seelye paid, from his individual means, $92 costs and $250 counsel fees.

As grounds for reversing the judgment below, the counsel for the plaintiff in error contends, in his brief, that there is nothing to show that Harrison could have regained the cotton except upon the very conditions which he accepted, namely, that he would receive it at New Orleans and defray all charges connected with its having been carried thither; that except the redelivery of the cotton, the record shows nothing to defeat the presumption, arising from the time and place of the seizure, that the cotton was properly captured and might have been held; that the judgment obtained by Harrison was *res inter alios*, as against Flanders; that Seelye cannot recover in this suit without showing that he could not have successfully resisted the suit by Harrison; that the agreement of Harrison to hold the United States harmless on account of the seizure required him to repay to the United States any money which they had already paid upon that account, as well as any which they might thereafter pay because of obligations then existing; that the question in its present form is not affected by the fact that Harrison paid Seelye without waiting for the United States to pay Seelye and then demand repayment from Harrison; that, in point of right, Harrison, by paying Seelye, paid his own debt; that his accepting from Burbridge an order for the cotton, on paying all proper and legitimate charges, including the charges for transportation to Shreveport, is a contemporaneous interpretation of what was meant by saving the United States and their agents harmless; that, originally, Seelye & Atwood might have recovered from the United States, or, perhaps, from Flanders, for the freight and charges paid on the order of Flanders, but the acceptance of payment from Harrison, who acted in the matter substantially as an agent of the United States, ended the original obligation; and that no subsequent transaction between Harrison and Seelye, whether voluntary or involuntary on the part of Seelye, could revive such obligation, or impose any new duty in the premises on either the United States or Flanders.

It is manifest that the judgment rendered against Flanders

in the present suit is founded on the fact that Harrison recovered his judgment against the firm, and that Seelye paid to Harrison the amount of that judgment, and also paid the expenses of defending the suit in which the judgment was recovered. The petition shows this, and so do the findings and judgment. The amount claimed by Seelye in the petition and the amount recovered by him is the exact amount of the Harrison judgment recovered July 13, 1871, and of the costs and counsel fees paid by Seelye. Prior to the bringing of the suit by Harrison, the firm had been fully reimbursed by Harrison, for the charges which they had paid and incurred on the order of Flanders. Although that judgment, and the payment by Seelye of its amount and of the expenses attendant on the defence of the suit, are the sole ground of the claim made in the present suit and the sole foundation of the judgment recovered in it, yet Flanders was neither a party nor a privy to the suit brought by Harrison, and it is not alleged in the petition nor found as a fact by the Circuit Court, that Flanders, or the government of the United States, or any officer or agent of the government, had any notice of the bringing or pendency of the suit brought by Harrison, or any opportunity to assume or control or take part in its defence. The recovery in the present suit is, by the operation of the certificate of probable cause granted by the Circuit Court, under sect. 989 of the Revised Statutes, made substantially a recovery against the government, to be paid out of the treasury. All relationship between Seelye and his firm on one side and the government and its agents and officers on the other side, ceased entirely when the firm was reimbursed by Harrison and the cotton was delivered to Harrison. The firm held the cotton, by authority of Flanders, as security for the charges which they paid by his order, and they held it as security also for their storage charges. They parted with the cotton because all their claims against it were reimbursed, and with the closing of that transaction their agency and that of Seelye as representing the government, or Flanders, in any capacity, in connection with the transaction, entirely ceased. Neither the firm nor Seelye had any such representative capacity in defending the suit brought by Harrison. There is not in the petition any allegation of any fact which

tends to show that the government or Flanders is bound by the judgment in the suit brought by Harrison, nor is any such fact stated in the findings made by the Circuit Court. The petition merely alleges that all that Seelye did, and all that he was compelled to pay, was the direct result of the orders of Flanders, and that Flanders is bound to reimburse to him the amount so paid, either in direct obedience to his orders or as the necessary result of that obedience. The payment of the Harrison judgment was, however, in no proper sense the result of any obedience to any order of Flanders. Not only is there not in the special findings any finding of any facts which tend to make the Harrison judgment of any binding or probative force as against Flanders, as a party or a privy to it, but the finding in regard to the Harrison bond is conclusive to show that no judgment in favor of Harrison against Seelye & Atwood can be used to aid in establishing the present claim against Flanders and the government, unless it appears affirmatively that they had notice of the Harrison suit and an opportunity to defend it. The answer of Flanders in the present suit alleges that the charges which he directed Seelye & Atwood to pay were legal charges on the cotton under the act of Congress referred to, and that they were refunded to them by Harrison, "as an admitted claim." It also alleges that Seelye & Atwood, in their answer in the Harrison suit, averred that the charges which they paid were lawful charges on the cotton, and were acquiesced in by Harrison and reimbursed to them. Proof of such admission of, and acquiescence in, the claim, by Harrison, was, therefore, admissible, and was made by proving that Harrison gave at the time the bond referred to. In view of the provisions of that bond it is difficult to see why, as against Flanders, Harrison is not debarred from saying that he did not admit and acquiesce in the lawfulness and propriety of the charges which he paid to Seelye & Atwood. His bond was given to save harmless the government and the agents of the Treasury Department, "on account of the seizure and detention of said cotton, and on account of any damages they might sustain by reason of said seizure." The charges reimbursed to Seelye & Atwood by Harrison grew directly out of the seizure and detention of the cotton, and any amount which might be

paid on the recovery in the present suit would be covered by the terms of the bond. The bond covers not merely damages for taking and keeping the cotton, but the agreement is to hold the government and Flanders harmless on account of the seizure and detention. This covers the expenses attending the removal and keeping of the cotton. The act of 1863 expressly makes the expenses of transporting and disposing of captured property a charge upon its proceeds even where a claimant establishes a right to such proceeds. In any event, therefore, before the recovery by Harrison against Seelye & Atwood can be made the foundation of a cause of action or a recovery by Seelye against Flanders, it must appear that he had a fair opportunity to set up as against such recovery by Harrison the said matters of defence to his claim. Proving in the present suit the giving of the bond by Harrison was proving that Flanders had a good defence to the suit brought by Harrison against Seelye. Such proof, having been given, must be regarded as having been properly given, under the answer. It was proof of the admission by Harrison of the claim of Seelye & Atwood, as is alleged in the answer. It does not appear that Flanders had any notice of the Harrison suit, or any opportunity to make therein the defence referred to. It was necessary that it should so appear, the existence of such defence being established. It is not for Flanders to show that he had no notice, by proving a negative.

Our attention has been called to the provisions of articles 378, 379, 382, and 388 of the Code of Practice of Louisiana, as having a bearing on this case. They are as follows: "Art. 378. The obligation which one contracts to defend another in some action which may be instituted against him is termed *warranty*. The one who has contracted this obligation is called the warrantor." "Art. 379. . . . Personal warranty is that which takes place in personal actions; it arises from the obligation which one has contracted to pay the whole or a part of a debt, due by another to a third person." "Art. 382. The defendant wishing to call one in warranty, may, in his answer, pray the court to decree against his warrantor the same judgment which may be rendered against him on the principal action; such prayer will be considered as a demand in war-

ranty." "Art. 388. The defendant, though he has not called his warrantor to defend the suit brought against him, does not lose on that account his action in warranty, unless the warrantor prove that he had means for defending the action, which were not used owing to the defendant having failed to call him in warranty, or having neglected to apprise him of the suit having been brought." In *Sterling* v. *Fusilier* (7 Mart. (La.) 442), the Supreme Court of Louisiana, in reference to provisions of the Civil Code like those just cited, says that the neglect of a person sued in failing to call in his warrantor to defend the suit, has no other effect, in a suit afterwards brought by such person against his warrantor, than to cause the warranty to cease, on proof, in the latter suit, that the warrantor had sufficient grounds or means of defence to have obtained a judgment in his favor, of which he could not avail himself for want of having been called on; and that that species of defence must be pleaded and proved. Assuming that Flanders was still a warrantor to Seelye & Atwood when the suit by Harrison against that firm was brought, we are of opinion, for the reasons before stated, that it appears in this case that Flanders had a sufficient defence to have obtained a judgment in his favor if he had been called in warranty in the Harrison suit, or been notified of the bringing of that suit, and that he could not avail himself of that defence in the Harrison suit, for the reason that he was not called in warranty or notified of the bringing of that suit. That defence is not only proved in this suit, but is sufficiently pleaded, as is before shown. There is nothing in article 388 of the code which requires Flanders to prove anything more than he has proved in this suit. The existence of the defence being proved, the presumption is that it would have been proved and availed of, in the Harrison suit, by Flanders, if he had been called in warranty or been notified of the bringing of the suit, and it is then for the plaintiff in this suit to rebut such presumption, which has not been done.

Judgment reversed, and cause remanded with directions to award a new trial.

MR. JUSTICE FIELD, MR. JUSTICE BRADLEY, and MR. JUSTICE WOODS dissented.

COUNTY OF RALLS *v.* DOUGLASS.

1. County bonds issued in Missouri by a *de facto* county court, which are sealed with the seal and signed by the *de facto* president thereof, cannot, when held by *bona fide* purchasers, be impeached by showing that he was not *de jure* a member of the court.
2. It is no defence to a suit on such bonds so held that the company, in payment of the county subscription to whose capital stock they were issued, was not organized within the period prescribed by law.
3. The validity of such bonds cannot be impeached upon the ground that after the Constitution of Missouri of 1865 took effect they, without a vote of the people authorizing it, were issued to pay for such a subscription, if the latter was made pursuant to the authority of the charter granted to the company in 1857.
4. Such bonds so issued are admissible in evidence, although no internal revenue stamp is thereunto affixed.
5. In a suit against the county on the bonds, the execution of them is admitted, unless it be denied by a plea or an answer, verified by affidavit.
6. Where the ownership was alleged in the petition, and the answer denied that the coupons were, in good faith and before they matured, owned by the plaintiff, evidence of the fact is admissible.

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

This suit was brought by Joseph M. Douglass against the County of Ralls, to recover the amount due upon certain interest coupons detached from bonds issued by the defendant in payment of its subscription to the capital stock of the St. Louis and Keokuk Railroad Company, which was incorporated by an act of the General Assembly of Missouri approved Feb. 16, 1857.

The section of the act under which the county claimed the right to subscribe is set forth in the opinion of this court in the following case, p. 733.

The bonds are sealed with the seal of the county court, tested by the clerk, and countersigned by the agent of the county. Those bearing date Feb. 10, 1870, recite that they are issued under the authority of said act, and in pursuance of an order of the county court of Feb. 8, 1870, to subscribe $200,000 to the capital stock of that company. Those bearing date June 13, 1871, differ in their recitals from the others, in stating that they are issued in pursuance of that

order and of an order amendatory thereof dated June 13, 1871.

A demurrer was sustained to several of the defences set up in the answer. Upon the issues of fact the jury rendered a verdict for the plaintiff, and, judgment having been rendered thereon, the county brought this writ of error. The questions arising upon the demurrer and during the trial are stated in the opinion of the court.

Mr. Henry A. Cunningham for the plaintiff in error.

Mr. John H. Overall for the defendant in error.

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

If we understand correctly the questions presented in this case, they are —

1. Whether, if county bonds are issued in Missouri by a *de facto* county court, and are sealed with the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.

2. Whether it can be shown as a defence to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter.

3. Whether bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are invalid if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken.

4. Whether county bonds and coupons issued in the years 1870 and 1871, in payment of subscriptions to railroad companies, were admissible in evidence on the trial of an action against the county for the recovery of the amount due thereon, if not stamped as obligations for the payment of money under the provisions of the internal revenue laws of the United States in force at the time of their issue.

5. Whether in this suit it was necessary to prove the order

of the county court authorizing the president of the court to sign and the agent to countersign the bonds, there being no plea or answer sworn to denying the execution of the bonds or coupons sued on.

6. Whether testimony was admissible to prove that the plaintiff was a *bona fide* holder and owner of the coupons sued on, there being no averment in the petition to that effect.

There are other questions presented by the assignments of error, but they are not alluded to in the argument, and we do not deem them of sufficient importance to require attention.

1. As to the competency of the court.

In no State is it more authoritatively settled than in Missouri that "the acts of an officer *de facto* (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done." In *State* v. *Douglass* (50 Mo. 593, 596), the Supreme Court of that State said: "Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established." To the same effect is *Harbaugh* v. *Winsor*, 38 id. 327. This is conclusive. The question here is not whether Dimmick was *de jure* probate judge of Ralls County, but whether he was acting under color of right as a justice and president of the county court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action while exercising the duties of the office, another.

2. As to the organization of the company.

Both this court and the Supreme Court of Missouri have held over and over again that such a defence as was here set up cannot be maintained. *Hale Bank* v. *Merchants' Bank of Baltimore*, 10 id. 123; *Kayser* v. *Trustees of Bremen*, 16 id. 88; *Smith* v. *County of Clark*, 54 id. 58; *City of St. Louis* v. *Shields*, 62 id. 247; *County of Macon* v. *Shores*, 97 U. S. 272.

3. As to the vote of the people.

The Supreme Court of Missouri has many times decided, and this court, following such decisions, has always held, that the provision in the State Constitution of 1865, art. 11, sect. 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation without a vote of the people, was intended as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the Constitution took effect. *State* v. *Macon County Court*, 41 Mo. 453; *Kansas City, &c. Railroad Co.* v. *Alderman*, 47 id. 349; *State* v. *County Court of Sullivan County*, 51 id. 522, decided in 1873, in which it was said, "it has always been held that the provision of the Constitution, art. 11, sect. 14, was a limitation upon the future power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted;" *State* v. *Greene County*, 54 id. 540; *County of Callaway* v. *Foster*, 93 U. S. 567; *County of Scotland* v. *Thomas*, 94 id. 682; *County of Henry* v. *Nicolay*, 95 id. 619; *County of Cass* v. *Gillett*, 100 id. 585. When all these cases were decided the act of March 23, 1861, was in force, which provided that it should not be lawful for counties to subscribe to the stock of railroad companies until an election had been held under the provisions of that act, yet it seems never to have been specially referred to, either by counsel or the court, except once in *Smith* v. *Clarke County* (54 Mo. 58, 70), when Napton, J., said: "So that the provisions of the revised code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as their reports show, not to effect the repeal of the privileges contained in special charters."

Such being the condition of the law on this subject down to April, 1878, we do not feel inclined to reconsider our former rulings, and follow the later decisions of the Supreme Court of the State in *State* v. *Garroute* (67 Mo. 445) and *State* v. *Dallas County* (72 id. 329), where this whole line of cases was substantially overruled. The bonds involved in this suit were all in

the hands of innocent holders when the law of the State was so materially altered by its courts. In our opinion, the rights of the parties to this suit are to be determined by the "law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." *Douglass* v. *Pike County*, 101 U. S. 687.

4. As to the stamps.

The act of July 13, 1866, c. 184 (14 Stat. 141), amending sect. 154 of June 30, 1864, c. 173 (13 id. 293), provided that all official instruments, documents, and papers issued by the officers of the United States government, or by the officers of any State, county, town, or other municipal corporation, should be exempt from taxation. This exempted the class of public securities to which these bonds and coupons belong. It is, indeed, said in a proviso that the intention was only to exempt State, county, town, or municipal corporations from taxation while in the exercise of the functions strictly belonging to them in their ordinary governmental and municipal capacity; but that does not, as we think, affect this case. These bonds were issued by this county in its municipal capacity, and for purposes which were declared by law to be municipal.

5. As to the proof of authority from the county court.

It is conceded that, under the practice in Missouri, unless the execution of the bonds was denied under oath, their execution was admitted. There was no such denial here. Hence it was only necessary to prove such facts connected with the execution as were directly put in issue by the pleadings. The only defence relied on under this branch of the case was the authority of the court to make the order it did. All else was, therefore, admitted. As the presiding judge was necessarily the president of the court, the bonds are not invalid because signed by the president as presiding judge.

6. As to proof of *bona fide* ownership.

Ownership was alleged in the petition. This ownership at the maturity of the coupons and for value was denied in the answer. This clearly made the evidence not only proper but necessary.

Since all the defences relied on involved questions of law only, except that as to *bona fide* ownership, and the court

correctly decided the legal propositions in favor of the plaintiff, it was not error to instruct the jury to bring in a verdict for the plaintiff if they believed he was a *bona fide* holder and owner of the coupons sued for.

Judgment affirmed.

MR. JUSTICE BLATCHFORD did not sit in this case, nor take any part in deciding it.

RALLS COUNTY COURT *v.* UNITED STATES.

1. Where judgment has been duly obtained in Missouri against a county upon coupons detached from its bonds, no defence which questions their validity can be pleaded to a *mandamus* commanding the county court to pay the judgment from moneys in the treasury, or raise the means therefor by the levy of a special tax.
2. If not restrained by some valid special limitation upon the exercise of its taxing power, a county, authorized by law to contract an extraordinary debt by the issue of negotiable securities, can levy a tax sufficient to meet the principal and interest, as they respectively mature. *United States* v. *New Orleans* (99 U. S. 582) cited upon this point and approved.
3. A general law confining the annual tax "to defray the expenses of the county" to a fixed per centum is not applicable to such a debt.
4. After the debt was created, laws passed, depriving the county court of the requisite power to levy the tax which it possessed when the bonds were issued, are invalid.

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. Henry A. Cunningham for the plaintiff in error.

Mr. John H. Overall, contra.

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

Section 29 of the act to incorporate the St. Louis and Keokuk Railroad Company, approved Feb. 16, 1857, is as follows: —

"It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends."

Under this authority the County Court of Ralls County subscribed $200,000 to the stock of the company, and, during the years 1870 and 1871, issued bonds of the county to pay the subscription. Default having been made in the payment of coupons for interest attached to some of these bonds, Douglass brought suit against the county, in the Circuit Court of the United States for the Eastern District of Missouri, for their recovery, and, on the 16th of October, 1878, obtained judgment for $17,158.43. That judgment was affirmed in *County of Ralls* v. *Douglass*, *supra*, p. 728.

After the judgment was rendered in the Circuit Court, the present suit was begun by the United States, on his relation, to require the county court, by *mandamus*, to pay the amount due out of moneys in the treasury of the county; or, if that could not be done, to raise the necessary means by the levy of a special tax. In the return to the alternative writ many defences were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defences, it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and, as such, entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri in *State* v. *Rainey* (74 Mo. 229), and the principle on which the decision rests is elementary.

The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defences that can be considered are those which may be presented in

the proper course of judicial procedure against the collection of valid coupons, executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.

This brings us to consider what may be done to enforce the judgment. The county court insists that its power of taxation is limited to the levy of an annual tax of one-half of one per cent on the taxable property in the county, and that as this tax has always been levied at the times provided by law, the duty of the court in the premises has been fully performed. The relator, on the contrary, claims that the limit of one-half of one per cent only applies to taxes to defray the general expenses of the county, and that if the fund produced in this way is not sufficient to enable the county to pay his judgment, an additional tax must be levied and collected specifically for that purpose. This presents the real controversy we have to settle.

When the charter of the St. Louis and Keokuk Railroad Company was granted, when the subscription was made to its stock by the county court, and when the bonds to pay the subscription were put out, there were limitations on the powers of the county court for the levy of taxes to defray the expenses of the county which confined the tax for a year to one-half of one per cent or less. The question we have to consider is not whether this power has been reduced below that limit, but whether the limit is applicable to the obligation of the county created under the authority of the particular charter now in question.

It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.

The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation. This general doctrine has been so many times announced, that it cannot be necessary now to do more than refer to *Loan Association* v. *Topeka* (20 Wall. 655), where the opinion was given by Mr. Justice Miller, and *United States* v. *New Orleans* (98 U. S. 381), in which Mr. Justice Field, speaking for the entire court, went elaborately over the whole subject. In *United States* v. *County of Macon* (99 id. 582), there was a special limitation on the power to tax coupled with the authority to contract, and because the legislature saw fit to say how much of a tax in addition to that otherwise provided might be levied to meet the new and extraordinary obligation which was contemplated, it was held that a prohibition against anything more was necessarily to be inferred.

In the present case there is no such special limitation. The defence rests entirely on the power to tax to "defray the expenses of the county," which it has always been the policy of the State to restrict. The county court was, however, not only authorized to issue bonds, but to "take proper steps to protect the interest *and credit* of the county." It would seem as though nothing more was needed. As the commercial credit of the county, in respect to its negotiable bonds, could only be protected, under ordinary circumstances, by the prompt payment of both principal and interest, at maturity, and there is nothing to show that payment was to be made in any other way than through taxation, it necessarily follows that power to tax to meet the payment was one of the essential elements of the power to protect the credit. If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other. Here it seems to have been understood by the legislature that the ordinary taxes might not be enough to enable the county to meet the extraordinary obligation that was to be incurred, and so, without placing any restriction on the amount to be

raised, the county court was expressly empowered to do *all* that was necessary to protect the credit of the county. We cannot agree to the position taken by the counsel for the plaintiff in error, that this power was exhausted when the bonds were issued to pay the subscription. The faith of the county pledged by the subscription was kept when the bonds were put out, but only by transferring the credit to be protected from the subscription to the bonds. The subscription was paid by the bonds; but the obligation to pay the bonds, principal and interest, when they matured was legally substituted.

We have been referred to many instances in which statutes were passed authorizing special taxes to pay bonds which had long before been issued under original authority like that contained in the present charter; but this does not, in our opinion, change the case. Such legislation seems to have been procured out of abundant caution; but in none of the numerous cases in the Missouri reports, to which our attention has been directed, is it anywhere said that the requisite tax could not have been levied but for such legislation. In *State* v. *Dallas County Court* (72 Mo. 329), and some other cases before, it was held that such a provision as that contained in the charter of the St. Louis and Keokuk Railroad Company, now under consideration, was repealable; but none of the judges whose decisions have been published intimate even that if there had been no repeal there could not be a tax. It has been many times decided that county courts in Missouri, while acting as the governing bodies of their counties, which are nothing more than political subdivisions of the State, have no implied powers. Authority must be conferred on them by law to act, or they cannot act at all. This is not peculiar to the county officials of Missouri. The same principle applies to all municipal organizations in all the States, and in this respect it matters but little whether the organization exists as a full corporation or a *quasi* corporation. The point is that all such organizations for local government, by whatever name they may be called, have only such powers as the legislatures of their respective States see fit to delegate to them. But all powers that are delegated may be exercised in any proper way and at all proper times.

This makes it unnecessary to consider whether the power of taxation given by the general railroad laws in force when these bonds were made can be invoked in aid of the relator. It is enough that we find sufficient power in the charter of the company itself, without looking elsewhere. We ought, perhaps, to say, however, that the remark in the opinion in *United States* v. *County of Macon* (99 U. S. 582, 591), to the effect that the power of taxation granted by the general railroad laws was confined to subscriptions authorized by them, should be construed as made in a case where a special limitation on the power to tax was contained in the charter which authorized the issue of the bonds then in question, and that it was only necessary to decide that the railroad laws did not enlarge that power. The language there used may be broader than on further consideration we shall be willing to agree to. That case is authority on this point only to the extent it was necessary then to decide.

It follows from this that all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the Circuit Court had authority by *mandamus* to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defence to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not the creditors. The writ as issued was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court *cause the tax to be collected* is in excess of the requirements of the law, when the justices of the court are called on to show why they have not obeyed the order. The same may be said of the order to draw the warrant on the treasurer. As at present informed, we see no irregularity in anything that has been done.

The judgment of the Circuit Court will be affirmed, and the cause remanded, with leave to the court to make such changes in the order originally entered as may have become necessary by reason of the time that has elapsed since the writ of error was brought; and it is

So ordered.

MR. JUSTICE BLATCHFORD did not sit in this and the case mentioned in the following note.

NOTE. — *Lincoln County Court* v. *United States*, error to the same court, was argued at the same time and by the same counsel as the preceding case.

MR. CHIEF JUSTICE WAITE, on behalf of the court, remarked that the cases differed only in one particular. Here the bonds were not actually delivered until after the statute requiring registration went into effect, though they were in the hands of the agent for delivery before. It is contended that on this account no special tax can be levied for their payment, notwithstanding the judgment that has been recovered upon them. In our opinion this is a defence that cannot be taken advantage of after judgment. As has been said in the Ralls County case, it was conclusively settled by the judgment, which this proceeding is to carry into execution, that the coupons sued on were binding obligations of the county, duly created under the authority of law, and as such are entitled to payment out of any fund that can lawfully be created for that purpose.

Judgment affirmed and the cause remanded, with the same order as in that case.

LEWIS *v.* COMMISSIONERS.

1. The act of Kansas approved March 2, 1872 (Laws of Kansas, 1872, p. 110), does not require that the bonds issued pursuant to its provisions by a county in aid of works of internal improvement shall in all cases be deposited with the treasurer of state before they are delivered to the auditor of state for registration and for his certificate thereon, required by the fourteenth section. *Infra*, p. 742.
2. That certificate, as between the *bona fide* holder for value and the county, is conclusive that the bonds, which by their terms purport to be issued under that act, and which absolutely and unconditionally covenant to pay a certain sum of money at a time and place therein named, are negotiable as the valid obligations of the county.

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

This case depends upon the construction of an act of the legislature of Kansas, approved March 2, 1872. Laws of Kansas, 1872, p. 110.

The first section provides that the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk, and treasurer of any municipal township in the State, may issue the bonds of such county, city, or township, in any sum necessary, not greater than ten per cent, inclusive of all other bonded indebtedness, of the taxable property of such county, city, or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement. It also declares that all counties may, in addition to the amount therein authorized, issue bonds not exceeding $100,000.

The second section provides that the bonds so issued shall be payable at such place in the city of New York as the officers issuing the same may direct, in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent per annum, "all in the discretion of the officers issuing the same," the interest to be payable semi-annually, and evidenced by coupons attached, — such bonds, if issued by a county, to be signed by the chairman of the board of county commissioners, and attested by the county clerk.

The third section declares that, before any bonds are issued, the same shall be ordered by a vote of the qualified electors of the municipality.

The eighth section provides, among other things, that if the proposition voted for be to aid in the construction of a railroad (either by donation thereto or the taking of stock therein), or other work of internal improvement, that the proper officers of the municipality shall at once subscribe upon the books of the railroad company, "specifically setting forth the conditions upon which such subscription is made, the amount of such donation thereto, stock taken therein, or bonds voted therefor."

The eleventh section, upon the construction of which the case turned in the court below, is in these words: —

"That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge, or other work of internal improvement, either by donation thereto or the taking of stock therein, then, upon the subscription being made, as hereinbefore provided, the officers of such county, city, or township [shall thereupon issue the bonds of such county, city, or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original or a copy of the subscription, setting forth its terms in full, to the treasurer of state, which said bonds shall be held by the said treasurer of state, in escrow, until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of said subscription being in all things fully complied with, then the treasurer of state shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, that such bonds shall not bear interest or be negotiable until after the delivery and registration thereof: *And provided further*, that in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the treasurer of state cancelled, and redelivered to the county, city, or township issuing the bonds: *And provided further*, that this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

The twelfth section makes it the duty of the municipality issuing the bonds to register the same in a book kept for that purpose, showing the date, amount, maturity, and rate of interest, and, if to aid in the construction of a railroad or other work of internal improvement, of what railroad or other work of internal improvement, and whether the same be a donation or for stock therein; and at the same time transmit to the auditor of state a certified statement, attested by the clerk, under the corporate seal of the municipality, of the number, amount, character of the bonds, to whom, and for what purpose, issued.

The thirteenth section declares it to be the duty of the clerk of each county, city, or township in the State, within sixty days after the act took effect, and thereafter on the first day of January and July of each year, and at such other times as the auditor may request, to transmit to that officer a certified, full,

and complete statement of the bonded indebtedness of every description of said municipality, particularly setting forth the nature of such bonds, and for what they were issued. From such statement the auditor is required to make a faithful record of the bonded indebtedness of the several counties, cities, and townships of the State, noting therein all bonds subsequently issued, paid, or cancelled, as the same may be reported to him.

The fourteenth section has an important bearing upon the case, and is in these words: —

"Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof."

The remaining sections, among some things of an unimportant character, provide that the auditor shall annually ascertain the amount accrued and to accrue before the tax of the succeeding year shall be levied and collected (for the final redemption of the same), upon all bonds registered in his office, and certify the amount thereof to the clerk of the county in which the bonds are issued; that the clerk of the county shall thereupon proceed to ascertain the amount of tax necessary to pay the interest and create a sinking fund, in compliance with the auditor's certificate; that the county treasurer shall, at the time of his annual settlements with the State treasurer, pay over to the latter moneys collected under the act, take duplicate receipts therefor, one copy of which shall be filed with the auditor of state; that the State treasurer, out of the moneys so received, shall pay off the interest accrued upon such registered bonds, taking up the interest coupons, which shall be cancelled

and filed with the auditor of state; that the moneys thus collected and remaining in the hands of the State treasurer, after the payment of the interest accrued, except that accruing for the current year, shall be retained as a sinking fund for the final redemption of the bonds; that when any registered bonds mature, the same shall be paid by the State treasurer out of any money in his hands for that purpose, and, when paid, cancelled and filed with the auditor, who shall enter satisfaction in the record of registration; that the treasurer and auditor of state shall annually publish a detailed statement of the business transacted by them under the act during the preceding year; and that the State shall be deemed the custodian only of the taxes so collected, and credited to such municipality, in no manner liable on account of such bond; but the tax and funds so collected to be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds until fully satisfied, the State treasurer to be liable on his official bond for the faithful disbursement of all moneys so collected or received by him.

The case was, by stipulation of the parties, submitted for trial to the court. There was a finding for the defendants. Judgment having been entered thereon, Lewis brought this writ of error.

Submitted on printed arguments by *Mr. James Grant* for the plaintiff in error, and by *Mr. Edward Stillings*, *Mr. Thomas P. Fenlon*, and *Mr. A. M. F. Randolph* for the defendants in error.

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

At an election held on the 27th of August, 1873, in the county of Barbour, State of Kansas, the qualified voters gave their sanction to a donation of $100,000 in bonds of the county, to aid in the construction of the Nebraska, Kansas, and Southwestern Railroad. By the terms of the proposition voted on, the bonds were to be placed in the hands of the State treasurer, who was to deliver to the railroad company one-half of them when the proposed road should be constructed to Medicine Lodge, and the remainder of them when

it should be completed through the county. A few days after the election, they were signed, sealed, and attested by the proper officers of the county, in conformity with the order of the board of commissioners. They are dated Sept. 1, 1873, and payable to the railroad company, or bearer, with interest, semi-annually, at the rate of ten per cent per annum, payable at the National Park Bank in the city of New York. Each is signed by the chairman of the board of county commissioners, is attested by the county clerk, and purports, upon its face, to be "one of a series of one hundred bonds of one thousand dollars each, all of like tenor and date, . . . issued for the purpose of aiding in the construction of the Nebraska, Kansas, and Southwestern Railroad, through said Barbour County, in the State of Kansas, under and in pursuance of an act of the legislature of the State of Kansas, entitled 'An Act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872."

There is nothing upon the face of the bonds indicating that the donation was otherwise than absolute and unconditional.

They were left by the county officers with one Hutchinson, to be deposited with the treasurer of state, as required by the terms of the proposition upon which the people had voted. But they were never so deposited, and by Hutchinson were procured to be registered by the auditor of state, and then fraudulently put in circulation.

An indorsement was made upon each bond as follows: —

"STATE OF KANSAS, *ss:*

"I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

"In witness whereof I have hereunto set my hand and affixed my seal of office, at Topeka, this nineteenth day of November, 1873.

"D. W. WILDER, *Auditor.*"

Lewis purchased the bonds and coupons before the maturity of any of the coupons, and (according to our interpretation of the facts specifically found) without notice of any fraud in their execution or issue, unless, as claimed by the county commissioners, such notice was furnished by the terms of the act above mentioned. He brought the present action against the board of commissioners of the county, to recover the coupons due Sept. 1, 1875, March 1, 1876, and Sept. 1, 1876. The defence, which was sustained in the court below, is placed upon the ground that the bonds were issued in plain violation of that act, and that all persons, whether purchasers in good faith or not, were required to take notice of the fact that they were not binding obligations of the county.

We have carefully considered the reasons upon which the judge of the Circuit Court based the conclusion that the county was not liable upon the bonds even in the hands of a *bona fide* purchaser for value. His opinion seems to proceed upon these grounds: That under the act of 1872 it was a condition precedent that the bonds should not bear interest nor be negotiable until they should pass through the hands of the State treasurer, he alone being invested with authority to determine when they were to be delivered to the parties entitled thereto, for the purposes of registration; that the requirement of that condition was manifest from the statute, of the terms of which all were bound to take notice; that although the bonds, on their face, disclosed no conditions whatever for their delivery, the purchaser should have ascertained whether, prior to their registration, they had, in the first instance, been deposited with that officer as escrows, and that he could not take the certificate of the auditor as conclusive evidence that the statute had been pursued; that as the bonds were not placed in the hands of the treasurer, they never had the quality of negotiability, and could not, therefore, have been rightfully registered, nor their regularity and legality certified by the auditor under his seal of office; and since the conditions affixed by the popular vote had never been performed by the construction of the proposed road, the bonds were not the valid obligations of the county.

We are unable to concur in some of the views expressed by

the learned judge, especially in his conclusion that the bonds are not enforceable against the county. The fundamental proposition upon which that conclusion seems to rest is, that bonds executed under the act of 1872 could not, consistently with its purpose and language, be registered and issued, even when the subscription was payable immediately and without conditions, unless, in the first instance, they be delivered to the treasurer of state, and be by him delivered to the party entitled thereto. This interpretation is not, we think, justified by any fair construction of the act. Under some circumstances, distinctly disclosed upon its face, it is not at all necessary that they be delivered to the treasurer in order that they may be registered and become the valid obligations of the municipality, in whose name they are issued. The last proviso of the eleventh section expressly declares that that section — the only one which refers to the custody of the bonds by the State treasurer — "shall not apply when the people have named some party as trustee in their vote upon the proposition, and the contractor [that is, as we suppose, the railroad company proposing to do the work of construction] may thereafter agree to the same." If the people on one side, and the company on the other, agree upon a trustee to hold the bonds until certain contingencies happen, or certain terms or conditions are performed, the statute explicitly declares the eleventh section shall not apply. Again, suppose the people had voted — as, it would seem, that under sects. 1, 2, and 3, they might have done — for a donation, or a subscription of stock, to be paid in bonds deliverable at once, without any conditions or terms whatever. Could it be claimed that the bonds must, of necessity, have been delivered to the treasurer of state? If so, for what purpose could he have received them? What ends could have been subserved by his custody of them, when to their delivery no conditions were attached? When should he, in such case, have delivered them to the parties entitled thereto? If, in the case supposed, the company, under the agreement with the county, and under the vote of the people, became entitled, at once, to the bonds for the purpose of having them registered, and the required certificate of the auditor indorsed thereon, it cannot be that the legislature intended the parties to perform

the idle ceremony of passing them through the hands of the treasurer, to be by him immediately surrendered to the proper parties. That officer, in the case put, has no duty to perform, such as the act imposes when conditions are attached to a subscription. For these reasons we are of opinion that the eleventh section, in so far as it requires a delivery of bonds to him, has no application except in cases where, to the subscription of stock, or to the donation, are annexed conditions to be complied with before that officer may rightfully surrender the bonds intrusted to him. The object of that section is to prescribe a mode in which the people of a county may, if they pursue the statute, be protected, in some degree, against a premature delivery of county bonds by local officers in advance of the performance of conditions imposed by the popular vote.

If we are correct in this view, it follows that the purchaser of these bonds was not informed, by the statute, that they belonged to that class which were imperatively required to be deposited, in the first instance, with the State treasurer, and by him held until the conditions upon which they were to be delivered were fully performed.

But it remains for us to consider the important practical question as to the rights of the parties, in view of the admitted fact, that the proposition approved by popular vote did, in terms, provide for the ultimate delivery of the bonds only upon certain conditions, — bonds, therefore, which ought to have been, but were not, delivered by the county officers to the State treasurer, to be held until the prescribed conditions were performed. The determination of this question, so far as it involves the good faith and diligence of the parties, is somewhat complicated by the absence of any finding as to whether the subscription was, in fact, made on the books of the company, "specifically setting forth the conditions" upon which it was made (sect. 9); or whether the original or a copy of the subscription was, in fact, delivered or even transmitted to the treasurer of state (sect. 11); or whether the officers of the county themselves made a record of the bonds in a book kept for that purpose (sect. 12); or whether they transmitted to the State auditor a certified statement, attested by the county clerk, "of

the number, amount, and character of the bonds so issued, to whom issued, and for what purpose" (sect. 12). We cannot, therefore, certainly know what facts would have been ascertained by the purchaser had he resorted to all those sources of information, — an investigation upon which, for reasons hereafter to be stated, he was not required to enter. We have in the special finding only the fact that the county, under the order of the board of commissioners, executed bonds payable to the railroad company or bearer, and purporting to have been issued under and in pusuance of the act of 1872; and that the bonds were left by the county officers with Hutchinson for delivery to the State treasurer, when the statute required the county authorities themselves to deliver the bonds to that officer.

Now, it is to be observed that the bonds do not, upon their face, indicate that they were deliverable upon the performance of certain conditions. They are made payable, unconditionally, to bearer, at a designated place and at a specified time. By the act of the county officers, intrusting the bonds to one upon whom no official responsibility rested, he was enabled to represent himself to the auditor as presumptively the owner, because the bearer, of the bonds. But these facts, it is insisted, are of no consequence in view of the statutory provision, declaring, in effect, that bonds, of the kind here in suit, "shall not bear interest or be negotiable" until after their delivery by the State treasurer to the parties entitled thereto. Whatever force might be conceded to this argument, looking alone to the requirements of the eleventh section of the act, we are of opinion that more consequence is to be attached to the action of the auditor of state, under the fourteenth section, than seems to have been done by the court below. The presumption is that the legislature, while aiming to guard local communities against the fraudulent conduct of their officers, did not intend to withdraw all protection to the *bona fide* purchasers of municipal securities which those officers were authorized to execute, and which they might put into circulation, or negligently permit to get into circulation. Hence, as we think, the requirement as to the registration of bonds issued under the act, and the duty of the State auditor, upon registration, to attest their regularity and legality by a certificate, under his seal of office.

The State treasurer may improperly surrender bonds deposited with him for delivery only upon the performance of specified conditions. But such delivery would not render them binding upon the municipality, in whose name they are executed. The holder is under a necessity, by the statute, to do something more. He is required to present them for registration to another officer, the auditor of the State, in whose office (if the county authorities obey the statute) is kept a record of the number, amount, and character of the bonds, to whom issued, and for what purpose. And that officer is not under a duty to admit the bonds to registration, simply because asked to do so, and without making inquiry as to their regularity and legality. Unless satisfied that they are issued in accordance with the provisions of the act, he is bound to deny the application for registration. But, if satisfied that the provisions of the State have been pursued, he is required to register the bonds, and certify, upon each one, under his seal of office, that it has been regularly and legally issued. To him, therefore, is committed, by the State, the important function of finally determining whether the law has been, in all respects, obeyed, and, consequently, whether the bonds have been regularly and legally issued. His determination, necessarily, involves an investigation as to every fact essential to their validity. Purchasers in good faith, although required to know what the statute contains, are not bound, under such circumstances as are here disclosed, to go behind the auditor's certificate, and find out whether he has ascertained all the facts, or whether he has correctly and honestly passed upon the questions arising upon an application for registration. The investigation which the statute authorized him to make involved the inquiry whether the bonds were of the class which should have passed through the hands of the treasurer, and, also, whether the conditions, upon which they were deliverable, had been performed. Purchasers have the right to assume — having no notice to the contrary — that he has, in these respects, discharged his duty. The registration acts, in some of the States, while imposing like duties upon State auditors, and requiring them (when the facts justified them in so doing) to certify, upon municipal bonds, that they have

been issued in compliance with law, expressly declare such certificates to be *prima facie* evidence only of the facts stated, and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality, in whose name they are executed, to issue them. *Anthony* v. *County of Jasper*, 101 U. S. 693. But the statute in question contains no such provision. The legislature of Kansas confers upon the auditor of state full authority to ascertain and determine whether bonds presented for registration have been issued in accordance with the statute, and, if satisfied such is the fact, it is made his duty to certify upon the bonds that they have been regularly and legally issued. Had it appeared upon the face of these bonds that they were deliverable upon certain terms, and, therefore, belonged to the class which should pass through the hands of the State treasurer, and if the purchaser, in such a case, be held to have taken the bonds subject to the statutory requirement that they were not negotiable unless they had been, in the first instance, actually delivered by or in behalf of the county officers to the State treasurer, and by the latter surrendered to the proper parties, it is clear no such condition can be attached to the purchase by appellant. For the bonds here in suit do not disclose the conditional nature of the subscription, nor that they belonged to the class which, as a condition precedent to their negotiability, must have been delivered to the State treasurer. That these facts are not disclosed upon the face of the bonds is the fault of the county, and it is estopped, as against a *bona fide* purchaser, to deny that they are of the class which might have been delivered, at once, and without going through the hands of the State treasurer, to the auditor of state, and been registered and certified as regularly and legally issued. In such a case, at least, the action and certificate of the auditor of state must be deemed conclusive evidence, as between the county and a *bona fide* purchaser, that the bonds were regularly and legally issued, and, therefore, negotiable, in the fullest sense of that word. If such be not the construction of the registration act, it is difficult to perceive of what practical value is the auditor's certificate, or what the legislature intended by the requirement that he should, after

examination into the facts, attest the regularity and legality of the bonds. If the determination of that officer, in this case, operates hardly upon the people of the county, the result must be attributed to the legislation in question as well as to the negligence of the State and county officers. What we have said is in harmony with the settled doctrines of this court upon the subject of negotiable securities issued by municipal corporations, as announced in numerous cases with which the profession is familiar, and which need not be here cited.

There are other questions in the case. But they are of minor importance, and it seems to be unnecessary to consider them.

Judgment reversed, and cause remanded with directions to enter a judgment in favor of the plaintiff below.

CARITE *v.* TROTOT.

1. The seizure and sale under executory process, authorized by art. 732 of the Code of Practice of Louisiana, vest in the purchaser, as against the owner and subsequent incumbrancers, an absolute title to the mortgaged lands.
2. Such incumbrancers cannot set aside a conveyance by the creditor to the mortgagor's wife, made pursuant to his agreement with her, that should he purchase the lands when they were subjected to judicial sale, he would sell them to her.
3. "The separation of property obtained by the wife" is not rendered void by the omission to publish it pursuant to art. 2429 of the Civil Code, nor by the consent of the husband that the case might be tried, nor by the failure to issue execution on the judgment authorizing the separation, where the object of the suit was merely to put an end to the community and to secure to her and her children the right to her future earnings, he not being condemned to pay any money other than the costs.
4. Under art. 2425 of the Civil Code, his financial embarrassment is sufficient to authorize a judgment of separation of property in her favor.
5. The proper parish court had jurisdiction of such a suit, although it was not prosecuted for the recovery of money or money's worth.

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. Thomas J. Semmes for the appellants.

Mr. Joseph P. Hornor and *Mr. William S. Benedict* for the appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a bill in equity filed by Félicité Trotot, the appellee, to foreclose a mortgage and for the sale of the mortgaged property, consisting principally of a sugar plantation with its improvements, in Louisiana. The property originally belonged to Jean Baptiste Clement, a citizen of France, who, and also his agent and attorney in fact, Antoine C. Tremoulet, by whom he was represented in the transactions in question, are parties to the suit, and appellants, with Celestine Carite and her children. Clement, through Tremoulet, sold the property Sept. 22, 1869, to the firm of Copponex & Co., composed of Copponex, Moulor, and Carite, the husband of Celestine, for $55,000, of which $10,000 was paid in cash, $6,764 was an incumbrance in favor of the Citizens' Bank of Louisiana, assumed by the purchasers, and the remainder, evidenced by their four promissory notes for $9,559 each, payable respectively Sept. 1, 1870, 1871, 1872, and 1873, with interest at eight per cent per annum, amounting to $38,236, was secured by mortgage upon the premises.

On Jan. 11, 1871, Copponex sold his interest in the firm business and this property to his partners for $10,000 cash, they assuming the debts of the partnership; and on Dec. 30, 1872, Moulor sold his interest to Carite for $55,000, in addition to the assumption by the latter of the incumbrance in favor of the Citizens' Bank, amounting then to $5,573, and three unpaid notes of $9,559 each, with interest, still due to Tremoulet as agent for Clement. For the purchase-money, agreed to be paid to Moulor, Carite gave eleven promissory notes of $5,000 each, — three payable in one year from date, two in two years, two in three years, two in four years, and two in five years, — secured by mortgage upon the plantation.

The appellee claims to be the holder and owner of five of these notes, the first three and the second two, bearing interest at the rate of eight per cent per annum, and to have the right, they being overdue and unpaid, to foreclose the mortgage

given by Carite to Moulor, and sell the mortgaged premises for the payment of the amount due thereon. She also insists that her mortgage securing the debt is the first and best lien upon the premises, except what may still appear to be due to the Citizens' Bank.

As the grounds of this priority, the bill alleges that on Feb. 10, 1873, Casimir Carite, conspiring with his wife, Celestine Carite, and Tremoulet, induced the latter to institute, in the Circuit Court of the United States for the District of Louisiana, proceedings, by executory process, in the name of Clement, upon the mortgage and notes given by Copponex & Co., for the seizure and sale of the premises, and caused them to be sold to Tremoulet for a price less than the amount due to the Citizens' Bank, and the amount claimed to be due to Clement, and the title was conveyed to him accordingly; that the proceedings and sale were simulated and fraudulent, the possession of Casimir Carite not being disturbed thereby, and the object being to defraud the appellee and his other creditors; and that, in point of fact, the debt originally due from Copponex & Co. to Clement, secured by the mortgage to the latter, was, at the date of said proceedings and sale, paid and extinguished; that, in further prosecution of the same conspiracy and fraud, Casimir Carite induced and caused his wife, on Feb. 13, 1873, to file a petition in the Parish Court of St. James, in Louisiana, representing that she was married to him April 23, 1863, and that there existed between them a community of acquests and gains, which allegations, it is admitted, were true, but further setting forth that he had become hopelessly involved in debt, which, it is alleged, was false, and prayed for a judgment of separation of property from him; that a pretended defence was made by him to the petition, on which judgment was rendered in her favor, separating her in property from him, and dissolving the community of acquests and gains theretofore existing between them; that this proceeding was fraudulent and void, because it was voluntary and by consent, because the wife had no claim against him and alleged none, and assigned no reason in law why such separation should be decreed, because there was no derangement of his affairs, and no allegation that his wife could conduct the business of the plantation better

than he, the latter in point of fact having conducted the same after the decree, as before; and because said judgment was never published as required by law, nor ever executed in any manner by the issue of any writ; that, in further pursuance of said conspiracy and fraud, Tremoulet, on May 22, 1873, pretending to act as his agent, made to Celestine Carite a pretended sale of the said plantation and property for a sum sufficient to cover the amount alleged to be due to Clement, although that debt, or a large part of it, had previously been satisfied and extinguished.

The prayer of the bill is that the proceedings under which Tremoulet purchased the premises for Clement, the decree of separation of property from her husband on behalf of Mrs. Carite, and the sale and conveyance to her of the plantation by Clement, be adjudged to be void and be set aside, and that the complainant's mortgage and debt be charged as the first lien on the same, and be satisfied by a sale thereof for that purpose.

The final decree of the Circuit Court is substantially in accordance with the prayer of the bill, declaring that the sale to Tremoulet for Clement, and by him to Celestine Carite, be set aside and annulled as simulated and illegal; that the judgment of separation of property between her and her husband is null and void for want of publication; that the plantation and property be recognized as belonging to the community formerly subsisting between Carite and his wife, as it did before said simulated sales were made; and that the complainant had established the mortgage under which she claims, as a valid and subsisting lien upon the property to secure the sum of $25,000, with interest at the rate of eight per cent per annum from Dec. 30, 1872, for which, if not paid within sixty days, it was ordered that the premises be sold.

The object of this appeal is to review that decree.

The first question it presents relates to the validity and effect of the judicial proceedings taken by Tremoulet, which resulted in the sale of the property to Clement.

Against its validity it is asserted in the bill that the debt to Clement, at the time of the sale, had been extinguished, and that the proceeding, therefore, was a mere pretext and cover for an intended fraud. But the evidence leaves no doubt that

this was an unfounded suspicion. It is abundantly established by the proof that, at the time of the sale, there was still due on account of the debt to the Citizens' Bank, assumed by Carite, $5,573, and that two of the notes for $9,559 each, on one of which interest had been running from Jan. 15, 1873, and on the other from its date, Sept. 1, 1869, were overdue and unpaid; and that another note of the same series, and of the same amount, falling due Sept. 1, 1873, was held by Tremoulet for Clement, the whole amounting to $34,395.40.

The proceeding itself, though summary, was familiar in practice in such cases, and strictly according to the law of Louisiana, and if not voidable on other grounds, had the effect to vest in Clement an absolute title to the property, free of all subsequent incumbrances. It was executory process which is authorized (Code of Practice, art. 732) "when the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor;" which is the case (art. 733) "when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage." By art. 3360, Civil Code, it is declared "that the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already acquired to another creditor;" so that the seizure and sale, by virtue of executory process under a mortgage, are not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding. The security of the latter, in that event, is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two-thirds of the value of the mortgaged property, as appraised for that purpose. This effect is expressly declared by Code of Practice, arts. 707, 708. *Hart* v. *Foley*, 1 Rob. (La.) 378. It follows, therefore, that unless the judicial sale to Clement is a nullity, the mortgage lien of the appellee is itself extinct, though the mortgage debt will survive as a personal obligation.

It is contended, however, by the appellee, that this sale to Clement was void, as a fraud upon her rights as a creditor of

Carite, because taken in connection with the subsequent sale to Mrs. Carite, it was intended to defeat the claims of the creditors of her husband, and to place this property beyond their reach.

The circumstances attending the transaction are these: Carite was undoubtedly insolvent. Two of the notes, held by Tremoulet for Clement, had become due, and remained unpaid. He was in arrears on account of interest. He was embarrassed by other debts, for which he was pressed, so as seriously to threaten the uninterrupted prosecution of the business of the plantation. The notes were placed by Tremoulet in the hands of an attorney for collection. The necessary formal preliminary demand of payment was made. A negotiation for an extension of time was begun by Carite, who suggested that he could make such an arrangement with all his creditors. Tremoulet told Carite that he had no desire to acquire the property, as he represented Clement, who resided in France, and who did not wish a sugar plantation, and would not know what to do with one if he had it; but that he would feel obliged to act upon the matured notes if the consequence of non-action was to be the seizure of the mortgaged property by other creditors and the consequent diminution of the security. The upshot was his promise to abstain from a seizure under the mortgage until Carite should have time to arrange with his creditors, provided no seizure was made by other parties.

What efforts Carite made to obtain from other creditors the desired indulgence do not appear, but if any were made they did not succeed. On Feb. 7, 1873, Tremoulet, in a letter to Clement, reported that, by an arrangement with Carite, the latter would make no objection to the sale and seizure of the immovables, and would rather facilitate the execution thereof, on condition that Tremoulet would oblige himself, buying them in Clement's name, to resell the same to his wife, from whom he was separated in property, at a price that would cover all that was due to Clement, including interest, costs, and attorney's fees, provided that nobody should put in a higher bid than that amount, the accrued interest to be paid in cash. The terms, he added, were not then fixed, but might be soon, and said that he should not be too exacting, knowing that

Carite continues the plantation at his own expense, that everything predicted a good crop, and notwithstanding the depreciation in the value of real estate, the plantation was adequate security for the mortgage to Clement.

On Feb. 10, 1873, Neal and McIntyre, citizens of Kentucky, commenced a proceeding in the Circuit Court for the sequestration of ten mules on the plantation, on which they as vendors claimed to have a lien and privilege for the unpaid purchase-money, amounting to $2,150, and a writ was accordingly issued to the marshal, requiring him to seize and take possession of them.

On the same day, in consequence of this proceeding, Tremoulet caused executory process to issue in behalf of Clement, and seized the mortgaged property, including the mules sought to be subjected by Neal and McIntyre, which he claimed were subject to the Clement mortgage, because they had become immovables by destination. The plantation and property were taken into possession by the marshal, though Carite was permitted to remain for the purpose of attending to the growing crop, and were advertised for sale. Mr. Edward D. White, Tremoulet's attorney, testified as follows: —

"During the seizure and before the sale quite a number of the creditors of Mulor, Copponex, & Co. and Carite called on me. To all of them I stated exactly what had been said to Carite; that is, that the seizure of the property had been provoked by the threatened removal of the immovables by destination; that the property was not desired by the plaintiff; that he had no intention of bidding on it beyond the amount of his claim, with costs and charges; that Carite had been told if he could successfully arrange with his creditors, indulgence would be given and proceedings stopped."

On March 3, Tremoulet reported by letter to Clement the fact of seizure and that the property was advertised for sale, saying: "I am waiting for Mr. Carite to make our arrangements for the sale that I shall make to his wife." The sale was had on April 5, and on April 10 Tremoulet reported that fact by letter to his principal, saying: "In case the plantation would have brought wherewith to cover your debt, capital and interest, it was understood that I would not buy the same in, but

would receive the amount due you. . . . Now, I am awaiting Mr. Carite to sell the plantation back to his wife on the terms agreed upon. It is well understood that you shall have to bear no costs, the sale having been made only for the purpose of relieving the plantation from the embarrassments in which Moulor had placed it." He then proceeds to explain the reasons for the resale as proposed, and said: "Another important reason is, that I could not do you justice in charging myself with the administration of this property at the distance where I am. . . . In one word, I preferred in your own interest to resell the plantation, taking all possible precautions, rather than to work the same for your account, notwithstanding the fine prospect of the present crop." On May 26 he reports the conclusion of his negotiations with Mrs. Carite and the resale to her, giving the details of the purchase. He says: "I have been obliged to accept from Mrs. Carite a smaller amount than the amount agreed upon in order to make the sale of the immovables, and this in your interest; it was preferable to accept these terms than to keep the plantation and work the same for your account, at the present price of labor. In case I should have refused to effect an understanding with Mrs. Carite, I would not have found a purchaser that would have taken the plantation on the same terms."

We see nothing in the circumstances of the case as disclosed in this record to impeach the good faith, or affect the validity, of this transaction. Clement had the unquestionable right to subject to judicial sale the property, held as security for his debt, and become its purchaser at two-thirds of its appraised value. No one was wronged by such a procedure, although it had the effect to disappoint every other creditor. The sale was open and public, and there is no suggestion of any attempt to prevent the property from bringing the best price. Every subsequent incumbrancer had the right and the opportunity to bid upon it, and, if he chose, to buy it for himself. If he neglected or declined to do so, it must be assumed that he made his decision in the pursuit of his own interests. The title acquired by Clement was indefeasible and absolute. No right of redemption remained, and it was subject to no trust. He could

dispose of it at his own will. If he chose so to do, he was entirely free to convey it, on any consideration he approved, to Mrs. Carite; as much so, if she was legally capable of receiving title, as to any other person. And what he could lawfully do with the property, after it had become his own, he could agree to do in advance. In all this there is nothing whatever that touches the right of any creditor of Carite. It is a lawful end, pursued by lawful means; and if, by reason of it, others have sustained any loss, it is because the property was not sufficient to pay all for which it had been pledged, or because those interested in the security voluntarily sacrificed their own interests. In neither event is there ground for complaint. The course of Tremoulet seems to have been dictated, as it was justified, by a wise regard to the interests of his absent principal. It was a mere measure of self-protection, to disembarrass the property of debt, to protect it against disorganization and waste, justly apprehended as the result of seizures by subsequent mortgagees and lien-holders, or which might have occurred, if Carite, driven to that necessity, had surrendered it to the delays and expenses of administration and sale, in a court of bankruptcy. We cannot perceive, in the acquisition and disposition of the title by Clement, either an intention or a tendency to impede or defeat the just rights of the appellee, or any other creditor of Carite.

It is further contended, however, that the decree of separation of property between Carite and his wife is void; that she having no capacity, therefore, to receive and hold the title to this plantation as separate property, it inured to the community as before, and was replaced subject to the previously existing liens in their order. It is not conceded that this consequence would result if it should be adjudged that the community had not been interrupted, for it is claimed that the sale to Clement having necessarily destroyed the lien of all subsequent incumbrances, a conveyance to Carite himself, although it would have made the property liable to the pre-existing debts of the community, it could be subjected only by process, open to general creditors by means of judgment and levy under execution. However this may be, we proceed to examine the grounds on which it is urged that the decree of separation of

property rendered on the petition of Mrs. Carite should be annulled.

The first of these, and the one on which the Circuit Court based its decree, is that the judgment was never advertised, in violation of art. 2429, Civil Code, which provides that "the separation of property obtained by the wife must be published three times in the public newspapers at the farthest within three months after the judgment which ordered the same."

The fact that no such publication was made is not denied, but its omission, it is insisted, does not avoid the judgment. And such is the construction put upon this article by the Supreme Court of Louisiana. In *Turnbull* v. *Davis* (1 Mart. (La.) N. S. 568), that court said: "It is true that by law publication of a separation of property between husband and wife is expressly required; but the pain of nullity is not denounced against a neglect of such publication. It is not a prohibitive regulation, which might, in some instances, imply nullity. We are, therefore, of opinion that a judgment of separation, unattended by publication, is not *ipso facto* void; but if such laches afford any ground for annulling and declaring it inefficient, it can only be decreed on showing fraud and injury to third parties as a consequence of omitting the publication. In the present case there is no positive testimony that the defendants have suffered injury, resulting from the neglect to publish the decree of separation; nor can such injury be legally presumed from the whole tenor of the evidence."

The authority of this case was recognized and the decision followed in *Raiford* v. *Thorn*, 15 La. Ann. 81, decided in 1860.

We have examined *Spires* v. *McKelvy* (23 id. 571), *Levistones* v. *Brady* (11 id. 696), *Bostwick* v. *Gasquet* (11 La. 534), and *Heyman* v. *The Sheriff, &c.* (27 La. Ann. 193), to which we have been referred by counsel for the appellee, and do not find in them anything which overrules the decisions cited above, or that is inconsistent with them.

It is next objected that the judgment of separation of property is null, because, in violation of art. 2428, Civil Code, it was not executed. That article reads as follows: "The separation of property, although decreed by a court of justice, is null if it has not been executed by the payment of the rights

and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can reach them, or at least by a *bona fide* non-interrupted suit to obtain payment."

It will be observed that the language of this article differs from that of art. 2429, just considered, in expressly denouncing nullity as a consequence of non-compliance with its requirements. But the nature of the execution must have relation to the nature of the judgment, and the terms of the article manifestly refer to cases where the judgment involves the transfer of property or the payment of money, and not the mere question of the future status of the wife, and her right, independent of her husband, separately to acquire property in her own right. This is the view taken by the Supreme Court of Louisiana in the case of *Jones* v. *Morgan* (6 La. Ann. 630), in which it is said that "the article of the code requiring execution to issue within a limited time after the decree of separation, under a pain of nullity, is only applicable to cases in which there is a judgment against the husband for a sum of money. This precaution is, no doubt, intended for the protection of those with whom the husband is in the habit of dealing. But, in this case, the object of the action was not to recover moneys of the wife; it was simply to put an end to the community and then to secure to the wife and her children the future earnings she might derive from her untiring industry."

In such a case the intent and effect of the judgment are merely to confer upon the wife, in respect to her future acquisitions, the fruits of her own industry, and the savings of her own economy, the right to act separately from her husband, as though she were sole; and the right becomes fixed and vested by its actual exercise. *Holmes* v. *Barbin*, 13 La. Ann. 474.

This is what is meant by what the Supreme Court of Louisiana say in *Muse* v. *Yarborough* (11 La. 530), that "it is not the mere judgment of separation which renders the parties separate of property. The judgment recognizes the necessity for separation and judicially authorizes it; but if not followed by a *bona fide* execution, it produces no effects, even between the parties."

It is only when the judgment of separation of property is founded on a cause, which results in the establishment of some

claim against the husband's estate susceptible of execution, by some authentic act, or by judicial process to enforce it, that a neglect or failure to insist upon its execution is deemed conclusive evidence that it is the intention of the parties not to dissolve the community. The law in such cases for the protection of creditors, otherwise liable to be misled, annuls the unexecuted judgment of separation. *Handy* v. *Sterling*, 1 La. Ann. 308; *Longino* v. *Blackstone*, 4 id. 513; *Succession of Hearing*, 28 id. 149.

The costs of the suit, which Carite was condemned to pay, can hardly be considered any part of the judgment of separation of property, of which execution is required, and hence the failure to attempt their collection cannot affect its validity. In all other respects his wife assumed and exercised the right conferred upon her by the judgment, dissolving the community between him and her, by the very transaction in question, acquiring by purchase the title, of a plantation, which she has since administered, not less in his lifetime than since his death, so far as the record discloses, in her own name and right, and has thus, in the meaning of the law, executed the judgment of separation.

It is next objected that this judgment is void for want of any legal ground to justify it. The grounds on which it was prayed for, in the wife's petition, are thus stated: —

"Petitioner further represents that, owing to a series of crushing misfortunes, her husband, who was heretofore possessed of considerable means and property, has lately become hopelessly involved in debt, for the satisfaction of which all his property is now being attached, seized, and disposed of by his numerous creditors. That all of her husband's property will not be sufficient to pay and satisfy the enormous debt which is due by him. That, in consequence of the above-recited circumstances, petitioner fears and believes that the earnings of her separate industry may be seized by her husband's creditors, and thus be lost to herself and children; for which reasons petitioner is desirous of being separated in property from her said husband."

This petition was filed Feb. 13, 1873. This was after the writ of sequestration issued by Neal and McIntyre had been

executed, and after the seizure made by Tremoulet under his executory process in behalf of Clement.

Article 2425, Civil Code, which it is alleged regulates this proceeding, reads as follows: "The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

An authoritative construction of this article is found in *Wolf* v. *Lowry*, 10 La. Ann. 272. The court there say: "In *Davock* v. *Darcy* (6 Rob. 342), it was held that the right of the wife to a separation of property was not limited to the cases mentioned in art. 2399 (now 2425) of the code, and that she might obtain a separation of property when the habits and circumstances of her husband rendered it necessary to preserve for her family the earnings from her industry or talents. The same question was afterwards decided in the case of *Penn* v. *Crockett* (7 Ann. 343), when the right of the wife, which had been made the basis of the action of separation of property, was the value of a slave which had been given to the wife during marriage, and had been alienated by the husband. The court reaffirmed the former decision and held that, in case of the derangement of the husband's affairs, this was sufficient to authorize a judgment of separation of property in favor of the wife. After these repeated decisions we must consider the law as settled, the question being one of the construction of statutory laws, involving no fundamental principles."

This doctrine, that a claim for money or property on the part of the wife is not necessary to support a judgment of separation, was reaffirmed in *Mock* v. *Kennedy* (11 La. Ann. 525), where the court say: "It is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised, whether as a seamstress, teacher, milliner, or (as in the case at the bar) a shopkeeper, is not material; she is entitled, under the humane spirit of our jurisprudence, upon proof of this fact, accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separation, to protect the

fruits and earnings of her separate industry from being squandered by her husband or seized by his creditors."

In *Webb* v. *Bell* (24 La. Ann. 75), a judgment of separation, on appeal, was affirmed, notwithstanding the petition of the wife was opposed by the husband, on the ground that there was neither allegation nor proof that the plaintiff had, at the time of the institution of the suit, a separate trade or industry of any kind from which she was deriving revenue or means inuring to her own benefit. The sole ground of the judgment was the embarrassed circumstances of the husband's affairs. The court said: "The purpose sought by separation of property and dissolution of community in this case seems to be to enable the wife, by the use of her own limited means and those she might obtain through her relatives, to earn for herself and child a support, without having her earnings fall into the community."

The same point was expressly decided in *Meyer* v. *Smith & Co.* (id. 153), where the only allegation in the petition, on which the judgment was based, was that, "owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, the education, maintenance, and support of herself and family, that a dissolution of the community, &c., be decreed."

It is also objected to the judgment of separation that it was by consent, and, therefore, null, as equivalent to a voluntary separation, made void by art. 2427, Civil Code, and that it is not supported by evidence.

Both these objections are met by the case of *Powlis* v. *Cook*, 28 id. 546. In that case, as in this, the husband consented that the case might be fixed and tried, but, as the court then said, "that did not make it a consent judgment." And as to the proof of the husband's insolvency, the court then say, what may be adopted here, it "is manifest from this litigation, if not otherwise shown."

It is also urged that the parish court had no jurisdiction to entertain a suit for separation of property. No adjudication to this effect by the Supreme Court of Louisiana is referred to by counsel; while, on the contrary, it is tacitly assumed to exist, in the case of *Willis* v. *Ward*, 30 id. 1282. Art. 87 of

of the Constitution of the State, of 1868, then in force, prescribes that parish courts "shall have exclusive jurisdiction in original suits in all cases where the amount in dispute exceeds one hundred dollars and does not exceed five hundred dollars." The only limitation of the jurisdiction is as to the amount of money involved in the controversy, and has no relation to the question, where the suit is not prosecuted for the recovery of money or money's worth.

It is finally urged that the property in controversy belongs to the community, notwithstanding the judgment of separation. But on the admission of the validity of the sale to Clement, and of the judgment of separation of property, it is impossible to maintain this position; for, on that supposition, Clement had the right to dispose of the title to Mrs. Carite, precisely as to any other person capable of purchasing. The sale was made on credit, except as to the small sum of $1,243.73, and it does not help the contention of the counsel for the appellee on this point to admit what he says "that every cent that Mrs. Carite has paid on account of the purchase of the plantation was simply a part of the profits of the plantation itself;" because it is not claimed that any portion of those profits accrued prior to the time when all the interest which Carite, or any of his creditors, subsequent in right to Clement, ever had in the property, had been divested by the sale to him. Consequently it is fully shown that the community had no claim to any of the consideration paid by her for her purchase.

Upon these grounds the Circuit Court should have dismissed the bill of the appellee for want of equity, and for this error the decree will be reversed, and the cause remanded with directions to render a decree dismissing the bill; and it is

So ordered.

PAPER-BAG CASES.

PAPER-BAG MACHINE COMPANY *v.* NIXON.

NIXON *v.* PAPER-BAG MACHINE COMPANY.

1. A party, having the absolute ownership of a patented machine, has the right either to use it during the extended term of the letters-patent, or to transfer such ownership and right to another.
2. A license for the exclusive use of such a machine within certain territory does not continue longer than the term of the original letters.
3. A licensee cannot, as such, sue for an infringement, but must assert his rights in the name of the original patentee.
4. Where the matter in controversy is merely the costs of suit, an appeal from the decree in which they were taxed will not be considered.

APPEALS from the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. George Harding and *Mr. John R. Bennett* for the Paper-Bag Machine Company.

Mr. James Morse and *Mr. E. W. Kittredge*, *contra.*

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

On the 28th of April, 1857, a patent was granted to Charles H. Morgan and Benjamin R. Smith for an invention by Benjamin F. Rice of a "machine for making paper bags." This will hereafter be referred to as the Rice patent. By agreements entered into on the 11th of February and 12th of August, 1859, the owners of this patent executed to Martin Nixon, Thomas Nixon, and William H. Chatfield, partners, under the name of Nixon & Chatfield, a license for the exclusive use of the patented machines within certain territory, which included the States of Ohio and Indiana. Thomas Nixon, one of the licensees, is one of the parties to these appeals, and upon the dissolution of the firm of Nixon & Chatfield, in the year 1865, his interest in the license passed to and became vested in Chatfield & Woods. On the 6th of March, 1860, a reissue of this patent was granted to Charles H. Morgan, Leonard Whitney, Jr., and Thurston Priest. Some time about the year 1863, Francis H.

Morgan (a brother of Morgan, one of the patentees) became the owner of one of the machines covered by this patent, with an unrestricted license for its use. Morgan, the patentee, was for a time a joint owner of the machine with his brother, but he afterwards parted with his interest, and Francis H. Morgan became the sole owner. While there is no testimony in the case showing any instrument in writing by which the other patentees united in a license for the use of this machine, we are entirely satisfied that they gave their assent to what was done by Charles H. Morgan, and are in no condition to claim adversely to the license which he undertook to grant.

On the 17th of March, 1863, another patent was issued to Charles H. Morgan for an improvement in paper-bag machines. This will hereafter be referred to as the Morgan patent. Afterwards, Francis H. Morgan became the owner of two machines containing the improvements embraced in this patent, with an unrestricted license for their use. On the 26th of October, 1865, an exclusive license for the use in Philadelphia of machines embraced in both patents was granted to Francis H. Morgan, but there is no testimony showing that his rights in respect to the machines he already owned were confined to that territory, and there is no doubt but that he owned all the machines now in question long before this exclusive license was given.

On the 27th of November, 1865, which was after Thomas Nixon had retired from the firm of Nixon & Chatfield, and transferred all his interest in the exclusive license for the Rice patent to the other partners, Francis H. Morgan sold and conveyed to Thomas Nixon the two Morgan machines which he owned, and agreed to furnish on demand all other machines of like pattern and workmanship which Nixon might want. Nixon on his part bound himself not to use the machines he got in this way except within the States of Ohio and Indiana, and to pay the owner of the patent a royalty of three cents on every thousand bags made. He also agreed not to use any other machines in the manufacture of bags than such as he procured under this contract.

Afterwards, on the second day of November, 1866, Nixon wanted another machine, and called on Francis H. Morgan to

furnish it under his contract. Morgan having none of the Morgan machines on hand at the time, offered his Rice machine in the place of the one called for by the contract. This Nixon agreed to accept, if he could be released from his obligation not to use any other than Morgan machines within his territory. Morgan thereupon stipulated accordingly, and Nixon took the machine.

All these things were done by Francis H. Morgan with the full knowledge and consent of Charles H. Morgan, who was then the sole owner of his own patent and of a half-interest in that of Rice. An attempt was made to show the contrary of this, but the testimony leaves no doubt in our minds as to the fact.

Nixon took to Richmond, Indiana, all the machines he got from Francis H. Morgan, and either himself or through others carried on the manufacture of bags by their use. On the 21st of April, 1871, the Rice patent was extended for seven years from April 28, 1871, on the application of Roxana Rice, the widow and executrix of the inventor. Mrs. Rice assigned the extended patent to the Union Paper-Bag Machine Company, and that company, on the 27th of June, 1871, granted to Chatfield & Woods the exclusive right to use in the States of Ohio and Indiana machines constructed under the patent. At the same time the company granted to the same parties the exclusive right of using within the same territory other machines covered by other patents which it owned, reserving a royalty of four cents on every thousand bags manufactured by any of the machines.

On the 17th of July, 1871, after this assignment, the Bag Company and Chatfield & Woods sued Thomas Nixon, Morris H. Nixon, and William Anderson, alleged to be doing business as partners under the name of Nixon & Company, to restrain them from using the Rice machine. The defendants answered, denying the alleged partnership, and averring that the business was carried on by Morris H. Nixon and William Anderson alone, they using the machine which belonged to Thomas Nixon and paying him a stipulated rent therefor. The suit was then discontinued as to Thomas Nixon, and from that time it was prosecuted alone against the other defendants. A new suit of

a similar character was, however, begun against Thomas Nixon, and the two were carried on together. In both the suits answers were filed, denying, in effect, the validity of the patent and the infringement; but on the 31st of May, 1873, decrees were entered in both cases, enjoining the defendants from using the machine, and ordering a reference to a master to state an account of profits and damages.

The accounting was continued before the master until the 14th of June, 1876, when Thomas Nixon paid to the Bag Company the sum of $7,543, and took a receipt therefor, as follows: —

"CINCINNATI, June 14, 1876.

"Received of Thomas Nixon the sum of seven thousand five hundred and forty-three dollars (7,543.00) money due under the contract of F. H. Morgan with Thomas Nixon, dated November 27th, 1865, and in full for the amount which the said Thomas Nixon reported to be due as royalties under said contract, May 10, 1876.

"$7,543.00. UNION PAPER-BAG MACHINE CO.,

"By EDWIN J. HOWLETT, *Pres.*"

The hearing before the master was continued after this payment was made, and on the 23d of October, 1877, a report was filed, in which the master stated that the period covered by his inquiries was from June 27, 1871, the date of the exclusive license to Chatfield & Woods, to June 9, 1875, the date of the service of the injunction in the case. He also set forth the facts as to the contracts with Francis H. Morgan, and the payment of the royalties thereunder, substantially as they have already been given. He found that the number of bags manufactured by Nixon & Company between the dates above mentioned was 93,500,000, and that the royalty fixed by the Bag Company for the use of all its machines was four cents a thousand.

After the report was filed, the defendants in each of the cases asked and obtained leave to put in a supplemental answer, setting up the contract with Francis H. Morgan, and the payment to and acceptance by the Bag Company of the royalties due thereunder on the 14th of June, 1876. Upon the final hearing, after these answers were in, the court proceeded on the evidence to state the accounts, and decreed that Chatfield & Woods had no right on the pleadings and evidence to any

recovery. As to the Bag Company, it was found that it was the owner of the Rice patent; that it had an established license fee for the use of the several patents for improvements in paper-bag machinery, referred to in its licenses to Chatfield & Woods, and others, of four cents a thousand bags; that this license fee included the use of the Rice machine; that the Francis H. Morgan contract operated as a license to Nixon for the use of the Morgan machines, but not of the Rice machine; that 93,500,000 bags had been manufactured by Nixon & Anderson, by the use of all three of the machines; that they had already paid three cents a thousand on their royalty and must now pay one cent a thousand more, amounting in the aggregate to $935, for which a decree was entered against them. From this decree both parties have appealed; the Bag Company and Chatfield & Woods claiming that the defendants were liable to them, not for the license fee, but for the profits they made by the use of the Rice machine, and the defendants that the payment by Thomas Nixon of the royalty reserved under the Francis H. Morgan contract was a full satisfaction of all claims that could be made on them for the use of this machine, as well as those constructed under the Morgan patent.

In the suit against Thomas Nixon the same general conclusions were reached as in that against Morris Nixon and Anderson, but a decree for one cent damages only was rendered against him, because he only rented his machines to others to be used, and did not use them himself. From this decree, also, both parties appealed.

Upon the foregoing facts, the first question that presents itself is whether the use of the Rice machine was included in the royalty fixed by the contract of Francis H. Morgan with Thomas Nixon. If it was, then clearly, so far as the Bag Company is concerned, the acceptance of the stipulated royalty was a satisfaction of all claims for damages. This was substantially conceded on the argument.

The right of the owner of a patented machine, without any conditions attached to his ownership, to continue the use of his machine during an extended term of the patent, is well settled. *Bloomer* v. *McQuewan*, 14 How. 539; *Chaffee* v. *Boston*

Belting Co., 22 id. 217; *Mitchell* v. *Hawley*, 16 Wall. 544; *Adams* v. *Burke*, 17 id. 453. Consequently Francis H. Morgan had, by his ownership of the Rice machine, the right to its use during the extended term of the patent. He could also sell it to others to be used in the same way. Power to sell the machine and transfer the accompanying right of use is an incident of unrestricted ownership. The contract of Morgan was to furnish Thomas Nixon with all the Morgan machines he wanted to use in the designated territory at the stipulated price and royalty. When called upon to furnish one of these machines under the contract he persuaded Nixon to take the Rice machine instead. Under these circumstances there cannot be a doubt that it was the intention of the parties to put the Rice machine in the place of a Morgan machine under the contract, and that whatever compensation was to be paid to the patentee for the use of the Morgan machine must be paid for the use of the Rice machine. It follows that, so far as the Bag Company is concerned, there should have been no decree against Nixon & Anderson. The payment of the royalty in June, 1876, was in full for the use of the Rice machine as well as the Morgan machines.

Next, as to Chatfield & Woods. Their exclusive right to the use of the Rice machine continued no longer than the term of the original patent. *Wilson* v. *Rousseau*, 4 How. 646. The Bag Company does not appear ever to have had any interest in the patent before the extension. Chatfield & Woods have never been anything else than licensees. As such they could not sue for an infringement. All their rights must be enforced through or in the name of the patentee. *Littlefield* v. *Perry*, 21 Wall. 205. Their recovery in this case, therefore, must be limited to their rights under the license from the Bag Company. Such was the understanding of the master, for he distinctly states in his report that his inquiries were confined to the period between the date of this license and the service of the injunction which stopped all further use of the machines.

Whatever may have been the effect of the first exclusive license held by Chatfield & Woods upon the right of Nixon to use his Rice machine in Indiana before the end of the original term of the patent, as that license ceased when the term

expired, it necessarily follows that during the extended term no questions can arise under that license. After the extended term began, that license did not stand in the way of the use by Nixon of his machine wherever he pleased, and the Bag Company took its title subject to his rights as an unrestricted owner, save in respect to royalties, of one of the patented machines. Chatfield & Woods took their license subject to the same rights in Nixon. They cannot claim as against Nixon more than the company could convey, and as Nixon was in legal effect operating his machine under a valid license superior to theirs, it follows that in this suit there can be no recovery in their behalf. Their remedy, if they have any, is against the company on their contract for the license, or to secure the benefit of the royalty.

From what has thus been said it appears that the decree in the suit against Nixon & Anderson, as far as it requires the payment of damages, was wrong. As the payment of the royalty was not made until long after the interlocutory decree sustaining the validity of the patent, and the supplementary answer setting up the special defence was not filed until after the report of the master was in, it was right to charge the costs against them.

So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. The decree against him will consequently not be considered. *Canter* v. *American & Ocean Insurance Companies*, 3 Pet. 307; *Elastic Fabrics Co.* v. *Smith*, 100 U. S. 110.

The decree in the case against Nixon & Anderson will be reversed, with costs, and the cause remanded with instructions to enter a decree against the defendants for one dollar only and costs of suit. That in the suit against Thomas Nixon alone will be affirmed, each party to pay the costs of his own appeal; and it is

So ordered.

MR. JUSTICE MATTHEWS, MR. JUSTICE GRAY, and MR. JUSTICE BLATCHFORD did not sit in these cases, nor take any part in deciding them.

THE "MAMIE."

Where a petition of the owner of a vessel claiming the benefit of the limited liability provided by sect. 4283 of the Revised Statutes was rejected and an appeal taken, — *Held*, that this court has jurisdiction where the aggregate amount claimed is more than $5,000 in excess of the value of the vessel.

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

The "Mamie," a small pleasure-yacht propelled by steam, was run down and sunk by the steamer "Garland" in the Detroit River, July 22, 1880. More than fourteen passengers on the "Mamie" were drowned.

Thirteen different suits, each claiming damages in the sum of $5,000, were, under the statute of Michigan entitled "An Act requiring compensation for causing death by wrongful act, neglect, or default," brought in the Superior Court of Detroit, within the Eastern District of Michigan, against the owners of the "Mamie," by the several administrators of the passengers who had perished by reason of the collision.

A petition in admiralty was filed in the District Court of the United States for the Eastern District of Michigan by the owners to obtain the benefit of a limitation of their liability to a sum not exceeding the amount or value of their interest in the yacht, and also to contest with each separate plaintiff in the State court (being summoned into the admiralty court) the question of any liability at all to him, and of the damages due to the estate of his intestate, if any, and to enjoin him from proceeding in the State court.

The court dismissed the petition. The decree was, on appeal, affirmed by the Circuit Court, and the petitioners thereupon appealed here.

A motion is now made to dismiss the appeal, on the ground that the matter in dispute, exclusive of costs, does not exceed the sum of $5,000. The conceded value of the "Mamie" was less than $5,000.

Mr. Alfred Russell in support of the motion.

Mr. A. B. Maynard and *Mr. H. H. Swan*, *contra.*

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

The record has not been printed, but the value of the matter in dispute, as shown by the briefs submitted, is at least the full amount of all the claims against the owners of the "Mamie" in the several suits which it was the object of this proceeding to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of $5,000.

Motion denied.

MR. JUSTICE GRAY and MR. JUSTICE BLATCHFORD did not sit in this case, nor take any part in deciding it.

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