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UNITED STATES REPORTS

VOLUME 109

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1883

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON R. WAITE, Chief-Justice.
SAMUEL F. MILLER, Associate Justice.
STEPHEN J. FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM B. WOODS, Associate Justice.
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.

ATTORNEY-GENERAL.

Benjamin Harris Brewster.

SOLICITOR-GENERAL.

Samuel Field Phillips.

REPORTER.

J. C. Bancroft Davis.

CLERK.

James H. McKenney.

MARSHAL.

John G. Nicolay.

The allotment of the Chief-Justice and Associate Justices to Circuits continues as announced in 107 U. S.

MEMORANDA.

THE BAR OF THE SUPREME COURT OF THE UNITED STATES met in the court-room, in the Capitol, Washington, on Monday, December 17th, 1883, at 11 o'clock A.M., to pay respect to the memory of the late JEREMIAH S. BLACK.

On motion, MR. GEORGE F. EDMUNDS was elected chairman, and JAMES H. MCKENNEY, secretary.

On motion of Mr. RICHARD T. MERRICK, the following named gentlemen were appointed by the chair to constitute a committee on resolutions: Mr. RICHARD T. MERRICK, Mr. THOMAS F. BAYARD, Mr. PHILIP PHILLIPS, Mr. J. RANDOLPH TUCKER, Mr. GEORGE W. BIDDLE, Mr. Z. B. VANCE, Mr. J. HUBLEY ASHTON, Mr. WILLIAM A. WALLACE, Mr. WALTER H. SMITH.

The meeting then adjourned until Friday, December 21st, inst., at 12 M., to await the report of the committee.

On reassembling on Friday, December 21st, the committee, through Mr. MERRICK, reported the following resolutions for adoption:

Resolved, That the members of the Bar of the Supreme Court of the United States have received with a sense of profound regret the intelligence of the death of JEREMIAH S. BLACK, of the State of Pennsylvania, once Chief Justice of the Supreme Court of that State, Attorney-General and Secretary of State of the United States, and eminently distinguished as a practitioner at this bar and as a jurist of unsurpassed ability.

Resolved, That the memory of the deceased deserves to be cherished with the utmost veneration by the members of this bar, as that of a lawyer profoundly versed in the science of the law and worthy to be ranked with the greatest and ablest of our age and country; a statesman illustrious for his public services, a ready scholar, a vigorous writer, unexcelled as a logician, and in all the relations of life an eminent and most worthy citizen.

Resolved, That the Attorney-General of the United States be requested to communicate these resolutions to the Court, with the request that they be entered on its records.

Resolved, That these resolutions be also communicated to the family of the deceased, with the expression of the sympathy and condolence of the members of this bar.

The resolutions were unanimously adopted.

On Monday, January 7th, 1884, the ATTORNEY-GENERAL presented the resolutions to the court, and asked that they be entered on its minutes. After reading the resolutions, the ATTORNEY-GENERAL said :

I am instructed that on an occasion like this it is customary to make some few remarks. I am prompted not only by reason of the duty imposed upon me and the custom of the occasion, but by the sincere respect I have always felt towards this gentleman. More than thirty years ago the Constitution of Pennsylvania was changed, and the old bench of the Supreme Court passed away and new men were chosen by popular vote. At that time Judge BLACK was one of the newly elected judges, and became Chief Justice of the Court. It was then I first made his acquaintance. It was my good fortune to enjoy a comfortable practice at the bar of that Court, and that led to a social intimacy between us which was never broken from that time down to the day of his death.

I passed many happy moments with him : long and pleasant walks and talks we had together in years gone by. I am, and ever have been, proud of the friendship he bestowed upon me. When I came here to hold the office I now occupy he was among the first to greet me. Frequently during the past two years we spent many cheerful hours together. Within a short time before his death we had a long, warm, and earnest interview. He parted from me with words of tenderness and affection. I can almost hear him now as he left me.

But those days have gone and he has gone.

> " Eheu ! fugaces, Postume, Postume,
> Labuntur anni.; nec pietas moram
> Rugis, et instanti senectae
> Afferet, indomitaeque Morti."

It is the recollection of all these years of pleasant intercourse that prompts me now to speak as I do of him ; confining myself more to my personal knowledge of him than to a recital of the history of his great career, or a description of the grand qualities he possessed. Why should I speak of them ? All men know them. They are a part of the common history of the bar of this country —of the country itself. The resolutions that I have read, that speak and testify for the bar of this Court, set forth in full and strong terms the just description of his high characteristics.

He was a remarkable man ; he was a wonderful man ; he had great gifts : and all who enjoyed the benefit of personal intercourse with him felt the force of his presence. I can see him now, as we all knew him, with his square, masculine person. I shall say of him now what I have said to him, that he reminded me of that remarkable character described by Charles Lamb in his quaint and beautiful essay upon the Old Benchers of the Inner Temple, when

he spoke of Thomas Coventry. He said: "His step was massy and elephantine; his gait was peremptory and path-keeping."

How often has he stood before this Court when he had risen to the very pinnacle of professional honor!—passing, as he did, from one point of promotion to another—how often has he stood before this Court displaying those wonderful qualities, those marvellous qualities of advocacy! He was the very king of disputants! His words were as pure and weighty as gold, and as glittering as steel. No wretched fallacy stood in his path that he did not pursue it with merciless energy, until it was slaughtered at his feet.

He was a scholar; he was a lawyer; he was a statesman; he was a noble-hearted, just man.

> "Justum et tenacem propositi virum,
> Non civium ardor prava jubentium,
> Non vultus instantis tyranni
> Mente quatit solida, neque Auster."

But he has passed away! And yet his labors will not be forgotten. They will be remembered for years and years to come. The work that he left behind him was greater than he was himself. And so it is, the work of great thinkers and great actors remains long after their names sometimes have perished from the recollection of men. Southey, in his "Doctor," says this: "That when Wilkie was in Spain, and in the Escurial, followed by an old Jeronomite monk, he wandered through the galleries of that huge palace, looking at its great works of art. Presently they stood before a large picture of the "Last Supper," hanging in the refectory. The monk said to him, as Wilkie gazed at it: "And so you look at that with admiration. So do I—admiration mingled with other feelings. When I entered here, a young man, there hung that picture. All those who were in the monastery with me at that time have passed away, and so have nearly all those who came after me, and here I remain, and here is that picture, and I look at the figures in it and remember those that have been with me, likewise looking at it, and I am sometimes tempted to think that we are but the shadows, and that picture is the reality."

So it is with all the works of genius of all the great thinkers and the great workers of this world. Their works remain and they pass away, until like the Jeronomite we are tempted to say: The works are the realities, the men were but the shadows.

And thus it is he has passed away, shadow-like passed away, but leaving his great works behind him—his deeds of forensic force and power, done in this great tribunal, in the cause of law and public order, and the cause of humanity and public duty.

I could go on in this way, tempted by the melancholy and yet not unpleasant sadness of my subject to wander off until I should be involved in the deep shadows of such thoughts; but I must remember where I am, and what I have to do, and so end these few words of reflection and honest admiration for a grand man and a dear friend; and I could do it in no better way than by adverting to a sentiment expressed by a great judge, in a great case, that touches this thought of mortality—that mortality which, having come to him, we now meet to deplore, while we praise him—that mortality that sooner or later must come to all of us.

In the trial of the great contest about the Earldom of Oxford, in the time of Charles the First, it is reported in the books that Lord Chief Justice Crew delivered an opinion. I shall here recall a passage in his eloquent exordium, that will apply to my present purpose. Speaking of the Earl of Oxford, he says :

"I heard a great Peer of this Realm, and a Learned say, when he lived, there was no King in Christendom had such a Subject as Oxford. * * *

"I have labored to make a Covenant with myself, that Affection may not press upon Judgment ; for I suppose there is no man that hath any apprehension of Gentry or Nobleness, but his Affection stands to the continuance of so noble a Name and House, and would take hold of a twig or twine-thread to uphold it. And yet time hath his revolution, there must be a period and an end of all temporal things, *Finis rerum*, an end of Names and Dignities, and whatsoever is *terrene*,—and why not of DeVere ?

"For where is Bohun ? Where's Mowbray? Where's Mortimer? Nay, which is more and most of all, where is Plantaganet! They are entombed in the Urnes and Sepulchres of mortality."

So may we now all say : Where are all these great worthies that have stood here before this Court, benefiting their country, honoring their profession, and helping their race ? Where are they ? Where we will soon be, entombed in the urns and sepulchres of mortality !

Mr. Chief Justice WAITE said :

The high position which Mr. BLACK had at the bar and in the administration of public affairs, his varied attainments and great ability, and his official connection at times with the Court—once as Attorney-General of the United States, and again as Reporter of the Decisions of the Court—make it eminently proper that the request of the bar should be granted. Their resolutions, therefore, and your remarks, Mr. Attorney-General, in presenting them, may be entered on the minutes.

JOHN WILLIAM WALLACE.

In memory of the late JOHN WILLIAM WALLACE, LL.D., who was for thirteen years the reporter of the decisions of this Court, these lines are added. Born in Philadelphia in 1815, a graduate of the University of Pennsylvania in 1833, and admitted to the bar in 1836, he was from childhood within that circle of Philadelphia lawyers, of whom Chauncey, Sergeant and Binney (the brother of Mr. Wallace's mother), were among the foremost. It thus happened that he grew up among legal traditions, instincts and modes of thought, and although his tastes inclined him rather to the studies of the closet than the contests of the forum—tastes which his ample means enabled him to gratify—yet through all his life, from first to last, he was a worker—not a dilettante legal trifler, but an earnest, accomplished and useful worker. In 1842 he edited Jebb's British Crown Cases Reserved. In 1844 he was appointed standing Master in Chancery of the Supreme Court of Pennsylvania, and in 1849 began the publication of the reports of the Circuit Court of the United States in the third circuit, known as Wallace Junior's Reports.

In 1841 he had become the treasurer and librarian of the Law Association of Philadelphia, whose law library is the oldest and one of the best in America. It thus became his duty to inform himself of the comparative merits of the reports from the Year Books down, lest, as he tells us, "an extravagant price might be paid for volumes which were 'now scarce only because they had been always worthless.'" And, "thus noting what memory or reading happened to supply," the result was a modest volume of a hundred pages, now known in all the English-speaking legal world, "The Reporters." The knowledge and love of the subject shown in it, the appreciativeness, the sound criticism and the occasional quiet humor, soon made the little book a favorite, and its fourth edition, ably edited by another hand, appeared in 1882.

In 1863 Mr. Wallace was appointed the reporter of the decisions of this Court, and between that time and his resignation in 1876, twenty-three volumes of reports were published. To this work he gave unremitting attention, undisturbed by social or other attractions. The gravity of the questions which were then coming before the Court cannot be overestimated, and the complications of the civil war gave to many of them a novelty unknown since the days of the Berlin and Milan decrees. Questions of commercial law, of prize law, of inter-state law, of constitutional law, of international law—some of them questions as much perhaps of statesmanship as of strict law—were added to the already heavy business of the Court, and came before it in rapid succession. To report these fully, yet succinctly, required exceptional qualities, and it is believed that the profession appreciates the fullness, point and accuracy with which in Mr. Wallace's reports, the statement of the case and the arguments of counsel are presented and lead up to the opinion of the Court. At the last, years of work began to tell upon him, and in 1876 he resigned his position.

Apart from the duty he paid to his profession, his services as president of the Historical Society of Pennsylvania from 1868 until his death, were constant and valuable, and did much to place it in its present high position. In politics he was a Federalist, in religion a churchman of the Episcopal faith.

Mr. Wallace possessed a peculiar and charming cultivation; his acquaintance with history, biography, belles-lettres and art was varied and exact, his conversation most attractive, and his old-time, courtly manner, whether to the young or the old, brought pleasure to both. Last and best, he was an upright, honored and honorable man, and in public and private bore himself throughout as became an American gentleman.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1883.

OSBORNE *v.* ADAMS COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Submitted October Term, 1883. Decided October 15th, 1883.

PROPERTY OF
UNITED STATES SENATE
COMMITTEE ON

Internal Improvements — Municipal Bonds — Statutes.

Application being made to open the judgment in this case in order to enable the court to consider the case of *Traver* v. *Merrick County*, decided by the Supreme Court of Nebraska, and the court now having considered it: *Held*, that that case is an authority in support of the former ruling of this court in this case.

Motion for rehearing. The statement of facts appears fully in the opinion.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case was decided at the last term of this court, and is reported in 106 U. S., 181. We there held that a steam grist-mill was not a work of internal improvement, within the meaning of the statute of Nebraska, approved February 15, 1869, authorizing counties, cities, and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement." It was also said that the court was not justified by anything in *Township of Burlington* v. *Beasley*, 94 U. S. 310, or in the decisions of the

courts of Nebraska, "in holding that a steam or other kind of grist-mill is of the class of internal improvements which municipal townships in that State are empowered, by the statute in question, to aid by an issue of bonds."

A petition for rehearing was filed near the close of the last term, calling our attention to the fact that the Supreme Court of Nebraska had then recently decided that a grist-mill operated by water power was a work of internal improvement within the meaning of the before-mentioned statute. The judgment was suspended in order that appellee might have an opportunity of presenting the full text of the opinion of the State court. That has been done at the present term. The case to which reference is made is *Traver* v. *Merrick County*, the opinion in which was not filed in the State court until after the close of our last term.

It is quite true, as claimed by counsel for appellee, that the State court does, in that case, rule that a water grist-mill is a work of internal improvement within the meaning of the statute in question. But the court takes care to say:

"In our view there is a clear distinction between aiding the development of the water power of the State—a power that is continuing in its nature and may be used without cost or expense, and must be used at certain points on a stream where a dam can be erected and power obtained—and a mill propelled by steam, that must be attended with a continuous cost for fuel, and may at any time be moved to another locality."

So far from the decision of the State court furnishing any ground for a rehearing, it is an authority in support of that construction of the act of 1867 which excludes steam grist-mills from the class of internal improvements in aid of which counties, cities, and precincts of organized counties are, by that statute, authorized to issue their bonds.

The rehearing is denied.

CIVIL RIGHTS CASES.

UNITED STATES *v.* STANLEY.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

UNITED STATES *v.* RYAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

UNITED STATES *v.* NICHOLS.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

UNITED STATES *v.* SINGLETON.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ROBINSON & Wife *v.* MEMPHIS AND CHARLESTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Submitted October Term, 1882.—Decided October 15th, 1883.

Civil Rights—Constitution—District of Columbia—Inns—Places of Amusement—Public Conveyances—Slavery—Territories.

1. The 1st and 2d sections of the Civil Rights Act passed March 1st, 1875, are unconstitutional enactments as applied to the several States, not being authorized either by the XIIIth or XIVth Amendments of the Constitution.
2. The XIVth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.

Statement of Facts.

3. The XIIIth Amendment relates only to slavery and involuntary servitude (which it abolishes); and although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions; yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances and places of public amusement (which is forbidden by the sections in question), imposes no badge of slavery or involuntary servitude upon the party, but at most, infringes rights which are protected from State aggression by the XIVth Amendment.
4. Whether the accommodations and privileges sought to be protected by the 1st and 2d sections of the Civil Rights Act, are, or are not, rights constitutionally demandable; and if they are, in what form they are to be protected, is not now decided.
5. Nor is it decided whether the law as it stands is operative in the Territories and District of Columbia: the decision only relating to its validity as applied to the States.
6. Nor is it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States.

These cases were all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars

given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together by the solicitor general at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 29th day of March, 1883.

Mr. Solicitor General Phillips for the United States.

After considering some objections to the forms of proceedings in the different cases, the counsel reviewed the following decisions of the court upon the Thirteenth and Fourteenth Amendments to the Constitution and on points cognate thereto,

viz.: *The Slaughter-House Cases*, 16 Wall. 36; *Bradwell* v. *The State*, 16 Wall. 130; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Minor* v. *Happersett*, 21 Wall. 162; *Walker* v. *Sauvinet*, 92 U. S. 90; *United States* v. *Reese*, 92 U. S. 214; *Kennard* v. *Louisiana*, 92 U. S. 480; *United States* v. *Cruikshank*, 92 U. S. 542; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago B. & C. R. R. Co.* v. *Iowa*, 94 U. S. 155; *Blyew* v. *United States*, 13 Wall. 581; *Railroad Co.* v. *Brown*, 17 Wall. 445; *Hall* v. *DeCuir*, 95 U. S. 485; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Missouri* v. *Lewis*, 101 U. S. 22; *Neal* v. *Delaware*, 103 U. S. 370.

Upon the whole these cases decide that,

1. The Thirteenth Amendment forbids all sorts of involuntary personal servitude except penal, as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the Fourteenth and Fifteenth Amendments, which must be construed as *advancing* constitutional rights previously existing.

2. The Fourteenth Amendment expresses prohibitions (and consequently implies corresponding positive immunities), *limiting State action only*, including in such action, however, action by all State agencies, executive, legislative, and judicial, of whatever degree.

3. The Fourteenth Amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in discharge of ministerial functions.

The right violated by Nichols, which is of the same class as that violated by Stanley and by Hamilton, is the right of locomotion, which Blackstone makes an element of personal liberty. Blackstone's Commentaries, Book I., ch. 1.

In violating this right, Nichols did not act in an exclusively private capacity, but in one devoted to a public use, and so affected with a public, *i.e.*, a State, interest. This phrase will be recognized as taken from the *Elevator Cases* in 94 U. S., already cited.

Restraint upon the right of locomotion was a well-known

feature of the slavery abolished by the Thirteenth Amendment. A first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law to require the whole community to be on the alert to restrain that power. That this is not exaggeration is shown by the language of the court in *Eaton* v. *Vaughan*, 9 Missouri, 734.

Granting that by *involuntary servitude*, as prohibited in the Thirteenth Amendment, is intended some *institution*, viz., custom, etc., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations, to create an *institution*.

Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances, for any reason turning merely upon the race or color of the latter, partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel—and is constitutional.

Mr. William M. Randolph for Robinson and wife, plaintiffs in error.

Where the Constitution guarantees a right, Congress is empowered to pass the legislation appropriate to give effect to that right. *Prigg* v. *Pennsylvania*, 16 Peters, 539; *Ableman* v. *Booth*, 21 How. 506; *United States* v. *Reese*, 92 U. S. 214.

Whether Mr. Robinson's rights were created by the Constitution, or only guaranteed by it, in either event the act of Congress, so far as it protects them, is within the Constitution. *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *The Passenger Cases*, 7 Howard, 283; *Crandall* v. *Nevada*, 6 Wall. 35.

In *Munn* v. *Illinois*, 94 U. S. 113, the following propositions were affirmed:

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property."

"It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc."

"When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

Undoubtedly, if Congress could legislate on the subject at all, its legislation by the act of 1st March, 1875, was within the principles thus announced.

The penalty denounced by the statute is incurred by denying to any citizen "the full enjoyment of any of the accommodations, advantages, facilities, or privileges" enumerated in the first section, and it is wholly immaterial whether the citizen whose rights are denied him belongs to one race or class or another, or is of one complexion or another. And again, the penalty follows every denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges, except and unless the denial was "*for reasons by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude."

Mr. William Y. C. Humes and *Mr. David Posten* for the Memphis and Charleston Railroad Co., defendants in error.

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all

the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"SEC. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns,

public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

Opinion of the Court.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correc-

tion of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as

well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *State laws* impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may

adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based

upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte *Virginia*, 100 U. S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause of the section is directed.

This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat. 27, ch. 31, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat. 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject

parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and

denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States* v. *Harris*, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the sub-

ject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that

Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public

conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

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We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful

avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in

other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth and Fifteenth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States* v. *Michael Ryan*, and of *Richard A. Robinson and Wife* v. *The Memphis & Charles-*

ton Railroad Company, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. *And it is so ordered.*

MR. JUSTICE HARLAN dissenting.

The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The purpose of the first section of the act of Congress of March 1, 1875, was to prevent *race* discrimination in respect of the accommodations and facilities of inns, public conveyances, and places of public amusement. It does not assume to define the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied so as to work a

discrimination solely because of race, color, or previous condition of servitude. The second section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen, of that equality of right given by the first section, except for reasons by law applicable to citizens of every race or color and regardless of any previous condition of servitude.

There seems to be no substantial difference between my brethren and myself as to the purpose of Congress; for, they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is, that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white persons; and *vice versa*.

The court adjudges, I think erroneously, that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.

Whether the legislative department of the government has transcended the limits of its constitutional powers, "is at all times," said this court in *Fletcher* v. *Peck*, 6 Cr. 128, "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." More recently in *Sinking Fund Cases*, 99 U. S., 718, we said: "It is our duty when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States, but this declaration should never be made except in a clear case. Every possible presumption is

in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Before considering the language and scope of these amendments it will be proper to recall the relations subsisting, prior to their adoption, between the national government and the institution of slavery, as indicated by the provisions of the Constitution, the legislation of Congress, and the decisions of this court. In this mode we may obtain keys with which to open the mind of the people, and discover the thought intended to be expressed.

In section 2 of article IV. of the Constitution it was provided that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Under the authority of this clause Congress passed the Fugitive Slave Law of 1793, establishing a mode for the recovery of fugitive slaves, and prescribing a penalty against any person who should knowingly and willingly obstruct or hinder the master, his agent, or attorney, in seizing, arresting, and recovering the fugitive, or who should rescue the fugitive from him, or who should harbor or conceal the slave after notice that he was a fugitive.

In *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 539, this court had occasion to define the powers and duties of Congress in reference to fugitives from labor. Speaking by Mr. Justice Story it laid down these propositions:

That a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection, when another construction equally accordant with the words and the sense in which they were used, would enforce and protect the right granted;

That Congress is not restricted to legislation for the execu-

tion of its expressly granted powers; but, for the protection of rights guaranteed by the Constitution, may employ such means, not prohibited, as are necessary and proper, or such as are appropriate, to attain the ends proposed;

That the Constitution recognized the master's right of property in his fugitive slave, and, as incidental thereto, the right of seizing and recovering him, regardless of any State law, or regulation, or local custom whatsoever; and,

That the right of the master to have his slave, thus escaping, delivered up on claim, being guaranteed by the Constitution, the fair implication was that the national government was clothed with appropriate authority and functions to enforce it.

The court said: "The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given, and when the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionary to whom it is entrusted." Again: "It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfilment of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the Union. *A fortiori*, it would be more objectionable to suppose that a power which was to be the same throughout the Union, should be confided to State sovereignty which could not rightfully act beyond its own territorial limits."

The act of 1793 was, upon these grounds, adjudged to be a constitutional exercise of the powers of Congress.

It is to be observed from the report of Priggs' case that Pennsylvania, by her attorney-general, pressed the argument that the obligation to surrender fugitive slaves was on the States and for the States, subject to the restriction that they should not pass laws or establish regulations liberating such fugitives; that the Constitution did not take from the States the right to determine the status of all persons within their respective jurisdictions; that it was for the State in which the alleged fugitive was found to determine, through her courts or in such modes as she prescribed, whether the person arrested was, in fact, a freeman or a fugitive slave; that the sole power

of the general government in the premises was, by judicial instrumentality, to restrain and correct, not to forbid and prevent in the absence of hostile State action; and that, for the general government to assume primary authority to legislate on the subject of fugitive slaves, to the exclusion of the States, would be a dangerous encroachment on State sovereignty. But to such suggestions this court turned a deaf ear, and adjudged that primary legislation by Congress to enforce the master's right was authorized by the Constitution.

We next come to the Fugitive Slave Act of 1850, the constitutionality of which rested, as did that of 1793, solely upon the implied power of Congress to enforce the master's rights. The provisions of that act were far in advance of previous legislation. They placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the nation. It invested commissioners, appointed under the act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded all good citizens to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. Without going into the details of that act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave. And this court, in *Ableman* v. *Booth*, 21 How. 506, adjudged it to be "in all of its provisions fully authorized by the Constitution of the United States."

The only other case, prior to the adoption of the recent amendments, to which reference will be made, is that of *Dred Scott* v. *Sanford*, 19 How. 399. That case was instituted in a circuit court of the United States by Dred Scott, claiming to be a citizen of Missouri, the defendant being a citizen of another State. Its object was to assert the title of himself and family to freedom. The defendant pleaded in abatement that Scott—being of African descent, whose ancestors, of pure African blood, were brought into this country and sold as slaves—was not a *citizen*. The only matter in issue, said the court, was whether the descendants of slaves thus imported

and sold, when they should be emancipated, or who were born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States.

In determining that question the court instituted an inquiry as to who were citizens of the several States at the adoption of the Constitution, and who, at that time, were recognized as the people whose rights and liberties had been violated by the British government. The result was a declaration, by this court, speaking by Chief Justice Taney, that the legislation and histories of the times, and the language used in the Declaration of Independence, showed "that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that instrument;" that "they had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;" that he was "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;" and, that "this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion."

The judgment of the court was that the words "people of the United States" and "citizens" meant the same thing, both describing "the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;" that "they are what we familiarly call the 'sovereign people,' and

every citizen is one of this people and a constituent member of this sovereignty;" but, that the class of persons described in the plea in abatement did not compose a portion of this people, were not "included, and were not intended to be included, under the word 'citizens' in the Constitution;" that, therefore, they could "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States;" that, "on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

Such were the relations which formerly existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood, who had been imported into this country and sold as slaves.

The first section of the Thirteenth Amendment provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Its second section declares that "Congress shall have power to enforce this article by appropriate legislation." This amendment was followed by the Civil Rights Act of April 9, 1866, which, among other things, provided that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27. The power of Congress, in this mode, to elevate the enfranchised race to national citizenship, was maintained by the supporters of the act of 1866 to be as full and complete as its power, by general statute, to make the children, being of full age, of persons naturalized in this country, citizens of the United States without going through the process of naturalization. The act of 1866, in this respect, was also likened to that of 1843, in which Congress declared "that the Stockbridge tribe of Indians, and each and every one of them, shall be deemed to be and are hereby declared to be, citizens of the United States to

all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States." If the act of 1866 was valid in conferring national citizenship upon all embraced by its terms, then the colored race, enfranchised by the Thirteenth Amendment, became citizens of the United States prior to the adoption of the Fourteenth Amendment. But, in the view which I take of the present case, it is not necessary to examine this question.

The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet, it is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared, by this court, to have had—according to the opinion entertained by the most civilized portion of the white race, at the time of the adoption of the Constitution—"no rights which the white man was bound to respect," none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people which (although the larger part of them were in slavery) had been invited by an act of Congress to aid in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that amendment was considered, and what were the mischiefs to be remedied and the grievances to be redressed by its adoption.

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was *implied* from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or

inference. Those who framed it were not ignorant of the discussion, covering many years of our country's history, as to the constitutional power of Congress to enact the Fugitive Slave Laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt. Therefore, *ex industria*, power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted. Legislation for that purpose, my brethren concede, may be direct and primary. But to what specific ends may it be directed? This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. *United States* v. *Reese*, 92 U. S. 214; *Strauder* v. *West Virginia*, 100 U. S. 303. That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master's rights, but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.

The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom?

Had the Thirteenth Amendment stopped with the sweeping declaration, in its first section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of *Prigg* v. *Commonwealth of Pennsylvania*, repeated in *Strauder* v. *West Virginia*, to protect the freedom established, and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the second section of the Amendment.

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866. Whether that act was authorized by the Thirteenth Amendment alone, without the support which it subsequently received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, my brethren do not consider it necessary to inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enfore contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment, Congress has to do with slavery and

its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the Civil Rights Act of 1866. I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, *Slaughter-house Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

To test the correctness of this position, let us suppose that, prior to the adoption of the Fourteenth Amendment, a State had passed a statute denying to freemen of African descent, resident within its limits, the same right which was accorded to white persons, of making and enforcing contracts, and of inheriting, purchasing, leasing, selling and conveying property; or a statute subjecting colored people to severer punishment for particular offences than was prescribed for white persons, or excluding that race from the benefit of the laws exempting homesteads from execution. Recall the legislation of 1865–6 in some of the States, of which this court, in the *Slaughter-*

House Cases, said, that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party. 16 Wall. 57. Can there be any doubt that all such enactments might have been reached by direct legislation upon the part of Congress under its express power to enforce the Thirteenth Amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that amendment? That it would have been also in conflict with the Fourteenth Amendment, because inconsistent with the fundamental rights of American citizenship, does not prove that it would have been consistent with the Thirteenth Amendment.

What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

It remains now to inquire what are the legal rights of colored persons in respect of the accommodations, privileges and facilities of public conveyances, inns and places of public amusement?

First, as to public conveyances on land and water. In *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, this court, speaking by Mr. Justice Nelson, said that a common carrier is "in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." To the same effect is *Munn* v. *Illinois*, 94 U. S. 113. In *Olcott* v. *Supervisors*, 16 Wall. 678, it was ruled that

railroads are public highways, established by authority of the State for the public use; that they are none the less public highways, becaused controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that no matter who is the agent, or what is the agency, the function performed is *that of the State;* that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that, upon these grounds alone, have the courts sustained the investiture of railroad corporations with the State's right of eminent domain, or the right of municipal corporations, under legislative authority, to assess, levy and collect taxes to aid in the construction of railroads. So in *Township of Queensbury* v. *Culver*, 19 Wall. 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666: "Though the corporation [railroad] was private, its work was public, as much so as if it were to be constructed by the State." To the like effect are numerous adjudications in this and the State courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts in *Inhabitants of Worcester* v. *The Western R. R. Corporation*, 4 Met. 564, said in reference to a railroad:

"The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. . . . It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public." In *Erie, Etc., R. R. Co.* v. *Casey*, 26 Penn. St. 287, thecourt, referring to an act repealing the charter of a railroad, and under which the State took possession of the road, said: "It is a public highway, solemnly devoted to public use. When the lands were taken it was for such use, or they could not have been taken at all. . . . Railroads es-

tablished upon land taken by the right of eminent domain by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them."

In many courts it has been held that because of the public interest in such a corporation the land of a railroad company cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit. Upon this ground the State, when unfettered by contract, may regulate, in its discretion, the rates of fares of passengers and freight. And upon this ground, too, the State may regulate the entire management of railroads in all matters affecting the convenience and safety of the public; as, for example, by regulating speed, compelling stops of prescribed length at stations, and prohibiting discriminations and favoritism. If the corporation neglect or refuse to discharge its duties to the public, it may be coerced to do so by appropriate proceedings in the name or in behalf of the State.

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. "Personal liberty consists," says Blackstone, "in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law." But of what value is this right of locomotion, if it may be clogged by such burdens as Congress intended by the act of 1875 to remove? They are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of rights of a character

so necessary and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. The Thirteenth Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned.

Second, as to inns. The same general observations which have been made as to railroads are applicable to inns. The word 'inn' has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travellers or wayfarers who might choose to accept the same, being of good character or conduct." Redfield on Carriers, etc., § 575. Says Judge Story:

"An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants. An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. . . . If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . . They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest." Story on Bailments, §§ 475–6.

In *Rex* v. *Ivens*, 7 Carrington & Payne, 213, 32 E. C. L. 495, the court, speaking by Mr. Justice Coleridge, said:

"An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that

tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want."

These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.

Third. As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the public are, in any legal sense, concerned, or with which the public have any right to interfere; and, that the exclusion of a black man from a place of public amusement, on account of his race, or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer is, that places of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.

I also submit, whether it can be said—in view of the doctrines of this court as announced in *Munn* v. *State of Illinois*,

94 U. S. 113, and reaffirmed in *Peik* v. *Chicago & N. W. Railway Co.*, 94 U. S. 164—that the management of places of public amusement is a purely private matter, with which government has no rightful concern? In the Munn case the question was whether the State of Illinois could fix, by law, the maximum of charges for the storage of grain in certain warehouses in that State—the *private property of individual citizens.* After quoting a remark attributed to Lord Chief Justice Hale, to the effect that when private property is "affected with a public interest it ceases to be *juris privati* only," the court says:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

The doctrines of *Munn* v. *Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may therefore regulate, to some extent, the mode in which they shall be conducted, and, consequently, the public have rights in respect of such places, which may be vindicated by the law. It is consequently not a matter purely of private concern.

Congress has not, in these matters, entered the domain of State control and supervision. It does not, as I have said, assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement, shall be conducted or managed. It simply declares, in effect, that since the nation has established universal freedom in this country, for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations

and advantages of public conveyances, inns, and places of public amusement.

I am of the opinion that such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and, consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment. Much that has been said as to the power of Congress under the Thirteenth Amendment is applicable to this branch of the discussion, and will not be repeated.

Before the adoption of the recent amendments, it had become, as we have seen, the established doctrine of this court that negroes, whose ancestors had been imported and sold as slaves, could not become citizens of a State, or even of the United States, with the rights and privileges guaranteed to citizens by the national Constitution; further, that one might have all the rights and privileges of a citizen of a State without being a citizen in the sense in which that word was used in the national Constitution, and without being entitled to the privileges and immunities of citizens of the several States. Still, further, between the adoption of the Thirteenth Amendment and the proposal by Congress of the Fourteenth Amendment, on June 16, 1866, the statute books of several of the States, as we have seen, had become loaded down with enactments which, under the guise of Apprentice, Vagrant, and Contract regulations, sought to keep the colored race in a condition, practically, of servitude. It was openly announced that whatever might be the rights which persons of that race had, as freemen, under the guarantees of the national Constitution, they could not become citizens of a State, with the privileges belonging to citizens, except by the consent of such State; consequently, that their civil rights, as citizens of the State, depended entirely upon State legislation. To meet this new peril to the black race, that the

purposes of the nation might not be doubted or defeated, and by way of further enlargement of the power of Congress, the Fourteenth Amendment was proposed for adoption.

Remembering that this court, in the *Slaughter-House Cases*, declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested—was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him"—that each amendment was addressed primarily to the grievances of that race—let us proceed to consider the language of the Fourteenth Amendment.

Its first and fifth sections are in these words:

"SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

"SEC. 5. That Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It was adjudged in *Strauder* v. *West Virginia*, 100 U. S. 303, and *Ex parte Virginia*, 100 U. S. 339, and my brethren concede, that positive rights and privileges were intended to be secured, and are in fact secured, by the Fourteenth Amendment.

But when, under what circumstances, and to what extent, may Congress, by means of legislation, exert its power to enforce the provisions of this amendment? The theory of the opinion of the majority of the court—the foundation upon which their reasoning seems to rest—is, that the general government cannot, in advance of hostile State laws or hostile State

proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment. It is said that such rights, privileges, and immunities are secured by way of *prohibition* against State laws and State proceedings affecting such rights and privileges, and by power given to Congress to legislate for the purpose of carrying *such prohibition* into effect; also, that congressional legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

In illustration of its position, the court refers to the clause of the Constitution forbidding the passage by a State of any law impairing the obligation of contracts. That clause does not, I submit, furnish a proper illustration of the scope and effect of the fifth section of the Fourteenth Amendment. No express power is given Congress to enforce, by primary direct legislation, the prohibition upon State laws impairing the obligation of contracts. Authority is, indeed, conferred to enact all necessary and proper laws for carrying into execution the enumerated powers of Congress and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. And, as heretofore shown, there is also, by necessary implication, power in Congress, by legislation, to protect a right derived from the national Constitution. But a prohibition upon a State is not a *power* in *Congress* or *in the national government.* It is simply a *denial* of *power* to the *State.* And the only mode in which the inhibition upon State laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits for the reason that they are suits arising under the Constitution. The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States. It is not said that the *judicial* power of the nation may be exerted for the enforcement of that amendment. No enlargement of the judicial power was required, for it is clear

that had the fifth section of the Fourteenth Amendment been entirely omitted, the judiciary could have stricken down all State laws and nullified all State proceedings in hostility to rights and privileges secured or recognized by that amendment. The power given is, in terms, by congressional *legislation*, to enforce the provisions of the amendment.

The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside"—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, *and* of their respective States. Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, § 2.

The citizenship thus acquired, by that race, in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the *provisions* of *this article*" of amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. If any right was created by that amendment, the

grant of power, through appropriate legislation, to enforce its provisions, authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure, and protect that right.

It is, therefore, an essential inquiry what, if any, right, privilege or immunity was given, by the nation, to colored persons, when they were made citizens of the State in which they reside? Did the constitutional grant of State citizenship to that race, of its own force, invest them with any rights, privileges and immunities whatever? That they became entitled, upon the adoption of the Fourteenth Amendment, "to all privileges and immunities of citizens in the several States," within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the Constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free republican government, such as are "common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens." Of that provision it has been said, with the approval of this court, that no other one in the Constitution has tended so strongly to constitute the citizens of the United States one people. *Ward* v. *Maryland*, 12 Wall. 418; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Paul* v. *Virginia*, 8 Wall. 168; *Slaughter-house Cases*, 16 id. 36.

Although this court has wisely forborne any attempt, by a comprehensive definition, to indicate all of the privileges and immunities to which the citizen of a State is entitled, of right, when within the jurisdiction of other States, I hazard nothing, in view of former adjudications, in saying that no State can sustain her denial to colored citizens of other States, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to her white citizens and withholds them from her colored citizens. The colored citizens of other States, within the jurisdiction of that State, could claim, in virtue of section 2 of article 4 of the Constitution, every privilege and immunity

which that State secures to her white citizens. Otherwise, it would be in the power of any State, by discriminating class legislation against its own citizens of a particular race or color, to withhold from citizens of other States, belonging to that proscribed race, when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship; and that, too, when the constitutional guaranty is that the citizens of each State shall be entitled to "all privileges and immunities of citizens of the several States." No State may, by discrimination against a portion of its own citizens of a particular race, in respect of privileges and immunities fundamental in citizenship, impair the constitutional right of citizens of other States, of whatever race, to enjoy in that State all such privileges and immunities as are there accorded to her most favored citizens. A colored citizen of Ohio or Indiana, while in the jurisdiction of Tennessee, is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter State. It is not to be supposed that any one will controvert this proposition.

But what was secured to colored citizens of the United States —as between them and their respective States—by the national grant to them of State citizenship? With what rights, privileges, or immunities did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. In *United States* v. *Cruikshank*, 92 U. S. 542, it was said at page 555, that the

rights of life and personal liberty are natural rights of man, and that "the equality of the rights of citizens is a principle of republicanism." And in *Ex parte Virginia*, 100 U. S. 334, the emphatic language of this court is that "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." So, in *Strauder* v. *West Virginia*, 100 U. S. 306, the court, alluding to the Fourteenth Amendment, said: "This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." Again, in *Neal* v. *Delaware*, 103 U. S. 386, it was ruled that this amendment was designed, primarily, "to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons."

The language of this court with reference to the Fifteenth Amendment, adds to the force of this view. In *United States* v. *Cruikshank*, it was said: "In *United States* v. *Reese*, 92 U. S. 214, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Here, in language at once clear and forcible, is stated the principle for which I contend. It can scarcely be claimed that exemption from race discrimination, in respect of civil rights, against those to whom State citizenship was granted by the

nation, is any less, for the colored race, a new constitutional right, derived from and secured by the national Constitution, than is exemption from such discrimination in the exercise of the elective franchise. It cannot be that the latter is an attribute of national citizenship, while the other is not essential in national citizenship, or fundamental in State citizenship.

If, then, exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States—and I do not see how this can now be questioned—why may not the nation, by means of its own legislation of a primary direct character, guard, protect and enforce that right? It is a right and privilege which the nation conferred. It did not come from the States in which those colored citizens reside. It has been the established doctrine of this court during all its history, accepted as essential to the national supremacy, that Congress, in the absence of a positive delegation of power to the State legislatures, may, by its own legislation, enforce and protect any right derived from or created by the national Constitution. It was so declared in *Prigg* v. *Commonwealth of Pennsylvania.* It was reiterated in *United States* v. *Reese*, 92 U. S. 214, where the court said that "rights and immunities created by and dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." It was distinctly reaffirmed in *Strauder* v. *West Virginia*, 100 U. S. 310, where we said that "a right or immunity created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." How then can it be claimed in view of the declarations of this court in former cases, that exemption of colored citizens, within their States, from race discrimination, in respect of the civil rights of citizens, is not an immunity created or derived from the national Constitution?

This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to

enforce rights secured by that instrument. The legislation which Congress may enact, in execution of its power to enforce the provisions of this amendment, is such as may be appropriate to protect the right granted. The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of this court. Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say what legislation is appropriate—that is—best adapted to the end to be attained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government. In *United States* v. *Fisher*, 2 Cr. 358, the court said that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." "The sound construction of the Constitution," said Chief Justice Marshall, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wh. 421.

Must these rules of construction be now abandoned? Are the powers of the national legislature to be restrained in proportion as the rights and privileges, derived from the nation, are valuable? Are constitutional provisions, enacted to secure the dearest rights of freemen and citizens, to be subjected to that rule of construction, applicable to private instruments,

which requires that the words to be interpreted must be taken most strongly against those who employ them? Or, shall it be remembered that "a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature—for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty—necessarily requires that every interpretation of its powers should have a constant reference to these objects? No interpretation of the words in which those powers are granted can be a sound one, which narrows down their ordinary import so as to defeat those objects." 1 Story Const. § 422.

The opinion of the court, as I have said, proceeds upon the ground that the power of Congress to legislate for the protection of the rights and privileges secured by the Fourteenth Amendment cannot be brought into activity except with the view, and as it may become necessary, to correct and annul State laws and State proceedings in hostility to such rights and privileges. In the absence of State laws or State action adverse to such rights and privileges, the nation may not actively interfere for their protection and security, even against corporations and individuals exercising public or quasi public functions. Such I understand to be the position of my brethren. If the grant to colored citizens of the United States of citizenship in their respective States, imports exemption from race discrimination, in their States, in respect of such civil rights as belong to citizenship, then, to hold that the amendment remits that right to the States for their protection, primarily, and stays the hands of the nation, until it is assailed by State laws or State proceedings, is to adjudge that the amendment, so far from enlarging the powers of Congress—as we have heretofore said it did—not only curtails them, but reverses the policy which the general government has pursued from its very organization. Such an interpretation of the amendment is a denial to Congress of the power, by appropriate legislation, to enforce one of its provisions. In view of the circumstances under which the recent amendments were incorporated into the Constitution, and especially in view of the peculiar character of the new

rights they created and secured, it ought not to be presumed that the general government has abdicated its authority, by national legislation, direct and primary in its character, to guard and protect privileges and immunities secured by that instrument. Such an interpretation of the Constitution ought not to be accepted if it be possible to avoid it. Its acceptance would lead to this anomalous result: that whereas, prior to the amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon States and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. With all respect for the opinion of others, I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties, whereby the master could seize and recover his fugitive slave, were legitimate exertions of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?

It does not seem to me that the fact that, by the second clause of the first section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of

protecting citizens of the several States, being also citizens of the United States, against all discrimination, in respect of their rights as citizens, which is founded on race, color, or previous condition of servitude.

Such an interpretation of the amendment is plainly repugnant to its fifth section, conferring upon Congress power, by appropriate legislation, to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship. This alone is sufficient for holding that Congress is not restricted to the enactment of laws adapted to counteract and redress the operation of State legislation, or the action of State officers, of the character prohibited by the amendment. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section, to clothe Congress with power and authority to meet that danger. If the rights intended to be secured by the act of 1875 are such as belong to the citizen, in common or equally with other citizens in the same State, then it is not to be denied that such legislation is peculiarly appropriate to the end which Congress is authorized to accomplish, viz., to protect the citizen, in respect of such rights, against discrimination on account of his race. Recurring to the specific prohibition in the Fourteenth Amendment upon the making or enforcing of State laws abridging the privileges of citizens of the United States, I remark that if, as held in the *Slaughter-House Cases*, the privileges here referred to were those which belonged to citizenship of the United States, as distinguished from those belonging to State citizenship, it was impossible for any State prior to the adoption of that amendment to have enforced laws of that character. The judiciary could have annulled all such legislation under the provision that the Constitution shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. The States were

already under an implied prohibition not to abridge any privilege or immunity belonging to citizens of the United States as such. Consequently, the prohibition upon State laws in hostility to rights belonging to citizens of the United States, was intended—in view of the introduction into the body of citizens of a race formerly denied the essential rights of citizenship—only as an express limitation on the powers of the States, and was not intended to diminish, in the slightest degree, the authority which the nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the Constitution. Any purpose to diminish the national authority in respect of privileges derived from the nation is distinctly negatived by the express grant of power, by legislation, to enforce every provision of the amendment, including that which, by the grant of citizenship in the State, secures exemption from race discrimination in respect of the civil rights of citizens.

It is said that any interpretation of the Fourteenth Amendment different from that adopted by the majority of the court, would imply that Congress had authority to enact a municipal code for all the States, covering every matter affecting the life, liberty, and property of the citizens of the several States. Not so. Prior to the adoption of that amendment the constitutions of the several States, without perhaps an exception, secured all *persons* against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all *persons* to the equal protection of the laws. Those rights, therefore, existed before that amendment was proposed or adopted, and were not created by it. If, by reason of that fact, it be assumed that protection in these rights of persons still rests primarily with the States, and that Congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon State laws or State proceedings inconsistent with those rights, it does not at all follow, that privileges which have been *granted by the nation*, may not be protected by primary legislation upon the part of Congress. The personal rights and immunities recognized in the prohibitive clauses of the amendment were, prior to its adoption,

under the protection, primarily, of the States, while rights, created by or derived from the United States, have always been, and, in the nature of things, should always be, primarily, under the protection of the general government. Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new right, created by the nation, with express power in Congress, by legislation, to enforce the constitutional provision from which it is derived. If, in some sense, such race discrimination is, within the letter of the last clause of the first section, a denial of that equal protection of the laws which is secured against State denial to all persons, whether citizens or not, it cannot be possible that a mere prohibition upon such State denial, or a prohibition upon State laws abridging the privileges and immunities of citizens of the United States, takes from the nation the power which it has uniformly exercised of protecting, by direct primary legislation, those privileges and immunities which existed under the Constitution before the adoption of the Fourteenth Amendment, or have been created by that amendment in behalf of those thereby made *citizens* of their respective States.

This construction does not in any degree intrench upon the just rights of the States in the control of their domestic affairs. It simply recognizes the enlarged powers conferred by the recent amendments upon the general government. In the view which I take of those amendments, the States possess the same authority which they have always had to define and regulate the civil rights which their own people, in virtue of State citizenship, may enjoy within their respective limits; except that its exercise is now subject to the expressly granted power of Congress, by legislation, to enforce the provisions of such amendments—a power which necessarily carries with it authority, by national legislation, to protect and secure the privileges and immunities which are created by or are derived from those amendments. That exemption of citizens from discrimination based on race or color, in respect of civil rights, is one of those privileges or immunities, can no longer be deemed an open question in this court.

Dissenting Opinion.

It was said of the case of *Dred Scott* v. *Sandford*, that this court, there overruled the action of two generations, virtually inserted a new clause in the Constitution, changed its character, and made a new departure in the workings of the federal government. I may be permitted to say that if the recent amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide, by legislation of a direct character, for the security of rights created by the national Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States, rests primarily, not on the nation, but on the States; if it be further adjudged that individuals and corporations, exercising public functions, or wielding power under public authority, may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the Constitution ordains as a principle of republican citizenship; then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.

But if it were conceded that the power of Congress could not be brought into activity until the rights specified in the act of 1875 had been abridged or denied by some State law or State action, I maintain that the decision of the court is erroneous. There has been adverse State action within the Fourteenth Amendment as heretofore interpreted by this court. I allude to *Ex parte Virginia*, *supra*. It appears, in that case, that one Cole, judge of a county court, was charged with the duty, by the laws of Virginia, of selecting grand and petit jurors. The law of the State did not authorize or permit him, in making such selections, to discriminate against colored citizens because of their race. But he was indicted in the federal court, under the act of 1875, for making such discriminations.

The attorney-general of Virginia contended before us, that the State had done its duty, and had not authorized or directed that county judge to do what he was charged with having done; that the State had not denied to the colored race the equal protection of the laws; and that consequently the act of Cole must be deemed his individual act, in contravention of the will of the State. Plausible as this argument was, it failed to convince this court, and after saying that the Fourteenth Amendment had reference to the political body denominated a State, "by whatever instruments or in whatever modes that action may be taken," and that a State acts by its legislative, executive, and judicial authorities, and can act in no other way, we proceeded:

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it. But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State, in the denial of the rights which were intended to be secured." *Ex parte Virginia*, 100 U. S. 346–7.

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with

duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.

But the court says that Congress did not, in the act of 1866, assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community. I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him, even upon grounds of race. What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race. The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social rights. The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit

in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed. Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house, or court-room, was an invasion of the social rights of white persons who may frequent such places. And yet, such a suggestion would be quite as sound in law—I say it with all respect—as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.

The court, in its opinion, reserves the question whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another. I beg to suggest that that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson and Wife* v. *Memphis & Charleston Railroad Company*. In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce? Has it ever been held that the judiciary should overturn a statute, because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment? We have often enforced municipal bonds in aid of railroad subscriptions, where they failed to recite the statute authorizing their issue, but recited one which did not sustain their validity. The inquiry in such cases has been, was there, in any statute, authority for the execution of the bonds? Upon this branch of the case, it may be remarked that the State of Louisiana, in 1869, passed a statute

giving to passengers, without regard to race or color, equality of right in the accommodations of railroad and street cars, steamboats or other water crafts, stage coaches, omnibuses, or other vehicles. But in *Hall* v. *De Cuir*, 95 U. S. 487, that act was pronounced unconstitutional so far as it related to commerce between the States, this court saying that "if the public good requires such legislation it must come from Congress, and not from the States." I suggest, that it may become a pertinent inquiry whether Congress may, in the exertion of its power to regulate commerce among the States, enforce among passengers on public conveyances, equality of right, without regard to race, color or previous condition of servitude, if it be true—which I do not admit—that such legislation would be an interference by government with the social rights of the people.

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.

At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

UNITED STATES *v.* HAMILTON.

ON CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Submitted October Term, 1882.—Decided October 15th, 1883.

Practice

This court will not take cognizance of a division of opinion between the judges of a circuit court on a motion to quash an indictment.

Mr. Justice Bradley delivered the opinion of the court.

The certificate of division in this case was made on a division in opinion between the judges on a motion to quash the indictment. As a motion to quash is always addressed to the discretion of the court, a decision upon it is not error, and cannot be reviewed on a writ of error. In the case of *United States* v. *Rosenburgh*, 7 Wall. 580, we decided the precise point, that this court cannot take cognizance of a division of opinion between the judges of a circuit court upon a motion to quash an indictment. This decision was re-affirmed in *United States* v. *Avery*, 13 Wall. 251, and in *United States* v. *Canda*, decided at October term 1881.

The case, not being properly before us, is dismissed.

POINDEXTER *v.* GREENHOW, Treasurer.

IN ERROR TO THE HUSTINGS COURT OF THE CITY OF RICHMOND, VIRGINIA.

WHITE *v.* GREENHOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Opinion of the Court.

CARTER *v.* GREENHOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Motion to advance, made October 9th, 1883.—Denied October 15th, 1883.

Practice.

A case will not be taken up out of its order simply because it is of great public importance.

Motion to advance a suit against a tax collector.

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

These motions are denied. Rule 32 applies only to writs of error and appeals brought to this court under the provisions of section five of the act of March 3, 1875; that is to say, to writs of error and appeals from orders of the circuit courts remanding causes which have been removed from a State court, and from orders dismissing suits because they do not really and substantially involve disputes or controversies properly within the jurisdiction of the circuit courts, or because the parties to the suits have been improperly made or joined for the purpose of creating a case cognizable under that act. These are not such cases. That of Poindexter is a writ of error to a State court. In those of White and Carter, begun in the circuit court, the declarations were demurred to because not sufficient in law, and the judgments were in favor of the defendants on the demurrers. The cases as made by the declarations were disposed of on the merits, and the writs of error are for the review of such judgments.

Neither are the parties entitled to a hearing in preference to others under the provisions of section 949 of the Revised Statutes. The State of Virginia is not a party to either of the suits, and the execution of the revenue laws has not been enjoined or stayed. A tax collector has been sued for alleged wrongs done the several plaintiffs while he was engaged in the collection of taxes due the State, but he is not restrained from discharging any of his official duties.

Par. 4 of Rule 26 relates only to revenue cases and cases in

which the United States are concerned, which also involve or affect some matter of general public interest. Even these can not be advanced except in the discretion of the court and on the motion of the attorney-general.

The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for imperative reasons.

Motion denied.

UNITED STATES v. GALE & Another.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Submitted November 9th, 1882.—Decided October 15th, 1883.

Constitution—Criminal Law—Elections—Fraudulent Registration—Grand Jury—Practice—Revised Statutes.

1. The court adheres to the rulings in *Ex parte Siebold*, 100 U. S. 371, and *Ex parte Clarke*, 100 U. S. 399, that §§ 5512 and 5515 Rev. St. relating to violations of duty by officers of elections are not repugnant to the Constitution of the United States, and holds them to be valid.
2. Where a defendant pleads not guilty to an indictment, and goes to trial without making objection to the mode of selecting the grand jury, the objection is waived; even though a law unconstitutional, or assumed to be unconstitutional, may be followed in making the panel.
3. An objection to the qualification of grand jurors, or to the mode of summoning or empanelling them, must be made by a motion to quash, or by a plea in abatement, before pleading in bar.

Indictment against inspector and clerk of Election District No. 8, Northern District of Florida, for removal of ballots cast by electors at an election for representative in Congress, and substitution of different ballots. *Mr. Solicitor-General Phillips* for the plaintiffs. No appearance for defendants.

Opinion of the Court.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The indictment against the defendants in this case was for misconduct as election officers at an election held in Florida for a representative to Congress, in stuffing the ballot-box with fraudulent tickets, and abstracting tickets which had been voted. In empanelling the grand jury which found the indictment, four persons, otherwise competent, were excluded from the panel for the causes mentioned in section 820 of the Revised Statutes, which grounds are, in substance, voluntarily taking part in the Rebellion, and giving aid and comfort thereto. The exclusion of these persons for this cause appears by an amendment of the record, made *nunc pro tunc*, showing what took place; but no objection was taken to the indictment or proceedings on that account until after a plea of not guilty, and a conviction, when the objection was first taken on motion in arrest of judgment. The indictment was founded upon sections 5512 and 5515 of the Revised Statutes, and the constitutionality of those sections was called in question, as well as that of section 820. The judges having disagreed upon the motion in arrest of judgment, certified up the following questions for the determination of this court, namely:

1. Whether sections 5512 and 5515 of the Revised Statutes of the United States, on which such indictment was founded, are repugnant to and in violation of the Constitution of the United States? 2. Whether section 820 of the Revised Statutes of the United States is repugnant to and in violation of the Constitution of the United States? 3. Whether judgment of this court could be rendered against the defendants on an indictment found by a grand jury empanelled and sworn under the section aforesaid? and 4. Whether the indictment aforesaid charges any offence for which judgment could be rendered against the defendants in this court under the Constitution and laws of the United States?

The question of the validity of sections 5512 and 5515 has already been decided by this court in the cases of *Siebold* and *Clarke*, 100 U. S. 371, 399, and was determined in favor of their validity. As to those sections, therefore, the answer must

be in the negative, namely, that they are not repugnant to, nor in violation of, the Constitution of the United States.

The second question, as to the constitutionality of the 820th section of the Revised Statutes, which disqualifies a person as a juror if he voluntarily took any part in the Rebellion, is not an essential one in the case; inasmuch as, by pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived. The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in empanelling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury or excluded therefrom, or to mere irregularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularities.

Chitty, in his work on Criminal Law, vol. 1, p. 307, says:

"It is perfectly clear that all persons serving upon the grand jury must be good and lawful men; by which it is intended, that they must be liege subjects of the king, and neither aliens nor persons outlawed even in a civil action; attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous. And if a man who lies under any of these disqualifications be returned, he may be challenged by the prisoner before the bill is presented; or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which purpose he may be allowed the assistance of counsel on producing in court the record of the outlawry, attainder, or conviction, on which the incompetence of the juryman rests."

This is undoubtedly the general rule as to the manner in which objection may be taken to the personnel of the grand jury, though in this country a motion to quash the indictment may be made instead of pleading specially in abatement. The requirement of answering over to the felony in connection

with the plea in abatement is for the benefit of the accused, in order that he may not be concluded on the merits if he should fail in sustaining his special plea,—a precaution which probably would not be necessary in our practice.

By an English statute passed in the 11th year of Henry IV., it was declared that indictments made by persons not returned by the sheriff, or by persons nominated to him, or who were outlawed or had fled to sanctuary for treason or felony, should be void, revoked and annulled. On this statute it was held that if any such persons were on a grand jury which found an indictment, it made the whole void, and if the matter appeared on the record, or in the proceedings of the same court, advantage might be taken of it on motion in arrest of judgment, or even on the suggestion of an *amicus curiæ;* but if it did not appear on the record of the cause, or in the records of the same court, the better opinion was that it could only be pleaded in abatement, or raised by motion to quash. Hawkins says:

"If a person who is tried upon such an indictment take no exception before his trial, it may be doubtful whether he may be allowed to take exception afterward, because he hath slipped the most proper time for it; except it be verified by the records of the same court wherein the indictment is depending, as by an outlawry in the same court of one of the indictors, etc." Hawkins, book 2, ch. 25, sect. 27.

In Bacon's Abridgment (Juries, A) it is said that the court need not admit of the plea of outlawry of an indictor unless he who pleads it have the record ready, or it be an outlawry of the same court; and it is added, as the better opinion, that no exception against an indictor is allowable, unless the party takes it before trial. Chitty lays down the same rule. 1 Crim. L. 307–8. Lord Chief Justice Hale, speaking of what the caption ought to contain, among other things, says:

"It must name the jurors that presented the offence, and therefore a return of an indictment or presentment *per sacramentum* A. B., C. D., *et aliorum*, is not good, for it may be the

presentment was by a less number than twelve, in which case it is not good (H. 41 Eliz. B. R. Croke, n. 16, *Clyneard's Case*, p. 654); and it seems to me that all the names of the jurors ought to be returned; for the party indicted may have an exception to some or one of them, as that he is outlawed, in which case the indictment may be quashed by plea, though there be twelve besides without exception; for possibly that one, who is not *legalis homo*, may influence all the rest, and so vitiate the whole indictment."

All these authorities tend to the same point, namely, that the proper mode of taking objection to the personnel of the grand jury, even under the statute referred to, when the matter does not appear of record, is by plea in abatement.

If under the operation of so stringent a statute as that of 11 Hen. IV., the general rule was, that the objection to the constitution of the grand jury must be taken before trial, and could only be taken afterward when it appeared on the record, much more would it seem to be requisite that all ordinary objections based upon the disqualification of particular jurors, or upon informalities in summoning or empanelling the jury, where no statute makes proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity. It would be trifling with justice, and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings. In most cases it could not appear in a record properly made up; but, if appearing at all, it would require (as in the present case) a special certificate of the court analogous to a bill of exceptions, or a case stated,—not constituting a part of the true record. But even if it should appear upon the record as a proper part thereof, the fact of pleading to the merits and going to trial without taking the objection would also appear, and would amount in law to a waiver of the irregularity. If it could be taken advantage of on a motion in arrest of judgment, it would be a good ground of reversal on error, and all the proceedings of a long term might be rendered nugatory by

admitting a person to the grand jury, or excluding a person from it, without the matter being called to the attention of the court; whereas, if the objection were taken *in limine*, the irregularity might be corrected by reforming the panel or summoning a new jury.

The remarks apply with additional force where the objection is not to the disqualification of jurors who are actually sworn upon the panel, but to the exclusion, or excuse, of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable, and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found the indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for an improper cause, that is, because they labored under the disqualification created by the 820th section of the Revised Statutes, which is alleged to be unconstitutional. It is not complained that the jury actually empanelled was not a good one; but that other persons equally good had a right to be placed on it. These persons do not complain. If their right to serve on the grand jury was improperly infringed, perhaps they might complain of being excluded. That is another matter. Or, perhaps, the defendants, if correct in their assumption that the law is unconstitutional, and that the court was governed by an improper rule in excluding persons under it, might have had the benefit of the error by moving to quash the indictment, or by pleading in abatement. But passing by these proper modes of taking the objection, they waited until they had been tried and convicted on a plea of not guilty, and then moved in arrest of judgment. We think they were too late in raising the objection.

Some importance is attached to the fact that the court followed an unconstitutional law, or one assumed to be such. We do not see that this is in any wise different from the case in which the court misconstrues the law. The result is the

same: certain persons, under a misconception of the court, are excluded from the grand jury who are qualified to serve on it; but the jury, as actually constituted, is unexceptionable in every other respect. In either case, whether the court is mistaken as to the validity of a law or as to its interpretation, the objection relates so little to the merits of the case that it ought to be taken in the regular order and due course of proceeding.

There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with. But there is no complaint of this kind in the present case: the complaint simply relates to the action of the court in excluding particular persons who might properly have served on the jury. We do not think that this vitiated all the proceedings so as to render them absolutely null and void. It might have sufficed to quash the indictment if the objection had been timely and properly made. Nothing more.

We think that this conclusion is the result not only of the English, but of the better American authorities.

Mr. Wharton, in his section on the "Disqualification of Grand Jurors, and how it may be excepted to," begins by stating the general rule, that irregularities in selecting or empanelling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to, by challenge to the array, or motion to quash; and this must be before the general issue. Crim. Pl. & Pr. 8th ed., § 344. He then shows that in some States it has been held that objections to disqualification of individual jurors can only be taken by challenge, and not by motion to quash or by plea; but that in others the motion to quash, as well as the plea, is allowed; the latter rule being more generally followed, and being more in accordance with the English law. He then adds:

"Ordinarily after the general issue has been pleaded objections are too late; and when the objection goes to the manner of drawing it should be taken by challenge to the array. . . But on principle, in those cases in which the defendant is surprised, and had no opportunity to take exception until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea." (§ 350.)

We apprehend that the rule last stated is the correct one. But in § 353, it is added, that at common law, if the objection appears of record, and there be no statutory impediment, a motion in arrest of judgment may be entertained. This last position we do not think is well sustained. As we have seen, it was by force of the statute of 11 Henry IV. that objections might be taken after the trial in England; and the American cases referred to by Mr. Wharton do not sustain his observation. In *Hardin's Case*, 2 Richardson, 533, the motion in arrest of judgment was based on the ground that the grand jury was not such for the term at which the bill was found, and of course the proceedings were *coram non judice*. In the other cases cited in support of the position, the motions were overruled. We think that the doctrine of waiver applies as well to cases where the objection appears of record as where it appears by averments; and that it applies to all cases of objection to the qualifications of jurors, and to the mode of empanelling the jury; but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice therein. Brooke's Abr. Indict. 2; *Seaborn's Case*, 4 Dev. 305; *Robinson's Case*, 2 Parker's Crim. Cas. 308. In the case in Brooke, persons not *legali homines* were on the grand jury, and it was held that the objection ought to be pleaded before pleading to the felony. In *Seaborn's Case* it was held that, after conviction of murder, it was too late to take advantage of an error in constituting the grand jury, though it appeared in the record. In *Robinson's Case*, 2 Parker's Crim. Cas. 235, 308, 311, which was argued by able counsel in the Supreme Court of New York before Justices Parker, Wright and Harris, no precept for summoning the grand jury had been issued by the district attorney to the sheriff, as the law

required, though the sheriff summoned them in the usual way. The court held that this omission did not affect the substantial rights of the prisoner, and that the objection could not be raised after trial and conviction. Many authorities were referred to in the opinion of the court delivered by Mr. Justice Parker, and this general statement was then made:

"It seems to be well settled in most of the States that an objection to the qualification of grand jurors, or to the mode of summoning or empanelling them, must be made by a motion to quash or by a plea in abatement, before pleading in bar."

The subject is also discussed in Bishop's Crim. Procedure, chap. LX., where the same general rule is laid down, though with a reservation of some doubt as to cases where the objection appears of record. (§§ 887, 888.) As before stated, we think that it is the nature of the objection, rather than the fact of its appearing or not appearing on the record, which should decide whether it ought to be taken by a plea in abatement, or whether it may also be taken by motion in arrest of judgment; though, of course, it cannot be taken by such a motion unless it does appear of record.

Being satisfied that the defendants could not raise the question of the constitutionality of section 820 by motion in arrest of judgment, it is not necessary, as before observed, to express any opinion on that point. It may be proper, however, to call attention to the singular position of that section. It was originally enacted as section 1 of the act passed June 17, 1862, entitled "An Act defining different causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts," 12 Stat. 430. At that time (1862) it was no doubt a very proper and necessary law; but after the rehabilitation of the insurgent States, the proclamation of general amnesty, and the adoption of the Fourteenth Amendment, guaranteeing equal rights to all citizens of the United States, there would seem to have been no just reason for the continuance of the law; especially as by far the largest portion of white citizens in the States lately in rebellion would be disqualified under it. Accordingly, by the 5th section of the act

commonly called the Enforcement Act, passed April 20, 1871, 17 Stat. 15, Congress, after providing that in prosecutions under that act, no person should be a grand or petit juror who should, in the judgment of the court, be in complicity with any combination or conspiracy punishable by the provisions thereof, repealed the said first section of the act of 1862; and the law remained in this state until the adoption of the Revised Statutes. For some unexplained reason, the revisers imported the section back again into the Revised Statutes (as section 820), although it had not been in force for over two years. It is probable that the fact of its repeal was overlooked by Congress when the revision was adopted; and it is to be hoped that their attention will be called to it.

In conclusion, to the third and fourth questions certified by the court below, the answer will be in the affirmative;

And it is so ordered.

STEEVER *v.* RICKMAN.

Submitted October 22d, 1883.—Decided October 23d, 1883.

Appeal—Clerk's fees—Practice.

If, through fault of the party prosecuting a cause in this court, printed copies of the record are not furnished to the justices or parties, the writ or appeal will be dismissed for want of prosecution, unless good cause be shown to the contrary. The fees of the clerk of this court must be paid in advance when demanded.

Motion to use printed record without paying clerk's fee.

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

By the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1884, c. 143, 22 Stat. 631, the clerk of this court is required to pay into the treasury the fees and emoluments of his office over and above his own compensation as fixed by law, and his necessary clerk hire and incidental expenses. It is proper, therefore, that for his protection his fees should be paid in advance, if demanded.

Syllabus.

Under Rule 10, it is the duty of the clerk to have the record printed, and a fee has been fixed for preparing the record for the printer, indexing the same, and supervising the printing. Ordinarily this fee is to be paid in the first instance by the party who prosecutes the cause. If he fails to make the payment when demanded in time to enable the clerk to cause the printing to be done in due course, he fails in the orderly prosecution of his suit, and may be dealt with accordingly. Consequently if, through the fault of a plaintiff in error or appellant, printed copies of the record are not furnished to the justices or the parties when required in the due prosecution of the cause, the writ or appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary.

In the present case the record has been printed, but the clerk has not furnished the necessary copies to the justices because his fee for preparing the record for the printer and other services, has not been paid by the appellant, although demanded. As this is the first time the question has arisen, and the practice has not heretofore been authoritatively announced, it is ordered that, unless the appellant pay to the clerk within twenty days from the entry hereof what is due him for this fee, the appeal be dismissed for want of prosecution. If the payment is made, the clerk shall at once notify the opposite party, and the cause may thereafter be brought on for hearing under paragraph 7 of Rule 26, as a case that has been passed under circumstances which do not place it at the foot of the docket.

OLIVER & Others *v.* RUMFORD CHEMICAL WORKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Argued October 10th and 11th, 1883.—Decided October 29th, 1883.

License—Patent—Survivorship.

The reissued letters patent No. 2,979, granted to the Rumford Chemical Works, June 9th, 1868, for an "improvement in pulverulent acid for use

Statement of Facts.

in the preparation of soda powders, farinaceous food, and for other purposes," claimed, in claim 1, "as a new manufacture, the above-described pulverulent phosphoric acid," and, in claim 2, the manufacture of such acid, and, in claim 3, the mixing with flour of such acid and an alkaline carbonate, so as to make the compound self-raising, on the application of moisture or heat, or both. There was transferred to M., by the Rumford Chemical Works, the exclusive right to make, sell, and use, in a specified territory, for five years, self-raising flour by the use of the acid, he agreeing to make the flour, and to use his skill to introduce it, and to purchase all the acid from the grantor. M. died in less than three months from the date of the grant: *Held*, under the provisions of §§ 11 and 14 of the act of July 4th, 1836, 5 Stat. 121, 123, that the right acquired by M. was only that of a licensee; that the instrument of license did not carry such right to any one but him personally; and that such right did not, on his death, pass to his administrator, so as to authorize a suit at law, founded on the license, to be brought in the name of the grantor, for the use of the administrator, to recover damages for an infringement of the patent committed after the death of M., by the manufacture and sale of self-raising flour, by the use of such acid, in said territory.

Action on the case for infringement of patent. The facts were stated by the court in the following language:

On the 9th of June, 1868, reissued letters patent No. 2,979 were granted to the Rumford Chemical Works, a corporation of Rhode Island, for an "improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes." The original patent, No. 14,722, was granted to Eben Norton Horsford, April 22d, 1865, for fourteen years, for an "improvement in preparing phosphoric acid as a substitute for other solid acids," and was reissued to the Rumford Chemical Works, as No. 2,597, May 7th, 1867, for an "improvement in the manufacture of phosphoric acid and phosphates for use in the preparation of food and for other purposes."

The specification of reissue No. 2,979 sets forth the mode of preparing the acid, which is a dry pulverulent acid, described as having the capacity of being intimately mixed with dry alkaline carbonates, or other sensitive chemical compounds, without decomposing them or entering into combination with them, except upon the addition of moisture or the application of artificial heat. It says:

"This requires that the phosphoric acid, or acid phosphates, be

mixed with some neutral agent, as flour or starch, gypsum, etc., so that action of the acid shall be prevented while dry, and shall, when moisture or heat is applied, be prompt, thorough, and equally diffused. . . . It may, among other uses, be mixed with dry alkaline carbonates, carbonate of potassa, or carbonate of soda, and remain in this state without evolution of carbonic acid until moistened or heated, thus making it a substitute for cream tartar and tartaric acid in the preparation of yeast powder or baking powder. . . . It . . . is suited to be employed as the acid ingredient in the preparation of self-raising farinaceous food. In order to make an article possessing these qualities, and suited to this office, it is necessary that a powder should be made which can be not only evenly comminuted and diluted, but one which shall have so little affinity for the moisture of the atmosphere that it may be mixed with flour and bicarbonate of soda in the practical preparation of self-raising flour."

The claims of reissue No. 2,979 are four in number, as follows:

"1. I claim, as a new manufacture, the above-described pulverulent phosphoric acid. 2. I claim the manufacture of the above-described pulverulent phosphoric acid, so that it may be applied in the manner and for the purposes above described. 3. I claim the mixing, in the preparation of farinaceous food, with flour, of a powder or powders, such as described, consisting of ingredients of which phosphoric acid, or acid phosphates, and alkaline carbonates, are the active agents for the purpose of liberating carbonic acid, as described, when subjected to moisture or heat, or both. 4. The use of phosphoric acid or acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food."

On the 1st of February, 1869, the following instrument in writing was executed and delivered by the Rumford Chemical Works to one Allen F. Morgan:

"To all people to whom these presents shall come, the Rumford Chemical Works, a corporation transacting business in East Providence, in the State of Rhode Island, sends greeting: Know ye that the said corporation, in consideration of the agreement, of even date herewith, entered into between it and Allen F. Mor-

gan, of Memphis, in the county of Shelby and State of Tennessee, does hereby sell, assign and transfer unto the said Allen F. Morgan the right to use, within the territory described in said agreement, Horsford's patent cream of tartar substitute, for the purpose of manufacturing within said territory self-raising cereal flours, with the right to use and sell the flours so manufactured; to have and hold and exercise such rights within the limits aforesaid, for and during the time and under and subject to the conditions and limitations named and specified in the agreement aforesaid, of even date herewith, to which reference is hereby made as a part hereof."

On the same day Morgan executed and delivered to the Rumford Chemical Works the following instrument in writing:

"To all men to whom these presents shall come: Know ye, that because the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has licensed and granted unto Allen F. Morgan, of the city of Memphis, county of Shelby and State of Tennessee, the exclusive right to manufacture, sell and use during the time of five years from the date hereof, the article known as self-raising flour, from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River; thence southerly along the said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Granada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and westerly along said boundary line to the point of beginning, by an instrument in writing bearing even date herewith, which is made a part of this agreement, and because of other good and sufficient reasons moving him thereto, that he has agreed, and by these presents does covenant and agree, to and with the aforesaid Rumford Chemical Works, that he will immediately commence the manufacture of self-raising flour in accordance with the written instructions furnished by

the said Rumford Chemical Works, as to proportions and quality of flour, and that he will use all his business tact and skill, and all other means necessary to introduce and sell the same, and to make the sale thereof as large as in any way possible in the territory aforesaid, during the continuance of the license aforesaid, and no longer, and to sell the said self-raising flour nowhere but in the territory specified, except upon the written consent of the said Rumford Chemical Works. And I further agree to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horsford, and by him assigned to the said Rumford Chemical Works, and to maintain them at my own cost and expense in suits at law, whenever it shall be in my judgment necessary so to do, and to avail myself of such advice, counsel and assistance as the said Rumford Chemical Works may elect to give in said suits; and to purchase all of the acid used in making our said self-raising flour of the Rumford Chemical Works or of their agents, as directed; and that in case of my failure to perform the covenants and agreements hereby entered into, it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to me, and to terminate this agreement. The use of said phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement."

On the 12th of April, 1870, the patent was duly extended for seven years from April 22d, 1870. On the 21st of May, 1870, the extended term was assigned by Horsford to the Rumford Chemical Works. Morgan died on the 19th of April, 1869. In July, 1869, his widow, Kate G. Morgan, was appointed administratrix of his estate. She afterwards intermarried with J. N. Payne. A suit at law was brought, in 1875, in the name of the Rumford Chemical Works, for the use of J. N. Payne and his wife, Kate G. Payne, in the Circuit Court of the United States for the Western District of Tennessee, against J. N. Oliver and others, partners, constituting the firm of Oliver, Finnie & Co., to recover damages for the infringement by the defendants, for the period from April 1st, 1870, to February 1st, 1874, of the rights of the said Kate G. Payne and her husband, under said patent, by making and selling

self-raising flour by the use of Horsford's patent pulverulent phosphoric acid in the territory before named. The theory of the suit was that the right of Morgan became vested in his administratrix, as a personal asset, and continued under the extension, and that the suit brought would lie for infringements of such right committed prior to the expiration of the five years from February 1st, 1869. The suit was tried by a jury, and resulted in a verdict for the plaintiffs for $3,538.97 damages, and a judgment in their favor for that amount, with costs. To review that judgment this writ of error is brought.

Mr. Estes and *Mr. Ellett* for the plaintiffs in error.

Mr. George Gantt and *Mr. Isham G. Harris* for the defendants in error

Several points were argued. The following is a summary of the argument of the defendants' counsel on the point on which the case turned in the opinion :

This is an assignment or grant of an exclusive right in and under the patent throughout a specified part of the United States. A patent may embrace more than one invention. Curtis on Patents, § 110. This patent embraces four. *Rumford Chemical Works* v. *Lauer*, 10 Blatchford, 122. Either of these could be assigned separately. *Adams* v. *Burke*, 17 Wall. at p. 456; *Dorsey Rake Co.* v. *Bradley*, 12 Blatchford, 202. There can be a grant of a limited number of machines. *Wilson* v. *Rousseau*, 4 How. at p. 686; *Washburn* v. *Gould*, 3 Story, 122. Morgan had the exclusive right as to the third and fourth claims. Nothing was left in the Rumford Works except a reservation which was a license back. *Littlefield* v. *Perry*, 21 Wall. 205, and cases cited above.

This is an exclusive license giving the plaintiff exclusive right in the designated territory, which he can enforce. *Mitchell* v. *Hanly*, 16 Wall. 544.

Morgan's license was not a personal privilege which terminated at his death. If the parties in this case had intended to limit this grant to Morgan's lifetime it would have been easy for them to have said so. Instead of doing that, they give it

for a fixed time, and the only condition upon which it can be terminated before the end of that time is the failure of the grantee to perform his agreements under the contract. Certainly his personal representatives can perform them in his shoes. All the intendments and presumptions of law are against defeating the deceased's rights under his contracts. 1 Parsons on Contracts, 111.

Mr. Justice Blatchford delivered the opinion of the court. After reciting the facts in the above language, he continued.

Various questions are presented by the record and have been discussed in argument, but there is one which goes to the foundation of the suit, and upon which our views are such as to make it unnecessary to consider any other. The court charged the jury that the interest of Morgan in the patent did not terminate at his death, but passed to his administratrix. The defendants excepted to this charge. The evidence was that Morgan died on the 19th of April, 1869, and the defendants asked the court to instruct the jury that the privilege conferred on Morgan by the instrument of February 1st, 1869, from the Rumford Chemical Works to him, terminated at his death, and did not pass to his administratrix, and that they should find for the defendants, if they believed that Morgan died on the 19th of April, 1869. The court refused to give such instruction, and the defendants excepted.

It is apparent that what was granted to Morgan was only the exclusive right to use, within the territory specified, the patented acid in making self-raising flour, and to use and sell in said territory the flour so made. The acid used in making the self-raising flour was all of it to be purchased from the Rumford Chemical Works, or its agents. No right was granted to make the acid, or to use it or sell it otherwise than as an ingredient in the self-raising flour. The effect of the grant made by the two instruments of February 1st, 1869, is subject to the provisions of § 11 of the act of July 4th, 1836, 5 Stat. 121, which was the statute in force at the time, and provided as follows:

"Every patent shall be assignable at law, either as to the

whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof."

By § 14 of the same act it was provided that damages for making, using or selling the thing whereof the exclusive right is secured by a patent:

"May be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees or as grantees of the exclusive right within and throughout a specified part of the United States."

Morgan was not an assignee of the entire right secured by the patent, nor of any undivided part of such entire right, nor of the exclusive interest in such entire right for the territory specified. He did not acquire the whole of the exclusive right or legal estate vested in the Rumford Chemical Works by the patent for the said territory, leaving no interest in his grantor for that territory, as to anything granted by the patent. It is well settled that a transfer of a right such as Morgan acquired is not an assignment, nor such a grant of exclusive right as the statute speaks of, but is a mere license. Curtis on Patents, 3d ed. § 179; *Gayler* v. *Wilder*, 10 How. 477, 494. This being so, the instrument of license is not one which will carry the right conferred to any one but the licensee personally, unless there are express words to show an intent to extend the right to an executor, administrator or assignee, voluntary or involuntary.

In *Troy Iron and Nail Factory* v. *Corning*, 14 How. 193, 216, this court said:

"A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensee, and is not transferable by him to another."

Opinion of the Court.

In the present case there are no words of assignability in either instrument. The right is granted to Morgan alone, to him personally, with an agreement by him that *he* will enter on the manufacture of the self-raising flour, and that he will use all *his* business tact and skill to introduce and sell the flour. It is apparent that licenses of this character must have been granted to such individuals as the grantor chose to select because of their personal ability or qualifications to make or furnish a market for the self-raising flour, and thus for the acid, all of which was to be purchased from the grantor. The license was made revocable by the grantor on the failure of Morgan to perform his covenants and agreements.

We have not overlooked the fact that the privilege granted to Morgan was to continue for five years. This means no more than that he was to have it for five years, if he should live so long, and if the patent should not have expired. But it cannot have the effect to impart assignability to the privilege, or to prolong its duration beyond that of his life.

Respect for the Supreme Court of Tennessee induces us to say that we have carefully examined the opinion of that court in *Oliver* v. *Morgan*, 10 Heiskell, 322. That was a suit brought by the widow and administratrix of Morgan against Oliver, Finnie & Co., in a court of the State, to recover compensation under an agreement made between him and them February 15th, 1869, and which was to continue till April 1st, 1870, whereby he was to prepare self-raising flour for them under the license to him from the Rumford Chemical Works, and they were to pay him so much a barrel. In that suit it was held that Mrs. Morgan could recover not only for the time prior to Morgan's death, but for the subsequent time, and that the license to Morgan vested in him an interest which passed, at his death, to his personal representative. The proceedings in that suit are made a part of the record on this writ of error. But the suit in the circuit court was tried wholly on the view that the question as to the construction of the instruments of February 1st, 1869, was an open one, and was a question of general law, and not one as to a rule of property, and that there was nothing in the former suit which, as *res judicata*, could be

binding between the parties in this suit, as an estoppel. There is nothing in the pleadings which raises the question of such an estoppel. The lower State court having, in the prior suit, rendered a judgment for the plaintiff, the Supreme Court of the State, while giving the interpretation before mentioned of the rights of Morgan, reversed the judgment for errors in other respects, and awarded a new trial. Afterwards there was, in the lower court, a verdict by consent, followed by a judgment for the plaintiff, for a less sum than the amount of the first verdict and judgment. Moreover, the present suit is one in a court of the United States, brought under the provisions of an act of Congress, for the infringement of letters patent. The former suit arose out of a contract between Morgan and Oliver, Finnie & Co., and was brought to recover damages for the breach of that contract. Under these circumstances, the question as to the rights of Morgan under the patent must be regarded as one to be passed upon in this suit as an original question, as if there had been no former suit. Giving to the opinion of the Supreme Court of Tennessee that consideration which is due to the force of reasoning in the views which it announces, we are unable to concur in the construction it gave to the license to Morgan. Accordingly:

The judgment of the Circuit Court is reversed, with direction to award a new trial.

PORTER, Assignee, *v.* LAZEAR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Submitted October 11th, 1883.—Decided October 20th, 1883.

Assignment—Bankruptcy—Dower.

In Pennsylvania, as in other States, dower is not barred by an assignment of the husband's estate under the Bankrupt Act of the United States, and a sale by the assignee in bankruptcy under order of the court.

Amicable suit by an assignee of a bankrupt to recover pur-

chase-money of real estate of the bankrupt sold at public sale; the object of such suit being to determine whether the right of the bankrupt's wife to dower passed at the sale.

The case was submitted by the plaintiff in error on the brief of his attorney, *Mr. D. T. Watson.*

Mr. Justice Gray delivered the opinion of the court.

This is an action by the assignee in bankruptcy of S. B. W. Gill to recover the purchase money of land of the bankrupt, sold by the plaintiff to the defendant.

In the case stated by the parties the following facts were agreed: On the 28th of November, 1877, Gill, upon petition of his creditors, was adjudged a bankrupt by the District Court of the United States for the Western District of Pennsylvania, and the plaintiff was afterwards appointed assignee of his estate, which included two lots of land in Pittsburgh. On the 27th of May, 1878, the assignee, pursuant to an order of the district court, and for the purpose of raising money to pay the bankrupt's debts, sold these lots by public auction to the defendant for the sum of $465, subject to the lien of a certain mortgage for $2,550; but the order of the court directed, and the advertisement thereof stated, that all other liens and incumbrances should be discharged by the sale. At the time of the commencement of the proceedings in bankruptcy, the bankrupt had a wife, who is still living, and who claims a right of dower in the land. The sale having been confirmed absolutely by the district court, the assignee thereupon executed and tendered a deed of the land to the defendant, and demanded payment of the purchase money, which was refused, by reason of the incumbrance of the right of dower. It was agreed that if the court should be of opinion that the right of dower of the bankrupt's wife was divested by the bankruptcy proceedings and sale, judgment should be entered for the plaintiff for the sum of $465, with interests and costs; otherwise, judgment for the defendant.

Upon the case stated the Supreme Court of Pennsylvania

gave judgment for the defendant, and the plaintiff sued out this writ of error.

The single question is, whether a wife's right of dower is barred by an assignment in bankruptcy and a sale by the assignee in bankruptcy under order of the court. By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him. *Squire* v. *Compton*, Vin. Ab. Dower, G. pl. 60; *Smith* v. *Smith*, 5 Ves. 189. If it is barred in this case, it must be either by force of the provisions of the recent Bankrupt Act, or by reason of the nature of the right of dower under the local law of Pennsylvania.

But, under the provisions of the Bankrupt Act, all that passes to the assignee by the assignment in bankruptcy, or that can be sold by direction of the court, is property or rights of the bankrupt, or property conveyed by the bankrupt in fraud of creditors, unless indeed a person holding a mortgage or pledge of, or lien upon, property of the bankrupt elects to release the same. Rev. Stat. §§ 5044–5046, 5061–5066, 5075; Stat. 22d June, 1874, c. 390, § 4; *Donaldson* v. *Farwell*, 93 U. S. 631; *Dudley* v. *Easton*, 104 U. S. 99, 103.

The law of Pennsylvania as to the liability of the right of dower to be taken for the debts of the husband is certainly in some respects peculiar.

An act passed in 1705, "for taking lands in execution for payment of debts," provided that all lands of a debtor, having no sufficient personal estate, should be liable to be seized and sold upon judgment and execution obtained against him; and that in case of default in payment of any debt secured by mortgage of real estate, the mortgagee might by writ of *scire facias* obtain execution to be levied by sale of the mortgaged premises. 1 Dall. Laws of Penn. 67–71. Another act passed in the same year, "for the better settling of intestates' estates," while recognizing a right of dower in the widow, "which dower she shall hold as tenants in dower do in England," authorized the administrator, in case of insufficiency of the personal estate, to

sell and convey the lands of the deceased, including the rights of the widow therein, for the payment of his debts. Ib. Appendix, 43–45.

It was established by judicial decisions in Pennsylvania, upon the construction and effect of these statutes, before the beginning of the publication of reports, that the wife's right of dower could be taken and sold on execution upon a judgment recovered against the husband, or upon *scire facias* on a mortgage executed for valuable consideration by him alone, or under a devise by him for the payment of his debts. *Howell* v. *Laycock*, cited in 2 Dall. 128, and 4 Dall. 301, note; *Graff* v. *Smith*, 1 Dall. 481, 484; *Scott* v. *Crosdale*, 2 Dall. 127; *S. C.* 1 Yeates, 75; *Mitchell* v. *Mitchell*, 8 Penn. State, 126; *Blair County Directors* v. *Royer*, 43 Penn. State, 146.

The grounds of those decisions have been explained by two of the most eminent judges of Pennsylvania.

In *Kirk* v. *Dean*, 2 Binn. 341, 347, Chief Justice Tilghman said:

"It may be proper to take notice of deeds of mortgage of the husband's property. It is understood that by such deeds the wife may be barred of dower, though she was no party to the conveyance. But this depends on another principle, in which the law of Pennsylvania differs from the common law. The right of creditors prevails against the right of dower. A purchaser under an execution against the husband takes the land discharged of dower; and the only mode of proceeding on a mortgage, with us, is to sell the land by an execution. We have no court in which the equity of redemption can be foreclosed."

In *Helfrich* v. *Obermyer*, 15 Penn. State, 113, 115, Chief Justice Gibson said:

"Land is a chattel for payment of debts, only when the law has made it a fund for that purpose. It then has undergone a species of conversion, so far as may be necessary to the purpose of satisfaction, which extinguishes every derivative interest in it which cannot consist with the qualities it has been made to assume. Thus, a judgment, or a mortgage, binds it and converts it; and it is seized as personal property on a *fieri facias*, which

commands the sheriff to levy the debt off the defendant's goods and chattels. We readily comprehend how a sale on a judgment, a mortgage, or an order of the Orphans' Court, passes the land freed from dower; but the reason is not so obvious why a sale under a testamentary power, created in good faith, for the benefit of creditors, should do so. It is because the law mades a decedent's land a fund for payment of his debts, by giving the creditors a lien on it, which might be enforced by judicial process, and would extinguish the widow's dower in it. It would come to the same thing in the end, and she is consequently not injured by a process substituted by the husband to produce exactly the same result."

It thus appears that the right of dower in Pennsylvania does not differ, in nature or extent, from the right of dower at common law, except so far as the local law has made it a chattel for the payment of debts of the husband, either by converting it into personalty, in his lifetime, by virtue of the effect attributed by that law to a judgment recovered against him or a mortgage executed by him, either of which could only be enforced in that State by a levy of execution in common form; or by giving his creditors, after his death, a lien upon the whole title in the land.

The State court has accordingly constantly held that, with these exceptions, the right of dower is as much favored in Pennsylvania as elsewhere, that the old decisions are not to be extended, and that neither an absolute conveyance by the husband, nor an assignment by him for the benefit of creditors, whether executed voluntarily or under a requirement of the insolvent law of the State, impairs the wife's right of dower. *Kennedy* v. *Nedrow*, 1 Dall. 415, 417; *Graff* v. *Smith*, and *Kirk* v. *Dean*, above cited; *Killinger* v. *Reidenhauer*, 6 S. & R. 531; *Riddlesberger* v. *Mentzer*, 7 Watts, 141; *Keller* v. *Michael*, 2 Yeates, 300; *Eberle* v. *Fisher*, 13 Penn. State, 526; *Helfrich* v. *Obermyer*, above cited; *Worcester* v. *Clark*, 2 Grant, 84.

In *Worcester* v. *Clark*, just cited, it was held that the sale of a bankrupt's real estate by his assignee under the Bankrupt Act of 19th August, 1841, c. 9, did not divest the widow's right

of dower. It is true that the decision was put upon the ground that the right of dower was saved by the proviso, inserted in the second section of that act, that "nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, which may be vested by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act;" and that the judge delivering the opinion said that, were it not for that proviso, he should have no difficulty in holding that a sale in pursuance of a decree in bankruptcy would, like a sheriff's sale by virtue of either a judgment or a mortgage, bar dower. But the decision is significant as evidence that by the law of Pennsylvania a right of dower is "a lawful right, valid by the law of the State," and as treating the question whether it was divested by proceedings in bankruptcy as depending upon the true construction of the Bankrupt Act. Upon this question of construction, we are not bound by the opinion of the State court, and have no hesitation in disapproving the dictum, and in holding that the proviso relied on was not in the nature of an exception to or restriction upon the operative words of the act, but was a mere declaration, inserted for greater caution, of the construction which the act must have received without any such proviso, and that the omission of the proviso in the recent Bankrupt Act does not enlarge the effect of the assignment or of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt but to his wife.

The result is, that, so far as this case depends upon the construction of the Bankrupt Act of the United States, this court is of opinion that there is nothing in that act, or in the proceedings under it, to bar the wife's right of dower in lands of which her husband was seized during the coverture; and that, so far as it depends upon the law of Pennsylvania, the decision of the Supreme Court of that State in this case, reported in 87 Penn. State, 513, is in accord with all the previous adjudications of that court, and is strong, if not conclusive, evidence against the plaintiff in error.

It may be added that this decision is in conformity with one made twelve years ago by Judge Cadwalader in the District

Argument for the Appellant.

Court of the United States for the Eastern District of Pennsylvania. *In re Angier*, 10 Amer. Law Reg. (N. S.) 190; *S. C.* 4 Bankr. Reg. 619.

Judgment affirmed.

LAVER *v.* DENNETT & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Argued October 9th, 1883.—Decided October 29th, 1883.

Assignment—License—Mistake—Patent.

After many conversations, and after a draft agreement had been made, A, in 1870, in writing, granted to B a license to make, use, and sell, and vend to others to sell, an invention in defined districts. In 1873 B discovered that the agreement gave him no exclusive rights, which it was the purpose of both parties to have done. He notified A, and A at once offered to grant such right for the original consideration. In November, 1873, B refused to accept a new agreement, and took steps to terminate the existing one. A thereupon sued B for royalties claimed to be earned under it. B filed a bill in equity, claiming that there was a mistake in the agreement, and praying to have it cancelled and A restrained from prosecuting an action under it: *Held*, That there was no mistake between the parties as to the agreement made; that the minds of the parties met, and an agreement was made, although the legal effect of it was different from what was intended; that A was not in default; and there was no ground for the relief prayed for.

Suit in equity to have an agreement respecting the transfer of an interest under a patent set aside and cancelled, as made under a mistake, and all suits at law thereon stayed and enjoined. The facts are stated in the opinion of the court.

Mr. John F. Swift for the appellant.

1. The contract failed to express the intent of the parties.

Where a mistake occurs as to the subject matter of the contract, there is no assent, and of course no contract. 1 Story on Contracts, sec. 538; 2 Chitty on Contracts (Am. ed.), 1089–90. Where there is a mutual mistake as to a fact forming the basis

of a contract, the contract will be void, although no fraud be practised. 1 Story on Contracts, sec. 539, and cases cited; 1 Parsons on Contracts, *p. 475. The mistake here is one of fact rather than of law. 1 Story Eq. Juri., secs. 152, 153, 164 f. Where the instrument, through the fault of the scrivener or otherwise, fails to state the full terms of the agreement or understanding of the parties, the mistake is one of fact, which equity will relieve against. *Hunt* v. *Rousmanier*, 1 Peters, 1, 12; *Hartford* v. *Salisbury Ore Co.*, 41 Conn. 113, 133; *Briosa* v. *Pacific M. Ins. Co.*, 4 Daly, 246; 1 Adams Equity (Am. notes), p. 169. In this case the fault of the scrivener must be imputed to the appellees who employed him. But were the mistake one of law, equity would afford relief. *Hunt* v. *Rousmannier*, 8 Wheat. at p. 211; *Wheeler* v. *Smith*, 9 How. 55, 81; *Whelen's Appeal*, 70 Penn. St. 410; *Hearst* v. *Pryol*, 44 Cal. 230, 235; 1 Story Eq. Juri., secs. 119 *et seq.*, 130, 134, 138. We find no case which we think precisely in point, and are unwilling, where the *effect* of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief. Ch. J. Marshall in *Hunt* v. *Rousmanier*, 8 Wheat. at p. 216.

Mr. R. E. Houghton for the appellees.

Mr. Justice Matthews delivered the opinion of the court.

This appeal is from a decree dismissing the complainant's bill, and the record discloses the following as the facts material to the determination of the controversy.

The appellees, in 1870, being British subjects, were owners of letters patent of the United States, bearing date January 4th, 1870, granted to one Dennett, for the term of seventeen years from August 13th, 1863, for an improvement in the construction of concrete arches for building. On November 2d, 1870, they entered into a written contract with the appellant, an architect, then residing in Albany, N. Y., but at the time of filing this bill a citizen of California. By this contract the appellees granted to the appellant, his executors, administrators, and assigns, during the residue of the unexpired term of the letters

patent, "full and free liberty, license, and authority to make, use, and sell, or vend to others to be sold, the said invention within the divisions of the United States, as thereinafter specified, or one or more of them, in the manner and according to the provisions and agreements thereinafter contained and upon the payment of the sums of money as therein provided, and not otherwise." For the puposes of the license the territory of the United States was *divided* into four *districts*, named A, B, C, and D respectively, and a royalty of ten shillings sterling per square of one hundred square feet was to be paid for all work actually done under the patent, and which, from certain specified dates, it was agreed should amount to an annual minimum sum of £500, and not to be payable in excess of an annual maximum sum of £1,000 in each of such divisions.

It was also stipulated that the appellant might surrender the license at any time upon giving six months' notice, and that the appellees might revoke it upon any default of the appellant after thirty days' notice.

It appears that this contract was entered into after many conversation between the parties, and after a draft agreement had been prepared and submitted to the appellant for examination. Upon his suggestion it was amended and finally executed.

Various unsuccessful efforts appear to have been made by the appellant while at Albany, and after his removal to San Francisco, and also by one Fuller, who acted as his agent at Albany, to introduce the patent; and some correspondence took place between the parties in regard to its progress and prospects.

This correspondence, as well as the negotiations which led to the execution of the contract, was conducted on the part of the appellees by Frederick Ingle; and it was to him that the following letter was addressed by the appellant:

"San Francisco, 26*th April*, 1873.

"Frederick Ingle, Esq.,

"5 *Whitehall, London, England.*

"Dear Sir: It now turns out, just as Mr. Fuller and myself

are about to close negotiations for the sale of your patent right, that I have no power to sell. Will you, therefore, send me the proper papers from your firm, stating that you will not grant licenses to any one else in the United States? I enclose you an eminent legal opinion thereon. Mr. Fuller had arranged for the sale of Massachusetts, which includes Boston; but we wait for your proper authority, which must be exclusive, or no value can be attached to the license I hold. Of course I am aware of the understanding which I have stated your firm would not go back on, but then the parties purchasing hold that it is not exclusive. In like manner I am unable to close with parties here for section D. I have had so much trouble with this matter, and now that it appeared to be in a good way to be productive of profit this annoyance arose. You can, however, remedy it in the way prescribed. Yours very truly,

"AUGUSTUS LAVER."

"P. S.—Send the papers to Mr. Fuller, at Albany, and then he will send me duplicates. "A. L."

This letter seems to have been received by Ingle, and in reply he sent by cable the following:

"*May* 6, 1873.

"FULLER, *Architect, Albany, New York:*

"Dennett will alter agreement, giving Laver exclusive right.

"ROBERT DENNETT & CO."

Fuller had evidently written a letter to Ingle, to the same effect, about the same time, for, although it is not contained in the record, Ingle's reply to it, written the day he sent the cable message, was produced and read in evidence. In this letter, dated May 5th, 1873, he says, referring to the objection to the terms of the license, "there is no objection on our part to alter it in any way to suit the requirements of the case." He adds:

"You will bear in mind that this lease was granted to Mr. Laver to pay as an annual royalty. If it had been proposed then to purchase out and out, I dare say the terms to the exclusive right would have been more precise; at any rate, our intention was for Mr. Laver to have the exclusive right (in all our negotia-

tions), and when the document was signed we looked upon it as so settled, unless he elected to throw it up before certain dates for the respective sections as specified in the agreement. He had the document to examine before signing it, and could have made the objection then. At any rate you will, I think, give us credit for having faithfully carried out both the letter and spirit of the agreement. We have had many applications from parties for permission to work the patent in the United States since October, 1870, the date of our agreement, but have had to reply in each case that our arrangements as to licensing were made. . . .

"I shall write to our solicitor, Mr. Van Santvoord & Hauff, of Times Building, Park Row, New York, and instruct him to get whatever you require with regard to the specification. I don't know in what respect it is incomplete. The agreement can be altered to give any parties who propose to purchase the most absolute rights, on payment of the purchase money of section B."

He then proceeds, in answer he says to a request to that effect, to give the prices for each division, upon an out and out purchase of a gross sum; and referring to Laver's statement, that Fuller was on the point of completing the negotiations for division B, he says:

"To facilitate completion of the matter, had you not better write to or see Mr. Van Santvoord, whom we will instruct to give you as much assistance as he can. We could not, of course, undertake any litigation in respect of infringements, after we had disposed of our rights for a fixed sum."

He says, further:

"Our wishes have always been to give him exclusive rights, and I thought that the agreement expressed as much before you raised the question. At any rate we are willing to alter it to facilitate your negotiations. The question is, how is it to be done?

"One plan is for us to send power of attorney out to Mr. Van Santvoord, and tell him to alter the agreement and sign for us. Another, and I think a preferable plan, is to write to him to prepare two fresh copies of agreement, distinctly giving Laver exclusive rights, and referring to the old agreement, which will be thereby cancelled. He will then let you see the alterations. One

copy must be sent to Laver for signature, and another to us, and on the return you and Van Santvoord can exchange them. You must clearly understand, however, that we shall not consent to any other alterations, or to introduce any fresh clauses."

On May 9th, 1873, Ingle wrote to the appellant as follows:

"DEAR SIR: Yours of 29th March came duly to hand, with enclosures, and I delayed answering it for a week or two, as I was expecting to hear from Mr. Fuller. I have now heard from him, and you no doubt know to what effect.

"He complains of the agreement not giving you exclusive rights. I think it expressed enough for the purpose contemplated at the time, and you were satisfied with it. At any rate, we intended to give you exclusive rights, and have in all good faith acted up to that intention, inasmuch as we have refused many offers of agency since October, 1870, the date of our agreement with you. I suppose Mr. Fuller will send you the letter I wrote him in reply; at any rate, I will write him by this post a line requesting him to do so; then you will see exactly what I propose to do. I may say that I have also by this post instructed Mr. Van Santvoord, our solicitor in New York, to prepare full agreements, giving you exclusive rights, and send them to each of us to be re-signed and exchanged; when this is done they will supersede the others, and I hope will be sufficient for Mr. Fuller's purpose.

"Speaking generally, our view with regard to this matter is this (I mean Dennett's and my own), that we gave a liberal margin of time to make preliminary arrangements, and asked for only a moderate royalty on each section. You had the option of holding or abandoning up to certain dates. If you had decided to surrender, we should have been losers of two years of valuable time, and should have had all our work to begin over again. As you elected to keep the patent right, you could hardly expect us to forego the just claims for which we stipulated, after such very liberal reservations in your favor. We do not suppose for a moment that you expect this. We do not wish to press you hardly in the matter, but it is really time now that some tangible return was made to us; of course if the section B is sold at once, and the money paid over, as we hope it will be, we forego any claim for royalties already due on that section."

It is also shown that the appellees, on May 10th, 1873, wrote to their solicitors in New York, giving instructions in reference to drawing up a fresh agreement, giving the appellant the exclusive rights which he required; but that neither the appellant nor Fuller, his agent, communicated with the solicitors on the subject. It was not until November 3d, 1873, that appellant wrote to Ingle refusing to sign any new agreement, and claiming that the defect in the original agreement had resulted in the loss of the sale of the patent for Massachusetts for the price of $30,000, and intimating that in consequence thereof, the appellant was entitled to treat the whole matter as at an end. On October 12th, 1874, the appellees, having in the meantime, by further correspondence, insisted upon their rights under the contract, and demanded payment of the royalties which had accrued, brought an action in the Circuit Court of the United States for the District of California against the appellant to recover the amount due on account thereof. And on September 3d, 1875, the appellant filed this bill in equity in the same court, in which it was claimed that by reason of the mistake in omitting from the contract a grant of the exclusive right to the appellant to use and sell the said invention under the said patent, the said indenture was not the agreement of the appellant, and that in November, 1873, because of said defect, he had surrendered said invention and indenture, and all his rights thereto and thereunder, to the appellees. The bill prayed that the indenture be ordered to be cancelled, as executed by mistake, and that the appellees be perpetually restrained and enjoined from the prosecution of the action at law upon it.

The chief, if not the only instance, in which, it is alleged, the defect in the license actually operated to the injury of the appellant, is the loss of the sale of the patent for the New England States; and as to that, the proof wholly fails. The only witness examined on the subject is the appellant himself, who knew nothing of it, except as he learned it from Fuller, his agent; and his evidence, being hearsay, cannot be regarded. The parties with whom the negotiations took place, and who, it is said, refused to proceed after discovering the defect in the license, are not examined nor even named. Fuller, the agent

of the appellant, who personally conducted the negotiation, is not examined as a witness at all; and in his letter to Ingle of June 23d, 1873, gives an entirely different account of the reasons for the loss of the sale. He there says:

"*Your decision not to protect* the patent renders it valueless, even if it could not be infringed. *The duration of the patent is so short* no parties would dream of paying large sums for it. Acting as Mr. Laver's attorney, I did the best I could to dispose of it for New England States. *That is now abandoned unless the patent can be extended.*"

There is no proof of fraud or misrepresentation on the part of the appellees, and all charges to that effect in the bill, are substantially withdrawn by the appellant in his testimony.

It is claimed, however, on the part of the appellant, that he has a strict right in equity to the relief prayed for in his bill, on the ground that no contract was ever in fact entered into, the minds of the parties never having met upon the same terms.

But there is no foundation for such a contention. The minds of the parties did meet. There was in fact an actual agreement, the terms of which were perfectly well understood by both parties. They acted upon that understanding from the time the instrument was executed; and when the appellant first discovered that it did not have the legal effect intended, and gave notice to the appellees accordingly, there was no controversy between them on the subject. The common intention was at once admitted, and the necessary correction promptly offered. There was, no doubt, a mistake, but it was in the instrument which undertook to express the agreement, and not in the agreement itself. It did not relate to any matter of fact which was the basis of the contract, an error in regard to which would be fundamental, and therefore fatal, but affected only the document which professed to express, but did so incorrectly, the actual intention of both parties.

It is equally wide of the mark to say, as it was argued, that the contract has failed by reason of the failure of the consideration. The appellant cannot say that he did not acquire something by reason of the license, although his right was not, as

it was intended to be, exclusive. But so far as appears in the case, he had the same benefits and advantages he would have enjoyed if the instrument had contained the exclusive grant it was supposed to secure. For the parties on both sides acted upon that construction, and, as we have already shown, no actual loss is proven to have arisen to the appellant by virtue of the defective assurance.

That the instrument imperfectly expressed the agreement of the parties was not the exclusive fault of the appellees. It was the duty of the appellant to have discovered the error before executing the contract. He did not, in fact, find it out until after two years from its date; and then, applying for its correction, failed to avail himself of the offer of the appellees, promptly made, in response to his demand to execute a corrected agreement.

The only equity which the appellant could claim was to have the mutual mistake in the language of the instrument corrected, until some default had occurred on the part of the appellees. But they were in no default. They offered to make the correction as soon as they had notice of the mistake; but the appellant declined to accept it. After the further lapse of more than six months, he insisted on his right to put an end to the agreement itself. This he was in no position to do. His delay to assert such a claim, if his right had been otherwise better founded, constituted such laches as would, at least, greatly weaken his title to relief, if it did not amount to a bar; and coupled with the loss to the appellees of the value of their own rights under the patent, which cannot be restored, would make it inequitable, as against them, to absolve the appellant from the legal obligation of his contract.

We see no ground in the facts of the case for the application of the principles and authorities invoked by the appellant as a warrant to grant him the relief for which his bill prays.

The decree is accordingly affirmed.

KING *v.* GALLUN & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Submitted October 10th, 1883.—Decided October 29th, 1883.

Patents—Evidence.

1. In his specification, A describes a process for placing hair in small bundles and by a baling press uniting several bundles into a bale of a convenient size for transportation: *Held*, That this description does not show a patentable invention.
2. The court will take judicial notice of matters of common knowledge, and of things in common use.

This was a bill in equity brought by Wendell R. King, the appellant, against August Gallun and Albert Trostel, to restrain them from infringing letters patent No. 152,500, dated June 30, 1874, granted to the appellant for certain improvements in baled plastering hair.

The invention and its advantages are thus set forth in the specification:

"It is found that the wants of the trade in plastering hair require it to be compressed for transportation in packages of from three to five bushels; this amount of hair forms a package of a good size to conveniently handle, weighing from twenty to forty pounds. The trade unit for the article of plastering hair is always the bushel; it is sold by the bushel or by the multiple thereof.

"Heretofore this hair has been packed in a mass of a certain number of bushels baled together, varying in amount as the order required, so that when received the retail dealer was compelled to parcel out the same and weigh it to suit his customers. This is a disagreeable and difficult thing to do, as the hair is dirty and matted together, and after it is once removed from the case into which it has been compressed by a bailing press, is bulky and not easy to reduce again to a convenient package. For the convenience of the trade I propose to form the hair in small bundles of one bushel each, and unite several bundles into a bale of a convenient size for transportation.

Opinion of the Court.

"I first place a bushel of hair into a paper sack loosely, or only so far packed as may be readily done by hand; several of these one-bushel packages are then placed side by side in a baling press. I use for this purpose the bailing press heretofore patented to me; they are thus compressed forcibly together, so that the bale produced will be a compact, firm bale, occupying only about one-fifth of the original bulk; the paper bags which still envelop the individual bushels of the bale keep said bushels separate, and serve at the same time to protect the hair.

"The bale, after being compressed, is tied in the usual way, and is then in shape for transportation without further covering, although it may be desirable, if the bale is sent a long distance, to envelop it in a stout sacking cover. Hair baled thus may be separated by the retail dealer into bushel packages, each of which remains compressed into a small size, and is in convenient condition to handle."

The claim was as follows:

"Having thus described my invention, I claim as an article of manufacture the bale B of plasterers' hair, consisting of several bundles, A, containing a bushel each by weight, enclosed or incased in paper bags or similar material, and united, compressed, and secured to form a package, substantially as specified."

The defence was want of novelty in the alleged invention, and that the same was not patentable.

The circuit court dismissed the bill, and from its decree the complainant appealed.

Mr. L. L. Coburn for appellant.
Mr. Josiah Stark for appellee.

Mr. Justice Woods delivered the opinion of the court.

We are of opinion that the patent of complainant does not describe a patentable invention. The claim is for an article of manufacture, to wit, a bale of plasterers' hair consisting of several bundles enclosed in bags, and compressed and secured to form a package.

It is evident that the patent does not cover any improvement in the quality of the hair. Its qualities are unchanged. It

does not cover the packing of the hair into parcels, or the size, shape, or weight of the parcels, nor the compression of the parcels separately. Nor does it cover the material of the bags which constitute the outer covering of the parcels. Complainant claims none of these things as secured by his patent. The packing of hair and other articles in parcels of the same shape, size, and weight, and the compression of the several parcels, has from time immemorial been in common use. Neither does complainant contend that his patent covers a single parcel or package of hair. All, therefore, that the patent can cover is simply an article of manufacture resulting from the compression and tying together in one bale of several similar parcels or packages of plasterers' hair. The object of this invention is thus set out in the specification: "For the convenience of the trade"—that is to say, to enable the retail dealer more easily to parcel out the hair in quantities to suit his customers—"I propose to form the hair in small bundles of one bushel each, and unite several bundles into a bale of convenient size for transportation." The invention and the object to be accomplished by it are thus seen to be contained with narrow limits.

In deciding whether the patent covers an article the making of which requires invention, we are not required to shut our eyes to matters of common knowledge or things in common use. *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592; *Ah Kow* v. *Nunan*, 5 Saw. 552.

The subdivision and packing of articles of commerce into small parcels for convenience of handling and retail sale, and the packing of these small parcels into boxes or sacks, or tying them together in bundles for convenience of storage and transportation, is as common and well known as any fact connected with trade. This well known practice is applied, for instance, to fine-cut chewing and fine-cut smoking tobacco, to ground coffee and spices, oatmeal, starch, farina, desiccated vegetables, and a great number of other articles. This practice having been common and long known, it follows that there is nothing left for the patent of complainant to cover but the compression of the bale formed of several smaller parcels. Can this be dignified by the name of invention? When the contents of

the smaller parcels are such as to admit of compression into a smaller compass, the idea of compressing the bale of the smaller parcels for transportation and storage would occur to any mind. There is as little invention in compressing a bale of several parcels of hair tied up together as in compressing one large parcel of the same commodity.

But it is perfectly well known that the compression of several packages of the same thing into larger packages or bundles is not new, and that it has long been commonly practised. Packages of wool, feathers, and plug tobacco have been so treated. The case of plug tobacco is a familiar instance. The plugs are formed so as to retain their identity and shape, the outer leaves of the plug forming at the same time a part of the plug as well as its covering. The plugs, after being so put up as to preserve their identity under pressure, are, as is well known, placed in a frame and subjected to pressure, and reduced to a smaller and compact mass, which is then boxed up and is ready for market. This is done in part for convenience in handling, transportation, and storage. When the box is opened by the retail dealer, the plugs can be taken out separately and sold. This method of treating plug tobacco would suggest to every one the compression into a bale, of distinct packages of plasterers' hair, and leaves no field for invention in respect to the matter to which the patent of complainant relates.

In view of the facts to which we have referred, which are of common observation and knowledge, we are of opinion that the article of manufacture described in the specification and claim of the complainant's patent does not embody invention, and that the patent is for that reason void.

In support and illustration of our views, we refer to the following cases decided by this court: *Hotchkiss* v. *Greenwood*, 11 How. 248; *Phillips* v. *Page*, 24 How. 164; *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592; *Atlantic Works* v. *Brady*, 107 U. S. 192; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649.

The patent of complainant cannot be sustained by the authority of the case *Smith* v. *Goodyear Dental Vulcanite Company*, 93 U. S. 486, where the court said: "The invention

is a product or manufacture made in a defined manner. It is not a product alone, separate from the process by which it is created." In that case the invention was the product of a new process applied to old materials. In this case it is the product of an old process applied to old materials.

Judgment affirmed.

HEWITT *v.* CAMPBELL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted October 12th, 1883.—Decided October 29th, 1883.

Burden of Proof—Equity—Evidence.

In a serious conflict of testimony, a bill in equity may be dismissed on the ground that the complainant fails to establish the facts on which he claims relief.

Mr. S. S. Henkle, for appellant.
Mr. W. E. Edmondston, for appellee.

Mr. Justice Harlan delivered the opinion of the court.

Counsel for appellant states the theory of the bill to be that Campbell was not the *bona fide* purchaser of the lots described, or of either of them, although he holds them by conveyances absolute upon their face; that he was only the broker of Burgess; and that the conveyances were made to him in that capacity, for the purpose of enabling him to raise money upon them for the use of Burgess, less reasonable charges for any services in that behalf rendered. The bill was dismissed by the court below in special term, and that order was affirmed in general term.

The record discloses a serious conflict in the testimony of witnesses, and the court below might well have dismissed the bill upon the sole ground that the complainant had failed to establish the facts upon which he based his claim for relief, and which must have been established before any relief could be granted. The decree must, therefore, be affirmed.

It is so ordered.

GREEN COUNTY *v.* CONNESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Submitted October 9th, 1883.—Decided October 29th, 1883.

Franchises—Municipal Bonds—Municipal Corporation—Railroads.

1. The court adheres to its former rulings in regard to the liability of municipal corporations to innocent holders of the bonds of such corporations, issued in aid of railroads. *Douglas* v. *Pike County*, 101 U. S. 677.
2. The rights of such holders are to be determined by the law as it was judicially construed to be when the bonds were put on the market as commercial paper.
3. A consolidation of two railroad corporations merges the franchises and privileges of each in the new company, so that they continue to exist in respect to the roads thus consolidated.

Suit to recover coupons due on bonds issued by the county in payment of a subscription made by virtue of the laws of the State of Missouri, to aid in the construction of a railroad that became consolidated with the Hannibal and St. Joseph Railroad. The authority to lend the aid was obtained before the consolidation, and was exercised after it. The defendant in error was the owner and holder for value of some of the bonds before maturity. Judgment against the county in the court below. Error to reverse that judgment.

The case was submitted by *Mr. P. T. Simmons*, *Mr. Charles W. Thrasher*, and *Mr. Henry C. Young*, on behalf of the plaintiff in error, and by *Mr. James S. Bottsford*, *Mr. Marcus T. C. Williams*, and *Mr. Robert G. Ingersoll*, on behalf of the defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

Nearly every point in this case has already been decided by this court in the cases of *County of Callaway* v. *Foster*, 93 U. S. 567; *County of Scotland* v. *Thomas*, 94 U. S. 682; *County of Henry* v. *Nicolay*, 95 U. S. 619; *County of Schuyler* v. *Thomas*, 98 U. S. 169; *County of Cass* v. *Gillett*, 100 U. S. 585; *Louisana* (*City*) v. *Taylor*, 105 U. S. 454; and *County of Ralls* v. *Douglass*, 105 U. S. 728. In the case last cited we

referred to the previous cases, and to the cases in Missouri which they followed, and said:

"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. *Garroutte*, 67 Mo. 445, and *State* v. *Dallas County*, 72 Mo. 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. 677, 687."

From the views thus expressed we are not disposed to swerve.

One point taken in the present case may not have been presented in any of the cases cited, to wit, that the rights, privileges, and franchises of the Kansas City and Cameron Railroad Company were not expressly declared to pass over to the company with which it might become consolidated, by the law authorizing such consolidation. This law was passed March 11, 1867, and declared as follows:

"It shall be lawful and competent for said company to make such arrangement with any other railroad company to furnish equipments and to run and manage its railroad as it may deem expedient and find necessary, or to lease the same, or to consolidate it with any other company upon such terms as may be deemed just and proper."

In the "finding of facts" made by the court, it is, amongst other things, found as follows:

"That under the provisions of an act of the general assembly of the State of Missouri, approved May 11th, 1867, entitled, &c., the said corporation, then known as the Kansas City and Cameron Railroad Company, on the 21st day of February, in the year 1870, was consolidated with the Hannibal and St. Joseph

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Railroad Company, and all the rights, privileges, franchises, and property of said Kansas City and Cameron Railroad Company were, by said consolidation, transferred to the Hannibal and St. Joseph Railroad Company, which then and thereby became the owner of and possessed of the same."

If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but "consolidation" is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall. 460, and *Branch* v. *City of Charleston*, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, "upon such terms as may be deemed just and proper," would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect; and the court has found that this was done. We think, therefore, that the point is not well taken.

The judgment of the circuit court is affirmed.

HASKINS *v.* ST. LOUIS & SOUTHEASTERN RAILWAY COMPANY & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Submitted October 9th, 1883.—Decided October 29th, 1883.

Appeal—Appeal Bond—Certiorari.

The authority conferred by R. S. § 1000 to take the security on an appeal cannot be delegated; and if the security is not given until after the term is over, citation must issue and be served.

Opinion of the Court.

A receiver was appointed in a suit in equity commenced below for the foreclosure of a railway mortgage. One Haskins, in the employ of the receiver, struck his head on the timber of a bridge while on duty on a train in motion, and was killed. Leave was granted to his widow to prosecute her claim for damages in the foreclosure suit. After hearing, the claim was disallowed. Appeal taken, and the case submitted by appellant, there being no appearance for the appellees.

Mr. F. E. Williams for appellant.

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

We have no jurisdiction in this case. The appellee has not appeared and has never been served with a citation. The decree was entered on the 14th of June, 1879, and at the foot of the entry is the following: "Petitioner prays an appeal, which is granted upon bond and security being given, according to law, within thirty days." A copy of what purports to be an appeal bond, filed on the 3d of July, 1879, is found in the transcript, but there is no evidence that it was ever approved or taken as good and sufficient security by the court or any justice or judge thereof. A commissioner of the circuit court has certified that he knew the obligors to be good and responsible for any cost that might accrue in the cause, but that is not enough. Sec. 1000 of the Revised Statutes requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or to a commissioner. *O'Reilly* v. *Edrington*, 96 U. S. 724, 726. If the appeal is allowed in open court the security may be taken by the court, and no citation is necessary, but if the security is not given until after the term is over, a citation must be issued and served. *Sage* v. *Railroad Co.*, 96 U. S. 712, 715. Unless an appellee voluntarily appears, we cannot proceed against him if the record does not show affirmatively that he has been brought within our jurisdiction by proper notice.

The appeal is dismissed for want of jurisdiction.

OPELIKA CITY *v.* DANIEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Submitted October 10th, 1883.—Decided October 29th, 1883.

Appeal—Jurisdiction—Practice.

A brought suit against B upon bonds aggregating $24,000, on which over $5,000 interest was claimed as overdue. Before trial A, by leave of court, amended so as to include only 90 of the coupons originally sued on. He took judgment for less than $5,000. *Held*, that the amendment was within the discretion of the Court below, and this court has no jurisdiction.

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

The action below was brought originally upon 119 interest coupons cut from 24 bonds of the city of Opelika. The bonds were in the aggregate for $24,000, and the amount claimed to be due on the coupons was more than $5,000. At first a demurrer was filed to the complaint. This being overruled, the validity of the bonds was put in issue by various pleas. Before trial, the plaintiff, Daniel, asked and obtained leave to amend his complaint so as to include only ninety of the coupons originally sued for. After the amendment a jury was empanelled, and on the trial the ninety coupons only were put in evidence. The verdict was for $4,755.64, and a judgment was entered thereon for that amount and no more. To reverse that judgment this writ of error was brought. At a former term, Daniel moved to dismiss because the value of the matter in dispute did not exceed $5,000. That motion was continued for hearing with the case on its merits.

We decided at the last term in *Elgin* v. *Marshall*, 106 U. S. 578, that our jurisdiction depends on "the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered," and that we are not permitted, "for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." That, like this, was a suit on coupons, and the judgment was for less than $5,000, although the bonds from which they were cut amounted to

much more, and the validity of the bonds was one of the questions in dispute. The two cases cannot be distinguished in this particular.

It was clearly within the discretion of the court to permit the amendment of the complaint before trial. In *Thompson* v. *Butler*, 95 U. S. 694, we declined to take jurisdiction where the verdict was for more than $5,000, but the plaintiff, before judgment, with leave of the court, remitted the excess, and actually took judgment for $5,000 and no more. In that case it was said, p. 696 :

"Undoubtedly the trial court may refuse to permit a verdict to be reduced by a plaintiff on his own motion ; and if the object of the reduction is to deprive the appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy."

That case was stronger in favor of jurisdiction than this. There the reduction was made after verdict. Here before trial. The plaintiff in effect discontinued his suit as to part of the coupons. He certainly could have discontinued as to all, and it is difficult to see why he might not as to a part.

The writ is dismissed for want of jurisdiction.

Syllabus.

THE TORNADO.

GOOD INTENT TOW-BOAT COMPANY & Others *v.* ATLANTIC MUTUAL INSURANCE COMPANY & Others.

ATLANTIC MUTUAL INSURANCE COMPANY & Others *v.* GOOD INTENT TOW-BOAT COMPANY & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Argued October 22d, 1883.—Decided November 5th, 1883.

Appeal—Contract—Insurance—Salvage.

The owners of three steam-tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." When the boats were about to begin pumping, the United States marshal seized the ship and cargo on a warrant on a libel for salvage. After the seizure the marshal took possession of the ship and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about eighteen hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for twelve days, but their attendance was unnecessary, and not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage, the owners of the tugs claimed each $50 per hour for the whole time, including the twelve days, as salvage. The claims were resisted by insurers of the cargo, to whom it was abandoned. The District Court allowed $500 to each tug, and $500 to the crew of each tug. On appeal by the owners of the tugs, the Circuit Court decreed to each of them $1,000. On further appeal by them, this court affirmed that decree.

Held, That to enforce the contract as one continuing during the time claimed would be highly inequitable; and, as against the insurers of the cargo, the right of the tugs to compensation must be regarded as having terminated when the ship and cargo were raised, and the tugs must be regarded as having been then discharged.

The decree of the Circuit Court was entered May 24th, 1880. June 26th a cross appeal to this court, returnable at its October term following, was allowed. The bond thereon was filed in the Circuit Court July 5th. But the appellants in it did not docket it, or enter their appearance on it, in this court, until September 27th, 1883: *Held*, That it must be dismissed.

Statement of Facts.

These were three libels of intervention filed in the District Court of the United States for the District of Louisiana, against the ship Tornado, her cargo and freight, and the proceeds thereof in the registry of that court, to recover for salvage services rendered by three steam-tugs, the Rio Grande, the Norman and the Harry Wright.

The libel in the case of the Rio Grande alleged an employment of her owners on the 27th of February, 1878, by the masters and agents of the Tornado, "to pump out and raise said ship and her cargo," with the pumps and appliances of the Rio Grande, for a compensation of $50 per hour, and claimed $14,900, for 298 hours, from 6 o'clock P.M. on February 27th, till 4 o'clock A.M. on March 12th. It alleged that the marshal of the United States seized the ship while the work was going on, and directed the libellants to proceed under the contract to finish the work.

The libel in the case of the Norman alleged an employment of her owners on the 27th of February, by the master and agents of the Tornado, "to assist in pumping out and raising said ship and cargo," by the use of the Norman and her appliances, for a compensation of $50 per hour, and claimed $13,900, for 278 hours, from 6 o'clock P.M. on February 27th, till 8 o'clock A.M. on March 11th. The libel alleged that the ship was under seizure by the marshal when the work was commenced, and that the marshal continued the services of the Norman till the saving of the ship and cargo was fully assured.

The libel in the case of the Rio Grande alleged an employment of her owners, on February 27th, to pump water out of the ship, and to remain near her afterwards ready to render service, for a compensation of $50 per hour, and claimed $11,200, for 224 hours, from 10 o'clock P.M. on February 27th, till 6 o'clock A.M. on March 9th. The libel alleged that the ship was raised and saved, with her cargo, late in the afternoon of February 28th; and that the marshal, after he seized the ship and cargo, continued the employment of the tug under said contract.

The resistance to these claims was made by the underwriters on the cargo, to whom the cargo was abandoned. Their answer alleged that the ship and cargo and her freight were

seized by the marshal about midday of February 27th; that the three tugs came about sundown on the 27th, but performed no effective service in pumping during that night; that effective pumping began the next morning; and that by noon on the 28th the ship was raised out of water, and was free from all danger of sinking or again taking in water.

The district court awarded $1,000 to each tug, one-half to her owners and the other half to her crew. The owners of the three tugs appealed to the circuit court, and that court awarded to the owners of each tug $1,000, and they appealed to this court. The circuit court found the facts and the conclusions of law on which it rendered its decree. There was no bill of exceptions, and the review of the decree is limited to a determination of the questions of law arising on the record. The material findings of fact by the circuit court were as follows:

"The ship Tornado was a vessel of 1,720 tons burden, and had come to the port of New Orleans for a cargo of cotton, which she had shipped and stowed away, to the amount of 5,195 bales. She was almost ready for sea, and was lying alongside the wharf in the Third District of the city of New Orleans, at the foot of Marigny street, when, on Sunday, the 24th of February, 1878, at six o'clock A.M., smoke was found coming out of the main hatch, and a number of the crew were at once sent to the nearest fire-alarm box, and the fire department of the city of New Orleans were quickly on the spot. The main hatch having been opened, the fire-engines immediately commenced to throw water down the main hatch, which they continued to do until nine o'clock A.M., when the main hatch was closed, and the steam gas-boat Protector, being provided with apparatus for the manufacture of carbonic acid gas, commenced to attempt to extinguish the fire, which at that time was raging quite violently in the hold, by attempting to fill the vessel with carbonic acid gas. This continued until nine o'clock P.M., when the main hatch was opened, and it was found that there was less smoke than there had been before the experiment with the gas had commenced. The engineer of the Protector went down the main hatch, and having hooked on to some bales of the cotton they were hoisted up

and landed on the levee greatly charred. In the meantime the fire-engines were pumping in water through the hatch hole, and the smoke was increasing. A hole was then cut in the deck abreast the main rigging on the starboard side, and some fourteen bales of cotton were got out of this hole. At six o'clock P.M. smoke was greatly increasing and the hatches were again put on, and the hole in the deck covered, and the Protector again commenced pouring carbonic acid gas into the hold of the vessel, and continued doing so during the night. While these things were going on, the harbor tug-boats, the Continental, the N. M. Jones, the Belle Darlington, the Fern, the Aspinwall, the Charlie Wood, the Ida, the Ella Wood No. 2, the Joseph Cooper, Jr., and the Wasp, had all got there, hearing that the vessel was in peril, and were, with the fire department, engaged in pouring water, with their more or less powerful pumps, upon the fire, at all times when the gas experiments were not going on. Arriving at the scene of the disaster, some earlier than others, they were all there during the whole of the first day. On Monday the 25th of February, at six o'clock in the morning, the main hatch was opened, and the hole that had been made in the deck was uncovered, and the smoke was found to be greatly increased ; some thirty-two bales of cotton were at this time taken out by the stevedores. The fire department was hard at work pumping water, and several holes were cut in the decks, trying to get at the seat of the fire. The main pumps were taken up to allow the hose suction to be put down, and the Protector and the steam engines were pumping out the water part of the day, but the smoke kept on increasing. At six o'clock P.M. there were twelve feet six inches of water in the hold, and the draft of water aft was twenty-three feet eight inches, and forward twenty-five feet six inches. At eleven and a half P.M. the smoke was still increasing and appearing, and the crew were employed in landing the sails and new ropes, sizing stuff, and all that could be got at, on the wharf. On Tuesday, the 26th of February, at six o'clock A.M., Canby, the regular stevedore of the vessel, and his men, came on board and landed the boats and water casks on the wharf, tore up the forward deck and carlings and commenced to save cargo. By noon the stevedore Drysdale had 181 bales landed, and Mr. Canby 100. The fire department were pouring in water during the night and all the forenoon, and

still the smoke increased, and by noon the men were forced to come up from the hold, and the fire brigade were set to work to fill the ship with water, it having been determined by the captain that the only chance of saving any part of the ship or cargo was to fill her with water and sink her, it being deemed impossible to stop the fire otherwise; and about seven o'clock P.M. of Tuesday, February 26th, the ship sank, the water being two or three feet above the main deck. On Wednesday, February 27th, Ellis, the master, and Shultz, the agent of the Tornado, made a contract with the tow-boat association to which the Norman, Rio Grande, and Harry Wright belonged, to pump out the Tornado for a compensation of fifty dollars per hour for each boat, to be continued until the boats were discharged. After the making of said contract, and while the Tornado still lay upon the bottom of the river, the Protector filed a libel for salvage against the Tornado and cargo, and, by virtue of a warrant issued on said libel, the United States marshal seized the Tornado and cargo when the said tow-boats were about to begin pumping her out. After the seizure the marshal took possession of the Tornado and displaced the authority of the master, but permitted the said tow-boats to proceed and pump out the Tornado. The said tow-boats commenced pumping out the Tornado early in the evening of February 27th, assisted by other tugs and the fire department of the city of New Orleans, and succeeded, with said assistance, at twelve o'clock M. of Thursday, February 28th, in raising the Tornado and placing her in a position of safety. The efficient work of pumping out the Tornado was done between 6 A.M. and 12 M. of February 28th. The said pumping service was done without serious danger to the tow-boats by which it was rendered. The total valuation of the property saved was $140,090.75. The value of the tow-boats in the aggregate was $75,000; and their daily expenses were each $100, when actually at work. The usual charge made by tugs in the port of New Orleans is from $6 to $12 per hour for pumping. The said tow-boats remained alongside the Tornado after she was raised, ready to render her assistance in case it was needed, for the period of about twelve days, but such attendance was unnecessary and not required by any peril of the Tornado and cargo, and the fire department of the city was also at hand ready to extinguish a fire in the Tornado should

it again break out. The three tow-boats of the appellants, at the time of making the contract, were out of service, laid up on the other side of the river, without crews or provisions, but were immediately manned and victualled and brought over and laid alongside of the Tornado in the afternoon of Wednesday, the 27th of February. At that time there were no other tow-boats alongside of the Tornado. The said tow-boats were provided with machinery and pumps for extinguishing fires and pumping out sunken ships."

The circuit court found the following conclusions of law from these facts: 1. The contract made by the master and agent of the Tornado for pumping her out was inequitable, and ought not, under the facts of the case, to be enforced. 2. The service rendered by the three tow-boats was a salvage service, but one of low grade. 3. Each of them should be allowed $1,000. 4. The costs of the appeal should be paid out of the fund in the registry. The decree was that the owners of each tug recover $1,000 from the fund in the registry, and that the costs of the appeal be paid out of that fund.

Mr. J. P. Hornor and *Mr. Wm. S. Benedict* for the Tow Boat Company, and *Mr. P. Phillips*, *Mr. James McConnell* and *Mr. Hallett Phillips* for the Insurance Companies.

Mr. Justice Blatchford delivered the opinion of the court After stating the facts as above set forth, he continued:

The sole question to be considered on the appeal of the appellants is, whether the amounts which the circuit court awarded to them severally, as owners of the three steam-tugs, should be increased. The errors assigned by the appellants are (1) that the circuit court held that the contract for pumping out the ship was inequitable, and ought not, under the facts of the case, to be enforced; (2) that it held that the salvage service was of a low grade; (3) that it allowed to each boat only $1,000. These are all assigned as errors in conclusions of law. There is no complaint made by the libellants of the conclusion of law that the service was a salvage service.

In the case of *The Connemara*, 108 U. S., this court said:

Opinion of the Court.

"The services performed being salvage services, the amount of salvage to be awarded, although stated by the circuit court in the form of a conclusion of law, is largely a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case."

We are of opinion that no ground is shown, on the facts found, for awarding a larger sum to the appellants than the circuit court allowed them. The contract, as found, was a contract made by the master and the agent of the ship with the association to which the three tugs belonged, "to pump out" the ship, for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." This does not give a very clear idea as to what the contract was. If the pumping out should be completed, there could be no continuance of the service of pumping out the ship, or of the contract to pump out the ship. If the contract was, that the compensation named should continue, in any event, and whether the ship was pumped out or not, until the boat should be discharged, the attendance of the boats alongside of the ship, after she was pumped out and raised and placed in a position of safety, the boats being ready to render assistance, in case it was needed, for a period of about twelve days, is found to have been unnecessary and not required by any peril of the Tornado and cargo. It is not found, as a fact, that the boats were formally discharged by the master or agent of the ship. But it is found that after the contract was made, and while the ship still lay at the bottom of the river, and when the boats were about to begin to pump her out, the marshal seized the ship and cargo under a warrant on a libel for salvage filed against the ship and cargo, and took possession of the ship, and displaced the authority of the master, but permitted the boats to proceed and pump out the ship, and that they, with other assistance, pumped out the ship and raised her and placed her in a position of safety by a pumping service of about eighteen hours. It is not found that the marshal requested or sanctioned in any way the continued presence of the tugs after the ship was raised and made safe. The authority of the master was displaced by the marshal. On these facts we are of opinion that

to enforce the contract as one continuing during the time claimed by the libellants would be highly inequitable; and that, as against the insurers of the cargo, the right of the boats to compensation must be regarded as having terminated when the ship and cargo were raised, and the boats must be regarded as having been then discharged, within any fair interpretation which can be given to the contract. A compensation of $50 per hour for the eighteen hours of actual pumping would amount to $900. Every agreement for salvage compensation is subject, as to amount, to the judgment of the court as to its being equitable and conformable to the merits of the case. Parsons on Shipping, 306; *The Helen and George*, Swabey, 368; Jones on Salvage, 94 *et seq.*

The final decree of the circuit court was entered on the 24th of May, 1880. On the 26th of June following, the underwriters on the cargo filed a petition in the circuit court praying a cross-appeal to this court from the decree, and it was allowed, returnable at the October term, 1880. On the 5th of July following, the bond on the cross-appeal was filed in the circuit court. But the appellants in the cross-appeal did not docket it or enter their appearance on it, in this court, until September 27th, 1883; and the appellees in it are entitled to have it dismissed. *Grigsby* v. *Purcell*, 99 U. S. 505; *The S. S. Osborne*, 105 U. S. 447.

The cross-appeal is dismissed, and on the appeal of the libellants, the decree of the circuit court is affirmed.

DOUBLE-POINTED TACK COMPANY *v.* TWO RIVERS MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Argued October 25th, 1883.—Decided November 5th, 1883.

Patent.

The first claim of letters-patent No. 147,343, granted February 10th, 1874, to the Double-Pointed Tack Company, as assignee of Purches Miles, the in-

Statement of Facts.

ventor, for an "improvement in bail-ears," namely, "1. The compound staple-fastening *d*, for bails, made with the diagonally cut penetrating points 2 and 3, loop 4, and body 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth," does not, in view of what existed before in the art, set forth any patentable invention.

It was commonly known that the effect of a diagonal cut on a penetrating point was to force the point, in being driven, in a direction away from the cut. Double-pointed staples, with a diagonal cut on each point, but the diagonal cut on one point on the upper and outer side, and on the other point on the lower and outer side, as the staple was driven, were old, the effect in driving being to bring the points together ; and there was nothing more than mechanical skill in putting the diagonal cuts on the same side of each leg, so as to incline both points, in driving, in the same direction.

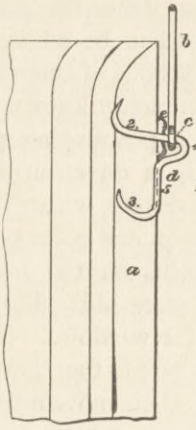
The second claim of the patent, namely: "2. The convex metallic washer *e*, in combination with the compound bail-fastening staple *d*, having upwardly penetrating points 2, 3, and loop 4, as and for the purposes specified," does not set forth a patentable combination, but only an aggregation of parts. Neither the staple nor the washer affects or modifies the action of the other.

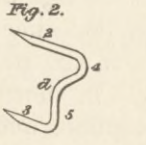
This was a suit in equity brought in the Circuit Court of the United States for the Eastern District of Wisconsin, for the infringement of letters-patent No. 147,343, granted February 10th, 1874, to the plaintiff, the Double-Pointed Tack Company, as assignee of Purches Miles, the inventor, for an "improvement in bail-ears." The circuit court dismissed the bill, and the plaintiff appealed to this court.

The specification of the patent says :

"Wire-staples have been employed to form the fastening eyes for bails, and these have been driven into the wood with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight. My invention consists in a bail-fastening staple made of wire, with the penetrating ends cut at such an angle that, in driving them into the wood, they will assume an upward inclination, so that the weight will tend to force such points inwardly rather than to draw them out, and the bending of the ends in clinching will always be upwardly, thus making a better and more reliable article than heretofore ; and I combine with such fastening a convex metallic washer to keep the bail from contact with the wood or the paint thereon. In the drawing, Figure 1 is a section of the fastening complete ;

Figure 2 shows the compound staple fastening separately; and Figure 3 is an elevation of the washer. The wood work, *a*, represents part of a pail or tub, and the bail, *b*, is of wire, having eyes, *c*, at the ends, which are bent so as to stand parallel, or nearly so, to each other. The compound staple-fastening, *d*, is made with the penetrating points 2, 3, loop 4 for the eye *c*, and the body 5. The ends 2, 3, of the wire are cut diagonally, so that, in driving them into the wood, the tendency is to bend upwardly and clinch, and they will usually be long enough to pass through the wood and be clinched. The body of the fastening stands vertically or nearly so, and will usually be partially imbedded in the wood. The sheet-metal washer *e* prevents the eye *c* coming against the wood. The points of the staple penetrate the wood upwardly so as effectually to prevent the staple pulling out under the ordinary strain to which it is subjected."





The claims of the patent were these:

"1. The compound staple-fastening *d* for bails, made with the diagonally cut penetrating points 2 and 3, loop 4, and body 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth. 2. The convex metallic washer *e*, in combination with the compound bail-fastening staple *d*, having upwardly penetrating points 2, 3, and loop 4, as and for the purposes specified."

The case was argued by *Mr. Arthur v. Briesen*, for the appellant; *Mr. Wm. P. Lynde*, for the appellee.

Mr. Justice Blatchford delivered the opinion of the court. The gist of the invention set forth in the descriptive part of

the specification, so far as the first claim is concerned, is to cut the two penetrating ends of the wire diagonally, and in such a way that, while the staple is being driven, the cut faces will both of them be on the lower side, and the two penetrating ends will both of them incline upwardly. It is shown to have been commonly known that the effect of a bevel or a diagonal cut on a penetrating point was to force the point, in being driven, in a direction away from the bevel or cut. Double-pointed staples, with a diagonal cut on each point, but the diagonal cut on one point on the upper and outer side and on the other point on the lower and outer side, as the staple was driven, were old. They were used to secure wire screens as guards for windows. The effect in driving them was to bring the two points together, by throwing them towards each other, through their movements in opposite directions. The mechanical action embodied was the forcing each point, in being driven, in a direction away from its bevel or cut. The result was that the legs of the staple were bent and came together, and were thus clinched in the driving, and it was more difficult to pull out the staple than if the legs had gone in without bending. In view of this state of the art, there was no patentable invention, and nothing more than mechanical skill, in putting the diagonal cuts or bevels on the same side of each leg of the staple, so as to give both points, in driving, an inclination in the same direction, that direction being one away from both bevels, and in using the device to fasten a bail. This was the view taken by the circuit court. There is no suggestion in the specification or claims as to any invention or novelty in the form of the loop, or of the body, or in the relative lengths of the two penetrating points, or as to the angles formed by such points with the loop or the body, before driving. The so cutting the penetrating ends that they will both of them incline upwardly in driving is the only feature of invention set forth, and to this the patent must be limited, so far as the first claim is concerned.

The second claim is for the washer in combination with the staple of the first claim. This is not a patentable combination. There is only an aggregation of parts when the staple is used

with the washer. The use of the washer is stated in the specification to be to keep the eye at the end of the bail from contact with the wood or the paint thereon. The upper point or leg of the staple goes through the eye and through the centre of the washer. But, the presence of the washer does not modify or affect the action of the staple, nor does the staple modify or affect the action of the washer. The washer keeps the eye of the bail from rubbing the wood of the pail. It would have the same effect if it were fastened in some other way than by having the leg of the staple pass through it, and the staple would in such case have the same operation which it now has.

The decree of the circuit court is affirmed.

MANHATTAN LIFE INSURANCE CO. *v.* BROUGHTON, Trustee.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 22d, 1883.—Decided November 5th, 1883.

Evidence—Insanity—Insurance—Judgment—Parties—Statutes—Suicide.

1. A judgment of nonsuit is no bar to a new action, and of no weight as evidence at the trial of that action.
2. Pending an action in a court of the State of New York against a corporation established in that State, by a widow, a citizen of New Jersey, upon a policy of insurance on the life of her husband, the plaintiff assigned the policy to a citizen of New York in trust for her benefit, and was afterwards nonsuited by order of the court. Upon a subsequent petition by the trustee to another court of the State to be relieved of his trust, a citizen of New Jersey was at her request appointed trustee in his stead. One object of this appointment was to enable a suit on the policy to be brought in the Circuit Court of the United States, which was afterwards brought accordingly: *Held*, that the suit should not be dismissed under the act of 3d March, 1875, c. 137, §§ 1, 5.
3. A self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide, within the meaning of a condition in a policy of insurance upon his life, that the policy shall be void in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law.

Argument for the Plaintiff in Error.

The main facts in this case are stated in the opinion of the court. For the purposes of the reported argument below it is sufficient to say that the plaintiffs in error insured the life of one Ferguson for $10,000, payable to his wife in ninety days after proof of his death; that the policy was to be void if Ferguson should die by suicide; that Ferguson hanged himself; that suit was brought in the Court of Common Pleas of the City of New York by the widow to recover on the policy, in which under a ruling of the court the plaintiff became nonsuited; that the claim, after commencement of suit and before nonsuit, was assigned to a trustee, a citizen of New York, to secure a debt; and that after nonsuit the trustee was removed by amicable judicial proceedings, and the defendant in error, a citizen of New Jersey, substituted, the object being to have this suit brought.

Mr. James Otis Hoyt for the plaintiff in error.

1. The expression, "in case he shall die by suicide," includes all cases of voluntary self-destruction. If a man takes his life, knowing and intending the consequences of his act, it is his act within the meaning of the policy, and it is immaterial whether he did not know the difference between right and wrong; but if he was so insane that he did not know that his act would kill him, and did not intend it should, it was not his act within the meaning of the policy. The question is whether the self-killing was his own act, and not whether it was his responsible act. This is the law of New York, the *locus* of the contract.

Van Zandt v. *Mut. Benefit Ins. Co.*, 55 N. Y. 169; *McClure* v. *M. L. I. Co.*, 55 N. Y. 651; *De Gogorza* v. *Knickerbocker I. Co.*, 65 N. Y. 232; *Weed* v. *Mut. Benefit Ins. Co.*, 70 N. Y. 561.—Of Massachusetts. *Dean* v. *Am. I. Co.*, 4 Allen, 96; *Cooper* v. *Mass. Mut. Ins. Co.*, 102 Mass. 227.—Of Pennsylvania and other States. *Am. L. I. Co.* v. *Isett's Admrs.*, 74 Penn. 176; *St. Louis Mutl. L. I. Co.* v. *Graves*, 6 Bush (Ky.), 268.—Of England. *Borradaile* v. *Hunter*, 5 Man. and G. 639; *Dufaur* v. *Professional Ass. Co.*, 25 Beav. 599.

2. The cases of *Life Insurance Company* v. *Terry*, 15 Wall. 580; *Insurance Company* v. *Rodel*, 95 U. S. 232, though seeming to adopt a somewhat different doctrine from the above case, do not go as far as the learned judge below in his charge. There is no evidence of any insane impulse in the case. On the contrary, the evidence shows a deliberately planned and intelligently executed act of suicide.

3. The evidence shows that the plaintiff was made trustee by the Supreme Court of the State of New York, and for the purpose of bringing an action in the United States Court, Mrs. Ferguson having failed to recover under the New York rule. The court below had no jurisdiction; or if the plaintiff was a citizen of New Jersey, it should not have exercised its jurisdiction, the appointment having been made merely to bring the action where it was supposed a more favorable rule existed than in New York.

4. The same issues involved in this action were tried in the case in the Court of Common Pleas for the City of New York, and the judgment in that case was a bar to the present one and an estoppel. *Krekeler* v. *Ritter*, 62 N. Y. 372. In the event of a recovery by plaintiff, the amount of the judgment in the Court of Common Pleas should be deducted.

Mr. Erastus F. Brown for the defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is an action brought on the 9th of June, 1879, in the Circuit Court of the United States for the Southern District of New York by John G. Broughton, a citizen of Bloomfield, in the State of New Jersey, against a corporation established in the city and State of New York, upon a policy of insurance in the sum of $10,000 on the life of Israel Ferguson, of New York, dated the 15th of June, 1864, made and payable to his wife, and containing a condition that it should be null and void "in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law of these States, or of the United States," or of any other country which he might be permitted by this policy to visit or reside in.

At the trial the plaintiff offered evidence that Ferguson died

in the city of New York on the 14th of August, 1876, and that presently afterwards his widow and family removed to Red Bank, in the State of New Jersey, and had since had their home there. He also introduced a deed, dated the 10th of February, 1877, by which Mrs. Ferguson assigned the policy to John G. Nestell, of New York, in trust to pay a claim for $2,000 and the necessary expenses of collecting the amount of the policy, and to invest the surplus for her benefit; and a record of the Supreme Court of New York, showing that in May, 1879, in a suit brought by Nestell against Mrs. Ferguson to be relieved of his trust, Broughton, the plaintiff, was, upon her request, substituted as trustee in Nestell's stead. There was evidence tending to show that one object in having Broughton appointed was that a suit could be brought in his name in the United States court.

The defendant, having pleaded in bar a former judgment in an action brought against it upon the policy by Mrs. Ferguson, in October, 1876, in the Court of Common Pleas for the City and County of New York, offered evidence by which it appeared that in such an action the death of Ferguson by hanging himself was proved, and the only question in controversy was whether, and how far, he was insane at the time of his death; and that upon the defendant's motion the court, in December, 1878, granted a nonsuit, because he was not shown to have been so insane as not to know the physical consequences of his act, and the decision was entered of record in this form:

"Motion for nonsuit granted, and complaint dismissed; allowance one hundred and fifty dollars to defendant, if further litigation be carried on by plaintiff."

The defendant requested the circuit court to direct a verdict for the defendant, because the former judgment was a bar; and afterwards objected to the introduction by the plaintiff of evidence of the condition of Ferguson's mind at the time of his death, because that question had been tried and determined in the former action. The court rightly denied the request, and overruled the objection. A judgment of nonsuit does not determine the rights of the parties, and is no bar to a new action.

Homer v. *Brown*, 16 How. 354. A trial upon which nothing was determined cannot support a plea of *res judicata*, or have any weight as evidence at another trial.

The defendant, at the close of the plaintiff's evidence in chief, and again at the close of all the evidence in the case, moved to dismiss the action for want of jurisdiction, because Broughton had only a nominal interest, and the real controversy was between citizens of New York; and at the argument in this court contended that the action should be dismissed because the evidence showed that the plaintiff was made trustee for the purpose of bringing an action in the United States court, after Mrs. Ferguson had failed to recover in the State court, under the rule established by the recent decisions of the Court of Appeals in *Van Zandt* v. *Mutual Benefit Ins. Co.*, 55 N. Y. 169, and *Weed* v. *Same*, 70 N. Y. 561.

But the case does not fall within the prohibition of the first section of the act of 3d March, 1875, c. 137, 18 Stat. 470, 472; that no circuit court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made; nor within the provision of the fifth section of the same act, authorizing the circuit court to dismiss a suit, upon being satisfied that it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that parties have been improperly or collusively made or joined for the purpose of creating a case cognizable by that court. *Williams* v. *Nottawa*, 104 U. S. 209. Mrs. Ferguson, the assured and payee named in the policy, was herself a citizen of New Jersey, and as such, if no assignment had been made, might have sued the company in the Circuit Court of the United States; and Broughton, a citizen of the same State, was appointed in the stead of the former trustee, a citizen of New York, not by Mrs. Ferguson's deed in pais, but by a court of competent jurisdiction. Under these circumstances, the mere fact that one object in having him appointed was to enable a suit to be brought in the circuit court is not sufficient to require or justify the construction that he was improperly, and it cannot be pretended that he was collusively, made a

plaintiff for the purpose of creating a case cognizable by that court. The question involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton as her trustee, had a right to seek the independent judgment of a federal court. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102; *Burgess* v. *Seligman*, 107 U. S. 20.

Several minor points suggested at the argument hardly present any question of law.

The interrogatories put by the counsel for the plaintiff to the expert called by the defendants were clearly admissible on cross-examination, for the purpose of testing the knowledge and accuracy of the witness, and require no special consideration.

The instruction requested, that "the only legal test of insanity is delusion," was in direct contradiction of the testimony of the experts called on each side, and could not properly be given as a rule of law.

The court rightly refused to direct a verdict for the defendant on the ground that there was no sufficient evidence to show that Ferguson was insane, or to render the defendant liable upon its contract. Without undertaking to recapitulate the evidence, it is sufficient to say that members of his family, and persons well acquainted with him in his business, testified that he was naturally of a lively, cheerful, sanguine disposition; that in 1874 he met with heavy losses in business, and his son died suddenly by falling from a window; that from that time forward there was a marked change in his demeanor; "he was always walking with his head bowed down, and a gloomy expression, and the entire vitality and cheerfulness which the man had before was gone;" "he was gloomy, dull, mopish;" "he sat down in the office and moaned and would be gloomy there;" "he always complained of his head; he would say, 'The trouble is here; it is all in my head, my head;'" that shortly before his death he had "a vacant expression in his face;" "he had a queer expression about his eyes; it was sort of a wild, unnatural expression;" "that kind of expression which the human face takes on when one is frightened; a far-off, glassy look, as though the mind was dwelling on nothing;"

that "he was very much changed, and was very excitable; he looked different, and had a wild expression; he staid a great deal by himself when he came home from business; he would go to his room and lie on his bed with his hat and overcoat on, and not come out to his meals." The experts called for the plaintiff testified that Ferguson was suffering from that kind of unsoundness of mind which they termed melancholia. There was clearly some evidence of insanity for the jury, and the question of its weight was for them, and not for the court. *Insurance Co.* v. *Rodel*, 95 U. S. 232.

The remaining, and the most important, question in the case is whether a self-killing by an insane person, having sufficient mental capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide, within the meaning of the policy. This is the very question that was presented to this court in 1872 in the case of *Life Ins. Co.* v. *Terry*, 15 Wall. 580. At that time there was a remarkable conflict of opinion in the courts of England, in the courts of the several States, and in the circuit courts of the United States, as to the true interpretation of such a condition. All the authorities agreed that the words "die by suicide," or "die by his own hand," did not cover every possible case in which a man took his own life, and could not be held to include the case of self-destruction in a blind frenzy or under an overwhelming insane impulse. Some courts and judges held that they included every case in which a man, sane or insane, voluntarily took his own life. Others were of opinion that any insane self-destruction was not within the condition.*

* *Borradaile* v. *Hunter*, 5 Man. & Gr. 639; *S. C.* 5 Scott N. R. 418; *Dormay* v. *Borrodaile*, 10 Beav. 335; *Schwabe* v. *Clift*, 2 Car. & K. 134, and *Clift* v. *Schwabe*, 3 C. B. 437; *Stormont* v. *Waterloo Ins. Co.*, 1 F. & F. 22; *Dufaur* v. *Professional Ass. Co.*, 25 Beav. 599, 602; *Solicitors', &c., Assurance Society* v. *Lamb*, 1 Hem. & Mil. 716, and 2 D. G. J. & S. 251; *Breasted* v. *Farmers' Loan & Trust Co.*, 4 Hill, 73, and 8 N. Y. 299; *Dean* v *American Ins. Co.*, 4 Allen, 96; *Cooper* v. *Massachusetts Ins. Co.*, 102 Mass. 227; *Eastabrook* v. *Union Ins. Co.*, 54 Maine, 224; *Gove* v. *Farmers' Ins. Co.*, 48 N. H. 41; *St. Louis Ins. Co.* v. *Graves*, 6 Bush, 268; *Nimick* v. *Mutual Benefit Ins. Co.*, 10 Amer. Law Reg. (N. S.) 101; *Gay* v. *Union Ins. Co.*, 9 Blatchf. C. C. 142; *Terry* v. *Life Ins. Co.*, 1 Dillon, 403.

In *Terry's Case* (the trial of which in the circuit court before Mr. Justice Miller and Judge Dillon is reported in 1 Dillon, 403) it was admitted that the person whose life was insured died by poison, self-administered; and the insurance company requested the court to instruct the jury, first, that if he destroyed his own life, and at the time of self-destruction had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, the plaintiff could not recover on the policy; and secondly, that if the self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, it was wholly immaterial that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action. 15 Wall. 581. The circuit court declined to give either of the instructions requested, and instructed the jury in substantial accordance with the first of them only, saying:

"It devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited, or angry, or distressed in mind, formed the de-

termination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy." 15 Wall. 582.

The necessary effect of giving these instructions, after refusing to give the second instruction requested, was to rule that if the deceased intentionally took his own life, having sufficient mental capacity to understand the physical nature and consequences of his act, yet if he was impelled to the act by insanity, which impaired his sense of moral responsibility, the company was liable. That the ruling was so understood by this court is apparent by the opening sentences of its opinion, on page 583, as well as by its conclusion, which, after a review of the conflicting authorities on the subject, was announced in these words:

"We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." pp. 590, 591.

In *Insurance Company* v. *Rodel*, 95 U. S. 232, the same rule was expressly reaffirmed. In that case the circuit court declined to instruct the jury that the plaintiff could not recover if the assured knew that the act which he committed would result in death, and deliberately did it for that purpose; and, instead thereof, repeated to the jury the instructions of the circuit court in *Terry's Case*, and the conclusion of the opinion of this court in that case, as above quoted. This court in affirming the judgment, said:

"This charge is in the very words of the charge sanctioned and approved by this court in the case of *Life Insurance Company* v. *Terry*, 15 Wall. 580, including an explanatory clause of the opinion of the court in that case. We see no reason to modify the views expressed by us on that occasion." 95 U. S. 241.

The policies in the cases of *Terry* and of *Rodel* used the words "die by his own hand," instead of which the policy before us has the words "die by suicide." But, for the purposes of this contract, as was observed in *Terry's Case*, 15 Wall. 591, the two expressions are equivalent.

In the present case, the defendant requested the court to instruct the jury "that if Israel Ferguson died by suicide, the plaintiff cannot recover, unless he has proved to your satisfaction that such act of self-destruction was not Ferguson's voluntary and wilful act; that he had not at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and did not have, at the time, a purpose and intention to cause his own death by the act;" "that unless the evidence established that Israel Ferguson did not commit suicide consciously and voluntarily, the plaintiff cannot recover;" and "that if he thus committed it, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong."

The court declined to give these instructions, and read to the jury the second instruction refused in *Terry's Case*, and the instructions given therein, as above quoted, and stated that the refusal of the former and the giving of the latter had been approved by this court, and that its decision contained a full exposition of the law, so far as it was necessary to be understood for the purposes of this case, and laid down the rule which would determine them in the application of the evidence which had been introduced; and further instructed them as follows:

"Upon the part of the defendant, an argument based upon the peculiar circumstances surrounding the suicide has been addressed to you, which is deserving of consideration; the various circumstances, showing premeditation, plan, thought, which, it is

very fairly urged, afford quite strong evidence that at the time of his death he was in the full possession of his mental faculties. A serious question, gentlemen, which you will ask yourselves in this case, it seems to me, is this : Had he, in view of his misfortunes, and of the probable future that awaited him, deliberately come to the conclusion that it was better to die than to live, and did he in that view commit suicide ; or was he so far mentally unsound that he could not exercise a rational judgment upon the question of life and death ? Did he become oblivious to the duties which he owed to his family, to his friends, and to himself ? Was he impelled by a morbid impulse which he had not sufficient strength of will to resist, and acting under the influence of this insane impulse, did he determine to take his own life ? Because, if his reasoning faculties were so far impaired that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation, and to execute his design with success, nevertheless, within the authority which I have read, he was so far insane that the plaintiff is entitled to recover on this policy."

These instructions are in exact accordance with the adjudications in the cases of *Terry* and *Rodel ;* and upon consideration we are unanimously of opinion that the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction, upon the interests of those for whose benefit the policy was made, to depend upon the very subtle and difficult question how far any exercise of the will can be attributed to a man who is so unsound of mind that, while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, or in any just sense be said to know what it is that he is doing.

If a man's reason is so clouded or disturbed by insanity as to prevent his understanding the real nature of his act, as regards either its physical consequences or its moral aspect, the case appears to us to come within the forcible words uttered by the late Mr. Justice Nelson, when Chief Justice of New York, in the earliest American case upon the subject : " Speaking

legally also (and the policy should be subjected to this test), self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for the purpose;" and, whether it was by drowning, or poisoning, or hanging, or in any other manner, "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power." *Breasted* v. *Farmers' Loan & Trust Co.*, 4 Hill, 73, 75.

Judgment affirmed.

NEWMAN *v.* ARTHUR, Collector.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 24th, 1883.—Decided November 5th, 1883.

Customs Duties—Manufactures of Cotton—Statutes.

1. The rule that where words are used in an act imposing duties upon imports, which have acquired by commercial use a meaning different from their ordinary meaning, the latter may be controlled by the former, is not applicable when the language used in the statute is unequivocal.
2. The fact that at the date of the passage of an act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the statute clearly and fairly includes them.

This action was brought to recover money alleged to have been illegally exacted by the collector of customs at the port of New York, and paid under protest. There was a verdict and judgment in favor of the defendant below, to reverse which this writ of error is prosecuted.

The importations were made in 1875, and consisted of cotton goods, upon which the collector assessed a duty of five and a half cents a square yard and twenty per centum ad valorem. The plaintiff, at the time of the liquidation, claimed that the goods were liable to a duty of only thirty-five per cent. ad valorem as manufactures of cotton not otherwise provided for.

It was proven on the trial that goods like those in question

Statement of Facts.

were first manufactured in Manchester, England, in 1868 or 1869, they being then a new article of manufacture, and were first introduced into this country in 1869 or 1870. They have been known, since their first introduction into this country in trade and commerce, by the name of cotton Italians, and used exclusively for coat linings. The importations in question were wholly of cotton, and dyed black in the piece, after being woven, and were made in imitation of a well-known article called Italian cloth, made of wool, and used for lining woollen coats. The surface of the cotton Italians was by some process of weaving and calendering made smooth and glossy like that of the real Italians. Plain woollen goods were those in which the warp and woof threads cross each other at right angles.

Cotton Italians were not plain woven, but were twilled goods, and had upon them figures of different designs made in weaving. The cotton Italians in question had more than one hundred threads and less than two hundred threads to the square inch, counting the warp and filling, and were less in weight than five ounces to the square yard, and did not exceed in value 25 cents to a square yard. Plaintiff's counsel gave evidence tending to show that the number of threads to the square inch in plaintiff's importations could not be counted without unravelling the goods.

The plaintiff's counsel asked the plaintiff, who was duly sworn as a witness in the cause, the following question: "Are the goods bought and sold by the count of the number of threads?"

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted.

The plaintiff's counsel then offered to prove by the witness that goods like those in question were never known in trade and commerce in this country as countable goods, or so bought and sold.

The defendant's counsel objected to the evidence as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. Plaintiff's counsel then offered to show

that prior to 1861, and ever since, there had been in trade and commerce in this country a great variety of cotton cloths known as countable goods, and which were bought and sold by the number of threads in the warp and filling, which number of threads was ascertainable by a glass and without taking the fabric to pieces.

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. The plaintiff's counsel then asked the witness the following question: "Was the value of cotton Italians partially or wholly determined between the manufacturer and the purchaser according to the number of threads to the square inch?"

To this question defendant's counsel objected as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted.

It was conceded that plaintiff's goods were neither cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, nor pantaloon stuff, nor goods of like description to them or either of them, nor for similar use.

Among others, not necessary here to refer to, the following instructions were requested by the counsel for the plaintiff in error, which the court refused to give, and to which exception was duly taken, viz:

"3d. That if the number of threads to the square inch in plaintiff's goods, counting the warp and filling, cannot be counted without taking the goods to pieces, then the plaintiff is entitled to recover.

"5th. That cotton Italians, being a new manufacture, and unknown here and abroad when the act of 1864 was passed, they were not specifically enumerated, and the presumption, until rebutted, is, that they come under the general provision of manufactures not otherwise provided for."

Mr. Edwin B. Smith for the plaintiff in error.

Congress *could not* have intended, at the date of the enactment, to impose the duty exacted from the plaintiff upon this article *specifically*, because it then had no existence; it could

not have been intended to embrace it within the *general terms*, because it had not the distinctive trait by which the goods covered by the act at its date are known, distinguished, bought, sold and valued.

Congress did not mean to subject to this "countable" clause every article of cotton manufacture of which, by cutting out a square inch, the number of threads constituting the warp and woof of that area could be counted; but only those articles in which the threads *were* counted in ordinary mercantile transactions therein, and which could be counted by methods practised by the trade. Thus in *Barlow* v. *United States*, 7 Peters, 404–9, a restricted meaning was given to the designation "refined sugars;" and so in multitudinous cases not necessary to be individually specified.

Mr. Solicitor General for the defendant.

Mr. Justice Matthews delivered the opinion of the court.

After reciting the facts as above stated, he continued:

The provisions of the law which govern the case are contained in section 2504 Revised Statutes, being schedule A, cotton and cotton goods, and are as follows:

"1. Sec. 2504. On all manufactures of cotton (except jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description), not bleached, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard, five cents per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted, or printed, five cents and a half per square yard, and, in addition thereto, ten per centum ad valorem.

"2. On finer and lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted, or printed, five and a half cents per square yard, and, in addition thereto, twenty per centum ad valorem.

"3. On goods of like description, exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted, or printed, five and a half cents per square yard, and, in addition thereto, twenty per centum ad valorem.

"4. On cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuffs, and goods of like description, or for similar use, if unbleached, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding five ounces to the square yard, six cents per square yard; if bleached, six cents and a half per square yard; if colored, stained, painted, or printed, six cents and a half per square yard, and, in addition thereto, ten per centum ad valorem.

"5. On finer or lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, six cents per square yard; if bleached, six and a half cents per square yard; if colored, stained, painted, or printed, six and a half cents per square yard, and in addition thereto, fifteen per centum ad valorem.

"6. On goods of lighter description, exceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, seven cents per square yard; if bleached, seven and a half cents per square yard; if colored, stained, painted, or printed, seven and a half cents per square yard, and in addition thereto, fifteen per centum ad valorem: *Provided*, That upon all plain woven cotton goods, not included in the foregoing schedule, unbleached, valued at over sixteen cents per square yard; bleached, valued at over twenty cents per square yard; colored, valued at over twenty-five cents per square yard, and cotton jeans, denims, and drillings, unbleached, valued at over twenty cents per square yard, and all other cotton goods of every description, the value of which shall exceed twenty-five cents per square yard, there shall be levied, collected, and paid a duty of thirty-five per centum ad valorem: *And provided further*, That no cotton goods having more than two hundred threads to the square inch, counting the warp and filling, shall be admitted to a less rate of duty than is provided for goods which are of that number of threads."

"12. . . . and all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem."

The contention of the plaintiff in error now relied on is, in substance, that the goods in question are not embraced in the provisions of the statute applicable to "manufactures of cotton," described and classed by the number of threads to the square inch, because that description had reference only to goods so described and classed by mercantile usage in dealings between buyers and sellers, where the threads could be counted by the aid of a glass, whereas, the goods in question, as it must be assumed from the offers of proof which were rejected, were not dealt in by manufacturers and merchants according to any such usage, and could not be, because the threads in a square inch could not be counted, except by unravelling the fabric for that purpose; and it is therefore argued, that as the goods in question were of a new manufacture, not known at the date of the passage of the act, they cannot be considered as within the specified enumeration of the statute, and the appropriate duty must be determined by the final clause, embracing "all other manufactures of cotton not otherwise provided for." The claim is, in the language of counsel making it, that:

"Congress did not mean to subject to this 'countable' clause every article of cotton manufacture of which, by cutting out a square inch, the number of threads constituting the warp and woof of that area *could be counted;* but only those articles in which the threads *were counted* in ordinary mercantile transactions therein, and which could be counted by methods practised by the trade."

It is sought to support this argument by invoking the rule of construing the statute applied in *Arthur* v. *Morrison*, 96 U. S. 108, and the numerous cases there cited, that where words are used in an act imposing duties upon imports, which have acquired, by commercial use, a meaning different from their ordinary meaning, the latter may be controlled by the former if such be the apparent intent of the statute; but the application fails in the present instance because the language used is une-

quivocal. There is no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances. The rejected proof of the custom of merchants to rate certain descriptions of goods, as to values, by the number of threads to the square inch, as ascertained by inspection by means of a glass, throws no light whatever on the meaning of the law, because the law fixes the rate of duty by a classification based on the number of the threads in a square inch, without reference to the mode in which the count is to be made. It might be quite convenient for dealers not to count the threads, except when they could do so without unravelling, but it is pure conjecture that Congress intended to stop the count by collectors at the same limit. There appears to be no difficulty in counting threads, no matter how fine the fabric, as long as the goods are plain woven; and the necessity of unravelling for the purpose of counting seems to exist only in case of twilled goods; and yet, this very act requires a count of threads in the case of jeans, denims, drillings, bed-tickings, etc., which are twilled, and bases a difference of duty upon them according to the number of threads to the square inch so ascertained.

The fact that at the date of the passage of the act goods of the kind in question had not been manufactured, cannot withdraw them from the class to which they belong, as described in the statute, where, as in the present case, the language fairly and clearly includes them.

There is no error in the record, and the judgment is accordingly *Affirmed.*

Statement of Facts.

ARTHUR, Collector, *v.* PASTOR & Others.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 15th, 1883.—Decided November 5th, 1883.

Customs Duties—Wool.

The statute imposing duties divides foreign wool into three classes, and enacts, among other things, that the duty on wool of the first class, which shall be imported washed, shall be twice the amount of the duty to which it would be subjected if imported unwashed; and further, that wools of that class shall pay a specific duty per pound, and an ad valorem duty in addition. *Held*, that the specific duty by weight is to be calculated on the same number of pounds in each case, and is to be twice the amount for washed wool that it is for unwashed; and that the ad valorem duty on washed wool is to be twice the ad valorem duty on the same number of pounds of unwashed wool.

This action was brought by the defendants in error to recover from the defendant below, now plaintiff in error, money alleged to have been illegally exacted and paid under protest, as customs duties upon an importation of wool. Upon the facts set out in a bill of exceptions, and in respect to which there is no dispute, there was a verdict and judgment for the plaintiff below, upon a charge of the court to that effect, to review which this writ of error is prosecuted, the error alleged being that, upon the law of the case, the verdict and judgment should have been rendered for the plaintiff in error.

The importation, which took place January 3d, 1876, consisted of 3,294 pounds of washed wool of class 1, tariff schedule L, the dutiable appraised value of which, in its washed condition, was $1,627, or 49.49 cents per pound. Had it been imported in an unwashed condition, the dutiable appraised value thereof would have been $813.50, or 24.69 cents per pound.

There were three grades or descriptions of wool known to the trade, rated as to value according to the degree to which they had been freed from impurities, by processes of cleaning, known as unwashed, washed, and scoured wool; and their cost and value were determined in a corresponding proportion,

washed wool being worth twice and scoured wool three times that of unwashed wool.

The same distinction, for the purposes of the law, was made in the provisions of the tariff act then in force. By the terms of that act (Rev. Stat., title XXXIII., schedule L) foreign wools were divided into three classes; the first clothing wools, the second combing wools, the third carpet wools and other similar wools. It was provided that "the duty upon wool of the first class, which shall be imported *washed*, shall be twice the amount of the duty to which it would be subjected if imported *unwashed*; and the duty upon wool of all classes, which shall be imported *scoured*, shall be three times the duty to which it would be subject if imported *unwashed*."

It was then provided that the duty to be levied should be as follows:

"Wools of the first class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be thirty-two cents or less per pound; ten cents per pound, and in addition thereto eleven per centum ad valorem. Wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed thirty-two cents per pound; twelve cents per pound, and in addition thereto ten per centum ad valorem."

The collector, in making his assessment upon the importation in question, exacted duty as follows:

On 3,294 pounds at 20 cts. per pound.....	$658 80
On $1,627 (its value *washed*) at 22 per cent.....	357 94
Total.....	$1,016 74

The importers protested that they should be charged, as an ad valorem duty, only $178.97, or one-half the amount charged and collected, being twenty-two per cent. on the reduced value of the wool, as if unwashed, making a difference of $178.97, which is the amount in controversy. It was proven on the trial that the value of that number of pounds of such wool, *unwashed*, would have been $813.50.

Opinion of the Court.

Mr. Assistant Attorney-General Maury for the plaintiff in error.

The case turns upon the meaning of the word "amount" in the clause of the act which says:

"The duty upon wool of the first class which shall be imported *washed*, shall be *twice the amount* of the duty to which it would be subjected if imported *unwashed*."

The difficulty in adopting the defendant's contention is that it sets up a changeable and inconstant standard, which Congress could not have intended.

It is submitted that it is much more reasonable to suppose that Congress used the word "amount," in the above collocation, as interchangeable with rate, than in its primary sense, necessitating, as the latter view does, the resort to an implication which looks very much like judicial legislation.

Mr. Edward Hartley and *Mr. Walter H. Coleman* for the defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

After stating the facts as above recited, he continued:

The construction of the statute and the rule of computation, adopted by the collector, proceed upon the supposition that the rate of duty to be charged and collected upon washed wool is to be double that charged and collected upon the same weight and value of unwashed wool. Hence, because 3,294 pounds of unwashed wool would be chargeable with a duty of ten cents per pound, and eleven per cent. of its appraised value as unwashed wool, it is found that the same weight of washed wool would be chargeable with twenty cents per pound, and twenty-two per cent. of its appraised value as washed wool.

The error in this calculation clearly is in assuming that the same number of pounds of unwashed wool would be worth as much as washed wool, a supposition which is inconsistent with the fact as admitted, and with the evident meaning of the law. The language of the act of Congress is too plain to admit of doubt. It declares that the duty upon a given quan-

tity of washed wool shall be twice the amount of duty "to which it would be subjected if imported unwashed." By the terms of the comparison the weight is supposed to be the same in both cases—in the case, as actually presented, a quantity of wool weighing 3,294 pounds. Hence the duty, so far as determined by weight, is calculated upon the same number of pounds, being eleven cents a pound for the unwashed wool, and twenty-two cents per pound for the washed wool. But when the *ad valorem* duty is to be determined, the relative values necessarily determine its amount; and, as 3,294 pounds of unwashed wool is to be appraised at $813.50, while the same weight of washed wool would be twice that sum, or $1,627, it follows, that the duty on the latter is to be double that which the law imposes upon the former, namely, twenty-two per cent. of $813.50, which is equal to $178.97, and not twenty-two per cent. on $1,627, equal to $357.94, as charged by the collector. If the rule adopted by him should prevail, the amount of the *ad valorem* duty collected upon equal weights of unwashed and of washed wool, would be four times as great upon the latter as upon the former, for not only is the rate of duty doubled, but it is assessed upon double the value of the unwashed wool. But the statute expressly limits the duty in the case of washed wool to double the amount to which it would be subjected if imported unwashed.

It is admitted in argument that the letter of the law justifies, if it does not require this conclusion; but it is urged that the meaning of the statute requires the construction which would impose rates of duty upon washed wool double those imposed upon unwashed, calculated upon the weight and value of each separately considered. And this contention is maintained upon the argument that the contrary reading of the statute implies that Congress has made the appraised value of wool in its unwashed state the standard for determining the amount of *ad valorem* duty to be collected upon washed wool, which, it is insisted upon the argument, *ab inconvenienti*, is not admissible. But this is, not by implication merely, but expressly what the act declares; and any fancied or real objections to such a standard cannot affect the obvious meaning of the law. It is

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obvious, however, that the natural division of wools into the grades of unwashed, washed, and scoured, carried into the act as the ground of difference in the amount of duties to be assessed accordingly, fully explains the intention of Congress to tax the wool itself uniformly by varying the amount of duty according to the degree to which a given quantity has been freed, by processes of cleansing from the dirt and foreign matter with which, in its unwashed state, it is usually found.

There is no error in the record, and the judgment is

Affirmed

UNITED STATES *v.* FISHER.

APPEAL FROM THE COURT OF CLAIMS.

Submitted March 30th, 1883.—Decided November 5th, 1883.

Salary—Statute.

When Congress appropriates a sum "in full compensation" of the salary of a public officer, the incumbent cannot recover an additional sum in the court of claims, notwithstanding a prior statute fixes the salary at a larger amount than the sum so appropriated.

In such case the earlier act is suspended for the time covered by the appropriation.

The appellee, Fisher, held the office of Chief Justice of the Territory of Wyoming, from February 14th, 1876, to November 26th, 1879. Up to and including June 30th, 1877, he was paid his salary at the rate of $3,000 per annum. From June 30th, 1877, up to and including November 26th, 1879, he was paid and received, without protest, compensation as such chief justice, at the rate of $2,600 per annum.

The appellee, contending that he was entitled to a salary at the rate of $3,000 per annum for his whole term of service, brought this suit in the court of claims to recover the difference between what his salary at that rate would have been from June 30th, 1877, up to and including November 26th, 1879, and the amount actually paid him for that period.

The majority of the court of claims was of opinion that the

contention of the appellee could not be sustained; but in order that the question might be brought to this court and finally settled, rendered a judgment *pro forma* in his favor for $862.22, from which the United States have appealed.

Mr. Solicitor-General Phillips for the United States.

Mr. J. Thomas Turner and *Mr. Theodore H. N. McPherson* for the appellee.

Mr. Justice Woods delivered the opinion of the court.

The act of June 17th, 1870, entitled "An Act to regulate the salaries of chief justices and associate justices in the Territories," 16 Stat. 152; Rev. St. § 1879, provided as follows:

"The salaries of the chief justices and associate justices of the Territories of New Mexico, Washington, Wyoming, etc., shall be three thousand dollars each per annum."

This statute remaining in force, Congress, on March 3d, 1877, passed an act entitled "An Act making appropriations for the legislative, executive and judicial expenses of the government for the year ending June 30th, 1878, and for other purposes." 19 Stat. 294. This act declared as follows:

"That the following sums be and the same are hereby appropriated out of any money in the treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June 30th, 1878, for the objects hereinafter expressed.

* * * * * *

"Government in the Territories.

* * * * * *

"Territory of Wyoming. For salaries of governor, chief justice and two associate judges, at two thousand six hundred dollars each."

The act of June 19th, 1878, making appropriations for the fiscal year ending June 30th, 1879, contained similar provisions in the same language. 20 Stat. 178, 194. The act of June 21st, 1879, 21 Stat. 23, making appropriations for the fiscal year ending June 30th, 1880, appropriated "the same sums of money

and for like purpose (and continuing the same provisions relating thereto) as were appropriated for the fiscal year ending June 30th, 1879," by the act above referred to making appropriations for that year. With the exception of the words "in full compensation," the opening clause of these acts is substantially the same as that used in all other appropriation acts of every description since the foundation of the government.

Upon this state of the statute law the question is presented whether from June 30th, 1877, up to and including November 26th, 1879, the appellee was entitled to a salary at the rate of $3,000 per annum, or at the rate of $2,600 per annum. The contention of appellee is that under the act of June 17th, 1870, he was entitled to a salary of $3,000, notwithstanding the subsequent legislation above referred to.

We cannot concur in this view. The act of June 17th, 1880, fixing the annual salary of appellee at $3,000, was not a contract that the salary should not be reduced during his term of office. *Butler* v. *Pennsylvania*, 10 How. 402. Nor was there any provision of the Constitution which forbade a reduction. *Clinton* v. *Engelbrecht*, 13 Wall. 434.

Congress therefore could, without the violation of any contract, reduce the salary of appellee, and had the constitutional power to do so.

Certain well-settled rules of interpretation are applicable to this case. One is that a legislative act is to be interpreted according to the intention of the legislation apparent upon its face, *Wilkinson* v. *Leland*, 2 Pet. 627; another, that, if possible, effect must be given to every clause, section, and word of the statute, Bacon's Abr. Statute, I. 2; *Powlter's Case*, 11 Coke, 29*a*, 34*a*; Potter's Dwarris, 194; Opinion of the Justices, 22 Pick. 571; and a third, that where two acts are in irreconcilable conflict the later repeals the earlier act, even though there be no express repeal. *McCool* v. *Smith*, 1 Black, 459; *United States* v. *Tynen*, 11 Wall. 88; *Red Rock* v. *Henry*, 106 U. S. 596; *United States* v. *Inim*, 5 McLean, 178; *West* v. *Pine*, 4 Wash. 691; *Britton* v. *Commonwealth*, 1 Cush. 302.

Applying these rules, we think that the appropriation acts above referred to, so far as they concern the question in hand,

are susceptible of but one meaning. Placing side by side the two clauses of the statute which relate to this controversy, their plain effect is to appropriate $2,600 for the salary of the appellee for one year, and to declare that the sum so appropriated shall be in full compensation for his services as chief justice for the year specified. There is no ambiguity and no room for construction.

We cannot adopt the view of appellee unless we eliminate from the statute the words "in full compensation," which Congress, abandoning the long-used form of the appropriation acts has, *ex industria*, inserted. Our duty is to give them effect. When Congress has said that the sum appropriated shall be in full compensation of the services of the appellee, we cannot say that it shall not be in full compensation, and allow him a greater sum.

Not only do the words of the statute make the intention of Congress manifest, but that intention is plainly repugnant to the former statute, which fixes the yearly salary of the chief justice at $3,000. It is impossible that both acts should stand. No ingenuity can reconcile them. The later act must therefore prevail, and the earlier act must for the time covered by the appropriation acts above referred to be considered as suspended. The result of these views is that the judgment of the court of claims, which gives the appellant a salary at the rate of $3,000 per annum from June 30th, 1877, to November 26th, 1879, must be reversed, and

The case remanded to the court of claims with directions to dismiss the petition.

UNITED STATES *v.* MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

Submitted March 30th, 1883.—Decided November 5th, 1883.

Interpreter—Salary—Statute.

The Revised Statutes fix the annual salary of an interpreter at four hundred dollars. In 1877 Congress appropriated in gross for such offices "at three

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hundred dollars per annum," and repeated the appropriation in like form down to and including the appropriation act of March 3d, 1881. A served as such interpreter from July, 1878, to November, 1882, and was paid at the rate of $300 per annum. In a suit to recover at the rate fixed by the Revised Statutes: *Held*, that Congress had expressed its purpose to reduce for the time being the salaries of interpreters, and that the claimant could not recover.

This was a suit by the appellee, Charles Mitchell, to recover a balance which he claimed to be due him as Indian interpreter at the Santee agency in the State of Nebraska, under section 2070, title XXIII., of the Revised Statutes.

That section, and section 2076, which constitutes part of the same title, and also relates to the compensation of interpreters, are as follows:

SEC. 2070. "The salaries of interpreters lawfully employed in the service of the United States in Oregon, Utah, and New Mexico, shall be five hundred dollars a year each, and of all so employed elsewhere, four hundred dollars a year each."

SEC. 2076. "The several compensations prescribed by this title shall be in full of all emoluments and allowances whatsoever."

It appeared from the findings of the court of claims that the appellee was an interpreter at the Santee Indian agency in the State of Nebraska, duly appointed under section 2068 of the Revised Statutes, and that he held the office and discharged its duties for several periods between July 1st, 1878, and November 22d, 1882, his whole term of service amounting to three years and seven months.

During all this time, instead of the salary of $400 per annum, as provided in section 2070, he was paid only at the rate of $300 per annum, for which he gave a receipt in full for his services, Congress having appropriated that sum only for his yearly compensation during his term of service.

The appellee, contending that he was entitled to a salary at the rate of $400 per annum, brought this suit to recover the difference between his salary at that rate and the sum which he was actually paid. The court of claims rendered judgment in his favor for $353.33; from which the United States appealed.

Opinion of the Court.

Mr. Assistant-Attorney-General Simons and *Mr. John S. Blair* for the United States.

Mr. George A. King for the appellee.

Mr. Justice Woods delivered the opinion of the court.

It is contended on behalf of the United States that, by the appropriation acts which cover the period for which the appellee claims compensation, Congress expressed its purpose to suspend the operation of section 2070 of the Revised Statutes, and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum. We think this contention is well founded.

The law fixing the salaries of interpreters, as found in section 2070 of the Revised Statutes, was first passed in the Indian appropriation act of February 27, 1851, 9 Stat. 587. That act appropriated a gross sum for the pay of interpreters authorized by the act of June 30, 1834, 4 Stat. 735, and declared that the salaries of interpreters employed in certain named Territories should be $500, and in all others $400 per annum. From the passage of that act down to the passage of the Indian appropriation act of March 3, 1877, 19 Stat. 271, the appropriations for the salaries of interpreters were made at those rates. The act last mentioned specifically appropriated for the pay of Indian interpreters the uniform sum of $300 each. This course of legislation was continued for five consecutive years, until the passage of the Indian appropriation act of May 17, 1882, 22 Stat. 68, which appropriated the gross sum of $20,000 for the payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior, and repealed section 2070 of the Revised Statutes. A like appropriation was made in the same terms by the Indian appropriation act of March 1, 1883. 22 Stat. 433.

An examination of this legislation, especially of the Indian appropriation acts, beginning with that of March 3, 1877, down to and including the act of March 3, 1881, which are all similar in their provisions, will clearly reveal the purpose of Congress. The act of March 3, 1877, opens with this provision:

"That the following sums be, and they are hereby appropri-

ated . . . for the purpose of paying the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various tribes." . . .

Then follow the specific appropriations, and among them the following:

"For the pay of seventy-six interpreters, as follows: . . . Seven for the tribes in Nebraska, to be assigned to such agencies as the Secretary of the Interior may direct, at three hundred dollars per annum, two thousand one hundred dollars."

After the specific appropriation for salaries of interpreters the following clause appears:

"For additional pay of said interpreters, to be distributed in the discretion of the Secretary of the Interior, six thousand dollars."

All the subsequent Indian appropriation acts, down to and including the act of March 3, 1881, make in the same language the same appropriation for salaries of interpreters, and contain a similar clause for their additional compensation.

We find, therefore, this state of legislation. By the Revised Statutes the salaries of interpreters were fixed, some at $400, and some at $500 per annum, with a provision that such compensation should be in full of all emoluments and allowances whatsoever.

By the acts in force during the appellee's term of service the appropriation for the annual pay of interpreters was $300 each, and a large sum was set apart for their additional compensation, to be distributed by the Secretary of the Interior at his discretion.

This course of legislation, which was persisted in for five years, distinctly reveals a change in the policy of Congress on this subject, namely, that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries and place a fund at the disposal of the Secretary of the In-

terior, from which, at his discretion, additional emoluments and allowances might be given to the interpreters. The purpose of Congress to suspend the law fixing the salaries of interpreters in Nebraska at $400 per annum, is just as clear as its purpose to suspend the section forbidding any further emoluments and allowances. Our opinion is, therefore, that the intention of Congress to fix, by the appropriation acts to which we have called attention, the annual salaries of interpreters for the time covered by those acts at $300 each, is plain upon the face of the statute.

The whole question depends on the intention of Congress as expressed in the statutes. Whether a simple failure by Congress to appropriate any or a sufficient sum to pay the salary of an officer fixed by previous law is of itself an expression of purpose by Congress to reduce the salary, we do not now decide. That is not this case. On the contrary, in this case Congress has in other ways expressed its purpose to reduce, for the time being, the salaries of the interpreters.

This purpose is of course irreconcilable with the provisions of the Revised Statutes on the same subject, and those provisions must be considered as having been suspended until they were finally repealed by the act of May 17, 1882. As the appellee has been paid in full his salary, as fixed by the later acts which were in force before and during and continued in force after his term of service, he has no cause of action against the United States. It follows that the judgment of the Court of Claims in his favor must be reversed,

And it is so ordered.

HOVEY & Another, Appellants, *v.* McDONALD & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued October 10th, 1883.—Decided November 5th, 1883.

Amendment—Appeal—District of Columbia—Equity—Execution—Injunction—Practice—Receiver—Supersedeas.

A, being entitled to a fund in the hands of the agent of Great Britain before the Mixed Claims Commission of 1873, B, his assignee in bankruptcy, filed

Syllabus.

a bill against him and C (C claiming the fund as purchaser), to restrain them from collecting the money. A restraining order first, and then a preliminary injunction were issued. D was then appointed receiver of the fund. Meanwhile E commenced suit in the same court against A and C, claiming one-fourth of the fund, and obtained preliminary injunction restraining them from collecting more than three-fourths. Subsequently an order was made in B's suit in which, after reciting that it was made by consent of parties in both suits, both restraining orders were vacated, payment of one-half of the fund was ordered to C discharged of claims of the plaintiffs in either suit, and the payment of the other half was ordered to D, and D was directed to hold it subject to the claims of B and E. This decree was carried out. Both bills were demurred to, and in each suit decree of dismissal was entered at special term on the demurrer. In B's suit appeal was taken and the decree was affirmed. In E's suit, the decree of dismissal was entered on the 24th June, 1875, and an appeal was taken on the same day. On the 28th of the same June the decree was amended by adding an order that the receiver pay the fund to C, and notice thereof was at once given to the receiver with demand of payment. The receiver repaired to court, and asked the court what he should do. The court directed him to obey the decree. He then surrendered the fund to C. E's appeal was perfected on the 12th July by filing an appeal bond. Judgment was reversed on appeal, and an order entered that the receiver should pay the money into court. Failing to do this, he was adjudged in contempt, and an order issued for an accounting. The auditor took testimony and returned it with a report that the receiver had done his duty in paying the money to C. This report being confirmed, an appeal was taken from that decree. The receiver moved to dismiss the appeal, on the ground that he was not party to the suit. *Held*,

1. That though the receiver was not party to the suit, he was principal party to a side issue which had arisen in it, which was appealable, and that the judgment upon it was final, and the appeal was properly taken.
2. That under the rules and practice of the Supreme Court of the District of Columbia, the suspensive force of the appeal in E's case was not operative until the filing of the bond.
3. That the completing of the decree in that suit by amendment on the 28th June was within the power of the special term.
4. That these proceedings against the receiver being in equity, are not governed by the rules regulating a *supersedeas* of execution.
5. That a decree in equity dissolving an injunction is not affected by a supersedeas, unless the court below order the continuance of the injunction pending appeal. Whether that should not have been done in this case—*Quaere.*

The facts are fully stated in the opinion of the court.

Mr. Chas. W. Hornor and *Mr. G. F. Edmunds* for the appellants.

Mr. Conway Robinson for the receiver.

Mr. Justice Bradley delivered the opinion of the court.

An award against the United States of nearly $200,000 having been made to one A. R. McDonald, a British subject, by the mixed commission appointed under the treaty of 1871, his bankrupt assignee, Thomas J. Phelps, filed a bill in the Supreme Court of the District of Columbia to restrain him from collecting the money, and to have it made subject to his debts, making one White also a defendant, who claimed to have purchased the claim. A restraining order, and subsequently a preliminary injunction, was granted according to the prayer of the bill, and George W. Riggs was appointed a receiver to collect and hold the money until the further order of the court. In the meantime a bill was filed by Charles E. Hovey and William Dole (the present appellants) against McDonald and White, setting up a lien upon one-fourth of the fund under an alleged agreement by which they were to receive that proportion as compensation for their services in aiding the prosecution of the claim, and praying that the lien might be established, and that the defendants might be enjoined from collecting or receiving more than three-fourths of the award. A preliminary injunction was also granted in accordance with the prayer of this bill. On the 16th of February, 1875, the following consent decree, or order, was made, to wit:

"In the Supreme Court of the District of Columbia,

"Thomas J. Phelps, Assignee, } In Equity.
vs. } No. 3,910.
Augustine R. McDonald and William White.

"This cause came on to be further heard on this 16th day of February, A. D. 1875; and thereupon, and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court, numbered 3,937, against the same defendants, and claiming one-fourth of the award in the proceedings mentioned,

"It is, this 16th day of February, A. D. 1875, ordered, adjudged, and decreed—

Opinion of the Court.

"1. That the restraining orders heretofore made in both said causes are hereby vacated.

"2. That the decree made in this cause on the 28th day of December, A. D. 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, viz : That the defendant William White may receive from the agents of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant A. R. McDonald in the prosecution of this claim ; which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant A. R. McDonald before said Mixed Commission, exclusive of said claim of Hovey and Dole.

"3. That the remaining half the net amount of said award shall be paid to the said George W. Riggs ; and it is ordered, adjudged and decreed that the defendants shall execute all such orders, receipts and acquittances necessary to enable the said George W. Riggs to collect the same. And the said George W. Riggs shall hold the said half of the said award subject to the claims, liens, and rights of the said Charles E. Hovey and William P. Dole, and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey and Dole hereinbefore mentioned. It is further ordered that said receiver be directed to invest the money so placed in his hands in bonds of the United States or in $3\frac{65}{100}$ bonds of the District of Columbia guaranteed by the United States, as he may deem best for the interest of the parties concerned, and that a copy of this decree be filed in the last-mentioned cause."

This decree was carried out; the money was collected from the agent of the British government, one-half of it being received by Mr. Riggs as receiver, and the suits progressed in due course. Both bills were demurred to, and both demurrers were sustained, and the bills dismissed by the court in special term.

In the case of Hovey and Dole a decree was entered on Thursday, the 24th of June, 1875, simply decreeing that the

demurrer to the bill be sustained, and that the bill be dismissed with costs. An appeal to the general term was entered the same day on the minutes of the court.

On Monday, the 28th of June, 1875, the decree was amended by adding thereto, the clause, "that the receiver appointed in this cause, and in *Phelps, assignee*, v. *McDonald and White*, No. 3,910, be directed to pay the funds belonging to said cause to the said defendants, McDonald and White, or order, and thereon said receiver shall be discharged;" and at the same time a decree was entered in the suit of Phelps, assignee, that the demurrer be sustained, and the bill dismissed with costs, and the same direction was given to the receiver to deliver the funds to McDonald and White. An appeal was entered in this case also, on the day the decree was rendered; but no appeal bond or undertaking was filed in either case until the 12th of July.

Soon after the entry of the last decree, and on the same day, a copy of it was served on the receiver by the attorney of McDonald and White, and the fund in his hands, then consisting of District bonds, was demanded of him: but before he delivered the bonds, the attorney of Hovey and Dole appeared and gave him verbal notice that an appeal had been taken, and insisted that it was a supersedeas of the decree. Thereupon, the receiver and the attorneys repaired to the court, and the receiver asked the judge what he should do, and was simply told to obey the decree—the complainants' attorney, at the same time, offering to furnish the security named by the court on the appeal. The receiver then delivered the bonds to the defendants.

In the case of Phelps, the bankrupt assignee, the decree of the special term was afterward affirmed; but in that of Hovey and Dole the decree of the special term was reversed, and the counsel for the complainants obtained an order on the defendants to pay back into court the money, or funds, which they had obtained from the receiver. Failing to do this, they were adjudged in contempt, and a decree *pro confesso* was entered against them. Thereupon the complainants obtained an order on the receiver to file his account; and this being done, and it

appearing thereby that, in obedience to the decree of the special term, he had delivered the fund to the defendants, the account was referred to an auditor, and the complainants filed exceptions thereto on the ground that he had delivered up the funds without due authority. The auditor took testimony as to the circumstances of the appeal, the notice given to the receiver, and his conduct in the matter, and reported that in his opinion the receiver had only done his duty. This report was confirmed by a decree of the general term, and from that decree the present appeal was taken.

The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion cannot prevail. The proceedings instituted by the order requiring the receiver to file his account, and the subsequent reference of that account to an auditor, and the exceptions thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a side issue in the cause, in which the complainants on the one side, and the receiver on the other, were real and interested parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of the receiver. We have so often considered cases of this sort, arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter into a detailed discussion of the subject at this time. The receiver, though not a party in the principal suit, was an officer of the court appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to. It is only necessary to refer to some of the cases that apply to the subject. It will be found fully discussed in *Blossom* v. *Milwaukee Railroad Company*, 1 Wall. 655; *Butterfield* v. *Usher*, 91 U. S. 246; *Trustees* v. *Greenough*, 105 U. S. 527; and *Hinckley* v. *Gilman, Clinton and Springfield Railroad Company*, 94 U. S. 467. In the case last cited a decree was rendered against a receiver, directing him to pay into court a certain sum of money, being the

balance found due from him on the settlement of his accounts. He appealed from this decree, and his right to appeal was sustained by this court. This case is a direct authority to show that the receiver in the present case, had the decree been against him, could have taken an appeal; and, if he would have had a right to appeal, surely the opposite parties have the same right.

We are brought, then, to consider the effect of the appeal taken from the decree of the special term upon the efficacy of said decree as a justification of the receiver in handing over to the defendants the fund in his possession. To arrive at a satisfactory conclusion, it will be necessary, in the first place, to take notice of the question as to the power of the court in special term to amend its decree after the appeal was entered.

By the laws relating to the District of Columbia, the Supreme Court of the District has general terms and special terms, the latter being held by a single judge, and proceeding in the conduct of causes as if it were a separate court. Rev. Stat. D. C., § 753. The special term renders final judgments and decrees; and any party aggrieved by an order, judgment, or decree of the special term, if the merits are involved, may appeal to the general term. § 772. The court in general term is authorized to adopt rules to regulate the time and manner of making appeals, and to prescribe the terms and conditions upon which they may be made. § 770. Such rules have been adopted. One is, that executions may issue after judgment in special term, unless the party condemned move to vacate it, or set it aside for fraud, deceit, surprise, or irregularity, or resort to a review of it before the general term. Rule 89. Another is, that appeals must be brought within thirty days after the judgment or decree is made or pronounced; and that they shall not stay execution (as between private parties) where the judgment is for a specific sum, unless, within twenty days after judgment or decree, an undertaking be given, with security, to abide by, perform, and pay the judgment or decree. Rule 91.

We do not perceive that there is anything peculiar in these appeals from the special to the general term to take them out of the operation of the general principles and rules which gov-

ern appeals from one court to another. One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. This includes a suspension of the power to execute the judgment or decree. But, of course, besides merely taking an appeal, those additional things must be done which the law requires to be done, in order to give to the appeal a suspensive effect, whether it be security for the payment of the claim or other condition imposed by law.

One of the qualifications of the general rule as to the suspensive effect of an appeal is, that the inferior court may perfect its judgment or decree, usually at any time during the term at which it is rendered. If, when an appeal is taken or a writ of error is sued out, the record has not been made up, it may be made up in due form. If any obvious mistake has occurred, it may be corrected; as where the jury by mistake has given damages in a penal action, or has given damages for a larger sum than the declaration demanded, the plaintiff may enter a remittitur of the damages on the record, after a writ of error is brought. Tidd's Pract. 942. And it is laid down as a general rule, at law (the principle of which is equally applicable to chancery proceedings), that those things which are amendable before error brought, are amendable afterwards, so long as diminution may be alleged and certiorari awarded—provided, of course, that the time for amendment has not passed by. Tidd, 714. In chancery proceedings it is a rule that when a clerical error has crept into the decree, or some ordinary direction has been omitted, the court will entertain an application to rectify it, even though it has been passed and entered. Where a decree has omitted a direction that is of course at the time it is made, it may be corrected by the insertion of that direction; as where, in a creditor's suit, the decree has omitted the usual direction to take an account of the personal estate, it was ordered to be inserted. Daniell's Ch. Pr., chap. XXV., sect. V. This rule is formulated in the 8th Equity Rule established by this court for the government of the circuit courts, which declares that "clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission,

may, at any time before an actual enrolment thereof, be corrected by order of the court or judge thereof, upon petition, without the form or expense of a rehearing." Such corrections, by analogy to the practice in cases at law, may undoubtedly be made after an appeal is taken.

In the present case, the correction of the form of the decree, by adding the direction to the receiver to pay over the money in his hands to the defendants, was a thing of course; it was merely expressing the legal effect and consequence of the decree. It was an amendment which the court below (the special term) was competent to make notwithstanding the appeal. The terms of the injunction were that the defendants should be restrained from receiving the money until the final hearing of the cause. Of course, when the cause was finally heard, and the bill dismissed, the injunction ceased to have effect by its own terms. The appointment of Mr. Riggs as receiver was for the purpose of holding the money as agent of the court, and withholding it from the defendants until the decision. The words of his commission were, "to collect and hold the money until and subject to the further order of the court." It was therefore a necessary consequence of the decree of dismissal, that the injunction should be dissolved, and that the receiver should be discharged and directed no longer to withhold the money from the possession of the defendants. The dissolution of the injunction, and the discharge of the receiver were directions of course to be inserted in the decree of dismissal, unless the court should affirmatively order otherwise. The court below, it is true, in view of the appeal, might have made an order to continue the injunction and to retain the property in the receiver's hands; but that was a matter of discretion, to be exercised according to the justice of the case. If the judge did not see fit to exercise it, it was of course to add to the decree of dismissal its legal effect and consequence. The making of the correction without notice to the complainants, if such notice was requisite, was an irregularity of which the receiver was not bound to know. We are of opinion, therefore, that the completion of the decree on the 28th of June, by adding the usual direction, was within the power of the special

term; and the rights of the parties to this appeal must be determined as if the decree had originally contained that direction.

This brings us to the question of the effect of the appeal as a supersedeas, or as a suspension of the decree thus corrected. The appeal was taken in time, and verbal notice that it had been taken and would be followed up by the proper undertaking was given to the receiver at once, before he had parted with the funds in his hands. At the same time he was served with a copy of the decree ordering him to deliver those funds to the defendants. The question is whether, under these circumstances, he paid the money in his own wrong, notwithstanding the order of the court.

A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but if the writ of execution has been not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded. To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment. R. S. 1007. This regulation applies to proceedings in equity as well as to cases at law. But it does not extend to the present case. The regulation of appeals from the special to the general term of the Supreme Court of the District is specially provided for in the laws and rules before referred to, which cover the whole subject. By these rules it is declared that, after judgment is

entered in the circuit court, or at a special term, execution may be issued, unless the party condemned moved to vacate or set it aside, or resort to a review of it before the general term: but no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, unless the appellant, with surety, within twenty days after the judgment or decree, execute and file an undertaking in the form prescribed. The appellants insist that this rule makes it unlawful to issue an execution within the twenty days. We doubt very much whether that is the true meaning of the rule. It would be more in accordance with the general mode of construing such regulations to hold that the supersedeas does not take effect until the condition is complied with, and will not take effect at all unless complied with during the time limited.

But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy.

In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See Palmer's Pract. H. L. 9, 10; 15 Vesey, 184; 3 Paige, 383-385.

In this country the matter is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law (when security is required), sus-

pends further proceedings, and operates as a supersedeas of execution. This, as we have seen, is the case in the circuit courts of the United States. But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order, either of the court which makes the decree, or of the appellate tribunal. This court, in the *Slaughter-House Cases*, 10 Wall. 273, decided that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, said "it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court;" and held that the same rule applies to writs of error from State courts in equity proceedings; and the decision of the court was based upon that view of the law. It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter. In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October term, 1878, declared that,

"When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party." Rule 93

Syllabus.

Of course, where the power is not exercised by the court, nor by the judge who allows the appeal, the decree retains its intrinsic force and effect.

Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so. Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none. But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made.

This disposes of the case, and requires that the decree appealed from should be affirmed,—

And it is so ordered.

LOUIS *v.* BROWN TOWNSHIP.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Submitted October 11th, 1883.—Decided November 5th, 1883.

Estoppel—Judgment—Mandamus—Municipal Bonds.

Defendants in error issued to A, their bonds with interest coupons attached. A endorsed to B, and B endorsed to the plaintiff after the bonds were overdue. While the bonds were in B's possession, overdue, B was party defendant in a suit in chancery in a State court in which D, an owner of real estate alleged to be encumbered by a mortgage to secure payment of the bonds, sought to have them declared invalid ; and party plaintiff to a cross-bill in that suit in which it was sought to have the same bonds declared valid, and the mortgage foreclosed. In these proceedings the bonds were adjudged to be invalid for want of authority in the trustees to issue them. During the same period B, as holder of the bonds, applied to the State court for a writ of mandamus to compel the trustees of the township to levy a tax for payment of interest on the bonds. In this suit

it was decided that the bonds were issued without legal authority. On these facts: *Held*,

1. That the general rule that a purchaser of overdue bonds, after judgment rendered that the bonds are void, is bound by that judgment, applies here.
2. That when a mandamus is refused on grounds that are conclusive against the right of the plaintiff to recover in any action whatever, the judgment is conclusive of that fact.
3. When a proceeding in mandamus is used as an action at law to recover money, it is subject to the principles which govern money actions.
4. The judgment of the State court that the bonds were void in the hands of B. is conclusive of that fact in the hands of his vendee and privy in action.
5. If the parties have had a hearing and an opportunity of asserting their rights, they are concluded by final decree so far as it affects rights presented to the court and passed upon, even though all were defendants in the suit, and as between them no issue was raised and no adverse proceedings had.

The facts are fully stated in the opinion of the court.

Mr. Hoadly, *Mr. Johnson* and *Mr. Colston* for the plaintiff in error.

Mr. J. P. Jones and *Mr. C. H. Scribner* for the defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is an action on bonds and interest coupons thereto attached, signed by the trustees of Brown township, payable to the Springfield, Mt. Vernon and Pittsburgh Railroad Company, or its assigns, on the first day of October, 1871, and dated April 20th, 1853.

The plaintiff says she is the owner and holder of the bonds and coupons, and in explanation of her title alleges that "after execution and delivery of said note to said railroad company as aforesaid, and in the year 1854, the said railroad company did indorse and deliver said note and the coupons thereto attached to Brown, Collins and Brown, and that said Brown, Collins and Brown afterwards indorsed and delivered said note and coupons to Richard B. Hopple, and Richard B. Hopple afterwards indorsed and delivered said note and coupons to the plaintiff, who now holds and owns the same."

The defendants for answer, among other matters, filed two pleas of a former adjudication, in which the bonds were declared to be void, and rely upon these in bar of the action.

The first of these pleas, called defence No. 3, sets out a suit by one Hiram Hipple, plaintiff, against the trustees of Brown township, Robert B. Hopple and others, in which he alleges himself to be the owner of real estate encumbered by a mortgage to secure the payment of the bonds on which the present suit is brought, and that said defendants, among whom was the Richard B. Hopple from whom plaintiff in this suit purchased the bonds aforesaid, asserted a claim to his land on account of said mortgage. The plea further alleges that the holders of the bonds, among whom was Richard B. Hopple, filed their answer and cross-bill alleging the bonds and mortgage to be valid, and pray that the bonds and mortgage might be declared to be valid, and for a decree of foreclosure of the mortgage, and that in said cross-bill said Richard B. Hopple set up as the foundation of his prayer for relief, his ownership of the identical bonds now set forth in this action. In the suit on the mortgage, which was finally appealed to the Supreme Court of the State, Hopple and the other bondholders failed, and were adjudged to pay costs, on the ground of the want of authority in the trustees of Brown township to issue the bonds. To this suit the trustees of Brown township and Richard B. Hopple and other bondholders were parties.

The second plea sets forth an application by Richard B. Hopple, in his right as owner of these bonds, for a writ of mandamus from the Supreme Court of Ohio, to compel the trustees of Brown township to levy a tax to pay the interest on said coupons. To the alternative writ the trustees answered, denying the validity of the bonds, and the court decided that the supposed bonds and coupons were issued without any legal authority, and without any authority to take stock in the railroad company to which they were delivered, and gave judgment for costs against said Hopple.

The plea also avers that said bonds were not transferred to Annie Louis, plaintiff, until long after said bonds and coupons were due.

To these pleas demurrers were filed, and the demurrers overruled, and plaintiff not desiring to reply or plead further, judgment was rendered for defendant.

The error assigned by plaintiff is the overruling of these demurrers.

We think the court was right, upon the plainest principles of jurisprudence.

The case is unembarrassed by the doctrine of bona-fide purchaser of negotiable securities, because the bonds were overdue in the hands of Richard B. Hopple when the suit of Hipple against him and others to have them declared void was commenced. The bonds fell due October 1st, 1871, the suit was commenced October 18th of that year, and the cross-bill, in which Hopple sought to enforce the bonds, was commenced April 2d, 1872. The bonds were, therefore, past due during the whole period of that litigation in which they were adjudged to be void in his hands.

As regards the action of mandamus while the bonds were not overdue, at the time of the judgment against Mr. Hopple, the plea expressly avers that they were overdue when the plaintiff Louis became their owner, and as she alleges in her declaration that she bought them of Hopple, it follows that they remained in his hands from the date of the judgment on mandamus against him until they became past due. This follows also from the fact that he asserted ownership of them after they were due, in the cross-bill to Hipple's suit.

The plaintiff, therefore, holding under Hopple by a purchase made after the bonds were due, and after the judgment in which they were decided to be void in his hands, is bound by that judgment, unless something can be shown which takes the case out of the general rule.

In the mandamus case, the plaintiff was the owner of the bonds, and the present plaintiff is bound by the privity of a subsequent holder of them. The defendants in that case are the defendants in this, so that the action is now between parties on whom that judgment is binding.

The only objection made to this is that while the statute of Ohio makes a judgment on mandamus a bar to another civil

action where the writ is granted, it does not so declare where it is refused. The words of the statute are not presented to us, nor any decision of the courts of that State cited to sustain the proposition.

It is easy to see why the statute should declare that where a party has had recovery of what he claims by a writ of mandamus, the other party should not also be harassed by another action for the same demand. But it would not follow that where a mandamus was refused on grounds which were conclusive against the right of plaintiff to recover in any action whatever, that the judgment would not be a protection when such other action was brought. Such was the case before us. The ground of the court's judgment in denying the mandamus was not left to inference, however strong that inference might be from the pleadings, as in the case of *Block* v. *The Commissioners*, 99 U. S. 686, but the court declared, in the case we are now considering, in positive terms, that: "The said supposed bonds or undertaking and coupons in the writ mentioned, were issued by the defendants without any legal power or authority, . . . and without any legal power or authority to make said supposed subscription to the capital stock of the railroad company, and that said supposed subscriptions, and said supposed bonds and coupons, are for said reason absolutely void," and that defendants are not estopped to set up the invalidity of said instruments.

Here is not only a denial of the writ of mandamus, but an adjudication that in the hands of Hopple the bonds in suit were absolutely void.

This court has repeatedly held since *Postmaster General Kendall's Case*, 12 Pet. 524, 614, that the proceeding in mandamus is, when appropriate, an action at law to recover money, and is subject to the principles which govern said actions, and in the case of *Block* v. *Commissioners*, 99 U. S. 686, the denial of the writ is held to be conclusive in a subsequent action as to the invalidity of the bonds, though the fact that the decision in mandamus was based on that ground is inferred from the pleadings, and not from the express language of the judgment, as in the present case.

Opinion of the Court.

We are of opinion that the judgment of the Supreme Court of Ohio established the fact that the bonds and coupons were void in the hands of Hopple, and the judgment is conclusive of that fact against his vendee and privy in this action.

The same result must follow in the case of *Hipple* v. *The Board of Trustees and Richard B. Hopple and others.* It is argued, in avoidance of this conclusion, that the board of trustees and Hopple being both defendants to Hipple's bill, no adversary contention on the question of the validity of the bonds could have taken place between them.

But this view of the case ignores entirely the facts that Hopple, in filing his cross-bill seeking to establish the bonds as valid, became plaintiff, and made the trustees defendants, and in this manner raised the issue of their validity between himself and the trustees directly, and it was in express terms decided against him. His assignee of those bonds, in the present action against the same trustees, is clearly bound by that decision.

But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple, does not impair the conclusive character of the decree in that case as between those parties. The present case is precisely analogous to that of *Corcoran* v. *The Chesapeake and Ohio Canal Co.*, 94 U. S. 741, and we cannot better express our views of this case than by a quotation from the opinion in that:

"It is said that Corcoran and his co-trustees, the canal company and the State of Maryland, *were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.* The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, *and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.* It is to be observed, also, that the very object of that suit was to determine the order of the distribution of the net revenue of the canal company, and

that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally, on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation." And in conclusion the court say: "It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction which had before it the parties to the present suit; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel; and that it, therefore, falls within the salutary rule of law which makes such a decision final and conclusive between the parties, and that none of the exceptions to that rule exist in this case."

We are of opinion that both demurrers were properly overruled, and

Affirm the judgment of the circuit court.

MR. JUSTICE MATTHEWS did not sit in this case.

INDIANA SOUTHERN RAILROAD COMPANY *v.* LIVERPOOL, LONDON & GLOBE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Argued October 15th, 1883.—Decided November 5th, 1883.

Appeal—Equity—Foreclosure—Mortgage—Practice—Railroad.

1. When it is within the discretion of the court below to grant or to refuse leave to file a cross-bill, the refusal to grant such leave is no ground of appeal.
2. The court will not review an alleged error respecting the proof in a railroad foreclosure suit and the allowance of amounts due to holders of mort-

gage bonds, if the evidence presented before the master is not before it, and if no objection to the proof was taken below.

3. When mortgage creditors take no appeal from a decree of foreclosure, the court will not, in an appeal by the debtor, inquire whether the creditor should not have had more.

The facts appear in the opinion of the court. The points presented in the briefs were mainly on the facts.

Mr. A. L. Roache and *Mr. S. A. Huff*, for the appellants.
Mr. George Hoadly and *Mr. B. Harrison*, for the appellee.

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

These are appeals from a final decree in a suit brought by the Liverpool, London & Globe Insurance Company to foreclose a mortgage given by the Indiana Southern Railroad Company to William H. Swift and Samuel J. Tilden, trustees, to secure an issue of bonds, fifteen hundred of which, amounting in the aggregate to $1,500,000, are held by the insurance company.

The suit was begun in a State court on the 13th of June, 1868, but on the 24th of November, 1871, it was removed to the Circuit Court of the United States for the District of Indiana. Among the defendants, when the removal was made, were the Ohio & Mississippi Railway Company and the Fort Wayne, Muncie & Cincinnati Railroad Company.

The Indiana Southern company acquired its title to the mortgaged property in January, 1866, by purchase at a foreclosure sale of the property of the Fort Wayne & Southern Railroad Company. When this purchase was made, the railroad was in an unfinished condition, and the Indiana Southern company itself abandoned all work upon it early in 1867. A part only of the line was graded by these companies, and no ties or rails were ever laid by either of them. The Indiana Southern company is confessedly insolvent.

After the proceedings for the foreclosure of the mortgage of the Fort Wayne & Southern company had been finished, after the mortgage by the Indiana Southern company to Swift and Tilden had been executed, and after the commencement of this suit for its foreclosure, the Ohio & Mississippi company and the

Fort Wayne, Muncie & Cincinnati company each purchased from the Fort Wayne & Southern company a part of the line of that company, the purchasing companies intending to use the property purchased in the construction of their respective roads. They claimed that the proceedings for the foreclosure of the mortgage of the Fort Wayne & Southern company were invalid, and that their title by purchase from that company was superior to the title of the Indiana Southern company and its mortgagees. Upon their purchase they each entered into the possession of their respective portions of the old line, and proceeded to construct and finish their several roads thereon.

On the 12th of September, 1872, Swift and Tilden, the trustees of the Indiana Southern mortgage, filed a cross-bill in the cause, the object and purpose of which was to foreclose the mortgage for the benefit of all bondholders, and to quiet their title as against the adverse claims of the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati companies. The Indiana Southern company has never answered either the bill or the cross-bill, and on the 24th of September, 1872, an order was entered in due form that the bill and cross-bill be taken as confessed by that company. On the 14th of November, 1873, a reference to a master was ordered to ascertain and report the amounts due to bondholders on the Indiana Southern mortgage. On the 18th of December, 1873, the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati companies each filed answers to the bill and cross-bill, setting up their respective titles and what they had done pending the suit in the construction of their roads upon and over a part of the original right of way and grading of the Fort Wayne and Southern company. Before this time, an agreement of compromise had been entered into between the insurance company and the two purchasing railroad companies, to take effect if all the other parties in interest should give their assent. This assent does not appear to have been obtained.

On the 21st of April, 1877, the master made a report, stating the amounts due the several bondholders who had proven their claims before him, and on the 17th of May the Indiana Southern company filed exceptions to all his allowances. On

the 2d of January, 1878, the same company appeared and moved to set aside the order referring the case to the master, and also for leave to file a cross-bill, the prayer of which was, 1, that the insurance company be required to take issue on the answers of the two railroad companies; 2, that the Indiana Southern company might have leave to do the same thing; and 3, that a receiver be appointed to take the possession of the property from the two companies, and hold it pending the suit. Leave to file this cross-bill was refused, but no action was taken directly on the motion to set aside the order of reference.

On the 2d of July, 1879, William H. Guion, claiming to have an interest in the bonds held by the insurance company, filed a petition to be admitted as a party to the suit for his own protection. This petition was denied.

On the 28th of January, 1880, both the trustees and the insurance company filed replications to the answers of the two railroad companies and the cause was thereupon submitted to the court, by all the parties who had appeared and pleaded, on the original and cross-bills, the answers thereto, the replications and proofs; and on consideration a decree was entered, finding due to the insurance company the full amount of the bonds held by it, principal and interest, being more than two millions of dollars, and to the other parties who had presented their claims the sums reported in their favor respectively by the master. It then ordered a sale of the mortgaged property, subject "to the right of the Ohio & Mississippi Railway Company and the Fort Wayne, Muncie & Cincinnati Railroad Company, to remove from said right of way or real estate any ties, rails, and other structures by them respectively placed thereon, or, by proceedings under their power of eminent domain, to appropriate such portions of said right of way used and possessed by them respectively, on making compensation therefor in accordance with law."

From this decree the Indiana Southern company took an appeal, giving security for costs only. Guion was also allowed an appeal on giving bond and security for costs, but the transcript does not show that he ever gave the bond.

The objections made to the decree by the Indiana Southern company are:

1. Because leave was refused the company to file its cross-bill;

2. Because the amounts found due the respective bondholders were not supported by sufficient evidence; and—

3. Because of the reservations in favor of the Ohio & Mississippi and Fort Wayne, Muncie & Cincinnati companies.

The objection of Guion is that he was refused leave to become a party to the suit.

As to the first objection of the railroad company, it is sufficient to say that it was, under the circumstances, clearly within the discretion of the court to refuse leave to file the cross-bill. The object of the railroad company was to get replications to the answers of the two intervening, or, as they are called in the argument, intruding railroad companies, and the appointment of a receiver. The replications were afterwards filed by the insurance company and the trustees, and the case was clearly not one in which the appointment of a receiver would have been proper. If it had been, no cross-bill was necessary to get the appointment. The Indiana Southern company was a party to the suit, and could move in that particular as well without as with a cross-bill.

As to the second objection. While this point is made in the assignment of errors, it was not mentioned in the argument. The evidence presented to the master in support of the claims of the several appearing bondholders has not been sent up. The master says they each presented sworn statements of their title, and also presented and filed with him their bonds and coupons. As no objections were made to any of the proof, the claims were allowed as presented. Under these circumstances, we cannot review the decree in this particular.

As to the third objection. The railroad company has alone appealed. The bondholders and trustees under the mortgage are satisfied with the decree as it has been entered. The railroad company has no other property which can be subjected to the payment of the balance of the mortgage debt remaining due after the mortgage is exhausted, and if the mortgagees are

satisfied with the security as it has been adjudged to them, we see no reason for inquiring, on the suggestion of the railroad company only, at this late day, whether they might not have had more.

The decree is affirmed.

GUION *v.* LIVERPOOL, LONDON, AND GLOBE INSURANCE CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Argued October 15th, 1883.—Decided November 5th, 1883.

Appeal.

A person not a party in a suit cannot take an appeal in it.

On the 2d July, 1879, William H. Guion, claiming to have an interest in the bonds of the appellee which were the subject of controversy in the suit of *The Indiana Southern Railroad Company* v. *The Liverpool, London, & Globe Insurance Company*, just reported, filed his petition in that suit in the court below, asking to be admitted as a party to the suit for his own protection. This petition was denied. Guion was allowed an appeal on giving bond and security for cost, but the transcript does not show that he ever gave the bond.

The case was argued simultaneously with the case of *The Indiana Southern Railroad Company*, and by the same counsel.

Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said:

The petition of Guion was for leave to appeal from a decree in a suit to which he was not a party. We decided in *Ex parte Cutting*, 94 U. S. 14, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given. So he is not a party to the decree from which he appeals. But if he is, he has never perfected an appeal by giving the necessary security.

Appeal dismissed for want of jurisdiction.

Statement of Facts.

EX PARTE PENNSYLVANIA.

APPLICATION FOR A WRIT OF PROHIBITION.

Submitted October 15th, 1883.—Decided November 5th, 1883.

Appeal—Jurisdiction—Practice—Writ of Prohibition.

1. The District Court of the U. S. for the Eastern District of Pennsylvania has jurisdiction over the claim of a pilot appointed under the laws of Delaware for fees when the vessel is seized within the jurisdiction of the court, and properly brought before it.
2. Where the evident purpose of an application for a writ of prohibition is the correction of a supposed error in a judgment on the merits, the court will not grant the writ.

The State of Pennsylvania by the act of 8th June, 1881, sec. 5, enacted that every vessel which is not spoken by a pilot outside of a straight line drawn between the capes of the Delaware shall be "exempt from the duty of taking a pilot on her voyage inward to the port of Philadelphia, and the vessel, as well as her master, owner, agent, or consignee, shall be exempt from the duty of paying pilotage, or half pilotage, or any penalty whatsoever, in case of her neglect or refusal so to do." The State of Delaware, by the act of 5th April, 1881, made it compulsory upon every vessel, except such as are solely coal laden, "passing in or out of the Delaware Bay by the way of Cape Henlopen," to receive a pilot. The vessel in this case did pass in by the way of Cape Henlopen, and was spoken by a Delaware pilot after she had entered the Capes. A Delaware pilot tendered his services to the incoming vessel within the exempted district bound for Philadelphia. The services being refused, the vessel was libelled in the District Court of the United States for the Eastern District of Pennsylvania to recover the legal fees for them. The claim was resisted on the ground that the court had no jurisdiction. The court allowed the claim, whereupon the attorney-general of the State of Pennsylvania applied to this court for a writ of prohibition to the court below, directing it to refrain from any further proceedings in the case.

Opinion of the Court.

Mr. L. C. Cassidy, Attorney-General of Pennsylvania, *Mr. Mr. H. G. Ward* and *Mr. M. P. Henry* in support of the suggestion.

1. The writ of prohibition is the proper remedy. A court may act beyond its jurisdiction in taking cognizance of a particular cause of action, although within its general jurisdiction. When it clearly appears that the court below has exceeded its proper powers, this complete remedy is the proper one. The brief cites and discusses *Quimbo Appo* v. *The People*, 20 N. Y. 531; *State* v. *Ridgell*, 2 Bailey, 560; *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Co.*, 104 U. S. 519; *Ex parte Hagar*, 104 U. S. 520; *The Chaskieh*, L. R. 8 Q. B. D. 197; *United States* v. *Peters*, 3 Dall. 121; *Ex parte Easton*, 95 U. S. 68; *Devoe Manufacturing Company*, 108 U. S.

2. The State of Delaware has no power to impose compulsory pilotage on vessels bound to Pennsylvania ports. Pilotage is a port regulation. A vessel is only subject to the pilotage laws of the port to which it is bound. *Cooley* v. *Board of Wardens*, 12 How. 299; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Smith* v. *Condry*, 1 How. 28; *The China*, 7 Wall. 53; *The Annapolis*, Lush. 295.

Mr. Thomas F. Bayard, *Mr. Curtis Tilton*, and *Mr. Henry Flanders*, against the suggestion, cited *Wilson* v. *McNamee*, 102 U. S. 572; Rev. St. §§ 4235, 4236; *The Clymene*, 9 Fed. Rep. 164; *The Clymene*, 12 Fed. Rep. 346; *The Alzena*, 14 Fed. Rep. 174; *Flanigen* v. *Washington Ins. Co.*, 7 Barr, 306; *Cooley* v. *The Board of Wardens*, 12 How. 299, 312; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 457; *Ex parte McNeil*, 13 Wall. 236, 342; and the cases from 104 U. S. cited on the other side.

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

We are unable to distinguish this case in principle from *Ex parte Hagar*, 104 U. S. 520, where it was held on the authority of *Ex parte Gordon*, id. 515, that as the admiralty court had jurisdiction of the vessel sued, and the subject-matter of the suit, it could not be restrained by a writ of prohibition from deciding all questions properly arising in that suit. This, like that, is a suit for pilotage fees, and the question is, whether

a statute of Delaware, under which the fees are claimed, is valid. If valid in Delaware it is in Pennsylvania, and the court sitting in Pennsylvania is as competent to decide that question in a suit of which it has jurisdiction, as a court in Delaware. The jurisdiction of the court in Pennsylvania is no more dependent on the validity of the law than was that of the court in Delaware. The subject-matter of the suit is a claim of a Delaware pilot for his pilotage fees under a Delaware statute, and the sole question in the case is, whether the fees are recoverable. The vessel when seized was confessedly within the jurisdiction of the court in Pennsylvania, and she was properly brought into court to answer the claim which was made upon her. About that there is no dispute, as there was at the last term in *Devoe Manufacturing Company*, 108 U. S., where the question was as to the right of the court in New Jersey to send its process to the place where the seizure was made. There the question was as to the jurisdiction of the court over a particular place; here as to the liability of a vessel confessedly seized within the territorial jurisdiction of the court upon a claim subject to judicial determination in an admiralty proceeding. The evident purpose of this application is to correct a supposed error in a judgment of an admiralty court on the merits of an action. That cannot be done by prohibition. The remedy, if any, is by appeal. If an appeal will not lie, then the parties are concluded by what has been done. Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved.

The petition is dismissed.

HUNT and Another, Appellant, *v.* OLIVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Argued October 22d, 1883.—Decided November 5th, 1883.

Mortgage—Supersedeas.

A mortgaged real estate to B, C, and D, including the south half of a fractional section. Two years later B assigned his interest in the mortgage to C and D, and took from A, who was embarrassed, a conveyance of all his property, including the other half of the fractional section. This was done to aid A in disposing of his property, and paying his debts. It was found in the decree below that it was for the joint benefit of B and his co-mortgagees. The mortgaged property was purchased by C at foreclosure sale. A brought suit against B, C, D, and others in possession, to redeem all the estate conveyed to B. An accounting showed a balance due A. Execution was ordered directing the defendants to surrender the lands. B and C appealed, giving security for a supersedeas. A applied for a writ of assistance putting him in possession of the north half. The court below granted the writ. On application to this court to stay the writ of assistance: *Held*, that the writ of *supersedeas* should issue.

The facts appear in the opinion of the court.

Mr. Henry M. Duffield, for the appellant Hunt.
Mr. Nathaniel Wilson, for the appellee.

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

This is a motion for a writ of supersedeas to stay the execution of a writ of assistance issued by the circuit court, after an appeal to this court, to put the appellee in possession of a part of the property involved in the litigation below. The material facts affecting the motion, as found and determined by the circuit court, or otherwise shown by the motion papers, are these:

On the 17th of November, 1866, Oliver, the appellee, executed to Henry S. Cunningham, Garrett B. Hunt, and Jacob Eschelman a mortgage on certain lands in Michigan to secure a debt of $35,000. Included in this mortgage was the S. fr. ½ sec. 12, T. 29, N. R. 8 E., containing $227\frac{5}{100}$ acres, more or less, "with the saw-mill and other improvements thereon." In

the summer of 1868, Oliver owned and possessed other lands encumbered by other mortgages, one to Calvin Haines and Philip N. Ranney, and others to other parties, and he also owed other debts to other persons, which were unsecured, amounting in the aggregate to a large sum. On the 2d of September, 1868, Cunningham assigned his interest in the $35,000 mortgage to his co-mortgagees, Hunt and Eschelman, and then took a conveyance from Oliver of all his property, real and personal, for the purpose of assisting him in disposing of it, and realizing any surplus that should remain after his debts were paid. Among other lands conveyed by Oliver at this time and for this purpose was frac. sec. 12, T. 29, N. R. 8 E. The decree finds that Cunningham took this conveyance "for the joint benefit of himself and his co-mortgagees." After this conveyance was made, Cunningham, Hunt, Eschelman, Haines, Ranney, George Robinson, and Henry Robinson, formed a partnership to carry on lumbering business and to cut the timber upon the property, and manufacture it. Hunt then proceeded to foreclose the $35,000 mortgage, and purchased the mortgaged property at the foreclosure sale. After this, on the 13th of March, 1873, Oliver filed a bill in equity in the Circuit Court of the United States for the Eastern District of Michigan against Cunningham, Hunt, Eschelman, Haines, Ranney, and the two Robinsons, the object of which was to redeem the lands which had been conveyed to Cunningham, and to charge the defendants, as mortgagees in possession, with the rents and profits of the property. Upon this bill a final decree was rendered on the 21st of September, 1882, finding due from the defendants to Oliver the sum of $41,488.87, for which execution was ordered, and directing the defendants to "surrender and yield up to the complainant possession of all lands transferred by said complainant to said defendant Cunningham by deeds dated September 3d, 1868," and to make, execute and deliver to complainant good and sufficient conveyances to transfer all their title and interest in and to the land described in said deeds, and which should describe and specify the lands as follows: "The entirety of the following lands: . . . Entire fract. sec. 12 T. 29, N. R. 8 E. . . ." From

this decree Hunt and Eschelman alone appealed, giving security for a supersedeas. Upon sec. 12 is a valuable saw-mill, but the complainant claims it is located on the north half of the section and not on the south half. After the appeal and supersedeas were perfected, Oliver applied to the circuit court for a writ of assistance to put him in possession of the north half of this section, and the writ was granted, on the ground that as Hunt had title only to the south half of the section, his appeal did not operate to stay the execution of the decree as to the north half. It is to stay the execution of this writ that the present application is made.

We think this motion should be granted. The decree appealed from finds as a fact that although the conveyance of Oliver was in form to Cunningham alone, it was taken by him for the joint benefit of himself and his co-mortgagees, that is to say, Hunt and Eschelman, the appellants. Such being the case, it is a matter of no importance that the legal title to the north half of section 12 may not have been in either of the appellants. As Cunningham took title to the whole property for them as well as himself, whatever in the decree affects that title affects them as well as him. They have been charged with the entire amount realized from the whole property, and it is impossible to reach any other conclusion from the papers submitted on this motion, than that, in the whole proceeding below, the appellants were deemed to have been in equity grantees under the deed to Cunningham jointly with him, and that their rights under the appeal are to be governed accordingly. Certainly an appeal with supersedeas by him would on the face of the papers stay the execution of the writ of assistance now complained of, and if such an appeal would have that effect as to Cunningham, the present appeal must as to these appellants.

A writ of supersedeas may issue.

Syllabus.

EVANS, Plaintiff in Error, *v.* BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Practice.

On motion to dismiss, with which is united, under Rule 6, a motion to affirm, the motion to affirm will be granted when it appears that the questions presented are frivolous, and that the case is brought here for delay only.

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

The writ of error in this case was not made returnable on any particular day. This, if the defect is not cured by amendment, entitles the defendant in error to a dismissal, but the plaintiff in error asks leave, under the authority of sec. 1005, Rev. Stat., to amend the writ by inserting the proper return day. That leave we grant, and therefore overrule the motion to dismiss, but on looking into the record we find the case was manifestly brought here for delay only. All the questions presented are so frivolous as not to need further argument. The motion to affirm is granted.

Judgment affirmed.

WINTHROP IRON CO. and Another *v.* MEEKER and Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.—MOTION TO DISMISS THE APPEAL.

Submitted October 15th, 1883.—Decided November 5th, 1883.

Appeal—Final Judgment.

Stockholders in a corporation filed a bill praying to have proceedings at a meeting of stockholders in the corporation and proceedings of the board of directors, under a supposed authority derived therefrom, set aside as fraudulent and void, and a receiver appointed. The court below made a

decree setting aside the proceedings and appointed a receiver; and added to the decree a clause reserving to itself such further directions respecting costs, &c., as might be necessary to carry the decree into execution. An appeal being taken, a motion was made to dismiss the appeal on the ground that the decree appealed from was not a final decree: *Held*,

1. That the decree appealed from was final as to all the relief prayed for in the bill.
2. When a decree decides the right to and possession of the property in contest, and the party is entitled to have it immediately carried into execution, it is a final decree, although the court below retains possession of so much of the decree as may be necessary for adjusting accounts between the parties.

Mr. R. D. Massey for appellants.
Mr. F. Ullmann for appellees.

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

This is a motion to dismiss an appeal because the decree appealed from is not a final decree. The motion papers show that the appellees, Meeker, Brown, and Brooks, a minority of the stockholders of the Winthrop Iron Company, on or about the 12th of November, 1881, filed a bill in equity in the Circuit Court of the United States for the Western District of Michigan against the Winthrop Iron Company, the Winthrop Hematite Company, and certain directors of the Iron Company who were the stockholders of the Hematite Company, the object and purpose of which was to set aside as fraudulent and void the proceedings of the stockholders of the Iron Company at a meeting held in Chicago on the first of October, 1881, and to have a receiver appointed to take possession of the property of the company and manage its affairs. The effect of the proceedings of the meeting complained of was, as alleged, to authorize a lease of the property of the Iron Company to the Hematite Company from and after the first of December, 1882, for the personal advantage of the majority stockholders of the Iron Company, regardless of the rights of the minority. The stockholders of the Hematite Company were also elected directors of the Iron Company, and constituted a majority of the board. On the second day of October, 1882, the cause was submitted to the court upon the pleadings, proofs, and arguments of counsel. From the proofs it appeared that notwith-

standing the pendency of the suit, the Iron Company had, on the 30th of November, 1881, executed a lease to the Hematite Company, according to the vote of the stockholders. On the 6th of April, 1883, a decree was rendered which, in effect, adjudged that the proceedings of the meeting were in fraud of the rights of the minority stockholders, and that the lease which had been executed in accordance with the authority then given was "null and void, for the fraud of the defendants, the Winthrop Hematite Company and the St. Clair Brothers," the majority stockholders and directors of the Iron Company, "in procuring the same." By the same decree a receiver was appointed to take charge of and manage the business of the Iron Company, evidently because a majority of the board of directors, after the election at the October meeting, were considered unfit to control its affairs, as their personal interests were in conflict with the interests of the company. Both the Iron Company and Hematite Company, as well as the defendant directors of the Iron Company, were ordered to "forthwith surrender and deliver to" the receiver all the property of the Iron Company, and "all corporate records and papers." The receiver was fully authorized to "continue the management of the business of the . . . company, with power to lease or operate its mines and plants until the further order of the court." The decree further ordered an accounting before a master by the Hematite Company and the defendant directors of the Iron Company, for all profits realized from the use of the leased property after the 1st of December, 1882, the date of the beginning of the term under the lease which had been set aside. There was also an order for an accounting by the defendant directors "concerning the ores mined by them, and the royalty upon such ores due and owing by them to the . . . company, and concerning the rights and obligations of the lessor and lessee, under and according to a lease mentioned in the bill, . . . expiring on December 1st, 1882." At the foot of the decree is the following: "And the court reserves to itself such further directions as may be necessary to carry this decree into effect, concerning costs, or as may be equitable and just." From this decree the appeal was taken.

Opinion of the Court.

In our opinion the decree as entered is a final decree, within the meaning of section 692 of the Revised Statutes, regulating appeals to this court. The whole purpose of the suit has been accomplished. The lease made under the authority of the meeting of October, 1881, has been cancelled, and the management of the affairs of the company has been taken from the board of directors, a majority of whom were elected at that meeting, and committed to a receiver appointed by the court, plainly because, in the opinion of the court, the rights of the minority stockholders would not be safe in the hands of directors elected by the majority. In order that the receiver may perform his duties, the defendants are required to turn over to him the entire property and records of the company. The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed, and a transfer of the management of the affairs of the company from a board of directors, whose personal interests were in conflict with the duty they owed the corporation, to some person to be designated by the court. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the cases there cited. In *Forgay* v. *Conrad*, 6 How., at p. 204, it was said by Chief Justice Taney, for the court:

"And when the decree decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant, ... and the complainant is entitled to have such a decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting, by a further decree, the accounts between the parties pursuant to the decree passed. This rule, of course, does not apply to cases where money is directed to be paid into court, or property to be

delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree."

Here the rights of the Hematite Company and the defendant directors of the Iron Company have been adjudicated and definitely settled. Their lease, which was in reality the subject-matter of the action, has been cancelled, and a delivery of the leased property to the Iron Company has been ordered. The complainants are entitled to the immediate execution of such a decree. The receiver to whom the delivery is to be made was not appointed to hold the property until the rights of the parties could be adjudicated, but to stand, subject to the direction of the court, in the place of and as and for the corporation, because, under the circumstances, the corporation is incapacitated from acting for itself. His position is like that of the guardian of the estate of an incompetent person. He represents the Iron Company, and a delivery of the leased property to him is a delivery in fact and in law to the company itself; that is to say, to the party for whose use the suit was prosecuted. The complainant stockholders sue for the company, and the delivery to the receiver is a delivery to the company that has been adjudged to be entitled to immediate possession, notwithstanding the lease to the Hematite Company. The defendant directors have not in form been removed from their office, but their power as directors has been taken from them, and they are no longer able to carry into effect the orders of the stockholders made in fraud of the rights of the minority at the meeting in October. A new officer has been appointed to stand in the place of the directors as manager of the affairs of the company. In the words of Mr. Justice McLean in *Craighead* v. *Wilson*, 18 How., at p. 201, the decree is final "on all matters within the pleadings," and nothing remains to be done but to adjust the accounts between the parties grow-

ing out of the operations of the defendants during the pendency of the suit. The case is altogether different from suits by patentees to establish their patents and recover for the infringement. There the money recovery is part of the subject-matter of the suit. Here it is only an incident to what is sued for.

The motion to dismiss is denied.

RETZER *v.* WOOD, Collector.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted November 1st, 1883.—Decided November 12th, 1883.

Collector—Express Business—Internal Revenue—Limitation—Pleading.

The idea of regularity, as to route or time, or both, is involved in the words "express business," under § 104 of the act of June 30th, 1864, c. 173, 13 Stat. 276, and those words do not cover what is done by a person who carries goods solely on call and at special request, and does not run regular trips or over regular routes.

In the absence of a statutory rule to the contrary, the defence of a statute of limitations, which is not raised either in pleading, or on the trial, or before judgment, cannot be availed of.

In a suit to recover back internal revenue taxes, tried by the circuit court, without a jury, the court having found the facts, and held that the taxes were illegally exacted, but that the suit was barred by a statute of limitation, rendered a judgment for the defendant. On a writ of error by the plaintiff, the record not showing that the question as to the statute of limitations was raised by the pleadings, or on the trial or before judgment, and the conclusion of law as to the illegality of the taxes being upheld, this court reversed the judgment, and directed a judgment for the plaintiff to be entered below.

This suit was commenced in a court of the State of New York, and was removed by the defendant into the Circuit Court of the United States for the Southern District of New York by a writ of certiorari. The defendant was a collector of internal revenue, and exacted and collected from the plaintiff at various times in the years 1866, 1867 and 1868 sums of money amount-

ing in all to $61.30, as a tax of 3 per centum on the gross amounts of the plaintiff's receipts from his business, under the provisions of § 194 of the act of June 30th, 1864, c. 173, 13 Stat. 276, which enacted, "that any person, firm, company, or corporation carrying on or doing an express business, shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business." The suit was commenced June 2d, 1874. The plea was the general issue. The statute of limitations was not pleaded. A jury having been waived by a written stipulation of the parties, the action was tried before the court without a jury. The court found the fact of the dates and amounts of the exactions, and these further facts: The plaintiff's business was the carrying of goods between New York and Brooklyn, and from one place in the city of Brooklyn to another place in the same city. He did not run regular trips, nor over regular routes or ferries, but where ordered. He had a place in Brooklyn where he received orders on a slate from persons who wished articles sent from there to New York, and from one place in Brooklyn to another place in Brooklyn. The goods were carried in wagons. They were of a miscellaneous character, such as boxes of dry goods, barrels of sugar, rolls of sole leather, trunks, and general merchandise. His business was done solely upon call, and at special request, and, as requested, he sent to any place in either of said cities and took baggage or freight to any place in either of said cities. On the 28th of May, 1873, he presented to the commissioner of internal revenue a claim, supported by his own oath, for the refunding to him of the moneys so exacted as taxes. No decision was ever made on the claim. The court found, as conclusions of law, (1) that the tax was illegally exacted; (2) that the action was barred by § 44 of the act of June 6th, 1872, c. 315, 17 Stat. 257. A judgment was rendered for the defendant. To reverse that judgment the plaintiff brought this writ of error.

There is in the record a bill of exceptions, which shows that, after the plaintiff had given evidence to establish the facts so found, the defendant offering no testimony, the plaintiff requested the court to render judgment for the plaintiff, but the

court refused, and the plaintiff excepted, and the court directed a judgment for the defendant, and the plaintiff excepted.

Mr. William Stanley and *Mr. Edwin B. Smith* for plaintiff.
Mr. Solicitor-General Phillips for the defendant.

Mr. Justice Blatchford delivered the opinion of the court. After reciting the facts as stated above, he said:

We are of opinion that the plaintiff was not liable to this tax, because he did not carry on or do an "express business," within the meaning of the statute. Although he carried goods between New York and Brooklyn, and from one place to another in either city, he did so solely on call and at special request. He did not run regular trips or over regular routes or ferries. He was no more than a drayman or truckman doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words "express business," in the statute, must have the meaning given them in the common acceptation. An "express business" involves the idea of regularity, as to route or time, or both. Such is the definition in the lexicons. Whether, if the plaintiff had held out to the world, at any place of business, that he was carrying on an "express" or was doing an "express business," or had so designated himself by inscription on his vehicle or vehicles, that would have made any difference, it is not necessary to inquire, because no such thing was shown.

As to the defence of the statute of limitations, it was not pleaded, nor brought to the attention of the court, as a defence at the trial. It was not within the issue raised by the plea of the general issue, which was the only issue to which the stipulation for a trial by the court extended. It is well settled, that, in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitations as a defence, must raise the question either in pleading, or on the trial, or before judgment. *Storm* v. *United States*, 94 U. S. 76, 81; *Upton* v. *McLaughlin*, 105 U. S. 640. Such was always the law in New York, and no contrary rule was in force in New York, by statute, at any time after this suit was

brought. When the testimony at the trial closed, and the plaintiff asked for a judgment in his favor, he was entitled to it. It is proper that the circuit court should be directed to enter such a judgment. The conclusion of law, by the circuit court, that the tax was illegally exacted, being a correct conclusion, and its conclusion that the suit was barred by limitation being an incorrect conclusion, it follows that the plaintiff was entitled to judgment on the facts found. The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant. This was a matter of law, the ruling on which can be reviewed by this court. *Norris* v. *Jackson*, 9 Wall. 125.

The defendant in error asks that, if the judgment be reversed, the case be remanded, so that the statute of limitations may be pleaded. Without passing on the question as to whether the statute invoked would furnish a defence in this case, we are of opinion that no ground exists for the course suggested. The record shows that the defendant's attorney had notice, by the declaration, that the plaintiff's claim accrued before a date more than eight years prior to the filing of the plea. Under such circumstances it would not be a fair exercise of discretion not to hold the defendant to his legal status.

The judgment is reversed and the case is remanded to the circuit court, with directions to enter a judgment for the plaintiff for $61.30, *with interest according to the law of the State of New York.*

SNYDER *v.* MARKS, Collector.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Submitted November 1st, 1883.—Decided November 12th, 1883.

Equity—Injunction—Internal Revenue—Taxes.

A bill in equity will not lie to enjoin a collector of internal revenue from collecting a tax assessed by the commissioner of internal revenue against a manufacturer of tobacco, although the tax is alleged in the bill to have been illegally assessed.

The remedy of a suit to recover back the tax after it is paid, which the statute provides, is exclusive.

This suit was brought in a State court of Louisiana, by the appellant, a tobacco manufacturer, against the appellee, a collector of internal revenue, to obtain an injunction restraining the appellee from seizing and selling the property of the appellant to pay two assessments of taxes against him, made by the commissioner of internal revenue, and to have the assessments declared void. An injunction having been granted *ex parte*, the appellee removed the suit, by *certiorari*, into the Circuit Court of the United States for the District of Louisiana, on the allegation that it was brought on account of acts done by the appellee, as such collector, under authority of the internal revenue laws of the United States, and to enjoin him, in his official capacity, from enforcing the payment of assessments made against the appellant, under authority of such laws, by executing warrants of distraint, as authorized by such laws.

After the removal of the suit the appellant, under an order to reform his pleading, filed a bill in equity in the circuit court. It set forth the assessments complained of as being in these words:

Statement of Facts.

"ALPHABETICAL LIST OF PERSONS LIABLE TO TAX UNDER THE INTERNAL REVENUE LAWS OF THE UNITED STATES, IN THE COLLECTION DISTRICT OF THE STATE OF LOUISIANA, REPORTED BY THE COLLECTOR OF SAID DISTRICT FOR ASSESSMENTS, AND THE AMOUNT ASSESSED AGAINST EACH BY THE COMMISSIONER OF INTERNAL REVENUE, AND CERTIFIED TO THE COLLECTOR OF SAID DISTRICT, FOR THE MONTH OF OCTOBER, 1879.

NAME.	P. O. ADDRESS.	ARTICLE OR OCCUPATION.	PERIOD.	TAX ASSESSED.	TOTAL TAX AND PENALTY ASSESSED.
Snyder, Chas. A.	New Orleans...	S. T. Tob. 7,800½ lbs...	July 6, '78, to Dec. 3, '78.	$1,872 12	$1,872 12
Irwin & Snyder.	....do.....	....do.....6,657 lbs....	Jan. 1, '78, to June 5, '78.	1,597 68	1,597 68

"Made Nov. 17, 1879."

The bill also averred that the assessments did not show upon what they were based, nor upon what the taxes were claimed to be due, and were void for uncertainty and unauthorized by law, and the commissioner of internal revenue was without jurisdiction to make them; that the Irwin & Snyder assessment was made more than fifteen months after the time which it embraced had elapsed, and that was true, also, as to a part of the Snyder assessment, and the commissioner had no authority to make an assessment except for a period of time not exceeding fifteen months before it was made; that the appellant was never a member of the firm of Irwin & Snyder; that he never owed the amount of either assessment; that, when he commenced the manufacture of tobacco, he gave a bond to the United States in a penalty of $20,000, conditioned that he would stamp all tobacco manufactured by him, as required by law, and comply with all the requirements of law relating to the manufacture of tobacco, and the sureties thereon were solvent, and that, if the United States had any lawful claim against him, an action would lie on the bond, which was ample security, while he was without adequate remedy against the United States for the seizure of his property to pay the claims. The prayer of the bill was for a decree declaring each of the assessments void as against the appellant, and enjoining the

appellee from distraining on the property of the appellant for the purpose of collecting the amounts of the assessments, and from attempting to collect the same except by judicial process.

The appellee demurred to the bill for want of equity, and because no suit could be maintained in any court to restrain the collection of any tax of the United States, and the appellant could not be permitted in this suit to attack the validity or regularity of the assessments or restrain the execution of a warrant issued thereunder. The circuit court sustained the demurrer and dismissed the bill. To review its decree this appeal is brought.

Mr. J. D. Rouse and *Mr. W. Grant* for the appellant.
Mr. Solicitor-General Phillips for the appellee.

Mr. Justice Blatchford delivered the opinion of the court. After reciting the facts, he said:

The sole object of the suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws. A decree adjudging the tax to be void as against the appellant is sought for only as preliminary to relief by injunction, and would be futile for any purpose of this suit unless followed by an injunction.

The internal revenue act of July 13th, 1866, c. 184, 14 Stat. 152, provided, § 19, as follows: "No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the secretary of the treasury, established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." By § 10 of the

act of March 2d, 1867, c. 169, 14 Stat. 475, it was enacted that § 19 of the said act of 1866 be amended "by adding the following thereto:" "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." In the Revised Statutes this amendment of and addition to § 19 of the act of 1866 is made a section by itself, § 3224, separated from that of which it is an amendment and to which it is an addition, and reads thus: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The word "any" was inserted by the revisers. This enactment in § 3224 has a no more restricted meaning than it had when, after the act of 1867, it formed a part of § 19 of the act of 1866, by being added thereto. The first part of § 19 related to a suit to recover back money paid for a "tax alleged to have been erroneously or illegally assessed or collected," and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended, to say, that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." The addition of 1867 was *in pari materia* with the previous part of the section and related to the same subject-matter. The "tax" spoken of in the first part of the section was called a "tax" *sub modo*, but was characterized as a "tax alleged to have been erroneously or illegally assessed or collected." Hence, when, on the addition to the section, a "tax" was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in § 3224. There is, therefore, no force in the suggestion that § 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

The statute clearly applies to the present suit, and forbids the granting of relief by injunction. It is distinctly alleged in the bill, that the appellee claims that the appellant owes to the United States the amounts assessed for taxes, both the tax

assessed against the appellant and that assessed against Irwin & Snyder. The bill also shows sufficiently that the assessment had relation to the business of the appellant as a manufacturer of tobacco, and to his liability to tax, under the internal revenue laws, in respect to such business. The instructions of the internal revenue department in regard to the preparation of assessment lists provided, that where an assessment was reported against a manufacturer of tobacco for having removed any taxable articles from his manufactory without the use of the proper stamp, or for not having duly paid such tax by stamp at the time and in the manner provided by law, the entry in the column headed "article or occupation" should be "Stamp Tax. Tob.," with liberty to use the initials "S. T." as an abbreviation for "stamp tax." The instructions stated that "Tob." is an abbreviation for "tobacco." Resort may be had to these instructions to show the meaning of the abbreviations in the assessment list. Read by the light of the instructions, the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him.

The inhibition of § 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. *Howland* v. *Soule*, Deady, 413; *Pullan* v. *Kinsinger*, 2 Abbott U. S. 94; *Robbins* v. *Freeland*, 14 Int. Rev. Rec. 28; *Delaware R. R. Co.* v. *Prettyman*, 17 id. 99; *United States* v. *Black*, 11 Blatchford, 538, 543; *Kissinger* v. *Bean*, 7 Bissell, 60; *United States* v. *Pacific Railroad*, 4 Dillon, 66, 69; *Alkan* v. *Bean*, 23 Int. Rev. Rec. 351; *Kensett* v. *Stivers*, 18 Blatchford, 397. In *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court, that the system prescribed by the United States

in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assignment and claim that it is valid.

The decree of the circuit court is affirmed.

CRAGIN *v.* LOVELL, Executor.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

SAME *v.* SAME.

APPEAL FROM THE SAME COURT.

Argued together November 1st, 1883.—Decided November 12th, 1883.

Action—Contract—Default—Equity—Error, writ of—Judgment—Louisiana Code—Principal and Agent—Promissory Note.

A defendant, against whom a judgment has been rendered on default by a circuit court of the United States in an action at law, cannot maintain a bill in equity to avoid it, upon the ground that the plaintiff at law falsely and fraudulently alleged that the parties were citizens of different States, without showing that the false allegation was unknown to him before the judgment.

Upon a negotiable promissory note, made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal.

In an action at law, the declaration alleged that the plaintiff sold land to a third person, who gave his notes for the purchase money, secured by mortgage of the land; that afterward the defendant, in a suit by him against that person, claimed the ownership of the land, and alleged that the other

Statement of Facts.

person, acting merely as his agent, illegally made the purchase in his own name, and that he was liable and ready to pay for the land ; that he was thereupon adjudged to be the owner of the land, and took possession thereof ; and that by reason of the premises the defendant was liable to the plaintiff in the full amount of the notes: *Held*, that the declaration showed no cause of action, even under art. 1890 of the Civil Code, and art. 35 of the Code of Practice of Louisiana.

A judgment, rendered on default, upon a declaration setting forth no cause of action, may be reversed on writ of error, and the case remanded with directions that judgment be arrested.

These two cases were argued together. Eliza A. Quitman, the defendant in error and appellee, having died since the judgment below, William S. Lovell, her executor, appeared in her stead.

In the action at law, she filed a petition against George D. Cragin in the Circuit Court of the United States for the District of Louisiana, alleging that she was a citizen of New York and he was a citizen of Louisiana; that on the 31st of January, 1878, she sold a plantation to Orlando P. Fisk, for the price of $22,500, of which the sum of $4,500 was paid in cash, and for the rest of which nine notes of Fisk were given, for $2,000 each, payable in successive years, and secured by a mortgage of the estate; that Cragin had paid the first three of the notes, and the petitioner, by foreclosure and sale of the estate under the mortgage, had obtained the sum of $10,447.05, to be credited on the remaining notes under date of May 1, 1874; and further alleging as follows:

"Now your petitioner represents that George D. Cragin is and was the real owner of said property, and liable to your petitioner, for the following reasons, viz :

"That subsequently to the said purchase of property by said Fisk, by a certain proceeding filed in this honorable court, the said Cragin did claim the entire ownership of the said property, and did claim that the purchase made in the name of the said Fisk was illegally entered in his own name by said Fisk, who was acting merely as the agent of said Cragin, and that the amount of the purchase price of said property paid in cash, as well as the first and second notes aforesaid, were made by said Fisk with the money of said Cragin, and that he, said Cragin, was liable for and ready to pay for said property ; that thereafter,

in due course of law, and after proper proceedings, the said Cragin was adjudged by this honorable court, by final decree, to be the owner of said property, and the matters and things in said petition contained were found to be true and correct.

"That pending said proceedings the said George D. Cragin was and in said case appointed the receiver of said plantation, so sold by your petitioner as aforesaid, and that, acting as such receiver, and subsequently as such owner of said plantation, he did remove therefrom all the movable property thereon, and which existed thereon at the date of the sale by your petitioner to said Fisk, of a value exceeding $1,000, and did lay waste and dilapidate the said property, to benefit his adjoining plantation, and to the detriment of your petitioner's rights.

"Petitioner further avers, that by reason of the causes aforesaid the said George D. Cragin is liable and indebted unto your petitioner in the full amount of said notes, less the credit due as aforesaid, for which amicable demand has been made without avail."

The record showed that Cragin was served with process in Louisiana, and, not appearing, was defaulted, and judgment was rendered for the plaintiff in the sum claimed (which was shown by computation and agreement of counsel to be $6,888.40), and the defendant sued out a writ of error, which was the first of the cases.

The other case was an appeal from a decree of the same court, dismissing upon demurrer a bill in equity, filed by Quitman against Cragin to annul and avoid the judgment aforesaid and to restrain the issue of execution thereon. The bill set forth the proceedings in the suit at law; and its only other material allegations were, that the Circuit Court had no jurisdiction of that suit, because both parties were citizens of New York; and that Quitman, knowing that fact, falsely and fraudulently alleged Cragin to be a citizen of Louisiana, and illegally and unjustly obtained judgment by default against him.

Mr. J. D. Rouse and *Mr. William Grant*, for Cragin, cited in the suit at law *Meyers* v. *Davis*, 6 Blatchford, 77; *Candler* v. *Rossiter*, 10 Wend. 488; *Ninan* v. *Bland*, 3 Smith (King's Bench),

114; *Morris* v. *Norfolk*, 1 Taunton, 212,217; Story on Agency, § 461; *Daniels* v. *Burnham*, 2 La. 243; Louisiana Code, art. 2234–6, 2276; *Succession of Tete*, 7 La. Ann. 95; *Beckham* v. *Drake*, 9 M. & W. 79; *Spencer* v. *Field*, 10 Wend. 88; *Townsend* v. *Hubbard*, 4 Hill, 351; *Fowler* v. *Schearer*, 7 Mass. 14; *Brinsley* v. *Munn*, 2 Cush. 337; *Stackpole* v. *Arnold*, 11 Mass. 27; *Delbitt* v. *Walton*, 9 N. Y. 571; *Eastern Railroad Co.* v. *Benedict*, 5 Gray, 566; *Metcalf* v. *Williams*, 104 U. S. 93; *Tyler* v. *Steele*, 26 Ala. 487; *Maignan* v. *Glaisses*, 4 La. 1; *Dabadie* v. *Poydras*, 3 La. Ann. 153; *Belmont* v. *Coneau*, 22 N. Y. 438; *Balfour* v. *Chew*, 4 Martin, N. S. (La.) 154; *McAuley* v. *Hagan*, 6 Rob. (La.) 359; *Tuthill* v. *Wilson*, 90 N. Y. 423; *Thompson* v. *Davenport*, 9 B. & C. 78; *Hyde* v. *Wolf*, 4 La. 234; *Rushton* v. *Aspinwall*, 2 Doug. 679, 683; *Spier* v. *Parker*, 1 T. R. 141; *Slocum* v. *Pomeroy*, 6 Cranch, 221.

Mr. Joseph P. Hornor, and *Mr. W. S. Benedict*, for Lovell, in the suit at law contended that Cragin, having alleged in his bill in equity against Fisk that he was liable to pay for and ready to pay for the property, by the laws of Louisiana Lovell could enforce this stipulation.

Civil Code of Louisiana: "ART. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked." *Bank* v. *Burke*, 4 Rob. (La.) 440, 441; *Myers* v. *Perry*, 1 La. Ann. 372; *Bank* v. *Lawless*, 3 La. Ann. 129; *Bonnafe* v. *Lane*, 5 La. Ann. 225. And in the case of *Hendrick* v. *Lindsay*, 93 U. S. Rep. 143, this court held: "It is now the prevailing rule in this country that a party may maintain assumpsit on a promise not under seal made to another for his benefit." In *Brewer* v. *Dyer*, 7 Cush. 337, the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into the possession of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then,

before the expiration of the lease, left the shop, and was held liable to an action by the lessor for the rent subsequently accruing, and this was distinctly approved in *Exchange Bank* v. *Rice*, 107 Mass. 42.

The former proceeding was against the property, not against the agent. Lovell is not therefore precluded from proceeding against Cragin the principal.

Mr. Justice Gray delivered the opinion of the court. After reciting the facts as above stated, he continued:

It is quite clear that the bill in equity was rightly dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence. *Jones* v. *League*, 18 How. 76; *Crim* v. *Handley*, 94 U. S. 652. The decree in the suit in equity must therefore be affirmed.

But it is equally clear that the judgment at law is erroneous. The petition shows no privity between the plaintiff and Cragin. It alleges no promise or contract by Cragin to or with the plaintiff. The mere description of the notes received by the plaintiff, as "notes of Fisk," does not show that they were not negotiable instruments, but on the contrary, in the connection in which it is used, and applied to notes given for the purchase money of land and secured by mortgage thereof, designates (as was assumed by both counsel at the argument) negotiable promissory notes, bearing no name but that of Fisk as maker; and on such notes no action will lie against any other person. *Nash* v. *Towne*, 5 Wall. 689, 703; *Williams* v. *Robbins*, 16 Gray, 77; *In re Adansonia Fibre Co.*, L. R. 9 Ch. 635; *Daniels* v. *Burnham*, 2 La. 243, 245. The case does not come within the decisions in *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326, in *Metcalf* v. *Williams*, 104 U. S. 93, and *Hitchcock* v. *Buchanan*, 105 U. S. 416, in each of which the name of the principal appeared upon the face of the note.

If the action is treated, not as an action upon the notes

themselves, but as an action to recover the amount of the notes, by reason of a subsequent agreement of Cragin to pay them, the plaintiff fares no better. The only allegations touching the relation of Cragin to these notes are, that, in a suit by him against Fisk, he alleged that Fisk in purchasing the land acted merely as his agent, and that he owned the land and was liable and ready to pay for it; and that he was thereupon adjudged to be the owner of the land and took possession thereof. If this amounted to a promise to any one, it was not a promise to the plaintiff, nor even a promise to Fisk to pay to the plaintiff the amount of the notes, but it was, at the utmost, a promise to Fisk to pay that amount to him, or to indemnify him in case he should have to pay it. It is therefore not within the provisions of the Louisiana Codes, cited in argument; * and the defendant is liable to an action at law by Fisk only, and not by the plaintiff. *National Bank* v. *Grand Lodge*, 98 U. S. 123; *Exchange Bank* v. *Rice*, 107 Mass. 37; *M'Cauley* v. *Hagan*, 6 Rob. La. 359. The final allegation, that by reason of the causes aforesaid, the defendant is indebted and liable to the plaintiff, is a mere conclusion of law, which is not admitted by demurrer or default. *Hollis* v. *Richardson*, 13 Gray, 392.

The judgment, having been rendered on default upon a declaration setting forth no cause of action, may be reversed on writ of error. *McAllister* v. *Kuhn*, 96 U. S. 87; *Hollis* v. *Richardson*, above cited; *Louisiana Bank* v. *Senecal*, 9 La. 225. This court, on reversing a judgment of the circuit court, may

* "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked." Louisiana Civil Code of 1870, art. 1890.

"An equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person, not a party to it, and for whose benefit certain stipulations have been made; thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account, or give a certain thing to a third person, not a party to the act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation." Louisiana Code of Practice, art. 35.

order such judgment for either party as the justice of the case may require. Rev. Stat. § 701; *Insurance Cos.* v. *Boykin*, 12 Wall. 433. In the case at bar, the order, following the precedent of *Slacum* v. *Pomery*, 6 Cranch, 221, will be that the judgment below be reversed, and the case remanded with directions that judgment be arrested.

Ordered accordingly.

UNITED STATES *v.* GIBBONS.

APPEAL FROM THE COURT OF CLAIMS.

Argued October 23d, 1883.—Decided November 12th, 1883.

Contract—Limitations.

1. Where the language of a contract is susceptible of two meanings, the court will infer the intention of the parties and their relative rights and obligations from the circumstances attending the transaction.
2. The parties contracted for the rebuilding of a shop at the Norfolk Navy Yard, which had been destroyed by fire. The specifications provided that "the foundation and the brick walls now standing that were uninjured by the fire will remain and will be carried up to the height designated in the plan by new work." After taking down so much of the old wall as was supposed to be injured, the government officers directed parties to examine the then condition of the walls before bidding on the specifications. Defendant in error did so, then bid, and his bid was accepted. *Held*, that the United States through its officers was bound to point out to bidders the parts of the walls which were to enter into the new structure, and that this was done by the act of dismantling a portion and leaving the rest of the wall to stand.
3. Payments under the contract were to be made in instalments and the balance when the work should be entirely completed. The contract also contemplated extra work. *Held*, that the cause of action for such extra work arose on the entire completion of the work.

The principal question in this case related to the proper construction of a building contract between the parties, entered into May 22d, 1866, the United States acting by Joseph Smith, chief of the bureau of yards and docks, under the authority of the Navy Department, for the repair of the entrance buildings and carpenter-shop at the Norfolk Navy Yard, which had been destroyed by fire in 1861, at the outbreak of the civil war.

Statement of Facts.

The contract required the appellee to furnish, at his own risk and expense, all the materials and work necessary for the repairs of the buildings according to the plans and specifications annexed, the entrance buildings to be entirely completed and delivered within one hundred and twenty days, and the carpenter-shop within thirty days, from the date of the contract. A gross sum was to be paid for the work on each, partial payments to be made during the progress of the work upon the certificate of the superintendent, and final payment when the work should be entirely completed, according to the plans and specifications, "and to the satisfaction of the party of the second part." It was declared in the contract that "no extra charge for modifications will be allowed unless mutually agreed upon by the parties, and no changes or modifications mutually agreed upon by the parties to this contract shall in any way affect its validity."

The specifications for the entrance buildings contained the following clause, upon which the case turned:

"The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated in the plan by new work."

The contract was made in pursuance of proposals, invited by an advertisement, in which it was stated that "persons desiring to bid must necessarily visit the yard and examine the present condition of the works, and can there see the plans and specifications to enable them to bid understandingly."

The findings of fact by the court of claims bearing on this point were as follows:

"III. At the outbreak of the late rebellion these buildings mentioned in the contract were burnt, but portions of the walls were left standing. Prior to the proposals for work, an inspection of these fragmentary walls, so left standing, had been made by the officers of the government in charge of the works, and those portions of them deemed unfit to form a part of the permanent structure were taken down, and those parts which were considered uninjured and proper to be built upon were left

standing for that purpose. After the agents of the government had prepared the walls, retaining the portion which the civil engineer of the navy yard in charge of the work supposed might be used in the new structure, the chief of the bureau of yards and docks invited the examination of bidders by the advertisement annexed to the petition, and the claimant, by his agent, visited and saw the walls so standing. At the time the claimant, by his agent, so visited the yard he was shown the walls by a quarterman acting under the civil engineer of the yard. The claimant's agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew, and that Mr. Williams, the master mason of the yard, and Mr. Worrall, the civil engineer of the yard, had said that they were to stand. (But it does not appear that the quarterman was authorized to make such representations to the claimant's agent.) And the civil engineer likewise represented to the claimant's agent that the portion of the walls then standing would remain and be used in the new work. After the claimant's agent had so visited the yard and been shown the walls, the claimant made his bid.

"IV. After the claimant had begun work under his contract, it was discovered that a portion of the walls still standing had been so injured by the fire as to be unfit for building a superstructure thereon. Commodore Hitchcock, commanding the naval station, thereupon ordered that the walls be further razeed, and pursuant to his orders, about one-third of the portion then standing was taken down by the claimant before proceeding to build. The effect of this second razeeing was that the claimant had to substitute new brick-work for that so removed; and the additional cost of construction thereby thrown upon him was the sum of $4,050; and for it he has received no remuneration additional to the price named or consideration expressed in the contract. It does not appear that at the time Commodore Hitchcock ordered the walls to be further razeed the defendants' officers made any pretence or claim that the increased expense was to be borne by the claimant as work required by the contract; nor does it appear that the claimant made any objection to the taking down of the walls as ordered by Commodore Hitchcock."

The appellee claimed compensation beyond the contract price

for the additional cost of construction rendered necessary by rebuilding that portion of the walls torn down by order of Commodore Hitchcock. The United States contended that it was covered by the terms of his contract.

Mr. Assistant Attorney-General Maury, for the appellant, cited *Garrison* v. *United States*, 7 Wall. 688; *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Lowber* v. *Bangs*, 2 Wall. 728, 737; *Hawkins* v. *United States*, 96 U. S. 689; and *Dale* v. *United States*, 14 Court Claims, 514.

Mr. Enoch Totten, for the appellee, cited *Dermott* v. *Jones*, 2 Wall. 1, 9, and the opinion of the court below in this case.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts as above, he continued:

In our opinion the court of claims committed no error in allowing the claim of the contractor.

The language of the specifications is, perhaps, susceptible of two meanings. According to one, it is as if it read that "the foundations and the brick walls now standing," *so far as they* "were uninjured by the fire, will remain;" according to the other, that "the foundations and brick walls now standing," *being such as* "were uninjured by the fire, will remain." But, without going into any refinements of merely verbal interpretation, we think the meaning of the parties, explained by the circumstances attending the transaction, is sufficiently plain, and determine satisfactorily their relative rights and obligations.

It must be conceded, we think, that it was intended that the old portion of the work was to remain as part of the new structure only so far as it was in fact fit to do so, having reference to the character and uses of the building, and that the United States had the right to determine the fact of fitness. It was clearly its interest to do so, in advance of bidding, because if it reserved the right to make the determination at any stage in the progress of the work, or even at the time of final acceptance on its completion, the whole risk of the contingency would be thrown upon the contractor, who could only indemnify himself by an increase in the estimate of probable cost;

and the government would thus be compelled to pay for an uncertainty which could as well be resolved in advance. The United States having a right to determine the fact, it would be reasonable, having regard merely to its own interests, to do so before letting the contract. It would be equally reasonable and just to the contractor that the decision should be made at the outset; and as the right to make it belongs to the proprietor, the duty follows to exercise it so that the contractor shall not be misled and injured.

Under the circumstances in the present case, and according to the terms of the specifications, we think it was the duty of the officers acting for the United States, the right performance of which the government assumed, to point out to the bidders the parts of the foundations and walls which were in fact so far uninjured as to enter into the new structure, and that this was actually done by dismantling and stripping the burnt building, so that upon inspection of what was left standing the proposing contractor would be able by measurement to ascertain precisely what new work he was to do and be paid for. To require him to determine the fact for himself provisionally, subject at any time before completion of the work to have his judgment reversed, and to be required in consequence to perform work which he could not and did not provide for in his estimates, would be unreasonable and unjust. The inspection invited by the advertisement was not for the purpose of assisting the contractor to determine subject to such a condition the question of the fitness of the standing walls to remain, but was, as we think, that he might see as part of the plan of the work what the authorized agents of the United States had designated as intended to remain in the permanent structure. It was the duty of the United States to point out the work deemed to be sufficiently uninjured to remain, and this was performed by allowing it to stand, and by not directing it to be taken down. We lay no stress, as the court of claims did not, on what was said at the time to that effect by unauthorized subordinates. The foundation and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the

United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done.

Judgment in favor of the appellee was rendered by the court of claims upon two other claims for small amounts, in respect to which we do not deem it necessary to say more than that it appears to us the allowance was proper. The defence by reason of the statute of limitations, also for the reasons alleged in the opinion of that court, was, in our opinion, properly overruled.

The judgment of the court of claims is accordingly

Affirmed.

BOOTH and others, *v.* TIERNAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted November 1st, 1883.—Decided November 12th, 1883.

Deed—Error—Evidence—Illinois—Limitations—Practice—Statutes.

1. The cause was submitted to the court below without the intervention of a jury. No error in law can be predicated of a finding of fact by the court.
2. It being proved that a deed had been lost, and not intentionally destroyed or disposed of for the purpose of introducing a copy, it is competent under the statute of Illinois to use in evidence a certified copy of the deed from the proper recorder's office in the place of the original, although it was admitted that there was an error in the copy.
3. It is competent to prove the error in such case by evidence of witnesses who had read the original deed; or by a copy of the registry of the original deed as entered in the file book.

Mr. B. C. Cook and *Mr. Charles W. Needham* for the plaintiffs in error:

Mr. William Burry for the defendant in error.

The facts appear in the opinion of the court.

Mr. Justice Matthews delivered the opinion of the court.

Opinion of the Court.

This was an action of ejectment brought by the defendant in error against the plaintiffs in error to recover the title and possession of a tract of land in Grundy County, Illinois, described as the northeast quarter of section twenty-nine (29), in township thirty-two (32) north of the base line, and in range eight (8) east of the third principal meridian.

By stipulation the intervention of a jury was waived by the parties, and the cause was submitted upon the evidence to the circuit court.

One of the defences relied on was the statute of limitations of Illinois, being sec. 4, chap. 83, of the Revised Statutes of that State, providing that possession for seven years, by actual residence thereon by any person having a connected title in law or equity, deducible of record from the State or the United States, &c., should be a bar to an action brought for the recovery of lands, &c.

Evidence was introduced on the part of the defendant below, the ancestor of the plaintiffs in error, tending to prove, as was claimed, that he had possessed the premises in controversy, by actual residence, for seven years next preceding the commencement of the action; but the finding of the court was that he had not been possessed, by actual residence thereon, of the land in controversy for that period.

This finding, although excepted to and alleged as error, is a conclusion of fact which we cannot review. No exceptions appear on the record to the rulings of the court upon any questions relating to the evidence upon this point, and it cannot be claimed that the evidence, as stated in the bill of exceptions, was not legally sufficient to justify the conclusion reached by the court. No error in law can, therefore, be predicated of this conclusion of fact.

On the trial it was admitted that Ibzan Lacey, the common source of title, derived title to the premises in controversy from the United States in 1839, and a power of attorney from Lacey and wife dated April 20th, 1839, to Joel Wicks, authorizing him to sell and convey the premises, was proved. It was further admitted that an original deed from Lacey and wife by Wicks, their attorney in fact, to Alva Newman, dated May 6th, 1840,

had been lost, and it was proved that it was not in the power of the plaintiff to produce it, and that it had not been intentionally destroyed or disposed of for the purpose of introducing a copy thereof in place of the original.

The plaintiff below then offered in evidence a certified copy from the proper recorder's office of the record of said original deed, which, however, described the land conveyed as the *southeast* quarter of section 29, &c., instead the *northeast* quarter of that section; but counsel for the plaintiff stated in connection with the offer that there would be offered other evidence tending to show that there was a clerical error in the description of the land as entered upon the record and contained in the copy, and that it should be the *northeast* instead of the *southeast* quarter of the section.

To the introduction of this certified copy objection was made, because it did not describe the land in controversy, and because no evidence was admissible to prove and correct any alleged mistake.

The ground of this objection is stated to be that the statute of Illinois (Laws 1861, p. 174, § 1) in force at the time, authorizing the record of a deed or a certified transcript from the record, to be used as evidence on a trial in place of a lost original, provided that it might be read in evidence "with like effect as though the original of such a deed, conveyance, or other writing was produced and read in evidence," and that as in this case, if the original had been produced, no evidence would be admitted to prove and correct the alleged mistake in the description of the premises conveyed, none can be admitted to prove and correct such a mistake in the record or transcript.

The court overruled the objection and admitted the certified copy of the deed in evidence, reserving the question upon the subsequent evidence to be offered, for the purpose of proving and correcting the alleged mistake. Such evidence was, in the further progress of the trial, admitted, on which, as a conclusion of fact, the court found that the land actually described in the lost deed was that in controversy; and thereon judgment was given for the plaintiff below. Exceptions were taken to the rulings of the court admitting the evidence subsequently offered

as to the mistake in the description, upon the ground of its competency, which will be hereafter considered. The general question raised by the exception to the introduction of the certified copy from the record, is whether evidence of any description is admissible for such a purpose.

The ruling of the circuit court on this point was correct. The language of the statute was intended merely to declare that the record of a deed, or a transcript from the record, though a copy only, and therefore in its nature merely secondary evidence, should nevertheless have the same effect, when competent as evidence at all, as the original itself, if it had been produced, upon the determination of the issues to be tried. It was not intended to declare that the record or a copy from it should, in law, be an original instrument for all purposes. The presumption is, that, as public officers generally perform their prescribed duties accurately, the record, and all certified transcripts from it, will be true copies of the original; but they are none the less copies on that account, and are made evidence only in lieu of the original, and on the grounds on which secondary evidence is permitted to be given. And there is nothing in the statute, either expressed or implied, which forbids the party from showing, by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, where it is shown that the record itself, or a copy from it, is not a true copy. By the very terms of the statute, the record of a deed is not original evidence, for it can be used only on proof of the loss of the original deed, or that the latter cannot be produced by the party offering the proof; and the object of the statute evidently was to require recording, in the first place, as notice to subsequent purchasers, and in the second, to supply a convenient statutory mode and instrument of secondary evidence. Its whole effect can be accomplished, without in any manner displacing or superseding the common-law principles which authorized other modes of proving the contents of lost deeds and other instruments. It is in this light that the statute has been viewed and treated by the Supreme Court of Illinois. *Bowman* v. *Wettig*, 39 Ill. 416. In *Nattinger* v. *Ware*, 41 Ill. 245, it was decided that a deed, properly executed and

acknowledged, but recorded with a misdescription of the premises, would protect the grantee against subsequent purchasers and encumbrancers. But how could this be, unless the party were at liberty to prove the mistake in the record, either by the production of the original, or, in case of its loss, by other competent secondary evidence? This is what happened in *Nixon* v. *Cobleigh*, 52 Ill. 387. There the plaintiff in ejectment, to prove his title, relied on a deed, signed, as he claimed, "Samuel H. Turrill." The original not being in his power to produce, he offered a certified copy from the record. It purported, however, to be signed by "James H. Turrill." Against the objection of the defendant, he was allowed to prove by parol evidence that the original was signed "by the name of Samuel H. Turrill." The court said: "This renders it morally certain that the recorder made a mistake in transcribing the original upon his records."

The same construction was given to a statute of Alabama, the meaning of which cannot be distinguished from the statute of Illinois, by the Supreme Court of that State in *Harvey* v. *Thorpe*, 28 Ala. 250, where the very point was ruled, that parol evidence was admissible to show that a deed was not correctly recorded. And the same principle was adjudged in Wisconsin, in *Sexsmith* v. *Jones*, 13 Wis. 565, and in New Hampshire, in *Wells* v. *Iron Co.*, 48 N. H. 491, 534.

The next question relates to the competency of the evidence admitted by the court to prove the mistake in the record of the deed, and the correct description of the property as contained in the original.

This was, in substance, as follows: First, the testimony of certain persons tending to prove that they had seen the original deed, and that it described the land conveyed as identical with that in controversy; second, a certified copy from an entry or file-book kept by the recorder of La Salle county, in which the land was situate at the time the conveyance was made by the attorney of Lacey to Newman, of a memorandum made by the recorder, showing the date of the receipt of the deed for record, the names of the grantor and grantee, the hour of its receipt, the nature of the conveyance, the date of its

execution, and the location of the land conveyed, under which head the premises are described as the "N. E. ¼ S. 29, T. 32 N., R. 8 E. 3d P. M.;" third, a transcript from the land office at Springfield, Illinois, in which office was contained the records of the entry of the land in controversy, showing Jeddiah Wooley entered the N. E. ¼ 29, 32, 8, on August 8th, 1835, and that he did not enter the S. E. ¼ of said section; also a receipt from the land office at Chicago, Illinois, in which office the land in controversy was sold, dated August 8, 1835, for $200 from Jeddiah Wooley, jr., in full payment of the N. E. ¼ sec. 29, town. 32 N., R. 8 east of third principal meridian, being the land in controversy, upon which receipt was a memorandum indorsed in the handwriting of Joel Wicks, who was dead at the time of the trial, as follows: "Sold this to Alva Newman, May 6th, 1840." But it is recited in the bill of exceptions that the court did not decide that the last mentioned memorandum and a memorandum on the copy of the deed of May 6th, 1840, from Lacey to Newman, that "this land was entered by Jeddiah Wooley, August 8th, 1835," were either of them competent evidence.

The evidence offered and objected to was, we think, competent. The testimony of witnesses who had read the original deed, as to their recollection of its contents, was direct evidence of the fact; and the copy of the registry of the deed, as entered in the file-book, was a copy of an official entry, made in a book of public records required to be kept by the recorder, and which constitutes the first step in the process of recording. The statute requires that every recorder shall keep "an entry book, in which he shall, immediately on the receipt of any instrument to be recorded, enter, in the order of its reception, the names of the parties thereto, its date, the day of the month, hour, and year of filing the same, and a brief description of the premises, indorsing upon such instrument a number corresponding with the number of such entry." Rev. Stat. Ill. 1845, p. 432, § 7; L. 1847, p. 69, § 1; L. 1869, p. 2, § 7.

All these items of evidence tended to prove the alleged mistake and what was the correct description of the premises conveyed in the lost original deed, and were entitled to be con-

sidered, in connection with the certified copy of the record of the deed itself, as secondary evidence of its contents. In admitting and considering them the circuit court committed no error; what effect should be given to them, singly or together, was for that court, to whom the cause had been submitted, alone to determine.

We find no error in the record, and the judgment is

Affirmed.

NEW ORLEANS NATIONAL BANKING ASSOCIATION *v.* ADAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Argued October 31st, 1883.—Decided November 12th, 1883.

Louisiana—Mortgage.

A executed a promissory note to B, another to C, and two others to D, and secured all by a mortgage of real estate in Louisiana. The notes to D were paid at maturity. Default being made by the others, B obtained a decree for foreclosure of the mortgage, and the property was sold to E. E, being unable to pay the purchase money, agreed in writing with the holders for time, and that the parties might enforce their judgments in case of non-payment, and that the original mortgages should remain in full force and effect, and that they were recognized as operating on the property to secure the debts. This agreement was recorded in the record of mortgages. E then conveyed to F, who mortgaged to G. The debt to B not being paid on the expiration of the extension, B instituted proceedings to foreclose, treating the agreement as a mortgage, and made G a party defendant. *Held*,

That the agreement was not a mortgage; that to constitute a mortgage there must be a present purpose to pledge the estate, and that there was no such purpose at the time of the agreement.

In equity. A firm doing business in Louisiana under the name of Tucker Brothers, on February 24th, 1860, made and delivered their promissory note of that date, for $5,000, payable February 15th, 1861, to the Bank of New Orleans, which afterwards, by virtue of the provisions of the "act to provide a national currency," etc., passed June 3d, 1864, became a national bank under the name of the New Orleans National

Banking Association. Tucker Brothers, on the same day, executed three other notes, for $5,000, one of them, payable to Godfrey Barnsley, falling due January 21st, 1861. To secure these four notes the makers executed a mortgage on a certain plantation in La Fourche Parish, Louisiana. Two of the notes were paid, but those given to the Bank of New Orleans and Barnsley were not paid at maturity. Thereupon the bank, having instituted a suit on the mortgage and the note held by it, on June 11th, 1867, obtained a decree of foreclosure against Tucker Brothers, by virtue of which, on September 7th, 1867, the mortgaged property was sold by the sheriff to one Albert N. Cummings for the price of $13,025 to satisfy said unpaid notes. Cummings being unable to pay the purchase money, it was agreed between him and the parties entitled to the proceeds of the sale that he should have time; whereupon Cummings, on September 7th, 1867, executed an agreement in writing, before J. K. Gourdain, a notary of the parish of La Fourche, in which he recited that he had not paid the purchase money of the plantation, and declared as follows:

"That he corresponded and compromised with the mortgage creditors hereinafter named, who agreed to give him time, without, however, impairing or novating the original claims, the right to enforce which they expressly reserved."

Cummings then by this same agreement stipulated that out of the price of the plantation he would pay to one Gaubert the sum of $1,851.10, on or before March 1st, 1861, he holding the first privilege on a part of the plantation for that amount; to Barnsley the sum of $4,904.40, on or before May 15th, 1870; and to the Bank of New Orleans $6,269.50, on or before May 1st, 1870; and that all these sums should bear interest at the rate of eight per cent. per annum after maturity till paid. The agreement then further declared as follows:

"It is understood, as above stated, that the parties hereto do not by those presents impair, affect, or novate their existing claims, and that in case of non-payment they will be entitled to enforce the judgments which may be held by them; and furthermore, that the original mortgages and privileges remain in full

force and effect, and are not hereby novated, and if need be, for the purpose of avoiding all doubts, the said privileges and mortgages are hereby recognized as operating on the said property in the proportions aforesaid, and to secure the debts stated as aforesaid with the rank above stated."

This agreement was duly recorded in the office of the recorder of mortgages for the parish of La Fourche on September 12th, 1867.

After the making of this agreement, Cummings, without having paid the sums the payment of which was promised thereby, sold the property to a Mrs. Tucker, who conveyed an undivided half interest to one Thomas J. Daunis, and Mrs. Tucker and Daunis then executed a mortgage on the same to John I. Adams & Co., to secure certain notes made by Daunis to said firm, after which Mrs. Tucker conveyed her undivided half of the property to Daunis. Subsequently the Bank of New Orleans, now become the New Orleans National Banking Association, assuming that the agreement entered into by Cummings before Gourdain, the notary, on September 7th, 1867, constituted a mortgage by which the balance found thereby to be due it from Cummings was secured, filed the bill in this case to foreclose the same. The bill made the firm of John I. Adams & Co. parties defendant, charging that said firm claimed to have a mortgage on the property covered by the alleged mortgage of the complainant, and that if said firm had any lien upon or interest in said premises it was subsequent to September 12th, 1867, the date of the inscription of the complainant's alleged mortgage.

To this bill John I. Adams & Co. filed a plea and answer, in which they set up that they, being holders of certain notes secured by a mortgage on the property described in the bill of complaint, instituted a certain suit upon the same against Thomas J. Daunis, in the district court sitting for the Parish of La Fourche, and obtained a writ of seizure and sale against said property, under and by virtue of which the same was seized by the sheriff, and in October, 1875, sold to John I. Adams, who claimed title thereto. They further alleged that

the agreement dated September 7th, 1867, set forth in the complainant's bill, was not a mortgage, and if it were, it was proscribed, because it had not been reinscribed within ten years from the date of the original inscription, as required by law.

Upon final hearing upon the pleadings and evidence, the circuit court dismissed the bill, and from its decree the complainant appealed.

Mr. J. D. Rouse, *Mr. William Grant*, and *Mr. Thomas L. Bayne* for appellants.

Mr. Joseph P. Hornor, and *Mr. W. S. Benedict* for appellees.

Mr. Justice Woods delivered the opinion of the court.

It is conceded by counsel for complainant that the original mortgage made by Tucker Brothers, dated February 24th, 1860, and the decree rendered thereon in favor of the Bank of New Orleans by the District Court of the Parish of La Fourche, in June, 1867, were both extinguished by the sale of the mortgaged premises to Cummings on September 7th, 1867.

But complainant insists that the agreement made by Cummings on the day last named, with the Bank of New Orleans and other parties entitled to the proceeds of the sale, constituted a mortgage, and that the same having, on September 12th, 1867, been recorded in the office of the recorder of mortgages for the parish in which the lands were situate, secured them a lien and privilege on the premises from the date of said record.

We are of the opinion that this contention is not well founded. While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage. *Wilcox* v. *Morris*, 1 Murphy, 116 (*S. C.* 3 Am. Dec. 678).

The agreement of September 7th, 1867, does not, on its face or by its terms, profess to create a lien in favor of the Bank of New Orleans on the premises in question, but it recites that the parties thereto do not thereby impair, affect, or novate their ex-

isting claims; that the original mortgages and privileges remain in full force and are recognized as operating on said property "to secure the debts stated as aforesaid with the rank above stated." The agreement is not of doubtful meaning. Its purpose is to recognize the old mortgage made by Tucker Brothers in 1860 and to preserve its lien on the mortgaged premises from the date of its inscription.

The contention of complainant is not that the agreement is a mortgage to secure the notes made by Tucker Brothers, but to secure from Cummings the price which he bid for the premises at the sale made to satisfy the mortgage executed by Tucker Brothers. The bill of complainant is framed upon this theory. But the fault of this theory is, that the agreement does not profess, of its own force, to secure the money due from Cummings, but excludes the idea that such is its purpose by declaring that the original mortgages are recognized as operating on said property to secure the sums due from Cummings.

It is perfectly clear, therefore, that the agreement of September 7th, 1867, was not intended by the parties as a new mortgage to take effect at that date, but as a recognition of the old mortgage, and that its purpose was to keep it alive and to preserve its lien as of the date of its inscription.

In other words, Cumming, by this agreement undertakes to keep alive and in full force a mortgage made by another party after it had been foreclosed, the mortgaged property sold, and the mortgage and the decree rendered thereon extinguished. It was not in his power to do this. It follows that the effect of the agreement of Cummings of September 7th, 1867, is simply as a contract to pay the parties entitled to it the purchase money of the premises bought by him, and creates no lien or privilege on the premises sold. In other words, it is not a mortgage.

This view is supported by the decision of the Supreme Court of Louisiana in the case of *Adams* v. *Daunis*, 29 La. Ann. 315. This was the proceeding by Adams to cause to be erased the mortgages anterior to his purchase of the premises in question. The agreement of Cummings of September 7th, 1867, was put in evidence in that case, and this court held it to be no mortgage.

The decree of the circuit court must be affirmed.

MATTHEWS *v.* DENSMORE and Others.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Argued October 18th, 1883.—Decided November 12th, 1883.

Courts—Officer—Trespass—Void and Voidable—Writ.

1. A writ issuing from a court of competent jurisdiction, with power to compel its enforcement, and in a case where the cause of action and the parties to it are before the court and within its jurisdiction, is not void by reason of mistakes in the preliminary acts which precede its issue.
2. If not avoided by proper proceedings, it is in all other courts a sufficient protection to the officer executing it.
3. The marshal for the Eastern District of Michigan seized the goods of the defendants in error, under a writ of attachment issued from the circuit court of that district, on a defective affidavit: *Held,* That in proceedings in the State courts of Michigan against the marshal, the process is sufficient to protect him if the property seized under it was liable to be attached in that suit.

This was a writ of error to the Supreme Court of the State of Michigan.

The plaintiff in error was marshal of the United States for the Eastern District of that State, and under a writ of attachment from the circuit court levied on a stock of goods which was the subject of controversy. The defendants in error, who were not the parties named in the writ of attachment, sued Matthews, the marshal, in trespass, on the ground that they were the owners of the goods, and that the goods were not liable to the attachment under which the marshal acted.

To this action the defendant pleaded the general issue, with notice that he should rely on the writ of attachment and should prove that the goods were subject to be seized under it.

When the defendant, who was admitted to be the marshal, as he had alleged, offered in evidence the writ of attachment, the court refused to receive it, on the ground that it did not appear by the affidavit on which it was issued that the debt claimed by the plaintiff in the writ was due. As the plaintiffs in the present action were in possession of the goods when they were seized under the writ, this ruling of the court was decisive

of the case. The defendant excepted and brought the case here on writ of error; the assigned error being "the refusal to admit in evidence the writ of attachment and proceedings thereunder."

Mr. Don M. Dickinson for the plaintiff in error.

Mr. O. M. Barnes for the defendants. The only question for the court relates to construction of Michigan statutes. *M. C. R. R. Co.* v. *M. S. R. R. Co.*, 19 How. 378. There is no conflict of jurisdiction. *Buck* v. *Colbath*, 3 Wall. 334. The affidavit was fatally defective. *Cross* v. *McMaken*, 17 Mich. 511; *Wells* v. *Parker*, 26 Mich. 102; *Matthews* v. *Densmore*, 43 Mich. 461. The defect is jurisdictional, and may be questioned in collateral proceedings. *Greenvault* v. *Farmers' & Mechanics' Bank*, 2 Doug. (Mich.) 498; *Wilson* v. *Arnold*, 5 Mich. 98; *Drew* v. *Dequindrie*, 2 Doug. (Mich.) 93; *Hale* v. *Chandler*, 3 Mich. 531. The rule that a writ fair on its face protects the officer executing it does not apply when the officer is sued by a stranger to the writ. 1 Waterman on Trespass, § 467; 2 Hilliard on Torts, 135–6 and 7; *Rosenbury* v. *Angel*, 6 Mich. 508; *Cook* v. *Hopper*, 23 Mich. 511; *High* v. *Wilson*, 2 John. 45; *Rinchey* v. *Stryker*, 28 N. Y. 45. When the affidavit does not show the facts required by statute, the writ is absolutely void. Drake on Attachments, 3d ed., § 83 to 88.

Mr. Justice Miller delivered the opinion of the court. After reciting the facts above stated, he continued:

The whole case turned on the trial in the local State court, as it did on the writ of error in the Supreme Court, which affirmed the judgment of the lower court, on the question of the validity of the writ of attachment in the hands of the marshal, and its sufficiency to protect him if the property seized under it was liable to be attached in that suit.

It is to be observed that this does not present a case where the validity of the writ is assailed by any proceeding in the court which issued it, either by a motion to set it aside as im-

providently issued, or to discharge the levy and return the property, or by appeal to a higher court of the same jurisdiction to correct the error of issuing it on an insufficient affidavit, but it is a proceeding in a court of another jurisdiction to subject an officer of the United States to damages as a trespasser for executing a writ of the court to which he owes obedience.

The Supreme Court of Michigan, whose judgment we are reviewing, says of this writ, in answer to the argument, that, being regular on its face, it should protect the officer: "No doubt the writ in this case must be regarded as fair on its face. Under the general law relating to attachments, where the suit is begun by that writ, the affidavit is attached to and in legal effect becomes a part of it; and if then the affidavit is void the writ is void also. But under an amendatory statute passed in 1867, which permits the issue of the writ in pending suits, the affidavit is filed with the clerk, and the officer to whom the writ is issued is supposed to know nothing of it. Comp. L., § 643. It was under the amendatory statute that the writ in this case was issued, and an inspection of its provisions shows that the writ contains all the recitals that the statute requires."

Here, then, we have a writ which is fair on its face, issued from a court which had jurisdiction both of the parties and of the subject-matter of the suit in the regular course of judicial proceeding by that court, and which the officer of the court in whose hands it was placed is bound to obey, and yet by the decision of the Michigan court it affords him no protection when he is sued there for executing its mandate.

We do not think this is the law. Certainly it is not the law which this court applies to the processes and officers of the courts of the United States and of other courts of general jurisdiction.

It had been supposed by many sound lawyers, after the case of *Freeman* v. *Howe*, 24 How. 450, that no action could be sustained against a marshal of the United States, in any case in a State court, where he acted under a writ of the former court; but in *Buck* v. *Colbath*, 3 Wall. 334, where this class of cases was fully considered, it was held that though the writ be a valid writ, if the officer attempt to seize property under it

which does not belong to the debtor against whom the writ issued, the officer is liable for the wrongful seizure of property not subject to the writ.

In the present case the officer is sued for that very thing, and offered to prove that the property attached was the property of the defendant in the attachment, and was liable to be seized under that writ, and that plaintiff in the present suit had no valid title to it, at least no title paramount to the mandate of the writ, but the State court refused to permit him to make that proof.

The ground of this ruling is that because there is a defect in the affidavit on which the attachment issued, that writ is absolutely void, and the officer who faithfully executed its commands stands naked before his adversary as a wilful trespasser.

It would seem that the mandatory process of a court of general jurisdiction, with authority to issue such a process and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the court and are within its jurisdiction, cannot be absolutely void by reason of errors or mistakes in the preliminary acts which precede its issue.

It may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts.

The precise point as to the validity of this writ of attachment was under consideration in this court in the case of *Cooper* v. *Reynolds*, 10 Wall. 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been often quoted since, and is conclusive in the federal courts in regard to the validity of their own processes when collaterally assailed, as in the present case.

The court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits *in rem* and *in per-*

sonam, in answer to the question, On what does the jurisdiction of the court in that class of cases depend? answers it thus:

"It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into court the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities, but the writ being issued and levied, the affidavit has served its purpose, and though a revising court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property."

See *Voorhees* v. *Jackson ex dem.*, *The Bank of the United States*, 10 Peters, 449; *Grignon* v. *Astor*, 2 How. 319.

If in a case where the title to land is to be divested by a proceeding in which its owner is not within the jurisdiction, and is never served with process nor makes any appearance, the writ on which the whole matter depends is held valid, though there be no sufficient affidavit to support it, how much more should the writ be held to protect the officer in a case where the defendant is in court and makes no objection to it, nor seeks to set aside or correct it, and where the court, before it issues the writ, has jurisdiction of the parties to the suit?

We think that when the writ is offered in a collateral suit against the officer who executed it, as evidence of the authority of the court to command him to attach the property of defendant in that suit, it is not void, though it might be avoided on a proper proceeding, and in the contest for the value of the goods seized with a stranger who claims them it

is sufficient to raise the issue of the liability of those goods to the exigency of the writ.

The judgment of the Supreme Court of Michigan is reversed, with directions for further proceedings in conformity to this opinion.

BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY and Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Argued October 18th and 19th, 1883.—Decided November 12th, 1883.

New Orleans—Statutes of Louisiana.

In the absence of fraud, a compromise made between the city authorities of New Orleans and a railroad company, respecting a disputed grant of a user of part of the city property, known as the Batture, for railroad purposes, was sustained, as authorized by the laws of Louisiana. Under the statutes of that State, the city authorities had the right to make the compromise at the time it was made, and it remained valid, notwithstanding the powers conferred upon the board of liquidation of the city debt of New Orleans, by the legislature.

The long record in this case presents no subject of general interest outside of the important special issues involved in the suit. The facts upon which the decision rests are fully set forth in the opinion of the court.

Mr. Richard T. Merrick and *Mr. Henry C. Miller* for the appellant; and

Mr. Thomas L. Bayne, for the appellees.

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

This appeal presents the following case:

Prior to the year 1820 disputes had arisen between the city of New Orleans and certain proprietors of riparian estates, as to the ownership of the batture or alluvion in front of the city

on the Mississippi River. In compromise of these disputes the proprietors surrendered to the city all their claims to property within certain boundaries.

In 1869 the legislature of Louisiana undertook, by act No. 26 of 1869, to grant to the New Orleans, Mobile & Chattanooga Railroad Company, now by change of name the New Orleans, Mobile & Texas Railroad Company, "the right to locate, construct, maintain, and use a passenger depot with offices and apartments suitable for its legitimate business, upon that part or portion of the levee or streets and grounds in the city of New Orleans bounded by Canal, Delta, and Poydras streets and a line parallel to and one hundred and fifty feet easterly from Delta street; and for the construction of a freight depot, and for other purposes of its legitimate business, to inclose and occupy the blocks of grounds, parts of streets, and portion of levee in said city bounded by Girod, Water, and Calliope streets and a line parallel to and two hundred and ninety feet easterly from Water street, provided said company shall not inclose or occupy that part or portion of the blocks of ground within said last limits which is the private property of individuals until said company has acquired the title thereto; and said company shall thereafter, if requested by said city, extend the wharf in front thereof equal with the present wharf in front of the northerly corner of the outer block within said limits, recently sold by said city and now owned by said company."

The validity of this act was disputed by the city, and suits were brought by the company in a State court to establish the grant. These suits resulted in judgments, which, as the company claimed, confirmed its title. The city denied that such was the effect of the judgments, and attempted to tear down and destroy the fences and other structures of the company. Thereupon the company, on the 8th of July, 1874, brought another suit to enjoin the city. This suit resulted in a decree by the Circuit Court of the United States for the District of Louisiana, on the 11th of June, 1878, allowing the injunction prayed for. From that decree the city, on the 30th of July, 1878, appealed to this court, and the appeal was docketed on the 16th of December following.

Opinion of the Court.

During the pendency of this suit in this court the legislature of Louisiana passed act No. 133 of 1880, creating a board of liquidation of the city debt "for the purpose of liquidating, reducing, and consolidating the debt of the city of New Orleans." By this act it was provided that the board thus created should "have exclusive control and direction of all matters relating to the bonded debt of the city of New Orleans," and authority to issue new bonds of the city, to be exchanged for old at the rate of fifty cents of new for one dollar old.

Section 5 of that act is as follows:

"SECT. 5. That it shall be the duty of the city authorities, as soon as possible, after the organization of the board of liquidation of the city debt, to turn over and transfer to the said board all the property of the city of New Orleans, both real and personal, not dedicated to public use; and the board of liquidation shall be, and is hereby, empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable; the proceeds of such sale or sales to be deposited with the fiscal agents of the board at credit of 'city debt fund.'"

No new bonds were ever issued by the board of liquidation under this authority, and the city never actually transferred to the board any of the batture property. Neither did the board ever assume control of such property. A reason given for this by the president of the board, and suggested by the counsel for the appellant in his argument, is, that fears were entertained that if property not dedicated to public uses should be actually separated and set apart from that which was, judgment creditors of the city might levy their executions and subject such as was thus shown not to be required for public use to the payment of their judgments.

On the 23d of June, 1882, act No. 20, of 1882, was passed by the legislature of Louisiana, "to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions."

Secs. 8, 28, and 78 of this act are as follows:

"SEC. 8. The council shall also have power . . . to authorize the use of streets for horse and steam railroads and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turn-table; to compel them to keep conductors on their cars, and compel all such companies to keep in repair the street bridges and crossings through or over which their cars run; to lay off and sell in lots or squares so much of the batture, from time to time, as may not be required for public purposes, but the right of accretion or to future batture shall never be sold.

"SEC. 28. That all the rights, titles, and interest of the city of New Orleans, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees, and landing places, buildings and other property of whatever description, and wherever situated, and with all goods, chattels, moneys, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of actions, books, accounts, and vouchers, be and they are hereby vested in the city of New Orleans, as incorporated by this act.

"SEC. 78. All laws in conflict, inconsistent, or contrary to the provisions of this act, be and the same are hereby repealed."

By Act No. 58 of 1882, passed June 30th, 1882, entitled "An Act to authorize the city of New Orleans to renew and extend payment of her outstanding bonds, other than premium bonds, to provide the rate of interest on the bonds as reduced or extended, and authorize the levy of a tax to pay the same," the board of liquidation was "authorized and empowered to extend the bonded indebtedness of said city, other than premium bonds, outstanding at the passage and promulgation of this act, for the period of forty years from January 1st, 1883, at a rate of interest not exceeding six per cent."

On the 5th of July, 1882, Act No. 81 of 1882 was passed and approved, a copy of which is as follows:

"Act No. 81 of 1882, entitled an act to authorize the city of New Orleans in the sale or lease of franchise, or right of way for

street railroads, or other privilege, to apply the price paid for the same in the performance of works of public improvements of a permanent character, such as paving streets, embellishing parks, etc.

"Whereas, notice as required by article 48 of the Constitution has been given of the intention to apply for the passage of this act; therefore,

SEC. 1. Be it enacted by the General Assembly of the State of Louisiana, That hereafter, whenever the city of New Orleans, through the proper authorities, shall contract with private corporations or individuals for the sale or lease of public privileges or franchises, such as the rights of way for street railroads, or for other public undertakings within her legal power and control, the price paid for the sale or lease of public privileges or franchises shall be applied by said city in the performance of works of public improvement of a permanent character, such as paving streets, embellishing parks, etc.

"SEC. 2. Be it further enacted, That all laws or parts of laws, and especially so much of section 10 of act No. 31, acts of 1876, known as the premium-bond act, and by section 5 of act No. 133, acts of 1880, as may be in conflict herewith, be, and the same are hereby, repealed."

Such being the legislative authority of the different departments of the city government, a resolution was passed by the city council on the 11th of October, 1882, accepting a proposition of the railroad company to compromise and settle all the matters in controversy in the suit pending in this court on appeal, by which the company was to pay the city $40,000, and the city was to dismiss its appeal and acquiesce in the decree of the circuit court. The negotiations which resulted in this compromise began as early as August 1st, 1882, when the council appointed a committee to confer with the railroad company on the subject. The money stipulated for in the compromise was paid on the 11th of October, 1882, and on the same day an agreement of compromise, dismissing the appeal and acquiescing in the decree appealed from, was duly signed and executed by the mayor of the city under the authority of the council. On the next day the board of liquidation noti-

fied the city authorities that it claimed the fund realized from this settlement. On the 13th of October a resolution of the board was adopted to the effect "that the $40,000 now in the hands of the administrator of finance be enjoined and the attorney be directed to institute legal proceedings at once." On the 17th of October the resolution of the 13th was so far modified as "to authorize the attorney of the board to take such steps as, in his judgment, are requisite to set aside the agreement of compromise; . . . to oppose the dismissal of the appeal, and to hold the fund decreed from said compromise so as to restore it if the compromise is annulled, or to claim it for the board if said compromise becomes a finality."

On the 10th of October, 1882, the suit pending in this court was continued at the request of the parties, but at a later day in the term the railroad company appeared and presenting a stipulation for the dismissal of the appeal, signed by the city attorney of New Orleans pursuant to the terms of the compromise, asked to have the appropriate order entered upon that stipulation. Thereupon the board of liquidation came and resisted the entry of any such order, on the ground that during the pendency of the appeal authority over the subject-matter of the controversy had been transferred from the city council to the board, and that the compromise which had been effected was not binding. The board also asked leave to prosecute the appeal in the name of the city. It was conceded that the city council made the compromise which was claimed, and that the railroad company was entitled to a dismissal of the appeal if the council had authority to do what was done, and the compromise was fair. This court thought the dispute as to the authority of the council presented questions too important to be settled summarily on motions, and ordered the motions to be continued until the present term, when the appeal would be dismissed in accordance with the stipulation, unless the board should begin and prosecute without unnecessary delay, in some court of competent jurisdiction, an appropriate suit to set aside the compromise. This suit was brought for that purpose, and the Circuit Court for the Eastern District of Louisiana, on full consideration, entered a decree dismissing the bill. To reverse

that decree this appeal was taken, and the single question to be decided is, whether, upon these facts, the board of liquidation is entitled to the relief it has prayed for.

There is no pretence of fraud, either on the part of the city council or the railroad company. So far as appears, the negotiations were carried on by both parties openly and without any attempt at concealment. The board of liquidation does not even allege that it was ignorant of what was being done.

The whole case, therefore, turns on the legislative authority of the city council to bind the city by a compromise of the suit, and about this we have no doubt. Under act No. 133 of 1882, the city authorities were only required to turn over to the board such property as was not dedicated to public use. It was substantially conceded on the argument that if the railroad was removed the property between Poydras and Canal streets would immediately be put to such use, and it is by no means certain that this may not be true of some or all the rest. All except that between Poydras and Canal streets has been formed into squares, but the control of it was never assumed by the board. The fact that fears were entertained that if such control should be assumed the property would be levied on and sold under executions against the city, is very persuasive evidence to show that it was apparently property dedicated to public use, though occupied to some extent by the railroad company for its tracks and passenger and freight stations.

But however this may be, we are entirely satisfied that under the legislation of 1882 the city council had full authority to bind the city by a compromise of the pending suit. Confessedly no bonds were ever issued, or obligations incurred, by the board of liquidation under act No. 133 of 1880; and on the 23d of June, 1882, the city council was, in express terms, authorized to lay off and sell, in lots or squares, so much of the batture, from time to time, as might not be required for public purposes. Then, on the 5th of July, only a few days later, the city was authorized, through its proper authorities, to contract with private corporations for the sale or lease of public privileges or franchises, such as rights of way for street

railroads, or for other public undertakings within her legal power and control, the price paid to be applied by the city "in the performance of works of public improvement of a permanent character." All this is entirely inconsistent with the provisions of sec. 5 of act No. 133 of 1880, at least so far as the control and disposition of batture property are concerned. The repealing sections of these acts, therefore, operated directly on the powers of the board over the subject-matter of this compromise, and left the city council free to act in the premises.

It must be borne in mind that all the legislation involved relates to the distribution of the powers of the city government among the different departments. As the question is presented to us no contract rights need protection. Whether the board of liquidation is a corporation that can sue in its own name or that can be sued is not at all important, for even if it be a corporation, it is in effect nothing more than one of the departments of the city government charged with the duty of controlling and directing matters relating to the bonded debt. Even though the effect of section 5 of the act of 1880 was to pledge the property of the city not dedicated to public use to secure the payment of the public debt, there was nothing to prevent the legislature from revoking the pledge until contract rights had in some way intervened. It is agreed that no new bonds were ever issued by the board under the authority or upon the faith of the act of 1880 before the new charter was granted, and act No. 81 of 1882 was passed before anything was done in the way of extending or renewing bonds under act No. 58 of the same year.

The result of the whole legislation is, therefore, that in 1880 the board of liquidation was created and given power to dispose of and sell the property of the city not dedicated to public uses, and out of the proceeds pay the public debt; but before any new rights had accrued under this power, the control and disposition of batture property not needed for public purposes was withdrawn from the board and given to the city council, and the proceeds of the sales and leases of public privileges and franchises were appropriated to the payment of the expenses of public improvements which

were permanent in their character. Whether the money realized from this compromise is to be applied to the payment of the public debt or to make permanent improvements, we do not undertake to decide, but that the compromise itself was within the departmental authority of the city council, and not subject to the control of the board of liquidation, is to our minds clear.

It follows that the circuit court was right in refusing to set aside the compromise.

Decree affirmed.

KNOX COUNTY COURT *v.* UNITED STATES *ex rel.* GEO. W. HARSHMAN.

SAME *v.* UNITED STATES *ex rel.* DAVIS.

SAME *v.* UNITED STATES *ex rel.* WELLS and Others.

MASON COUNTY COURT *v.* HUIDEKOPER, Relator.

BAKER, Treasurer, *v.* UNITED STATES *ex rel.* DAVIS.

ALL, IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Argued October 26th, 1883.—Decided November 12th, 1883.

Municipal Bonds—Taxation.

Bonds of the kind involved in these suits are debts of the county. Holders are entitled to payment out of the general funds of the county raised by taxation for ordinary use, after exhausting the special fund. The majority of the court adhere to the rulings in *United States* v. *Clark County*, 96 U. S. 211; *United States* v. *Macon County*, 99 U. S. 582, 589; and *Macon County* v. *Huidekoper*, 99 U. S. 592.

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

In *United States* v. *County of Clark*, 96 U. S. 211, it was decided, at the October term, 1877, that bonds of the character of those involved in the present suits were debts of the county, and that for any balance remaining due on account of princi-

pal or interest after the application of the proceeds of the special tax of one-twentieth of one per cent., the holders were entitled to payment out of the general funds of the county. This, we all agree, means that the payment of this balance is demandable out of funds raised by taxation for the ordinary county uses. The mandamus applied for in that case was one "requiring the county court and the justices thereof to direct the clerk of the county to draw a warrant on the county treasurer for the balance of the judgment remaining unpaid, so that he might be enabled, on its presentation, to have it paid in its order out of the county treasury," and there was no fund out of which the payment could be made, except that raised by taxation for ordinary county uses. By the judgment of this court such a mandamus was awarded.

At the next term, in 1878, the point thus decided was explicitly stated in *United States* v. *County of Macon*, 99 U. S. 582, 589, and in *Macon County* v. *Huidekoper*, Id. 592, a majority of the court adhered to the decision and ordered judgment accordingly. It was conceded on the argument that all the judgments now under consideration must be affirmed unless these cases are overruled. This a majority of the court are unwilling to do, and judgments of affirmance are, consequently, ordered.

EX PARTE MEAD, Executrix, Petitioner.

ORIGINAL.

Submitted October 29th, 1883.—Decided November 12th, 1883.

Appeal—Bankruptcy.

When a claim presented for proof in bankruptcy as a debt against the bankrupt's estate is rejected by the district court, an appeal from the decision to the circuit court is incomplete and invalid, if the appellant fails to give to the assignee the notice thereof which the statute requires, within ten days after the decision—even though such notice may have been given to the objecting creditor.

Petition for mandamus.

Opinion of the Court.

Mr. F. W. Hackett submitted the motion for the rule. The facts fully appear in the opinion of the court.

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

James C. Mead, in his lifetime, filed with a register in bankruptcy proof of his claim against the estate of Abraham Mead, a bankrupt. Mary E. Travis, a creditor of the bankrupt, applied for a re-examination, and upon consideration the claim was rejected by the district court. Pending the proceedings James C. Mead died, and the petitioner, his executrix, appeared in his stead. After the rejection of the claim the executrix took an appeal to the circuit court, and did all that was necessary to perfect such an appeal, except giving notice to the assignee within ten days after the entry of the decision. This she did not do, but she did give notice to the objecting creditor within the prescribed time. The circuit court, on the application of the assignee, refused to entertain the appeal, because of the failure of notice to him. The petitioner now seeks by mandamus to require the circuit court to take the case and proceed therewith.

By sec. 4980 of the Revised Statutes "appeals may be taken from the district to the circuit courts in all cases in equity" arising under the bankrupt act . . . ; "and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the district court to the circuit court for the same district;" but by sec. 4981 no such appeal can be allowed, unless, among other things, notice thereof be given "to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." If a supposed creditor takes an appeal from an order rejecting his claim, he must, under the provisions of sec. 4984, file in the clerk's office of the circuit court "a statement, in writing, of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall be thereupon had in the

pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted in the usual manner in the courts of the United States."

In *Wood* v. *Bailey*, 21 Wall. 640, it was decided that the omission to give notice to an assignee of an appeal from a decree in his favor in a suit in equity was fatal to the appeal. The effect of the ruling in that case is that the statute makes the notice within the prescribed time "a condition of the right of appeal" under sec. 4980. That seems to us conclusive of the present case. Proceedings under sec. 5081 for the re-examination of a claim filed against a bankrupt's estate are in the nature of a suit against the assignee for the establishment of the claim. A creditor may move for the re-examination, and, under general order in bankruptcy No. 34, may be required to form the issue which is to be certified to the district court for determination, but the assignee alone can appeal from an order of allowance, and if the supposed creditor appeals the assignee must defend in the circuit court, where the proceedings are against him. Hence the necessity for notice to him in such cases; and, in our opinion, the words "to the assignee or creditor, as the case may be," in sec. 4981, mean to the assignee if the appeal is by the supposed creditor, and to the supposed creditor if it is by the assignee.

As, upon the petitioner's own showing, the circuit court properly refused to entertain his appeal,

The rule asked for is denied, and the petition dismissed.

ALABAMA GOLD LIFE INSURANCE COMPANY *v.* NICHOLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Submitted October 29th, 1883.—Decided November 12th, 1883.

Appeal—Judgment—Jurisdiction—Texas.

It is within the discretion of a circuit court of the United States, sitting in the State of Texas, if a plaintiff appears in open court and remits a part of the

verdict in his favor, to make the proper reduction and enter judgment accordingly.

If by such remission the judgment be reduced to $5,000 or less, errors in the record will be shut out from re-examination, in cases where the jurisdiction of this court depends upon a larger amount being involved in the controversy.

Motion to dismiss for want of jurisdiction.

Mr. W. W. Boyce for the defendants.
Mr. P. Phillips and *Mr. W. Hallett Phillips contra.*

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

In this case a verdict was rendered against the plaintiff in error for $6,610, and a judgment entered thereon December 9th, 1879. In the verdict was included, for damages $600, attorney's fees $500, and interest $510, in all $1,610. The next day, December 10th, 1879, the defendants in error appeared in open court and "entered a remittitur" of these amounts, "leaving the amount of said judgment to be for the amount of five thousand dollars and costs of suit." Upon this being done a new judgment was entered "that the plaintiffs have and recover from said defendant the sum of five thousand dollars, and also costs about this suit incurred as of the date of said judgment, and have execution therefor instead of the sum of six thousand and six hundred and ten dollars, and also all costs about this suit incurred as in said judgment is recited." This writ of error was brought on the 8th of January, 1880, to reverse the judgment so entered. The defendant in error now moves to dismiss the writ because the value of the matter in dispute does not exceed $5,000.

The judgment as it stands is for $5,000 and no more. The entry of the 10th of December is equivalent to setting aside the judgment of the 9th and entering a new one for the amount remaining due after deducting from the verdict the sum remitted in open court. There was nothing to prevent this being done during the term and before error brought. The judgment of the 10th is, therefore, the final judgment in the action.

In *Thompson* v. *Butler*, 95 U. S. 694–696, it was said:

"Undoubtedly the trial court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and if the object of the reduction is to deprive an appellate court of its jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends on the amount in controversy."

Articles 1351 and 1352 of the Revised Statutes of Texas are as follows:

"ARTICLE 1351. Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted.

"ARTICLE 1352. Any person in whose favor a judgment has been rendered may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted." Revised Statutes of Texas, 1879, pp. 211, 212.

Without deciding what effect these statutes will have on our jurisdiction in cases coming up from that State, if the amount is remitted after judgment, without any action thereon by the court other than noting on the docket and entering on the minutes what has been done, we are of opinion that it is within the discretion of a court of the United States sitting in that State, if a plaintiff appears in open court and remits a part of a verdict in his favor, to make the proper reduction and enter judgment accordingly. That was the effect of what was done in this case, and the rule established in *Thompson* v. *Butler*, *supra*, applies.

The motion to dismiss is therefore granted.

Dismissed.

LAMAR, Executor, *v.* McCAY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted October 31st, 1883.—Decided November 19th, 1883.

On the question of the fact as to whether the proceeds of certain cotton had been recovered and received from the United States as part of the proceeds of cotton recovered for in the court of claims, this court reversed the decree of the circuit court.

The case was submitted on the briefs.

Mr. Edward N. Dickerson for the appellant:
Mr. J. K. Herbert, *Mr. Shellabarger* and *Mr. Wilson*, for the appellee, and the *Appellee* for himself.

Mr. Justice Blatchford delivered the opinion of the court.

The appellee, who was the plaintiff below, seeks to recover from the executor of Gazaway B. Lamar a sum of money, on the allegation that the testator received that money from the United States, as the proceeds of 136 bales of upland cotton, which belonged to the assignor of the plaintiff. Lamar recovered in the court of claims, on the 1st of June, 1873, a judgment against the United States for $579,343.51, as the proceeds of 3,184 bales of upland cotton and 91 bales of Sea Island cotton, which Lamar owned in Savannah, Georgia, in December, 1864, at the time that city was captured by the military forces of the United States, and all of which bales were captured by said forces and shipped to the agent of the Treasury Department at New York, and there sold by him, and the proceeds paid into the treasury of the United States. The amount of the judgment was paid to Lamar in April, 1874. This bill was filed in August, 1879. It alleges that the 136 bales were shipped by the plaintiff's assignor to C. A. L. Lamar, now deceased (the son of G. B. Lamar), who received and held them as the property of such assignor; that, after the death of C. A. L. Lamar, G. B. Lamar came into possession of the 136 bales, and retained such possession as the agent and fiduciary of such as-

signor, that the suit in the court of claims was brought for the recovery of the 136 bales, with other cotton; and that the proceeds of the 136 bales were included in said judgment, and were received by G. B. Lamar. The circuit court entered a decree in favor of the plaintiff for the agreed amount of the avails of the 136 bales, and the defendant has appealed to this court.

On the question as to whether the 136 bales were embraced in Lamar's recovery, the circuit court found that they were. We are not able to concur in this conclusion. The question is one altogether of fact. It has involved the examination of the pleadings and proofs and other proceedings in the suit in the court of claims, besides a consideration of the effect of the provisions in the will of G. B. Lamar, and of an advertisement he published, and of entries he made in his books, in regard to the 136 bales, after he had received the amount of the judgment. It would not conduce to any good end to review the propositions discussed by the respective counsel, consisting largely of arithmetical calculations, in elucidation of their respective contentions. It must suffice to say that the record and proceedings of the court of claims do not show that the 136 bales were embraced in the final petition of G. B. Lamar in that court, or in the 3,275 bales for which judgment was awarded. There is not in the proofs before the court of claims any testimony in regard to the 136 bales. It may very well be that they passed into the possession of G. B. Lamar, and were seized and sent to New York and sold, and that their proceeds are now in the treasury. But, the evidence before the court of claims was entirely sufficient to show that G. B. Lamar was entitled to recover the proceeds of the 3,275 bales for which he did recover, without including the 136. Every bale of the 3,275 is traced, in that evidence, into the hands of G. B. Lamar, and identified as cotton he had purchased and paid for, as a buyer of it. The 136 bales were no part of it.

The will was made in September, 1872, nearly eight months before the final petition was filed in the court of claims. That petition omitted to mention the 136 bales, they having been specially mentioned in the amended petition filed April

16th, 1872, which was the petition pending when the will was made. The final petition states that it is filed "in lieu of and as a substitute for all other petitions and amendments thereto heretofore filed in this cause."

The 136 bales, with other cotton, having been taken from the possession of G. B. Lamar and sold, he made, as he states in his will, "claims upon the government of the United States for payment for such cotton," which claims, the will says, "are now before the court of claims, and also before the committee on claims of the Congress of the United States." The will directs his executors to press the claims, and gives a list of the cotton, and specifies among it the 136 bales, "belonging to a gentleman in Richmond, Virginia," and as being cotton on which C. A. L. Lamar made advances. G. B. Lamar did, in his amended petition filed in the court of claims, April 16th, 1872, make a specific claim for the proceeds of that cotton. But he dropped that claim in his final petition, and had no recovery for it. He did not receive his money till more than ten months after he obtained judgment. The impression was on his mind that he had recovered for the 136 bales, and, under that erroneous belief, he advertised in a newspaper in Richmond for the rightful owner of the cotton to come forward and prove his ownership, and pay advances and expenses of collection, and receive the balance due. The advertisement stated that cotton was placed in the possession of C. A. L. Lamar, and stored in Lamar's warehouse; that advances were made on it, and there were charges for storage, compressing, and cartage; that the cotton was taken by the United States; and that he had received payment for it from the treasury. He also, in April, 1874, made entries in his books stating that he had received so much money from the United States for the 136 bales, "of which the owner is unknown and is advertised for in Richmond, Virginia."

The evidence derived from the advertisement and the entries in the books is of no force except to show Mr. Lamar's own belief at the time, and cannot avail to control the internal evidence afforded by the record from the court of claims, that the 136 bales were not included in the recovery in that court.

This conclusion makes it unnecessary to consider any of the other questions raised.

The decree of the circuit court is reversed and the case is remanded to that court, with direction to dismiss the bill of complaint.

ARNSON and Another *v.* MURPHY, Collector.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 15th, 1883.—Decided November 19th, 1883.

Collector—Customs Duties—Limitations—Statutes.

1. The common-law right of action against a collector to recover back duties illegally collected is taken away by statute, and a remedy given based on statutory liability, which is exclusive.
2. The time fixed by statute for commencing this action is within ninety days after the adverse decision of the secretary of the treasury on appeal, but if the secretary fail to render a decision within ninety days, the importer has the option either to begin suit, treating the delay as a denial, or to await the decision, and sue within ninety days thereafter.
3. The limitation laws of the State in which the suit is brought do not furnish the rule for determining whether the action is brought in time.

The facts appear in the opinion of the court.

Mr. Lewis Sanders for the plaintiff in error.
Mr. Solicitor-General for the defendant.

Mr. Justice Matthews delivered the opinion of the court.

This action was brought May 8th, 1879, by the plaintiffs in error in the Supreme Court of New York, to recover money alleged to have been illegally exacted by the collector for customs duties, and was removed by the defendant by writ of *certiorari* to the Circuit Court of the United States for that district.

On the trial it appeared that the several amounts alleged to have been illegally exacted were paid under protest, duly made, on various dates from April 26th, 1871, to November 29th,

1871; that within ninety days from date of each payment an appeal from the decision of the collector had been duly taken to the secretary of the treasury, and that no decision by that officer, in any of the cases, had been rendered prior to the commencement of this action; and that this suit was not brought until after ninety days had elapsed from the date of the latest appeal, and not until after the lapse of more than six years from the expiration of that period.

The defendant pleaded in bar, besides other defences, that the cause of action sued upon did not accrue with six years before the commencement thereof, that being the limitation prescribed by the statute of New York, then in force, for actions upon contracts, obligations, or liabilities, express or implied, other than those upon judgments or decrees of courts of the United States, or of courts of any State or Territory within the United States, and those upon sealed instruments.

The court thereupon directed a verdict in favor of the defendant, to which exception was duly taken, and for that alleged error the judgment thereon is now brought into review.

The cause of action arose under the act of June 30th, 1864, 13 Stat. 202, the 14th section of which is now section 2931 of the Revised Statutes. It distinctly provides, that, on the entry of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on such merchandise and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of the merchandise shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objections thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury. The decision of the secretary on such appeal shall be final and conclusive, and such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary of the

treasury on such appeal, for any duties which shall have been paid before the date of such decision on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the secretary.

"No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the secretary of the treasury shall have been first had on such appeal, unless the decision of the secretary shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise, rested upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact; which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay; and involved a corresponding right on his part to withhold from the government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced Congress, by the act of March 3d, 1839, ch. 82, 5 Stat. 348, sec. 2, to alter the relation between these officers and the United States by requiring them peremptorily to pay into the treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein, that the secretary of the treasury himself, on being satisfied that, in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the excess out of the treasury. The legal effect of this enactment, as was held in *Cary* v. *Curtis*, 3 How. 236, was to take from the claimant all right of action against the collector, by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory act of February 26th,

1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the secretary of the treasury the authority to refund conferred by the act of 1839, 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney* v. *Watson*, 92 U. S. 449, until repealed by implication by the act of June 30th, 1864, 13 Stat. 214. The 14th section of the act last mentioned is, as already cited, in substance, the present sec. 2931 of the Revised Statutes, providing for the appeal to the secretary of the treasury, and the 16th section, being the present sec. 3012½, Rev. Stats., restores to the secretary of the treasury the authority to refund moneys paid under protest and appeal, which he shall be satisfied were illegally exacted, originally conferred upon him by the act of 1839. And the provision of the act of 1845, which construed the act of 1839 so as to restore to the claimant the right of action, judicially declared in *Cary* v. *Curtis*, *supra*, to have been taken away by the latter, now appears as sec. 3011 of the Revised Statutes. It was in force when the present action was brought, and is as follows:

"Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

By reference to the 14th section of the act of 1864, now sec. 2931 Rev. Stats., it will appear that the written protest must be made within ten days, and the appeal to the secretary of the treasury within thirty days, from the ascertainment and

liquidation of the duties by the proper officer. The decision of the secretary on such appeal shall be final and conclusive, unless within ninety days after it was made suit is brought; and no suit shall, in the meantime, pending the appeal, be brought unless the decision by the secretary shall be delayed more than ninety days from the date of the appeal, if arising upon an entry at any port east of the Rocky Mountains.

It appears to us quite plain, from the reading of the statute, that no action arises to the claimant, in such cases, until after a decision against him by the secretary of the treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal; but, with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. It cannot be that he is obliged, in case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit while the matter is still *sub judice*. There is no language in the act requiring such a conclusion, it is inconsistent with the terms actually employed, and is not founded on any sufficient reason. The right to sue at all, before the final decision of the appeal, is merely inferred from the form of the exception, and in its nature is permissive and not peremptory. The right to sue at any time within ninety days after the decision on the appeal is clearly given in the terms which declare that such decision shall not be conclusive if suit is brought thereafter within that period; and the prohibition against suing before such decision is rendered, is express, with the saving only on the part of the claimant to sue before final decision is rendered, if such decision is delayed for more than ninety days after the date of the appeal. But there is nothing which requires him to sue until after such decision has been rendered. The whole purpose of the saving in his favor evidently is, that he shall not be required to wait longer than ninety days after his appeal for an adjudication. There is nothing to forbid his waiting, with-

out suit, as long as he has reason to expect a favorable decision upon his appeal.

From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout*, 10 Peters, 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive. For any inconveniences that may result to outgoing collectors or the representatives of those who have deceased, by the unavoidable delays in deciding appeals in the Treasury Department, and the absence of a definite period of time beyond which no suit shall be brought, it is for Congress alone to apply the needful remedy.

It follows that in such cases, of which the present is one, the limitation laws of the State in which the cause of action arose, or in which the suit was brought, do not, under section 721, Rev. Stats., furnish the rule of decision, and that it was, therefore, an error in the circuit court to apply, as a bar to the action, the limitation prescribed by the statute of New York.

For that error the judgment is accordingly reversed, and the cause remanded with instructions to grant a new trial, and

It is so ordered.

Syllabus.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* PALMES, Collector.

IN ERROR TO THE SUPREME COURT OF FLORIDA.

Argued November 8th and 9th, 1883.—Decided November 19th, 1883.

Construction of Statutes—Constitutional Law—Florida—Franchises—Immunities—Public Improvements—State Courts—Railroads—Taxation.

The legislature of Florida, acting under the Constitution of the State, passed an improvement act, exempting from taxation the capital stock of railroad companies accepting its provisions. The Alabama and Florida Railroad Company was organized, and constructed a railroad within the State limits, and became entitled to enjoy the exemption. In 1868 the State of Florida adopted a Constitution which provided for a uniform and equal rate of taxation, and that the property of corporations theretofore or thereafter to be incorporated should be subject to taxation. The road and property, rights, privileges, and franchises of the A. & F. Co. being sold under decree of foreclosure, became by mesne conveyances vested in the Pensacola and Louisville Railroad Co. In 1872 the legislature enacted that the P. & L. Co., as assignees of the A. & F. Co., should be exempted from taxation during the remainder of the period for which the A. & F. Co. would have been exempted. In 1877 the title of the P. & L. Co. to its road and other property, and its franchises, rights, privileges, easements, and immunities were conveyed to the Pensacola Railroad Company, and the legislature authorized the P. R. Co. to acquire and enjoy them. The P. & L. Co. possessed, among other things, the power to lease to a railroad company out of the State. It was claimed that this right passed to the P. R. Co., and the latter leased its railroad and property, rights, privileges, easements and immunities to the plaintiff in error. *Held*,

1 That the right of exemption from taxation did not pass from the A. & F. Co. to the P. & L. Co. by the sale under the mortgage.

2. That the language of the act of 1877 was broad enough to create that right anew, if the legislative grant was valid; but that

3. The legislature of Florida, after the adoption of the Constitution of 1868, could not make an original grant to a railroad, exempting its railroad property from taxation.

4. That any right of this kind that could have been created by the act of 1877, was personal, and not assignable.

5. That a demurrer to the bill does not admit the contrary of these facts in law which appear upon the face of the bill, and of which the court must take judicial notice.

6. That the federal question before the court is, whether the State court gave effect to a State law which impairs the obligation of a contract; in deciding which, and in determining whether there was a contract, the

Statement of Facts.

court is not necessarily governed by previous decisions of State courts, except where they have been so firmly established as to constitute a rule of property.

This was a writ of error bringing into review a decree of the Supreme Court of Florida, dismissing a bill in equity filed by the plaintiff in error, which sought to enjoin the defendant, a collector of revenue under the laws of Florida for the county of Escambia, from collecting, by a sale of property levied on for that purpose, certain taxes claimed by him to be due from the complainant.

The ground of jurisdiction is, as stated and shown in the record, that in the cause wherein the decree complained of was rendered there was drawn in question the validity of a statute of the State of Florida, to wit, "An Act entitled an act for the assessment and collection of revenue," approved March 5th, 1881, wherein and whereby certain taxes for State and county purposes were imposed upon the line of railroad extending from the city of Pensacola, in the State of Florida, to the northern boundary of the State of Florida, in the direction of Montgomery, Alabama, of which railroad the plaintiff in error is in possession and is owner; the validity of this statute being questioned on the ground that it was repugnant to the Constitution of the United States, in that it impaired the obligation of a contract, and the decision of the Supreme Court of Florida being in favor of its validity.

The contract, the obligation of which it was alleged has been thus impaired, and of which the plaintiff in error claims the benefit, was asserted to arise as follows:

The general assembly of the State of Florida passed an act, which took effect January 6th, 1855, entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," the preamble to which recites that:

"The Constitution of the State declares 'that a liberal system of internal improvements, being essential to the development of the resources of the country, shall be encouraged by the government of this State, and it shall be the duty of the general assembly, as soon as practicable, to ascertain by law proper objects of

improvements in relation to roads, canals, and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements.' "

The act then proceeded to create an internal improvement fund to aid in the construction of certain described railroads, and other works of internal improvement, by means of corporations organized or to be chartered for that purpose; and the 18th section provided as follows:

"That the capital stock of any railroad company accepting the provisions of this act shall be forever exempt from taxation, and the roads, their fixtures and appurtenances, including workshops, warehouses, vehicles, and property of every description needed for the purpose of transportation of freight and passengers, or for the repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction and for the period of thirty-five years from their completion, and that all the officers of the companies, and servants and persons in the actual employment of the companies, be and are hereby exempt from performing ordinary patrol or militia duty, working on public roads, and serving as jurors."

By an act of the general assembly of Florida, approved December 14th, 1855, it was enacted:

"That a line of railroad to be constructed from the city of Pensacola, or any other point or points on the waters of Pensacola Bay or the waters of St. Andrews Bay, to the north line of the State, leading in the direction of Montgomery, Alabama, shall be considered proper improvements to be aided from the internal improvement fund in the manner provided for, or which may hereafter be provided for, in 'An Act to provide for and encourage a liberal system of internal improvements in the State,' approved January 6th, 1855."

The Alabama and Florida Railroad Company, by an act approved January 8th, 1853, had been incorporated to build a railroad falling within that description, to extend from some point on the bay of Pensacola to some point on the boundary line between the States of Florida and Alabama, and to meet

and connect with a railroad leading thence to the city of Montgomery. This company, it was alleged in the bill, built and for a time operated the line of railroad contemplated by its charter, and became entitled to the benefits and privileges of the Internal Improvement Act of 1855, by accepting its provisions and complying with its conditions. Its line of railroad was completed about January 1st, 1860.

By virtue of a decree of foreclosure and sale at the suit of trustees of a first mortgage, to satisfy the bonds secured thereby, the railroad of the Alabama and Florida Railroad Company, and all the rights, privileges, and franchises of the said company, were sold and conveyed on August 7th, 1872, to one A. E. Maxwell, his heirs and assigns, in trust, and by him were sold and conveyed on December 10th, 1872, to the Pensacola and Louisville Railroad Company, a corporation created by the laws of Florida.

The original act incorporating the last-named company was passed July 16th, 1868, but it appeared to have been reorganized by an amendatory act which took effect February 4th, 1872, the 18th section of which was as follows:

"That the Pensacola and Louisville Railroad Company, having become the assignee of the Alabama and Florida Railroad of Florida, and the franchises of the said corporation, and being in possession of and operating the said line of road, which corporation was exempt from taxation for a limited period, the said Pensacola and Louisville Railroad company and its property, now owned or hereafter to be acquired, shall also be exempt from taxation during the remainder of said period."

On May 6th, 1878, in pursuance of a decree of the Circuit Court of the State of Florida, sitting in Leon County, a sale and conveyance was made transferring the title of the Pensacola and Louisville Railroad Company in and to its road and other property, "together with all the franchises, rights, privileges, easements, and immunities" of that company, to the Pensacola Railroad Company. This company was a corporation of the State of Florida, created by an act of the general assembly, which took effect February 27th, 1877. The second section of that act was as follows:

Statement of Facts.

"SEC. 2. *Be it further enacted*, That the said Pensacola Railroad Company be, and it is hereby, authorized and empowered to acquire by purchase and assignment all the property, rights, franchises, privileges, and immunities of the Pensacola and Louisville Railroad Company, a corporation created by an act of the general assembly of the State, approved July 16, A.D. 1868, whether the same were acquired under the laws of the States of Florida or Alabama or the laws of the United States, or as the assignee or successor of the Alabama and Florida Railroad Company; and upon completion of the said purchase and assignment, the said Pensacola Railroad Company shall be deemed in law and equity to be fully invested with and entitled to all the said property, rights, franchises, privileges, and immunities of said Pensacola and Louisville Railroad Company, as though the same were originally granted to or acquired by the said Pensacola Railroad Company."

By the 13th section of the act of 1872, amending the charter of the Pensacola and Louisville Railroad Company, it was provided that:

"It shall be lawful for said company to purchase, lease, acquire an interest in, to unite or consolidate with, lease or sell to any other railroad company in or out of the State, and to make the same one company, with a consolidated stock and property and with one board of directors," &c.

The right under this section to sell and transfer its property and franchises to a corporation of another State, it was claimed, passed from the Pensacola and Louisville Railroad Company to the Pensacola Railroad Company; and accordingly, on October 20th, 1880, the Pensacola Railroad Company conveyed to the Louisville and Nashville Railroad Company, the plaintiff in error, its railroad from its junction with the Mobile and Montgomery Railway to its terminus in Pensacola Bay, its property, real and personal, with certain exceptions, all its franchises, except the franchise to be and exist as a corporation, rights, privileges, easements, and immunities, by virtue of which conveyance the plaintiff in error claimed in the bill that it became entitled to all the rights, property, privileges, franchises, and

Argument for Plaintiff in error.

immunities of the Alabama and Florida Railroad Company, the Pensacola and Louisville Railroad Company, and the Pensacola Railroad Company, under the various acts incorporating these companies, and acts amendatory to the same.

The plaintiff in error, the Louisville and Nashville Railroad Company, was a corporation of Kentucky, and by an amendment to its charter, which took effect March 6th, 1878, reciting that its stockholders had become largely interested in the commerce and railroad business between the States of Kentucky and Tennessee and the southeast, and the several railroad connections in that part of the country, by an extension of its system, was enabled "to operate, lease or purchase, upon such terms or in such manner as they deem best, any railroad in any other State or States deemed necessary for the protection of the interest of the stockholders."

Mr. John L. Cadwalader for the plaintiff in error.

I. All the facts necessary to obtain relief are admitted. II. The State contracted with the Pensacola Railroad Company that if it would buy the old road and carry on the business, it should be exempt from taxation. The State is estopped from denying the exemption. *Humphrey* v. *Pegues*, 16 Wall. 244; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 711–2; *Railroad Company* v. *County of Hamblen*, 102 U. S. at 277. III. The State is also estopped by the decision of its own court in the case of *Gonzales* v. *Sullivan*, involving this right as between the State and the plaintiffs privy in estate. Bigelow, Estoppel, lxiii; 45, 94–5, 284; Cooley on Constitutional Limitations (5 ed.), 59–60; Freeman on Judgments, § 165; Taylor on Evidence, § 1689. *Blakemore's Case*, 2 Den. Cr. C. 410; *Smith* v. *Kernochen*, 7 How. 198; *Preble* v. *Board of Supervisors*, 8 Bissel, 358; *Finney* v. *Boyd*, 26 Wis. 366; *State* v. *C. & L. Railroad Co.*, 13 S. Car. 290. Indeed, such an estoppel by judgment may fairly be said to make part of the title to the property concerned. Brooke's Abridgment, Estoppel, 15; *Adams* v. *Barnes*, 17 Mass. 364; *Kelly* v. *Donlin*, 70 Ill. 378; *State* v. *C. & L. Railroad. Co.*, 13 S. Car. p. 313–4. IV. The

plaintiff's position is like that of a purchaser of bonds relying on the decision of the Supreme Court of a State adjudicating the validity of the bonds. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Louisiana* v. *Pilsbury*, 105 U. S. at 295. V. The constitutionality of the act of 1855 is not an open question in this court. *New Jersey* v. *Wilson*, 7 Cranch, 164; *Jefferson Bank* v. *Skelley*, 1 Black, 436; *Home for the Friendless* v. *Rouse*, 8 Wall. at 438; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Railway Company* v. *Whitton*, 13 Wall. 269; *Humphrey* v. *Pegues*, 16 Wall. at 249. That being so, the Supreme Court of Florida has decided its meaning in accordance with the contention of the plaintiff. *Gonzales* v. *Sullivan*, 16 Fla. 791; and that construction is binding upon this court. *Burgess* v. *Seligman*, 107 U. S. 20. VI. The exemption in question was not attached to any particular corporation, but to the line of road. If this can be maintained, it follows that the exemption goes with the property. *New Jersey* v. *Wilson*, 7 Cranch, 164; *Tennessee* v. *Hicks*, cited in *State* v. *Whitworth*, 8 Lea (Tenn.), 594; *Chicago, &c., Railroad Company* v. *Pfaender*, 23 Minn. 217; *St. Paul, &c., Railroad Company* v. *Parcher*, 14 Minn. at 328; *Winona, &c., Railroad Company* v. *County of Deuel*, 7 Am. & Eng. R. R. Cas. 348.

Mr. E. A. Perry for the defendant.

Mr. Justice Matthews delivered the opinion of the court.

After reciting the facts in the foregoing language, he said:

The exemption from taxation, created by the 18th section of the Internal Improvement Act of 1855, is, in every respect, similar to that which was declared in *Morgan* v. *Louisiana*, 93 U. S. 217, to be not assignable. No words of assignability are used by the legislature of the State in the language creating it, and, from its nature and context, it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and employees, and that all alike were privileges personal to the corporation or to individ-

uals connected with it, entitled to them by the terms of the law. This exemption, therefore, did not pass from the Alabama and Florida Railroad Company to the Pensacola and Louisville Railroad Company by the conveyances which passed the title to the railroad itself, and to the franchises connected with and necessary in its construction and operation.

This conclusion is confirmed by the 18th section of the act of February 4th, 1872, amending the charter of the Pensacola and Louisville Railroad Company. That section recites that the last-named company having become assignee of the Alabama and Florida Railroad Company, and of its franchises and property, "which corporation was exempt from taxation for a limited period, the said Pensacola and Louisville Railroad Company and its property, now owned or hereafter to be acquired, shall also be exempted from taxation during the remainder of its said period." Here the original exemption is declared to be the privilege of the Florida and Alabama Railroad Company, the particular corporation to which it was granted, and the necessity for conferring it by a new legislative grant upon the assignee of the property and franchises of the original corporation, rests upon the implication that the exemption did not pass to it by the assignment between the parties. And the further inference is equally necessary, that the exemption transferred or created in the new company by the terms of the legislative grant, is identical in its character as a personal and unassignable privilege to the new grantee, with that it had when it belonged to the first company.

But the 2d section of the act of February 27th, 1877, incorporating the Pensacola Railroad Company, authorized and empowered it to acquire, by purchase and assignment, all the property, rights, franchises, privileges, and immunities of the Pensacola and Louisville Railroad Company, and upon completion of such purchase and assignment, declared that the former should be deemed, in law and in equity, to be fully invested with and entitled to all the said property, rights, franchises, privileges, and immunities as though the same were originally granted to or acquired by the said Pensacola Railroad Company.

It is claimed that this language is broad enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola and Louisville Railroad Company by the 18th section of its charter. And we are of this opinion. The language is comprehensive and unequivocal, and the word immunity is apt to describe the exemption claimed. It admits of no doubt, we think, if the Pensacola and Louisville Railroad Company were entitled to this exemption, and if the legislative grant of authority to make and accept this assignment of it was valid and effective, that the right to be exempt from taxation according to its terms passed to the Pensacola Railroad Company. But it must be borne in mind that it must be taken to have vested in the latter, if at all, precisely as it had in the former, that is, as a personal privilege. The assignment in the particular instance, based upon the express authority of a new enactment, did not impart to the immunity the quality of general assignability to other successors in the title to the property and franchises, claiming only under a conveyance between the parties.

The title of the plaintiff in error, therefore, to the exemption claimed, must be supported by some other authority. This is claimed to be found in the general power, given by the 13th section of its charter, to the Pensacola and Louisville Railroad Company to lease or sell to or consolidate with any other railroad company in or out of the State, which power passed with others to the Pensacola Railroad Company by the 2d section of its charter. But as we have already seen, and as was decided in *Morgan* v. *Louisiana*, 93 U. S. 217, and *Wilson* v. *Gaines*, 103 U. S. 417, the exemption from taxation does not pass by virtue of a conveyance of the railroad and its franchises, which was all the Pensacola Railroad Company could pass under that authority, but requires for its transfer some particular and express description, indicating unequivocally the intention of the legislature that it might pass by an assignment. That does not exist in this case, and the exemption claimed by the plaintiff in error fails because it was not and could not be transferred to it, under the law, by the Pensacola Railroad Company.

It is sought to avoid this conclusion by converting the

question into one of pleading. It is said that the bill alleges, as a matter of fact, that the exemption passed to and vested in the complainant below, and that the truth of the allegation is admitted by the demurrer. But this is matter of law; the documents of title are exhibited with the bill and constitute part of the record; and we take judicial notice of their legal effect. A fact impossible in law cannot be admitted by a demurrer. In *Wilson* v. *Gaines*, 103 U. S. 417, it was inferred in the face of a demurrer, claimed to be an admission of a contrary allegation, that the sale did not pass any rights of property not described as within the lien of the mortgage.

We have thus shown that the claim of the plaintiff in error to the exemption alleged fails, because the Pensacola Railroad Company, if it possessed it, had no power to convey it. It will appear, on further examination, that it fails for a distinct and deeper reason, namely, because the Pensacola Railroad Company was itself not entitled to any such exemption. That company was incorporated by the act of February 27th, 1877, which undoubtedly did purport to grant to it, as assignee of the Pensacola and Louisville Railroad Company, in terms sufficiently broad, the immunity from taxation, which, by the 18th sec. of the act of February 4th, 1872, was expressly declared to be granted to the latter.

Both the statutes, however, were passed by the general assembly of Florida, acting under the Constitution of that State, which went into effect in 1868.

Article XII., sec. 1, of that Constitution, is as follows:

"The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, scientific, religious, or charitable purposes."

And article XIII., sec. 24, is as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational, or charitable purposes."

In 1875 this clause was amended so as to read as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational, or charitable purposes."

It is under the authority and in pursuance of the mandates of these constitutional provisions that the legislature passed the act of March 5th, 1881, under which the road of the plaintiff in error is subjected to taxation, and the validity of which is here under review.

It cannot be and is not contended that under these constitutional limitations the legislature of Florida could make an original grant to a railroad corporation exempting its railroad property from taxation.

But the grant to the Pensacola and Louisville Railroad Company by the act of 1872, and that to the Pensacola Railroad Company by the act of 1877, though in form the renewal or transfers of previously existing grants, were in fact the creation of new ones. In *Trask* v. *McGuire*, 18 Wall. 391–409, it was said, speaking of similar provisions in the Constitution of Missouri: "The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation;" and in *Shields* v. *Ohio*, 95 U. S. 319, it was decided that in cases of corporations created by consolidation, the powers of the new company did not pass to it by transmission from its constituents, but resulted from a new legislative grant, that could not transcend the constitutional authority existing at the time it took effect. It follows that the exemption from taxation in terms contained in the charters of 1872 and 1877 were void, as unauthorized and prohibited by the State Constitution of 1868.

It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms in such manner that it became impressed upon the property itself, into whosesoever hands it should afterwards come,

following the title, like an easement or a convenant running with the land, which we have shown, however, not to be the case; for, even on that supposition, the privilege is one that must be exercised by some person capable in law of accepting and exercising it. The conception of an immunity that is impressed upon the thing in respect to which it is granted is purely metaphorical. The grant is to a person in respect of a thing, and it is said to inhere in or be attached to the thing only when by its terms the grant is assignable by a conveyance of the thing, and passes as an incident with the title to each successor. There must always be a person capable not only of receiving the title, but also of accepting the conditions accompanying it, and which constitute the exemption; otherwise the conditions become impossible and void.

After the adoption of the Constitution of Florida of 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company, in 1872, the capacity at that time to receive this privilege depended altogether upon the legislative act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. The prohibition which forbids the legislature from exempting the property of railroad corporations from taxation, makes it impossible for the legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation.

It has, however, been earnestly urged upon us in argument, by counsel for the plaintiff in error, that the Supreme Court of Florida, in the case of *Gonzalez* v. *Sullivan*, 16 Fla. 791, explicity decided, in opposition to the views we have expressed, that the railroad and property, the subject of this litigation, then held by the Pensacola and Louisville Railroad Company, were exempt from taxation, according to the terms of the provision in the Internal Improvement Act of 1858; and it is pressed

upon us as a conclusive determination of the law of Florida upon the point, particularly authoritative in the present case, for the reason that the plaintiff in error, having subsequently to that decision acquired its title, may be presumed to have acted upon the faith of it.

This presumption is not pressed, however, to the extent of establishing a contract between the plaintiff in error and the State of Florida, the obligation of which has been impaired by any law subsequently passed, nor of working an estoppel against the State as *res adjudicata*, with an equivalent effect. The decision cited, therefore, cannot be allowed any greater effect as an authority than ought to be given, in cases of this description, to the judgments of State tribunals.

The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this court. *State Bank of Ohio* v. *Knoop*, 16 How. 369–391.

As was said by Chief Justice Taney in the case of *The Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416–432: "But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation, the instrument created, has or has

not been impaired by the law complained of. Now, in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law, passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State."

To the same effect are the cases of *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, and *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116.

It is true that in all these cases the State courts, whose judgments were brought into review, had construed the statutes as not creating a contract; but the principle is equally applicable in the converse case. *Burgess* v. *Seligman*, 107 U. S. 20.

It is undoubtedly true that the opinion of the Supreme Court of Florida in the case of *Gonzalez* v. *Sullivan*, 16 Fla. 791, is not consistent with that which we have expressed upon some of the principal questions involved in this case. It did declare, speaking of the effect of the Internal Improvement Act of 1855, "that an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies," and that by the act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because "the property passed, and with it, as an incident, went the exemption."

But the main topics of discussion in the opinion were, whether the Florida and Alabama Railroad was within the scope of the Internal Improvement Act of January 6th, 1855, by virtue of the amendment of December 14th, 1855, the constitutional authority to pass which was denied in argument but affirmed by the court; and the question as to the effect of the provisions of the Constitution of 1868, which we have considered, upon the capacity of the Pensacola and Louisville Railroad Company and the Pensacola Railroad Company to accept the privilege and benefit of the exemption, by legislative authority exerted in 1872 and 1877, does not seem to have been raised or noticed, much less adjudged.

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In our opinion there is no error in the judgment of the Supreme Court of Florida in the matter complained of, and

It is accordingly affirmed.

UNITED STATES to the use of WILSON, Administrator, *v.* WALKER.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Argued October 26th, 29th, 1883.—Decided November 19th, 1883.

District of Columbia—Administrator—Surety.

1. When an administrator duly appointed in the District of Columbia, is removed, and an administrator *de bonis non* appointed in his place, the administrator *de bonis non* is not entitled to demand of the administrator so removed the proceeds of a claim against the United States due the intestate and collected by the former administrator; and cannot maintain suit against a surety of the former administrator to recover damages for failure by the former administrator to pay such sum to the administrator *de bonis non*.
2. A decree by the Supreme Court of the District of Columbia, directing an administrator who has been removed to pay over to an administrator *de bonis non* appointed in his place a sum collected by the former from the United States for a claim due to the intestate, is void for want of jurisdiction, and furnishes no ground for maintaining an action against a surety of the former administrator for failure of that administrator to comply with the decree.

This was an action at law on an administrator's bond. The bond was made by Charlotte L. Ames and Cunningham Hazlett, as administrators of the estate of Horatio L. Ames, deceased, with Frederick P. Sawyer and the defendant in error, David Walker, sureties. It was in a penalty of $120,000, was payable to the United States, and was subject to the condition that the said Ames and Hazlett should well and truly perform the office of administrators of Horatio Ames, deceased, and discharge the duties of them required as such without any injury to any person interested in the faithful performance of said office. Hazlett died at a date not given, and after his death and until January 9th, 1875, Charlotte L. Ames continued to be

Statement of Facts.

sole administratrix, and on the day last named she was removed from said office by order of a justice of the Supreme Court of the District of Columbia, and on the same day Nathaniel Wilson was appointed administrator *de bonis non*. On January 22d, 1876, Charlotte L. Ames, in the settlement of her account as administratrix, was directed by the decree of a justice of said supreme court, holding a special term for the transaction of orphans' court business, to pay over to said Nathaniel Wilson, administrator *de bonis non* of the estate of Horatio Ames, deceased, on or before February 8th, 1876, the sum of $34,876.75. She failing to pay this sum or any part of it, Wilson, administrator *de bonis non*, on April 12th, 1876, brought this suit in the name of the United States for his use on the bond above mentioned against Charlotte L. Ames, David Walker, and the administrators of the estate of Frederick P. Sawyer, who, on August 31st, 1875, had departed this life. The suit was afterwards discontinued as to Charlotte L. Ames and the administrators of Sawyer, and was prosecuted against David Walker alone.

The declaration contained two counts. The first count set out the obligation of the bond without stating the condition. The second count stated the obligation of the bond and averred the condition as above set forth, and assigned as breach the failure of Charlotte L. Ames to pay over to Wilson, the administrator *de bonis non*, the said sum of $34,876.75.

The defendant pleaded to the first count the condition of the bond and its performance.

To the second count he pleaded, first, "that by the condition of the bond the defendant, as surety, became liable to the plaintiff, as administrator *de bonis non*, only for such of the assets of the estate as had not been converted into money by the said administrators or the survivor, and the defendant says that the assets of said estate consisted wholly of a claim or chose in action owing by the government of the United States, and that the money claimed in this action is the proceeds of said claim or chose in action collected from the government and thereby converted into money," etc. The second plea to the second count averred that the defendant, as surety as aforesaid,

was liable only for such assets of said estate as had not been administered by said administrators or the survivor, and that the money claimed in this action is for assets which had been administered before the removal of said surviving administrator from office and the appointment of plaintiff. Both these pleas also aver that defendant was not a party to the proceeding in which the order to pay over was made and was not served with process therein, nor did he voluntarily appear.

In his replication to the first plea (the plea of condition performed) the plaintiff set out three breaches, each of them consisting in the failure of the administratrix to pay over the money to her successor, in compliance with an order of the court.

The plaintiff demurred to the remaining pleas. The defendant demurred to the replication to the first plea.

Issue was joined on both demurrers, and the court, in general term, overruled the plaintiff's demurrer, sustained that filed by the defendant, and entered judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Mr. A. S. Worthington for the plaintiff.

Mr. W. D. Davidge for the defendant.

Mr. Justice Woods delivered the opinion of the court.

The first question presented by the record is, whether it was competent for the administrator *de bonis non* of the estate of Ames to sue on the bond of the principal administrator to recover money collected by him from the United States and not paid over or accounted for.

It is well settled at common law that "the title of an administrator *de bonis non* extends only to the goods and personal estate, such as leases for years, household goods, &c., which remain in specie and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate." Bacon's Abr., Title Executors and Administrators, B 2, 2, citing *Packman's Case*, 6 Coke, 293 (Part VI. 1, 8 *b*).

In illustration of this rule the same authority says:

"It is holden that if an executor receives money in right of

the testator, and lays it up by itself and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished as part of the testator's effects, as goods *in specie*.

"But if A dies intestate, and his son takes out administration to him and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate, this acceptance of the note is such an alteration of the property as vests it in the son; and, therefore, on his death, it shall go on to his administrator, and not to the administrator *de bonis non*."

An administrator *de bonis non* derives his title from the deceased, and not from the former executor or administrator. To him is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded, but if mixed with the administrator's own money it is considered as connected, or as, technically speaking, "administered." *Beall* v. *New Mexico*, 16 Wall. 535; *Coleman* v. *M. Murdo*, 5 Randolph, 51; *Bank of Penn.* v. *Haldeman*, 1 Penrose & Watts, 161; *Potts* v. *Smith*, 3 Rawle, 361; *Bell* v. *Speight*, 11 Humph. 451; *Swink* v. *Snodgrass*, 17 Ala. 653; *Slaughter* v. *Fronau*, 5 T. B. Mon. 19; *Gamble* v. *Hamilton*, 7 Mo. 469.

In the case of *Beall* v. *New Mexico*, 16 Wall. 535, it was said by Mr. Justice Bradley, speaking for this court, that "by the English law, as administered by the ecclesiastical courts, the administrator who is displaced, or the representative of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate—distributees, next of kin, or creditors—and the accounting may be made or enforced in the probate court, which is the proper court to supervise the conduct of administrators and executors. To the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered."

Such was the law of Maryland before the organization of the District of Columbia, and such it continues to be in the District, unless changed by statute. In the case of *Hagthorp* v. *Hook's Adm'r*, 1 Gill & Johnson, 270, it was held by the Court of Appeals of Maryland that the authority conferred by the letters of administration *de bonis non* issued under the act of 1798, No. 101, ch. 14, sec. 2, was "to administer all things described in the act of assembly as assets not converted into money, and not distributed, delivered, or retained by the former executor or administrator under the direction of the orphans' court. Such an administrator can only sue for those goods, chattels, and credits which his letters authorize him to administer."

To the same effect are the cases of *Sibley* v. *Williams*, 3 Gill & Johnson, 52; *Hagthorp* v. *Neale*, 7 Gill & Johnson, 13; and *Lemmon* v. *Hill*, 20 Md. 171.

In the case of *Ennis* v. *Smith*, 14 How. 400, it was said by this court:

"We understand by the laws of Maryland, as they stood when Congress assumed jurisdiction over the District of Columbia, that the property of a deceased person was considered to be administered whenever it was sold or converted into money by the administrator and executor, or in any respect changed from the condition in which the deceased left it. It did not go to the administrator *de bonis non* unless, on the death of the executor or administrator, it remained in specie or was the same then that it had been when it came to his hands. When the assets have been changed, it is said in Maryland that they have been administered."

But counsel for appellant contend that this rule applies only to the case where an executor or administrator has died, and not to the case where he had been removed; that while the words "not administered," in the commission of an administrator *de bonis non*, still frequently mean not changed in form, yet, as applied to an administrator *de bonis non* in place of a living administrator, they have come to mean almost invariably not fully and legally administered; and it is said that this dis-

tinction appears in the laws of Maryland in force before the organization of the District of Columbia, and continuing in force until the passage of the act of February 20th, 1846, "to enlarge the powers of the several orphans' courts held in and for the District of Columbia." 9 Stat. 4.

In support of this view we are referred to chapter 101 of the Maryland act of 1798, 2 Kilty's Laws, by which it is provided in sub-chapter 5, sec. 5, that where letters testamentary have been granted in a case of the discovery of a will, and consequent revocation of letters of administration, it shall be the duty of the administrators to file their accounts and to "deliver to the executor, on demand, all the goods, chattels, and personal estate in their possession belonging to the deceased," and on failure their administration bonds shall be liable to be put in suit; and to sub-chapter 6, sec. 13, of the same statute, where it is provided that if an executor or administrator shall not file his inventory within thirty days, his letters may be revoked and other letters granted, and thereupon the power of such executor or administrator shall cease, and he shall deliver up to the person obtaining such letters all the property of the deceased in his hands.

These statutes do not tend to support the distinction relied on by plaintiff in error; for, as is well established by the authorities we have cited, the goods and chattels, personal estate and property of the deceased are such only as remain unchanged and in specie. When a debt due the deceased is collected or a chattel of his estate is sold, the money received becomes the property of the administrator, and he is accountable therefor to those beneficially interested in the estate, and, under the acts referred to, the removed executor or administrator was not bound to turn it over to his successor.

It may be conceded that the words unadministered assets, as used in statutes, have sometimes been construed to include the proceeds of assets sold or collected and not accounted for or paid over; and that an administrator *de bonis non* might call a removed administrator to account for such proceeds. But whatever may have been the rule elsewhere upon this question, we think that by the provisions of the act of Congress

of February 20th, 1846, to enlarge the power of the several orphans' courts held in and for the District of Columbia, 9 Stat. 4, reproduced in sections 975, 976, 977, 978 of the Revised Statutes relating to the District of Columbia, the common law is not changed, and that the statute applies the same rule to the case of a removed as has been applied to the case of a deceased executor or administrator.

Section 974 provides that if the security on the bond of an executor or administrator shall become, for any cause, insufficient, the court may order him to give further security. Section 975 provides that if he fails to comply with such order the court may remove him, and appoint a new administrator.

Section 976 is as follows:

"The court shall further have power to order and require any assets or estate of the decedent which may remain unadministered to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment or any other legal process."

We think the meaning of this act is plain. When it was passed, the words "assets or estate of the decedent which remain unadministered," had a uniform and well settled meaning in the statute law of Maryland, in force in the District of Columbia, and that meaning, as we have seen, was assets or estate remaining in specie and unchanged in form. The act of 1846 must be construed as using the words in this well settled signification, unless the contrary appears. But there is not a word in the act of 1846 to indicate that Congress intended to give any new or different meaning to these words.

Independently of this consideration, the meaning of the law is not doubtful. It would be an unnatural construction to say that the law required the removed executor or administrator to deliver to his successor assets which had been converted or wasted, and which no longer existed, and when there remained only a right to sue for their value. When assets have been turned into money by an executor or administrator and the money mingled with his own, the assets have ceased to exist as assets or estate of the decedent.

It is the assets and estate of the decedent that are to be delivered. The authorities we have referred to all concur in the proposition that where personal property of an estate under administration has been sold or a debt collected, the proceeds are not property of the decedent, but are the individual property of the executor or administrator, and he is liable to an action for not accounting.

When assets have been turned into money by an executor or administrator, he is bound to account, not for the identical money received, but for an equal amount; and if he fails to account for and pay over this equal amount he is liable in damages, which are measured by the proceeds of the assets so turned into money. The statute surely cannot mean that the removed administrator must "deliver" damages to his successor.

Our conclusion is therefore that the act of February 20th, 1846, does not apply a different rule to the case of an administrator *de bonis non* succeeding a removed administrator, from that applied to one succeeding a deceased administrator, and that no action lies on the bond sued on in this case in favor of the administrator *de bonis non* to recover money collected by Mrs. Ames from the United States on a claim belonging to the estate of the decedent. On the contrary, the defendant, as surety on the bond of the removed administrator, is liable only at the suit of creditors, distributees, and legatees entitled to the funds.

The next point taken by the plaintiff in error is that the decree of the justice of the Supreme Court of the District, directing the administratrix to pay over the fund to her successor, was conclusive in this suit.

We are of opinion that in making the order referred to, the Supreme Court of the District exceeded its jurisdiction, and that its order is for that reason void. Its authority, and its sole authority for making the order, is to be found in section 976, above referred to, of the Revised Statutes relating to the District of Columbia:

"The court shall have further power to order and require any

assets or estate of the decedent which may remain unadministered to be delivered to the newly appointed administrator *de bonis non.*"

It appears from the pleadings in the case that the money ordered to be paid was the proceeds of a debt due the decedent which his administratrix had collected. It was not, therefore, as we have seen, assets or estate of the decedent. It was the property of the removed administrator. The court was therefore without power to direct the payment of the money to the administrator *de bonis non.* Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. The limitation was well expressed by Mr. Justice Swayne, in *Cornett* v. *Williams*, 20 Wall. 226, when he said:

"The jurisdiction having attached in this case, everything done, within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud."

The case of *Bigelow* v. *Forrest*, 9 Wall. 339, is in point. It was an action of ejectment. Bigelow, who was defendant in the court below, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the act of July 17th, 1862. Referring to this decree, Mr. Justice Strong, speaking for this court said:

"Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the act of Congress the district court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest."

And the judgment of the court was that so much of the decree of the district court as was in excess of its powers was void.

In *Ex parte Lange*, 18 Wall. 163, Mr. Justice Miller deliver

ing the opinion of the court, after stating that the circuit court had exceeded its authority in pronouncing sentence upon Lange, and that its judgment was therefore void, said:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

In the case of *Windsor* v. *Mc Veigh*, 93 U. S. 274, Mr. Justice Field, after a review of the cases bearing upon this subject, announces their result as follows:

"The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator *de bonis non*. The court made an order directing the delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void.

The result of these views is, that

The judgment of the Supreme Court of the District of Columbia must be affirmed.

Statement of Facts.

MEATH *v.* BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argued November 8th, 1883.—Decided November 19th, 1883.

Limitations—Mississippi Statutes—Practice.

1. When the court below finds generally for a defendant, and also makes special findings on the issues, no error can be assigned on the special findings.
2. The subject of the action in this suit being an instrument under seal, and the cause having accrued in the State of Mississippi on the 1st day of April, 1871, the action is subject to the provisions of the code of the State of Mississippi of 1857 so far as it affects the limitation of the action.
3. When it appeared in a suit prosecuted in the State of Mississippi that the plaintiff at the time when the action was begun had no legal title to the matter which was the subject of the suit, but acquired his interest therein subsequently to the commencement of the suit, and judgment was rendered accordingly, that was not a judgment on "a matter of form" in the sense in which that expression is used in § 2163 of the Mississippi Code of 1871 ; but one which may be pleaded in answer to another suit brought for the same cause of action.

Action upon a sealed instrument.

The plaintiff in error, Patrick G. Meath, who was the plaintiff below, brought this suit, on December 21st, 1878, against the Board of Mississippi Levee Commissioners. It was founded on a contract in writing, under seal, between Meath and the defendants, dated April 13th, 1869, by which Meath covenanted to construct certain levees in the State of Mississippi on or before April 1st, 1871, and the defendants covenanted to pay him a specified price per cubic yard in coupon bonds of the board of levee commissioners maturing on January 1st, 1876.

The declaration averred that the plaintiff expended large sums of money in the purchase of tools, etc., for the performance of said work, and while he was actually engaged therein, and with ample means to accomplish it, the defendants, on January 10th, 1870, without any fault or negligence of plaintiff, ordered and coerced him to desist from work on said levees

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until further orders from them; that he was ready, able, and willing to go on with the work, and remained awaiting the orders of the defendants until April 1st, 1871, and was prevented from resuming the work by the wrongful acts of the defendants.

The declaration further averred that "on March 26th, 1877, plaintiff brought his suit in the Circuit Court of the United States for the Southern District of Mississippi on said contract, and the same was tried on or about April 5th, 1878, and was defeated for matter of form, in this, to wit, because though it appeared in the evidence that one Thomas Boyle had purchased, for the sole use and benefit of plaintiff, the said claim under said covenant against defendants, at a sale thereof made by plaintiff's assignee in bankruptcy, the formal assignment made by him to plaintiff had not in fact been executed and delivered until after the bringing of said action, though antedated to conform to the fact, and, therefore, that the said action should have been brought in the name of the said Boyle, for plaintiff's use."

The plaintiff claimed in the present action the sum of $70,000 as due him for work done and accepted under said contract, and a large sum for damages, because he was not permitted to complete the work.

The defendant filed eight pleas, but as the judgment of the court below was based exclusively on the sixth and seventh pleas, the others need not be noticed. The sixth plea averred that "the several supposed causes of action in said declaration mentioned, if any such there were or still are, did not, nor did any or either of them, accrue to the said plaintiff at any time within seven years next preceding the commencement of this suit."

The seventh plea set out the facts in regard to such former suit, begun March 26th, 1877, referred to in the declaration, denied that it was decided against the plaintiff for matter of form only, and averred that it was so decided on matter of substance; and concluded by averring that "the present action was not brought within seven years after the cause of action accrued," and was, therefore, barred by the statute.

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The plaintiff demurred to these pleas, and his demurrer was overruled. Thereupon he filed his replication taking issue.

The parties waived a jury and submitted the issues of fact to the court by the following agreement:

"In this cause a jury is waived, and it is agreed to submit the cause to the court in lieu of a jury, to be decided on the law and the evidence, and separate findings thereof to be rendered by the court, so that the decision may be finally reviewed by the Supreme Court of the United States. The court having, in the decision of the questions arising upon the demurrers to sixth and seventh pleas filed, expressed the opinion that the pending of the former suit could not be availed of to prevent the bar of the statute of limitations, and that this action is barred by limitation, it is agreed that the sole question shall be presented upon the pleadings and proof, and that only such evidence as in the judgment of the court bears upon that issue shall be incorporated in its findings and presented to the Supreme Court of the United States; and that the record for said court shall consist of the pleadings and exhibits, the orders of the court, the findings of fact and law in the cause, and this agreement. And it is further agreed that should the supreme court differ in opinion with and reverse the circuit court, the cause shall be remanded for trial on its merits on all the other questions in the case."

The cause was tried under this agreement and the court made both a general and special finding of facts. The general finding was as follows:

"The court having heard the evidence upon the sixth and seventh pleas of the defendant, and replications thereto, &c., finds said issues in favor of defendants, and that said plaintiff's right of action when this suit was brought was barred by the statute of limitations."

The court found, by its special findings, as follows: the plaintiff's cause of action accrued in this case on April 1st, 1871, and, what the record also showed, this action was brought December 21st, 1878; on March 26th, 1877, the plaintiff brought an action against the defendant on the contract set out in and

exhibited with the declaration in this cause; the defendant pleaded a transfer of all interest in said contract to an assignee in bankruptcy under the bankrupt law; to said plea the plaintiff replied that his assignee in bankruptcy had sold the said contract to one Boyle, who purchased it for the plaintiff, and assigned it to him some time in January, 1877; issue was joined on this replication; this issue was submitted to the court for trial; on the trial it was shown that the assignment by Boyle to Meath was made on January 28th, 1878; on this state of facts the court found that the plaintiff did not have the legal title to the claim sued on when the action was commenced; and judgment therein was rendered in that suit for the defendants.

Upon the general and special findings, the court found, as matter of law, that this action was barred by the limitation of seven years, and rendered judgment for the defendants. To this conclusion of law the plaintiff excepted, and sued out the present writ of error.

Mr. James Lowndes, for the defendants in error.

Mr. Justice Woods delivered the opinion of the court.

It is insisted, by the plaintiff in error, that the special findings of the court are fatally defective, because they do not find the contract by which the suit was brought or fix the date when the cause of action accrued, and that for this reason the judgment of the circuit court should be reversed. We might dismiss this assignment of error on the ground that there was a general finding for the defendants on all the issues of fact, and that no error can be assigned on such a finding. *Tioga Railroad* v. *Blossburg and Corning Railroad*, 20 Wall. 137. But the special findings also fix specifically the date when the plaintiff's right of action accrued, to wit, on the first day of April, 1871. In considering the sufficiency of the special findings the stipulation between counsel, for submitting the cause to the court, must be kept in mind. The only questions which, by this agreement, were to be submitted to the court were the issues raised by the replication to the sixth and seventh pleas,

being pleas of the statute of limitations. The contract and breaches, as set out in the declaration, were, for the purpose of this trial, taken for granted; they were confessed by the pleas, and, as a matter of avoidance, the statute of limitations was set up. The court by its general and special findings, has declared, as a conclusion of fact, that the matters set up in the pleas of the statute of limitations were proven. We think the findings pass upon every issue submitted to the court, and that they are not imperfect or defective.

The limitation law of Mississippi applicable to this case was as follows:

"ART. 6. All actions of debt or covenant founded upon any bond, obligation or contract, under seal or upon the award of arbitrators, shall be commenced within seven years next after the cause of such action accrued, and not after."

The Revised Code of Mississippi of 1871 failed to provide any limitation for causes of action under seal which arose after October 1st, 1871, the date fixed by section 2938, when that code should take effect, but did contain the following provision:

"SEC. 2172. The several periods of limitation prescribed by this chapter shall commence from the date when it shall take effect, but the same shall not apply to any action commenced nor to any cases where the right of action or of entry shall have accrued before that time, but the same shall be subject to the laws now in force; but this law may be pleaded in any case where a bar has accrued under the provisions thereof."

It will appear from these provisions of the statute law that the absence of any limitation of actions upon contracts under seal, between October 1st, 1870, and April 19th, 1873, can have no effect upon the controversy in this case. When the cause of action in this case arose, as found by the court, to wit, on April 1st, 1871, article 6, page 400, of the Code of 1857, above quoted, barring actions on sealed instruments in seven years, was in force, and this limitation was expressly continued by the Revised Code of 1871.

Opinion of the Court.

The case of *Furlong* v. *The State*, 58 Miss. 717, relied on by counsel for plaintiff in error, can have no application to the case, for in that suit the cause of action accrued after the Code of 1871 had taken effect. Nothing was decided in that case which has any bearing on this.

Therefore, upon the facts specially found, namely, that the cause of action in this case accrued on April 1st, 1871, and that this suit was not brought until December 21st, 1878, it is apparent that the sixth plea of defendant is sustained, unless this case is saved by the averment in the declaration that the suit was brought within a year after a former suit for the same cause of action had been defeated for matter of form.

It is, therefore, to be considered whether, upon the special findings, the plaintiff is entitled to the saving clause of section 2163 of the Code of 1871, which is as follows:

"If, in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated by the death or marriage of any party thereto, or for any matter of form, ... the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit."

The findings show that on March 26th, 1877, an action, in all respects similar to this, was brought, on the same contract sued on in this case, by the plaintiff in error against the same defendants, and that, upon the trial of that suit the court found that the plaintiff did not have the legal title to the claim sued on when the said action was commenced, and judgment was accordingly rendered in favor of the defendant and against the plaintiff.

Upon these findings the circuit court was of opinion in this case that the former action was not defeated for any matter of form, and therefore that the plaintiff's cause did not fall within the exception of section 2163 of the Code of 1871, and was barred by the limitation of seven years applicable to contracts under seal.

We are of opinion that the facts thus specially found sustain the judgment of the circuit court in this case. The Supreme

Court of Mississippi, in the case of *M. & C. R. R. Co.* v. *Orr*, 43 Miss. 279, has construed the phrase "for matter of form" in section 2163, and declared that it "relates to technical defects in the form of the action, or pleadings, or proof, or to variances between the one and the other."

This case it is evident does not fall within this rule. The action brought by plaintiff on March 26th, 1877, was defeated because it appeared from the proof that when it was brought the plaintiff had no cause of action. The issue was deliberately and squarely presented by the pleadings in that former suit whether at the time of its commencement the right of action was in the plaintiff. The defendants averred it to be in the plaintiff's assignee in bankruptcy. The plaintiff replied that the contract on which his action was based had been bought at the assignee's sale and assigned to Thomas Boyle, who, before the commencement of the action, to wit, in January, 1877, had assigned and transferred it to him. On this the defendant took issue, and on that issue the cause was tried.

Upon the trial it turned out that the assignment by Boyle to the plaintiff was not made until January 28th, 1878, more than ten months after the action was brought, and the finding and judgment on the issue submitted was against the plaintiff and for the defendant.

Upon this state of facts we think the former suit was defeated, not for any matter of form, but for matter of substance.

The plaintiff failed in his action because the legal title to the contract on which he brought his suit was in another, because the evidence did not sustain the issue upon which he had staked his cause. The present case, therefore, does not fall within the exception prescribed by section 2137 of the Code of Mississippi of 1871, and is barred by the limitation of seven years prescribed by the Code of 1851, applicable to contracts under seal.

The judgment of the circuit court must be affirmed.

MONONGAHELA NATIONAL BANK *v.* JACOBUS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Submitted October 26th, 1883.—Decided November 19th, 1883.

Executor and Administrator—Statutes—Witness.

A creditor of A obtained judgment against him. He levied on capital stock in a corporation claimed by B under an assignment from A, and in the original suit summoned B as garnishee of A to answer. Pending these proceedings A died, and his administrator was substituted as defendant. B and the administrator were offered as witnesses on B's behalf in regard to the transactions at the time of the assignment: *Held,* That each was a competent witness on his own motion, notwithstanding the proviso in § 858 Rev. Stat., "That in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward unless called to testify thereto by the opposite party or required to testify thereto by the court."

Proceedings subsequent to judgment against a person as garnishee, who claimed title to property taken on execution as the defendant's property. The facts are stated in the opinion of the court.

Mr. D. T. Watson for the plaintiffs.

Mr. Thomas C. Lazear and *Mr. J. W. Douglas* for the defendant.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error having recovered a judgment for $9,056.12 against Alfred Patterson, in the Circuit Court of the United States, for the Western District of Pennsylvania, caused an execution attachment to be issued against the Fayette County Railroad Company and Samuel H. Jacobus, the defendant in error, attaching, as the property of Patterson, certain shares of the capital stock of that company, which stood in the name of Jacobus. The attachment was duly served upon Patterson, Jacobus, and the railroad company. The controlling issue in the case is whether the stock was the property

of Alfred Patterson, and liable to be attached in satisfaction of the judgment against him. Jacobus claims that the stock became his property in virtue of an unrecorded assignment and transfer, for a valuable consideration, by Alfred Patterson prior to the rendition of that judgment; consequently, that it is not liable to the bank's attachment.

In the progress of the litigation Patterson died, and his administrator was substituted of record as party defendant.

The contention on the part of the bank is that the assignment was by an insolvent debtor in trust for certain preferred creditors, and that it must have been recorded in order to protect the stock from the attachment of judgment creditors; that of Jacobus is, that the assignment was made in consideration of his assumption of certain liabilities of the debtor, and without any intent upon the part of either himself or Patterson to hinder, delay, or defraud the creditors of the latter.

At the trial, Jacobus, a witness in his own behalf, was allowed, over the objections of plaintiff, to testify as to what took place between him and Patterson at the time the stock in question was assigned by the latter to the former. The administrator was also permitted, over the objection of the plaintiff, to prove —he being present on the occasion of the assignment—that the assumption by Jacobus of certain debts of Patterson's was in consideration, and on the faith, of the transfer of this stock. This testimony bore directly upon the controlling issue in the case between the bank and Jacobus.

Whether Jacobus and the administrator of Patterson were competent witnesses depends upon the construction of section 858 of the Revised Statutes, which provides that

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court."

Opinion of the Court.

In *Potter* v. *National Bank*, 102 U. S. 163, we held that in actions in which judgment may be rendered for or against an executor, administrator, or guardian, it is no objection to the competency of the witness that he is interested in the issue to be tried; because, in such cases, the statute excluded only parties to the record, that is, those who, according to the established rules of pleading and evidence, are parties to the issue. It is now argued by plaintiff in error that Jacobus, as well as the administrator of Alfred Patterson, are parties to the record, and, unless called by the court or the opposite party, are incompetent to testify as to any transactions or statements by the intestate.

We are of opinion that they were each competent as a witness on the issue between the bank and Jacobus, as to whether these shares of stock were the property of the latter, and subject to the former's attachment. The liability of Alfred Patterson to the bank had become fixed by the judgment against him for the debt. There can be no judgment against his estate in this action, by which the amount of the bank's claim can be increased, or whereby Patterson's estate can be released from liability in whole or in part. The real issue was between the bank and Jacobus, and, consequently, the case is within the first clause of section 858, which provides that "No witness shall be excluded . . . in any civil action because he is a party to or interested in the issue tried." Within the meaning and object of the proviso, this is not an action by or against an administrator, on which judgment may be rendered for or against him.

We are of opinion that there was no error in admitting Jacobus or the administrator of Patterson to testify on their own motion.

In reference to the merits of the case, we do not perceive that any error was committed by the circuit court. The jury were properly instructed as to the law of the case.

The judgment is affirmed.

Statement of Facts.

GRACE and Another *v.* AMERICAN CENTRAL INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Argued October 19th, 1883.—Decided November 19th, 1883.

Agent—Contract—Evidence—Insurance—Jurisdiction—Pleading.

1. A fire insurance policy contained this clause : "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transactions relating to this insurance :" *Held,* that this clause imports nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy ; that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.
2. Parol evidence of usage or custom among insurance men to give such notice to the person procuring the insurance was inadmissible to vary the terms of the contract.
3. The doctrine reaffirmed, that when jurisdiction of the circuit court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear affirmatively and with equal distinctness in other parts of the record. An averment that parties reside, or that a firm does business, in a particular State, or that a firm is "of" that State, is not sufficient to show citizenship in such State.
4. Where the record does not show a case within the jurisdiction of a circuit court, this court will take notice of that fact, although no question as to jurisdiction had been raised by the parties.

This was an action upon a policy of fire insurance issued September 26th, 1877, by the American Central Insurance Company of St. Louis to the firm of Wm. R. Grace & Co.

The circumstances under which it was issued were these: A

clerk of Wm. R. Grace & Co., charged with the duty of effecting insurance against loss by fire upon their property, employed one W. R. Moyes, a broker in the city of New York, to obtain insurance, in a specified amount, for his principals. Moyes instructed one Anthony, an insurance broker and agent in Brooklyn, who had on previous occasions obtained policies for Grace & Co., to procure the required amount of insurance. Anthony obtained the policy in suit from the general agents in New York city of the defendant company, mailed or delivered it to Moyes, and by the latter it was delivered to Grace & Co. not later than the day succeeding its date. On the morning of October 6th one Carrol, for the insurance company, verbally notified Anthony that the company refused to carry the risk, and required the policy to be returned. There was some conflict in the testimony as to what occurred between Carrol and Anthony on this occasion. But, in the view which the court took of the case, it was conceded that Anthony gave Carrol to understand that the policy would be returned to the company or its agents. The property insured was destroyed by fire on the night of October 6th, 1877, or early on the morning of the 7th. Prior to the fire neither the insured, nor their clerk by whose instructions the policy was obtained, had any knowledge or notice of the conversation between Carrol and Anthony, or of the fact that the company had elected not to carry the risk. At the trial it was admitted that the contract between the parties was fully executed upon the delivery of the policy to the insured. The plaintiff sued out his writ of error to reverse that judgment.

The eighth clause of the policy was in these words:

"This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured

named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance."

The court refused, although so requested by plaintiffs, to rule that Anthony was not, within the meaning of the policy, their agent for the purpose of receiving notice of its termination; but charged the jury, in substance, that Anthony was, for such purpose, to be deemed the agent of the insured. Exception was taken in proper form by plaintiffs, as well to the refusal to give their instruction, as to that given by the court to the jury. A verdict was returned for the company, and judgment thereon was entered. The plaintiff sued out his writ of error to reverse that judgment.

Mr. Winchester Britton, for the plaintiffs in error, cited, as to the construction of the contract, *Whited* v. *Germania Fire Ins. Co.*, 76 N. Y. 415; *Rohrbach* v. *Same*, 62 N. Y. 47; *Alexander* v. *Same*, 66 N. Y. 464; *Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434; *Standard Oil Co.* v. *Triumph Ins. Co.*, 64 N. Y. 85; and as to usage and custom, *Bradley* v. *Wheeler*, 44 N. Y. 495; *Higgins* v. *Moore*, 34 N. Y. 417; *Esterly* v. *Cole*, 3 Coms. 502; *Dawson* v. *Kittle*, 4 Hill, 107; *Wheeler* v. *Newbould*, 5 Duer, 29; *Brueck* v. *Phœnix Ins. Co.*, 21 Hun, 542; *Wallis* v. *Bailey*, 49 N. Y. 464; *Berkshire Woolen Co.* v. *Proctor*, 7 Cush. 417; *Cunningham* v. *Fonblanque*, 6 C. & P. 44; *Garey* v. *Meagher*, 33 Ala. 630; *Chesapeake Bank* v. *Swain*, 29 Md. 483; *Mills* v. *Hallock*, 3 Edw. Ch. 652; *Haskins* v. *Warren*, 115 Mass. 514; *Randall* v. *Smith*, 63 Me. 105, and note; *Adams* v. *Pittsburg Ins. Co.*, 76 Penn. State 411; *Harris* v. *Turnbridge*, 83 N. Y. 92; Lawson on Usages and Customs, pp. 23, 48, 52, 55, 63, 89, 97; *Fisher* v. *Sargeant*, 10 Cush. 250; *Winsor* v. *Dellaway*, 4 Met. 221.

Mr. George W. Parsons, for the defendant in error, cited, as to the construction of the contract, Story on Agency, § 140; *Standard Oil Co.* v. *Insurance Co.*, 64 N. Y. 85; *Anderson* v. *Connley*, 21 Wend. 279; *Insurance Co.* v. *Insurance Co.*, 66 N. Y. 119; *Insurance Co.* v. *Stark*, 6 Cranch, 268; *Bennett* v. *Insurance Co.*, 81 N. Y. 273; *Insurance Co.* v. *Mueller* (*Supreme Ct. of*

Penn.), 8 Ins. Law Jour. 263; *Armour* v. *Insurance Co.*, 47 N. Y. Superior Ct. R. 352; *Bank of U. S.* v. *Davis*, 2 Hill, at 451; *McEwen* v. *Insurance Co.* 5 Hill, 101; *Fulton Bank* v. *Sharon Canal Co.*, 4 Paige, at 137; *Boyd* v. *Vanderkemp*, 1 Barb. Ch. 273; and as to usage, Parsons on Contracts, 52; *Hinton* v. *Locke*, 5 Hill, 437; *McPherson* v. *Cox*, 86 N. Y. 472; 2 Phillips on Evidence (4th Am. Ed.), 798; *Blachett* v. *Royal Exch. Ass. Co.*, 2 Cromp. and J. 244; *Hinton* v. *Locke*, 5 Hill, 437; *Grant* v. *Maddox*, 15 M. and W. 737; *Yates* v. *Pyne*, 6 Taunt. 446; *Keener* v. *Bank of United States*, 2 Penn. State 237; *Sweet* v. *Jenkins*, 1 Rhode Island, 147; *Mumford* v. *Hallett*, 1 John. R. 433; *Rankin* v. *Insurance Co.*, 1 Hall (N. Y.), 682; *Partridge* v. *Life Insurance Co.*, 1 Dill. 139; *Barnard* v. *Kellogg*, 10 Wall. 383; *Steinbach* v. *Insurance Co.*, 13 Wall. 183; *Blackett* v. *Assurance Co.*, 2 Cromp. & Jer. 244; *Rogers* v. *Insurance Co.*, 1 Story's R. 603; *Winnesheik Ins. Co.* v. *Holzrafe*, 53 Ill. 516.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the above language, he said:

The charge, in connection with the opinion delivered by the learned judge who presided at the trial, indicates that, in his judgment, the words in the eighth clause—"It is a part of this contract that any person, other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy,"—were intended to be qualified by the words "in any transaction relating to this insurance." Upon this ground it was ruled that notice of the termination of the policy was properly given to Anthony, who personally procured the insurance. We do not concur in this interpretation of the contract. The words in their natural and ordinary signification import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy. Representations by that person in procuring the policy were to be regarded as made by him in the capacity of agent of the insured. His knowledge or information, pending negotiations

for insurance, touching the subject-matter of the contract, was to be deemed the knowledge or information of the insured. When the contract was consummated by the delivery of the policy he ceased to be the agent of the insured, if his employment was solely to procure the insurance. What the company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance, was, to exclude the possibility of such person being regarded as its agent, "under any circumstances whatever, or in any transaction relating to this insurance." This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used. There is, in our opinion, no room for a different interpretation. If the construction were doubtful, then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them, and, therefore, in cases like this, most favorably to the insured. The words are those of the company, not of the assured. If their meaning be obscure it is the fault of the company. If its purpose was to make notice to the person procuring the insurance, of the termination of the policy, equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled.

As the uncontradicted evidence was that Anthony's agency or employment extended only to the procurement of the insurance, the jury should have been instructed that his agency ceased when the policy was executed, and that notice to him, subsequently, of its termination was ineffectual to work a rescission of the contract.

At the trial below evidence was offered by the company, and was permitted, over the objection of plaintiffs, to go to the jury, to the effect that, when this contract was made, there existed in the cities of New York and Brooklyn an established, well-known general custom in fire insurance business, which authorized an insurance company, entitled upon notice to terminate its policy, to give such notice to the broker by or

through whom the insurance was procured. This evidence was inadmissible because it contradicted the manifest intention of the parties as indicated by the policy. The objection to its introduction should have been sustained. The contract, as we have seen, did not authorize the company to cancel it upon notice merely to the party procuring the insurance—his agency, according to the evidence, not extending beyond the consummation of the contract. The contract, by necessary implication, required notice to be given to the insured, or to some one who was his agent to receive such notice. An express written contract, embodying in clear and positive terms the intention of the parties, cannot be varied by evidence of usage or custom. In *Barnard* v. *Kellogg*, 10 Wall. 383, this court quotes with approval the language of Lord Lyndhurst in *Blackett* v. *Royal Exchange Assurance Co.*, 2 Cromp. & Jervis, 244, that "usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom. Whatever apparent conflict exists in the adjudged cases as to the office of custom or usage in the interpretation of contracts, the established doctrine of this court is as we have stated. *Partridge* v. *Insurance Co.*, 15 Wall. 573; *Robinson* v. *United States*, 13 Wall. 363; *The Delaware*, 14 Wall. 579; *Nat. Bank* v. *Burkhardt*, 100 U. S. 686.

The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do not feel at liberty to pass without notice. *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450; *Jackson* v. *Ashton*, 8 Pet. 148. As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. *Turner* v. *Bank of North America*, 4 Dall. 8; *Ex parte Smith*, 94 U. S. 455; *Robertson* v. *Cease*, 97 U. S. 646. In the last case it is said

that "where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record." *Railway Co.* v. *Ramsay*, 22 Wall. 322; *Briges* v. *Sperry*, 95 U. S. 401. In *Brown* v. *Keene*, 8 Pet. 112, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive.

The present case was commenced in the Supreme Court of New York, and was thence removed, on the petition of the defendant, to the Circuit Court of the United States for the Eastern District of New York. The record does not satisfactorily show the citizenship of the parties. The complaint filed in the State court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace, and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that State. The petition for the removal of the cause shows that the defendant is a corporation of the State of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri. The record, however, fails to show of what State the plaintiffs are citizens. They may be doing business in and have a residence in New York without, necessarily, being citizens of that State. They are not shown to be citizens of some State other than Missouri. *Bingham* v. *Cabot*, 3 Dall. 382; *Abercrombie* v. *Dupuis*, 1 Cranch, 343; *Jackson* v. *Twentyman*, 2 Pet. 136; *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450; *Hornthall* v. *Collector*, 9 Wall. 560; *Brown* v. *Keene*, *supra*; *Robertson* v. *Cease*, *supra*.

It is true that the petition for removal, after stating the residence of the plaintiffs, alleges "that there is, and was at the time when this action was brought, a controversy therein between citizens of different States." But that is to be deemed the unauthorized conclusion of law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which

recites the names of the firm of Wm. R. Grace & Co., and describes it as "of the county of Kings and State of New York." If that bond may be considered as part of the record for the purpose of ascertaining the citizenship of the parties, the averment that the plaintiffs are "of the county of Kings and State of New York" is insufficient to show citizenship. *Bingham* v. *Cabot*, 3 Dall. 382; *Wood* v. *Wagnon*, 2 Cranch, 9; *Jackson* v. *Ashton*, *supra*.

As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate for the benefit of parties at another trial the conclusion reached by us on the merits. And we have called attention to the insufficient showing as to the jurisdiction of the circuit court, so that, upon the return of the cause, the parties may take such further steps, touching that matter, as they may be advised.

The judgment is reversed and the cause remanded, with directions to set aside the judgment, and for such further proceedings as may not be inconsistent with this opinion.

STATE OF LOUISIANA *ex rel.* FOLSOM *v.* MAYOR AND ADMINISTRATORS OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argued April 9th and 10th, 1883.—Decided November 19th, 1883.

Constitutional Law—Contract—Judgment—Municipal Corporation—Tort.

1. The right to demand reimbursement from a municipal corporation for damages caused by a mob, is not founded on contract. It is a statutory right, and may be given or taken away at pleasure.
2. The fact that a statutory right to demand reimbursement from a municipal corporation for damages caused by a mob has been converted into a judgment does not make of the obligation such a contract as is contemplated in the provision of Article I. Section 10 of the Constitution, that no State shall pass any law impairing the obligation of contracts.
3. The term "contract," as used in the Constitution, signifies the agreement of

two or more minds for considerations proceeding from one to the other, to do or not to do certain acts.

4. To deny to a municipal corporation the right to impose taxes to such an extent as to make it impossible to pay a judgment recovered against it for injuries done by a mob is not depriving the owner of the judgment of property within the meaning of the Fourteenth Amendment to the Constitution.

Mandamus prayed for in the Supreme Court of Louisiana to the city authorities of New Orleans, to compel them to levy taxes and pay a judgment recovered by the relator. The prayer being denied, the decision was brought here on error for review, on the ground of repugnancy to the Constitution and laws of the United States. The facts appear in the opinion of the court.

Mr. Thomas J. Semmes for the plaintiffs in error.
Mr. W. F. Morris for the defendants in error.

Mr. Justice Field delivered the opinion of the court.

The relators are the holders of two judgments against the city of New Orleans, one for $26,850, the other for $2,000. Both were recovered in the courts of Louisiana; the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages done to the property of the plaintiffs therein by a mob or riotous assemblage of people in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. Rev. Stats. of La., 1870, sect. 2453.

The judgments were duly registered in the office of the comptroller of the city, pursuant to the provisions of the act known as No. 5 of the extra session of 1870, and the present proceeding was taken by the relators to compel the authorities of the city to provide for their payment. At the time the injuries complained of were committed, and one of the judgments was recovered, the city of New Orleans was authorized to levy and collect a tax upon property within its limits of one dollar and seventy-five cents upon every one hundred dollars of its assessed value. At the time the other judgment

was recovered this limit of taxation was reduced to one dollar and fifty cents on every one hundred dollars of the assessed value of the property. By the Constitution of the State, adopted in 1879, the power of the city to impose taxes on property within its limits was further restricted to ten mills on the dollar of the valuation.

The effect of this last limitation is to prevent the relators, who are not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met.

The relators sought in the State courts to compel a levy by the city of taxes to meet their judgments at the rate permitted when the damages were done for which the judgments were obtained. They contended that the subsequent limitation imposed upon its powers violated that clause of the federal Constitution which prohibits a State from passing a law impairing the obligation of contracts, and also that clause of the Fourteenth Amendment which forbids a State to deprive any person of life, liberty, or property without due process of law. The supreme court of the State, reversing the lower court, decided against the relators, and the same contention is renewed here.

The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation

within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. The term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.

A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. Chitty on Contracts, Perkins' Ed., 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. *Garrison* v. *City of New York*, 21 Wall. 203. There is, therefore, nothing in the liabilites of the city by reason of which the relators recovered their judgments, that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments.

The clause o the Fourteenth Amendment cited is equally inoperative to restrain the action of the State. Conceding that the judgments, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership, and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city. Although the present limitation of the taxing power of the city may prevent the receipt of sufficient funds to pay the judgments, the legislature of the State may, upon proper appeal, make other provision for their satisfaction. The judgments may also, perhaps, be used by the relators or their assignees as offsets to demands of the city; at least it is possible that they may be available in various ways. Be this as it may, the relators have no such vested right in the taxing power of the city as to render its diminution by the State to a degree affecting the present collection of their judgments a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.

The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the State from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy. As we have often said, the power of taxation belongs exclusively to the legislative department of the government, and the extent to which it shall be delegated to a municipal body is a matter of discretion, and may be limited or revoked at the pleasure of

the legislature. But, as we held in *Wolff* v. *New Orleans*, 103 U. S. 358, and repeated in *Louisiana* v. *Pilsbury*, 105 U. S. 278, in both cases by the unanimous judgment of the court, the legislation in that respect 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."

This doctrine can have no application to claims against municipal corporations, founded upon torts of the character mentioned. Whether or not the State, in so limiting the power of the city to raise funds by taxation that it cannot satisfy all claims against it recognized by law, though not resting upon contract, does a wrong to the relators, which a wise policy and a just sense of public honor should not sanction, is not a question upon which this court can pass. If the action of the State does not fall within any prohibition of the federal Constitution, it lies beyond the reach of our authority.

The question of the effect of legislation upon the means of enforcing an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, may involve other considerations, and is not presented by the case before us.

Judgment affirmed.

Concurring Opinion: Bradley, J.

Mr. Justice Bradley.—I concur in the judgment in this case, on the special ground that remedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion; just as it is whether the public shall, or shall not, indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion. And, as the judgments in the present case were founded upon a law giving this kind of remedy, I agree with the court, that any restraint of taxation which may affect the means of enforcing them is within the constitutional power of the legislature. Until the claim is reduced to possession, it is subject to legislative regulation. But an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the legislature can no more violate it without due process of law, than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property within the meaning of the Fourteenth Amendment. The remedy for enforcing a judgment is the life of a judgment, just as much as the remedy for enforcing a contract is the life of the contract. Whilst the original Constitution protected only contracts from being impaired by State law, the Fourteenth Amendment protects every species of property alike, except such as in its nature and origin is subject to legislative control. Hence I regard it important clearly to distinguish between this kind of judgment, now under consideration, and other judgments for claims based upon the absolute right of the party.

Mr. Justice Harlan dissenting.

By the Constitution of Louisiana adopted in 1879, and which went into effect January 1st, 1880, it is declared, "no parish or municipal tax, for all purposes whatever, shall exceed ten mills on the dollar of valuation."

The judgments held by plaintiff in error against the city of New Orleans were rendered and became final long before the adoption of that constitutional provision. At the time of their rendition, the law forbade execution against the defendant, but the city had the power, and was under a duty, which the courts could compel it to discharge, to include in its budget or annual estimate for contingent expenses, a sum sufficient to pay these judgments. At that time, also, the rate of taxation prescribed by law was ample to enable the city to meet all such obligations. But if the limitation upon taxation imposed by the State Constitution be applied to the judgments in question, then, it is conceded, the city cannot raise more money than will be required to meet the ordinary and necessary expenses of municipal administration. Consequently, under the limit of ten mills on the dollar of valuation, the judgments of plaintiffs become as valueless as they would be had the State Constitution, in terms, forbidden the city from paying them.

1. Are the judgments in question contracts? This question is answered by the Court of Appeals of New York, speaking by Woodruff, J., in *Taylor* v. *Root*, 4 Keyes, 344. It is there said:

"Contracts are of three kinds: Simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. . . The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever there-

after, any claim on the judgment is setting up a cause of action on contract."

Blackstone says that "when any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature." 3 Bl. 465. Chitty enumerates judgments among contracts or obligations of record, and observes that they "are of superior force, because they have been promulgated by, or are founded upon, the authority and have received the sanction of, a court of record." Chitty on Contracts, 3. An action in form *ex contractu* will lie on a judgment of a court of record, because the law implies a contract to pay it from the fact of there being a legal obligation to do so, "although," says Chitty, "the transaction in its origin was totally unconnected with contract, and there has been no promise in fact." Id. 87.

It seems to me that these judgments are contracts, within any reasonable interpretation of the contract clause of the national Constitution. It can hardly be that the framers of that instrument attached less consequence to contracts of record than to simple contracts. If this view be correct, then the withdrawal from the city of New Orleans of the authority which it possessed when they were rendered, to levy taxes sufficient for their payment, impaired the obligation of the contracts evidenced by those judgments.

2. But if this view be erroneous, it seems quite clear that the State Constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property within the meaning of the Constitution cannot, it seems to me, be doubted. They are none the less property because the original cause of action did not arise out of contract, in the literal meaning of that word, but rests upon a statute making municipal corporations liable for property destroyed by a mob. If a judgment giving damages for such a tort is not a contract within the meaning of the Constitution, it is,

nevertheless, property, of which the owner may not be deprived without due process of law. Its value as property depends in every legal sense upon the remedies which the law gives to enforce its collection. To withhold from the citizen who has a judgment for money the judicial means of enforcing its collection—or, what is, in effect, the same thing, to withdraw from the judgment debtor, a municipal corporation, the authority to levy taxes for its payment—is to destroy the value of the judgment as property. In *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, this court had occasion to consider the meaning of that provision in the constitutions of the several States which forbids private property from being taken for public purposes without just compensation therefor. Under the authority of statutes of Wisconsin, certain dams were constructed across a public navigable stream of that State. The dams so constructed caused the waters to overflow the land of a citizen, resulting in the almost complete destruction of its value. The argument was there made that the land was not *taken* within the meaning of the Constitution, and that the damage was only the consequential result of such use of a navigable stream as the government had a right to make for the purposes of navigation. But, touching that suggestion, this court said:

"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 any 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 rights under the pretext of the public good, which had no warrant in the laws or practice of our ancestors."

These principles of constitutional construction have an important bearing upon the present case. If the property of the citizen is "taken," within the meaning of the Constitution, when its value is destroyed or permanently impaired through the act of the government, or by the acts of others under the sanction or authority of the government, it would seem that the citizen, holding a judgment for money against a municipal corporation —which judgment is capable of enforcement by judicial proceedings at the time of its rendition—is deprived of his property without due process of law, if the State, by a subsequent law, so reduces the rate of taxation as to make it impossible for the corporation to satisfy such judgment. Since the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property.

But it is said that the plaintiffs are not deprived of their judgments, so long as they continue to be existing liabilities against the city. My answer is, that such liability upon the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings. A money judgment which cannot be collected is of as little value as Pumpelly's farm was, when covered by water to such an extent that it could not be used for any of the purposes for which land is desired.

It is also said by my brethren that plaintiffs are not deprived of their property in these judgments, because at the time they are unable to collect them. No State shall "deprive any person of life, liberty, or property, without due process of law," is the mandate of the Constitution. Could a State law depriving a person of his liberty be sustained upon the ground that such deprivation was only for a time? Pumpelly's land was adjudged to have been *taken* within the meaning of the Constitution, although it was possible that, at some future time, the

dams constructed under the authority of the State might be abandoned, or might give way, causing the waters to retire within their original limits, and thereby enabling the owner to re-occupy his farm. It is barely possible that the people of Louisiana may, at some future period in their history, amend her Constitution, so as to permit the city of New Orleans to levy taxes sufficient to meet its indebtedness, as established by the judicial tribunals of that State. But such a possibility cannot properly be recognized as an element in the legal inquiry whether the State may so reduce the rate of taxation by one of its municipal corporations, as to deprive it altogether of the power to pay valid judgments against it, which, at the time of their rendition, and under the rate of taxation which then obtained, were collectable through judicial proceedings.

It is further said that these judgments may also, "perhaps," be used by the relators or their assignees as offsets to demands of the city. My answer is, that the city may never have such demands. The possibility that it may have ought not to control the determination of this case, involving, I submit, a present deprivation of property, without due process of law.

In this case, before the adoption of the Constitution of 1879–80, before even the convention that framed it met, the plaintiffs had obtained, in the inferior State court, a final order in a mandamus suit, requiring the city of New Orleans to include in its next budget or statement of liabilities (and in succeeding budgets, until they were paid), the amounts of existing judgments against it, including those held by plaintiffs, and to levy a tax to the extent of $1.75 on every $100 of valuation to meet them. This judgment in the mandamus suit was in accordance with the law of the State as it then was. Plaintiffs, by the application of the constitutional limitation upon municipal taxation, *adopted after rendition of judgment in the mandamus suit*, is thus deprived not only of the benefit of that judgment, but of all power to enforce the collection of the original judgments, in the only way they can be enforced or be made of any value. If this be not a deprivation of property without due process of law, it is, I think, difficult to conceive of a case involving such a deprivation.

Syllabus.

For these reasons, I feel constrained to dissent from the judgment.

WALSH, Commissioner, *v.* PRESTON.

PRESTON *v.* WALSH, Commissioner.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Argued March 13th and 14th, 1883.—Decided November 19th, 1883.

Equity—Final Decree—Jurisdiction—Texas.

Prior to 1844, the Congress of Texas authorized contracts to be made for settling emigrant families on vacant lands to be designated in the contracts. Subsequently, that Congress passed an act to repeal this law, and presented it to the President of Texas for his signature. He vetoed the repealing act. Congress then passed it over the veto. While the repealing act was thus suspended, the President contracted with one Mercer and associates to settle families on a designated tract, capable of identification. Preston, the appellant in one suit and appellee in the other, was assignee under Mercer. In February, 1845, the Congress of Texas enacted that on failure of the associates to have the tract surveyed and marked by the first day of the next April, the contract should be forfeited. In October following suit was begun to have the contract annulled for non-compliance with these provisions. A decree was entered declaring it forfeited, but it did not appear that proper service of the subpœna, or other process or notice, was made to give the court jurisdiction. After lapse of several years, suit was brought against the commissioner of the land office of Texas to obtain certificates for location of land for which claim was made under the contract, either within the limits of the grant, or in case the land there had been appropriated, then land of equal value elsewhere. The bill also prayed for an injunction to restrain the commissioner from issuing patents for lands outside the grant, until the claims under the contract should be satisfied. The defendant denied the principal allegations of the bill, and demurred on the ground that the State of Texas had not been made a party, averring that it was a necessary party. The court below found for the plaintiff on the facts, and made a decree enjoining the commissioner and his subordinates forever from issuing patents within the boundaries of the contract tract except to Preston or his order: *Held*,

1. That the decree was defective in not defining specifically the rights of the plaintiff in the land; in not adjusting the conflicting rights of Texas and the plaintiff; and in tying up forever the hands of the government and all other interested parties without affording final relief.

2. That as the court could give no affirmative relief, and in the absence of the State of Texas could not settle its rights in the tract, it was without jurisdiction.
3. That even if the court had jurisdiction, the case was without equity on the merits.

Bill in equity to compel the delivery of patents of public land in Texas. The facts appear fully in the opinion of the court.

Mr. John Mason Brown and *Mr. George M. Davie* for Preston.

Mr. A. J. Peeler for Walsh.

Mr. Justice Miller delivered the opinion of the court.

These cases as they stand on our docket are cross-appeals from the decree of the Circuit Court of the United States for the Western District of Texas, in a suit wherein William Preston was plaintiff, and William C. Walsh, in his character of commissioner of the general land office of the State of Texas, was defendant.

The suit was commenced originally by George Hancock, a citizen of Kentucky, by a bill in chancery against John S. Groos, who was then commissioner of the land office, and after the death of Hancock, was revived in the name of Preston as plaintiff, and Walsh became substituted for Groos as his successor in office. The original bill is long, and after Preston became plaintiff he filed a very full amended bill.

To these the defendant demurred, and the demurrers being overruled, the defendant Walsh filed his plea in bar and his answer, under oath, to which there was a replication.

The bill is founded on a colonization contract between the State of Texas and Charles Fenton Mercer; a class of contracts well known in the history of Mexico, resting on a policy which was continued by Texas after separation from that government.

The contract on which the present suit is brought is dated January 29th, 1844, and is signed by Samuel Houston, president of Texas, and Charles F. Mercer, for himself and such associates as he may choose, and is attested by Anson Jones, secretary of State.

In making this contract the president acted under authority of an act of the Congress of Texas of February 5th, 1842, which declared,

"That the provisions of an act entitled 'An Act for the granting of lands to emigrants,' approved January 4th, 1841, so far as relates to the authority thereby given to the president to enter into a contract with W. S. Peters and others to introduce colonists, upon certain terms therein expressed and set forth, be, and the same are hereby, extended to such other company or companies which may be organized for like purposes, as the president in his judgment may approve.

"2. That all the rights accruing to said company by the provisions of said act, and all the duties, obligations, and conditions imposed by the same upon the said W. S. Peters and his associates, be and the same are hereby extended to such other companies as may be organized under the provisions of this act."

To the act of 1841, therefore, we are to look for the kind of contract which the president of Texas could make in 1844 with Mercer and his associates, for though a joint resolution of the Congress, dated January 16th, 1843, is relied on as introducing some modification of the act of 1841, that resolution seems carefully limited in its operation to contracts already in existence, and does not affect the power of the president in any contract he may make with other parties.

It is true this joint resolution authorizes an extension of the period within which the contracts, to which it specifically refers by name, may be performed, from three years to five years, and the contract in Mercer's case allowed five years, when the act of 1841 required performance within three years; but no point is raised that the Mercer contract is, for that reason, void, and we are not called on to declare the effect of this departure from the act of 1841 in this case.

This agreement is in conformity with the act of 1841 authorizing the contract with W. S. Peters and his associates, and as a substantial summary of the material parts of the Mercer contract, except the location of the land and the names of the parties, that statute is given here.

The first three sections of the act relate to the rights conferred on all immigrants to the State.

Sec. 4 enacts that the president of the republic be and he is hereby authorized to make a contract with W. S. Peters, Daniel S. Carroll, and others (naming them), collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the republic, on the following conditions, to wit:

"The said contractors on their part agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract: *Provided*, They shall commence the settlement within one year from the date of said contract."

It then proceeds:

"Art. 2009. [5] *Be it further enacted*, That the said contract shall be drawn up by the secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution; which contract shall be signed by the president and the party or parties, and attested by the secretary of State, who will also preserve a copy in his department.

"Art. 2010. [6] *Be it further enacted*, That the president shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside: *Provided, however*, That all legal grants and surveys that may have been located within the boundaries so designated previously to the date of said contract, shall be respected; and any locations or surveys made by the contractors or their emigrants on such grants and surveys, shall be null and void.

"Art. 2011. [7] *Be it further enacted*, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family comprehended in said contract; nor more than three hundred and twenty acres to a single man over the age of seventeen years.

"Art. 2012. [8] *Be it further enacted*, That no individual contract made between any contractor and the families or single persons which he may introduce, for a portion of the land to which

respectively they may be entitled, by way of recompense for passage, expense of transportation, removal or otherwise, shall be binding, if such contract embrace more than one-half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land; nor shall any emigrant be entitled to any land, or receive a title for such land, until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation, and under good fence, at least fifteen acres on the tract which he may have received.

"ART. 2013. [9] *Be it further enacted*, That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them: *Provided, however*, That this provision shall not release the colonist from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done without a sale of their land: *And further*, The president may donate to every settlement of one hundred families, made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

"ART. 2014. [10] *Be it further enacted*, That the president may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by them, ten sections for every hundred families; and in the same ratio of half sections for every hundred single men introduced and settled; it being understood that no fractional number less than one hundred will be allowed any premium.

"ART. 2015. [11] *Be it further enacted*, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; *And further*, All fees incidental to the issue of patents for lands acquired under the provisions of this law shall be paid to the commissioner of the general land office, for the use and benefit of the public treasury.

"ART. 2016. [12] *Be it further enacted*, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce; who shall be entitled to their respective quotas of land, agreeable to the provisions of this law.

"ART. 2017. [13] *Be it further enacted*, That the contractors shall be required to have one-third of the whole number of the families and single persons for which they contract within the limits of the republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same; and it shall be the duty of the secretary of state forthwith, after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture; unless the president, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them, for the number of families which they are bound to introduce. And this act shall take effect from and after its passage."

The contract with Mercer designated a large tract of land, about six thousand square miles in extent, the outer boundaries of which were described so as to be capable of identification by survey, within which he was to settle at least one hundred families within each period of a year for the five years succeeding the date of his contract, and the right to introduce new emigrants terminated at the end of that time.

What he was to do under this contract, and what he was to receive for it when done, as found in the instrument executed by him and the president, differ but little from the requirements of the foregoing statute. Where there may be found any difference material to the view we take of this controversy it will be pointed out in the course of the opinion.

The complaint, after setting forth this agreement, alleges that Mercer performed the obligations imposed on him, introducing and settling within the prescribed limits and within the five years allowed him twelve hundred and fifty-six (1256) families, and that in all other respects he fulfilled the obligation of his contract. It charges that for all this he has received no lands at the hands of the State, as he is entitled to, nor any evidence or certificate of his right to them, and that the State of Texas and the officers in charge of the land department deny all right of said Mercer or Hancock, his assignee, or Preston,

Hancock's devisee, or any of their associates, to receive such lands or such certificates, or any compensation for the services rendered under Mercer's contract in colonizing the families so introduced.

And it is specifically charged against the defendant that, as commissioner of the general land office having charge of such matters, he not only utterly refuses to recognize their rights and refuses to issue to them patents or certificates for the number of sections and half sections to which they are entitled, but that he is constantly issuing to others land certificates and patents, whereby the land within the reservation in which their claims must be satisfied is rapidly passing into the hands of private owners with title from the State.

The prayer of the bill is that defendant Walsh, by a mandatory injunction, be required "to refrain and desist from longer withholding from your orator the certificates for location of land to which your orator is entitled under the contract between Charles Fenton Mercer and the Republic of Texas, of date of January 29th, 1844, and from further refusing to execute and deliver to your orator the certificates for land to which on final hearing it may be decreed that your orator is entitled;" and if it be found there is not land enough within the bounds of the Mercer colony grant, remaining free from occupancy, sufficient to satisfy the orator's claim, that he may, by appropriate decree, receive certificates from the defendant for lands of equal value by way of recompense for lands wrongfully alienated to others. It is also prayed that the defendant and all his subordinates be enjoined and restrained from doing any act whereby there may issue any patent, certificate, plat, grant, survey, or location of lands outside and beyond the limit of the Mercer grant, save only to your orator, and until complainant's just claims are satisfied.

The answer of the defendant denies that the contract is a valid contract, alleges that in a suit by the governor of the State of Texas in a court of competent jurisdiction, against said Mercer and his associates, the contract was by a decree of that court annulled and declared void, and all rights under it forfeited, and relies on that decree in bar of the present suit.

He denies that Mercer or his privies ever performed their obligations under the contract, and denies that they ever introduced into the State and settled on the land described any immigrants or colonists, and expressly denies that the 1256 families found in the Crockett list, on which complainant relies, were introduced or in any manner brought into Texas by Mercer or his associates. He denies that he ever surveyed the outside boundaries of the grant, or made the surveys into sections or half sections which he was bound by his contract to make, by which alone could the settlements, houses and improvements of the settlers, or any of them, be so identified or described as to entitle complainant to receive certificates or patents for them, or for the premium lands mentioned in the contract.

The plea and demurrer rely on the incapacity of plaintiff to maintain against this defendant the suit in which the State of Texas is a necessary party, when the State is not made a party, and cannot be made a party in that court.

The decree of the court, after the introduction of much testimony, documentary and otherwise, and after full hearing, declares:

"That complainant's allegations are found to be true, and supported by proof, and that the defendant and all his subordinates of any description are restrained and prohibited and forever enjoined from issuing or delivering to any person or corporation any certificates, patents, or plats for any land within the boundaries of the Mercer colony as set forth in the bill, except to complainant, William Preston, or to such person as he may in writing direct."

It further decrees that defendant and all his clerks and subordinates are enjoined from hindering or obstructing said Preston or his agents in the surveying, selecting, platting, recording, entering, or claiming any and all lands lying within the limits and boundaries of the so-called Mercer colony; and they are also enjoined from hindering, obstructing, preventing, or delaying the said Preston, and his associates, from performing, completing, and perfecting all the several conditions, duties,

obligations, and acts devolving upon him, the said Preston, or said association, under the terms and stipulations of the colonization contract. And it orders that defendant pay the costs of the litigation.

It is not very easy to see on what principle this decree can be sustained.

There is no decree by which the right of plaintiff to any specific land is affirmed, nor to any ascertained quantity of land to be located generally.

There is no attempt, as there can be none in this suit, to adjust the conflicting rights of the State of Texas and the plaintiff in this land. There is no attempt to define the number of acres to which the plaintiff is entitled, or what he is yet to do, or what he *may* do, to perfect his right to any land whatever.

And yet, without establishing any such right or deciding what plaintiff may yet do to establish a right, the hands of the government are tied absolutely as to all the vacant land which belongs to it within the colony limits. Not only are the hands of the government thus tied, but other persons having rights, inchoate or vested, in those lands, with undisputed claims to patents, to certificates, to surveys perhaps, are all arrested in the precise condition they may be at the time this decree was rendered. The whole land-office business and functions of the commissioner within that colony, no matter whose interests are involved, are paralyzed by this decree. And what is more, they are paralyzed forever; for the language is that the commissioner and all his clerks, agents, &c., are enjoined *forever* from doing the forbidden acts.

This is also done in a case where the court, having exhausted its powers (for the decree is final), has found itself unable to grant any positive relief to plaintiff, gives him no land, no certificates, no right to land in other places, but leaves him also suspended, except what he may do now to perform the obligation which the contract imposed upon him. The time within which he was to do all that the contract required or permitted him to do expired by its terms January 29th, 1849, now nearly thirty-five years ago. We can see nothing whatever in the case by which he can now be authorized to do with effect what

he was required to do within the five years his contract was in force. Can he now introduce and settle colonists in a country filled with an active population? Can he now survey and cultivate the land and build the cabins which he did not survey, settle, and improve then? Can he, after the vast vacant prairies which he then agreed to convert into homes for families have been covered by a population of thousands, perform in that same territory, where now are thriving cities, the things he bound himself to do thirty-five years ago, so as to secure the lands rendered valuable by the enterprise of others?

If he can do none of this; if the court can give him no affirmative relief; if it has no other jurisdiction of this case but to tie up everybody's hands and preserve forever the present status of things, why should it do that?

A court of equity will not thus do a vain thing, the only effect of which is to embarrass thousands of people without a hearing or an opportunity to assert what they claim to be their rights, and tie the hands of a great State in dealing with her public lands, in a suit to which she is not a party.

But the plaintiff below insists, by his appeal from this decree, that the circuit court should have granted him the relief which he prays, and especially insists that for every hundred families of the twelve hundred and fifty-six which he located in the limits of his grant, there should now be issued to him certificates, which he may locate on the vacant lands within the contract limits, or, if they cannot be found, then on other vacant lands of the State.

We will examine into the merits of this claim.

It must be remembered that this examination is made on proceedings in a court where the real party in interest is not before it, and over which that court has no jurisdiction. That if the decree asked for is rendered, it must be satisfied out of the property of this party. That the circuit court, in undertaking to control the State of Texas in the disposition of its public lands, by a decree against one of its officers, is, in effect, rendering a decree of specific performance against the State.

But waiving this for the present, we proceed to inquire

whether, if the State were before this court as an ordinary party, plaintiff has made a case for specific performance.

It must be confessed that Texas, both as an independent republic and as a State of the Union, did all she could to prevent the making of this contract, and since it was made has denied its validity and refused to do anything under it, and has always denied any such performance on the part of Mercer and his successors and associates as entitled them to any rights under it if it be valid.

The contract bears date January 29th, 1844, and on the next day, January 30th, 1844, the Congress of Texas passed a statute repealing all laws authorizing the president to make colonization contracts, and forfeiting such of those already made as had not been complied with by the contractors. The legislative history of this repealing act shows that it had been presented to the president and vetoed, and while the matter was thus suspended the contract was signed the day before Congress passed the bill over his veto, which terminated all power in him to make such contracts. The aversion with which this contract was received has never been removed from the minds of the governing authorities in that State, and its Congress, on the 3d February, 1845, passed the following joint resolution:

"Joint Resolution to establish the limits of the Mercer Colony.

"ART. 2245. [1.] *Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled,* That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land actually surveyed and marked by the first day of April next.

"ART. 2146. [2.] *Be it further resolved,* That a failure to comply with the provisions of the above section shall work a forfeiture of their contract.

"ART. 2147. [3.] *Be it further resolved,* That no person shall be recognized as provided for in said contracts who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of lands as though they had been introduced, as provided for in said contract; and that this act take effect from and after its passage."

Opinion of the Court.

On the 11th day of October, 1846, the suit of the governor of the State against Mercer and his associates was commenced in the District Court of Navarro County, in which a decree was rendered September 25th, 1848, declaring the contract null and void on the verdict of a jury. Of this decree it is as well to say now, that while it would, if valid, dispose of the whole case, we are not satisfied, in the absence of personal service on the defendants and of any personal appearance by them, that there was such substituted service by publication as gave the court jurisdiction. The decree, therefore, is no bar to the rights of the present plaintiff, and the matter is here referred to as showing the unvarying hostility of the State authorities to this contract.

Mr. Mercer was, by these proceedings and many others found in the statute book of the State, put upon his guard that in order to establish any rights whatever under that contract, he must comply strictly and promptly with all the conditions and obligations which it imposed upon him.

In order to see exactly what it was that Mercer and his associates undertook to do, it may not be amiss to inquire for what purpose Texas desired the settlement of these colonists on her lands. This policy of colonization is one which Mexico had inaugurated long before Texas separated from that confederacy. It was founded on the idea that the government was abundantly rich in lands and deficient in population; that it owned large bodies of vacant lands which were rather a trouble than a profit, as resorts of Indians and beasts of prey, while they were much in need of an active and industrious agricultural population.

In the case of Texas it was desirable also that this population should be fighting men, as they were in a state of smouldering war with Mexico, which might break out at any moment, as that government had not acknowledged the independence of Texas, and still asserted dominion over that country—an assertion which led to the war a year or two later between Mexico and the United States.

What Texas desired then, in these colonization contracts, was, first, an accession to her population capable of military duty;

second, the settlement of this new population on her large tracts of vacant lands; and, third, that this should be done in a manner which would add to the value of those which would remain.

The first obligation, therefore, which the contractors, under the 4th section of the act authorizing the contract with Peters and others assume is, that they agree "to introduce a number of families to be specified in the contract within three years from the date of the contract."

The persons thus to be introduced are always spoken of in the statute as emigrants, and the 13th section contains a provision "that all substitution of families living within the limits of the republic by the contractors shall not entitle them to any premium for such families, nor operate in favor of them for the number of families which they are bound to introduce."

In the first clause of the contract now under consideration, after the recital of the authority by which it is made, Mercer agrees to introduce and settle within the limits hereafter described, and in accordance with the provisions of the act aforesaid, and within five years from the date hereof, as many *emigrant* families as he and his associates can settle within said limit.

Throughout this contract also the persons to be so introduced and settled are spoken of as emigrant families.

Another provision of the contract, in defining what shall constitute a family, speaks of males over seventeen years of age. And still another requires the contractors "to cause each male emigrant of the age of seventeen years and upward to be supplied and bring with him a good rifle, yager, or musket, and a sufficient supply of ammunition; and the party of the second part (the contractors) shall keep on hand, at all times, in some convenient place of deposit, such quantity of prime ammunition as will supply to each male emigrant of the age of seventeen years and upwards, settled by them, not less than one hundred rounds."

It was another condition of this contract that the contractors should survey the outside lines of the land within which they were to settle these emigrants, "and cause the unappropriated lands within the prescribed limits to be surveyed, as needed

for purposes of settlement, into sections of six hundred and forty acres, or half sections of three hundred and twenty acres, each, at his option, and shall cause to be built log cabins, &c., &c. For each family so settled the contractors were to receive a section of six hundred and forty acres, or two half sections of three hundred and twenty acres. But these were to be located on alternate sections as they were surveyed and numbered, and the other alternate sections were to remain to the republic; thus introducing the system which the government of the United States has adopted in all her railroad grants, of reserving every alternate section, that it might profit by the increased value which these sections acquired by the settlement of an agricultural population in their midst.

What compliance has plaintiff shown with this first and most important duty of *introducing from without the republic emigrant* families and settling them upon lands within the limits prescribed by the contract?

We feel constrained to say that there is no satisfactory evidence to our minds that Mr. Mercer, or any of his associates, or any agent of his, ever introduced into the State of Texas a single family from without the State, or that any such family ever came into the State by means of any request or any offer of help, or of land, or of any inducement offered by Mercer or his associates.

The first piece of evidence offered on the subject is a list of 119 names, with corresponding numbers on the left of the column, a statement at the head of the column called "Date of Introduction," then the names of the heads of the families, and in another column the names of the witnesses. These witnesses are, with a single exception, P. J. Pillans, Thomas C. Bean, and James Hilhouse.

This list of names is signed to a statement that they have each received of Charles Fenton Mercer and his associates a certificate, issued in accordance with Mercer's contract with the State, and that the families have been introduced and settled in manner and form as expressed in the contract. These certificates are nowhere introduced or found in the record, nor is a copy of any one of them produced.

The parties signing this paper do not state that they were emigrants from abroad introduced into the State by Mercer or his associates, and none of them swear to the statement which they sign. Daniel Rowlett, who describes himself as one of the Texas Association, and Pillans and Bean, who say they are disinterested persons, each make affidavit at the end of the list that it contains a true and accurate statement of emigrant families introduced and settled by Charles Fenton Mercer and his associates upon and within the limits of the Mercer grant.

But the deposition of Pillans in regard to this list is taken, and he swears that he got up the list and issued the certificates to the parties found by him on the lands when he went there in 1844 as the agent of Mercer, and to others who came afterwards, until he left in May, 1845. He is asked in a long and pointed cross-interrogatory if he knew where these settlers came from, who introduced them, &c., &c. To this he answered as follows:

"Many of the queries herein I cannot now, nor could I at any time, have answered. I rarely, if ever, knew where the colonists came from, or what induced such to come to the colony. The first that came selected grounds in the northeastern part of the colony, east of the Sabine River. They built, under contract with us, their own cabins, brought their own arms, but a large supply of ammunition was stored ready for distribution, bought by General Mercer. I presume the colonists came at the solicitations of the colony agents elsewhere, and because land could then be had without price. After I had ceased to be the agent I never entered the colony, save, perhaps, when riding through some portion of it when on a journey."

No deposition of Bean or Rowlett is found in the record.

A deposition of Richard T. Berchett is taken for plaintiffs, who says he was one of Mercer's associates in the contract, and was intimate with him, but says he knows nothing about the introduction of colonists by Mr. Mercer.

An effort is made to prove an advertisement by Mercer of his colonization scheme and its inducements to emigrants, making

it an exhibit in the interrogatories filed for several witnesses; but each of them says he knows nothing of the paper, nor can it be inferred from anything in it whether it was a circular or a newspaper advertisement, or what circulation it ever had.

With the exception of Crockett's report, which will be presently considered, this is about all that can be called evidence of the introduction by Mercer, or through his agents or associates, of emigrants into the State of Texas.

The report of John M. Crockett, of 1,256 families settled within the colony limits, which is introduced by plaintiff and relied on by him exclusively as giving the number and names of the emigrants for whose settlement he claims land under the contract, was, as it states on its face, made under the act of February 2d, 1850, of the legislature of the State.

It is manifest from a perusal of that act that it was designed, as its title imports, "for the relief of the citizens of Mercer's Colony," and that it was in no sense either a recognition of the validity of Mercer's contract or of his performance of its conditions.

"Section one enacts that every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the 28th of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit, 640 acres to each family and 320 acres to each single man over the age of seventeen years: *Provided, That nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.*"

A commissioner is to be appointed to hear proofs and to decide who is entitled to lands, and to issue to them certificates, which may be located on vacant lands within the colony.

Sec. 8, which prescribes what is necessary to be proved to entitle the party to a certificate, is as follows:

"ART. 2316. [8] That to entitle the colonists to the benefits of this act, they shall be required to prove, by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to

the twenty-fifth of October, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither: *Provided*, That they shall not be required to prove that they have cultivated land."

Here is no requirement that the parties shall have complied with the conditions of Mercer's grant, and no consent of Mercer required, nor even any condition that they should have been introduced by Mercer or settled under his contract. It is not even required that they should have come to Texas or settled in the colony within the five years during which his contract was in force; but if they immigrated to Texas any time before 1848, though it had been twenty years before his contract was made, and became citizens of the colony before October, 1848, their claim was respected.

And the fifth section declared "that no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent of the contractors, so that the boundaries thereof are justly and definitely marked."

Provision is also made for appeal by the claimant from the decision of the commissioner, but never a word of recognition of any legal right of the contractors or of their contract as furnishing the rule of decision.

The report itself contained no allusion to Mercer or his contract or his associates, except as a designation of the locality in its heading, thus:

"Record of certificates issued to citizens of Mercer's colony, concluded 30th September, 1851, by John M. Crockett, commissioner."

Here follows a list of 1,256 names, with the quantity of land for which a certificate has been issued by him, Crockett, to each; in every instance 640 or 320 acres, but no description or definite location of section or half section.

At the end Crockett swears that the foregoing is a full, complete, and correct list and description of the certificates issued by him to the settlers of said colony.

There is not here the slightest evidence that these men were brought to Texas by Mercer or any of his associates, or that he placed them on this land, or that he or they belong to the class which his contract required, or that he or they performed the conditions of that contract or any of them. And as the statute under which Crockett acted did not require proof of compliance with the Mercer contract, the inference that they had been so introduced is of little, if any, force.

It is quite remarkable that no attempt is made by plaintiff to prove that any of these settlers were introduced into Texas or settled on this land under his contract. The period when such settlement must have been made, if at all, was only about thirty years before the beginning of this suit, and in an agricultural community there must have been at the time this suit was tried many of the four thousand persons of whom these settlers were composed still living, whose testimony could have been procured. They could have told when they came to Texas, and who brought or sent them or induced them to come, and when and how they came to settle within the limits of this colony grant. They could not only have spoken for themselves, but for the body of the settlers who came about the same time. It is significant that plaintiff has wholly neglected to avail himself of this testimony, which, if in his favor, was the best to be had, since he has no documentary evidence which is satisfactory, though the archives of the State have been open to the inspection of himself and his agents.

Nor does the inference which the absence of this and other satisfactory evidence forces on the mind stand upon its mere absence, for the defendant has introduced some strong negative evidence of that character.

Mr. Crockett's testimony is taken by the defence, and a large number of the names found in his report are given in an interrogatory, and he is asked in others if any of these were settlers in Mercer's colony, and if he knows the date when they became settlers, and by whom they were introduced, to which he answers he has no means of knowing the date of their settlement.

To other interrogatories he answers that he went upon the

ground among the different settlements to facilitate the settlers in their proofs according to the act under which he was appointed; that the general opinion among the settlers was, that there was no validity in the claims of the Mercer colonists, as such, and the settlers did not base their claims to lands on Mercer's colony contract, believing that Mercer had forfeited his claims under it. That, he says, was the opinion, without exception, as he recollects. They thought he had failed in not surveying the lands or performing any other act stipulated in his contract.

To the 17th interrogatory he answers:

"It was the common report in the colony in 1849 and 1850 that Mercer and his associates had done nothing in the settlement of the country, in the surveying of the lands, furnishing houses, ammunition, &c.; but it was then understood that the settlers had located there without the aid of Mercer and his associates, and that they had no connection or relation with Mercer and his associates. The settlers had their own land surveyed. During all my visit I never heard a settler in Mercer's colony claim that he was introduced or brought into the country by Mercer or his associates, or base his claim to lands under the Mercer colony contract."

These were the men on whose introduction and settlement plaintiff relies altogether to prove his performance of that contract, and not one of whom has he called as a witness to that performance.

The defendant also took the deposition of John A. Harlan, who came to Texas in 1846, and settled in Navarro County, within the limits of the colony, and resided there twenty-one years. He says a good many persons came with him from Illinois at that time and settled in Navarro County. He says they came and settled of their own accord, brought their own guns and ammunition, built their own houses, and had nothing to do with Mercer in coming to the colony or in settling there, and he remembers the names of twenty men over seventeen years old of that class. In answer to a cross-interrogatory, he says he never knew of any effort of Mercer to settle the colony.

The defendant also took the depositions of P. P. Martin and H. W. Young, both of whom were settlers in the colony. Young says he came to Texas in 1843. He says his father settled in the colony before the contract with Mercer was made. Martin says he came to Texas from Tennessee in 1846, to the northern part of the Mercer colony. No one induced him to do so. He was introduced to Mercer, but had no conversation with him about the colony.

Mr. Terrill, a surveyor by profession, says a great many families settled in the colony during the years 1844, 1845, and 1846. Some of them claimed to be colonists and some were old Texans. He was surveying in the colony during these dates, and never knew or heard of Mercer or any of his associates assisting any settler in any way.

While there is this failure to prove satisfactory performance of the main obligation to introduce emigrants into Texas and settle them on the grant, and this testimony of witnesses on the ground that it was not done, there is a total absence of proof of an important condition in regard to the surveys.

We are of opinion that the outer boundary of the grant was surveyed so as to comply substantially with the contract in that respect. But the obligation to survey the land into sections and half sections, which Mercer undertook in the agreement, so that the settlers could know and identify that to which they became entitled, and so that the republic could know which were her alternate sections and half sections, and sell them to others, and so that both parties could know where the premium sections for each one hundred families, to which the contractors might become entitled, could be located, all of which, we think, were essential parts of the contract, remained wholly unperformed.

There is not the slightest evidence of such surveys by Mercer or his associates in the record. Mr. B. J. Chambers, a witness for plaintiff, who was a professional surveyor residing in Texas, says he made an agreement with Mr. Mercer to sectionize or survey certain lands for him in Navarro and Ellis counties, west of the Trinity River, and, at his request, accompanied him into the bounds of the grant. But he says he did not do any

surveying or any work for Mercer or his associates. He adds:

"I did not do it, because I was advised by nearly all the settlers I saw not to do it; that Mercer had not assisted them in their settlement in any way."

And this is the nearest approach to sectionizing these lands, as Mr. Chambers calls it, which the record discloses.

The importance of this matter can be readily seen now. If the court should be of opinion that all these settlers reported by Crockett were colonists under a compliance with his contract by Mercer, and if, as plaintiff claims, the contract is a grant *in præsenti*, how can either Mercer, or these colonists through him, have a decree for specific performance by an instrument which will carry a legal title to land described by metes and bounds as sections and half sections, would enable the court to do if the necessary legal surveys had been made? Plaintiff does ask for such relief. If they had surveyed this land, and settled the colonists on the enumerated sections and half sections of such surveys, they could now name the section and half section for which they ask a decree.

If they had made these surveys, and had settled each of their colonists on a distinct section or half section, which could be thus identified as his cabin and improvement, and had performed the other conditions of introducing these settlers as emigrants from abroad, the argument that the present case comes within that of *Davis* v. *Gray*, 16 Wall. 202, would have more force. In that case the railroad company to which the grant was made had made the necessary surveys, and the track of the road having been definitely located through those surveys, the sections and parts of sections to which they were entitled were specifically identified without any difficulty, and the officer was restrained from certifying or patenting them to others.

In the present case, while the circuit court seemed inclined to grant similar relief, it found itself unable to do so for want of these very surveys, which the plaintiff's predecessor had

promised to make as an important part of the contract now relied on as the foundation of the relief sought.

If this were a case between individuals, there could be no doubt of the decision which a court of equity would be compelled to make on this application for specific performance. The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law.

What has the plaintiff or his predecessors done to secure his title to the lands now prayed for? Almost nothing. If we are correct in holding that he introduced no emigrants and made no surveys, what else has he done? Has he or they given any time or labor in earnest effort towards the business? If so, the evidence of it is not found in the record.

Have they spent any money in the enterprise? A feeble attempt to show an outlay of $12,000 or $15,000 is made, but by no means successfully. If plaintiff were now suing in an action for damages before a jury, and he had proved a right to recover, the sum which he could get for his services and expenditures under the testimony in this record would be small indeed compared to the magnitude of the claim here set up.

We do not think it necessary to consider the argument that the contract is a grant *in præsenti*, with title to the land in the plaintiff, nor the idea that there is a trust by which these lands are held for his benefit, and that this trust is in some way made stronger by the legislation under which the Republic of Texas became a State in the Union.

In any view that can be taken of the contract, it was when made wholly executory. Mercer had not then paid anything or done anything to entitle him to land. It was all to be earned by actions to be performed thereafter. The republic conveyed him no title. It was a mere executory contract for the sale and purchase of land, in which the price was to be paid within five years, and the lands so earned, an unknown quantity, were to be then conveyed by an instrument called a certificate.

The total failure of Mercer to perform left him no rights

under the contract. The State seeks nothing against him for non-performance, and so the affair is ended.

The plaintiff and his predecessors in interest have not only not performed, but they have not shown any sufficient excuse for non-performance. They have not, in the language of the authorities, shown themselves ready, willing, and able to perform. On the contrary, they have permitted the matter to rest for thirty years without an effort to do so, and now, if they would, the state of matters in the colony is so changed that it is impossible that they can perform their agreement.

The result of these views is, that

Upon the appeal of Walsh the decree of the circuit court is reversed and the case remanded, with directions to dismiss the bill, and this necessarily disposes of the plaintiff's appeal.

Mr. Justice Harlan, with whom concurred Mr. Justice Field, dissenting.

Mr. Justice Field and myself differ from the court in our view of the facts of this case, and therefore dissent from its judgment.

The circuit court found that the complainant had satisfactorily established the contract between the Republic of Texas, through its president, and Charles Fenton Mercer and his associates, as alleged in the bill and amended bill; the entrance of Mercer upon the duties devolving upon him under the contract; the organization of the Texas Association; the appointment of surveyors and colonization agents; the running of lines and surveys; the introduction of one hundred and nineteen families within the first year of the grant; the making of the survey of the boundary limits of the colony grant by April 1st, 1845; the settlement of twelve hundred and fifty-six families within the limits of the colony prior to October 25th, 1848; the appointment of Mercer as chief agent and trustee for the association; the subsequent appointment of Hancock as chief agent; Hancock's death and the appointment of Preston, ratified by the association, as chief agent; the entrance of those persons upon the performance of their duties as agents of the association, and the activity displayed by them, respectively, in furthering the

objects and interests of the colony and the association; the employment of counsel; the expenditure of money; and the persistent applications made to the political departments of the State of Texas for relief. It further found that Mercer, as agent, made reports to the government of Texas, as required by the contract, up to and for the year 1847; that Mercer is dead long since; and that all his papers and documents, among which were copies of his correspondence and reports in relation to the Mercer colony, have been lost and destroyed.

The evidence adduced by the complainant has, it seems to us, been subjected by this court to the same rules of strictness and technicality which would be applied to an indictment for a criminal offence. We are of opinion that the circuit court did not misapprehend the effect of the testimony, and that a case is made entitling complainant substantially to the relief granted in the decree below.

By the contract between Mercer and the Republic of Texas the latter agreed to convey to the former and his associates, or their legal representatives, one section of 640 acres of land, or two half sections of 320 acres, for each family which they should introduce and settle upon the lands set apart for colonization by Mercer and his associates; each alternate section or half section of 640 or 320 acres being reserved to the republic, to be purchased or not by Mercer and his associates on certain stipulated terms. It was also agreed that a perfect title should be made in the usual mode and form to Mercer and his associates or their legal representatives for each section, half a section or other fractional part of a section to which they became entitled under the contract, and that the same should be conveyed to the parties as soon and whenever they should exhibit to the commissioner of the general land office of the republic, or other proper officer thereof, in the manner and form prescribed in the contract, the evidence of having surveyed the portion of land for which such conveyance was desired, and that there were comfortable small houses or cabins erected thereon, and families residing therein who had been settled thereon by Mercer and his associates or their legal representatives.

The Republic of Texas further agreed that Mercer and his

associates should receive, as further compensation for their services and for their labor and expense in introducing and settling the families provided for in the contract, a premium of ten sections of 640 acres or twenty sections of 320 acres of land for every hundred families introduced and settled as required; further, that upon Mercer and his associates paying into the public treasury twelve dollars, and obtaining the treasurer's or other proper officer's receipt for that sum paid into the same, and also of the delivery for cancelment of any bonds, promissory notes, or other audited liabilities of the republic to the amount of $640, they or their legal representatives should be entitled to demand and should receive from the government a full and absolute title to 640 acres of the reserved alternate sections. The right to purchase the alternate sections was, however, made to depend on certain conditions, which, in the view taken of the case by the court, need not be here set out.

It was provided in the contract that whenever Mercer and his associates, or their authorized agent or legal representative, "shall exhibit to the commissioner of the general land office of the republic a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said parties of the second part, or their legal representatives, have caused to be built a small comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family or several families respectively therein, they shall immediately receive thereafter a full and absolute conveyance from the government of the republic for as many sections of land of 640 acres, or half sections, or other fractional parts of sections equal in amount to 640 acres, as there shall be families certified to in such certificate or certificates."

It was further provided that the unlocated lands included in the boundaries described in the contract should remain and be held by the government of the republic for the purposes set forth in the contract, until the end of five years from its date, and "shall be considered as set apart, *exclusively of all future*

claims, to be colonized in the manner aforesaid, by and for the benefit of the party of the second part and of this republic."

It was also stipulated that unless Mercer and his associates, or their legal representatives, "shall, prior to the first of May, 1845, have introduced and settled on the land above mentioned, according to the tenor of this contract, one hundred families, all right and title of the party of the second part, or their legal representatives, to proceed further in the execution of this contract shall cease and determine from the moment of such default; but such default shall not work or operate retrospectively, but leave to the party of the second part, and all persons claiming under them, whatever right, title, or interest they may have acquired from the action of the party of the second part and their legal representatives prior to such default, to the same extent as if no such default or failure had occurred; and in like manner, and under like qualifications, the right of the said party to proceed further under this contract shall cease and determine provided 250 families be not introduced and settled by them, in manner aforesaid, on or before the expiration of two years from the date hereof; and so in like manner 150 additional families shall be settled on the said lands, according to the terms of this contract, by the said parties of the second part or their legal representatives, within each of the three remaining years, or the right of the said party to proceed further under this contract, through the full term of five years from the date hereof, shall, on the occurrence of any default as aforesaid, utterly cease and determine; provided, as before expressed, no such default shall operate otherwise than prospectively, either in relation to the second party to this contract, or to the emigrant families actually settled, or any person or persons claiming by, through, or under them, or any of them."

To what extent did Mercer and his associates comply with their contract? The inference to be drawn from the opinion of the court is, that the record furnishes no evidence whatever that Mercer and his associates did anything of a substantial character entitling them to the benefit of their contract with the Republic of Texas. But we are of opinion that this is an

erroneous view of the evidence. We cannot avoid the conclusion that the contrary is abundantly shown by the record. That Mercer and his associates introduced and settled one hundred and nineteen families prior to the first day of May, 1845, the evidence leaves on our minds no reasonable doubt. There was produced from the records of the general land office of Texas, certified by the commissioner of that office, a copy of what is styled the original agreement or covenant, signed by the heads of that number of families, showing the date of their introduction into and settlement upon the Mercer colony lands, the signature of each emigrant being duly witnessed.

That agreement is in these words:

"This instrument witnesseth, that the persons who have subscribed and undersigned their names hereto do hereby severally, but not jointly, agree and covenant as follows, to wit:

"That each of us has received of Charles Fenton Mercer and his associates, known as and comprising the 'Texas Association,' a certificate issued in accordance with a contract made on the 29th day of January, A.D. 1844, between them and Sam. Houston, then president of the Republic of Texas, acting in behalf of the said republic, authorizing them, among other things, to introduce and settle emigrant families upon the lands within the limits specified in said contract; the number and date of each certificate granted by said association, and by us received, being expressed and written in spaces to the left hand of our respective names, which certificates are received and held for the benefit of the respective families mentioned therein, each one of us forming a member of the family described in the certificate delivered to him, *which families have been specially introduced and settled at the times and in manner and form as stated and expressed in said certificates respectively by the said Mercer and his associates, and have emigrated as the said certificates declare and show.* And in consideration of the premises and the benefits from said certificates and the contract aforesaid, accruing and to arise, that we will severally observe and perform, as far as may be in our power, the several duties and requirements devolving upon us as settlers under said contract, whether prescribed by the terms thereof, or by the laws of the land in such behalf especially.

We bind ourselves severally not to give, sell, or in any way furnish to any Indian any spirituous liquor, nor any gunpowder, lead, or fire-arms, or warlike weapons of any description; and, moreover, to abstain from any waste or trespass upon the half sections adjoining those on which we have respectively settled, and on the whole sections adjoining thereto, and to guard the same from waste or trespass by others, and to protect the same from settlement by any other persons not authorized to settle thereon by the said association, or some legally authorized agent thereof; and to pay the sum of five dollars in materials, labor or money, towards the building of a school-house, of such dimensions and on such site as the said association or its agent may direct. Also that each family specified or referred to herein, each one certifying alone for his own family, has and occupies a suitable cabin or house as described in said contract; and that each male member thereof of the age of seventeen years and upwards is supplied with a good rifle, yager or musket, and a sufficient supply of prime ammunition."

This paper was supported by the signatures and the oath of one of the Texas Association and two disinterested persons, to the effect that the list contained "a true and accurate account and statement of emigrant families as certified to by the heads thereof to have been specially introduced and settled by Charles Fenton Mercer and his associates, known as and comprising the Texas Association, prior to the 1st day of May, 1845, upon and within the limits of the grant made by the Republic of Texas to said Mercer and his associates on the 29th of January, 1844, and referred to in the certificate subscribed to by the heads of the families respectively," &c. The record contains no evidence that the Republic of Texas by any of its officers ever made any objection to this certificate as defective either in form or substance. It brought the work of Mercer and his associates, as to these 119 families, within the terms of that portion of the contract already quoted. They did "exhibit to the commissioner of the general land office of Texas a certificate under oath subscribed by two witnesses," under date of August 2d, 1845, and certified on the same day by a "person qualified by the laws of Texas to administer an oath," showing

that Mercer and his associates had caused to be built a comfortable house or cabin on the lands settled upon by said families, and showing also that they had actually settled said families on the lands for which they received the certificates mentioned in the agreement between Mercer and such settlers. The criticism which is made in the opinion of the court upon the language of this agreement and certificate impresses us as exceedingly technical. It is said that the parties signing it do not state that they were *emigrants from abroad* introduced into the State by Mercer or his associates; they, however, do state and certify that they have each received a certificate in accordance with the contract of January 29th, 1844, describing it as one which authorized Mercer and his associates "to introduce and settle *emigrant* families upon the lands within the limits specified in said contract;" and they certify that they were "specially introduced and settled," as set forth in the certificates, and that they "have *emigrated* as the said certificates declare and show." That the persons who signed that agreement did not mean to certify that they emigrated from a State or country without the Republic of Texas is a suggestion which it did not occur to the attorney-general of Texas, in his very elaborate brief, to make. It is for the first time found in the opinion of this court. That Pillans, one of the persons who verified under oath the certificate relating to these 119 families, did not know "where the colonists came from," is a fact of no consequence; nor was it material to inquire from what particular State or country, other than Texas, they came. Pillans in his affidavit refers to them as "emigrant families," meaning thereby that they came from without the Republic of Texas. We have been unable to find any evidence that the persons embraced in these 119 families did not go to the Mercer colony tract from some place outside of Texas, and there is no suggestion to that effect in the argument of counsel.

It is said that none of these persons made oath to the papers they signed. Our answer is, that neither the contract nor the law of Texas required any such oath, but only the oath of two witnesses.

It seems to us that the complainant has made a clear case as

to the 119 families introduced by Mercer and his associates prior to May 1st, 1845.

The next inquiry is as to the effect to be given to the report of John M. Crockett in 1851. That report was made under the authority of an act of the legislature passed February 2d, 1850, the first section of which provided that "every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the 25th of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit, 640 acres to each family, and 320 acres to each single man over the age of 17 years: *Provided*, that nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed." In this language we have a distinct recognition of the fact that there was, at the passage of that act, a body of citizens in Texas known as "citizens *of the colony of Charles Fenton Mercer and his associates*," and that, *as* "*such colonists*," they were entitled to a certain quantity of land. Persons within the limits of the Mercer grant, who did not settle there in pursuance of some arrangement with Mercer and his associates, could not have been regarded as citizens of "the colony of Charles Fenton Mercer and his associates." Nor could such persons have been described as of that colony and *entitled*, as "such colonists," to receive 640 acres, or any other quantity, of land, unless they had entered upon the land under the contract between the Republic of Texas and Mercer and his associates. The proviso in the section quoted does not at all militate against this view. That only shows the purpose of the State not to give "the contractors of said colony" any advantage they did not then have under their contract with the republic.

The next section of the foregoing act provided for the appointment by the governor, by and with the advice and consent of the senate, of a commissioner, "whose duty it shall be to *hear proof* and *determine* what *colonists* shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such

parties, certificates for *their proper quantity* of land." Plainly, the purpose of the legislature was, through that officer, to ascertain who were entitled to land in virtue of the contract with Mercer and his associates. It was in violation of the contract for the State to thus pass over the contractors and treat directly with the colonists, but it is none the less clear that she proceeded upon the basis of giving land only to those who were "of the colony of Charles Fenton Mercer and his associates." The official report of Crockett contains the names of all such persons. His action was judicial in its nature, and his determination as to who were entitled to land as colonists aforesaid, was a determination that Mercer and his associates had complied with their contract to the extent, at least, of the persons named in his report. The State gave land to all persons reported by Crockett as of the Mercer colony, and, consequently, she was bound by her contract to compensate Mercer. By the articles of her annexation to the United States it was provided that she shall "retain all the vacant and unappropriated land lying within her limits, to be applied to the payment of the debts and *liabilities* of the said Republic of Texas, and the residue of said lands, *after discharging* said debts and *liabilities*, to be disposed of as such State may direct." Her liability under her contract with Mercer was one of the liabilities for the discharge of which she was bound to apply the unappropriated lands within her limits. Had the articles of annexation been silent as to the debts and liabilities, and made no provision as to the unappropriated lands of the Republic of Texas, and had the United States taken such lands, then, according to the settled principles of public law, they would have been bound to meet the debts and liabilities of the late republic, at least such as had been made a charge upon its public property. To avoid all difficulty upon that subject, it was expressly stipulated in the articles of annexation that Texas should retain her public lands, with power to dispose of them *after* discharging the debts and liabilities of the republic, and that "in no event are said debts and liabilities to become a charge upon the government of the United States." Thus was created, by treaty between the United States and the Republic of Texas, an express trust for the benefit of those

to whom the latter, at the time, was indebted or under liability. The agreement between the United States and Texas constituted, within the meaning of the Constitution, a contract, the violation of which, upon the part of the officers of that State, it is competent for the courts to prevent.

In the opinion of the court it is stated, among other things, that, since the contract was made with Mercer, Texas, both as an independent republic and as a State of the Union, has "denied its validity and refused to do anything under it." There is a serious obstacle in the way of our acceding to the correctness of this statement. It is found in the decision of the Supreme Court of Texas in *Melton* v. *Cobb*, 21 Texas, 539. Referring to this colonization contract with Mercer, that court said:

"That the contract of the 29th of January, 1844, if valid, reserved the land in question from location and appropriation by the plaintiff's certificate, cannot be doubted. But it is insisted that the contract was invalid, for the want of authority, on the part of the president of the republic, to confer on the grantee the benefits contemplated by the joint resolution of the 16th of February, 1843. He undoubtedly had authority under the act of the 4th of February, 1841, and the amendatory act of the 5th of February, 1842, to contract with the grantee to colonize vacant lands of the republic for that purpose, and to set apart and reserve from location the territory within certain boundaries, which he should designate, for the period of three years from the date of the contract."

Referring to the act of February 3d, 1845, copied in the opinion of this court, the Supreme Court of Texas said:

"This act cannot be regarded as anything less *than a virtual ratification by the government of the act of its agent in making the contract, and its legislative affirmation of its validity* . . . The contract was *again expressly recognized and treated as an existing contract by the act of 25th June*, 1845, and these acts were passed prior to the plaintiff's location and survey. It is unnecessary to refer to more recent acts containing *similar recognitions of the validity of the contract.* It will suffice to say that

these legislative recognitions of its validity *must be deemed to have put that question at rest. Houston* v. *Robertson*, 2 Texas, 6; *Hancock* v. *McKinney*, 7 id., 384, 441–2."

In view of the grounds upon which the court rests its decision, it is unnecessary for us to discuss the extent of relief to which Preston is entitled.

For the reasons stated, we cannot assent to the opinion and judgment in this case.

DUBUQUE AND SIOUX CITY RAILROAD CO. *v.* DES MOINES VALLEY RAILROAD CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued October 29th, 1883.—Decided November 19th, 1883.

Indian Titles—Iowa—Land Grants—Railroads.

Previous decisions of this court have settled: 1. That the grant of lands in 1846 to Iowa Territory for the improvement of the Des Moines River did not extend above the Raccoon Fork. 2. That the odd numbered sections within five miles of the river above Raccoon Fork and below the east branch, to which Indian title had been extinguished, did not pass under the act of 1856, granting lands to Iowa to aid in the construction of railroads. 3. That the act of 1862 transferred the title from the United States and vested it in Iowa for the use of its grantees under the river grant.

The court now decides: 4. That when the act of 1862 took effect, there was no Indian title in the way of the grant, and the title of the defendants in error in this suit was perfected. 5. That the reservation made by the executive under the act of 1846 is to have effect according to its terms, and not according to any mistaken interpretation which may at some time have been given to it.

Action to recover lands and quiet title. It was commenced in the Humboldt District Court in the State of Iowa. The present plaintiffs by petition set forth that in May, 1856, Congress granted to the State of Iowa, for the purpose of aiding in constructing a railroad from Dubuque to Sioux City, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road; that this grant became vested in the plaintiffs; and that the present defendants had wrong-

fully procured from the land office an illegal certification to certain designated sections within the grant, whereby the plaintiff's title was disquieted, and they prayed judgment that the lands might be decreed to them.

The answer set up that the lands in question were set apart prior to the act of 1856, as part of the lands granted to the State of Iowa by the act of August 8th, 1846, and that the defendants had succeeded to the rights of the State under the latter grant, and were entitled to the lands in controversy.

The district court gave judgment in favor of the plaintiffs. The supreme court of the State on appeal reversed that judgment. The cause was brought before this court, by writ of error. The facts necessary to the understanding of the issues involved appear in the opinion of the court.

Mr. Charles A. Clark for the plaintiffs in error.

Mr. C. C. Nourse and *Mr. B. F. Kauffman* for the defendants in error.

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

The following are no longer open questions in this court:

1. That the grant of lands to the Territory of Iowa for the improvement of the Des Moines River, made by the act of August 8th, 1846, c. 103, 9 Stat. 77, did not extend above the Raccoon Fork. *Dubuque & Sioux City Railroad Company* v. *Litchfield*, 23 How. 66.

2. That, notwithstanding this, the odd-numbered sections within five miles of the river, on each side, above the Raccoon Fork and below the east branch, to which the Indian title had been extinguished, were so far reserved, "by competent authority," for the purpose of aiding in the improvement of the Des Moines, that they did not pass under the act of May 15th, 1856, c. 28, 11 Stat. 9, granting lands to the State of Iowa to aid in the construction of certain railroads; and—

3. That the act of July 12th, 1862, c. 161, 12 Stat. 543, "transferred the title from the United States and vested it in the State of Iowa, for the use of its grantees under the river grant." *Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Will-*

iams v. *Baker*, 17 Wall. 144; *Homestead Company* v. *The Valley Railroad Company*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755, 767.

The lands involved in this suit are odd-numbered sections, located in Iowa, within five miles of the Des Moines, above the east fork, and it is insisted that they did not pass under the act of 1862, because,

1. When the reservation for the river improvement was made the Indian title had not been extinguished, and they were not then part of the public lands of the United States; and

2. The reservation, as in fact made, was along the east branch, and not the main river, where these lands are.

These objections present the only questions we have now to consider.

1. As to the Indian title.

It is conceded that when the act of 1846 was passed all Indian titles had been extinguished, except such as belonged to certain bands of the Sioux. By a treaty between the United States and the Sacs and Foxes, the Medawah-Kanton, Wahpacoota, Wahpeton, and Sissetong bands or tribes of Sioux, and the Ottawas, Iowas, Ottoes, and Missourias, concluded on the 15th of July, 1830, and proclaimed on the 24th of February, 1831, 7 Stat. 328, certain lands were ceded and relinquished to the United States "to be assigned and allotted, under the direction of the president of the United States, to the tribes now living thereon, or to such other tribes as the president may locate thereon, for hunting and other purposes." The north line of this cession is described in the treaty as follows:

"Beginning at the upper fork of the Des Moines River and passing the source of the Little Sioux and Floyds Rivers to the fork of the first creek which falls into the Big Sioux or Calumet on the east side."

The lands north of this line were occupied by the Sioux, and those south were held by the United States for the purposes set forth in the treaty. Whether the lands in controversy in this suit are situated north or south of this boundary line depends on whether the east branch or the Lizard made the

upper fork of the Des Moines, as understood by the parties when the treaty was concluded. If the Lizard, then all are north of the line; if the east branch, all, or nearly all, are south.

On the 28th of July and the 5th of August, 1851, treaties were negotiated with the Sioux, by which they surrendered all their title to lands in Iowa. The ratification of these treaties, in the form they were originally made, was not advised by the Senate, but on the 23d of June, 1852, certain amendments were proposed, on the acceptance of which the President was authorized to conclude the treaties "as amended." The amendments were agreed to by the Indians on the 4th and 8th of September, 1852, and the ratification of the treaties was duly proclaimed on the 24th of February, 1853.

The grant to Iowa under the act of 1846 was of "one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, encumbered, or appropriated), in a strip five miles in width on each side of said river, to be selected," &c., and the odd-numbered sections were afterwards selected. A question arose as to the extent of this grant, and as early as February 23d, 1848, the commissioner of the general land office certified to the officers of the State that, in the opinion of "his office," the State was "entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river within the limits of Iowa." The State claimed that the grant extended from the mouth of the river to its source. Notwithstanding the opinion of the land office and the claim of the State, a proclamation was issued by the president on the 19th of June, 1848, ordering into market some of the lands which lay above the Raccoon Fork. This led to a protest on the part of the officers of the State, and a correspondence between the representatives of the State in Congress and the secretary of the treasury, whose department then had charge of the public lands, which resulted in the announcement by the secretary, on the second of March, 1849, of his opinion that the grant extended from the mouth to the source of the river, not, however, including any lands in the State of Missouri. In accordance with this opinion, instructions were issued from the general land officers to the land

officers in Iowa, on the 1st of June, 1849, "to withhold from sale all the lands situated in the odd-numbered sections within five miles on each side of the river above the Raccoon Forks." This, however, did not settle the matter, and conflicting opinions were announced at various times by different officers of the executive departments of the government. Finally, on the 22d of February, 1851, the State officers formally notified the secretary of the interior, to whose department the charge of the public lands had before that time been assigned, of the demand by the State of "all the odd sections of land within five miles of the Des Moines River above the Raccoon Fork." After this the whole matter was brought before the president and cabinet, and the decision arrived at by them is indicated in the following letter of the secretary of the interior:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 29, 1851.

"SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month.

"I have considered and carefully reviewed my decision of the 26th July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country, and although my own opinion on the true construction of the grant is unchanged, yet in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my approval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Forks, as far as

the surveys have progressed or may hereafter be completed and returned.

"Very respectfully, etc., etc.,

"A. H. H. STUART, *Secretary.*

"*The Commissioner of the General Land Office.*"

In obedience to these instructions, lists were made out as the surveys progressed, and submitted to the secretary for his approval. His last approval, before the passage of the railroad grant of 1856, was on the 17th of December, 1853. The lands now in controversy were not surveyed at that time, and were not included in this or any of the lists previously made.

It is undoubtedly true, as was said in *Leavenworth, &c., Railroad* v. *The United States*, 92 U. S. 733, 743, that, "in the absence of words of unmistakable import," it will not be presumed that Congress has made a grant of lands to which the Indian title has not been extinguished; but there are, nevertheless, instances, as in the case of the Pacific railroads, where this has been done. Confessedly, however, in this case the congressional grant of 1846 did not include the lands now in controversy. Whatever reservation there was to interfere with the railroad grant of 1856, grew out of what was done by the executive officers of the government after the act of 1846 was passed, and while its effect was in doubt. That the State claimed all the alternate sections within five miles of the river on each side, and as far north as the State line, is not denied. That the intention of the president and his cabinet was to make the reservation as broad as the claim is to our minds perfectly apparent from the language of the instructions of the secretary of the interior to the commissioner of the general land office in his communication of the 29th of October, 1851. His words are:

"I am willing to recognize the claim of the State and approve the selections without prejudice to the rights, if any there be, of others, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary."

He then directed lists of selections to be prepared and sub-

mitted for his approval as the surveys were completed and returned. At this time all the Indian title that could, by any possibility, interfere with the grant as claimed by the State was in the process of extinguishment. Treaties which were to have that effect had already been negotiated with the Indians, and were waiting ratification by the United States. There could hardly have been a doubt in the minds of any of the parties that long before any judicial determination of the matters in dispute every vestige of Indian title would be gone. Hence, to leave "the question of the construction of the statute," that is to say, the effect of the grant, "entirely open," all the lands within the limit, surveyed or unsurveyed, and, as we think, encumbered by an Indian title, or unencumbered, were reserved from sale until the "action of the judiciary." This reservation was in force when the act of 1856 was passed, and it is *the* reservation which this court has held prevented the grant under that act from attaching to the lands within the limits of the river grant, as claimed by the State. The act of 1862 afterwards, in express terms, granted to the State, for the use of its grantees, "the alternate sections designated by odd numbers lying within five miles of said river, between the Raccoon Fork and the northern boundary of the State." At this time there was no Indian title in the way of the grant, and if the reservation was good as against the railroad companies in 1856, the title of the Des Moines Valley company, the grantee of the State, was perfected.

2. As to the east branch.

Much of what has been said about the Indian title applies to this objection. The State claimed the land along the river, and the reservation as promulgated was of what was claimed. No one now supposes the east branch was in fact the Des Moines River. It is undoubtedly true that at some time some officers of the government, as well as some officers of the State, supposed the branch was the main river, and acted accordingly; but that does not change the geographical fact that what was taken for the river was only a branch. The lists of selections along the branch, and their approval by the secretary, were mistakes, which the record shows were corrected in the final

settlements between the State and the United States by allowances in account. The same may be said of the marks on the plats sent out from the general land office to the local land officers. They were clerical mistakes, growing out of an imperfect knowledge of the geography of the country. They did not change the reservation, but only gave wrong information as to what it was. There is no question of estoppel as a consequence of the mistake involved. The railroad grant of 1856 was subject to the reservation for the river grant. There is no pretence of fraud anywhere, and the record does not show that the conduct of the appellants or their grantors has been in any way influenced by the plats or the unauthorized selections and certificates. They knew, or ought to have known, that the reservation was confined to the river lands, and that the branch was not the river. Hence the reservation is to have effect according to its terms, and not according to any mistaken interpretation which may at some time have been given to it.

We find no error in the record, and the

Judgment is affirmed.

KEYES *v.* THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted November 13th, 1883.—Decided November 26th, 1883.

Constitutional Law—Courts-Martial—Executive.

The president has the power to supersede or remove an officer of the army by appointing another in his place, by and with the advice and consent of the Senate.

Such power was not withdrawn by the provision in § 5 of the act of July 13th, 1866, c. 176 (14 Stat. 92), now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid, when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings, in that the prosecutor was a member of the court and a witness on the trial.

No opinion is expressed as to the propriety of such proceedings.

Statement of Facts.

The appellant brought a suit against the United States, in the court of claims, on the 2d of February, 1880, claiming to recover the sum of $4,236.36, for his pay as a second lieutenant in the 5th regiment of cavalry, in the army of the United States, from the 28th of April, 1877. That court dismissed his petition, on the following facts found by it: In February, 1877, the appellant was tried on four charges and specifications, before a general court-martial composed of ten officers. One of them, Colonel Merritt, was the colonel of the 5th cavalry. They were all present. The appellant being before the court, and the order appointing it being read, he was asked if he had any objection to any member of the court present, named in the order, to which he replied in the negative. The oaths were then administered to the members of the court in the presence of the appellant. The first three of the charges and specifications were preferred by the lieutenant-colonel of the 5th cavalry, and the fourth by Colonel Merritt. The appellant was represented by counsel of his own selection. He pleaded not guilty. Colonel Merritt was sworn as a witness on the part of the government, and gave testimony in support of the charge and specifications preferred by him, but gave no testimony in regard to the other charges and specifications. The day after the appellant pleaded not guilty, he withdrew, by leave of the court, his plea of not guilty to the second charge and its specifications, and entered a plea of guilty thereto. Colonel Merritt continued to sit as a member of the court throughout the trial, and participated in rendering the final judgment. At the close of the evidence, the appellant submitted, in writing, a statement of his defence, which was read to the court. It contained no objection or reference to the participation of Colonel Merritt in the trial, as a member of the court, or to his having been so sworn and examined as a witness on behalf of the government. The court found the appellant guilty of all the charges and specifications, and sentenced him to be dismissed from the service. The proceedings, findings, and sentence of the court were approved by the President of the United States, who ordered that the sentence should take effect on the 28th of April, 1877. On the 27th of June, 1877, the senate not being in ses-

sion, the president appointed Henry J. Goldman to be a second lieutenant in the 5th regiment of cavalry, and, on the 15th of October, 1877, he nominated Goldman to the senate for appointment as second lieutenant in said regiment in place of the appellant, dismissed, to date from June 15th, 1877. The senate advised and consented to the appointment of Goldman, and he was accordingly commissioned and still holds the office of such second lieutenant.

Mr. James Coleman for the appellant.—I. Courts-martial are courts of limited and special jurisdiction, and it is essential to their validity that it should be affirmatively shown that they acted upon a case *clearly* within their jurisdiction, and that their proceedings were strictly regular. No presumption can be indulged in favor of the validity of the judgment of such a court, and its judgment is everywhere treated *as a nullity*, unless the record affirmatively shows both jurisdiction and regularity of proceeding. 3 Greenl. Ev., sec. 470; *Duffield* v. *Smith and others*, 3 Serg. & Rawle, 589; *Brooks* v. *Adams*, 11 Pick. 440; *Mills* v. *Martin*, 19 Johns. 7; *Jones* v. *Crawford*, 1 Johns. Case, p. 20, and cases cited; *Opinion of Attorney-General Rush*, Opins. vol. 1, p. 177; *Sheldon* v. *Sill*, 8 How. 441; *State* v. *Gachenheimer*, 30 Ind. 63; *Ohio, &c., R. R. Co.* v. *Shultz*, 31 Ind. 150; *State* v. *Ely*, 43 Ala. 568. Courts-martial, and every other statutory court, or courts of limited and special jurisdiction, must observe all the principles of the common law, except in so far as special statutes have imposed a different rule for such courts. 3 Greenleaf on Evidence, 469; Adye on Courts-martial, 45; Benet on Courts-martial, 244; De Hart's Military Law, 322; *Mustratt's Case*, 2 Mac Arthur, 158; Simmons on Courts-martial, 485; Harwood on Naval Courts-martial, 21. Interested parties cannot join in deciding suits. *The Queen* v. *Justice of Hertfordshire*, 6 A. & E. 753; Broom's Legal Maxims, 119; *Stockwell* v. *Township of White Lake*, 22 Mich. 341; *Sigourney* v. *Sibley*, 21 Pick. 101; *Cottle App't*, 5 Pick. 483; *Coffin* v. *Cottle*, 9 Pick. 287; Hickman on Naval Courts-martial, 246–248. II. Consent will not confer jurisdiction. *Mordecai* v. *Lindsay*, 19 How. 199; *Montgomery*

v. *Anderson*, 21 How. 386; *Walker* v. *Kynett*, 32 Iowa, 524; *Rice* v. *State*, 3 Banks (Kansas), 141; *Lindsay* v. *McClelland*, 1 Bibb, 262; *Bent's Ex'r* v. *Graves*, 3 McCord, 280; *Foley* v. *People*, Breese, 57; *Falkenburgh* v. *Cramer*, Coxe, 31; *Parker* v. *Munday*, Coxe, 70; *Ballance* v. *Forsyth*, 21 How. 389; *Jackson* v. *Ashton*, 8 Pet. 148; *Kansas City, &c., R. R. Co.* v. *Nelson*, 62 Mo. 585; *State* v. *Judge, &c.*, 21 La. Ann. 258. III. Notwithstanding the accused confessed his guilt, he is not estopped from now controverting the jurisdiction of the court before which he was tried. *Duffield* v. *Smith*, 3 Serg. and Rawle, 589.

Mr. Attorney-General for the United States.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts in the language used above, and then said:

So far as regards the time after June 15th, 1877, the fact that Goldman was appointed by the president, by and with the advice and consent of the senate, a second lieutenant in the 5th cavalry, in the place of the appellant, from June 15th 1877, and was commissioned as such, and accepted and held the appointment, is a bar to the suit of the appellant. It was held by this court, in *Blake* v. *United States*, 103 U. S. 227, that the president has the power to supersede or remove an officer of the army by the appointment of another in his place, by and with the advice and consent of the senate, and that such power was not withdrawn by the provision of § 5 of the act of July 13th, 1866, c. 176, 14 Stat. 92, now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the president, by and with the advice and consent of the senate, to displace officers of the army or navy, by the appointment of others in their places.

In regard to the rest of the time covered by the suit, it be-

comes necessary to decide the question raised as to the validity of the sentence of the court-martial. It is contended for the appellant that the court-martial had no jurisdiction to try him; that the fact that he made no objection to any member of the court was not a consent upon his part which conferred jurisdiction on the court-martial; and that the fact that Colonel Merritt was prosecutor, witness and judge rendered the proceedings of the court-martial void. The position is taken that, although there is no statute or regulation which forbids what was done in this case, the sentence of a court-martial in which one of the judges is prosecutor and witness is absolutely void, and that neither what the appellant said nor what he omitted to say, at the time, can cure the defect in the organization of the court.

That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way. *Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank of United States*, 10 id. 449; *Cornett* v. *Williams*, 20 Wallace, 226, 249. This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial, which was sought to be reviewed on a writ of *habeas corpus*. *Ex parte Reed*, 100 U. S. 13.

Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. Of that character are the authorities cited and relied on by the appellant; but they do not apply to the present case.

Under the foregoing views, we express no opinion as to the propriety of the proceedings of the court-martial in the respects in which they are assailed.

The judgment of the court of claims is affirmed.

Mr. Justice Field did not sit in this case or take part in its decision.

BERNARDS TOWNSHIP *v.* STEBBINS, Executor.

SAME *v.* MORRISON and another.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued November 7th, 8th, 1883.—Decided November 26th, 1883.

Equity—Jurisdiction—Municipal Bonds—Municipal Corporations—Parties—Statutes.

If commissioners, authorized by statute to subscribe in the corporate name of a town for stock in a railroad company, and, upon obtaining the consent of a certain majority of taxpayers, to issue bonds of the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issue, without obtaining the requisite consent of taxpayers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals are omitted by oversight and mistake; and the town sets up the want of seals in defence of an action at law afterwards brought against it by one who has purchased such bonds for value, in good faith, and without observing the omission, to recover interest on the bonds; a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law.

A bill in equity in the Circuit Court of the United States against a town in one State by a citizen of another, for relief against the accidental omission of seals from bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the State in which the town is, and part by citizens of other States, and have been transferred to him by the real owners for the mere purpose of being sued, should be dismissed, under the act of March 3d, 1875, c. 137, § 5, so far as regards all bonds held by citizens of the same State as the defendant, and bonds held by a citizen of another State to a less amount than $500.

The facts are fully stated in the opinion of the court.

Mr. Alvah A. Clark and *Mr. Thos. N. McCarter* for appellants Stebbins and Morrison and another.

Mr. H. C. Pitney for Stebbins, appellee.

Mr. Cortlandt Parker for appellees Morrison and another.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

These are appeals by a township in New Jersey from decrees of the Circuit Court of the United States for the District of New Jersey, upon bills in equity by the appellees for relief against the accidental omission of seals on its bonds. The facts, appearing by the record, are as follows:

By the general laws of New Jersey, the inhabitants of each township in the State are a body politic and corporate, by the name of "The Inhabitants of the township of ——— in the county of ———." Rev. Stat. of N. J. of 1877, 1191.

On the 9th of April, 1868, the legislature of New Jersey passed a statute entitled "An Act to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley & Peapack Railroad Company," the first section of which directed the circuit court of either of those counties, on the application of twelve or more freeholders and residents of any township therein, situated along the route of the railroad, to appoint three "commissioners for such township to carry into effect the purposes and provisions of this act." The next two sections are as follows:

"SEC. 2. It shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sum of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor, under their hands and seals respectively; the bonds so to be executed may be in such sums, and payable at such times and places, as the said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners of or for either of said townships, until the written consent shall have been obtained of the majority of the taxpayers of such township, or their legal representatives, appearing upon the last assessment roll, as shall represent a majority of the landed property of such township (including lands owned by non-residents) appearing upon the last assessment roll of such

township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners; the fact that the persons signing such consent are a majority of the taxpayers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township, indorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service; such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same or a certified copy thereof shall be evidence of the facts therein contained, and received as evidence in any court in this State, and before any judge or justice thereof.

"SEC. 3. The said commissioners authorized by this act may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations and upon such terms as they shall deem most advantageous for their said township, but not for less than par; and the money that shall be raised by any loan or sale of bonds shall be invested in the stock of said railroad company for the purpose of building the aforesaid railroad, and said money shall be applied and used in the construction of said railroad, its buildings, equipment and necessary appurtenances, and for no other purpose; the commissioners respectively, in the corporate name of each of their said townships, shall subscribe for and purchase stock in said railroad company, to the amount they may have severally borrowed as aforesaid; and by virtue of such subscription or purchase of stock, upon receiving certificates for the amount of said stock so subscribed for or purchased by them, the said townships shall acquire all the rights and privileges respectively of other stockholders of said company, and it shall be lawful for the commissioners provided for in this act, or either of them, with the consent of the others, or a majority of the said commissioners, to participate in and to act in all the regular and legally authorized meetings of the stockholders, and either of them may act as director of said company if he shall be duly elected as such."

By § 4, the commissioners were directed to report annually

to the township committee the amount required for the next year to pay the interest or principal of the bonds, and to apply in payment thereof the dividends on the stock subscribed or purchased for the township; and any deficiency was to be assessed and levied upon the landed property of the township, like other taxes. By § 5, the railroad company might agree with the commissioners, "in behalf of their respective townships," to pay the interest accruing "on the bonds issued by such townships," for three years, or until the railroad should be completed and earning sufficient to pay dividends equal to the interest. By § 6, the commissioners might, after acquiring stock, exchange it for bonds issued, and cancel the bonds so received; or they might, with such consent as mentioned in § 2, sell the stock for cash at public sale, and apply the proceeds to the purchase or redemption of the bonds. And by § 7, at the end of twenty-five years, the sum due for principal and interest on the bonds, as reported by the commissioners, was to be assessed and levied on the landed property.

By § 9, the commissioners were required, before entering upon the discharge of their duties, to give a bond to the township, with sureties approved by the township committee or by the judge of the county court. By § 11, their pay and disbursements were to be "audited and paid by the township committee, the same as other township expenses." By § 12, the commissioners in each township were "to constitute a board to act for their said townships respectively." And by § 14, all bonds issued were required to be registered in the office of the county clerk, and the words "registered in the county clerk's office" to be printed or written across the face of each bond, attested by the signature of the county clerk, "and no bond shall be valid unless so registered."

Commissioners for the Township of Bernards in the county of Somerset were appointed, and gave bond to the township, according to §§ 1, 9. On the 17th of December, 1868, they filed in the county clerk's office the written consent of a number of taxpayers, not being a majority of all the taxpayers in the township, but being a majority in number and value of the owners of real estate therein; with an affidavit of one of the

commissioners to the signatures; and an affidavit of the assessor that the signers were a majority of the taxpayers of the township and represented a majority of the real property of the township, and also that they were a majority of the taxpayers of the township appearing upon its assessment roll for 1867, or their legal representatives, and represented a majority of the landed property of the township appearing upon that assessment roll.

In the same month of December, 1868, the commissioners subscribed in behalf of the township for stock in the railroad company, of the value of $127,000, which did not exceed ten per cent. of the assessed valuation of the landed property of the township in 1867; and caused bonds of the township to an equal amount to be printed in the form hereinafter set forth; and made an arrangement with the railroad company to exchange the bonds of the township for stock in the company, and to deliver the bonds to the company in instalments, as calls for payments on subscriptions were made, and as the work on the railroad progressed. The railroad was afterwards built and put in operation through the town; and the commissioners issued to the railroad company, in exchange for stock, instruments to the amount aforesaid, in the form of bonds, of the denominations of $1,000, $500 and $100 respectively, signed by the commissioners, but not sealed, with interest coupons annexed. The form of the bonds and the coupons was as follows:

"No. UNITED STATES OF AMERICA. $500.

"TOWNSHIP OF BERNARDS, SOMERSET COUNTY, STATE OF NEW JERSEY.

"The Inhabitants of the Township of Bernards in the County of Somerset acknowledge themselves to owe to bearer five hundred dollars, which sum they promise to pay the holder hereof, at the American Exchange National Bank in the City of New York, twenty-three years after the date hereof, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of July and January in each year, until

the said principal sum shall be paid, on the presentation of the annexed interest coupons at the said bank.

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said township in pursuance of an act entitled 'An Act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company,' approved April 9th, 1868.

"In testimony whereof the undersigned commissioners of the said Township of Bernards in the County of Somerset to carry into effect the purposes and provisions of the said act, duly appointed, commissioned, and sworn, have hereunto set our hands and seals the first day of January in the year of our Lord one thousand eight hundred and sixty-nine.

"JOHN H. ANDERSON,
"JOHN GUERIN,
"OLIVER R. STEELE,
"*Commissioners.*"

"Registered in the county clerk's office.

"WILLIAM ROSS, JR.,
"*County Clerk.*"

"$17.50. The Inhabitants of the Township of Bernards in the County of Somerset will pay the bearer, at the American Exchange National Bank in the City of New York, seventeen $\frac{50}{100}$ dollars, on the first day of January, 1869, for six months interest on bond No.

"JOHN H. ANDERSON,
"JOHN GUERIN,
"OLIVER R. STEELE,
"*Commissioners.*"

One-fifth of the whole amount of bonds was signed by the commissioners and delivered to the railroad company on the 16th of January, 1869, was registered on the 18th of the same month, and was afterwards put in circulation by the company. Upon a bill filed by certain taxpayers of an adjoining township in the spring of 1869, the Court of Chancery of New Jersey restrained the issue of like bonds, for want of the consent of a

majority of all the taxpayers of the township. *Lane* v. *Schomp*, 5 C. E. Green, 82. The commissioners thereupon obtained, and filed in the county clerk's office on the 1st of September, 1869, the written consent of other taxpayers, which, with those whose consent had been previously filed, constituted a majority of all the taxpayers in the township, with similar affidavits of commissioner and assessor; and the remaining four-fifths of the bonds were afterwards issued and registered, and put in circulation. Of the bonds in controversy, some were issued before, and some after, the 1st of September, 1869.

The commissioners intended to issue, and supposed that they had issued, perfect bonds, and their failure to affix their seals to the bonds was by oversight and mistake. The bonds were purchased by the present owners in good faith, in open market, for the then market price of from eighty-five to a hundred cents on the dollar, and without observing that they had no seals.

Cyrus Curtiss, a citizen of New York (of whom the appellee in the first case is the executor), held and owned such bonds to the amount of $2,000; and held like bonds to the amount of $3,000, owned by other citizens of New York, in amounts varying from $1,300 to $500 each, except that one owned only $200, and delivered by them to him solely for the purpose of bringing suit on the coupons; and also held coupons past due and unpaid upon like bonds to the amount of $18,600, owned by citizens of New Jersey, who had assigned those coupons to him for the sole pupose of collecting the amount thereof.

Thomas H. Morrison and Gardner S. Hutchinson, citizens of New York (the appellees in the second case), held and owned such bonds to the amount of $10,000; and also held like bonds to the amount of $12,000, owned by other persons, citizens of New York or Pennsylvania, in amonnts varying from $6,000 to $500 each, as well as bonds to the amount of $5,100 owned by citizens of New Jersey, all which bonds had been transferred to them by the owners for the mere purpose of collecting the unpaid coupons thereon.

In April, 1874, actions of debt were brought by Curtiss, and by Morrison and Hutchinson, against the township, in the Cir-

cuit Court of the United States for the District of New Jersey, to recover the amount of unpaid coupons for three years' interest on all the bonds so held by the plaintiffs; to which the township pleaded that the bonds were not sealed by the commissioners.

The plaintiffs in each of those actions thereupon, in the spring of 1876, after requesting the two surviving commissioners (the third having died meanwhile) to affix their seals to the bonds, which they declined to do unless by order of some court of competent jurisdiction, filed a bill in equity in the same court, praying for a reformation of the bonds; for an order that the surviving commissioners affix seals opposite the signatures; for a decree that the bonds should be deemed and taken to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; for a perpetual injunction against the setting up of the want of seals as a defence in the action already brought, or in any future action by the plaintiffs to recover principal or interest, due or to grow due, on the bonds; and for further relief. Demurrers to the bills were interposed and overruled; answers and replications were filed, and a hearing was had upon pleadings and proofs.

At the hearing, it was objected, in behalf of the township, that the plaintiffs, if entitled to any relief, could maintain their bills so far only as concerned the bonds that were both owned and held by them, and not as regarded the bonds owned by other persons. The court overruled the objection, and entered a final decree upon each bill that the bonds, or writings in the nature of bonds, therein described, be held and deemed to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; and that the township be perpetually enjoined from setting up the want of seals in the action at law already brought, or in any action to be thereafter brought, upon any of these bonds or coupons. From those decrees the township has appealed to this court.

It was contended in behalf of the township that the bonds were void: First. Because they were not under the seals of the commissioners, as required by the statute. Second. Because the statute did not authorize the issue of bonds with annexed

and detachable coupons not under seal. Third. Because the consent of the taxpayers to the borrowing of money and issue of the bonds was obtained by fraud. Fourth. Because the consent of a majority of all the taxpayers, as well as of those who represented a majority of the landed property of the township, was not obtained before the subscription for stock and the issue of the bonds. Fifth. Because the bonds were issued by the commissioners directly to the railroad corporation in exchange for stock, instead of being sold or disposed of by the commissioners and the money thus obtained applied to the purchase of stock, as required by the statute.

In dealing with these objections, it must be borne in mind that the cases before us are not actions at law upon the bonds or coupons, but bills in equity to restrain the township from setting up the want of seals in the actions at law heretofore brought by those plaintiffs against the township to recover the amount of the coupons; and the objections above recited are to be considered so far only as they affect the question whether the bills can be maintained.

It has been settled, upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law. *Smith* v. *Aston*, Freem. Ch. 308; *S. C.* Cas. temp. Finch, 273; *Cockerell* v. *Cholmeley*, 1 Russ. & Myl. 418, 424; *Wadsworth* v. *Wendell*, 5 Johns. Ch. 224; *Montville* v. *Haughton*, 7 Conn. 543; *Rutland* v. *Paige*, 24 Vt. 181. See also *Wiser* v. *Blachly*, 1 Johns. Ch. 607; *Green* v. *Morris & Essex Railroad Co.*, 1 Beasley, 165, and 2 McCarter, 469; *Druiff* v. *Parker*, L. R. 5 Eq. 131.

By the necessary effect and the very terms of the statute of New Jersey of 1868, the money is borrowed on the credit of the township, the stock obtained by the disposal of the bonds

belongs to the township, the bonds are issued on behalf of the township, and are the bonds of the township; and the commissioners, though not elected by the township, but otherwise appointed as provided by the statute, act in issuing the bonds, and in doing everything else that they are required by the statute to do, as the agents of the township. This view has been affirmed by the judgment of the Supreme Court of New Jersey, construing this very statute, in *Morrison* v. *Bernards*, 7 Vroom, 219, and by the judgment of this court upon the effect of a similar statute of New York, in *Draper* v. *Springport*, 104 U. S. 501.

In *Draper* v. *Springport* it was held that the mere fact that the commissioners had only signed, without sealing, the bonds, did not exempt the town from liability to a purchaser thereof in good faith and for valuable consideration. And Mr. Justice Bradley, in delivering judgment, said:

"It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments." "We cannot agree with the courts of the State that the form of a seal was an essential part of the transaction."

It was argued that the power conferred upon the commissioners to issue bonds was a statutory power, defects in the execution of which could not be supplied or relieved against in equity. There is much learning on this subject in the books. But Mr. Chance, upon a full review of the older cases, has clearly demonstrated that the true ground upon which equity grants relief is "the same as that on which it relieves against

the want of livery, the want of enrolment, or any other ceremony required, either at common law or by statute, but considered as not meant to be positively essential. The main point to be ascertained, at least with reference to forms prescribed by act of Parliament, is whether the legislature has attached a decisive weight to the observance of the forms." Chance on Powers, § 2989. See also 2 Sugden on Powers (7th ed.) 125–129.

In *Darlington* v. *Pulteney*, Cowp. 260, 267, Lord Mansfield said that the reason why equity could not relieve from defects in the execution of statutory powers to make leases was, "that there is nothing to affect the conscience of the remainderman." And in *De Riemer* v. *Cantillon*, 4 Johns. Ch. 85, where a sheriff's deed of land sold by him on execution omitted, by mistake in the description, an important part of the estate advertised and intended to be sold and purchased, and the purchaser, with the consent of the judgment debtors, took possession of and improved the whole, and afterwards, at their request, sold it, and conveyed by a like description, all parties understanding and believing that the whole was included in both deeds, and the price paid by the second purchaser being estimated on this basis, Chancellor Kent, upon a bill in equity filed by the last purchaser against the debtors, restrained them from prosecuting suits brought against him for the recovery of the land not included in the description, and decreed that they should release it to him.

In the present case, the commissioners, in issuing the bonds, acted rather in the capacity of agents of the township than as donees of a statutory power in the ordinary sense; and the direction of the statute that the bonds should be under the seals, as well as the hands, of the commissioners, was declared by this court in *Draper* v. *Springport*, above cited, to be "a matter of form rather than of substance," "merely a directory requirement," and not "an essential part of the transaction." The bonds are in other respects in the form prescribed by the statute. The commissioners intended to issue them in behalf of the town, pursuant to the statute, and stated on the face of the bonds that they had done so, and that they had thereto set

their hands and seals. The town received full consideration for the bonds, and the purchaser bought them in open market, in good faith and for value, and in ignorance of the want of seals. These facts present a strong case for the interposition of a court of equity, having jurisdiction of the cause and of the parties, to prevent the formal defect of the want of the seals of the commissioners from being set up to defeat an action at law upon the bonds or coupons. The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negligence as should prevent them from applying to a court of equity to correct a mistake of this character. See *Wadsworth* v. *Wendell* and *Montville* v. *Haughton*, above cited; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Elliott* v. *Sackett*, 108 U. S.

The objection that the statute did not authorize the bonds to be issued with coupons, if it is of any validity (which we do not intimate), will be fully open to the defendant in the actions at law upon the coupons.

The suggestion that the consent of the taxpayers to the issue of the bonds was obtained by fraud is not supported by the evidence.

The consent of a majority of all the taxpayers of the township has been held necessary by the court of chancery and by the Supreme Court of New Jersey. The chancellor, in granting an injunction against the issue of bonds without such consent, expressed the opinion that the want of such consent would afford no defence at law after the bonds had been once issued, and had come into the hands of innocent holders for value. The supreme court decided otherwise. *Lane* v. *Schomp*, 5 C. E. Green, 82; *Morrison* v. *Bernards*, 7 Vroom, 219. The question has not, so far as we are informed, been passed upon by the court of errors.

The exchange of the bonds directly for railroad stock would seem, in the absence of any decision in the courts of the State upon the point, to be a substantial compliance with the statute, or, at the most, a matter which would not defeat the rights of a *bona fide* purchaser. See *Scipio* v. *Wright*, 101 U. S. 665; *Montclair* v. *Ramsdell*, 107 U. S. 147, 160.

Opinion of the Court.

But if either the want of a written consent of a majority of all the taxpayers, or the fact that the bonds were issued directly in exchange for stock, is a fatal objection as against a purchaser for value and in good faith, it may be availed of by the township in the actions at law on the coupons. If these objections are not of that character, they do not impair the equity of the purchasers to relief against the accidental omission of the seals of the commissioners. The validity of both these objections, therefore, may be more appropriately determined in the actions at law.

The remaining question argued at the bar is how far the citizenship of the real parties in interest, and the amount of the claim of each, should affect the exercise of jurisdiction and the extent of the decree.

The position of the plaintiffs is, that the bonds and coupons being payable to bearer, they are entitled to sue, at law or in equity, on all the coupons held by them; that the combination of the holders of several claims of moderate amount against the same defendant, for the purpose of diminishing and sharing the expense of litigation, was entirely proper, and should be encouraged by the court; that the bonds and coupons owned as well as held by the plaintiffs, and by others not citizens of New Jersey, clearly brought the case within the jurisdiction of the court; and that to deny to citizens of New Jersey the right to transfer their claims to the plaintiffs for the purpose of collection in the same suit would be to discriminate unjustly between the citizens of New Jersey and the citizens of other States.

But, in the matter of the jurisdiction of the federal courts, the discrimination between suits between citizens of the same State and suits between citizens of different States is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded by bringing into the federal courts controversies between citizens of the same State.

In the Judiciary Act of 1789, the only express provision to this end was that the circuit court should not "have cognizance

of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." Stat. September 24th, 1789, c. 20, § 11; 1 Stat. 78; Rev. Stat. § 629, cl. 1. That provision has been held not to be restricted to actions at law, but to include bills in equity to foreclose mortgages, or to compel the specific peformance or enforce the stipulations of contracts. *Sheldon* v. *Sill*, 8 How. 441; *Corbin* v. *Black Hawk County*, 105 U. S. 659.

In *Barney* v. *Baltimore*, 6 Wall. 280, a bill in equity for the partition of real estate and for an account of rents and profits, in the Circuit Court of the United States for the District of Maryland, by a citizen of Delaware, owning a share in the estate, against citizens of Maryland, owning other shares therein, and to whom the owners of the remaining shares, being citizens of the District of Columbia, and not of any State, and therefore not authorized to sue in the Circuit Court of the United States, had conveyed their shares without consideration, under an agreement to reconvey upon request, and for the sole purpose of giving jurisdiction to the federal courts, was dismissed, because the grantors were necessary parties to the suit, and because their conveyance, not transferring their real interests to the other parties, was a fraud upon the court.

The act of March 3d, 1875, c. 137, § 5, directs that if "in any suit commenced in a circuit court," it shall appear to the satisfaction of the court, "at any time after such suit has been brought," "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable" by the circuit court, that court "shall proceed no further therein, but shall dismiss the suit," and shall make such order as to costs as shall be just; and its order of dismissal shall be reviewable in this court on writ of error or appeal. 18 Stat. pt. 3, 470.

Opinion of the Court.

In *Williams* v. *Nottawa*, 104 U. S. 209, decided by this court since the hearing of these cases in the circuit court, an action was brought by Williams, a citizen of Indiana, in the Circuit Court of the United States for the Western District of Michigan, against a township in that State and district, upon its bonds payable to bearer. The action, as the record on file shows, was brought in September, 1874, about six months before the passage of the act of 1875. It appeared that Williams personally owned only three of the bonds, of $100 each, and that the other bonds in suit had been transferred to him solely for the purpose of collection with his own, by the owners thereof, all of whom were citizens of Michigan, except one Tobey, whose bonds amounted to $300 only, and whose citizenship was not disclosed by the record. The circuit court gave judgment for the plaintiff for the amount of the bonds belonging to Williams and to Tobey, and in favor of the township for the remainder. Upon a writ of error sued out by Williams to reverse the judgment in favor of the township, this court held that, in obedience to the act of 1875, the action should be wholly dismissed; because, so far as concerned the bonds owned by citizens of Michigan, who could not sue a Michigan township in the courts of the United States, it could not be doubted that the transfer to the plaintiff, being colorable only, and never intended to change the ownership, was made for the purpose of "creating a cause cognizable in the courts of the United States;" and, as to the bonds owned by Williams and by Tobey, there was a collusive joinder, because, when the suit was begun, the amount due to each was less than $500, and therefore insufficient to maintain a suit in the federal courts.

The decision in *Williams* v. *Nottawa* establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same State as the defendant, or by reason of the insufficient value of their claims. The principle of that

decision is equally applicable to suits in equity to assert equitable rights under such bonds.

It was argued that these bills in equity were only auxiliary to the actions at law, which were brought before the passage of the act of 1875, and therefore that act had no application. The answer to this is twofold. First. The bills in equity, filed since the passage of the act, are independent suits, of broader aim than the actions at law. The actions at law are to recover the amount of coupons only; the bills in equity seek, not merely an injunction against setting up the defence of want of seals in the pending actions on the coupons, but also a decree declaring that the bonds shall be deemed valid. Second. Even the actions at law, brought before the passage of the act of 1875, are subject, under the adjudication in *Williams* v. *Nottawa*, to be dismissed, in whole or in part, as the facts may require, in the court in which they are pending.

It follows, that these bills should have been dismissed, so far as regarded the bond for $200, owned by a citizen of New York in the first case, and also as to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court. *Thompson* v. *Perrine*, 106 U. S. 589; *Chickaming* v. *Carpenter*, 106 U. S. 663; *Douglas' Commissioners* v. *Bolles*, 94 U. S. 104, 109; *Cromwell* v. *Sac County*, 94 U. S. 351, 360. The decrees of the circuit court must be modified accordingly.

The decrees in favor of the appellees being reversed as to a large part of their claims, they should pay costs in this court; but as they still maintain their bills as to the rest of their claims, they should recover costs in the court below.

The decrees of the circuit court are reversed, and the cases remanded with directions to enter

Decrees in conformity with this opinion.

Mr. Justice Field took no part in this decision.

WARNER and Others *v.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued November 13th, 1883.—Decided November 26th, 1883.

Mortgage—Power.

A husband and wife join in a mortgage of the wife's real estate to secure a debt of the husband contracted simultaneously with the execution of the mortgage. The wife dies before maturity of the debt, leaving a will devising all her estate to her husband in trust to enjoy the income during his life, with remainder to her children at his decease: — *But provided*, That said Cyrenius Beers may encumber the same by way of mortgage or trust deed or otherwise, and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property. The will appointed the husband as sole executor, and waived all security: *Held*, that the executor was empowered by the will to extend the mortgage debt at maturity without notice to the devisees of the remainder, and without affecting the mortgage security.

The husband, on the maturity of the debt secured by the mortgage, extended it by an instrument which did not refer to the will, or to the power which it conferred: *Held*, that, under the circumstances, it was to be construed as an execution of the power.

Bill to foreclose a mortgage, and cross-bill to have the mortgage set aside. The appellees filed the bill as plaintiffs in the court below, against the appellants and one Charles G. Beers, their brother, and against other parties, to foreclose a mortgage on real estate in Chicago. The appellants filed in that suit their cross-bill, setting forth their title to the mortgaged property, alleging that the mortgage was a cloud upon it, and praying a decree for the discharge of the mortgage. The controversy arose on the following facts:

On the 24th February, 1869, one Cyrenius Beers borrowed of the insurance company, appellees, $20,000, and executed and delivered to them his bond conditioned for the payment of that sum, with interest, payable semi-annually, at the rate of eight per cent. per annum. On the same day Beers and Mary Beers, his wife, duly executed and delivered the mortgage in contro-

versy, to secure the payment of that debt. The title to the mortgaged estate was in the wife, and was so described in the mortgage. In the following October the wife died, leaving a will, which was duly admitted to probate in March, 1872, and of which the following is a copy:

"I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age and sound mind, in view of the uncertainty of human life, do make, publish and declare this my last will and testament.

"First. I order all of my debts to be paid, including the expenses of my funeral and last illness.

"Second. I give and bequeath to my husband, Cyrenius Beers, all the estate, both real, personal, and mixed, of which I die seized or possessed, to be held by him in trust for the following uses, purposes, and trusts, and none other, that is to say, to receive the rents, income, and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers, and Charles G. Beers share and share alike to them, their heirs and assigns forever.

"But provided, That said Cyrenius Beers may encumber the same by way of mortgage or trust deed or otherwise, and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property.

"But provided further, That the said Cyrenius Beers may, in his discretion, during his life, sell and dispose of any or all of the real estate of which I may die seized or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the encumbrances upon any of the property of which I may die seized and possessed, and the remainder over and above what may be required to pay the indebtedness upon said property, the same being now encumbered, to reinvest in such way as he may see proper, and from time to time to sell and reinvest, such reinvestment to continue to be held in trust, the same as the estate of which I may die possessed; that is to say, the said Cyrenius Beers only to have the use during his life of said estate, with the right of sale and to encumber and reinvest, the remainder after his death to go to my children and their heirs forever.

Statement of Facts.

"Third. I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided, as such executor.

"In witness whereof I have hereunto set my hand and seal this fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine.

"MARY BEERS. [SEAL.]

"The above instrument, consisting of three pages, was, at the date thereof, declared to us by Mary Beers, the testator therein mentioned, to be her last will and testament, and she at the same time acknowledged to us, and each of us, that she had signed and sealed the same, and we thereupon, at her request, and in her presence, and in the presence of each other, signed our names thereto as attesting witnesses.

"SAMUEL BEERS, [SEAL.]
"GEORGE T. BEERS, [SEAL.]
"*Witnesses.*"

Cyrenius Beers, the husband, accepted the trust, and duly qualified as executor and administered upon the estate, and was discharged on the 20th September, 1877.

When the debt secured by the mortgage matured on the 24th February, 1874, it was not paid; but instead thereof Beers on that day entered into a written agreement with the company, in which, after reciting the execution of the bond, and that it was wholly unpaid, and the execution and delivery of the mortgage "by the said Cyrenius Beers and Mary his wife," "to secure the payment thereof," it was agreed as follows:

"Now, this memorandum witnesseth that the said The Connecticut Mutual Life Insurance Company, in consideration of the covenants and agreements on the part of the said Cyrenius Beers hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and time being the essence of this contract, doth hereby extend and postpone the time of payment of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned until

the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, interest to be paid thereon at and after the rate of nine per centum per annum, half yearly, in the same manner and at the place or places in the condition of said bond mentioned.

"And the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum, doth hereby convenant, promise, and agree to and with the said The Connecticut Mutual Life Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life Insurance Company, its successors and assigns, said principal sum of twenty thousand ($20,000) dollars, on the twenty-fourth day of February which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon at the rate of nine per centum per annum half yearly, to wit, on the twenty-fourth day of each of the months of August and February, which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due-bills signed by said Cyrenius Beers, bearing even date and given herewith; it being expressly understood and agreed by and between the parties hereto that in the event of a failure to pay either or any of said coupons at maturity then, at the election of said The Connecticut Mutual Life Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted.

"It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators, from their liabilities upon said bond, but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond.

"It is also expressly understood and agreed by and between the parties hereto that in the event of a failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns, to fulfil, keep, and promptly perform, as well in spirit

as in letter, the covenants in the said mortgage contained, given by said Cyrenius Beers to said company, then, at the election of said The Connecticut Mutual Life Insurance Company, its successors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding."

Cyrenius Beers died intestate in February, 1878, leaving the mortgage debt still due and unpaid.

The appellants and Charles G. Beers, one of the defendants in the original suit, were his heirs. They were also the children and devisees of the said Mary Beers. Charles G. conveyed his interest in the property to the appellants before the date of the cross-bill.

The extension of the mortgage debt in 1874 was made without the knowledge or consent of the appellants or of the said Charles G. Beers. The contention of the appellees was that under the circumstances it operated as a discharge of the mortgage lien.

The court below decreed the foreclosure of the mortgage and sale of the mortgaged estate. From this decree the defendants below appealed.

Mr. John S. Miller for the appellants. I. Mary Beers occupied the position of surety. The appellants, as her privies in estate, are entitled to every defence which could have availed to her. *Bank of Albion* v. *Burns*, 46 N. Y. 170; *Smith* v. *Townsend*, 25 N. Y. 479; *Gahn* v. *Niemcewicz*, 11 Wend. 312; *S. C.* 3 Paige, 614; *Johns* v. *Reardon*, 11 Md. 465; *Purvis* v. *Carstaphan*, 73 N. C. 575; *Aguilar* v. *Aguilar*, 5 Madd. 414; *Stanford, &c., Banking Co.* v. *Ball*, 4 De G., F. & J. 310; *Earl* v. *Countess of Huntingdon*, 2 Bro. P. C., case 1. II. By the extension of the time of payment, the mortgaged estate was released. *Bank of Albion* v. *Burns*, 46 N. Y. 170; *Smith* v. *Townsend*, 25 N. Y. 479. III. The will devised a life estate to Cyrenius, and remainder to the children. *Doe* v. *Considine*,

6 Wall. 458; *Doe* v. *Martin*, 4 Term R. 39; *Lambert* v. *Thwaites*, 2 Law Rep. Eq. Cas. 151–5; *Minors* v. *Battison*, 1 E. L. R. App. Cas. 428. The extension was not authorized by the power in the will. *Ward* v. *Bank of Ky.*, 7 T. B. Mon. 93; *Seitzinger* v. *Weaver*, 1 Rawle, 375; *Horwitz* v. *Norris*, 49 Penn. St. 213; *Slifer* v. *Beates*, 9 S. & R. 166; *Hetzel* v. *Barber*, 69 N. Y. 1. In making the extension, Beers acted solely in his own interest, and not as donee of the power. *Sir Edward Clere's Case*, 6 Coke R. 17 B.; *Andrews* v. *Emmott*, 2 Bro. C. C. 597; *Cox* v. *Chamberlain*, 4 Ves. 631; *Nunnock* v. *Horton*, 7 Ves. 391; 1 Sug. Pow. *367, *412; *Denn* v. *Roake*, 2 Bing. 497; *S. C.* 5 B. & C. 720; *S. C.* 1 Dow & Cl. 437; *Blagge* v. *Miles*, 1 Story R. 426; *Jones* v. *Wood*, 16 Penn. St. 25; *Bell* v. *Twilight*, 22 N. H. 500; 2 Story Eq. Jur., § 1062 a; *Coffing* v. *Taylor*, 16 Ill. 457; *Pease* v. *Pilot Knob Iron Co.*, 49 Mo. 124; *Mory* v. *Michael*, 18 Md. 227; *Maryland Mut. Ben't Society* v. *Clendinen*, 44 Md. 429; *Funk* v. *Eggleston*, 92 Ill. 515; *Towles* v. *Fisher*, 77 N. C. 437; *Blake* v. *Hawkins*, 98 U. S. 315. The power to sell was a naked power not coupled with a trust. Lewis on Trusts, 22, 6th London Ed. 19; 3 Redf. on Wills, 469; Hill on Trustees, 67; 2 Sugden on Powers, 159; *Eldridge* v. *Heard*, 106 Mass. 579.

Mr. Edward S. Isham for the appellee.

Mr. Justice Matthews delivered the opinion of the court. After reviewing the principal facts, he said:

This extension of the time of payment of the mortgage debt was made without any consent thereto on the part of the appellants.

It is claimed on their behalf that, as owners of the estate mortgaged by the testatrix to secure the debt of her husband, they are in a position of sureties, and that the extension of time for the payment of the debt, without authority from them, is, in equity, a discharge of the lien of the mortgage.

The appellee insists, in reply to this claim, that the agreement by which further time was given for the payment of the debt, during which the mortgage was continued in force, was

authorized by the will of Mary Beers and binds her devisees. Whether this be so is the precise question we are required to decide.

We are reminded, at the outset of the argument, by the counsel for the appellants, that being sureties, they are favorites of the law; that their contract is *strictissimi juris;* and that nothing is to be taken against them by intendment or construction. It is quite true that "the extent of the liability to be incurred must be expressed by the surety, or necessarily comprised in the terms used in the obligation or contract;" that is, "the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it." "In this sense only," continued Mr. Burge, Law of Suretyship, 1st Am. Ed., p. 40, "must be understood the expression that the contract of the surety is to be construed strictly. It is subject to the same rules of construction and interpretation as every other contract." Besides, the rule of construction applies only to the contract itself, and not to matters collateral and incidental, or which arise in execution of it, which are to be governed by the same rules that apply in like circumstances, whatever the relation of the parties. So that the fact that the appellants occupy the relation of sureties cannot control the determination of the question whether the agreement extending the time of payment of the mortgage debt, and the continuance of the mortgage as an encumbrance upon the estate, was a valid execution of the powers conferred by the will of the testatrix. That question must be answered according to its own rules.

It is further said, however, on the part of the appellants, that the agreement of February 24th, 1874, cannot be sustained in support of a continuation of the mortgage lien, as an execution of the powers conferred by the will of Mary Beers, because it does not appear that it was so intended by Cyrenius Beers, the donee of those powers. It is argued that the agreement of extension makes no reference either to the power or to the property of the testatrix, which is the subject of the power; that every provision contained in it can have its full operation and effect; that is, all that it professes to do or provide for can

be done, according to its full tenor, without referring the act to the power, and by referring it solely to the individual interest of Cyrenius Beers, as the debtor of the appellee.

This, however, on an examination of its terms, will appear to be an erroneous view of the true meaning and legal effect of the agreement of extension. It recites the indebtedness of Cyrenius Beers to the appellee, as then due and unpaid; that he had applied to them to extend the time for the payment of the principal sum; that Cyrenius Beers and Mary, his wife, had executed and delivered their deed of mortgage to secure the payment thereof; it is thereupon witnessed that The Connecticut Mutual Life Insurance Company doth thereby extend and postpone the time of payment of the principal sum until February 24th, 1879, interest to be paid thereon at the rate of nine per centum per annum; and in consideration thereof Cyrenius Beers agrees to pay the principal sum on the day named therefor, and the interest thereon as stipulated, it being understood that on failure to pay any instalment of interest the whole of the principal sum shall thereupon become due, and may be collected without notice, together with all arrearages of interest. It is also understood and agreed between the parties, that nothing in the agreement shall operate to discharge or release Cyrenius Beers from his liability upon the bond originally given for the payment of the debt, "but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond." It is also expressly understood and agreed between the parties that in the event of failure on the part of Cyrenius Beers, "to fulfil, keep, and promptly perform, as well in spirit as in letter, the covenants in said mortgage contained, given by said Cyrenius Beers to said company, then, at the election of the said company, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding."

Taking the instrument in all its parts and looking at its en-

tire scope and purpose, it must be admitted that, notwithstanding its omission of any direct and express stipulation of that character, its meaning and legal effect are to continue in force, so far as the parties to it had lawful authority to do so, the covenants and lien of the mortgage as security for the payment of the original debt, with the interest reserved at the increased rate until the expiration of the extended time of payment. This effect was undoubtedly intended by the parties, and this intention could not take effect except by virtue of the powers contained in the will of Mary Beers. Cyrenius Beers, as debtor, had no power to continue the mortgage in force, nor as tenant for life to renew it as a mortgage in fee. This is a demonstration, therefore, that the instrument must be treated as an execution of those powers, because, if it cannot otherwise operate according to the intention of the parties, it must be referred to the power which alone can make it effectual in all its provisions.

The rule applicable in such cases, it is claimed, is that deduced as the doctrine of *Sir Edward Clere's Case*, 6 Rep. 17 b, as stated by 1 Sugden on Powers, 417, 7th London Ed., that "where the disposition, however general it may be, will be absolutely void if it do not enure as an execution of the power, effect will be given to it by that construction." Mr. Chance, however, says:

"There are, indeed, in the case *dicta* apparently to this effect, that if the instrument refer not to the power and can have some effect by means of the interest of the party, though not all the effect which the words seem to import, still the instrument shall not operate as an execution of the power, the intention being thus contravened. It appears quite clear, however, at this day, and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries, that the rule is not thus confined; indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case as well as in the other? What rule of law or construction would be thereby violated?" 2 Chance on Powers, 72, § 1597, London Ed. 1831.

And Sir Edward Sugden said:

"And notwithstanding Sir Edward Clere's case, an intent, apparent upon the face of the instrument, to dispose of all the estate, would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not otherwise be satisfied." 2 Sugden on Powers, 412, ch. VI. sec. VIII. 7th London Ed.

In the present case, as we have seen, the legal effect and meaning of the instrument cannot be satisfied without treating it as an execution of the powers under the will, for Cyrenius Beers, merely as debtor, as mortgagor, and as owner of the life estate under the will of his wife, could not lawfully agree to keep in force and renew a mortgage upon the estate of which the appellants were devisees in remainder in fee.

The Supreme Court of Illinois in the case of *Funk* v. *Eggleston*, 92 Ill. 515, had the question under consideration, and in a learned opinion, in which a large number of authorities, both English and American, is reviewed, discarded even the modified English rule of later date, and adopted that formulated by Mr. Justice Story in *Blagge* v. *Miles*, 1 Story, 426, as follows:

"The main point is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts or deeds demonstrating the intention."

The rule as adopted by this court was tersely stated by Mr

Justice Strong, in delivering its opinion in *Blake* v. *Hawkins*, 98 U. S. 315–326, in this form:

"If the will contains no expressed intent to exert the power, yet, if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument."

In the case of *Munson* v. *Berdan*, 8 Stewart (N. J.), 376, it is said:

"It is sufficient if the act shows that the donee had in view the subject of the power."

And in *White* v. *Hicks*, 33 N. Y. 383–392, Denio, Ch. J., said:

"This doctrine proceeds upon the argument that by doing a thing which, independently of the power, would be nugatory, she (the donee of the power) conclusively evinced her intention to execute the power."

And in *Sewall* v. *Wilmer*, 132 Mass. 131–134, the Supreme Judicial Court of Massachusetts, in reference to a will made in Maryland, which was the domicile of the testatrix, but the provisions of which related to both real and personal estate situated in Massachusetts, held it to be a valid execution of a power contained in the will of her father, whose domicile was in that State, although it would have been otherwise held in Maryland. Gray, C. J., said:

"But in this commonwealth the decisions in England since our Revolution, and before the St. of 7 Will. IV., and 1 Vict., ch. 26, § 27, have not been followed; the court has leaned toward the adoption of the rule enacted by that statute as to wills thereafter made in England, namely, that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a con-

trary intention should appear by his will; and it has been adjudged that the mere facts that the will relied on as an execution of the power does not refer to the power, nor designate the property subject to it, and that the donee of the power has other property of his own upon which his will may operate, are not conclusive against the validity of the execution of the power; but that the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it."

We cannot doubt that Cyrenius Beers, in the agreement of February 24th, 1874, intended to exert whatever power had been conferred upon him by the will of his wife to continue in force the mortgage to the appellee, as an encumbrance upon her estate, for the reason that it is upon that supposition alone that it can have its due legal effect, *ut res magis valeat quam pereat;* and by force of the rules which we have seen ought to govern in such cases, we hold that, if the agreement, as made, is within the scope of the power, it must be regarded as a valid execution of it.

The question next to be considered, therefore, is, whether Cyrenius Beers was empowered by the will of his wife to consent to an extension of the time of payment of the mortgage debt, and a continuance thereby of the lien on the mortgaged estate.

It is to be observed, in the first place, that he is made executor of the will, tenant for life for his own use of all the property of the testatrix, and trustee of the legal title. Whether his title as trustee is to be considered as a fee simple or for life, or a chattel interest only, it is not necessary to decide. Its duration is to be measured by the nature of the purposes for which it was created, and they include the power to mortgage, to sell, and to reinvest in his own name as trustee. And it is not without significance, although of how much importance is not material, that the remainder in fee limited to the children of the testatrix, and which is described as a limitation of all the

estate of which the testatrix should die seized or possessed, is subsequently referred to as what shall remain after the death of the tenant for life, and after the exercise by him of the power of mortgaging or selling and reinvesting has been exercised for the purpose of paying the indebtedness upon the property. It is further to be noticed that the powers to mortgage and to sell are authorized to be exercised by him for the purpose specified, "as though he held an absolute estate in said property." The specific power given is to "encumber the same by way of mortgage or trust deed or otherwise, and renew the same, for the purpose of raising money to pay off any and all encumbrances now on said property," and the additional power to "sell and dispose of any or all the real estate of which I may die seized or possessed, as though he held an absolute estate to the same, and out of the proceeds pay any of the encumbrances upon any of the property of which I may die seized and possessed," and "the remainder over and above what may be required to pay the indebtedness upon said property, the same now being encumbered, to reinvest in such way as he may see proper, and from time to time sell and reinvest, such reinvestment to continue to be held in trust the same as the estate of which I may die possessed."

It is too plain to admit of dispute that under these ample powers Cyrenius Beers might have secured, by a new mortgage, a loan of the sum of money, at the stipulated rate of interest, necessary to pay his indebtedness to the appellee, and that he might, by a new loan from the appellee itself, secured by a new mortgage, upon the same terms and for the same time as granted by the agreement of extension, have raised the money and discharged the mortgage now in suit. Such a transaction would have been strictly within the letter of the authority. And yet it would, in fact, have been nothing but what was accomplished by the agreement of extension, namely, a continuance of the old loan, secured by the old mortgage, for a new term and at a higher rate of interest. The two transactions, though not the same in form, are so in substance, and a substantial execution of the power is all that is required. In the case of *Bullock* v. *Fladgate*, 1 Ves. & Beames, 471, where

the power was to convert an estate into money and to purchase other lands, which were the subject of the appointment, the master of the rolls, Sir Wm. Grant, no conversion having taken place, but the original estate having been appointed, said:

"I apprehend that equity will uphold an appointment of the estate itself as amounting substantially to the same thing; on which principle it is that appointments deviating considerably from the letter of the powers under which they were made, have frequently been supported."

The power to encumber the estate "by way of mortgage or trust deed or otherwise, and renew the same," is broad enough to include the renewal and extension of an existing encumbrance as well as the creation of a new one; and this is not inconsistent with the declaration that it is to be "for the purpose of raising money to pay off any and all encumbrances now on said property." The object clearly was to meet the demand of the existing mortgagee for punctual payment of the debt secured, and to prevent the possible sacrifice of a forced sale to satisfy the demand, if not complied with; an object which could as well be accomplished by extending the existing mortgage as by substituting a new one in its place. The power to renew a mortgage given for the purpose of raising money to pay off an existing encumbrance is expressly given; to renew an existing one, to avoid the necessity of creating a new encumbrance, is, we think, reasonably and fairly to be implied as equally within the intention of the testatrix, and within the scope of the powers created by the will. The extension of a mortgage debt, and continuance of a mortgage lien, is one mode of encumbering the property, and may be a step, and possibly, under some circumstances, a very important and necessary one, in preparing for its payment and extinguishment. Indeed it might well be, as the transaction shows the parties to it so understood, that Cyrenius Beers, uniting in himself the various characters of principal debtor and joint mortgagor, and of executor of his wife's will, tenant for life of the estate devised, and trustee with the ample powers conferred upon him of dealing with the encumbrance, was, in reality,

Statement of Facts.

constituted by the testatrix as the representative of all the interests created by the will, fully authorized, as if he were absolute owner of the estate, even as she could have done in her lifetime, to consent to the extension of the time of payment of the mortgage debt without prejudice to the mortgage security.

There is no error in the record, and

The decree of the circuit court is affirmed.

FLASH and Others *v.* CONN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Argued November 13th, 1883.—Decided November 26th, 1883.

Conflict of Law—Contract—Corporation.

1. The liability created by a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified, is in contract, and not a penalty; and can be enforced by an action sounding in contract against a stockholder found in another State.
2. The courts of New York having held that a liability of a stockholder to creditors arising under one of its general statutes for forming corporations was in contract, when the attempt was made to enforce it in New York, this court follows that interpretation in a suit to enforce such a liability in another State.
3. The liability of a stockholder to a creditor under the 10th section of the general act of the State of New York for forming corporations for manufacturing purposes is a liability in contract, which may be enforced by an action at law. It is not necessary to resort to equity.

The plaintiffs in error, who were the plaintiffs below, brought this suit in the Circuit Court of Escambia County, in the State of Florida, on January 27th, 1876. It was afterwards, on the petition of defendant, removed to the Circuit Court of the United States for the Northern District of Florida.

The declaration alleged that the defendant, on or before

Statement of Facts.

April 1st, 1874, was a stockholder in the Pensacola Lumber Company, a corporation organized in the State of New York, under the provisions of an act of the legislature of that State, passed February 17th, 1848, entitled "An Act to authorize the formation of a corporation for manufacturing, mining, &c., purposes," and various amendments thereof; that the defendant was the holder of seventy-five thousand dollars of the stock of said company, the entire stock being three hundred thousand dollars; that the company carried on business and had an office and an agent in said county of Escambia, State of Florida; that the company, while the defendant was the holder of the stock aforesaid, became largely indebted to the plaintiffs, which indebtedness was evinced by two promissory notes, one for $5,000, dated September 11th, 1864, and one for $5,946.20, of like date, and an account stated for $2,646.47; that the plaintiffs, on February 16th, 1875, instituted their suit in the Circuit Court of said Escambia County against the said company to recover the amount due on said notes and account, and on March 15th, 1875, judgment was rendered by said court in favor of plaintiffs, for the sum of $14,120.50 and costs; that the company having been adjudged bankrupt by the United States District Court for the Southern District of New York in the year 1875, its property could not be taken in execution to satisfy said judgment, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of the company had been sold by order of the bankrupt court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgment or claims of other creditors against the company; that by the provisions of the act under which the company was organized, all the stockholders were severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company should have been paid in, and a certificate thereof made, signed, and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of the county

where the business of the company was carried on. It is averred that the company failed to comply with the said provisions of the act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record said certificate, either in the county of New York, the county in which the operations of said company were by its articles to be carried on, or in the said county of Escambia, in which the company carried on business, or in anywise as required by the act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleged, the defendant became liable to the plaintiffs for the said debt and contract made by the company, and the plaintiffs claimed $28,000.

The defendant filed six pleas, to some of which the plaintiffs demurred and to others filed replications. The defendant filed a rejoinder to one of the replications, to which the plaintiffs demurred.

The cause was heard upon the several demurrers, and the court rendered the following judgment:

"This cause came on to be heard upon the plaintiffs' demurrers to defendant's first, second, fifth, and sixth pleas, and to defendant's rejoinder to plaintiffs' replication to defendant's third plea, and the court having determined that the plaintiffs' declaration is insufficient in law, it is, therefore, considered by the court that plaintiffs take nothing by their said suit."

From this judgment the writ of error is prosecuted.

Mr. E. A. Perry for the plaintiffs in error.

Mr. Michael L. Woods for the defendant in error. I. The judgment of the Supreme Court of Florida upon the writ of error presented no obstacle to the removal of the case under the act of 3d March, 1875. *Hewitt* v. *Phillips*, 105 U. S. 393. 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 invoked. *King* v. *Worthington*, 104 U. S. 44. The Circuit Court of the United States was not bound to follow and repeat the judgment of the

State court upon the demurrer to the declaration when the sufficiency of the latter was again questioned upon demurrers to the subsequent pleadings. II. Furthermore, the general principle of law is well settled, that when a statute confers a right and imposes a liability, *without providing a distinct remedy for their enforcement*, the common law supplies an adequate remedy by giving to a party an appropriate action, by which his rights may be enforced. But it is equally well settled, that when a statute confers a right and prescribes a remedy, *that remedy and that only*, can be pursued. *Knowlton* v. *Ackley*, 8 Cushing, 97; *Pollard* v. *Bailey*, 20 Wall., 527. III. The liability set forth in the declaration, being in the nature of a penalty imposed by a statute of New York, cannot be enforced in Florida. *Halsey* v. *McLean*, 12 Allen, 438; *Bird* v. *Hayden*, 1 Robertson, 383; *Derrickson* v. *Smith*, 3 Dutcher (N. J.), 166; *First National Bank* v. *Price*, 33 Md. 487; *The State* v. *John*, 5 Ohio, 217; *Cable* v. *McCune*, 26 Mo. 371; *Lawler* v. *Burt*, 7 Ohio St. 340. IV. The declaration is bad, because it does not show that the liability it sets up had been fixed and made actionable by legal proceedings against the corporation in the State of New York. The 10th and 24th sections, construed together, show that the liability created by the former is inchoate; and that it is the return of the *fi. fa.* unsatisfied which makes the liability of the stockholder absolute, fixed, and actionable. To have that effect, the execution must necessarily be issued by the court of the State which declares by statute it shall have such effect; for it is well settled, that when a statute confers a right and prescribes a remedy, that remedy, *and that remedy only*, can be pursued. *Pollard* v. *Bailey*; *Knowlton* v. *Ackley*, *supra*. But the force and effect of an execution issued by a Florida court against a New York corporation must be determined by the laws of Florida, not those of the State of New York. Story, Conflict of Laws, sec. 556–9. V. The case made by the declaration and the sixth plea, upon the demurrer to the latter, is not the subject of a common-law action, but of a bill in equity. In *Terry* v. *Tubman*, 92 U. S. 156, this court said:

"The case of *Pollard* v. *Bailey*, 20 Wall. 520, is an authority

against the maintenance of a separate action by one creditor who seeks to obtain his entire debt, to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made."

Mr. Justice Woods delivered the opinion of the court.

The only question arising upon the record is whether the declaration presents a cause which entitles the plaintiffs to recover in this action. This was the question considered by the court below, and upon what it deemed the insufficiency of that declaration its judgment was based. The sufficiency of the pleas and rejoinder were not considered, for, if the declaration was bad, the question whether the pleadings of the defendant were good was an immaterial one. If the pleas and rejoinder of the defendant had been adjudged good, that would not have been a final judgment to which a writ of error would lie, but the plaintiffs would have had leave to reply and surrejoin. We are, therefore, limited to the consideration of the sufficiency of the declaration.

The liability which this suit was brought to enforce arises, as the plaintiffs contend, on the tenth section of the act mentioned in the declaration, namely the act of the legislature of New York passed February 17th, 1848, entitled "An Act to authorize the formation of corporations for manufacturing, &c., purposes." The tenth section of the act and the eleventh and twenty-fourth, which also have reference to the liability of stockholders of the company, were as follows:

"Sec. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section.

"Sec. 11. The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital

stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of said company is carried on.

"SEC. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder . . . until an execution against the company shall have been returned unsatisfied in whole or in part."

Section 12 of the act will also throw some light on the present controversy. It provided that within twenty days from January 1st in every year every company organized under the act should make a report, which should be published, which should state the amount of the capital of the company, the proportion paid in, and its existing debts, and which should be signed by the president and a majority of the trustees and verified by the oath of the president and filed in the office of the clerk of the county where the business of the company was carried on; and if any of said companies should fail to do so all the trustees of the company so failing should be jointly and severally liable for its debts then existing.

The defendant contended on several grounds that the declaration set out no cause of action on which the suit could be maintained against him. The first ground was that the liability of the stockholders under section 10 of the act under which the company was organized, and which the suit was brought to enforce, was in the nature of a penalty, and could not be enforced in any court sitting beyond the limits of the State by which the law was passed.

It is well settled, and is not denied by plaintiffs' counsel, that the penal laws of one State can have no operation in another. They are strictly local and affect nothing more than they can

reach. *The Antelope*, 10 Wheat. 66; *Scoville* v. *Canfield*, 14 Johns. 338; *Western Transp. Co.* v. *Kilderhouse*, 87 N. Y. 430; *Lemmon* v. *People*, 20 N. Y. 562; *Henry* v. *Sargeant*, 13 N. H. 321; Story, Conflict of Laws, § 621, 8th ed.

Upon this branch of the case the question for solution is, therefore, whether the individual liability of stockholders provided for by section 10, above quoted, is in the nature of a penalty, or whether it is, as plaintiffs contend, based on a contract between the stockholders and the creditors of the company.

We think the liability imposed by section 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded. The fact that the liability ceases when these events take place does not change its nature and make that a penalty which would, without such limitation, be a liability founded on contract.

Such has been the construction given to section 10 by the Court of Appeals of New York. In the case of *Wyles* v. *Suydam*, 64 N. Y. 173, that court had under consideration sections 10 and 12 of the act under which the Pensacola Lumber Company was organized. The complaint alleged the liability of the defendant, both as a stockholder under section 10 and as a trustee under section 12. The complaint was demurred to, on the ground that two causes of action were improperly joined. The court sustained the demurrer. In giving the reasons for its judgment it said:

"The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders where the stock has not been paid in and a certificate of that fact recorded. In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as copartners. *Corning* v. *McCullough*, 1 N. Y. 47. The allegations in the complaint are sufficient to establish a perfect cause

of action against the defendant as a stockholder, primarily liable for the debts to the amount of his stock.

"The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company. The object of the action is the same, viz.: the collection of a debt, but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument. The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitation applies. 1 N. Y. *supra.* The defendant is entitled to contribution. But in respect to the action against defendant as trustee, this court held, in *Merchants' Bank* v. *Bliss*, 35 N. Y. 412, that the three years' statute of limitations applied under the following provision of the code: 'An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved.'"

This decision is upon the precise point of the controversy in this case. It declares that the liability such as that which the plaintiffs in this action seek to enforce is one arising upon contract, and is not in the nature of a penalty. This decision has never been modified or overruled by the Court of Appeals of New York.

We think this is a case where the construction of the State court is entitled to great if not conclusive weight with us. It is the settled construction of a law of the State upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under section 10 arises upon contract, the six years' limitation applies to it; if the liability is in the nature of a penalty the three years' limitation applies. It is clear that confusion and uncertainty would result should the State and Federal courts place different constructions on the section. Such a result ought, if possible, to be avoided.

It is true that this decision was made after the defendant had become a stockholder in the Pensacola Lumber Company,

but there had been no previous contrary decision. As said by this court in *Burgess* v. *Seligman*, 107 U. S. 20, "even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt."

If this were a case arising in the State of New York we should therefore follow the construction put upon the statute by the courts of that State. The circumstance that the case comes here from the State of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty.

The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. *Dennick* v. *Railroad Co.*, 103 U. S. 11.

The next contention of the defendant is that the recovery of a judgment against the company in the State of New York on the debt due the plaintiffs, and the issue of an execution thereon, returned unsatisfied, is a necessary condition to the liability of the defendant; and as the declaration only avers the recovery of a judgment in the State of Florida, it is insufficient.

It appears from the declaration that before the year allowed by section 24 of the statute, for bringing suits against the company on the debts due the plaintiffs had expired, the company had been adjudicated a bankrupt by the District Court of the United States for the Southern District of New York; that all its property had been sold, and the proceeds thereof were insufficient to pay the costs and expenses of the bankruptcy proceedings.

Although it has been held by the court of appeals, in the case of the *Rocky Mountain Bank* v. *Bliss*, 89 N. Y. 338, that a judgment in a court of the State of New York was necessary to fix the liability of a stockholder under section 10 of the act

under consideration, yet the same court, in the case of *Shillington* v. *Howland*, 53 N. Y. 371, held that in an action brought to charge a defendant as stockholder in a company organized under the same law, an adjudication in bankruptcy of the company excused a compliance with the condition which required a suit to be brought against the company within a year after the maturity of the debt, and a judgment to be recovered and an execution to be issued thereon and returned unsatisfied. We see no reason why we should not follow this decision, and it is conclusive of the question under consideration.

The object of section 24 was to compel the creditor to exhaust the assets of the company before seeking to enforce the liability of the stockholder. When the declaration shows that this was done, and that a literal performance of the condition would have been vain and fruitless, the performance of the condition may well be held to have been excused.

Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of *Pollard* v. *Bailey*, 20 Wall. 520, *Terry* v. *Tubman*, 92 U. S 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity.

But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York, under section 10 of the statute relied on in this case. *Shillington* v. *Howland*, 53 N. Y. 371; *Weeks* v. *Suydam*,

Syllabus.

64 N. Y. 173; *Handy* v. *Draper*, 89 N. Y. 334; *Rocky Mountain Nat. Bank* v. *Bliss*, Id. 338.

We have considered all the objections made to the declaration. In our opinion none of them are well founded.

Our conclusion is, therefore, that the declaration was sufficient, and it follows that

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Case No. 122, *John I. Adams & Co.* v. *Adna C. Conn*, is in all respects similar to the case just decided, and was submitted on the same arguments and briefs. The judgment in that case must, therefore, be reversed, and the cause remanded to the circuit court for further proceedings, in conformity with the opinion announced in the case No. 121.

TERRE HAUTE & INDIANA RAILWAY COMPANY *v.* STRUBLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Argued November 14th, 1883.—Decided November 26th, 1883.

Contract—Practice—Review.

1. A railway company, in consideration of the undertakings of S. in a written agreement, agreed therein to send all live stock coming over its road to East St. Louis, to the stock yard of S. at that place, except such as should be specially ordered otherwise by shippers or owners, and to pay him therefor an agreed rate for loading and an agreed rate for unloading: *Held*, that this agreement applied to all live stock shipped in the ordinary course of the company's business over its road, the direction of which was not otherwise specially ordered by shippers, and which it was possible for the company to have loaded at the stock yard of S.; and, that on a breach on the part of the company being proved, without fault on the part of S., he could recover from the company damages in consequence of stock being sent by the company to another stock yard at that terminus.
2. The action of the court below in denying a motion for a new trial is not subject to review.

Opinion of the Court.

Action on a written contract under seal to recover damages from the railway company for a breach. The essential facts appear in the opinion of the court.

Mr. John G. Williams for the plaintiffs in error.
Mr. Jefferson Chandler for the defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought by Struble, the defendant in error, to recover damages for an alleged breach of a written contract entered into between him and the Terre Haute and Indianapolis Railroad Company. A verdict and judgment were rendered in favor of plaintiff for the sum of $10,440. The defendant moved for a new trial and in arrest of judgment, and both motions having been denied, the case has been brought here for review.

By the contract in question Struble obligated himself to build and keep in good order on his leased grounds, in East St. Louis, Illinois, all necessary stock yards and feeding pens suitable for the reception, feeding, handling, loading and unloading of live stock which might be shipped or transported over the Terre Haute and Indianapolis Railroad to and from East St. Louis; to receive and unload all live stock over that road; to collect all freight and charges on same, and pay over to the company or its authorized agents all moneys so collected; to order from the proper agent of the company all cars necessary for the transportation of live stock from East St. Louis; to load in a proper manner all live stock for transportation from that place by that company; to bed such cars at a cost to shippers of not more than one dollar per car, to be collected by him from shippers; and to attend to all other necessary matters pertaining to the safe and prompt loading of all such live stock for transportation over that road.

The company, in consideration of the performance by Struble of the stipulations of the contract, agreed to build all necessary loading shutes for the use of the company connected with said yards; to send all live stock coming to East St. Louis over its road to Struble's yards, except such as may be specially ordered

otherwise by shippers or owners; to pay him fifty cents per load for all stock received by him over the road and unloaded in his yards, and two dollars for each and every car of live stock loaded by him to be transported by the company from East St. Louis; and to give him the loading of all live stock which may be transported over its road from that city.

Struble's yards were completed and opened for business in December, 1870. From that date until some time in October, 1873, all live stock coming to East St. Louis over defendant's line was unloaded at those yards, and live stock shipped over that road from that city was loaded by Struble. Early, however, in the fall of 1873, the National Stock Yards were completed and opened for business. They were just outside of the corporate limits of East St. Louis, and near defendant's road.

The plaintiff claimed that up to October, 1873, he performed all the conditions of the contract, and was ready, willing, and able to comply with it in all respects, until it should, by its own terms, be terminated; but that he was prevented by defendant after that date from fully executing it. All this the defendant denied.

The record contains numerous assignments of error, but we shall notice only such as are relied on in argument. They seem to embrace every essential question in the case.

1. It is claimed that the court below erred in admitting evidence offered by the plaintiff. The specification under this head refers to evidence as to the number of cars loaded with live stock and taken by the defendant from the National Stock Yards, between August 1st, 1874, and April 1st, 1880. The contention of plaintiff was that, within the meaning of the contract, he was entitled to load those cars, and recover therefor from the defendant the price fixed in the contract for such services; this, upon the alleged ground that that stock had not been specially ordered by shippers or owners to the National Stock Yards, and could have been directed by the defendant to Struble's yards had it made any or proper effort to do so. In this view the evidence objected to was competent, as furnishing a basis to estimate the damages which plaintiff sustained by

reason of the breach of the contract, if such breach was established by the evidence.

2. The court, among other things, said to the jury that in determining the quantity of stock that would probably have been shipped from the plaintiff's yards, they should include only such as the jury believed would have been possible for the defendant to direct to those yards. In the same connection the court said:

"The jury in considering the meaning of the words 'all live stock which may be transported over the said railroad from East St. Louis,' found in the last clause of the contract sued on, must determine from all the evidence before them what stock is included. The words evidently apply to such stock as in the ordinary course of the defendant's business should be shipped from that point over their line of railroad. It applies to all such stock, whether loaded at plaintiff's yards or some other yards used for loading stock so shipped. As already suggested, it should be applied only to stock which it was possible for defendant to have loaded by plaintiff. It does not apply to stock, the owner or shipper of which directed the loading to be done by some person other than the plaintiff, and over the loading of which defendant had no control."

We are of opinion that there was no error in these instructions. The contract contemplated, upon the part of Struble, all the preparations necessary in and about his yards to meet the necessities of the company's business in the transportation of live stock; and upon the part of the company that it would do all it could, in the absence of special orders from shippers, to bring live stock to plaintiff's yard to be by him loaded in cars for transportation over defendant's road. Such was, in substance, the direction given to the jury. The court could not, under any reasonable interpretation of the contract, have said less than it did.

3. It is assigned for error that the court overruled defendant's motion for a new trial. A large part of the printed argument on behalf of defendant is devoted to a discussion of the grounds assigned in support of the motion for a new trial. But

the action of the court below in refusing a new trial is not subject to review here. This has long been settled by the decisions of this court. *Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Wabash Railway Co.* v. *McDaniels*, 107 id. 456.

The judgment must be affirmed.

It is so ordered.

MILLER *v.* MAYOR OF NEW YORK and Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued November 6th, 1883.—Decided November 26th, 1883.

Constitutional Law—Navigable Waters—Nuisance.

1. A bridge erected over the East River, in the harbor of New York, in accordance with authority derived from Congress and from the legislature of New York, is a lawful structure which cannot be abated as a public nuisance. So far as it obstructs navigation, it obstructs it under an authority which is empowered to permit the obstruction.
2. It is competent for Congress, having authorized the construction of a bridge of a given height, over a navigable water, to empower the secretary of war to determine whether the proposed structure will be a serious obstruction to navigation, and to authorize changes in the plan of the proposed structure.
3. When the head of an executive department is required by law to give information on any subject to a citizen, he may ordinarily do this through subordinate officers in his department.
4. The navigable waters of the United States include such as are navigable in fact, and which, by themselves or their connections, form a continuous channel for commerce with foreign countries or among the States: Over these Congress has control by virtue of the power vested in it to regulate commerce with foreign nations and among the several States.
5. The former cases, in which the court has considered the power of Congress to authorize the construction of bridges over navigable streams, referred to and considered.

Bill in equity to abate a nuisance.

On the 16th of April, 1867, the legislature of New York passed an act creating a corporation by the name of the New York Bridge Company, for the purpose of constructing and

maintaining a permanent bridge over the East River, between the cities of New York and Brooklyn. Laws of 1867, chapter 399. The act, among other things, authorized the corporation to acquire and hold so much real estate as might be necessary for the site of the bridge, and of all piers, abutments, walls, toll-houses, and other structures proper to it, and for the opening of suitable avenues of approach, but no land under water beyond the pier lines established by law. It declared that the bridge at the middle of the river should not be at a less elevation than 130 feet above high tide, and should not be so constructed as to obstruct "the free and common navigation of the river;" that it should not obstruct any street it might cross, but span such street by an arch or suspended platform of suitable height to afford passage under it for all purposes of public travel and transportation; and that no street running on the line of the bridge should be closed without full compensation to the owners of the property upon it; and it designated the points of the commencement and termination of the bridge.

On the 20th of February, 1869, the legislature passed an act amending the act of incorporation and providing for the representation of the two cities of New York and Brooklyn in the board of directors of the bridge company, and directing that the company should proceed without delay to construct the bridge, authorizing it for that purpose to use and occupy so much of the lands under the water of the river, not exceeding a front on either side of 250 feet, nor extending beyond the pier lines, as might be necessary for the construction of the towers of the bridge.

By the act of March 3d, 1869, 15 Stat. 336, ch. 139, Congress authorized this work, and declared that when completed it should be

"A lawful structure and post road for the conveyance of the mails of the United States. *Provided*, That the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and in order to secure a compliance with these conditions the company, previous to commencing the construction of the bridge, shall submit to the secre-

tary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act, not to obstruct, impair, or injuriously modify the navigation of the river.

"SEC. 2. And be it further enacted, That the secretary of war is hereby authorized and directed, upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced ; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war."

The company complied with the provisions requiring them to submit plans to the secretary of war. A commission, consisting of three officers of the engineer corps, was appointed by the secretary of war to examine these plans. Their report was submitted to the chief of the corps, who thereupon addressed the following letter to the secretary of war :

"OFFICE OF THE CHIEF ENGINEER,
"WASHINGTON, D. C., *May* 31*st*, 1869.

"SIR : The report, with accompanying papers, of the commission constituted by Special Order No. 72, from the adjutant-general's office, to examine and report upon the bridge proposed to be built between the cities of New York and Brooklyn, is herewith respectfully submitted to the secretary of war.

"After an examination of them and a careful consideration of the subject, the conclusion at which I have arrived is, that the

proposed bridge, if built subject to the conditions recommended by the commission, with the prescribed height in the middle of one hundred and thirty feet above mean high water of spring tides, will conform to the requirements of the act of Congress, 'not to obstruct, impair or injuriously modify the navigation of the river;' and I recommend to the secretary of war approval of the same. The phrase in the act of Congress, 'not to obstruct, impair, or injuriously modify the navigation of the river,' was prepared by myself, and with reference to the meaning attached to those words by the best authorities, and they were, I believe, used in the act with that understanding of them. I would further recommend that the bridge company be furnished with a copy of the report of the commission.

"Very respectfully, your obedient servant.

"A. A. HUMPHREYS,

"*Brigadier-General and Chief of Engineers.*

"Hon. JOHN A. RAWLINS,

"*Secretary of War.*"

The secretary of war returned this letter and the accompanying papers to the chief of engineers with this indorsement thereon:

"WAR DEPARTMENT, *June* 19th, 1869.

"Respectfully returned to the chief of engineers, whose views and recommendations, as well as those of the commission herein referred to, are concurred in and approved, provided, that the height of the centre of the main span of the bridge shall not be less than 135 feet in the clear at mean high water of the spring tides; and provided further, that the structure shall conform in all other respects to the conditions recommended by the commission.

"The chief of engineers will furnish the bridge company with a copy of the act establishing the bridge, a copy of the report of the commission and of this report, and will notify the company that the plan and location of the bridge are approved, subject to the conditions herein imposed.

"(Signed) "JNO. A. RAWLINS,

"WAR DEP., *June* 19*th*, 1869. *Secretary of War.*"

Thereupon the chief of engineers addressed the following letter to the president of the bridge company:

Statement of Facts.

"OFFICE OF THE CHIEF OF ENGINEERS,
"WASHINGTON, D. C., *June* 21, 1869.

"HON. HENRY C. MURPHY,

"*President New York Bridge Company, Brooklyn, N. Y.:*

"SIR: I am directed by the secretary of war to inform the New York Bridge Company that he approves the plan and location of the East River Bridge as reported by the company to the commission instituted by orders from the war department, provided the bridge conform to the following conditions, viz.:

"First. That the centre of the main span shall, under no conditions of temperature or load, be less than one hundred and thirty-five feet in the clear above mean high water of spring tides, as established by the United States Coast Survey.

"Second. That the dimensions and coefficients of stability of the various parts of the structure shall not be reduced below those represented in the papers submitted to the commission by the company or its agents.

"Third. That no portion of the grillage or enrockments of the pier or tower foundations above the natural river-bed shall project beyond the pier lines, as established by the laws of the State of New York.

"Fourth. That no guys or stays shall ever be attached to the main span of the bridge, which shall hang below the bottom chords thereof.

"These considerations must be strictly adhered to in building the bridge.

"I am also instructed by the secretary of war to furnish the bridge company copies of the act of Congress establishing the bridge, of the report of the commission, and of the report of the chief of engineers, all of which are enclosed herewith.

"Very respectfully, your obedient servant,

"A. A. HUMPHREYS,
"*Brig. Gen. and Chief of Engineers.*"

The bridge was built in substantial compliance with these requirements; and the requirements of the legislature of New York in the several acts relating to the bridge have all been substantially complied with, and the bridge has been completed and is now in public use.

The appellant is a lessee of warehouses on the East River

above the bridge. After the building of the bridge was far advanced, and over $6,000,000 had been expended upon it, but before completion, he began this suit in the court below, on behalf of himself and others similarly situated, setting forth that the projected bridge would seriously impair and obstruct the navigation of the East River, and praying to have it adjudged to be a public nuisance, built without lawful authority, and the defendants in the suit enjoined from completing and maintaining it. Judgment being given against him in the court below, this appeal was taken.

Mr. William H. Arnoux for the appellant. I. The suit is brought in the federal court by reason of the inherent jurisdiction which it possesses over the subject-matter. *The Passaic Bridge*, 3 Wall. 789; see *Pindar* v. *Wadsworth*, 2 East, 154. The special injury to the complainant resulting from the construction of the bridge gives him a standing in a court of equity, to have the work enjoined and declared a nuisance. An individual receiving special damage from a public nuisance may maintain an action on the case for it as if it were a private nuisance. *Wheeling Bridge Case*, 13 How. 564; *State* v. *Dibble*, 4 N. C. 107; *United States* v. *New Bedford Bridge*, 1 Woodb. & Min. 401; *Rose* v. *Miles*, 4 M. & S. 101; *Att'y-Gen.* v. *Birmingham*, 4 Kay & J. 528; *Broadbent* v. *Imperial Gas Co.*, 7 De G., M. & G. 436; *Cary* v. *Brooks*, 1 Hill (S. C.), 365; *Corning* v. *Lowerer*, 6 Johns. Ch. 439; *Crowder* v. *Tinkler*, 19 Ves. 618, approved in *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91; *O'Brien* v. *Norwich, &c., R. R.*, 17 Conn. 371; *Smith* v. *Boslin*, 7 Cush. 254, etc. This right of action of complainant is not prejudiced by reason of any delay. Lapse of time does not affect the right to abate a nuisance. *Renwick* v. *Morris*, 3 Hill (N. Y.) 621; *S. C.* aff'd, 7 Hill, 575; *Folker* v. *Chad*, 3 Doug. 340; *Scheetz's Appeal*, 35 Penn. 88; Russell on Crimes (Ed. 1876), 274; *Mills* v. *Hall*, 9 Wend. 315; Angell on Tide Waters, 116. II. As a fact the bridge does obstruct navigation. The people have the *jus publicum* to all navigable waters, which is paramount to all other rights therein. The law contemplated that the secretary of war should act with reference

Argument for the Appellant.

to this right. III. In construing the act conferring the power on the secretary, it is to be remembered that public grants are to be construed strictly. *Bridge Company* v. *Hoboken Company*, 13 Beasley (N. J.) 81; *S. C.* ib. 503; and that nothing passes by legislative grant unless it is contained in express words, and that if a proviso is repugnant to the grant the grant fails. IV. The power conferred upon the secretary of war by the act of Congress in question, was not to finally determine whether the bridge, as then proposed to be built, would obstruct, impair or injuriously modify the navigation of the East River, but it was to authorize him to grant permission for the construction of the bridge, leaving to the proper tribunals the determination of the fact whether such bridge was an obstruction. V. The Congress of the United States had no constitutional power or authority to erect the secretary of war, or any other official member of the executive, into a legal tribunal to determine the force and effect of any statute passed by Congress. Under the Constitution, such judicial determination must be confined to the judiciary. *Marbury* v. *Madison*, 1 Cranch, 137; *Decatur* v. *Paulding*, 14 Pet. 497. VI. The only authority conferred upon the secretary of war by the act of Congress in question to approve the bridge was predicated upon the prescribed conditions, that the said bridge should be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the East River, and that he should be satisfied that the said bridge would conform to the prescribed conditions. And as the proofs show that the secretary of war was satisfied that the bridge, as then proposed to be and now is constructed, would not conform to the prescribed conditions, he had no power whatever in the premises to notify the bridge company that he approved the same, and such notification, if it had been given, would have been utterly null and void. VII. The condition precedent imposed by the act before the bridge could be constructed has never been complied with. The secretary of war could not devolve his duties upon a subordinate. *Lyon* v. *Jerome*, 26 Wend. 485; *Board of Excise* v. *Riker*, 35 N. Y. 154.

Mr. Joseph H. Choate for the appellees.

Mr. Justice Field delivered the opinion of the court.

This suit was commenced in May, 1876, to restrain the erection of the suspension bridge, then under construction, over East River, in the State of New York, between the cities of New York and Brooklyn, at the height of 135 feet above the river at high-water mark, which was the proposed elevation of the structure. As the bridge has since been completed, if the plaintiff can make good his contention, and establish that when he filed his bill he was entitled to the relief prayed, he may claim that the bridge shall be raised to a greater elevation, or be entirely abated. He is the lessee of certain warehouses on the banks of the river above the point of the proposed crossing of the bridge, and he states that he brings the suit on behalf of himself and of all others similarly situated. No one, however, has united with him in its prosecution. He stands alone as complainant, and alleges that the bridge, if erected as projected and intended at the height designated, would be built without lawful power and authority; that it would be a nuisance, and obstruct, impair, and injuriously modify the navigation of the river, and might seriously and prejudically affect the commerce of the port of New York; that merchant vessels from the New England States and British Provinces, and from ports south of New York, and vessels engaged in foreign commerce, pass and repass on the river the intended location of the bridge; that the masts of a large proportion of these vessels exceed 135 feet in height; and that the expense to them of striking parts of their masts in passing under the bridge, if built as proposed, with the detention and additional towage rendered necessary, would be so great as to destroy his warehouse business, and be a private and irreparable injury to him, for which an action at law would afford no adequate redress. He accordingly prays an adjudication of the court upon the character and effect of the proposed bridge in conformity with these allegations, and an injunction restraining the further prosecution of the work of building it at the height of 135 feet above mean high water, or at any other height that would obstruct, impair, or injuriously modify the navigation of the river.

The court below did not find in the allegations of a possible

loss to the plaintiff in his warehouse business, or in the proofs offered to sustain them, sufficient ground to restrain the completion of the work. It dismissed his complaint as being without substantial merit.

We approve of its action and decree. The erection of the bridge at the elevation proposed was authorized by the action of both the State and federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject. And the injury then apprehended and alleged by the plaintiff, and now sustained, is only such as is common to all persons engaged in commerce on the river, and doing business on its banks, and therefore not the subject of judicial cognizance. These conclusions will clearly appear by a reference to the legislation under which the work was commenced and prosecuted.

[The learned justice then reviewed the facts which are above set forth, and continued :]

It is contended by the plaintiff with much earnestness that the approval of the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or con-

necting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. *South Carolina* v. *Georgia*, 93 U. S. 13.

It is also objected that the notice given by the chief engineer to the company was not a compliance with the requirement that notification should be given by the secretary; but there is no force in the objection. When a secretary of the government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction.

The bridge being constructed in accordance with the legislation of both the State and federal governments must be deemed a lawful structure. It cannot, after such legislation, be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the

courts. The plaintiff is not deprived of his property nor of the enjoyment of it; nor does he from that cause suffer any damage different in character from the rest of the public. He alleges that his business of a warehouse-keeper on the banks of the river above the bridge will be in some degree lessened by the delay attending the passage under it of vessels with high masts. The inconvenience and possible loss of business from this cause are not different from that which others on the banks of the river above the bridge may suffer. Every public improvement, whilst adding to the convenience of the people at large, affects more or less injuriously the interests of some. A new channel of commerce opened, turning trade into it from other courses, may affect the business and interests of persons who live on the old routes. A new mode of transportation may render of little value old conveyances. Every railway in a new country interferes with the business of stage coaches and side-way taverns; and it would not be more absurd for their owners to complain of and object to its construction than for parties on the banks of the East River to complain of and object to the improvement which connects the two great cities on the harbor of New York.

Several cases have been before this court relating to bridges over navigable waters of the United States, in which questions were raised as to the authority by which the bridges could be constructed, the extent to which they could be permitted to obstruct the free navigation of the waters, and the right of private parties to interfere with their construction or continuance. In these cases all the questions presented in the case at bar have been considered and determined, and what we hereafter say in this opinion will be little more than a condensation of what was there declared. The power vested in Congress to regulate commerce with foreign nations and among the several States includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation; and by "navigable waters of the United States" are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the States. *The*

Daniel Ball, 10 Wall. 557. East River is such a navigable water. It enters the harbor of New York and connects it with Long Island Sound. Whatever, therefore, may be necessary to preserve or improve its navigation the general government may direct; and to that end it can determine what shall and what shall not be deemed an interference with or an obstruction to such navigation.

In the Wheeling Bridge case, a bridge erected over the Ohio River at Wheeling, under an act of the legislature of Virginia, which prevented the passage of steamboats with high chimneys, was judged to be an unlawful structure; and the court ordered that it should be raised so as to afford a free passage to the steamers, or that some other plan should be adopted, by a day designated, which would relieve the navigation from the obstruction, or that the bridge should be abated. Congress thereupon interfered and declared the bridge, as it was built at its existing elevation, to be a lawful structure. The court then held that the objection to the bridge as an obstruction to the navigation of the river was removed; that although it might still be an obstruction in fact, it was not so in contemplation of law, and the decree of the court for the abatement of the bridge could not be enforced. "There was no longer," said the court, "any interference with the enjoyment of the public right, inconsistent with the law, no more than there would be where the plaintiff himself had consented to it after the rendition of the decree." For its interference with the public use of the stream no individual could complain, as the power which could control and regulate that use had made the structure creating the interference a lawful one. 18 How. 430.

The case of *Gilman* v. *Philadelphia*, 3 Wall. 713, is much stronger than the Wheeling Bridge case, and is conclusive against the pretensions of the plaintiff. It there appeared that a bridge was about to be built over the Schuylkill River, at Chestnut street, in the city of Philadelphia, under the authority of an act of the legislature of Pennsylvania, when a party owning valuable coal wharves just above Chestnut street filed a bill to prevent its erection, alleging, as in the present case, that it would be an unlawful obstruction to the navigation of the

river and a public nuisance, inflicting upon him special damage, and claiming that he was entitled to be protected by an injunction to restrain the progress of the work, and to a decree of abatement should it be completed. The river was tide water and navigable to the wharves of the plaintiff by vessels drawing from 18 to 20 feet of water; and, for years, commerce to them had been carried on in all kinds of vessels. The bridge was to be only 30 feet high and without draws, and, of course, would cut off all ascent above it of vessels carrying masts. The city justified its intended action under the act of the legislature, setting up that the bridge was a necessity for public convenience to a large population residing on both sides of the stream. The court below dismissed the bill, and this court affirmed its decree, holding that as the river was wholly within her limits the State could authorize the construction of a bridge until Congress should by appropriate legislation interfere and assume control of the subject. In giving its opinion the court observed that it should not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce over them may be greater than on the water; that it was for the municipal power to determine which should be preferred, and how far either should be made subservient to the other; and that this power could be exercised by the State until Congress interfered and took control of the matter. All the considerations which governed the decision of that case operate with equal, if not greater, force in the present case. In that case different parts of a city separated by a navigable water were connected by a bridge; in this case two cities thus separated are united. In that case the obstruction was complete and permanent to all vessels having masts; in this case the obstruction does not exist except to a limited class of vessels having high masts, and to them it is little more than a temporary inconvenience. In that case there was no approval of the structure by Congress, except such as may be inferred from its silence; in this case there is its direct authorization of the bridge after a careful consideration of its effect upon navigation by a commission of distinguished engineers. In that

case the bridge was held to be a lawful structure against all private parties, the federal government alone having the right to object to the obstruction to the navigation of the river which it might cause and to remove it; in this case that government does not object, but approves and sanctions the structure; and the public benefit from it far outweighs any inconvenience arising from its interference with the navigation of the stream.

The recent case of *Escanaba Company* v. *Chicago*, 107 U. S. 678, follows the decision in *Gilman* v. *Philadelphia*, and is equally pointed and decisive.

In the light of these cases (and others of the same purport might be cited) the claim of the plaintiff that the construction of the great work which was to connect, and which has since connected, the cities of New York and Brooklyn should have been suspended, appears to be wholly without merit.

The decree of the court below dismissing his bill is affirmed.

MEMPHIS GAS LIGHT COMPANY *v.* TAXING DISTRICT OF SHELBY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Submitted November 15th, 1883.—Decided November 26th, 1883.

Constitutional Law—Contract—Taxation.

1. The legislative grant of a privilege to erect, establish and construct gas works, and make and vend gas in a municipality for a term of years, does not exempt the grantees from the imposition of a license tax for the use of the privilege conferred.
2. In order to establish a legislative contract to exempt from taxation, the statute must be explicit and unmistakable, and without doubtful words.
3. The Constitution of the United States does not profess in all cases to protect against unjust or oppressive taxation.

The facts and the contentions of the parties are stated in the opinion of the court.

Mr. Henry Craft, *Mr. Geo. Gaunt* and *Mr. Josiah Patterson* for plaintiffs in error.

Mr. J. B. Heiskell and *Mr. C. W. Heiskell* for the defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Tennessee.

The question presented is whether the statute of the State under which the defendant assessed a license tax of $250 against plaintiff in error is void, because it violates the contract found in the charter of the company.

This charter was enacted November 20th, 1851, and, after giving the name of the new corporation and the names of the incorporators, it refers for the rights, privileges, powers, and restrictions of the company to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth sections of an act incorporating the Nashville Gas Light Company, passed November 21st, 1849, and declares that those sections, not inconsistent with the first section of this act, shall apply to the Memphis Gas Light Company as fully and completely as though the same were fully set forth and incorporated.

For any contract of exemption from taxation we must, therefore, look to the provisions of those sections in the charter of the Nashville company.

These sections contain the usual powers necessary for the successful conduct of the business of the company, its organization, its shares of stock, mode of payment, laying pipes in the street and the like, and after a careful examination of them we are unable to see anything whatever which expresses a contract for any limitation of the power of the legislature to tax the company or its property.

Such was the opinion of the Supreme Court of Tennessee, delivered on rendering the judgment to which this writ of error is taken.

And though this court is bound for itself to inquire in every such case as this whether there existed a contract which might be impaired, on which subject the court has very recently, at the present term, collated the authorities in the case of *Louisville and Nashville R. R. Co.* v. *Palmes*, *ante*, we are unable

to discover any reason for dissenting from the opinion of the Supreme Court of Tennessee on that point.

The section of the charter on which plaintiff's counsel mainly rely as showing a contract is the fifth section, which reads as follows:

"SEC. 5. The said company shall have the privilege of erecting, establishing and constructing gas works, and manufacturing and vending gas in the city of Nashville, by means of public works, for a term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other southwestern cities; and for public lights, such sum as may be agreed upon by the company and the public authorities of Nashville: *Provided*, Said company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas."

The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege.

But the answer is that the company took their charter subject to the same right of taxation in the State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter.

The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the State constitutions and State laws.

In the case of the *Erie Railroad Co.* v. *Pennsylvania*, 21 Wall. 492, it was said:

"This court has in the most emphatic terms and on every occa-

sion declared that the language in which the surrender (of the right of taxation) is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further taxation. A State cannot strip herself of this most essential power by doubtful words. It cannot by ambiguous language be deprived of this highest attribute of sovereignty. The principle has been distinctly laid down in each of the cases referred to. It has never been departed from."

See also *Providence Bank* v. *Billings*, 4 Pet. 514; *Herrick* v. *Randolph*, 13 Wall. 531; *North Missouri R. R. Co.* v. *Maguire*, 20 Wall. 40; *Delaware R. R. Tax*, 18 Wall. 206.

There is in this case no language which attempts to exempt plaintiff from taxation, nor is there even the most remote implication of such exemption.

The judgment of the Supreme Court of Tennessee is affirmed.

GILFILLAN *v.* UNION CANAL COMPANY OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Argued April 20th, 1883.—Decided November 26th, 1883.

Constitutional Law—Contract—Corporations.

1. A provision in an act for the reorganization of an embarrassed corporation, which provides that all holders of its mortgage bonds who do not, within a given time named in the act, expressly dissent from the plan of reorganization, shall be deemed to have assented to it, and which provides for reasonable notice to all bondholders, does not impair the obligation of a contract, and is valid.
2. When a corporation, being embarrassed, and owing money to its mortgage bondholders and to others, was authorized by the legislature from which it obtained its franchises to make settlement with its creditors on a plan which provided that all holders of its mortgage bonds who did not, within a fixed period, dissent in writing from the proposed settlement, should be deemed to have assented; and when a large majority of such bondholders assented to such plan, and some dissented, and the plan went into operation: *Held*, that a holder of such bonds who had due

notice, and opportunity to act, and who neither assented to nor dissented from the plan within the time, was bound by its terms as fully as if he had expressly assented to it.

Suit to recover interest on coupons of mortgage bonds. Judgment in the State court for the defendants.

The facts and the alleged causes of error are stated in the opinion of the court.

Mr. James Duval Rodney for plaintiff in error.
Mr. Thomas Hart, Jun., for defendant in error.

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

The Union Canal Company of Pennsylvania, a corporation of the State of Pennsylvania, issued, in 1853, a series of bonds for the payment of money, amounting in the aggregate to $2,500,000, with coupons for semi-annual interest attached. These bonds and coupons were secured by a mortgage to trustees on the property of the company.

Prior to 1862 the company became pecuniarily embarrassed, and a plan was devised by parties in interest for the settlement of its affairs and liabilities, by which the entire indebtedness, whether secured or unsecured, was to be converted into a funded debt, secured by mortgage, on which interest was to be paid only "out of and from the clear net income and profits of the business of the corporation," but the right of voting at elections and meetings of the corporation was to be given to bondholders as well as stockholders. On the 10th of April, 1862, the legislature of Pennsylvania passed a statute, the purpose of which was to give authority for such an agreement between the company and its creditors. The statute provided in express terms that the agreement, if entered into, should only be binding on such of the holders of the bonds of 1853 "as shall signify their assent in writing thereto; and in case any such bondholder shall fail to file with the president of such corporation his or her refusal in writing, to concur in the said agreement, within three months from the date thereof, such bondholder shall be taken to have assented to the same." Ample provision was made for notice to the bondholders to appear and

express in writing their assents or dissents, and for the preservation of all the original rights of such as dissented.

Pursuant to this legislative authority, the contemplated agreement was entered into between the corporation, with the assent of its stockholders, and the creditors. The notice required by the statute was given, and bondholders to the amount of only $85,000 out of the $2,500,000 filed in writing their refusal to concur. All the rest either assented in writing or failed to signify their dissent.

At the time the agreement was made, Gilfillan, the plaintiff in error, owned $4,200 of the bonds of 1853, and the coupons thereon from November 1st, 1857. He had actual notice of the agreement and the proceedings for its execution, but he neither signified his assent thereto in writing nor filed with the president of the company his refusal to concur. Between the time of making the agreement and the commencement of this suit there was not "any clear net income and profits of the business" of the company.

This suit was brought against the company by Gilfillan on his coupons running from November 1st, 1857, to May 1st, 1877, inclusive. At the trial a case was stated which presented for determination the single question whether the agreement of settlement barred the action. The supreme court of the State decided that it did, and gave the judgment accordingly. To reverse that judgment this writ of error was brought.

The precise point we have to decide is whether the statute which made the failure of a bondholder to signify his refusal to concur in the agreement of settlement within the specified time equivalent to an express assent in writing, impaired the obligation of his bond. Mortgages of the kind of that executed by this company are of a peculiar character, and each bondholder under them enters by fair implication into certain contract relations with his associates. Such bondholders are not, like stockholders in a corporation, necessarily bound, in the absence of fraud or undue influence, by the will of the majority, when expressed in the way provided by law, but they occupy, to some extent, an analogous position towards each other. The mortgage, with the issue and distribution of bonds under

it, creates a trust, of which the selected mortgagee, or his duly constituted successor, is the trustee, and the bondholders primarily, and the stockholders ultimately, the beneficiaries. It not unfrequently happens that compromises and adjustments of conflicting interests become necessary in the course of the administration of such trusts. As in the present case, a very large majority of the bondholders sometimes think it is for their own interest as well as that of their associates to surrender a part of their rights and accept others instead, and they prepare and submit for execution an agreement, the object of which is to carry their plan into effect. No majority, however large, can compel a minority, small though it be, to enter into such an agreement against their will, and under the Constitution of the United States, it is probable that no statute of a State, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent, would be valid. But it seems to us a proper exercise of legislative power to require a minority to act whenever such an arrangement is proposed, and to provide that all shall be bound who do not, in some direct way, within a reasonable time after notice, signify their refusal to concur. To sustain such legislation it is only necessary to invoke the principle enforced in statutes of limitations, which makes neglect to sue within a specified time conclusive evidence of the abandonment of the cause of action. As was said in *Terry* v. *Anderson*, 95 U. S. 628, where the limitation was of actions upon certain legal obligations that embarrassed the entire community at the close of the late civil war, "the obligation of old contracts could not" in this way "be impaired, but their prompt enforcement could be insisted upon or their abandonment claimed."

As to statutes of limitations, it has always been held that shortening the time within which actions on existing contracts must be brought impairs no obligation of the contract, if a reasonable time is given to bring a suit before the bar attaches. In *Terry* v. *Anderson, supra*, it was said:

"In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this

statute is, under all the circumstances, reasonable. . . . In judging of that we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

What was said there seems to us equally applicable to the present case. There "the business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of all embarrassments, and permit a reorganization on the basis of the new order of things." Here a canal company, encumbered with a large bonded and floating debt, was bankrupt. The payment of its debts in the ordinary way was impossible. It is fair to infer from the case stated that the interest on the mortgage debt had been in arrear for years, and the floating debt which was unsecured amounted to at least $500,000, or one-fifth of the amount of the mortgage. In this condition of things undoubtedly the bondholders might have foreclosed their mortgage, and thus secured the proceeds of a sale of the mortgaged property, but to a very large majority this seemed unadvisable, and the reason is apparent. The property they had as security was a canal and its appurtenances. Purchasers of such property at advantageous prices were not easily found. Unless the bondholders themselves bought, a large sacrifice must almost necessarily be made, and but a small sum realized for distribution. If the bondholders did buy, it might be necessary for them to operate the canal and assume corresponding liabilities. The experience of the company in the past gave no encouragement of success in such an undertaking, and so a majority of the bondholders came to the conclusion that if they could be permitted to take part to some extent in the control of the business, it was better to let the property remain in the hands of the company without a foreclosure, and to demand their interest only as it could be paid out of profits actually realized. The question now is not whether this scheme was or was not a wise one. A majority of the bondholders thought it

was, while some did not. Unless all, or nearly all agreed, nothing could well be done. Hence application was made to the legislature, not to require all bondholders to adopt the plan and become bound by it, but to indicate whether they would or would not. If any said they would not, then it would be necessary for those who favored the scheme to determine whether, in view of such a dissent, they would go on and leave the dissenters at liberty to assert their rights. That would of course depend in a large degree upon the number of those who dissented and the amount of bonds they held. Prompt action was also important. In view of this, three months was fixed as the time within which the election must be made. There is no complaint of the length of time given, and if there was it could make no difference in this case, because Gilfillan had actual notice, and three months was certainly time enough for him to determine in his own mind whether an assent or dissent was most for his interest. So that the only question really presented to us is whether it was unreasonable to provide that a failure to dissent should be taken as an assent. What the majority wanted to know was how many would not come into the scheme, and the way the assent or dissent should be signified was a matter of but little importance, provided it was understood by the bondholders. The legislature, in the exercise of its discretion, saw fit to provide that every bondholder should be taken to have elected to become bound by the agreement, unless he filed in writing with the president of the company his refusal to concur. This was the way the vote was to be taken and the will of the bondholders ascertained. All who did not vote against were to be counted in favor of the plan. This being understood, no bondholder can complain, if it was within the power of the legislature to require him to act at all. If he does not wish to abandon his old rights and accept the new, all he has to do is to say so in writing to the president of the company. Inaction will be taken as conclusive evidence of abandonment, just as the failure to bring suit within the time allowed by a statute of limitation is evidence of the abandonment of an existing cause of action.

The same principle was applied in *Vance* v. *Vance*, 108 U.

S., where it was held that an article in the Constitution of Louisiana, adopted in 1868, which provided that existing secret mortgages and privileges should cease to have effect against third persons after the 1st January, 1870, unless before that time recorded, did not impair the obligation of a contract between an infant and her natural tutor. Mr. Justice Miller, in delivering the opinion of the court, after stating that the strong current of modern legislation and judicial opinion was against the enforcement of secret liens on property, said:

"We think that the law in requiring the owner of this tacit mortgage, for the protection of innocent persons dealing with the obligor, to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody."

And in *Jackson* v. *Lamphire*, 3 Pet. 280, it was said:

"It is within the undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the recording act."

We conclude, therefore, that it is within the just scope of legislative power to require bondholders, interested in common with others in a trust security, to signify their assent to or dissent from a plan proposed by proper persons for the compromise and adjustment of matters of difference affecting their common interests, and that the statute involved in this suit is of that character and valid.

Judgment affirmed.

Syllabus.

FAY and Others *v.* CORDESMAN and Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Argued November 14th, 1883.—Decided December 3d, 1883.

Patent.

Claim 4 of reissued letters patent No. 1527, granted to John Richards, August 15th, 1863, for a "guide and support for scroll-saws," the original patent, No. 35,390, having been granted to him, May 25th, 1862, for an "improved guide and support for scroll-saws," namely, "4. An anti-friction guide which is adjustable so as to accommodate different thicknesses of saw-blades, and to compensate for wear, in combination with the upper portion of a web saw-blade, substantially as set forth," does not cover an arrangement in which a band-saw is used, passing over wheels, and running constantly in one direction, towards the table on which the stuff lies, and having a tension over the peripheries of the wheels.

Claim 5 of said reissue, namely, "5. The combination of the anti-friction saw-support and guide, or the equivalent thereof, with an adjustable guard, or its equivalent, substantially as and for the purpose set forth," is not infringed by an arrangement in which such a band-saw is used, and the guard does not hold down the stuff against the upward lifting action of the saw, because the saw is constantly passing downward.

The claim of letters patent No. 78,880, granted to J. A. Fay & Co., June 16th, 1868, for an "improvement in guides for band-saws," on the invention of John Lemman, namely, "The combination of the roller *b* with fixed lateral guides, *c c c*, one or more, arranged and operated substantially in the manner and for the purposes specified," is for the combination of an anti-friction smooth faced wheel to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear, with the fixed guides, and is not infringed by an arrangement in which the wheel has two grooves in it, in one of which the saw runs, and in the other of which it can be made to run by lateral adjustment.

Claim 1 of letters patent No. 120,949, granted to J. A. Fay & Co., November 14th, 1871, for an "improvement in band-sawing machines," on the invention of William H. Doane and William P. McKee, namely, "1. The frame A, A′, A″, in combination with the lower arbor-bearing, said frame being constructed as herein described, with a depression, A‴, permitting the ready removal of the arbor, as explained," is not infringed by an arrangement in which the depression does not leave exposed a seat which is entirely open upward, and the arbor-bearing cannot be removed without detaching the pulley from the arbor.

Claim 2, namely, "2. The arrangement of frame A A′ A″ A‴, and of the horizontally and vertically adjustable arbor-bearing C, D, D′, E, E′, G, H.

Opinion of the Court.

A," is not infringed by an arrangement which does not have the frame and depression of claim 1, or the elements D D′, or the same or equivalent means of adjusting such arbor-bearing either horizontally or vertically.

Claim 3, namely, "3. The arrangement of step or saddle K and its contained box or bearing L L′," covers, as an element of the arrangement, among other things, a spring which carries the weight of the saddle, and gives an elastic tension to the saw, and is not infringed by an arrangement in which there is a rigid saddle and no spring.

Claim 4, namely, "4. In combination with the upper arbor, L′, the lower arbor-bearing, E, adjustable both vertically and horizontally, as shown and described and for the purpose set forth," in not infringed by an arrangement which does not infringe claims 2 and 3.

Bill in equity for infringement of a patent.

Mr. Robert H. Parkinson for the appellants.
Mr. E. E. Wood for the appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This suit in equity was brought for the infringement of three several letters patent. The first is reissue No. 1,527, granted to John Richards, August 25th, 1863, for a "guide and support for scroll-saws," the original patent, No. 35,390, having been granted to him May 27th, 1862, for an "improved guide and support for scroll-saws." The specification of the reissue is as follows, including what is inside of brackets and what is outside of brackets, omitting what is in italic:

"To all whom it may concern: Be it known that I, John Richards, of Columbus, in the county of Franklin, and State of Ohio, have invented a new and useful [method of guiding and supporting] *combined guide, guard and support for* scroll-saws; and I do hereby declare that the following is a full, clear and exact description of [one practical means of carrying out my invention] *the same*, reference being had to the accompanying drawings forming part of this specification, in which [Figure] *Fig.* 1 is a perspective view of a portion of [a] *the* table and [a] *the* saw-blade [of a 'scroll saw-mill,' with my invention applied to the same.] *and my improved upper combined guide, guard and support.* [Figure] *Fig.* 2, a longitudinal section of the same connected to the suspended stud of the building. [Figure] *Fig.* 3 is a horizontal section [through the guide and support.] *in the line x x, of*

Fig. 2. [The same] *Similar* letters of reference [where used] in [different] *the several* figures indicate corresponding parts. [It has long been a desideratum to obtain a scroll saw-mill which will work successfully while the upper end of the saw blade is left free from a sash or upper straining device; and this has never been attained until the development] *The nature* of my invention [which] *under this patent* consists, [1st, in working the saw at a point above the table in a groove which is enclosed by anti-friction material, such as steel, polished iron, or glass, or any other known and suitable metal or substance, the upper end of the saw being disconnected from any upper suspender or sash, but supported and guided at its back edges and at its sides or broad faces, and its lower end connected to any mechanical device that will produce the desired motion in the saw. It consists, 2d, in an adjustable guide and support whereby different thicknesses of scroll or web saw may be used at will. It consists, 3d, in attaching the anti-friction guide and support to an adjustable device which constitutes a guard to hold down the stuff being sawed, and also insures a support of the saw at the point near where the sawing is performed as well as above this point. My principle of operating a scroll or web saw must not be confounded with the 'muley saw,' as in the 'muley saw' it is common to employ guides attached to the saw, such guides running in or upon bearings independent of the saw plate, whereas with the web or scroll saw worked according to my discovery, the back of the blade or plate is supported upon a hardened steel or other durable anti-friction surface, and is guided laterally by similar surfaces, so that the saw is supported and guided without any means of tension being employed. Furthermore, 'muley' saws are supported at each end by cross-heads, and only in the centre by lateral guides; and a saw must be employed that is strong enough in its cross-section to stand the work. Now, with my plan, I support the saw down to the top of the wood being sawed, which is a new thing in this class of saw-mills, and enables me to use small, light saw blades. Previously to my discovery of running the upper end of the web or scroll-saw in frictional contact with an upper guide, it was deemed an impracticable thing, and it is now only by practical demonstration and long use that saw-mill men are convinced that such method of working scroll or web-saws will not cut through and rapidly wear out the guide.

The non-destruction of the guide in a short period of time, although the pressure upon it is immense, is due to the fact of the guide being of hardened steel or other smooth, hard material, over which the saw-plate glides with but little frictional wear.] *in the guide and back supporting bars or plates in connection with the sliding guard, the same constituting a combined guide, guard and support for the free or disconnected upper portions of a scroll-saw blade.* To enable others skilled in the art to make and use my invention, I will proceed to describe [one practical means in which I have embodied it with great success; but, in doing so, I do not wish to be understood as limiting myself to these mechanical devices in themselves, as the principle may be embodied in various other means and still not depart from the discovery embodied in machinery that I desire to patent.] *its construction and operation with reference to the drawings.* [Not using] *I do not use* a sash [or] *nor* other means of straining the saw S, [I] *but* fasten the lower end of the [blade] *same* to the upper end of a stock or slide, S′, of [a] *the* pitman, by a set screw, S^2, or [I may otherwise connect this end of the blade to a device which will properly operate the saw. The] *in any other similar manner, and have its top or* upper [end of the saw] *portion disconnected* above the table [T,] *T.* [I leave entirely disconnected, but in order to steady or guide and support this free end during the sawing operation, I attach a grooved steel guide to a] *The said upper portion of the saw is supported and guided by means of the two parallel bars a a, and the angular plate b. The bars have a lateral adjustment to accommodate saws of different thicknesses, their purpose being to keep the saw in a true vertical line, and to keep it from twisting, while the office of the back plate, b b′, is to support the saw against the strain of the stuff on the teeth, when the work is being shoved against it. The guides a a, and back plate b b′, are all made of hardened steel, to prevent friction and wear. This device a a b b′ is fastened to the lower end of the sliding* strip or *guard piece* A, [other device which will answer as a firm support to the guide, and as a guard to keep down the lumber being sawed. The device A is attached to a] *which is fitted in a grove of a suspended* stud [or timber] B, of the building, [and is better if made adjustable by means of a slot and clamp-bolt, such as designated by the letters *e c d;* but other known means for adjusting this device may be adopted. The guide, as shown, is formed of three parts, to wit,

a black plate, *b*, and two side plates *a*, *a*, which latter are bolted or screwed firmly to the former, as shown. The slots S through which the bolts *f f* pass are large enough to allow the plates *a a* a slight lateral adjustment whenever it is desired to use a saw with a greater thickness or a thinner saw. The same end, viz., the formation of a steel guide, or a guide of hard anti-friction surface, would be attained if a groove was formed in a thick steel plate, or other hard substance, except the advantage of accommodating saws of various thicknesses. I believe I am the first to use the grooved anti-friction guide, as well as the first to have the groove variable in width, and, therefore, I do not confine myself to adjustable guides and supports. The office of the back part of the groove or guide is to support the saw against the strain of the timber on the teeth when the work is being shoved against it, while the office of the lateral portions of the groove or guide is to keep the saw in a true vertical line and prevent it from twisting. The office of the guard A, which extends down nearly to the top of the table, is to hold down or prevent flying up of the 'stuff' or timber being sawed, and at the same time bring the supporting guide to the saw right down to the place where the sawing is being performed, and thus insure the most perfect operation as well as an effectual supporting and guiding of the saw.] *and confined accordingly, as the thickness of stuff being sawed requires, by means of a clamping screw-bolt, c, and hand-nut, d. The bolt passes loosely through an oblong slot, e, of the guard-strip, but fastens firmly in the stud B, as shown. This guard rests in close contact, or nearly so, with the stuff being sawed, and keeps the same firmly down upon the table, while the device a a and b b' guides and supports the saw, as above stated. It will be seen that screw-bolts, f f, confine the plate b and bars to the strip or guard A, and that the holes or slots through the bars a are elongated so as to allow the guide-bars a a chance to move nearer together or further apart, to admit different thicknesses of saw blade. It will also be seen that the guides, by being attached to the strip, are adjusted with it up and down, the said up and down adjustment being allowed by the slot e'' of the strip; and thus the angular part b' of the plate b aids also in holding down the stuff, it having a vertical kerf, g, cut in it, to admit the saw blade, and the guide and supporting plates or bars are always in proper position.* This [guard by its] arrangement *also* obviates the [heretofore] neces-

sity of leaving the upper end of the saw blade above the table unsupported and unguided, as it allows of the work or [timber] *stuff* being freely turned while the sawing is progressing, a clear open space between the guard and the table being left. [In the drawing I have shown the lower end of the guide forming an angle; this is to give a larger guard surface. This angular portion has a kerf, *g*, cut in it, to admit the saw plate to the back of the guide. I, however, do not limit myself to this form of guide.] *The plate b might be made without the angular part b', but not answer so good a purpose. I do not claim operating a scroll-saw without straining, nor do I claim the application of lateral guides to saws; neither do I claim an adjustable guard to prevent the stuff rising with the saw.*"

Reading, in the foregoing, what is outside of brackets, including what is in italic, and omitting what is inside of brackets, gives the text of the original specification. The original patent contained one claim, as follows:

"The guide bars, *a a*, and the back plate *b*, in connection with the sliding guard-strip A, the same constituting a combined guide, guard and support for the top of a scroll-saw, and operating substantially as herein described."

The reissue contains five claims, as follows:

"1. Running the upper portion of a web or scroll-saw above the table, in a groove of an anti-friction guide and support, substantially as and for the purpose described. 2. Operating practically an unstrained web or scroll-saw, by combining with such saw-mills an upper anti-friction guide, which supports the back of the saw-blade, and also sustains the saw-blade at its sides or faces, substantially as set forth. 3. The use of anti-friction guides as a substitute for straining devices, in combination with web or scroll saw-blades, the guide to be raised and lowered to suit the thickness of the stuff, substantially as set forth. 4. An anti-friction guide which is adjustable so as to accommodate different thicknesses of saw blades, and to compensate for wear, in combination with the upper portion of a web-saw blade, substantially as set forth. 5. The combination of the anti-friction saw support and guide, or the equivalent thereof, with an adjustable

guard, or its equivalent, substantially as and for the purpose set forth."

Infringement of only claims 4 and 5 of the reissue is alleged. It is apparent, in reading the specification of the original patent and that of the reissue, that Richards contemplated the use of his improvements only in connection with a saw-blade the upper end of which was free from any suspender or sash, and the lower end of which was so connected with mechanism as to obtain the desired motion in the saw. Claim 4 of the reissue claims, as an element in the combination covered by that claim, "the upper portion of a web saw-blade." The saw-blade shown in the drawings, and the only saw-blade which can have an upper portion capable of being free or disconnected, in the sense in which those words are used, is a reciprocating saw-blade, actuated from below, and alternately pushed and pulled. The specification of the reissue states that Richards' saw is supported and guided "without any means of tension being employed." The defendants use a band saw, which is an endless saw, passing over the wheels, and running constantly in one direction, towards the table on which the stuff lies, and having a tension over the peripheries of the wheels. For this reason, the defendants do not need, nor do they have any guard which performs the function of the guard embraced as an element in the combination covered by claim 5 of the reissue, of holding down the stuff against the upward lifting action of the saw, because the saw is constantly passing downward. There is, therefore, no infringement of either claim 4 or claim 5.

The second patent sued on is No. 78,880, granted to J. A. Fay & Co., June 16th, 1868, for an "improvement in guides for band-saws," on the invention of John Lemman. The specification says:

"Figure 1 is a front elevation of one of my improved guides; Figure 2 is a side elevation of the same; Figure 3 is an elevation of the anti-friction roller *b*, removed from the guide; and Figure 4 is a partial plan, showing the manner of adjusting the lateral guides. Similar letters of reference in the different figures indicate corresponding parts. In operating endless saws, guides are

needed both above and below the wood. As is well known, the high speed at which these saws are driven, and the small amount of surface presented to the guide from the edge of the saw plate, cause fixed guides to wear away very fast, even if made of hardened steel or glass, particularly when heavy sawing is done, and the strain of the feed falls on the saw. Rolling guides, while they have partially overcome the difficulty of friction and wear on the back of the saw, cannot be constructed to give a proper lateral support to the saw, as will hereafter be alluded to. The object of the invention here illustrated is to obviate these several difficulties, and give important advantages in operating saws of this kind. Its nature consists of a combination of anti-friction rollers and fixed guides, the first to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear; the fixed guides as a lateral support, and so constructed as to accommodate saws of different widths, as hereinafter explained. To enable others skilled in the art to make and use my invention, I will proceed to describe its mode of construction and the manner of operating the same, with the aid of the drawings. *a* is a frame or support for the guides. It is cored out to receive the wheel *b*, with room for lateral adjustment. On the top is a cylindrical extension, *h*, intended to be connected to a bar, on which the whole structure is adjusted up and down, to suit the thickness of the wood being sawed. *b* is an anti-friction wheel, of hardened steel or other suitable material, mounted on an axis, *f*, as shown in Fig. 3, and by red lines in Fig. 1. This axis has conical bearings formed in the piece *g*, which allows of compensation for wear; and by loosening the screws *s s*, the wheel *b* and bearings *g g* can be adjusted laterally, so as to bring different points of the periphery of wheel *b* in contact with the saw. *c c c* are lateral guides to keep the saw from turning and in a true line. These guides are so arranged that two or more of them can be used and the others removed or adjusted to receive a narrow saw, as shown in Fig. 4. The holes through which the screws *d d* pass are slotted, as shown by red lines, Fig. 1. E is a section of a band-saw, sufficiently wide to allow of all the plates, *c c c*, being used. The wheel *b* is so arranged as to barely pass through the plate *m*, and come in contact with the saw E. Oil-holes are formed at *i i*, Fig. 1, communicating with the bearings of axis *f*, as shown in Fig. 1. The operation will be readily understood. Having thus

explained the nature and objects of my invention, I do not claim the use of an anti-friction roller applied to the back of the saw; neither do I claim the fixed lateral guides." There is only one claim in these words: "The combination of the roller *b* with fixed lateral guides, *c c c*, one or more arranged and operating substantially in the manner and for the purpose specified."

This patent stands on very narrow ground. Anti-friction rollers applied to the back of the saw are disclaimed and were old. Fixed lateral guides, for the faces of the saw, are disclaimed and were old. The text of the specification limits the invention to a combination of an anti-friction wheel to support the back or thin edge of the saw, and to have lateral adjustment, presenting different points to wear, with fixed guides to support laterally the faces of the saw, the fixed guides being so constructed as to accommodate saws of different widths. The anti-friction wheel, by means of its conical bearings, can be advanced nearer, as it wears, to the back edge of the saw, and the wheel and its bearings are capable of being adjusted laterally, so as to bring different points of the periphery of the wheel in contact with the back edge of the saw. The arrangement of fixed guides referred to is manifestly that described in the Richards patent. The only point of invention dwelt on in the Lemman specification is the lateral adjustability of the wheel, which, though it is to be an anti-friction wheel, and so is to be made of hardened steel or other suitable material, will still wear away on the surface presented to the edge of the saw; and the lateral adjustment enables different points of the periphery of the wheel to be brought into contact with the saw, so as to present different points to wear from time to time. Thus the entire width of the periphery of a wheel may be utilized. The defendants have used a wheel which has two grooves in it, in one of which the saw runs and in either of which it can run. The wheel can be adjusted laterally, so as to bring the one or the other of the two grooves into use. But there is no adjustment to bring different points of the periphery of a smooth-faced wheel into use. In view of the state of the art, and of the

limitations of the specification, there has been no infringement. Merely adjusting a wheel laterally so as to give it different positions at different times was a thing well known to mechanics; and running the back edge of a saw in a groove in a roller existed in the prior Closterman device.

The third patent sued on is No. 120,949, granted to J. A. Fay & Co., November 14th, 1871, for an "improvement in band-sawing machines," on the invention of William H. Doane and William P. McKee. Claims 1, 2, 3, and 4 of this patent are alleged to have been infringed, there being seven claims. The specification, so far as it is material to be cited, says:

"The first part of our invention relates to an improved form of supporting frame and of the upper and lower arbor-bearings, whereby the said bearings, with their inclosed arbors, are made easily accessible and removable for inspection and repair, and relatively adjustable, so as to be brought into exact line, aud otherwise so regulated as to insure the perfect operation of the saw, as hereinafter explained. . . . Figure 1 is a perspective view of a machine embodying our improvements. Figure 2 is a vertical section of the machine in the plane of its arbors. . . . Figure 5 is a plan of the lower arbor-bearing. The frame which supports the operative parts of our machine consists of a single casting of the peculiar form here represented, that is to say, a base, A, from whose rear end there rises the main column or standard A^1 (supporting the upper arbor-bearing and saw guide), and from whose front end there rises a shorter column or pedestal, A'', which latter supports and is surmounted by the bench or table B, on which the stuff rests. The depression which intervenes between the columns A' and A'' leaves exposed a seat, which extends below the centre of the lower arbor and is entirely open upward, which seat forms an accessible and convenient place for the attachment, inspection, and regulation, and, when necessary, the ready detachment, of the lower arbor-bearing, which bearing is constructed as follows: Bolted or otherwise securely fastened to the top of base A is a pillow-block, C, having vertical flanges c c^1 The flanges c c^1 are traversed near their front end by two co-axial horizontal bolts D D^1, which, entering orifices in the box or bearing E E^1 of the lower pulley-arbor F, constitute a pivoted fasten-

ing for the said bearing. A set-screw, G, tapped in the bottom of the pedestal C, and pressing upwards against the box E E^1, enables its adjustment and retention to horizontality, or such approximation thereto as may be desired. Other set-screws, H H^1, passing horizontally through the flanges c c^1, near their rear end, enable the adjustment and retention of said box to a common vertical plane with the upper arbor. The end of the lower arbor most remote from the pulley I carries the driving-pulley J. It will be seen that, on the loosening of four screws, the entire lower arbor and journal-box may be lifted bodily upward and detached from the machine, without detaching the pulley from the arbor. The upper part of the standard A^1 is curved forward, as represented, and has a slot, a, to hold and guide to a vertical path a step or saddle, K, to which is pivoted a lug, l, that depends rigidly from the upper arbor-bearing L L^1. The saddle K has a horizontal extension, k, which bears on the point of a screw, M, occupying a nut, T, that rests on a spring or cushion, O, in the bottom of the slot a. The screw M being turned to the right or left elevates or depresses the upper arbor-bearing, and in so doing, causes the proper tension to be imparted to the saw. Another screw, N, that is tapped in the lug l, bears against the face of the saddle K, and enables the regulation, or angular adjustment, in a vertical plane, of the upper arbor-bearing. The above-described capacity for angular adjustment of the band-pulley arbors in their common plane enables the operator to confine the path of the saw nicely to the middle of the pulleys, or to shift it more or less toward the front or back portions of their peripheries, so as to cause all parts to be equally worn. The spring O, while co-acting with the screw M to preserve the proper tension of the saw, also imparts an elastic and yielding quality to the tension. . . . While preferring the described relative positions of the pivot-screws D D^1, and latterally adjusting screws H H^1, we do not confine ourselves thereto, as the pivot screws may be situated near the rear and the adjusting screws near the front portion of the box." The first six claims are as follows: "1. The frame A A^1 A″, in combination with the lower arbor-bearing, said frame being constructed as herein described with a depression, A‴, permitting the ready removal of the arbor, as explained. 2. The arrangement of frame A A^1 A″ A‴, and of the horizontally and vertically adjustable arbor-bearing C D D^1 E E^1 G H A. 3. The arrangement of step

or saddle K and its contained box or bearing L L^1. 4. In combination with the upper arbor L^1 the lower arbor-bearing E, adjustable both vertically and horizontally, as shown and described and for the purpose set forth. 5. In combination with the lower arbor, the upper arbor-bearing, adjustable in a vertical plane by means of the screw M, nut T, and spring O, as and for the purpose designated. 6. The combination of the slotted standard A^1 *a*, saddle K *k*, arbor-bearing L L^1 *l*, nut T, screws M N, and spring or cushion O, as shown and described, for the purpose set forth."

As to claim 1, it is for a combination of the three-sided frame A A′ A″ with the lower arbor-bearing, when the frame is constructed with a depression, A‴, intervening between the columns A′ and A″, which leaves exposed a seat which is entirely open upward, so as to give convenient access to the lower arbor-bearing, to attach, inspect, and regulate it, and also detach it, with its journal-box, by lifting the arbor and journal-box bodily upward, without removing the pulley from the arbor. In the defendants' machine the seat is not entirely open upward, and there is a hole through the body of the frame to receive the lower arbor-bearing, and the arbor-bearing cannot be removed without detaching the pulley from the arbor. This claim is not infringed.

As to claim 2, it is for the arrangement and combination of the three-sided frame A A′ A″ and the depression A‴ with the horizontally and vertically adjustable arbor-bearing, consisting of the pillow block or pedestal C, the two co-axial horizontal bolts, D D′, the box or bearing E E′, the vertical set screw G which adjusts the box E E′ to horizontality, the horizontal set screw H which adjusts the box E E′ to a common vertical plane with the upper arbor, and the base A which carries the pillow block or pedestal C. All these features in combination are made necessary in claim 2. It claims a combination of the frame and depression of claim 1 with the special construction of arbor-bearing set forth. The defendants do not have the frame and depression of claim 1, as already shown, and thus do not have that element of the combination covered by claim 2. Moreover, the co-axial bolts D D′ are a necessary feature of the peculiar arbor-bearing of the patent, and no such bolts are

found in the defendants' machine; and, if it has any means of adjusting the lower arbor-bearing, either horizontally or vertically, in the sense in which such adjustment is described in the patent, it has not the same means or equivalent means to what is found in the patent.

As to claim 3, it is for the arrangement of the step or saddle K with the upper arbor-bearing L L′ contained in it. What is the arrangement of the step or saddle K in connection with the arbor-bearing? The saddle moves through vertical slide-ways and it has pivoted to it a lug, *l*, which depends rigidly from the arbor-bearing. A screw N tapped into the lug *l* bears against the face of the saddle, so as to allow of the adjustment in a vertical plane of the upper arbor-bearing. The saddle has also a horizontal extension, *k*, which bears on the point of a screw, M, occupying a nut, T, which rests on a spring or cushion, O, in the bottom of the slot. By turning the screw M to the right or the left the upper arbor-bearing is elevated or depressed, and thus more or less tension is given to the saw. The spring O gives an elastic character to the tension. The effect of the arrangement or combination is to give an elastic vertical adjustment and also a horizontal adjustment. The whole object of the saddle with the lug *l* and the extension *k* is to adjust the arbor-bearing up and down and sidewise and at the same time give an elastic tension to the saw. The spring carries the weight of the saddle. There can be no operative arrangement of the saddle with the arbor-bearing which does not include the lug *l*, the screw N, the extension *k*, the screw M, the nut T, and the spring O. These are all elements in the arrangement or combination covered by claim 3. The spring is essential in the patent, as a part of claim 2. The defendants have a rigid saddle, and no spring. The fact that the spring is an element in claims 5 and 6 does not prevent its being an element in claim 3.

There being no infringements of claims 2 and 3 there is none of claim 4.

The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by

the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality. *Water Meter Company* v. *Desper*, 101 U. S. 332; *Gage* v. *Herring*, 107 U. S. 640.

The circuit court decreed a dismissal of the bill, and the plaintiff having appealed, the decree is affirmed.

FEIBELMAN *v.* PACKARD and Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Submitted November 8th, 1883.—Decided December 3d, 1883.

Bankruptcy—Conflict of Laws—Removal of Causes.

1. An action against a marshal of the United States for seizing a stock of goods more than $500 in value, under authority of a writ from a district court of the United States in proceedings in bankruptcy, the suit being on his official bond, and the sureties therein being joined as codefendants, is a suit of a civil nature arising under the Constitution and laws of the United States, which may be removed from the State courts to the federal courts.
2. A district court of the United States sitting in bankruptcy has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title. The officer, in a subsequent action against him for obedience to that order, may justify by proof that the title to the property at the time of seizure was in the bankrupt. If the local State laws are in conflict with this right, they will not be regarded as having any application to it. *Sharpe* v. *Doyle*, 102 U. S. 686, approved and followed.

Suit against a United States marshal and his sureties on his official bond to recover for an alleged illegal seizure of goods. The action was originally brought by Nathan Feibelman,

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since deceased, and revived by his administrator, the plaintiff in error, by petition filed April 24th, 1873, in the Fourth District Court for the Parish of Orleans, in the State of Louisiana. Its object was to recover damages for unlawfully seizing and taking forcible possession of a stock of merchandise alleged by the plaintiff to have been his property and in his possession. The defendant Packard was alleged to be the marshal of the United States for the district of Louisiana, and the seizure and taking of the property is stated to have been under a claim of authority based upon a writ or warrant issued by the judge of the District Court of the United States for the District of Louisiana in certain proceedings in bankruptcy instituted in that court by D. Valentine and Co. as creditors against E. Dreyfuss & Co.; but it is averred that the writ did not justify the acts complained of. The other defendants below were sureties on the official bond of Packard as marshal, and by an amendment to the original petition it is alleged "that all the acts charged and complained of in said original petition by which the petitioners suffered the damages therein set forth were done by said Packard in his capacity of marshal aforesaid, and are breaches of the conditions of said bond, and give unto your petitioner this right of action on said bond against said marshal and his sureties."

On April 7th, 1865, the defendants filed in the State court their petition for the removal of the cause to the Circuit Court of the United States for that district, accompanied by a sufficient bond, conditioned according to law, upon the ground that the suit arose under a law of the United States, but the application was denied; and thereafter, on April 22d, 1875, they filed in the circuit court a petition for a writ of certiorari to remove the same into that court, which was granted. Thereafter the cause proceeded to final judgment in favor of the defendants in that court, and the plaintiff brought the cause here by writ of error.

The case was submitted for the plaintiff in error, and argued for the defendants.

Mr. John Ray for the plaintiff in error made the following

point on the laws of Louisiana as governing the case. The decisions of the Supreme Court of Louisiana have been uniform from the organization of that tribunal to its latest decision on that point, that a sale in fraud of creditors cannot be attacked by a seizure by the sheriff, under an execution against the debtor, of the property in the hands of a third possessor, as was attempted in this case. We refer the court to the following decisions on that point: *St. Avid* v. *Wermprender's Syndics*, 4 Martin (La.) 704; *Richards* v. *Nolan*, 7 Martin (La.), 534; *Peet* v. *Morgan*, 9 Martin (La.), 307; *Barbarin* v. *Saucier*, 8 Martin (La.), 561; *Crocker* v. *De Passan*, 3 La. 27; *Brunet* v. *Duvergis*, 3 La. 81, 124; *Weeks* v. *Flower*, 5 La. 237; *Keller* v. *Blanchard*, 19 La. Ann. 53; *Van Ostern* v. *Simmons*, 15 La. Ann. 302; *Schneider* v. *Dreyfus*, 21 La. Ann. 271; *Austin* v. *Da Rocha*, 23 La. Ann. 44; *Anderson* v. *Carroll*, 23 La. Ann. 175; *Doherty* v. *Leake*, 24 La. Ann. 224; *Choppin* v. *Blanc*, 25 La. Ann. 35; *McAdam* v. *Soria*, 31 La. Ann. 862. This is very direct in point.

Mr. J. R. Beckwith for the defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

The action of the circuit court in the removal of the cause from the State court is assigned for error, and is first to be considered.

The suit was pending in the State court, but was not at issue when the removal act of March 3d, 1875, took effect, and the right of removal is regulated by its provisions.

The ground of the removal was that the suit, being one of a civil nature at law, in which the matter in dispute, exclusive of costs, exceeded five hundred dollars in value, arose under the Constitution and laws of the United States.

It is clear that the circuit court did not err in directing the removal of the suit from the State court; for, if we look at the nature of the plaintiff's cause of action and the grounds of the defence, as set forth in his petition, it is apparent that the suit arose under a law of the United States.

The action, as we have seen, was founded on the official bond

of Packard as marshal of the United States for that district, his sureties being joined as codefendants, and the acts complained of as illegal and injurious being charged to be breaches of its condition. The bond was required to be given by sec. 783, Rev. Stats., and sec. 784 expressly gives the right of action, as follows:

"In the case of a breach of the condition of a marshal's bond, any person thereby injured may institute, in his own name and for his sole use, a suit on said bond and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant; and the United States shall in no case be liable for the same."

Secs. 785 and 786 contain provisions regulating the suit, the latter prescribing the limitation of six years after the cause of action has accrued, after which no such suit shall be maintained, with the usual saving in behalf of persons under disabilities.

The counsel for plaintiff in error assumes in argument that the suit was to recover damages for alleged trespasses. It was plainly upon the bond itself, and therefore arose directly under the provisions of an act of Congress. *Gwin* v. *Breedlove*, 2 How. 29; *Gwin* v. *Barton*, 6 How. 7.

In *McKee* v. *Raines*, 10 Wall. 22, the removal, which was held to be unlawful, was made under the supposed authority of the act of March 3d, 1863, and that of April 9th, 1866.

After the removal of the cause, it was put at issue by the filing, on the part of the defendants, of an answer and amended answer. In these answers it was alleged that in a proceeding in bankruptcy against Dreyfus & Co., duly commenced in the district court for that district by David Valentine & Co., as creditors, an order was made directing "that the marshal take provisional possession of all the property of the said defendants, real and personal, belonging to the said firm of E. Dreyfus & Co., or the individual members thereof, and particularly the merchandise pretended to have been transferred to Moses Feibelman, at Delta, Louisiana, and all of the books of account, bank

books and papers of or relating to the business of said firm of E. Dreyfus & Co., and hold the same subject to the further orders of this court;" that a writ was issued in pursuance of that order to the defendant Packard, commanding him to execute said order, which is the writ mentioned in the plaintiff's petition; that, in obedience to the command of the said writ, the said marshal did take into his possession and custody the goods and property therein described and referred to, and none other; and that the said goods and property so taken and held are the same as those mentioned in the plaintiff's petition, the same having come into the possession of the plaintiff, in pursuance of a fraudulent conspiracy between the plaintiff and Moses Feibelman, and the members of the firm of E. Dreyfus & Co., the bankrupts, the object of which was to prevent the same from coming into the possession of the assignee in bankruptcy of said bankrupts, and so to cheat and defraud their creditors, the said goods and property being, when so seized, the property of said bankrupts, and not of the said Moses Feibelman, nor of the plaintiff, neither of whom were entitled to the possession of the same.

The plaintiff moved to strike from the answer the foregoing defence, which motion was overruled. This ruling of the court is assigned for error.

The ground on which this assignment of error is predicated is, that by the law of Louisiana a person in possession of personal property as owner, claiming title, cannot be disturbed in that possession by a seizure under judicial process running against another person; that a transfer in fraud of creditors cannot be attacked by a seizure by the marshal or sheriff, under an execution against the debtor, of the property in the hands of a third possessor; and that, consequently, in this suit, in which it was admitted that the goods had been taken out of the possession of the plaintiff, it was not competent to set up as a defence actual title in the bankrupts.

In support of this proposition, we are referred by counsel to various sections of the Revised Civil Code of Louisiana, and to numerous decisions thereon by the supreme court of that State; and the statement is made that the decision of this court in

Hozey v. *Buchanan*, 16 Pet. 215, which, it is admitted, is not reconcilable with the conclusion insisted upon, was made without the point having been mentioned or considered as to the law of Louisiana, under which the case arose.

But it is entirely immaterial, in our view of the case, what the law of Louisiana upon the point is, for the reason that that law has no application to it. The question relates, not to any law of that State, but to a law of the United States, and is, whether under the bankrupt act of 1867, the District Court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title, and whether, in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was, at the time, in the bankrupt.

This was the very point decided by this court in *Sharpe* v. *Doyle*, 102 U. S. 686, a reference to which makes it unnecessary to repeat the grounds of the conclusion, that in such a case the defence here allowed, if established, should prevail.

All the other exceptions taken during the trial were directed to the admission of testimony in support of this defence, and are disposed of when the defence itself is adjudged to be valid.

There is, therefore, no error in the record, and

The judgment is affirmed.

SMITH and Another *v.* McNEAL and Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Argued November 15th, 18th, 1883.—Decide November 26th, 1883.

Estoppel—Limitations—Statutes of Tennessee.

A suit was begun, within the seven years prescribed by the Statute of Limitation of the Code of Tennessee, in the Circuit Court of the United States for the Western District of Tennessee, for the recovery of land, which was

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dismissed for want of jurisdiction, by reason of the omission in the pleadings of a jurisdictional fact which actually existed. Within one year thereafter the plaintiff in the former suit commenced another suit in the same court against the same parties, to recover the same land, and set up the jurisdictional fact: *Held,*

1. That, although the second suit was begun more than seven years after the cause of action arose, it was within the saving clause of article 2755 of the Code of Tennessee, providing that: "If the action is commenced within the time limited, but the judgment or decree is rendered in favor of the plaintiff and upon any ground not concluding his right of action, or where the judgment or decree is rendered against the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest."
2. The doctrine that a dismissal of a suit for want of jurisdiction is no bar to a second suit for the same cause of action reaffirmed and the authorities cited.

December 31st, 1873, the plaintiffs in error brought suit against defendants in the Circuit Court of the United States for the Western District of Tennessee to recover forty acres of land. The declaration described the land and averred that the plaintiffs were possessed thereof, claiming in fee through a certificate of the United States district tax commissioners, naming them, under an act of Congress, entitled "An Act for the collection of taxes in insurrectionary districts within the United States and for other purposes," and the acts amending the same of January 1st, 1865, and that after such possession accrued the defendants, on December 1st, 1865, entered upon the premises and unlawfully withhold and detain the same, etc.

Two of the defendants, McNeal and Caruthers, demurred to the declaration, first, because it did not sufficiently describe the property sought to be recovered; and, second, because it did not show that the plaintiffs were not citizens of the State of Tennessee so as to give the court jurisdiction of the cause.

On February 24th, 1877, the court sustained the demurrer, upon the ground that it had "no jurisdiction of the cause of action in plaintiffs' declaration alleged and set forth," and dismissed the suit.

Afterwards, on October 20th, 1877, the plaintiffs in error brought the present suit against the same defendants in the

same court to recover the same tract of land. The declaration in this cause was identical with that in the former action, except that in this case the following averment was added:

"Defendants do not claim under, but adversely to, and deny the validity of plaintiffs' claim of title under the aforesaid acts of Congress, and the validity of plaintiffs' claim of title under the aforesaid acts of Congress is the only question in controversy between the plaintiffs and defendants."

The defendants pleaded the seven years' limitation prescribed by the statute of Tennessee, to which the plaintiffs pleaded the following replication:

"Now come the plaintiffs, by attorneys, and as to defendants' plea herein pleaded say, that on the 31st of December, 1873, and within seven years from the time the plaintiffs' cause of action accrued, the plaintiffs brought suit against defendants in this court to recover possession of the same premises whereof plaintiffs here now seek to recover possession; and the said suit was commenced upon the same cause of action that the plaintiffs' now writ and action are founded. That the said action, so commenced as aforesaid, was duly prosecuted by plaintiffs until the 1st of September, 1877, upon which day a judgment (which said judgment remaining of record in this court is referred to) was therein rendered by said circuit court upon a ground not concluding their said right of action. The record of said former suit remains in this court, and plaintiffs here make profert of the same; all of which plaintiffs are willing to certify."

The defendants demurred to this replication on two grounds: first, because it appeared by the judgment referred to and made a part of the replication, that said judgment was upon the merits; and, second, because it appeared from the record of said former suit that the court in which it was brought had no jurisdiction thereof, and said suit was dismissed for want of jurisdiction.

The cause was heard upon this demurrer, which the court sustained, and entered judgment dismissing plaintiffs' suit.

To reverse that judgment this writ of error was brought.

Mr. Samuel Shellabarger for plaintiffs in error.
Mr. P. Phillips for defendants in error.

Mr. Justice Woods delivered the opinion of the court.

The question presented by the record is the sufficiency of the plaintiffs' replication to the defendants' plea of the seven years' statute of limitation.

The limitation relied on by defendants is that prescribed by article 2765 of the Code of Tennessee, which is as follows:

"No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, etc., but within seven years after the right of action has accrued."

The plaintiffs in error contend that their present action is saved from the bar of this statute by the provision of article 2755 of the Code, which is as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or when the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff or his representatives or privies may commence a new action within one year after the reversal or arrest."

The question of law upon which the parties are at issue, is whether the judgment rendered February 24th, 1877, by which the suit begun December 31st, 1873, was dismissed, the dismissal being on the ground that the court had no jurisdiction of the cause of action set out in the declaration, falls within the saving of this section as being rendered on a ground not concluding the plaintiffs' right of action.

It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiffs' right of action.

In *Walden* v. *Bodley*, 14 Pet. 156, it was said by this court:

"A decree dismissing a bill generally may be set set up in bar of a second bill having the same object in view, but when the bill

has been dismissed on the ground that the court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to the second suit."

So in the case of *Hughes* v. *United States*, 4 Wall. 232, this court declared:

"In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also Greenleaf's Evidence, sections 529, 530, and cases there cited.

The cases would seem to settle the question against defendants in error, for they decide that the dismissal of a suit for want of jurisdiction is upon a ground not concluding the right of action. Defendants in error, however, contend that the bringing of a suit in a court having no jurisdiction thereof was gross negligence, and that the current of authority is against extending the terms of the statute to let in one guilty of it.

Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace.

But the suit between these parties, which was begun December 31st, 1873, is far from being such a case. There is nothing in the record to show that it was dismissed for any inherent want of jurisdiction in the court in which it was brought.

We think that on December 31st, 1873, when said first suit was brought, the circuit courts of the United States, under the second section of the act of Congress of March 2d, 1883, entitled an act further to provide for the collection of duties on imports, 4 Stat. 632, had jurisdiction of a suit brought to re-

cover lands purchased at a sale for taxes made under authority of the act of June 7th, 1862, for the collection of taxes in insurrectionary districts, where the title so derived was disputed by defendants. The defect was in the declaration, which, although it averred that plaintiffs claimed title under the revenue laws of the United States, did not aver that their title in that respect was disputed by defendants. Had such an averment been made, the jurisdiction of the court would have appeared on the face of the declaration. *Ex parte Smith*, 94 U. S. 455.

The first suit was therefore dismissed, because the declaration did not state the jurisdictional facts upon which the right of the court to entertain the suit was brought. In other words, the case was dismissed for a defect in pleading. In the present suit the defect of the declaration in the first suit is supplied.

We are of opinion, therefore, that the plaintiffs in error are entitled to the benefit of article 2755 of the Code of Tennessee, for their judgment in the first suit was not upon any ground concluding their right of action, nor have they been guilty of such negligence or carelessness in the bringing of their first suit as should exclude them from the benefit of the said article.

In support of the proposition that plaintiffs in error have not been guilty of such negligence as should exclude them from the benefit of article 2755, the case of *Cole* v. *The Mayor and Aldermen of Nashville*, 5 Cold. (Tenn.) 639, is much in point. See also *Memphis & Charleston Railroad Company* v. *Pillow*, 9 Heiskell (Tenn.), 248; *Weathersly* v. *Weathersly*, 31 Miss. 662; *Woods* v. *Houghton*, 1 Gray, 580; *Coffin* v. *Cottle*, 16 Pick. 383; *Givens* v. *Robbins*, 11 Ala. 156; *Skillington* v. *Allison*, 2 Hawks. (N. C.) 347; *Lansdale* v. *Cox*, 7 J. J. Marsh (Ky.), 391; *Phelps* v. *Wood*, 9 Vt. 399; *Spear* v. *Newell*, 13 Vt. 288; *Matthews* v. *Phillips*, 2 Salk. 424; *Kinsey* v. *Hayward*, 1 Ld. Raym. 432.

The judgment of the circuit court must be reversed, and the cause remanded to the circuit court for further proceedings in conformity with this opinion.

Statement of Facts.

BAILEY and Others *v.* THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 29th, 1883.—Decided December 3d, 1883.

Power of Attorney—Statutes.

Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by Congress or by the proper department, is good as between the government and such claimants, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of the act of July 29th, 1846, entitled "An Act in relation to the payment of claims," and the act of February 26th, 1853, entitled "An Act to prevent frauds upon the treasury of the United States." 9 Stat. 41, and 10 Stat. 170.

Suit to recover $200,070.34 from the United States, the same having been previously paid to a person holding the duly executed power of attorney of the plaintiffs; the plaintiffs claiming that the power was absolutely void under the provisions of the acts contained in 9 Stat. 41, and 10 Stat. 170.

By a decree passed March 25th, 1868, in the District Court of the United States for the Southern District of New York, certain sums of money were ascertained to be due on account of the illegal capture of the British steamer Labuan and her cargo by a cruiser of the United States.

On the 6th day of February, 1869, William Bailey, William Leetham, James Leetham, and Elizabeth Leetham, British subjects, executed and delivered a power of attorney—in which they described themselves as then or late owners of said steamer—constituting one A. E. Godeffroy, of New York, their attorney, with authority to receive from the government of the United States, and from all and every person or persons whom it might concern to pay or satisfy the same, all moneys then or which might thereafter become due and payable to them with reference to said vessel Labuan; upon receipt thereof, to execute acquittances, releases, and discharges for the same; and, upon non-payment thereof, to collect said moneys by such necessary actions, suits, or expedients as their attorney deemed proper.

Statement of Facts.

By an act of Congress, approved July 7th, 1870, it was, among other things, provided "that there be paid out of any money in the treasury not otherwise appropriated, to William Bailey, William Leetham, and John Leetham, of England, or their legal representatives, owners of the British steamer Labuan, $131,221.30, with interest from June 2d, 1862, to the time of payment, and five thousand dollars without interest." The act declares that such sums are due under the beforementioned decree of March 25th, 1868.

At the date of this act the owners, in different proportions, of the Labuan were William Bailey, William Leetham, and the executors and executrix of John Leetham, who were William Leetham, James Leetham, and Elizabeth Leetham.

An account between the United States and said owners, based upon the said act of July 7th, 1870, having been examined, adjusted, admitted, and certified by the proper officers of the treasury, a warrant was made, upon which a draft was issued on the treasurer of the United States for the sum of $200,070.34, payable "to Wm. Bailey, Wm. Leetham, and John Leetham, of England, or their legal representatives, or order." This draft was delivered to Godeffroy, with this indorsement thereon: "Pay on the indorsement of A. E. Godeffroy, att'y in fact. R. W. Taylor, comptroller." The draft having been indorsed in the names of the payees, by himself as their attorney in fact, Godeffroy received the proceeds, but has never paid to the parties named in the act of Congress, or to any one for them, any part of the sum collected by him from the United States.

The treasury department refused, although requested by appellants or their agents, to make further payment. Thereupon this action was brought in the court of claims to recover the amount specified in the act of Congress. Judgment was rendered for the United States, and the present appeal questions the correctness of that judgment.

Mr. J. Hubley Ashton (*Mr. Nathaniel Wilson* was with him) for appellants: The moneys appropriated and required to be paid to the claimants, by the act of Congress of July 7th, 1870,

never having been paid to them, or their duly authorized agent, the liability arising upon the law, and the contract it imports, has not been discharged, and the United States are liable to the claimants for the moneys specified in the statute. After the adjustment of an account between the United States and the persons named in the act, on the 11th of July, 1870, a warrant was drawn on the next day directing the payment to them of the amount specified, upon which a draft, dated the 12th of July, was issued, payable "to Wm. Bailey, Wm. Leetham, and John Leetham, owners, or their legal representatives, or order, $\$200{,}070\frac{34}{100}$." On this draft an indorsement was made by the comptroller, directing its payment "on the indorsement of A. E. Godeffroy, att'y in fact." This man, thereupon, indorsed the draft on the same day, the 12th of July, and got the money. The claimants have never received a dollar of it. The money was paid to Godeffroy upon a power of attorney given to him in England, in February, 1869, long before the passage of the act of Congress, by William Bailey, William Leetham, and the personal representatives of John Leetham; and which, of course, fulfilled none of the requirements of the act of July 29th, 1847, or the act of February 26th, 1853. This power of attorney was absolutely null and void; and no payment under it to Godeffroy could bind the claimants, or discharge the debt. Act of July 29th, 1846, 9 Stat. 41; Act of February 26th, 1853, 10 Stat. 170; *Coté's Case*, 3 Court of Claims, 64; *Pierce's Case*, 2 Court of Claims, 599; *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484, 489; *Becker* v. *Sweetzer*, 15 Minn. 427, 435. The claimants cannot be affected with any responsibility for the illegal payment of this money at the treasury to Godeffroy, and are not chargeable with any wrong or fault in connection with that transaction, and the United States are, and should be held, solely and exclusively responsible in law for the payment of the money to that person, and its consequent loss to the claimants. The fallacy of the argument on the other side consists in sedulously ignoring the character and relations of the claimants, who were British subjects, resident in their own country, and who knew nothing, and were not bound to know anything, of the acts of Congress of July

29th, 1846, and February 26th, 1853. The defence proceeds upon the idea that the claimants participated in the violation of law committed in the payment of this money to Godeffroy, and that the maxim, *in pari delicto potior est conditio defendentis*, furnishes the rule of decision in the case. If there was no *delictum* on the part of the claimants, there was no *par delictum* on their part, and the rule expressly requires equal wrong in order that the law should leave the parties where it finds them. "The maxim does not apply unless both the litigating parties are *in delicto;* it cannot be insisted upon as a defence, either by or against an innocent party." Broom's Legal Maxims, 724. No *delictum*, fault, or blame could be imputable to the claimants under any circumstances, in this transaction, unless they had actual knowledge of the acts of Congress which discredited and invalidated the power of attorney, which it is not shown they had. No one is presumed to know the law of a foreign country. 1 Story's Eq. Jur. § 140; *Haven* v. *Foster*, 9 Pick. 111; *Leslie* v. *Baillie*, 2 Y. & C. Ch. Cas. 91. It was the duty of the government to obey the act of 1853, and to protect these foreign claimants against the consequences of their own ignorance; and there can be no reason for excusing it from the performance of its duty to them, because the claimants, without knowledge of its statutes, gave a power of attorney, which those statutes declared void, to the man who received the money. As the claimants had no knowledge of the acts of Congress, there was no fault, wrong, or negligence on their part in intrusting Godeffroy with their power of attorney, and the whole blame, in the transaction of the payment of this money to him at the treasury, is therefore imputable to the government, and the government is solely responsible for the consequences of his infidelity.

Mr. Solicitor General for the United States.

Mr. Justice Harlan delivered the opinion of the court. After reciting the facts he continued:

It is contended, on behalf of appellants, that the power of attorney executed in 1869 to Godeffroy—upon the authority of

which alone was payment made to him—was, under the laws of the United States, absolutely null and void; consequently, no payment under it could bind the claimants or discharge the government from its obligation to pay the sums specified in the act of 1870. This presents the controlling question on the present appeal. Its determination depends upon the construction to be given to the act of July 29th, 1846, 9 Stat. 41, entitled "An Act in relation to the payment of claims," and to the first and seventh sections of the act of February 26th, 1853, 10 Stat. 170, entitled "An Act to prevent frauds upon the treasury of the United States."

The act of 1846 related to claims against the United States allowed by a resolution or act of Congress. That statute directed that they should not be paid to any other person than the claimant, his executor or administrator, unless upon the production to the proper disbursing officer of a warrant of attorney executed "after the enactment of the resolution or act allowing the claim." The first section of the act of 1853 declares that "all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest thereon, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, or orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." That act further provides (§ 7) that its provisions and those of the act of 1846 shall "apply and extend to all claims against the United States, whether allowed by special acts of Congress, or arising under general laws or treaties, or in any other manner whatever."

These enactments have been under examination in several cases heretofore decided in this court, some of which are now relied on to support the proposition that officers of the treasury were forbidden by statute from recognizing Godeffroy under any circumstances as agent of claimants, with authority

as between them and the government to receive the warrant and draft when issued. But we do not understand that any of these cases involved the precise question now presented for determination.

In *United States* v. *Gillis*, 95 U. S. 407, it was ruled that a claim against the United States could not be assigned so as to enable the assignee to bring suit against the government in his own name in the court of claims. In *Spofford* v. *Kirk*, 97 U. S. 484, the question was as to the validity of certain orders drawn by a claimant, before the allowance of his claim, upon the attorneys having it in charge, directing the latter to pay certain sums out of the proceeds when collected, and which orders, being accepted by the attorneys, were purchased by Spofford in good faith and for value. Upon the treasury warrant being issued, the claimant refused to admit the validity either of the orders he had given or the acceptances made by his attorneys. Thereupon Spofford sought, by suit against the claimant and his attorneys, to enforce a compliance with the orders and acceptances of which he had become assignee and holder. The court adjudged that the transfer or assignment to Spofford was, under the act of 1853—carried into the Revised Statutes, § 3477—a nullity as between him and the claimant. No question arose in that case as to what would have been the effect upon the rights of the claimant had the officers of the government recognized the assignment of Spofford. In *Erwin* v. *United States*, 97 U. S. 392, it was ruled that the act of 1853 applied to cases of voluntary assignments of demands against the government, and did not embrace cases where the title is transferred by operation of law. "The passing of claims to heirs, devisees, or assignees in bankruptcy," said the court, "are not within the evil at which the statute aimed."

But what was said in *Goodman* v. *Niblack*, 102 U. S. 556, seems to be more directly in point. That was the case of a voluntary assignment by a debtor of his property for the benefit of creditors, including his rights, credits, effects, and estate of every description. The assignment embraced a claim of the assignor arising under a contract with the United States. It

was adjudged in the court of original jurisdiction that, as to that claim, the assignment was rendered invalid by the act of 1853. But the language of this court, speaking by Mr. Justice Miller, was:

"It is understood that the circuit court sustained the demurrer, under pressure of the strong language of the opinion in *Spofford* v. *Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion, and in the others referred to, are mainly two: 1. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; 2. That by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, where the reward is contingent on success, so often suggest." "But these considerations," the court proceeded to say, "as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment."

These cases show that the statutes in question are not to be interpreted according to the literal acceptation of the words used. They show that there may be assignments or transfers of claims against the government, such as, for instance, those passed upon in *Erwin* v. *United States*, and in *Goodman* v. *Niblack*, which are not forbidden by the statutes.

In the case before us no question arises as to the transfer or assignment of a claim against the government. The question is whether payment to one who has been authorized to receive it, by the power of attorney executed before the allowance of the claim by the act of Congress was good as between the government and the claimant, where, at the time of payment,

such power of attorney was unrevoked. If, in respect of transfers or assignments of claims, the purpose of the statute, as ruled in *Goodman* v. *Niblack*, was to protect the government, not the claimant in his dealings with the government, it is difficult to perceive upon what ground it could be held that the statutory inhibition upon powers of attorney in advance of the allowance of the claim and the issuing of the warrant, can be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it. A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. And it may be so regarded by the officers of the government whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent. To hold otherwise would be inconsistent with the ruling heretofore made—and with which, upon consideration, we are entirely satisfied—that the purpose of Congress, by the enactments in question, was to protect the government against frauds upon the part of claimants and those who might become interested with them in the prosecution of claims, whether before Congress or the several departments. The title of the act of 1853 suggests this purpose. It is to prevent frauds upon the treasury. An effectual means to that end was to authorize the officers of the government to disregard any assignment or transfer of a claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof. Other sections of the statute —those forbidding officers of the government and members of Congress from prosecuting or becoming interested in claims against the government, and those punishing the bribery or undue influencing of such officers or members—sustain the view

that what was in the mind of Congress was to protect the government in the matter of claims against it. But if the protection of claimants was at all in the mind of Congress when passing the acts of 1846 and 1853, it is quite certain that the courts should not, to the injury of the government, extend that protection to those that elected not to avail themselves of the provisions of those statutes. Here it is not denied that the power of attorney executed in 1869 embraces, and was intended to embrace, the claims arising out of the decree of 1868, from whatever source the money in satisfaction of it might be derived. Nor is it pretended that such power of attorney had been revoked prior to the adjustment and payment of the claims in question.

It seems to us—looking at the mischiefs intended to be remedied by these statutes and giving the words of Congress a reasonable interpretation—that the claimants were not at liberty, as between the government and themselves, to question the right of the officers of the treasury to recognize the unrevoked authority which the latter had given to Godeffroy, without restriction as to time, to receive from any one whom it might concern to pay all sums of money due or to become due and payable on account of the seizure of the vessel *Labuan*.

The judgment must, therefore, be affirmed.

It is so ordered.

JACKSON *v.* ROBY and Another.

ROBY and Another *v.* JACKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Submitted October 31st, 1883.—Decided December 3d, 1883.

Mineral Lands—Revised Statutes.

1. Section 2324 Rev. St. enacts that where certain mining claims referred to in the section are held in common, the expenditure upon them required by the act may be made upon any one claim: *Held*, that the act contem-

plates that this expenditure is to be made for the common benefit, and that one enjoying a mining right defined by metes and bounds does not, by expending money upon a flume which passes over adjoining land and deposits the waste from his mine on that land without benefit to such adjoining land, and without other evidence of a claim to it, thereby make an expenditure upon it within the meaning of the Revised Statutes.

2. In a suit under section 2326 of the Revised Statutes to determine adverse claims to lands containing valuable mineral deposits, if neither party shows a compliance with the requirements of law in regard to work done upon the claim, the finding should be against both.

This was a suit under § 2326 of the Revised Statutes to determine adverse claims to lands in Colorado with mineral deposits. The facts, and the relations of the parties, are fully set forth in the opinion of the court.

Mr. John D. Pope for Jackson.

Mr. A. D. Bullis, *Mr. M. B. Carpenter* and *Mr. Amos Steck* for Roby and another.

Mr. Justice Field delivered the opinion of the court.

Previous to the legislation of Congress in 1866, mining claims upon the public lands of the United States were held under rules framed by miners themselves in different localities. These rules prescribed the extent of ground which miners could severally appropriate for mining, and the conditions upon which such ground could be acquired and held. They bore a general similarity in different districts, varying only according to the extent and character of the mines. They all agreed in one particular, in recognizing discovery and appropriation as the source of title, and development by working as the condition of continued possession. The first discoverer could derive no benefit from his discovery unless he followed it up by work for the development of his claim; and what that work should be, the nature and extent of it, how soon it should commence after the discovery, and when its suspension should be deemed an abandonment of the claim, were specifically declared.

The act of Congress of 1866 gave the sanction of law to these rules of miners, so far as they were not in conflict with the laws of the United States. 14 Stat. 251, ch. 262, sec. 1.

Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others that which required work on the claim for its development as a condition of its continued ownership. The act of 1872—and its provisions are re-enacted in the Revised Statutes—declares that on each claim subsequently located, until a patent for it is issued, there shall be annually expended for labor or improvements $100, and on claims previously located an annual expenditure of $10 for each one hundred feet in length along the vein; and provides that when such claims are held in common, the expenditure may be upon any one of them. And it declares that upon a failure to comply with these conditions the claim shall be opened for re-location in the same manner as if no location of the same had ever been made, provided the original locators, their assigns, or representatives, have not resumed work upon it after failure and before re-location. 17 Stat. 93, ch. 152, sec. 5; Rev. Stat. § 2324.

The act also points out various steps which must be followed by a party who seeks to obtain a patent for his mining claim. Among other things, he must file an application in the proper land office under oath, showing a compliance with the law, together with a plat and the field notes of his claim or claims, made under the direction of the surveyor-general of the United States, showing its or their boundaries. He must also at the time, or within sixty days thereafter, file with the register a certificate of the surveyor-general that $500 worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors. If within sixty days thereafter an adverse claim is filed, accompanied by the oath of the party making it, showing its nature, boundaries, and extent, proceedings are to be stayed until the controversy has been settled by the decision of a court of competent jurisdiction, or the adverse claim is waived. And it is made the duty of the adverse claimant, within thirty days afterwards, to commence legal proceedings to determine the question of the right of possession. Rev. Stat. § 2326.

Opinion of the Court.

In this case it appears that the defendants claimed the premises in controversy as their mining ground, and made application for a patent. The premises are situated on Blue River, in the county of Summit, in the State of Colorado, and embrace twenty-three acres and forty-eight hundredths of an acre. The plaintiff asserted an adverse right to them as part of what is called in the record "The Thomas Klak Claim," and brought the present action to determine his right of possession. In his complaint he alleges that on the 9th of August, 1876, he was the owner of the Klak claim, and ever since has been such owner and entitled to its possession; that he worked the same as a placer mining claim in connection with other claims adjacent and contiguous to it; that the defendants some time in 1880 entered upon a part of said claim—that portion now in controversy—and have ever since wrongfully withheld its possession from him. He avers that the premises are worth $50,000; that the action is brought in support of his adverse claim; and he asks judgment for possession of the premises.

The defendants, besides denying the allegations of the plaintiff, set up a right to a portion of the premises by location and occupation under the mining rules of the district, and to the remainder by purchase from the original locators.

On the trial the plaintiff produced and gave in evidence a certificate of location of the Klak claim made by his grantors in 1869, and also showed that they were owners of claims in what is called Lomax Gulch, adjoining and contiguous to the Klak claim, and began to work such adjoining claims in 1872, and continued the work until and during 1880; that in prosecuting the work they used a flume which extended over the premises in controversy a distance of one hundred and fifty feet, by means of which the tailings from the Lomax Gulch—that is, the waste material—were carried and deposited on the premises, so that at the end they covered a greater portion of them—more than one-third thereof. From them the plaintiff traced his title. With the exception of the extension of the flume over the premises, and their use as a place of deposit for the waste material from the adjoining claims, it was not shown that either he or his grantors ever did any work

upon them, or ever had possession of them. He insisted, however, that this extension of the flume and use of the premises were sufficient to give him the right of possession under that clause of the statute which provides that where several mining claims are held in common the labor or expenditure required may be made on any one of them. The court below held, and so instructed the jury, that these facts were insufficient to establish any possession or right of possession in him, and that therefore he was not entitled to a verdict.

The defendants proved the location in July, 1880, of a portion of the premises in controversy, then vacant and unoccupied, and a purchase of the remainder from previous locators; but they gave no evidence that any work on the claim was done by themselves or their grantors; and the court held that they had not established a title for the consideration of the jury, who were directed so to find. The jury brought in a verdict that neither party had proven title to the property. The effect of this verdict was to leave the defendants, who had applied for a patent, without any right to it, so far as the premises in controversy were concerned, and to leave the plaintiff in no better situation.

The contention of the plaintiff was made upon a singular misapprehension of the meaning of the act of Congress, where work or expenditure on one of several claims held in common is allowed, in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim—which has no reference to the development of the others—will answer. As was said in *Smelting* v. *Kemp*, 104 U.S., at page 655:

"Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance

from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists of the construction of a flume to carry off the debris or waste material."

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed, upon any one of them.

The language as to the construction of a flume to carry off the debris or waste material, at the conclusion of the citation above, has reference to such a structure as may be used to carry off the common debris of several claims, not to a flume used merely to remove the debris of one claim. Here no work was done for the general improvement of all the claims. The deposit of the debris from the Lomax Gulch on the premises in controversy, so far from tending to develop them, imposed obstacles in the way of their development, by covering them up with refuse matter.

There having been no work done by either claimant, plaintiff or defendants, on the premises in controversy, the court properly instructed the jury to find against both.

Judgment affirmed

Statement of Facts.

CUNNINGHAM *v.* MACON & BRUNSWICK RAILROAD COMPANY and Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Argued November 2d, 5th, 1883.—Decided December 3d, 1883.

Constitutional Law—Jurisdiction—Practice—Suing a State.

1. The State of Georgia indorsed the bonds of a railroad company, taking a lien upon the railroad as security. The company failing to pay interest upon the indorsed bonds, the governor of the State took possession of the road, and put it into the hands of a receiver, who made sale of it to the State. The State then took possession of it, and took up the indorsed bonds, substituting the bonds of the State in their place. The holders of an issue of mortgage bonds issued by the railroad company subsequently to those indorsed by the State, but before the default in payment of interest, filed a bill in equity to foreclose their own mortgage and to set aside the said sale and to be let in as prior in lien, and for other relief affecting the property, and set forth the above facts, and made the governor and the treasurer of the State parties. Those officers demurred: *Held*, that the facts in the bill show that the State is so interested in the property that final relief cannot be granted without making it a party, and the court is without jurisdiction.
2. Whenever it is clearly seen that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.
3. The cases at law and in equity in which the court has taken jurisdiction, when the objection has been interposed that a State was a necessary party to enable the court to grant relief, examined and classified.
4. The case of *United States* v. *Lee*, 106 U. S. 196, examined, and the limits of the decision defined.
5. The case of *Davis* v. *Gray*, 16 Wall. 203, questioned.

Bill in equity by holders of second mortgage bonds of a railroad company, to foreclose their own mortgage, and to set aside a previous sale of the railroad to the State of Georgia under the foreclosure of the first mortgage, and for other relief. Bill dismissed below on demurrer for want of jurisdiction, and the plaintiff below appealed. The facts appear in the opinion of the court.

Mr. A. G. Magrath and *Mr. W. W. Montgomery* for appellant.

Mr. Clifford Anderson and *Mr. Joseph H. Choate* for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for the Southern District of Georgia, dismissing the bill of complainant on demurrer.

The bill is filed by Cunningham, a citizen of the State of Virginia, against Alfred H. Colquitt, as governor of the State of Georgia, J. W. Renfroe, as treasurer of the State, the Macon and Brunswick Railroad Company, and A. Flewellen, W. A. Lofton, and George S. Jones, styling themselves directors of said railroad company, John H. James, a citizen of Georgia, and the First National Bank of Macon.

The bill sets out, with reasonable fulness and with references to exhibits which make its statements clear, what we will try to state, as far as necessary, in shorter terms.

It alleges that on the 3d day of December, 1866, the assembly of Georgia passed an act authorizing the governor to indorse the bonds of the Macon and Brunswick Railroad Company to the extent of $10,000 per mile, and that under this authority the governor indorsed bonds to the amount of $1,950,000, which were afterwards negotiated by said company. The statute under which this was done made the indorsement of these bonds to operate as a prior mortgage upon all the property of the company, which could be enforced by a sale by the governor upon default in payment of the bonds so indorsed, or interest on them as it fell due. In addition to this the company executed and delivered to the governor, on the 22d of June, 1870, a written mortgage confirming the lien created by the statute, which was duly acknowledged and recorded.

October 27th, 1870, the legislature, by an act amending the act of December 3d, 1866, authorized the governor to indorse an additional $3,000 per mile of the bonds of the company, which was done, and of this series of bonds the complainant became the holder and owner of nineteen for $1,000 each.

It is then alleged that on July 1st, 1873, the company failed

to pay its interest coupons upon both these sets of indorsed bonds, and that in a few days thereafter the governor, under the power vested in him by the act of 1866, took possession of the road and the property of the company and placed them in the hands of Flewellen as receiver; and that on the first Tuesday in June, 1875, he sold said road to the State of Georgia for the sum of $1,000,000, and made a conveyance of it to the State accordingly, a copy of which is filed as an exhibit to the bill. It is also alleged that the State of Georgia has taken up since that time the entire issue of $1,950,000, giving her own bonds in place of the bonds which she had so indorsed.

The bill assails this transaction because the governor, in advertising the sale, gave notice that he would accept in payment for bids bonds of the State at par, or bonds of the first series of $1,950,000 at their market value, or cash, and would not receive any of the second series of $600,000 in payment. Also because the sale was made improvidently, at a bad time, as the governor was informed by his agent, Flewellen, and because the governor was not authorized to bid for the property, and the State had no constitutional power to make the purchase.

And it is further alleged that if the sale is not absolutely void, it is voidable, because under the statutory and executed mortgages the State is trustee of the property mortgaged for the benefit of the bondholders, and her purchase can be set aside by the beneficiaries under the trust when they elect to do so. The bill insists that by the taking up and payment of the first series of indorsed bonds their lien on the property is extinguished, and that of the second series is now become paramount, and this suit is brought to foreclose that mortgage lien.

And if the court shall be of opinion that the sale was valid, then the bill insists that the holders of the second series were entitled to be paid *pro rata* under that sale, and that when the legislature of Georgia appropriates any money to pay the bonds which it gave in exchange for $1,950,000 of the indorsed railroad bonds, the amount so appropriated should be divided *pro rata* between these bonds and the $600,000 of the second series of indorsed bonds.

The prayer of the bill is for the appointment of a receiver

to whom all the property of the company shall be delivered; that the mortgage be foreclosed and the proceeds applied to payment of the bonds of the second series so far as necessary for that purpose; or, if the court shall be of opinion that the sale was valid, that Renfroe be enjoined from paying the coupons of interest on the State bonds exchanged for the first series of bonds, and that the holders thereof be made parties to the suit, and be compelled to account to the holders of the $600,000 series of bonds for their *pro rata* share of said exchanged bonds; and the bill prays that Colquitt, the governor, and Renfroe, the treasurer, and the three directors of the company, be compelled by subpœna to appear and answer it and certain interrogatories in it, and produce certain papers; and that Renfroe be enjoined from paying the coupons on the State bonds exchanged for the indorsed bonds; and that the State of Georgia may come in and make herself a party defendant to this bill if she should wish to do so; and there is a prayer for general relief.

To this bill there was filed by Flewellen, Lofton, and Jones, the directors, a demurrer and plea, as it is called. The plea is to the effect that they have no interest in the road otherwise than as agents of the State of Georgia, for which they hold and control the Macon and Brunswick Railroad and all its property and franchises of every description, and the plea and demurrer both rely on the proposition that the court has no jurisdiction of the case, because it cannot proceed without the State as a party, and that the court cannot compel the State to become a party to the suit.

Renfroe, the treasurer, filed a similar plea, and Colquitt, the governor, filed a demurrer and a plea separately.

The ground of demurrer stated by the governor is that it is apparent on the face of the bill that the court cannot take cognizance of the matters and things set up in said bill as against the defendant, because it appears that he has no personal interest in the same, but that it is an attempt to make the State of Georgia a party to the suit through the defendant as governor, so as to bind the State by the judgment and decision of the court in the case.

On this demurrer of Colquitt and the joint demurrer of the three trustees the case was decided and the bill dismissed.

Mr. Justice Woods in dismissing it said:

"The bill is to all intents and purposes a suit against the State. It is mainly her property, and not that of Alfred H. Colquitt or J. W. Renfroe, that is to be affected by the decree of this court. It is the title of the State that is assailed. The attack is not made against the State directly, but through her officers. This indirect way of making the State a party is just as open to objection as if the State had been named as a defendant." 3 Wood's R. 426.

The failure of several of the States of the Union to pay the debts which they have contracted and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no State can be sued in the ordinary courts as a defendant except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the State is not a party.

These suits have generally been instituted in the circuit courts of the United States, or have been removed into them from the State courts.

The original jurisdiction of this court has also been invoked in the recent cases of *The State of New Hampshire* v. *The State of Louisiana* and *The State of New York* v. *The State of Louisiana*, 108 U. S. 76. These latter suits were based on the proposition that the constitutional provision that States might sue each other in this court would enable a State whose citizens were owners of obligations of another State to take a transfer of those obligations to herself and sue the defaulting State in the court. The doctrine was overruled in those cases at the last term by the unanimous opinion of the court.

In the suits which have been instituted in the circuit courts the effort has been, while acknowledging the incapacity of those courts to assume jurisdiction of a State as a party, to proceed in such a manner against the officers or agents of the State government, or against property of the State in their

hands, that relief can be had without making the State a party.

The same principle of exemption from liability to suit as applied to the government of the United States has led to like efforts to enforce rights against the government in a similar manner. And it must be confessed that, in regard to both classes of cases, the questions raised have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them. Nor is it an easy matter to reconcile all the decisions of the court in this class of cases.

While no attempt will be made here to do this, it may not be amiss to try to deduce from them some general principles, sufficient to decide the case before us.

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration.

1. It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge

its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall, 152, 157; *The Davis*, 10 Wall. 15, 20; and *Clark* v. *Barnard* and others, 108 U. S.

2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him. See *Mitchell* v. *Harmony*, 13 How. 115; *Bates* v. *Clark*, 95 U. S. 204; *Meigs* v. *McClung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet. 498; *Brown* v. *Huger*, 21 How. 305; *Grisar* v. *McDowell*, 6 Wall. 363.

To this class belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession.

3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process.

Of this class are writs of mandamus to public officers, as in *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *Stokes*, 3 How. 87; *United States* v. *Schurtz*, 102 U. S. 378; *United States* v. *Boutwell*, 17 Wall. 604.

But in all such cases, from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer.

It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises.

Perhaps the strongest assertion of this doctrine is found in the case of *Davis* v. *Gray*, 16 Wall. 203.

In that case, the State of Texas having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the commissioner of the State land office and the governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from doing this by its decree, which was affirmed in this court.

Judge Hunt did not sit in the case, and Justice Davis and Chief Justice Chase dissented, on the ground that it was in effect a suit against the State. Though there are some expressions in the opinion which are unfavorably criticised in the opinions of both the majority and minority of this court in the recent case of *United States* v. *Lee*, the action of the court has not been overruled.

But it is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. Nor was there in that case any affirmative relief granted by ordering the gov-

ernor and land commissioner to perform any act towards perfecting the title of the company.

The case of the *Board of Liquidation* v. *McComb*, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the State in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of State indebtedness not within the provisions of the law on that subject.

In the opinion in that case the language used by Mr. Justice Bradley well and tersely thus expresses the rule and its limitations:

"The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

It is believed that this is as far as this court has gone in granting relief in this class of cases. The case of *Osborne* v.

Bank of the United States, 9 Wheat. 738, often referred to, was decided upon this principle, and goes no further; for, in that case, a preliminary injunction of the court forbidding a State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed. See *Louisiana* v. *Jumel*, 107 U. S. 711.

On the other hand, in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, 107 U. S. 711, decided at the last term, very ably argued and very fully considered, the court declined to go any further.

In the first of these cases the owners of the new bonds issued by the board of liquidation mentioned in McComb's case, above cited, brought the bill in equity, in the Circuit Court of the United States, to compel the auditor of the State and the treasurer of the State to pay, out of the treasury of the State, the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the State court for a writ of mandamus to the same officers, which suit was removed into the Circuit Court of the United States. In this they asked that these officers be commanded to pay, out of the moneys in the treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government.

The circuit court refused the relief asked in each case, and this court affirmed the judgment of that court.

The short statement of the reason for this judgment is, that as the State could not be sued or made a party to such proceeding, there was no jurisdiction in the circuit court either by mandamus at law, or by a decree in chancery, to take charge of the treasury of the State, and seizing the hands of the auditor and treasurer, to make distribution of the funds found in the treasury in the manner which the court might think just.

Opinion of the Court.

The Chief Justice said:

"The treasurer of the State is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them only as agent of the State. If there is any trust the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury, and pay it out according to law. They can be moved through the State, but not the State through them."

We think the foregoing cases mark, with reasonable precision, the limit of the power of the courts in cases affecting the rights of the State or federal governments in suits to which they are not voluntary parties.

In actions at law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority.

Courts of equity proceed upon different principles in regard to parties. As was said in *Barney* v. *Baltimore*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there

are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in *Shields* v. *Barrow*, 17 How. 130, "they are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."

"In such cases," says the court in *Barney* v. *Baltimore*, 6 Wall. 280, "the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession.

On the hypothesis that the foreclosure by the governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer, as settled in *Louisiana* v. *Jumel*.

If any branch of the State government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by mandamus, to compel them to provide means to pay the State's indorsement?

The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process.

The decree of the circuit court is affirmed.

Dissenting Opinion: Harlan, Field, JJ.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE FIELD, dissenting.

The bill in this suit was filed by Cunningham, a citizen of Virginia, in behalf of himself and all holders of the second series of the bonds of the Macon and Brunswick Railroad Company, indorsed by the State of Georgia, who may choose to be made parties to the suit and share the expenses thereof.

The defendants are: The Macon and Brunswick Railroad Company, a corporation of Georgia; Edward A. Flewellyn, W. A. Lofton, and George S. Jones, citizens of Georgia, and styling themselves "Directors of the Macon and Brunswick Railroad;" J. W. Renfroe, treasurer, and Alfred H. Colquitt, governor of the State of Georgia, both citizens of that State; the First National Bank of Macon, a corporation created under the laws of the United States and located at Macon, Georgia, and John H. James, a citizen of Georgia.

The suit relates to the Macon and Brunswick Railroad, of which Flewellyn, Lofton, and Jones, as directors aforesaid, are in possession, and which they are managing and operating in entire disregard, as the bill alleges, of the rights of complainant and other holders of the before-mentioned bonds.

But the suit has other features of which no notice is taken in the opinion of the court. The bill alleges that on or about July 2d, 1873, the then governor of Georgia not only seized the railroad and all other property of the company, but certain other property embraced in a deed of trust to one Whittle, which was not covered by the statutory and executed mortgages, so far as the $1,950,000 series of indorsed bonds is concerned, because acquired by the company after the last of that series had been indorsed, with funds other than the proceeds of the bonds, but which was covered by the mortgages so far as the $600,000 series is concerned, having been bought prior to the indorsement of the latter bonds. The property covered by the deed of trust to Whittle was, the bill alleges, transferred to the trustees therein named, with directions to dispose of the same and with the proceeds to redeem certain fare-bills of the company; but said trust was never carried out by them, because those fare-bills were fully paid out of the earnings of the railroad.

The bill charges that the sale at which the governor of Georgia purchased the property for the State was void:

1. "Because neither the legislature nor the governor had the right to exclude the $600,000 series of indorsed bonds from being used as so much cash, in the purchase of said road, at their face value—certainly they were entitled to be so used, in the event of the exhaustion of the $1,950,000, which themselves should have been received as cash at par."

2. "Because the governor was not authorized to bid on said property for the State, and the State had no constitutional power to make the purchase; or, if said sale is not void, it is certainly voidable, because, under the statutory and executed mortgages, the State is the trustee of the property mortgaged for the benefit of the bondholders, and had no right to buy at her own sale, as such trustee, without incurring the risk of having said sale set aside at the instance of any beneficiary under the trust, and your orator as such beneficiary, elects to set aside such sale."

The suit proceeds in part upon the general ground that the mortgages in question are mortgages to the governor of Georgia, as trustee for the bondholders, to secure the payment of the bonds indorsed by the State, and not mortgages of indemnity to the State to save her harmless against the liability incurred by her indorsement. If, however, the court should be of opinion that the mortgages are for the indemnity of the State, and that the sale of the railroad and purchase by the State are valid, then the complainant insists that both series of indorsed bonds stand upon an equal footing, and that the sums paid by the treasurer of the State, in taking up the coupons of the State bonds which have been exchanged for the $1,950,000 series of the Macon and Brunswick Railroad indorsed bonds, represent a portion of these proceeds, and should be paid *pro rata* upon both series of bonds; and that when the legislature of Georgia appropriates any sum for the principal of the State bonds so exchanged, such sum should in like manner be divided *pro rata* among the holders of both series of indorsed bonds, and that the State bonds so exchanged should themselves be treated as the proceeds of the sale of the railroad, and divided

pro rata among all the holders of both series of State indorsed bonds.

The case went off in the court below on demurrers and pleas which questioned the right of complainant to relief solely upon the ground that the suit was against the State, which was not, and could not be made, a party to the suit.

It is true, as stated in the opinion of the court, that the property to which the suit relates is in the actual possession of some of the defendants, who assert no individual claim thereto, but are acting for and on behalf of the State. It is also true that the apparent legal title to the property embraced by the mortgages, other than such as was covered by the deed to Whittle, stands in the name of the State. But the suit, as is quite clear, proceeds upon the ground that Georgia, by her officers, is not rightfully in possession, and that no valid title passed to the State by virtue of the sale in question. The issue is distinctly made by the bill, that the governor was not authorized to bid in the property, and that the State had no constitutional power to make the purchase. But the court declines or fails to consider or pass upon these questions. If the court had found that the sale under which the State claimed was valid, and that the governor had legal authority to make the purchase in virtue of which the officers of the State claim to be rightfully in possession in her behalf; or had it been adjudged that the complainant and those united in interest with him had no lien or claim upon the property, I should not, perhaps, have expressed any dissent, however much I may have differed with my brethren upon such questions. In other words, if the State was ascertained to be the lawful owner of and entitled to the possession of the property in question, I should recognize the legal difficulties in the way of enforcing a lien thereon for any purpose in behalf of others; for the enforcement of such lien would, in the case supposed, necessarily disturb the rightful possession of the State, which could not be sued against her will, and without whose presence in the suit a final comprehensive decree could not be passed.

But such is not the case before us. The case to be determined is that made by the bill. Its averments are admitted

by the demurrer and are not controverted by the pleas. They show that the property, although held by officers of the State, as her absolute property, is not rightfully so held. It is this aspect of the present decision which constrains me to dissent from the opinion of the court. If the citizen asserts a claim or lien upon property in the possession of officers of a State, the doors of the courts of justice ought not to be closed against him, because those officers *assert* ownership in the State. The court should examine the case so far as to determine whether the State's title rests upon a legal foundation. If that title is found to be insufficient, and if the State, claiming its constitutional exemption from suit, refuse to appear in the suit as a party of record, the court ought to proceed to a final decree as between the complainant and those who are in possession of the property, leaving the State to assert her claim in any suit she might bring. This must be so, otherwise the citizen may be deprived of his property and denied his legal rights, simply because the officers of a State take possession of and hold it for the State.

Such was the ruling of this court in *United States* v. *Lee*, 106 U. S. 196. That was an action to recover the possession of what was formerly known as the Arlington estate. The defendants held possession of the property in no other capacity than as officers and agents of the United States. The attorney-general of the United States appeared, and in due form gave the court to understand that the property in controversy was then, and for more than ten years had been, held, occupied, and possessed by the United States, through their officers and agents, as public property for public purposes, in the exercise of their sovereign and constitutional powers, namely, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors of the Union. Upon these grounds it was contended that no action could be maintained which would disturb the control of those who were in possession for the United States. The contention, in behalf of the government, was that the United States could not be sued without their consent, and that the maintenance of a suit against their officers and agents for the purpose of ousting them from the possession of the Arlington cemetery, would be

an encroachment upon the powers entrusted by the Constitution to the legislative and executive departments.

But to this argument the response of this court was: That under the American system of government the people, called elsewhere subjects, were sovereign; that their "rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch;" that "the citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered;" that "when he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right;" "that no man in this country is so high that he is above the law; no officer of the law may set that law at defiance with impunity; all the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Upon examination of the doctrine that, except where Congress has provided, the United States cannot be sued, we held that it had no application to officers and agents of the United States who, holding possession of property for public uses, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of the inquiry, and adjudged accordingly.

In the case just cited, we quoted, with approval, the language of Chief Justice Marshall, in *United States* v. *Peters*, 5 Cranch 115, where, speaking for the court, he said that "it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent them looking into the suggestion and examining the validity of the title."

In *United States* v. *Lee*, we also referred with approval to the decision in *Osborne* v. *Bank of United States*, 9 Wheat. 738. That was a suit by the Bank of the United States against the

auditor, treasurer, and other agents of the State of Ohio. The State, by its officers, levied a tax upon the bank, which it refused to pay. The State officer seized the money of the bank in payment of the tax, and delivered it to the treasurer of the State. The latter held it when the suit was brought, and the right of the State to hold the money in discharge of its taxes was the fundamental question in the case. The State was not made a party, because by the Constitution the judicial power of the United States did not extend to a suit against one of the United States by citizens of another State. It was conceded that the State was the real party in interest. That of which the bank complained were the acts of the defendants in their official character, and done in obedience to the statutes of Ohio. The contention, therefore, was, that as the State could not be sued, the suit must be dismissed. But to this the court, speaking by Chief Justice Marshall, replied:

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

The relief asked was granted without the State becoming a party to the record.

In *United States* v. *Lee*, the language just quoted from *Osborne* v. *Bank of United States*, was distinctly approved, and the adjudged cases were held to show that the proposition,

that when an individual is sued in regard to property which he holds in his capacity as an officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it.

In my judgment it is impossible to reconcile the decision here with the ruling in the Arlington case. As I concurred in the opinion and judgment in the latter case, I am constrained to withhold my assent to the present decision. In *United States* v. *Lee*, the judicial power was deemed ample to oust officers of the United States from the possession of property claimed by them, not as individuals, but as the representatives of their government. The possession of the government, by its officers, did not prevent the court from inquiring into the alleged title of the United States, and from awarding possession to those who claimed it as their property. But, in the case before us, the State of Georgia is allowed an exemption which the court did not feel at liberty to extend to the United States. The claim of complainant is, that he and others holding bonds indorsed by that State have a lien upon property in the possession of certain individuals. The latter assert a valid, complete title and the right of exclusive possession in the State. But the complainant contends that the alleged title of the State is not good in law; that the sale, in virtue of which the State asserts title and holds possession, was not a valid sale; that in any event the State, or her governor, holds the title merely as a trustee for others.

In effect, my brethren say that they will not determine these matters, and that because it appears that the State is the substantial party in interest, and that the defendants are only her officers, in possession in her behalf, the complainant and those united in interest with him must go out of court. It seems to me that the grounds upon which the Court proceeds would have led to a different conclusion, not only in *United States* v. *Lee*, but in all the prior decisions therein referred to as authority for the judgment in that case.

The court say that the judgment in *United States* v. *Lee* did not conclude the United States. So it may be said here,

that no decree rendered would have concluded the State of Georgia, had she declined to appear in the suit. But as in the former case the court did not decline to give relief because of the mere assertion of title in the United States, so in this case the mere assertion of title in the State should not have prevented an adjudication as to complainant's claim. Had the court ascertained that the property in contest was in the rightful possession and control of the State, then, but not before, the question would have arisen whether the bill must not be dismissed, so long as the State refused to become a party to the suit.

The court in its opinion reviews numerous cases other than those I have referred to, and states the principles upon which, in its judgment, they were decided. I content myself with saying that the correctness of that review is not conceded.

Limitations and qualifications are now placed upon former decisions which their language, I submit, does not justify. A doubt is now expressed as to whether *Davis* v. *Gray*, 16 Wall. 215, did not go beyond the verge of sound doctrine; this, notwithstanding the decision in the Arlington case was made to rest largely upon *Davis* v. *Gray*. In the Arlington case, we quoted from *Davis* v. *Gray*, a suit in equity, the following statement of the doctrine applicable to suits in the determination of which a State is interested:

"Where the State is concerned, the State should be made a party if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

The only comment made, in the Arlington case upon this language was "that though not prepared to say now that the

court can proceed against the officer, in all respects, as if the State were a party, this may be taken as intimating in a general way the views of the court at that time."

But I especially dissent from the statement by the court of the question involved in *Louisiana* v. *Jumel*, 107 U. S. 711. Had the court there denied the relief asked upon the sole ground that granting it would be "to take charge of the treasury of the State, and, seizing the hands of the auditor and treasurer, to make distribution of the funds found in treasury in the manner which the court might think just," I should not, in that case, have expressed any dissent from the action of my brethren. I am unwilling by silence to accede to the suggestion that the substantial relief asked in *Louisiana* v. *Jumel*, could not have been granted without taking charge of the treasury of the State. There were in the hands of the treasurer of Louisiana money raised by taxation under certain constitutional and statutory provisions. It was money which, by contract with creditors of the State, was set apart and appropriated to the payment of the interest due on designated bonds of the State. The records of the State treasurer's office showed the exact amount obtained by taxation for that purpose. It was in the power of the officers of the State to have paid that money out in discharge of her contract obligations without the slightest confusion in the accounts of the State treasurer. The contrary was not claimed by those officers. But the treasurer and other officers declined to apply the money in their hands for the purposes to which it had been dedicated. They rested their refusal upon an ordinance passed by the State, which was conceded on all hands to be in palpable violation of the Constitution of the United States, and therefore null and void. As a reason for not discharging a plain official duty imposed by law, those officers referred to a void provision in the Constitution of Louisiana, and it was held that there was no power in the courts of the Union to compel the performance of that duty. This court declined to give any relief against the State officers of Louisiana, partly upon the ground that the relief asked "will require the officers, against whom the process is issued, to act contrary to the positive

orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do." "They must," proceeded this court, "use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation, when the same power has declared that it shall not be done." Thus the Constitution of the United States, which is the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding, was, as I then thought and still think, subordinated to "the supreme political power" of the State of Louisiana.

My brethren declare it to be impossible to compel a State to pay its debts by judicial process. As no decree was asked against the State on the bonds held by complainant, and since the State was not made a party to the record, it is difficult to perceive why it was deemed necessary to make this declaration. But if, by that declaration, it was meant that no State can be sued as a party to the record, and no judgment rendered against it as a party defendant, the proposition will not be disputed. I submit, however, that under our system of government the citizen may demand that the courts shall determine his claim to, or his alleged lien upon, property, by whatever individuals that property may be held, and that he cannot be denied an adjudication and enforcement of that claim merely because the individuals sued *assert* right of possession and title in the government they represent. The hardship and injustice of a different rule is well illustrated in the present case, especially as respects the property embraced by the deed of trust to Whittle. The bill alleges, and the demurrer admits, that that property was not covered by the statutory and executed mortgages upon which the State rests its claim. If these averments are true, the State of Georgia has no pretence of right, by its officers, to hold that property. But my brethren adjudge—if I do not misapprehend the opinion—that the assertion by defendants of title in the State is sufficient to preclude judicial inquiry into the rightfulness of their possession or the validity of the State's title.

Syllabus.

My brethren say that "on the hypothesis that the foreclosure by the governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued." But, may not the court inquire whether that hypothesis be sound? Must it be assumed to be sound because the officers of the State so declare? Besides, if the alleged trust was vested in the State as trustee—if, as claimed by complainant, the State became the trustee of the property mortgaged for the benefit of the bondholders—may not the court proceed to a decree as between the parties to the record? If the trustee cannot be made a party, and refuses to appear, the court ought not, for that reason, to permit the interests of others to be sacrificed.

If the officers of the United States may be deprived of the possession of property held by them for the government, but the title to which is judicially ascertained, in an action against them only, not to be legally in the United States, I do not see why the courts may not, at the suit of the citizen, enforce his claims upon property as against officers of a State, who may be judicially ascertained, in a suit against them, not to be in rightful possession for such State. Such relief would not conclude the rights of the State, but would leave to her the privilege of asserting her claim in any court of competent jurisdiction.

I am authorized by Mr. Justice Field to say that he concurs in this opinion.

LEROUX and Another *v.* HUDSON, Assignee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Argued November 6th, 7th, 1883.—Decided December 10th, 1883.

Bankruptcy—Conflict of Laws—Equity—Jurisdiction—Statutes.

1. A marshal of the United States, who, under a provisional warrant in bankruptcy, has, after receiving a bond of indemnity under General Order No. 13, in bankruptcy, seized goods as the property of the debtor, and been sued for damages for such seizure, in an action of trespass in a State

Statement of Facts.

court, by a third person, who claimed that the goods were his property at the time of the seizure, cannot maintain a suit in equity in a circuit court of the United States, for an injunction to restrain the further prosecution of the action of trespass, the parties to the suit in equity being citizens of the same State.

2. Such marshal having delivered the goods seized to the assignee in bankruptcy appointed, after an adjudication of bankruptcy, in the proceeding in which the provisional warrant was issued, and the assignee having sold the goods, under the order of the court in bankruptcy, without giving to the plaintiff in the action of trespass any notice, under § 5063 of the Revised Statutes, of the application for the order of sale or of the sale, and such plaintiff not having brought any action against the assignee to recover the goods, or applied to the bankruptcy court for the proceeds of sale, and the assignee not being sued in the action of trespass, he cannot bring a suit in equity in a circuit court of the United States, joining the marshal as plaintiff, against the plaintiff in the action of trespass, to have the title to the goods determined, on the allegation that they were transferred to such plaintiff in fraud of the bankruptcy act, and for an injunction restraining the prosecution of that action.

Bill in equity to restrain the prosecution of an action in the State courts of Michigan, against the assignee of a bankrupt and the marshal of the Eastern District of Michigan, for entering on the premises of Leroux and removing goods claimed by the assignee to be the property of the bankrupt, and to quiet the title to said goods in the assignee. The material facts were as follows:

On the 14th of March, 1878, proceedings in involuntary bankruptcy were instituted in the District Court of the United States for the Eastern District of Michigan, against Samuel Schott and Philip Feibish, composing the firm of Schott & Feibish. On the same day a warrant was issued by the court to the marshal, under § 5024 of the Revised Statutes, commanding him "to take possession provisionally of all the property and effects of the debtors." The petitioning creditors gave a bond of indemnity to the marshal, under Order No. 13 of the General Orders in Bankruptcy, and required him to seize, under the warrant, as the property of the debtors, certain goods in the hands of Joseph P. Leroux and Max Schott, composing the firm of Leroux & Co., then in the store of the latter at Bay City, Bay County, Michigan, which goods the creditors al-

leged had been transferred to J. Leroux & Co. by Samuel Schott and Feibish, in violation of the bankruptcy law. The seizure was made on the 29th of March by the marshal, Salmon S. Matthews, assisted by his deputies, Myron Bunnell and Horace Becker. An adjudication of bankruptcy was made against Samuel Schott and Feibish on the 13th of April. On the 22d of April J. Leroux & Co. commenced an action of trespass in the Circuit Court for Bay County, Michigan, against Matthews, Bunnell and Becker, to recover $25,000 damages for the acts of the defendants, on the 29th of March, in breaking and entering the store at Bay City and injuring the same, and taking therefrom and carrying away goods of the value of $25,000, the property of the plaintiffs, and converting the same to their own use, and preventing the plaintiffs, for three days, from carrying on their lawful business in the store. On the 6th of May Joseph L. Hudson was appointed assignee in bankruptcy of Samuel Schott and Feibish, and became duly vested with that office. Thereupon the marshal delivered the goods to the assignee, and the latter took possession of them as part of the estate of the bankrupts. The defendants in the trespass suit appeared therein by attorney and demanded a trial, and served a notice of defence, setting up the issuing of the provisional warrant, the seizure of the goods thereunder, the fact that they were the goods of Samuel Schott and Feibish, the adjudication in bankruptcy, the appointment of an assignee, and the fact that the goods had been turned over by the marshal to the assignee, and were held by him as a part of the estate of the bankrupts. At a term of the State Circuit Court, in September following, on application of the defendants, the trial of the suit was postponed to the next term, on affidavit of the illness and absence of an important witness.

In October, 1878, Hudson (the assignee), Matthews (the marshal), and Bunnell and Becker filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Michigan, against Leroux and Max Schott, setting forth the substance of the above facts, and alleging that the goods had been sold by the assignee under the order of the bankruptcy court; that he was holding the proceeds to be applied as a part

Statement of Facts.

of the estate of the bankrupts, if the title should be found to be in the assignee, or he should be entitled to the said assets as assignee and to distribute the same as part of the estate; and that he had the proceeds in hand awaiting the determination of that question. The bill also alleged that the goods were transferred by the bankrupts, when insolvent, to Leroux and Max Schott, with a view to prevent them from coming to the assignee in bankruptcy, and a large part of them within three months before the filing of the petition in bankruptcy, and when Leroux and Max Schott knew that the transfer was made with a view to prevent the goods from going to the assignee, and to prevent them from being distributed under the bankruptcy act, to defeat its object and to injure and delay its operation and evade its provisions; that the transfers of the goods were, therefore, void, and the title to them became vested in the assignee; that he claimed that by reason of the suit in the State court he was unable to proceed with the settlement of the estate of the bankrupts; that the funds so received by him for the goods must be kept until the question in reference to their title should be determined; and that the question in regard to the fraud on the bankruptcy act, so attempted, could not be litigated and determined in the State court. The bill then set forth various matters intended to show the existence of such fraud, and prayed that Leroux and Max Schott be enjoined from further prosecuting their suit, or any other suit, in a State court, for damages in regard to the goods seized by the marshal, and that if they should claim any interest therein they should proceed to establish their claim in the Circuit Court of the United States or in the District Court in bankruptcy. It also prayed that any sale or transfer of the goods from the bankrupts to Leroux and Max Schott be set aside and decreed to be in violation of the bankruptcy act, and that the goods be decreed to be a part of the estate of the bankrupts, and that the title of the assignee to the goods or the funds arising therefrom be quieted and decreed to be perfected in him. In November following, on notice and after a hearing, the court granted a preliminary injunction in accordance with the prayer of the bill. Each of the defendants demurred

separately to the bill for want of jurisdiction and want of equity. The demurrers were overruled, on a hearing. Each of the defendants then answered separately. The answers maintained the right of the defendants to proceed with the suit in the State court, and averred that they owned the goods at the time of the seizure, and denied the equity of the bill. Proofs were taken in the cause on both sides. At the close of the plaintiffs' proofs, the defendants entered on the record a protest against the jurisdiction of the court, with a statement that, by bringing the suit in the State court, they had not sought in any manner to interfere with the goods seized, but had waived the question of interference with the goods. A decree was entered adjudging that the goods were, at the time of their seizure, a part of the estate of the bankrupts; that the title thereto vested in the assignee; that the sale or transfer of them to the defendants was in violation of the bankruptcy act, and should be set aside; that the title of the assignee to the goods and their proceeds be quieted and declared to be perfect; and that the defendants be perpetually enjoined according to the prayer of the bill. From this decree the defendants appealed.

Mr. Don M. Dickinson for the appellants.

Mr. H. C. Wisner for the appellees.—I. The circuit court has jurisdiction to entertain, hear and determine the case presented by the bill, as to the title of the assignee to the goods; R. S. § 4979; R. S. § 630; *Allen* v. *Massey*, 17 Wall. 351; *Ex parte Schwab*, 98 U. S. 240.—II. The evidence shows that the property belonged to the estate of the bankrupts, at the time of the seizure.—III. The circuit court having found and adjudged the property in question to belong to and to be a part of the estate in bankruptcy of which complainant Hudson is assignee, that court has the power to stop all further litigation upon that question between appellant and the marshal. *Ex parte Christy*, 3 How. 292; *Peck* v. *Jenness*, 7 How. 612; this delegation of power to the federal courts is in terms so broad that they are enabled to reach and determine *every question* in any way materially affecting the successful work

ing out of the system. And having such power, which in other words is jurisdiction, and having adjudged questions by virtue of it, and decreed what shall be done, its power to enforce that decree by any necessary writ or process must be undoubted. *French* v. *Hay*, 22 Wall. 259; *Dietzsch* v. *Huidekoper*, 103 U. S. 494. The answer made to this, however, is, that the suit in the State court having been commenced before the bill was filed in this case, that court first acquired jurisdiction of the parties and subject-matter, and hence cannot be interfered with by any other court, and in support of this answer *Peck* v. *Jenness*, 7 How. 612, and like cases are cited. These suits, if prosecuted to judgment, may result in a decision contrary to that of the circuit court, and the marshal be called upon to pay for the property. Before being concluded years may intervene in a litigation through the system of State courts, thence to this court. *Sharpe* v. *Doyle*, 102 U. S. 686.

Mr. Wm. F. Cogswell for the appellees.—I. The transfer of the goods was fraudulent, both at common law, the statute of frauds of Michigan and the bankruptcy law. There has never been a time since Twyne's case that these transactions would not be held fraudulent.—II. The court had ample jurisdiction to adjudge the transfers fraudulent, and that the property belonged to the assignee, and to restrain the vexatious actions brought against its officers in the State courts. The act of March 3d, 1793, 1 Stat. 334, is not applicable to this case, because the injunction asked for is authorized by law, and relates to proceedings in bankruptcy. R. S. § 720.

Mr. Justice Blatchford delivered the opinion of the court. After reciting the foregoing facts, he said:

This suit divides itself into two branches—the case of the assignee, and that of the marshal and his deputies. The assignee was not a party to the trespass suit. The plaintiffs in that suit, abandoning all pursuit of the goods and all action against the assignee, brought and continued their suit for damages against the marshal and his deputies. They did not disturb the possession of the goods in the assignee, or claim the

proceeds of the goods. Although the bill states that the assignee, on applying to the bankruptcy court for an order to sell the goods, made known to it the facts as to the claim of Leroux and Max Schott thereto, it is not averred that any notice was given to them of the intention to sell or of the sale. It is provided as follows by § 5063 of the Revised Statutes:

"Whenever it appears to the satisfaction of the bankruptcy court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property, in any suit or controversy between the parties, in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale."

The failure to give any notice to Leroux and Max Schott of the application for the order to sell the goods, although the facts as to their claim were laid before the bankruptcy court, and the fact that no suit was brought against the assignee to recover the possession of the goods from him, are evidence that the bankruptcy court and the assignee did not regard, and could not regard, the case as one where, under § 5063, the title to the goods was in dispute. It was not in dispute as between Leroux and Max Schott of the one part and the assignee of the other part. The former abandoned the goods and all claim to them or to their proceeds, and the assignee acted on that view in selling the goods without notice. They relied solely on their suit in trespass, and the defendants in that suit relied for protection, in case of adverse result, not on the goods or their proceeds, but on the bond of indemnity which the petitioning creditors had given to the marshal. Under these circumstances, after pleading in the suit in the State court, and procuring a postponement of the trial, the defendants in that suit

and the assignee joined in bringing the bill in equity. Had the Circuit Court of the United States any cognizance of the suit? There was no common interest between the assignee and the other plaintiffs. The assignee was not sued in the State court. When the suit in equity was brought, the marshal had no interest in the goods, and no right to rely on them or their proceeds for indemnity, and no right to look to the assignee for protection. The marshal turned the goods over to the assignee, and did so voluntarily, so far as appears, relying on the bond of indemnity as his protection, and substituting that in place of a retention of the goods, when he might well have insisted on retaining them, if Leroux and Max Schott still claimed title to them, inasmuch as the suit in trespass was brought before the goods were turned over to the assignee.

An assignee in bankruptcy has, by § 5129, the right, in case of a transfer of property to a person not a creditor of the bankrupt, in violation of that section, to "recover the property or the value thereof, as assets of the bankrupt." Here the assignee had the property, and there was no occasion for him to bring a suit to recover it.

By § 4979, a circuit court of the United States has jurisdiction of a suit "at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in the assignee." The jurisdiction invoked by the assignee in this case cannot be maintained under § 4979. It does not appear by the bill or the proofs that the defendants claim an interest in the proceeds of the goods adverse to the interest which the assignee claims in such proceeds. When the bill was filed the goods had been sold and were represented by their proceeds in the hands of the assignee. The only interest which the assignee then had touching the goods or in their proceeds was his claim to own those proceeds as assignee. No interest could be adverse to such interest of his unless it was another claim to own or receive those proceeds. The defendants made no such claim. The bill does not allege that they did, but it and the proofs show that from the time they brought the trespass suit they

never disputed the right of the assignee to deal with the goods and their proceeds as a part of the assets of the estate. Nor is the bill filed to remove a cloud on the title to real estate or to set aside written instruments of title which might interpose obstacles to the rights of the assignee in the goods or their proceeds.

It is enacted by § 630 of the Revised Statutes "that the circuit court shall have jurisdiction in matters in bankruptcy, to be exercised within the limits and in the manner provided by law." This refers to the limitations in § 4979. As the bill avers that all the parties are citizens of Michigan, the jurisdiction of the circuit court in this case must be given by the bankruptcy statute, or it does not exist. We are of opinion, upon full consideration, that it is not so given, notwithstanding what was said by this court in *Ex parte Schwab*, 98 U. S. 240.

It may, moreover, be said, that if there were jurisdiction by the citizenship of the parties, a bill such as this, by the assignee in bankruptcy, to obtain such relief as he asked in respect to his own rights, would not lie, he being in possession, and his right to assert possession and ownership and to control and dispose of the property and its proceeds not being questioned or threatened.

As regards the marshal and his deputies, apart from the assignee, there is nothing in the bankruptcy statute which authorizes them to invoke the action of the circuit court, for any relief by injunction in respect to the suit for trespass. As the assignee had no right conferred by that statute to bring the suit in equity in respect to any claim of his own, he had no right as assignee to bring it in respect to any claim of his co-plaintiffs, nor had all together any right conferred by that statute to bring it. The relief sought by injunction depends wholly, as the bill is framed, on the right of the assignee, as such, to maintain the suit in respect to his own case.

If the case as to the marshal and his deputies were one of jurisdiction by citizenship of the parties, it would fall within the principles laid down by this court in *Buck* v. *Colbath*, 3 Wall. 334. The provisional warrant being one merely com-

manding the marshal to seize the property of the debtors, it was for the marshal to determine for himself whether the goods seized were legally liable to seizure under the warrant, and the circuit court could afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He was liable to suit in any court of competent jurisdiction, for injuries growing out of his mistakes. The State court in which the suit for trespass was brought was such a court, and that suit was an appropriate suit. The parties bringing it were entitled to proceed with that suit in that forum. As was said in *Buck* v. *Colbath*, there was nothing in the mere fact that the provisional warrant issued from a federal court, "to prevent the marshal from being sued in the State court, in trespass, for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it. This view was reaffirmed in *Sharpe* v. *Doyle*, 102 U. S. 686, and was there applied to a seizure under a provisional warrant in bankruptcy like that in the present case.

We have limited our decision to the precise questions presented in this case, without attempting to define the cases in which an assignee in bankruptcy can maintain a suit under § 5129 or under § 4979, or to specify what relief by injunction can be granted to him under the bankruptcy act, in a proper case.

The decree of the circuit court is reversed, and the cause is remanded to that court, with direction to dismiss the bill.

SCHOTT *v.* HUDSON, Assignee, differs from Leroux's case, only in the following immaterial respects: The goods seized were in the hands of Max Schott, in his store at East Saginaw, Saginaw County, Michigan, and had been transferred to him by the debtors. The marshal, Matthews, assisted by John E. Wells, a deputy, seized them on March 29th, 1878. Max Schott, on the 6th of April, commenced an action of trespass in the Circuit Court for Saginaw County, Michigan, against Matthews and Wells, to recover $25,000 damages for the acts of the de-

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fendants in breaking and entering the store at East Saginaw, and taking therefrom and carrying away goods of the plaintiffs of the value of $20,000, and converting the same to their own use, and preventing the plaintiffs from carrying on their lawful business in the store. After the defendants in the trespass suit had appeared therein by attorney, and demanded a trial, and given the like notice of defence as was given in the suit for trespass brought by J. Leroux & Co., nothing further was done in the suit. In October, 1878, Hudson (the assignee), Matthews (the marshal), and Wells filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Michigan, against Max Schott, making the like allegations, *mutatis mutandis*, as to the goods taken from Max Schott, as were made in the bill filed by J. Leroux & Co., in regard to the goods taken from them, and containing a like prayer for relief and for an injunction. Like proceedings took place, except that a demurrer was embodied in the answer instead of being filed separately. The answer was of a like character, the proofs and protest were identical, and a like decree was entered, from which the defendant appealed. The same questions are involved as in *Leroux* v. *Hudson*, the facts are substantially the same, and the same conclusions are reached.

The decree of the circuit court is reversed, and the cause is remanded to that court, with direction to dismiss the bill.

RANDALL *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued November 16th, 1883.—Decided December 10th, 1883.

Evidence—Master and Servant—Practice—Railroad—Statutes—Verdict.

When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

Statement of Facts.

A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks; the lock of the switch was in the middle of the space; and the handle, when lying flat extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track: *Held*, that there was no such proof of fault on the part of the railroad corporation, in the construction and arrangement of the switch, as would support an action against it for the injury.

A brakeman, working a switch for his train on one track in a railroad yard, is a fellow servant with the engineman of another train of the same corporation upon an adjacent track; and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman.

A statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineman or fireman sixty rods from any highway crossing, and until the highway is reached, and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury caused by negligence of the fireman in this respect, to a fellow servant.

This is an action against a railroad corporation by a brakeman in its employ, for personal injuries received, while working a switch, by being struck by one of its locomotive engines.

The declaration, in seven different counts, alleged as grounds of action that the defendant negligently constructed and kept its tracks and switches in a defective and dangerous condition; that the defendant, by one of its agents and servants, who was at the time unskilful, negligent and unfit to perform the business and employment that he was engaged by the defendant to perform, and who was engaged in a service for the defendant other and different from the service in which the plaintiff was engaged, and whose negligence, unskilfulness and unfitness were known to the defendant, negligently propelled one of its locomotive engines against and over the plaintiff; that this was done without sounding any whistle or ringing any bell, as required by the laws of the State of West Virginia; and that the defendant neglected proper precautions in the selection and employment of its agents and servants.

Statement of Facts.

A statute of West Virginia provides that "a bell or steam whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling until such street or highway is reached," under a penalty of not exceeding $100 for each neglect; and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained by reason of such neglect." Stat. of W. Va. of 1873, ch. 88, § 31.

The evidence introduced at the trial, as understood by this court, conclusively proved these facts: The injury occurred at night, at a place where, as the plaintiff himself testified, "there was one network of tracks," in the defendant's railroad yard, near the junction of a branch road with the main road, and about ten rods from a highway crossing. The plaintiff had previously been employed on another part of the road. On the night in question, in the performance of his duty as a brakeman on a freight train, he unlocked a switch which enabled his train to pass from one track to another; and he was stooping down, with his lantern on the ground beside him, to unlock the ball of a second switch to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine, in no way connected with his train, backing down on the second track. The tender projected ten inches beyond the rail. The distance between the adjacent rails of the second and third tracks was about six feet. The second switch was a ground switch of a kind in common use, the lock of which was in the centre of the space between the two tracks; and the handle of which was about two feet long, and when lying flat extended towards either track, and when thrown one way opened the switch, and when thrown the other way closed it. The switch could be worked efficiently and safely by a man standing midway between the two tracks, using reasonable care. It could not be safely worked by standing at the end of the handle while an engine was coming on the track next that end. Upright switches could not be used at a place where the tracks were so near

together, without seriously interfering with the moving and management of the trains.

The plaintiff testified that he had never worked a ground switch before, and that the first switch was an upright switch. But he admitted on cross-examination that the two kinds of switches were unlocked in the same manner, and the other evidence established beyond doubt that the first switch was also a ground switch.

A single witness, who had been a brakeman, called for the plaintiff, in answer to a question, often repeated, of his counsel, whether that was a safe and proper switch to be used at that point, testified that he could not say it was a very safe place at that time there; that he thought that was not a proper kind of switch, and an upright switch would have been more convenient to handle; that he did not think it was a very safe ball there; that he thought it was not a safe ball there; and that it could not be unlocked without danger while an engine or train was coming upon the other track.

The engine which struck the plaintiff was being driven at a speed of about twelve miles an hour, by an engineman in the defendant's employ, and there was evidence tending to show that it had no light except the headlight, and no bell, and that its whistle was not sounded.

There was no evidence that the tracks were improperly constructed, or that the engineman was unfit for his duty. The other grounds of action relied on were improper construction and arrangement of the switch; negligence of the defendant in running its engine, by an unskilful and negligent engineman, alleged to have been engaged in a different service for the defendant from that in which the plaintiff was engaged; and omission to comply with the requirements of the statute of West Virginia.

At the close of the whole evidence (of which all that is material is above stated), the court directed the jury to return a verdict for the defendant, because the evidence was such that if a verdict should be returned for the plaintiff, the court would be compelled to set it aside. A verdict for the defendant was accordingly returned, and the plaintiff sued out this writ of error.

Opinion of the Court.

Mr. B. D. Dovener for the plaintiff in error, cited *Hough* v. *Railway Co.*, 100 U. S. 213; *Chamberlain* v. *M. & M. R. Co.*, 11 Wis. 248; *N. O. Jackson & G. N. R. Co.* v. *Allbritton*, 38 Miss. 242; *Paulmier* v. *Erie R. R. Co.*, 5 Vroom, 151; *Nashville R.R. Co.* v. *Elliot*, 1 Coldw. (Tenn.) 611; *Haynes* v. *East Tenn. & Geo. Railroad*, 3 Coldw. 222; Wood on Master and Servant, sec. 357; Wharton on the Law of Negligence, secs. 211, 212, and 232*a*; *Railroad Co.* v. *Fort*, 17 Wall. 553; *Ford* v. *Fitchburg R. R. Co.*, 110 Mass. 240.

Mr. John K. Cowen for the defendant in error.

Mr. Justice Gray delivered the opinion of the court. After reciting the facts as above, he said:

1. It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants* v. *Fant*, 22 Wall. 116; *Herbert* v. *Butler*, 97 U. S. 319; *Bowditch* v. *Boston*, 101 U. S. 16; *Griggs* v. *Houston*, 104 U. S. 553. And it has recently been decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts when submitted to them, negligence ought to be inferred. *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193.

Tried by this test, there was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch, to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service

of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track.

2. The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow servants, within the rule. In *Packet Company* v. *McCue*, 17 Wall. 508, and in *Railroad Company* v. *Fort*, 17 Wall. 553, the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; in the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In *Hough* v. *Railway Company*, 100 U. S. 213, and in *Wabash Railway Company* v. *McDaniels*, 107 U. S. 454, the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants.

Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish

courts, as is clearly shown by the cases cited in the margin.* They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence, against the corporation, their common master.

The only cases cited by the plaintiff, which have any tendency to support the opposite conclusion, are the decisions of the Supreme Court of Wisconsin in *Chamberlain* v. *Milwaukee & Mississippi Railroad Co.*, 11 Wis. 248, and of the Supreme Court of Tennessee in *Haynes* v. *East Tennessee & Georgia Railroad Co.*, 3 Coldw. 222, each of which wholly rejects the doctrine of the master's exemption from liability to one servant

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* *Farwell* v. *Boston & Worcester Railroad Co.*, 4 Met. 49; *Holden* v. *Fitchburg Railroad Co.*, 129 Mass. 268; *Coon* v. *Syracuse & Utica Railroad Co.*, 5 N. Y. 492; *Wright* v. *New York Central Railroad Co.*, 25 N. Y. 562; *Besel* v. *New York Central Railroad Co.*, 70 N. Y. 171; *Slater* v. *Jewett*, 85 N. Y. 61; *McAndrews* v. *Burns*, 10 Vroom, 117; *Smith* v. *Oxford Iron Co.*, 13 Vroom, 467; *Lehigh Valley Coal Co.* v. *Jones*, 86 Penn. State, 432; *Whaalan* v. *Mad River Railroad Co.*, 8 Ohio State, 249; *Pittsburgh, Fort Wayne & Chicago Railway Co.* v. *Devinney*, 17 Ohio State, 197; *Slattery* v. *Toledo & Wabash Railway Co.*, 23 Indiana, 81; *Smith* v. *Potter*, 46 Mich. 258; *Moseley* v. *Chamberlain*, 18 Wis. 731; *Cooper* v. *Milwaukee & Prairie du Chien Railway Co.*, 23 Wis. 668; *Sullivan* v. *Mississippi & Missouri Railroad Co.*, 11 Iowa, 421; *Peterson* v. *Whitebreast Coal Co.*, 50 Iowa, 673; *Foster* v. *Minnesota Central Railroad Co.*, 14 Minn. 277; *Ponton* v. *Wilmington & Weldon Railroad Co.*, 6 Jones, N. C. 245; *Louisville Railroad Co.* v. *Robinson*, 4 Bush, 507; *Mobile & Montgomery Railroad Co.* v. *Smith*, 59 Ala. 245; *Hogan* v. *Central Pacific Railroad Co.*, 49 Cal. 128; *Kielley* v. *Belcher Mining Co.*, 3 Sawyer, 500; *Hutchinson* v. *York, Newcastle & Berwick Railway Co.*, 5 Exch. 343; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266; *Bartonshill Coal Co.* v. *McGuire*, 3 Macq. 300; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Morgan* v. *Vale of Neath Railway Co.*, 5 B. & S. 570, 736; *S. C.* L. R. 1 Q. B. 149; *Tunney* v. *Midland Railway Co.*, L. R. 1 C. P. 291; *Charles* v. *Taylor*, 3 L. R. C. P. D. 492; *Conway* v. *Belfast & Northern Counties Railway Co.*, Ir. R. 9 C. L. 498, and Ir. R. 11 C. L. 345.

for the negligence of another, and the first of which has been overruled by the later cases in the same State.

This action cannot, therefore, be maintained for the negligence of the engineman in running his engine too fast, or in not giving due notice of its approach.

3. The statute of West Virginia, on which the plaintiff relies, has no application to this case. There is no evidence that the engine which struck the plaintiff was about to cross a highway; and the main, if not the sole, object of the statute evidently was to protect travellers on the highway. *O'Donnell* v. *Providence & Worcester Railroad Co.*, 6 R. I. 211; *Harty* v. *Central Railroad Co.*, 42 N. Y. 468. It may perhaps include passengers on the trains, or strangers not trespassers on the line of the road. But it does not supersede the general rule of law which exempts the corporation from liability to its own servants for the fault of their fellow servants.

Judgment affirmed.

ELLIS and Others *v.* DAVIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Argued November 9th and 12th, 1883.—Decided December 10th, 1883.

Conflict of Laws—Constitutional Law—Jurisdiction—Louisiana—Practice—Probate of Wills—Wills.

1. When an heir at law brings a suit in equity to set aside the probate of a will in Louisiana as null and void, and to recover real estate; and prays for an accounting of rents and profits by an adverse party in possession, who claims under the will, this court will refuse to entertain the prayer for recovery of possession, if the complainant has a plain, adequate, and complete remedy at the common law. *Hipp* v. *Babin*, 19 Howard, 271, affirmed.
2. Circuit courts, as courts of equity, have no general jurisdiction for annulling or affirming the probate of a will. *Broderick's Will*, 21 Wall. 503. affirmed.
3. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is

not conferred, and it cannot be exercised by them at all, until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

4. If by the law obtaining in a State, a suit whose object is to annul and set aside the probate of a will of real estate can be maintained, it may be maintained in a federal court, when the parties are on one side citizens of the State in which the will is proved, and on the other citizens of other States. *Gaines* v. *Fuentes*, 92 U. S. 18, approved.

5. By the laws of Louisiana an action of revendication is the proper one to be brought for the purpose of asserting the legal title and right of possession of the heir at law to the succession, when another is in possession under claim of title by virtue of a will admitted to probate. In a proper case as to parties this action can be brought in the Circuit Court of the United States. And as it furnishes a plain, adequate and complete remedy at law, it is a bar to the prosecution of a suit in chancery.

6. In regard to the transfer of the Beauvoir estate to the defendant by the testatrix in her lifetime, no fraud is shown to warrant the interference of a court of equity.

Bill in equity by the appellants as heirs at law and next of kin to recover possession of real estate, part of which was devised to the appellee, by Sarah Ann Dorsey, by will duly proved in the State of Louisiana, and part of which was situated in Mississippi and was given to him by Mrs. Dorsey in her lifetime, and to set aside the will as made under undue influence, and the conveyance as obtained by the exercise of undue and improper influence, and to have an accounting of rents and profits. Demurrer to the bill. The bill was dismissed below. The plaintiffs appealed.

Mr. William Reed Mills for the appellants.

Mr. John D. McPherson and *Mr. Calderon Carlisle* for the appellee.

Mr. Justice Matthews delivered the opinion of the court.

The appellants, who were complainants below, are alleged in the bill of complaint to be, respectively, citizens of New York or Missouri, or British subjects and aliens, the defendant being a citizen of Mississippi.

It is set forth in the bill that Sarah Ann Dorsey died on July 4th, 1879, seized in fee simple of certain real estate, consisting

of two plantations in Tensas Parish, in Louisiana, an estate called Beauvoir and other property in Harrison county, Mississippi, and real estate, not described, in Arkansas, besides a large amount of movable and personal property, rights, and credits, also not described; that she died, leaving no heirs in the ascending or descending lines, the appellants being her next of kin and sole legal heirs in the collateral line, entitled to succeed, in case of intestacy, to the whole of her estate; that during her lifetime, on May 10th, 1878, Mrs. Dorsey, by a notarial act of procuration, constituted the defendant her agent and attorney in fact, with full and special powers to take exclusive control, charge, and management of all her property and estate, and all transactions and business in any manner connected therewith, including the power,

"For and in her name to sue and to be sued, to purchase, lease, alienate, or encumber real estate situate anywhere, to borrow money, execute notes, or other evidences of indebtedness.

"That, in virtue of said agency, the defendant entered upon and assumed the exclusive management of said property and business, and took possession of all account books, title deeds, and papers thereto appertaining, and continued in the exclusive control, management, and possession as said agent to the time said agency expired by the death of the principal, and since her said death has still continued in said exclusive possession, management, and control.

"That though, on the expiration of said agency, it was incumbent on and the duty of said defendant to render to said heirs, all of whom, and their respective rights, were well known to him, a full, fair, and correct account of his administration of said agency, and to surrender to them, all and singular, the said property, account books, title deeds, papers, &c., which had then come into his possession, and which your orators had well hoped he would have done, yet, on the expiration of his said agency, said defendant, notwithstanding amicable demand, refuses still so to do."

It is further alleged in the bill that the defendant claims that the said Sarah Ann Dorsey, by her last will and testament,

bequeathed to him all her property, for his own sole use and benefit, and thereby constituted him her sole heir and executor, and that, by virtue thereof, he is entitled in his own right to said estate; and the bill admits that on July 15th, 1879, the defendant caused to be filed in the Second District Court for the Parish of Orleans an instrument written and signed by Sarah Ann Dorsey, of which the following is a copy:

"BEAUVOIR, HARRISON CO., MISS., *Jan.* 4, 1878.

"I, Sarah Ann Dorsey, of Tensas Parish, La., being aware of the uncertainty of life, and being now in sound health in mind and body, do make this my last will and testament, which I write, sign, and seal with my own hand, in the presence of three competent witnesses, as I possess property in the States of Louisiana, Mississippi, and Arkansas. I owe no obligation of any sort whatever to any relation of my own; I have done all I could for them during my life; I therefore give and bequeath all my property, real, personal, and mixed, wherever located and situated, wholly and entirely, and without hindrance or qualification, to my most honored and esteemed friend, Jefferson Davis, ex-president of the Confederate States, for his own sole use and benefit, in fee simple, forever; and I hereby constitute him my sole heir, executor, and administrator. If Jefferson Davis should not survive me, I give all that I have bequeathed to him to his youngest daughter, Varina.

"I do not intend to share the ingratitude of my country towards the man who is, in my eyes, the highest and noblest in existence.

"In testimony whereof I sign this will, written with my own hand, in presence of W. T. Watthall, F. S. Hewes, and John C. Craig, subscribing witnesses, resident in Harrison County, Mississippi.

"(Signed) SARAH ANN DORSEY.

"At Mississippi City, on the fourth day of January, eighteen hundred and seventy-eight, the above-named Sarah Ann Dorsey signed and sealed this instrument, and published and declared the same as and for her last will, and we, in her presence and at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"W. T. WATTHALL.

"F. S. HEWES.

"JOHN C. CRAIG."

Opinion of the Court.

But it is charged that the pretended will is not valid, but is void, because at the time of writing and signing the same Sarah Ann Dorsey was not of sound and disposing mind, because the same was written and signed by her when under the undue influence of the defendant, which undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influence, and because the motive and object inducing and controlling the testatrix to make the same were contrary to law.

The bill then proceeds to recite in detail a narrative of facts alleged in support of these charges affecting the testamentary capacity of Mrs. Dorsey and the integrity of the execution of the instrument as her testament; and alleges further that the defendant, "though in nowise ignorant of the premises hereinbefore set forth touching the nullity of said alleged will," nevertheless resorted to proceedings before the Second District Court for the Parish of Orleans for the probate thereof, "*ex parte* and without any previous notification thereof, judicial or extra-judicial." And it is thereupon further alleged:

"That by said proceedings it appears that on the 15th July, 1879, defendant, through his attorneys, filed his certain petition, in which he alleges that by the tenor of the last will and testament of Mrs. Sarah Ann Dorsey, dated 4th January, 1878, he is made the legatee and executor of the deceased; that said will had been on said day filed, and which he prays might be duly proved according to law; that thereupon an order was obtained that said will should be proved before the judge of said court forthwith; that in accordance with said order, and on proof that said instrument was wholly written, dated, and signed in the handwriting of the testatrix (the only proof essential under the laws of Louisiana and the practice of its courts for an *ex parte* probate of an olographical will), and on the further (and unusual in such *ex parte* probate) sworn statement of two of the subscribing witnesses that "the testatrix, Mrs. Sarah Ann Dorsey, at the time of the execution of the aforesaid will, was of sound and disposing mind," a decree of probate, in usual form, was rendered, decreeing the probate and registry of the will and execution of its provisions, in-

cluding the issuing of letters of executorship, on defendant's complying with the provisions of law.

"That by said proceedings it further appears that without previously qualifying as executor or applying for an order of inventory, or in any manner showing to the court the amount of the indebtedness of the succession; without tendering any security to creditors or deferring his application for a reasonable time within which creditors might, should they desire, demand of him security, or heirs might contest the validity of the will, or any of its provisions, or the sufficiency of the testimony of its probate—proceedings not only usual, but, as to most of them, essential prerequisites to any demand by a testamentary heir or universal legatee to be put in possession of an estate; yet, notwithstanding this, said defendant, on the said 15th July, by representing to the court that the testatrix left no forced heirs and owed no considerable debt, that he was willing to accept and take the succession pure and simple, and that in his opinion 'there is no necessity of further administration,' obtained an order, 'That, as the sole and universal legatee of the late Sarah Ann Dorsey, petitioner, Jefferson Davis, be put in possession of all the property, real, personal, and mixed, left by her and wherever situated.'

"That by said proceedings and decrees said Second District Court ceased to have jurisdiction over or regarding the administration of said succession, and, owing to his citizenship and the limited jurisdiction of said court, defendant in the premises ceased to be in any manner further amenable or subject to its jurisdiction.

"That, although said proceedings and decrees, as your orators are advised, are not *res adjudicata* against them, yet, nevertheless, in virtue thereof, said will and its order of probate are and will remain a muniment of title in defendant to all and singular the estate of said Sarah Ann Dorsey so long as said will and order of probate shall remain unannulled and unrevoked through judicial proceedings had contradictorily with said defendant."

And it is further alleged that this decree of probate was unadvisedly rendered and should be revoked, cancelled, and recalled, for the reasons rendering said will, of which it is the probate, null and void, and because the testimony given in support of the probate was false and erroneous, and because, even if uncontradicted, it would be insufficient.

It is further charged in the bill, that the defendant also claims title to the estate in Mississippi called "Beauvoir," by virtue of a sale to him of said property and a conveyance thereof made by Sarah Ann Dorsey February 19th, 1879, a copy of which is set out, which the applicants aver, however, to be null and void, for the same reasons on which they allege the will to be void, and because at the time the defendant occupied towards the said Sarah Ann Dorsey such a relation of trust and confidence, as that he had no right to purchase the property, and that his consent to the sale thereof to himself, without security for the payment of the price, which was below its value, was a violation of his trust, for which reasons, it is claimed, said sale should be cancelled and annulled.

It is also alleged in the bill, "that, owing to the complicated character of the said agency thus held by defendant, an account thereof, as herein demanded, cannot properly be taken except in a court of equity."

The prayer of the bill is as follows:

"And that it may be decreed that the said alleged will of the said Sarah Ann Dorsey, dated 'Beauvoir, Harrison County, Mississippi, January 4, 1878, and filed in the Second District Court for the parish of Orleans in the record of her succession under No. 41,376 of the docket, on the 15th July, 1879, be cancelled and annulled as absolutely void and of no effect in law; and that the decree of probate of said alleged will, and the decree recognizing said defendant to be the sole and universal legatee of said Sarah Ann Dorsey, and as such ordered to be put in possession of all the property left by her, wherever situated, both rendered on said 15th July, 1879, and in extenso set forth in Exhibit B, be revoked, cancelled, and recalled as absolutely void and of no effect in law; and that the alleged sale and conveyance of property situate in Harrison County, Mississippi, by said Mrs. Dorsey to defendant, on the 19th February, 1879, and in extenso set forth in Exhibit C, be cancelled and annulled as absolutely void and of no effect in law, in so far as either said will, decree of probate, decree of possession, or sale, in any manner to be pleaded by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against

your orators or their coheirs as her legal and sole heirs, and as such entitled to the ownership and possession of all and singular the property belonging to her estate, and which in any manner has come into the possession of said defendant, either as agent or trustee.

"And that it be further decreed that said defendant come to a full and fair account of all and singular his acts and doings of his agency under the said act of procuration of May 10th, 1878; and that it be decreed the defendant furnish to this honorable court a full and detailed statement of all properties, real and personal, of said Sarah Ann Dorsey, which came into his possession or under his control and management as her agent, or of which he has taken possession under and by virtue of said alleged will or said decrees of the Second District Court of July 15th, 1879, or said alleged sale of February 19th, 1879.

"And that it be further decreed that said defendant at once surrender unto your orators, and, if so desired by them, jointly with their coheirs, the possession of all said property, including all books, papers, evidences, title-deeds, &c., which, belonging to said estate, at any time since May 10th, 1878, has come into his possession.

"And that defendant be perpetually enjoined and restrained by the decree of this court from setting up or pleading said alleged will, said decree of probate, said decree of possession, and said act of sale, or any title, right, or claim thereunder, against your orators as next of kin and legal heirs of said Mrs. Sarah Ann Dorsey.

"And that it be further decreed that defendant make a full and true discovery and disclosure of and concerning all and singular the transactions and matters appertaining to or connected with his said agency, as well during the lifetime as since the death of his principal. And that defendant may be decreed to come to an account with your orators, to be taken by and under the direction and decree of this honorable court, of all his dealings and transactions under the agency assumed by him under the act of procuration of May 10th, 1878, or as trustee since Mrs. Dorsey's death, and to pay over to your orators what shall be found due to them by defendant upon the taking of said account."

To this bill the defendant below filed a demurrer, which de-

murrer was sustained and a decree rendered dismissing the bill without prejudice, to reverse which this appeal is prosecuted.

One of the main objects of this bill is to obtain from the defendant an account of the rents and profits received by him of the estate formerly belonging to Sarah Ann Dorsey, and, in order thereto, a declaration that the legal title to that estate is vested in them as her heirs at law and next of kin, in a decree that the alleged will under which the defendant claims, and the probate thereof, are null and void. It is admitted that the defendant is in possession, and that he holds adversely to the appellants; and there is a prayer in the bill for a recovery of the possession. In no respect does it differ from the frame of the bill in *Hipp* v. *Babin*, 19 Howard, 271.

In that case the complainants sought by a bill in equity to recover possession of real estate to which they claimed title, as against a judicial sale, alleged to be void as against them, under which the defendants were in possession, and also for an account of rents and profits. The court refused to entertain the prayer for the recovery of the possession, on the ground that the remedy of the complainants at law was plain and adequate. It was urged that the bill would, nevertheless, lie for the account. To this Mr. Justice Campbell, delivering the opinion of the court, replied as follows:

"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 complex-

ity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account."

This case was cited and its doctrine approved and applied in the recent case of *Root* v. *Railway Co.*, 105 U. S. 189–212.

In the present bill no circumstances are alleged to except the case from the general rule. The defendant did not sustain towards the complainants at any time any relation of trust and confidence; he was not their agent; and any right which they can assert against him for the rents and profits of the estate is altogether dependent upon their title to that estate, and cannot arise until that has been established. The title which they assert to that is not an equitable, but a legal title, as heirs at law and next of kin of Sarah Ann Dorsey, and is to be established and enforced by a direct proceeding at law for the recovery of the possession which they allege the appellee illegally withholds. There is no ground, therefore, on which the bill can be supported for the account as prayed for.

It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far at least as it gave effect to the will as a muniment of title.

It is well settled that no such jurisdiction belongs to the circuit courts of the United States, as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will*, 21 Wall. 503. It was elaborately considered and finally determined in England by the House of Lords in the case of *Allen* v. *McPherson*, 1 House of Lords' Cas. 191. In that country, it was undoubtedly the practice of the courts of chancery to entertain bills to perpetuate the testimony of the witnesses to a will devising lands, at the suit of the devisee against the heir at law, it being alleged that the latter disputed its validity; and this, as Blackstone says, 3 Bl. Com. 450, "is what is usually meant by proving a will in chan-

cery." It is also true, that a bill in equity, in the nature of a bill of peace, or *quia timet*, would lie at the suit of a devisee against the heir at law, in which the validity of the will having been sustained by the verdict of a jury on the trial of an issue, *devisavit vel non*, a decree might be passed establishing the will and the title of the devisee under it, and perpetually enjoining the heir at law from setting up any claim of title against it. Story on Equity Jurisprudence, § 1447. The heir at law, it was formerly held, was not entitled to file such a bill, for he could bring his action of ejectment, and thus had his remedy at law; although such a bill would be entertained, if not objected to, or if there were any impediments to the proper trial of the merits on such an action. *Bootle* v. *Blundell*, 19 Ves. Jr. Ch. R. 494. The modern rule is "that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the court to direct an issue, if from any cause that course appears desirable." *Boyse* v. *Rossborough*, 6 House of Lords' Cas. 1–42. The manifest ground on which courts of equity in England proceeded, in declining the jurisdiction in question was, that as to wills of personalty, the jurisdiction of courts of probate was exclusive, and that as to devises, the remedy at law was plain, adequate, and complete. In this country, from a time anterior to the adoption of the Constitution, the same distinction of jurisdiction has existed, all probate and testamentary matters having been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them having been vested in courts having jurisdiction also over other subjects. For reasons growing out of our policy, which subjected real estate equally with personalty to the payment of debts, and in other respects freed it from feudal fetters, the probate jurisdiction was extended, but with varying effect in different States, over wills of land, as well as of personal chattels; preserving, however, in some form, the rights and remedies of heirs at law to contest their validity. But it was almost universally recognized that no will could have effect, for any purpose, until admitted to probate and record by the local authority, although in some States, while the original probate was conclusive until set aside, for all pur-

poses and as to all persons, in others it was conclusive, while in force at all, only as to personalty and for the purposes of administration, and not as a muniment of title as to devises. In States where it is held to have a conclusive force, formal modes are prescribed of contesting the validity of the instrument as a will, and of the regularity and legality of the probate, by suits regularly instituted solely for that purpose, and *inter partes;* but such proceedings are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate, but the judgment, as in other cases *inter partes*, binds only parties and privies. In those States where the probate, although conclusive while in force as to personalty and for the purposes of administration merely, is only *prima facie* evidence where the will is relied on as a muniment of title to real estate, its validity may become a question to be tried whenever and wherever a litigation arises concerning real property, the title to which is affected by it, just as in England, in actions of ejectment between the heir and the devisee, or those claiming through them. In a State, of which New York is an example, where, by its law, its own courts of general civil jurisdiction are authorized thus incidentally and collaterally to try and determine the question of the validity of a will and its probate in a suit involving the title to real property, there can be no question but that the circuit courts of the United States might have jurisdiction of such a suit by reason of the citizenship of the parties, and in exercising it would be authorized and required to determine, as a court administering the law of that State, the same questions. And where provision is made by the laws of a State, as is the case in many, for trying the question of the validity of a will already admitted to probate, by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction, under existing provisions of law, to administer the remedy and establish the right in a case where the controversy is wholly between citizens of different States. The judicial power of the

United States extends, by the terms of the Constitution, "to controversies between citizens of different States;" and on the supposition, which is not admitted, that this embraces only such as arise in cases "in law and equity," it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof of validity of wills. The original probate, of course, is mere matter of State regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the States, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has often been decided by this court that the terms "law" and "equity," as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the States, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another (*Railway Co.* v. *Whitton*, 13 Wall. 270, 287; *Dennick* v. *Railroad Co.*, 103 U. S. 11), but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law. *Ex parte Boyd*, 105 U. S. 647; *Boom Co.* v. *Patterson*, 98 U. S. 403.

In *Hyde* v. *Stone*, 20 How. 170–175, it was said by Mr.

Justice Campbell, delivering its opinion, that "the court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In *Payne* v. *Hook*, 7 Wall. 425, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res*, which is the subject of the litigation, is entitled to administer it. *Williams* v. *Benedict*, 8 How. 107; *Bank of Tennessee* v. *Horn*, 17 How. 157; *Yonley* v. *Lavender*, 21 Wall. 276; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 150; *Hook* v. *Payne*, 450; 14 Wall. 252.

It was said by this court in *Gaines* v. *Fuentes*, 92 U. S. 10-18, Mr. Justice Field delivering its opinion, that

"The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary."

And, referring to the nature of suits which, as in that case, sought to annul the probate of a will and adjudge it to be invalid, the court further said (p. 20):

"And if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States."

As that was a case in which the sole question decided was

the right of the defendant to remove the cause from the State court to the Circuit Court of the United States, under the act of March 2d, 1876, 14 Stat. 558, it was assumed, and not decided, that the said suit brought in the State court was one which, under the laws of the State, its courts were authorized to entertain for the purpose of granting the relief prayed for. The point decided was, that if it were it might properly be transferred to a court of the United States.

It remains, therefore, in the present case to inquire whether the complainants are entitled, under the laws of Louisiana, to draw in question, in this mode and with a view to the decree sought, the validity of the will of Sarah Ann Dorsey and the integrity of its probate.

An examination of the decisions of the Supreme Court of Louisiana on the subject will disclose that a distinction is made in reference to proceedings to annul a will and its probate, according to the objects to be accomplished by the judgment and the relation of the parties to the subject. If the administration of the succession is incomplete and *in fieri*, and the object is to alter or affect its course, the application must be made to the court of probates, which, in that case, has possession of the subject and exclusive jurisdiction over it. If, on the other hand, the succession has been closed, or has proceeded so far that the parties entitled under the will have been put in possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication in the courts of general jurisdiction, in which the legal title is asserted as against the will claimed to be invalid, making an issue involving that question.

In *O'Donogan* v. *Knox*, 11 La. 384, the Supreme Court of Louisiana said:

"It appears then that the jurisdiction of the courts of probate is limited to claims against successions for money, and that all claims for real property appertain to the ordinary tribunals, and are denied to courts of probate. The plaintiff in this case was therefore compelled, in suing for the property of the succession, to seek redress in the district court, and whether she attacked the will, or

the defendant set it up as his title to the property, the court having the cognizance of the subject must of necessity examine into its legal effect. And although the will may have been admitted to probate and an order given for its execution, yet these are only preliminary proceedings necessary for the administration of the estate, and not a judgment binding on those who are not parties to them. When, therefore, in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited power shall pronounce upon the subject; for in that case the ordinary courts would submit to another tribunal the decision of the main question in the cause, without right of trial by jury, and would have little else to do than to comply with its decree."

In *Robert* v. *Allier's Agent*, 17 La. 4, the same court said:

"On the question of jurisdiction arising from the state of the case we understand the distinction repeatedly made by this court to be that whenever the validity or legality of a will is attacked and put at issue (as in the present case) at the time that an order for its execution is applied for, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate under it, courts of probate alone have jurisdiction to declare it void, or to say that it shall not be executed. This is the purport and extent of the decision in the case of *Lewis' Heirs* v. *His Executors*, 5 La. 387; C. of Pr., Art. 924, § 1. But when an action of revendication is instituted by an heir at law against the testamentary heir or universal legatee, who has been put in possession of the estate, and who sets up the will as his title to the property, district courts are the proper tribunals in which such suits must be brought. 6 Martin's N. S. 263; 2 La. Rep. 23; 11 La. Rep. 388."

In *Rachal* v. *Rachal*, 1 Rob. (La.) 115, it is also said:

"We cannot consider the question of jurisdiction as an open one. The doctrine is now well settled that in a suit for property, whether the plaintiff attacks the will under which it is held or the defendant sets it up as his title to the property claimed, the

courts of ordinary jurisdiction before whom the principal matter, to wit, the action of revendication, is brought, must of necessity pronounce on the validity of the will which is thus drawn in question. The proceedings had in the court of probate for the settlement of the estate, such as the probate of the will and the order given for its execution, cannot have the effect contended for by the appellant ; they cannot be considered as a judgment binding on the plaintiffs, who were not parties to them."

In *Succession of Duplessis*, 10 Rob. (La.) 193, it is said:

"This court has often held that the admission of a will to probate, and the order given for its execution, are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties thereto."

To the same effect are *Succession of Dupuy*, 4 La. Ann. 570; *Sophie* v. *Duplessis*, 2 La. Ann. 724; *Abston* v. *Abston*, 15 La. Ann. 137.

In *Sharp* v. *Knox*, 2 La. 23, it was said:

"The petitioner himself shows that the defendant holds the property claimed from him under a will and confirmatory act, which she seeks to set aside. This she cannot effect except in a court of ordinary jurisdiction, *i.e.*, in the district court."

In *Hoover's Succession* v. *York*, 30 La. Ann. 752, the suit was simply to annul a will and the probate of a will, and to have certain persons plaintiff declared heirs and entitled to take as such. This, it was declared, was purely a probate proceeding, and cognizable alone by the parish court in which the succession was opened. "It was a matter incidental to the opening and settlement of the succession."

And the same principle governed the decision in *Blasini* v. *Blasini's Succession*, 30 La. Ann. 1388. That was an application in the probate court on the part of forced heirs, demanding that their rights as such, known under the law of Louisiana as their *légitime*, of which their ancestor could not deprive them by his testament, should be recognized, so that they might

receive their share of the succession. The effect of allowing it would be not to annul or invalidate the will, but merely to displace it, in the administration of the succession, to the extent required by their indefeasible interest in it. It was objected to the jurisdiction of the court that the succession had been closed by a previous judgment sending the widow and testamentary heir into possession; but the exception was overruled on the ground that the suit was of probate jurisdiction.

In *Gibson* v. *Dooley*, 32 La. Ann. 959, an action to annul a will, it was held, might be brought in the parish court, although the succession had been closed by a delivery of the property to the instituted heir. The rule, as laid down in *Robert* v. *Allier*, 17 La. 15, was cited and approved, but was held not to apply. The reason was given in these words:

"Here no action of revendication was instituted, but simply a suit for the nullity of the will. There is no prayer for ejectment or that plaintiffs may be put into or quieted in their possession of property claimed under the will."

By the law of Louisiana, C. of Pr., art. 4, a real action is given, which relates to claims made on immovable property, or to the immovable rights to which they are subjected, the object of which is the ownership or the possession of such property, and, when prosecuted by one having the title against the person in possession, is called the petitory action, and is the proper action for the recovery of an universality of things, such as an inheritance. C. of Pr., art. 12. It is an action of revendication, C. of Pr., art. 43, and is the proper one to be brought for the purpose of asserting the legal title and consequent right of possession of the heir at law to the succession, when another is in possession under claim of title by virtue of a will admitted to probate, as is abundantly shown by the citations already made from the decisions of the Supreme Court of Louisiana. We entertain no doubt that this action can be brought in a proper case as to parties in the circuit court of the United States.

The Louisiana Code of Practice, art. 556, *et seq.*, provides for

an action of nullity, whereby definite judgments may be revised, set aside, or reversed, which may proceed either on the ground of vices of form or upon the merits, as that the judgment was obtained through fraud, and is a separate action, commenced by petition, the adverse parties being cited as in other suits. This action, with reference to the jurisdiction of the courts of the United States, was the subject of consideration in *Barrow* v. *Hunton*, 99 U. S. 80; but the present is not an action of that description, for the relief prayed for is recovery of the possession of the inheritance, which, we have seen, must be prosecuted in an action of revendication. Whether the probate of a will is a definite judgment which can be the subject of an action of nullity under these provisions of the Code of Practice, is a question, therefore, which we are not called upon to discuss or decide. The case of *Gaines* v. *Fuentes*, 92 U. S. 10, was such an action of nullity, but, as before remarked, the point decided in that case was not that it would lie, according to the law of Louisiana, but that if it would lie in the State court it was removable to the circuit court of the United States, because it presented a controversy wholly between citizens of different States.

The present suit is not an action of nullity, because it prays for the recovery of possession of the inheritance, to which the appellants claim the legal title as heirs at law of Sarah Ann Dorsey. That claim, as has been shown, is properly the subject of an action of revendication, which furnishes a plain, adequate and complete remedy at law, and consequently constitutes a bar to the prosecution of a bill in chancery.

There is nothing left, therefore, as a ground of support for the present bill, except so much of the case made by it as rests upon the prayer for the cancellation of the sale and conveyance of the Beauvoir estate by Mrs. Dorsey in her lifetime. That relief is claimed in part on the ground of a constructive fraud, growing out of the defendant's relation to her at the time as a confidential agent; but we see nothing in the circumstances as detailed to forbid such a transaction between the parties, and the charges of actual fraud and undue influence applicable to this sale, considered as detached from the rest of

the case, are not of such character, even when admitted by the demurrer, as in law would justify a recission. And as the case for relief as to this sale is not made independently, but only as part of the whole case intended to be presented by the bill, we conclude that it must fail with the rest.

The demurrer was rightly sustained and the bill properly dismissed.

The decree is affirmed.

TOWNSEND *v.* LITTLE and Others.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued November 26th, 1883.—Decided December 10th, 1883.

Constructive Notice—Deed—Fraud—Secret Trust—Statutes—Utah.

A, having acquired the right to occupy a tract of land in Salt Lake City, took possession of it and erected a public house thereon, and lived in it with his wife and B, his polygamous wife, carrying on a hotel there. He ceased to maintain relations with B, as his polygamous wife, but he being desirous to have the benefit of her services, both concealed this fact. He made a secret agreement with her, that if she would thus remain she should have one-half interest in the property. He acquired title to the property from the mayor under the provisions of the act of March 2, 1867, 14 Stat. 541, without any disclosure of the secret agreement. Subsequently A's interest therein passed into the hands of innocent third parties for value, without notice of the claim of B under the secret agreement: *Held*,

1. That B had no rights in the premises as against innocent *bona fide* encumbrancers and purchasers without notice of her claim.
2. That the joint occupation of the premises by A and B, under the circumstances, was no constructive notice of B's claim of right.
3. The territorial act under which a deed of the property was made to A by the mayor, directed that "deeds of conveyance of the same shall be executed by the mayor of the city or town, under seal of the corporation." A general act of the Territory at the time the deed was made required deeds to be witnessed. The deed to A bore the corporate seal, as required by the special act; but was not witnessed: *Held*, that the special act controlled the general act, and that the deed was good.

By an act of Congress passed March 3d, 1867, entitled "An Act for the relief of the inhabitants of cities and towns

upon the public lands," 14 Stat. 541, it was provided that whenever any portion of the public lands of the United States had been, or should thereafter be, settled upon and occupied as a town site, it should be lawful for the corporate authorities of the town to enter at the proper land office, at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their several interests, and that the execution of said trust, as to the disposal of the lots of said town, &c., should be conducted under such rules and regulations as might be prescribed by the legislature of the State or Territory in which the same might be situated.

In pursuance of the authority thus granted, the legislature of the Territory of Utah, by an act passed February 17th, 1869, Compiled Laws of Utah, 1876, page 379, provided that whenever the corporate authorities of any town should enter any public land occupied as a town site, such corporate authorities should give notice thereof, by publication in a newspaper for three months, whereupon any person claiming to be the rightful occupant, or entitled to the occupancy or possession of any lot or part thereof, should, within six months after the first publication of the notice, file in the probate court of the county a statement in writing, containing an accurate description of the particular parcel of land in which he might claim to have an interest, and the specific right, interest, or estate therein which he claimed to be entitled to receive; and that the filing of a statement should be considered notice to all persons claiming any interest in the lands described therein of the claim of the party filing the same; and that all persons failing to file such statement within the time limited by the act, should be forever barred the right of claiming or receiving such land, or any interest or estate therein, or in any part, parcel, or share thereof, in any court of law or equity. The act further provided that if there were no adverse claimants to a particular lot or parcel of land, the probate court should give notice to the person filing the statement claiming the same to produce his proofs in support of his statement, and the court, if satisfied from the proofs of the validity of such claim, should cause

judgment to be entered of record, and certify the fact to the mayor of the town, who should make to the party claimant a deed for the tract or parcel of land so adjudged to him.

The appellant, Elizabeth M. Townsend, brought this suit in the District Court for the Third Judicial District of the Territory of Utah, by which she claimed title under the provisions of the act of Congress and the act of the Legislature of the Territory of Utah, to the undivided half of a certain lot in the city of Salt Lake, which was particularly described in her bill of complaint.

She alleged that in the year 1867 she and the defendant, James Townsend, went into the actual possession of said premises; that from the date just mentioned until March 1st, 1778, they jointly occupied and improved said property and kept a hotel thereon, known as the Townsend House; that they occupied said premises as two persons, for their mutual and equal benefit, mutually acknowledging each other's interest; that said premises formed part of a tract of land in Salt Lake City, in the Territory of Utah, subject to entry, which, on November 21st, 1871, was in fact entered at the United States land office in Salt Lake City by Daniel H. Mills, mayor of said city, in trust for the occupants thereof, under the act of Congress aforesaid; that at the date of said entry the appellant was, as to a half interest in said premises, one of the persons for whose relief said act of Congress was passed, and she and said Townsend were conclusively entitled to a conveyance of said premises from the mayor on complying with said rules and regulations; that on May 1st, 1873, Townsend obtained a deed from the mayor conveying the entirety of said premises to himself in fee, without the knowledge of appellant, and she was not informed thereof until a subsequent year; that when it came to her knowledge she requested Townsend to convey to her one-half of said premises, which he promised to do, admitting her right to the same, and that upon the obtaining of such deed from the mayor by Townsend a trust resulted in her favor, binding Townsend to convey to her the one undivided half of said premises, which he has never done. The bill further alleged that the defendants Hooper, Jennings and

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Roberts claimed some interest in the premises, adverse to appellant, as purchasers, encumbrancers, or otherwise, but that their rights were only such as they had questionably derived from Townsend, with notice of appellant's possession and occupancy of said premises, and her consequent rights, and subject thereto. The bill prayed that the purchase of said premises by Townsend might be declared as to one-half thereof, as a purchase in trust by him for appellant, and that Townsend, Hooper and Jennings might be required to convey the same to her.

The defendant Townsend filed no answer. Roberts answered disclaiming any interest in the premises. Defendants Hooper and Jennings filed a joint answer, in which they denied all the averments of the petition, except that the premises in controversy were situate within the town site of Salt Lake City, and were subject to entry by the mayor under the act of Congress, and that Townsend had obtained a deed from the mayor for the whole of said premises. They averred that they were purchasers of said premises for a valuable consideration, without notice of the claim of appellant, and that they had no notice thereof until the bringing of this suit, and that appellant and Townsend had conspired to bring and maintain this suit for the purpose of defrauding them, well knowing that the claim of appellant was false.

The district court made a finding, from which the following facts appeared :

On March, 1865, the defendant, James Townsend, took possession of the premises in question, having purchased the possessory right thereto of one Clawson, who conveyed the same to him for the price of $6,000. Afterwards, in the years 1872 and 1873, he purchased the rights of other claimants for $3,000 All the purchase money for these claims was paid by Townsend out of his own means. In the fall of the year 1866 he went on the premises to reside, taking with him his lawful wife, whom he had married in 1828, and the appellant as a plural or polygamous wife. He kept a hotel on the premises from that date until February, 1878, which was known as the Townsend House, and was carried on in his name solely, and he was rep-

resented to the public by every advertising agency as the sole proprietor. During all this time he and the appellant lived together on the premises as husband and polygamous wife, the appellant taking an active part in conducting the business of the hotel. The lawful wife of Townsend also lived with him as such on the same premises until her death in 1870.

In the fall of the year 1867, Townsend and appellant entered into a verbal agreement with each other, whereby Townsend stipulated that if appellant would continue to live at the Townsend House and assist in carrying on the business of the hotel, as she had theretofore done, he would convey to her a one-half interest in the real and personal property of the hotel.

During the fall of the same year Townsend took another polygamous wife, but ostensibly continued his cohabitation with the appellant as his polygamous wife, the motive of both being to conceal from the public any change in their relations to each other.

On November 21st, 1871, the mayor of Salt Lake City entered in the land office and paid for the lands embraced in the town site of Salt Lake City, in trust for the occupants thereof, and received a patent therefor on June 1st, 1872. The mayor gave for the period of three months the public notice required by law of such entry, the first publication being on November 24th, 1871. Within the time allowed by law for occupants to assert their claims to the lands embraced in said town site, Townsend applied for a conveyance to himself of the premises in controversy, and in due course of proceedings in the probate court was adjudged to be the rightful occupant thereof and entitled to a deed therefor. Whereupon the mayor, on May 1st, 1873, executed and delivered to him a deed under his corporate seal of the city, purporting to convey to him the whole of said premises in fee in execution of said trust, but said deed was without witnesses.

The appellant did not, within six months after the first publication of notice of entry of said town site by the mayor, or at any time, make or deliver to the clerk of the probate court of said county any description of said premises, or of any right, interest or estate claimed by her therein, or make any claim

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as an occupant or otherwise to a conveyance of any interest therein under the town-site laws.

After his purchase of the possessory right to said premises, and before the fall of 1868, Townsend expended in the erection of buildings thereon the sum of $16,000. On October 1st, 1868, he borrowed of defendant Hooper the sum of $5,000, and on December 8th, 1868, a further sum of $5,000. For these sums he executed his several notes and deeds of trust on the premises to secure the same.

On September 24th, 1873, the indebtedness of Townsend to Hooper on these notes amounted to $12,500, and on that day he renewed the same by giving Hooper his three notes, two for $5,000 each and one for $2,500, due in one year, and at the same time executed a deed of trust to trustees to secure the same.

On October 10th, 1876, Townsend gave his note to defendant Roberts for $5,000, payable in one year, and secured it by a deed of trust upon the same premises. This note afterwards by assignment became the property of defendants Hooper and Jennings.

Afterwards Townsend contracted other debts, which, either by deed of trust or judgment, became liens on said premises, and by various assignments the defendants Hooper and Jennings became the owners and holders of all the debts secured by lien on said premises. On April 10th, 1878, the sum of $16,425 was due on the notes executed by Townsend to Hooper on September 24th, 1873, and the trustees named in the deed of trust to secure the same, in pursuance of the power thereby conferred, sold said premises to defendant Jennings for $22,500, which sum he paid, and it was applied to the discharge of the several liens on the property in the order of their priority. Jennings afterwards conveyed an undivided half of the premises to his co-defendant Hooper.

During all their transactions with Townsend the defendants Hooper, Jennings, and Roberts dealt with him, prior to the proceedings in the probate court under the town-site law, as the sole owner of said premises, as against every one save the United States, and subsequently thereto as absolute sole owner,

without any actual or constructive notice of any claim of the appellant; and neither the trustees in said trust deed, nor the defendants Hooper, Jennings, and Roberts, nor any of them, had any notice of the claim of the appellant to any interest in or right to said premises until after the bringing of this suit.

Upon this finding of facts the district court dismissed the bill of complaint. Its decree was carried to the supreme court of the Territory by appeal, where it was affirmed. The decree of the latter court affirming the decree of the district court is brought under review by the present appeal.

Mr. James H. Mandeville submitted the case for the appellant.

Mr. P. L. Williams for the appellee.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the foregoing language, he continued:

The facts found by the court leave no ground for the appellant's case to rest on. Whatever rights, if any, she might have as against Townsend, had he continued the owner of the premises in controversy, she certainly has none against innocent *bona fide* incumbrancers and purchasers without notice of her claim. The arrangement between Townsend and the appellant was a secret agreement known only to themselves, and, as found by the court, they, after the agreement, continued to live together, as they had previously done, in order that the public might not know that any change had taken place in their relations to each other. A secret agreement, as between herself and Townsend, which they purposely kept concealed, cannot be set up against *bona fide* purchasers without notice. The finding of the court that neither Hooper, Jennings, nor Roberts had notice, either actual or constructive, of appellant's alleged rights, cuts up by the roots all claim on her part as against them to the premises in controversy.

Appellant contends, however, that her joint physical occupancy with Townsend of the premises, as found by the court, was constructive notice to the defendants Hooper and Jennings of her alleged rights, and that they therefore purchased in

subservience thereto. When Townsend, in 1866, entered into possession of the premises which he had previously bought with his own money, he took with him his lawful wife and the appellant, his polygamous wife. At that time it is not disputed that he was the sole occupant under the act of Congress. The appellant was no more a joint possessor at that time than any servant or guest of the hotel. A secret agreement subsequently entered into between Townsend and the appellant, and purposely kept concealed from the public by them, cannot be held to change the nature of Townsend's occupancy so as to affect with constructive notice persons who had no actual notice.

Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb* v. *Fluitt*, 2 Anst. 432; *Kennedy* v. *Green*, 3 My. & K. 699. Where possession is relied on as giving constructive notice it must be open and unambiguous, and not liable to be misunderstood or misconstrued. *Ely* v. *Wilcox*, 20 Wis. 523; *Patten* v. *Moore*, 32 N. H. 382; *Billington* v. *Welsh*, 5 Bin. 129. It must be sufficiently distinct and unequivocal so as to put the purchaser on his guard. *Butler* v. *Stevens*, 26 Maine, 484; *Wright* v. *Wood*, 23 Penn. State 120; *Boyce* v. *Williams*, 48 Ill. 371. As said by Strong, J., in *Meehan* v. *Williams*, 48 Penn. State 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See also *Holmes* v. *Stout*, 3 Green. Ch. 492; *McMechan* v. *Griffing*, 3 Pick. 149; *Harwick* v. *Thompson*, 9 Ala. 409.

Tested by these rules, it is plain that the physical occupancy of the premises in question by appellant, as found by the district court, was not such possession as to put a purchaser on inquiry and charge him with constructive notice. On the contrary, viewed in connection with the other facts found, it was such as to mislead him.

The case of appellant is, therefore, an attempt to set up a secret trust as against *bona fide* purchasers for value without notice. But nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right,

obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that when equities are equal the law shall prevail. *Williams* v. *Jackson*, 107 U. S. 478; *Willoughby* v. *Willoughby*, 1 T. R. 763; *Charlton* v. *Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Wis. 609; *Tildesley* v. *Lodge*, 3 Sm. & Giff. 543; *Shine* v. *Goff*, 1 Ball & B. 436; *Bowen* v. *Evans*, 1 Jones & La. T. 264; *Vattier* v. *Hind*, 7 Pet. 252. This is the case of defendants Hooper and Jennings.

The appellant contends, however, that as the deed executed by the mayor of Salt Lake City to Townsend was without witnesses as required by the general law of the Territory, it did not convey the legal title. But the act of the territorial legislature providing for the conveyance to occupants by the mayor of lands included in the town site did not require witnesses to his deed. It merely directed that "deeds of conveyance for the same shall be executed by the mayor of the city or town under the seal of the corporation." According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the Territory requiring deeds generally to be executed with two witnesses. *Pease* v. *Whitney*, 5 Mass. 380; *Nichols* v. *Bertram*, 3 Pick. 341; *The State ex rel. Fosdick* v. *Perrysburg*, 14 Ohio St. 472; *London, etc., Railway* v. *Wandsworth Board of Works*, Law Rep. 8 C. P. 185; Bishop on the Written Laws, § 112 *a*. The deed of the mayor to Townsend having been executed in conformity with the special act was therefore valid and effectual to convey the legal title.

The result of these views is that the appellant has failed to show herself entitled to the relief prayed in her bill.

The decree of the Supreme Court of the Territory of Utah affirming the decree of the district court by which her bill was dismissed must be affirmed.

UNITED STATES v. JONES, Administrator, and Others.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Submitted October 11th, 1883.—Decided December 10th, 1883.

Conflict of Laws—Constitutional Law—Damages—Eminent Domain—State Courts.

1. The power to take private property for public uses, in the exercise of the right of eminent domain, is an incident of sovereignty, belonging to every independent government, and requiring no constitutional recognition, and it exists in the government of the United States. *Boom* v. *Patterson*, 98 U. S. 406, cited and approved.
2. The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain. As this limitation forms no part of the power to take private property for public uses, the government of the United States may delegate to a tribunal created under the laws of a State, the power to fix and determine the amount of compensation to be paid by the United States for private property taken by them in the exercise of their right of eminent domain; or it may, if it pleases, create a special tribunal for that purpose. On this point *Kohl* v. *United States*, 91 U. S. 367, cited and approved.

Mr. Solicitor-General for the plaintiff in error.

Mr. Norman S. Gilson and *Mr. George E. Sutherland* for the defendants in error.

Mr. Justice Field delivered the opinion of the court.

By an act of Congress passed on the 8th of August, 1846, certain lands were ceded to Wisconsin to aid in improving the navigation of Fox and Wisconsin rivers, in that State, and in constructing a canal to unite the rivers, and thus form a connection between the waters of Green Bay, in Lake Michigan, and the waters of the Mississippi. 9 Stat. 83, ch. 170.

The State accepted the cession of the lands, and in August, 1848, created a board of public works, under whose superintendence it placed the construction of the improvement contemplated. The work, however, was not done under that board; the means furnished proved inadequate. Various other attempts, therefore, were made by different companies created by the State to carry out the improvement, and in furtherance of it Congress ceded additional lands; but none of these at-

tempts proved successful. The improvement was only partially made.

In 1866, by various transfers, which it is unnecessary to detail, the lands ceded by Congress, and the works of improvement, including the locks, dams, canals, and other structures connected with it, became the property of a corporation known as the Green Bay and Mississippi Canal Company.

In July, 1870, Congress passed an act "for the improvement of water communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers;" by which, among other things, the secretary of war was authorized to ascertain the sum which ought to be paid to the Green Bay and Mississippi Canal Company for the transfer of its property and rights of property in the line of water communication between Wisconsin River and the mouth of Fox River, including its locks, dams, canals, and franchises, or so much thereof as, in his judgment, should be needed; and for that purpose to join with the company in the appointment of a board of arbitrators. In making their award the arbitrators were required to take into consideration the amount of money obtained from the sale of lands ceded by Congress to aid in the construction of the water communication, which was to be deducted from the valuation found by them. 16 Stat. 189, ch. 210.

Under this act arbitrators were appointed, the value of the works ascertained, and an award made, the amount of which having been paid, the entire property was, in 1872, conveyed to the United States. Since then the United States have been the owners and in possession of the works, and Congress has made various appropriations to carry on and complete the improvement.

The arbitrators, in making their award, proceeded upon the principle that the United States should pay for the works what their construction had cost the State, and the companies succeeding to its interests, after making a reasonable abatement for wear and decay, and deducting the amount obtained from the sale of the ceded lands. Some of the dams constructed had caused the lands of several parties to be overflowed, and in the estimate of the amount to be paid by the United States no ac-

count was taken of the liability of the company for such damages. The question, therefore, soon arose whether the payment of these damages devolved upon the United States; and this question was submitted by the committee on commerce of the House of Representatives to the secretary of war, and by him was referred to the assistant judge advocate-general. That officer held that liability for the damages incurred from the flowage of water on the lands of others, caused by the works constructed, followed the property transferred, and devolved on the United States. Upon this opinion a bill was prepared for the assumption by them of the company's liability for such damages, which was passed by Congress and approved on the 3d of March, 1875. This act provided that whenever, in the prosecution and maintenance of the improvement mentioned, it should become necessary or proper, in the judgment of the secretary of war, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries, or other material adjacent to the line of improvement and needful for its prosecution or maintenance, the officers in charge of the works might, in the name of the United States, take possession of and use the same, after having first paid, or secured to be paid, the value thereof, "which may have been ascertained in the mode provided by the laws of the State" wherein the property lay.

The act also provided that in case any lands or other property were then or should be overflowed or injured by means of any part of the works of the improvement theretofore or thereafter constructed, for which compensation was then or should become legally owing, and in the opinion of the officers in charge it should not be prudent to lower the dam or dams, the amount of such compensation might be "ascertained in like manner;" that the department of justice should represent the interest of the United States in legal proceedings under the act and for "flowage damages" previously occasioned, and that a portion of the appropriation made for the prosecution of the improvement, not exceeding in amount $25,000, might be applied in payment for property and rights thus taken and used.

In the previous year, 1874, the legislature of Wisconsin had passed a law providing for ascertaining the compensation to be made for damages caused to lands by their being overflowed or otherwise injured or taken by the United States in the construction of any public works. It declared, among other things, that in case the lands of any person had been overflowed or injured or taken, or if it should be found necessary or proper thereafter to overflow, injure, or take the lands of any person for or by reason of the construction of any dam, bridge, lock or pier, or the repair or enlargement thereof, or the construction, repair, or enlargement of any canal or other works of the United States government in the improvement of any harbor, river, or stream of water in the State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured, or taken might be ascertained, determined, and paid in the manner prescribed in chapter 119 of the Laws of 1872, entitled "An Act in relation to railroads and the organization of railroad companies," for acquiring title to lands by railroad companies, and that all the provisions of such act properly applicable thereto should apply in the case of the overflow, injury, or taking of lands by the United States government for the purposes mentioned.

Chapter 119 of the Laws of 1872, referred to in this act of 1874, prescribes the mode in which land may be condemned for railroad purposes. The company is to file a petition for the appointment of commissioners of appraisal, with the clerk of the circuit court of the county in which the property is situated, containing, among other things, a description of the land desired and the names of parties interested in it. Notice is then to be given, by publication for three successive weeks in a newspaper of the county or adjoining county, of the filing of the petition, of the time and place of its presentation, and of the application for the appointment of commissioners. On the presentation of the petition the parties whose interest may be affected by the proceedings are at liberty to show cause against its prayer. If no sufficient cause be shown, the court or judge may grant the petition and appoint three disinterested and competent freeholders, resident in the county or adjoining

county, to ascertain and appraise the compensation to be made to the owner or owners of the property. Either party to the proceeding, if dissatisfied with the award rendered, may appeal from it to the circuit court, where a trial is to be had by a jury, and the compensation fixed by them. The proceeding, so far as the ascertainment of compensation is concerned, there takes the form of a regular action at law, in which the petitioner becomes the plaintiff and the contestants the defendants. The chapter also provides that the party interested in the land may institute and conduct the proceedings to a conclusion if the company delay or omit to prosecute the same.

Under the legislation referred to, the present proceeding was instituted by the defendants in error to recover the value of certain lands which had been overflowed by a dam constructed by the canal company in the prosecution of the improvement mentioned. In their petition they ask for the appointment of commissioners for the appraisal of certain lands, which are described, and of the damage caused to them by a dam constructed by the canal company, but owned by the United States, they having succeeded to the title and possession of the company. They also set forth the ownership of the lands, the injury to them from the dam causing the waters of Lake Winnebago to set back and overflow them, and that the dam cannot be maintained without a continuance of such injuries. All the allegations required by the statute were set forth. Commissioners were accordingly appointed, before whom the parties interested appeared, the United States being represented by counsel retained by the department of justice. They awarded the petitioners the sum of $8,000. From this award both parties appealed to the circuit court, where the case was tried before a jury. Previously, however, to its being impanelled the defendants objected to the action of the court on three grounds: First, that it had no jurisdiction of them; second, that it had no jurisdiction to try a cause in which the United States were a party; and, third, that the act of Congress of March 3d, 1875, was unconstitutional in that it assumed to confer upon the State court authority to try a cause in which the United States were a party. These objections were overruled, and the

trial resulted in a verdict for the plaintiffs for $10,000. The judgment entered thereon was affirmed by the supreme court of the State, and from that court the case is brought here on writ of error.

Various exceptions were taken to the rulings of the court on the trial, but as they do not involve any question of federal law they are not open for consideration here. The only point presented upon which we can pass relates to the jurisdiction of the court below; if that can be sustained its judgment must be affirmed.

The position of the counsel of the United States in the court below, as we understand it, was substantially this: That the power vested in the federal government to take private property for the public uses of the United States is, in its nature, exclusive, and its exercise by any State is therefore prohibited as completely as though the prohibition were expressed in terms; that the power cannot, therefore, be delegated to the State of Wisconsin; that the ascertainment of the compensation is involved in the exercise of the power as a necessary part of it, inasmuch as there can be no lawful taking until compensation is made; and that the act of Congress transferring to the State board and State court the function of ascertaining the value of the property taken, and the amount of compensation to be made, is therefore invalid.

There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom* v. *Patterson*, 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general govern-

ment—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—cannot be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion. Undoubtedly it was the purpose of the Constitution to establish a general government independent of, and in some respects superior to, that of the State governments—one which could enforce its own laws through its own officers and tribunals; and this purpose was accomplished. That government can create all the officers and tribunals required for the execution of its powers. Upon this point there can be no question. *Kohl* v. *United States*, 91 U. S. 367. Yet from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government;

but as a matter of convenience and as tending to a great saving of expense.

The use of the courts of the States in applying the rules of naturalization prescribed by Congress, the exercise at one time by State justices of the peace of the power of committing magistrates for violations of federal law, and the use of State penitentiaries for the confinement of convicts under such laws, are instances of the employment of State tribunals and State institutions in the execution of powers of the general government. At different times various duties have been imposed by acts of Congress on State tribunals; they have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. 1 Kent, 400. And though the jurisdiction thus conferred could not be enforced against the consent of the States, yet, when its exercise was not incompatible with State duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld. Whatever question might arise as to such delegation of authority, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute. Almost, if not quite from the first year of its existence, it has been the practice of the general government, when necessary to take private property for public uses, to resort to State boards and tribunals to ascertain the value of the property and hence the compensation to be made. *Burt* v. *Merchants' Ins. Co.*, 106 Mass. 356. In recent statutes such resort is expressly prescribed. For example, on the 3d of March, 1879, an act was passed for improving a part of Tennessee River, which provided that, whenever it became necessary to take private property, "the price to be paid shall be determined, and the title and jurisdiction procured, in the manner prescribed by the laws of the State of Alabama." And, on the 14th of June, 1880, an act was passed making an appropriation for constructing reservoirs on the head waters of the Mississippi, with a provision that "injuries occasioned to individuals by the overflow of their lands shall be ascertained and determined by agreement, or in accordance with the laws of

Minnesota." These are but examples of many instances of legislation where resort is had to local boards or tribunals to ascertain particular facts by which the general government may be guided in its action. Whatever assent may be necessary to the validity of the proceedings against the United States, owing to their general immunity from process, is given by such legislation.

The provisions of the act of 1875, with reference to the property overflowed by dams constructed in the improvement of the navigation of Fox and Wisconsin rivers, that the compensation to be made shall be ascertained in the mode and manner prescribed by the laws of the State, and that in any proceedings to ascertain such compensation the interests of the United States shall be represented by the department of justice, constitute a sufficient waiver of immunity. The legislation amounts to a consent to such proceedings as the State laws authorize for the condemnation of property in which the United States are interested. In the present case the overflow of the property for which compensation was asked was caused whilst the property was held by the canal company, before its acquisition, in 1872, by the United States; and the legislation is, in legal effect, little more than a declaration that the United States will pay the compensation which may be awarded by officers of the State in proceedings taken in accordance with its laws. In any aspect in which the legislation can be viewed, we see no objection to it arising out of the independent or sovereign character of the government of the United States.

Judgment affirmed.

THOMAS, Trustee, *v.* BROWNVILLE, FORT KEARNEY, AND PACIFIC RAILROAD COMPANY and Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Argued October 19th, 1883.—Decided December 10th, 1883.

Contract—Equity—Fraud—Mortgage—Railroad.

A railway company contracted with parties associated together as a construction company for the construction of a portion of its road, the payment to be made in mortgage bonds. Two of the directors were also parties in the construction contract. As part of the transaction the other parties in the construction contract agreed to assume subscriptions by all individual directors of the railroad company to the capital stock of that company (which was worthless), and relieve them from all liability under it: *Held*, that the contract could not be enforced in equity when resisted by stockholders in the corporation; and that mortgage bonds issued under it to the construction company were voidable at election of the parties affected by the fraud, while in the hands of parties who took from the construction company not in the ordinary course of business, but under circumstances which threw doubt upon their being holders for value or without notice: also, *Held*, that, notwithstanding the invalidity of the contract, the holders of the bonds in a suit for the foreclosure of the mortgage were entitled to a decree for the payment of the sums actually expended for construction under the contract, and remaining unpaid, which were payable and paid in bonds declared void.

Bill in equity to foreclose a railroad mortgage. Decree of sale and sale made. Then stockholders petition to intervene on the ground of fraud, and by permission intervened, praying to set aside the sale, and to have the mortgage decreed invalid. The decree below set aside the sale and decreed the bonds to be invalid. Appeal.

Mr. Wm. M. Ramsey, for appellant, submitted the case on brief.

Mr. J. H. Broady for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the District of Nebraska dismissing appellant's bill for a foreclosure of a railroad mortgage.

The mortgage was made by the Brownville, Fort Kearney and Pacific Railroad Company to secure the payment of bonds issued by said company to certain persons who had contracted to build its road, and to whom 610 of said bonds of $1,000 each had been delivered. There was a default in the payment of these bonds. After they were executed and delivered, the Brownville and Fort Kearney R. R. Co. became consolidated under the laws of Nebraska with the Midland Pacific R. R. Co., under the new name of the Nebraska Railway Company. In the bill of foreclosure both these companies, that is, the Brownville Company and the Nebraska Company, are made defendants, and an answer confessing plaintiff's right to relief being filed, the court rendered a decree of foreclosure, and apparently a sale was had.

But at this stage of the proceeding certain parties interested as stockholders of the original Brownville and Fort Kearney Company were permitted to make themselves defendants, and the first decree was vacated.

These parties set up by way of answer and cross bill that the contract for the construction of the road, on account of which the bonds were issued, was fraudulent and void, and so were the bonds issued under it, and they resisted the foreclosure of the mortgage on that account.

The fraud charged in this answer and cross bill is founded on two allegations:

1. It is alleged that two of the board of directors who took part in making the construction contract were interested with the other parties in the contract.

2. That the other contractors besides these two made an agreement at the same time that the construction contract was made, with twelve of the shareholders of the railroad company, that they would relieve them, as subscribers to the stock of said company, from the payment of any further assessments upon the stock which they had subscribed for, by paying out said stock and having same assigned to them; in all not to exceed $16,500 of the $41,000 of individual subscriptions to said company.

The names of the persons thus relieved by the construction

company included all the directors of the railroad company at the time the contract for construction was made. As the stock was worthless, and these parties were liable to be called on to pay up this $16,500, the effect upon the directors in making a construction contract with the men who relieved them of their liability, two of them being also parties in the construction contract, is readily seen.

These allegations are proved beyond question, and the circuit court held the contract void, and the bonds issued in fulfilment of it also void, and dismissed the bill.

We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light.

But as this court said in the case of the *Twin Lick Co.* v. *Marbury*, 91 U. S. R. 587, such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity.

In the present case the stockholders of the corporation, whose officers accepted those benefits at the hands of the parties with whom they were, in the name of the corporation, making a contract for over a million of dollars, do denounce and repudiate that contract. The conduct of these directors is utterly indefensible. The case of *Wardell* v. *The Union Pacific Railroad Company*, 103 U. S. 651, is in precise analogy to this. See, also, same case in 4 Dillon, 330.

The original contract being such that the contractors can maintain no suit on it, the bonds which they received are affected with the same vice, and cannot be enforced unless they are negotiable instruments in the hands of innocent holders for value.

This principle is set up and relied on to reverse the decree,

on the ground that the bonds are in the hands of the Burlington and Missouri River Railroad Company. This company is no party to the suit, but it appears in evidence that, while it has possession of these bonds, it did not receive them by any purchase in the ordinary course of business. They came into its possession as part of a transaction in which it purchased the consolidated Nebraska company's railroad, and these bonds were probably taken as security against their being used to injure the title. It is also shown that, as further security in the same direction, the Burlington and Missouri Railroad Company yet retains $400,000 of the price of the road, which it agreed to pay. Under these circumstances we do not see that that company is in condition to avail itself of the doctrine of *bona fide* holders for value.

But we are asked to reverse the decree so far as to permit the trustee in this case to recover such a sum as the construction company actually earned in building the road. The matter was referred to a master, who, on this hypothesis, reported that the contractors had done work for the railroad company, which it had accepted, to the value of $205,947.66 beyond what they had received payment for, except as it was paid by these bonds. He also reported that this work was of that much advantage to the company, and its value or cost is estimated as on a *quantum meruit*, without regard to the prices fixed by the contract.

We are of opinion that appellant's view of this part of the transaction is sound.

The bonds and mortgage in the hands of the trustee were issued in payment for this work. To the extent of $205,947.66 the consideration is good, and no sound principle is seen on which they cannot to that extent be enforced. To this extent they do not rest on the original contract, but on work, labor, and material actually furnished to the company and received by it. These services and materials are not estimated by the prices named in the contract, but by their real value to the company.

In the analogous case of *Wardell* v. *The Union Pacific Railroad Company*, 4 Dillon, 339, the circuit court, after rejecting

the fraudulent contract on the same grounds that we reject this one, said:

"By what rule shall we measure Mr. Wardell's rights? He has spent time and labor and money in discovering the mines and in placing them in condition to be profitably worked. . . . Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation."

This ruling was affirmed in this court on appeal in the same case. 103 U. S. 651; see also *Gardner* v. *Butler*, 3 Stewart (N. J.) Eq. 702.

There is another principle of equity jurisprudence which leads to the same conclusion.

The stockholders who have resisted complainant's claim were not parties to the original suit for foreclosure, nor were they either necessary or proper parties as the case then stood. The decree and sale were made in a suit where all the usual parties to such suit were agreed.

These stockholders had no legal right to interfere. It was only by permission of the court that they were allowed to come in and contest the validity of the mortgage. In doing this they became actors. They filed their cross bill.

In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other terms would be unjust, and would make the court the instrument of this injustice.

The decree of the circuit court must, therefore, be reversed and the case remanded to that court, with directions for a decree in favor of the plaintiff for the sum of $205,947.66, *with interest. If a sale becomes necessary, this sum must be paid*

Syllabus.

out pro rata on the bonds secured by the mortgage, on their being produced and cancelled, or surrendered for cancellation, provided the road sells for so much.

MR. JUSTICE FIELD and MR. JUSTICE MATTHEWS took no part in the hearing or decision of this case.

CANADA SOUTHERN RAILWAY COMPANY *v.* GEBHARD and Another, Executors.

SAME *v.* GEBHARD.

SAME *v.* SAME.

SAME *v.* GEBHARD and Another, Executors.

ALL: IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 24th, 1883.—Decided December 10th, 1883.

Bankruptcy—Conflict of Laws—Constitutional Law—Contracts—Corporations—Dominion of Canada—Statutes (Foreign).

1. The Parliament of Canada has authority to grant to an embarrassed railway corporation within the Dominion power to make an arrangement with its mortgage creditors for the substitution of a new security in the place of the one they hold, and to provide that the arrangement shall be binding on all the holders of obligations secured by the same mortgage when it shall have received the assent of the majority, provision being made for the protection of the minority in the enjoyment of rights and privileges in the new security identical with those of the majority.
2. When the Parliament of the Dominion of Canada authorizes a corporation, existing under its authority, to enforce upon its mortgage creditors a settlement by which they are to receive other securities of the corporation in place of their mortgage bonds, and the scheme is assented to by a large majority of bondholders, and goes into effect, and the right of citizens of the United States who are bondholders to participate in the reorganization on the same terms as Canadians or other British subjects is preserved and recognized, the settlement is binding upon bondholders who are citizens of the United States, and who sue in courts of the United States to recover on their bonds.

Statement of Facts.

3. A corporation dwells in the place of its creation, but may do business wherever its charter allows and local laws do not forbid. A corporation of one country, doing business in another country, is subject to such control, in respect to its powers and obligations, as the government which created it may properly exercise. Every person who deals with it anywhere impliedly subjects himself to such laws of its own country affecting its power and obligations as the known and established policy of that government authorizes. Anything done in that country under the authority of such law, which discharges it from liability there, discharges it everywhere.

4. As individual holders of mortgage bonds issued by a railroad corporation, and secured by the same mortgage, have mutual contract interests and relations, there is nothing inequitable, when the power exists, in subjecting a small minority to the will of a decided majority, in reorganizing the mortgage indebtedness when the corporation is embarrassed. *Semble*, That if this were done by virtue of a statute of the United States, enacted under the provision of the Constitution conferring power to establish uniform laws on the subject of bankruptcy, it would not be regarded as impairing the obligation of a contract.

Suits (commenced in the Supreme Court of the State of New York and removed to the Circuit Court of the United States for the Southern District of New York), by holders of mortgage bonds of the Canada Southern Railway Company, and of extension bonds, to recover on their extension bonds and on the interest coupons on their mortgage bonds. The following are the facts as stated by the court:

What is now known as the Canada Southern Railway Company was originally incorporated on the 28th of February, 1868, by the legislature of the Province of Ontario, Canada, to build and operate a railroad in that province between the Detroit and Niagara rivers, and was given power to borrow money in the province or elsewhere and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining, and working the railway." Under this authority the company, on the 2d of January, 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to $8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the City of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the com-

pany covering "the railway of said company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured.

Before the 31st of December, 1873, the company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund their coupons falling due January 1st, 1874, July 1st, 1874, and January 1st, 1875, by converting them into new bonds payable on the 1st of January, 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be cancelled until the new bonds were paid.

In this condition of affairs the Parliament of Canada, on the 26th of May, 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," for all the purposes mentioned in, and with all the franchises conferred by, the several incorporating acts of the legislature of the province. This, under the provisions of the British North America act, 1867, passed by the Parliament of Great Britain "for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof," made the corporation a Dominion corporation, and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March, 1875, another series of bonds, amounting in the aggregate to $2,044,000, or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the company found itself unable to pay its interest and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to

the company and to the bondholders "a scheme of arrangement of the affairs of the company," which was approved at a meeting of the directors on the 28th of September, 1877. This scheme contemplated the issue of $14,000,000 of thirty-year bonds, bearing three per cent. interest for three years and five per cent. thereafter, guaranteed, as to interest, for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1st, 1878. These new bonds were to be secured by a first mortgage on the property of the company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December, 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of $7,332,000 out of $8,703,000; and by the holders of $1,590,000 of the second series of bonds out of $2,029,000 then outstanding. Upon the representation of these facts to the Parliament of Canada, the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name on the 16th of April, 1878.

This statute, after reciting the scheme of arrangement, with the causes that led to it, and that it had been assented to by the holders of more than two-thirds of the shares of the capital stock of the company, and by the holders of more than three-fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock and other plant" of the company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 was as follows:

Statement of Facts.

"4. The scheme, subject to the conditions and provisos in this act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the company secured by the said recited indenture of the fifteenth day of December, one thousand eight hundred and seventy, and of all coupons and bonds for interest thereon, and also, by all the holders of the second mortgage bonds of the company secured by the said recited indenture of the fifteenth day of March, one thousand eight hundred and seventy-five, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error were, and always had been, citizens of the State of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the city of New York, where the exchanges were made, in December, 1873. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the 1st of July, 1875, and since, though demanded. The company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The company pleaded the scheme of arrangement as a defence, and at the trial tendered the new bonds in ex-

change for the old. The circuit court decided that the arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

Mr. Joseph H. Choate for the plaintiff in error.
Mr. John M. Bowers for the defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court. After reciting the foregoing facts, he said:

Two questions are presented for our consideration:

1. Whether the "Arrangement Act" is valid in Canada, and had the effect of binding non-assenting bondholders within the Dominion by the terms of the scheme; and,

2. Whether, if it did have that effect in Canada, the courts of the United States should give it the same effect as against citizens of the United States whose rights accrued before its passage.

1. There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts, and the Parliament of the Dominion had, in 1878, exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. As to all matters within its authority, the Dominion Parliament has "plenary legislative powers as large and of the same nature as those of the imperial parliament." *The City of Fredericton* v. *The Queen*, 3 Canada Supreme Court, 505.

On the 20th of August, 1867, the Parliament of Great Britain passed the "Railway Companies Act, 1867." 2 Stat. 1332; 30, 31 Vict., c. 127. This act provides, among other things, for the preparation of "schemes of arrangement" between railway companies unable to meet their engagements and their creditors, which can be filed in the court of chancery, accompanied by a declaration in writing, under the seal of the company, and verified by the oaths of the directors, to the effect that the company is unable to meet its engagements with its creditors. Notice of the filing of such a scheme must be pub-

lished in the Gazette, and the scheme is to be deemed assented to by the holders of mortgages, bonds, debenture stock, rent charges, and preference shares, when assented to in writing by the holders of three-fourths in value of each class of security, and by the ordinary shareholders when assented to at an extraordinary general meeting, specially called for that purpose. Provision is then made for an application to the court by the company for a confirmation of the scheme. Notice of this application must be published in the Gazette, and, after hearing, the court, if satisfied that no sufficient objection to the scheme has been established, may confirm it. Sec. 18 is as follows:

"The scheme when confirmed shall be enrolled in the court, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favor of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by parliament."

This act, it is apparent, was not passed to provide, for the first time, a way in which insolvent and embarrassed railway companies might settle and adjust their affairs, but to authorize the court of chancery to do what had before been done by parliament. Lord Cairns, L. J., said of it in *Cambrian Railways Company's Scheme*, L. R. 3 Ch. at page 294:

"Hitherto such companies, if they desired to raise further capital to meet their engagements, have been forced to go to parliament for a special act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to or dissented from by those who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of the present act . . . appears to be to dispense with a special application to parliament of the kind I have described, and to give a parliamentary sanction to a scheme filed in the court of chancery, and confirmed by the court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem generis*."

And even now in England special acts are passed whenever the provisions of the general act are not such as are needed to meet the wants of a particular company. A special act of this kind was considered in *London Financial Association* v. *Wrexham, Mold and Connah's Quay Railway Company*, L. R. 18 Eq. 566.

In Canada no general statute like that in England has been enacted, but the old English practice of passing a special act in each particular case prevails, and Osler, J., said in *Jones* v. *Canada Central Railway Company*, 46 Up. Can. Q. B. 250, "our statute books are full" of legislation of the kind. The particular question in that case was whether, after the establishment of the Dominion government the provincial parliaments had authority to pass laws with reference to provincial corporations which would operate upon debentures payable in England, and held by persons residing there, but it was not suggested, either by the court or counsel, that a statute of the kind, passed by the Dominion Parliament in reference to a Dominion corporation, would not be valid as a law. So far as we are advised, the parliamentary authority for such legislation has never been doubted either in England or Canada. Many cases are reported in which such statutes were under consideration, but in no one of them has it been intimated that the power was even questionable.

In *Gilfillan* v. *Union Canal Company*, *ante*, it was said that holders of bonds and other obligations issued by large corporations for sale in market and secured by mortgages to trustees, or otherwise, have, by fair implication, certain contract relations with each other. In England, we infer from what was said by Lord Cairns in *Cambrian Railways Company's Scheme*, *supra*, they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common benefit. Ordinarily their

ultimate security depends in a large degree on the success of the work in which the corporation is engaged, and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority; and unless, as is the case in the States of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors, are imperilled by the financial embarrassments of the corporation, a reasonable "scheme of arrangement" may, in our opinion, as well be legalized as an ordinary "composition in bankruptcy." In fact, such "arrangement acts" are a species of bankrupt acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassments by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated. The necessity for such legislation is clearly shown in the preamble to the Grand Trunk Arrangement Act, 1862, passed by the Parliament of the Province of Canada on the 9th of June, 1862, before the establishment of the Dominion government, and which is in these words:

"Whereas the interest on all the bonds of the Grand Trunk Railway Company of Canada is in arrear, as well as the rent of the railways leased to it, and the company has also become indebted, both in Canada and in England, on simple contract, to

various persons and corporations, and several of the creditors have obtained judgment against it, and much litigation is now pending; and whereas the keeping open of the railway traffic, which is of the utmost importance to the interests of the province, is thereby imperilled, and the terms of a compromise have been provisionally settled between the different classes of creditors and the company, but in order to facilitate and give effect to such compromise the interference of the legislature of the province is necessary."

The confirmation and legalization of "a scheme of arrangement" under such circumstances is no more than is done in bankruptcy when a "composition" agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character.

2. That the laws of a country have no extra-territorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose, that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway.

The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, &c. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta* v. *Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to

such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors and shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when

the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish . . uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

On the whole, we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained. The same result was reached by the Court of Queen's Bench in the Province of Ontario, when pass-

ing on a similar statute in *Jones* v. *The Canada Central Railway Company*, *supra*.

The judgments are reversed and the causes remanded, with instructions to enter judgment on the facts found in favor of the railway company in each of the cases.

Mr. Justice Harlan, dissenting.—The Canada Southern Railway Company is a corporation created and organized under the laws of the Dominion of Canada. It was given, by its charter, power to borrow in Canada "or elsewhere," at a rate of interest not exceeding eight per cent. per annum, such sums of money as might be necessary to complete, maintain, or work its railway; to issue bonds therefor, payable either in currency or in sterling, at such place, within Canada "or without," as might be deemed advisable; to sell the same at such prices or discount as might be deemed expedient or necessary; and to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company for the payment of the said sums and the interest thereon.

In pursuance of the authority thus conferred, the company, in 1871, issued its bonds in the customary form of negotiable securities, and made them payable in the year 1906, at the office of the Union Trust Company in the city of New York, with interest at the rate of seven per cent. per annum, coupons being given for such interest. These bonds, with their interest, were secured by a deed of trust to Wm. L. Scott and Kenyon Cox, citizens of the United States, conveying to them and their successors in the trust, the railway of the company, its lands, tolls, revenues present and future, property, effects, franchises, and appurtenances. That deed declared that the bonds, and also the rights and benefits arising therefrom, should pass by delivery.

In 1873 the company issued certain bonds, of the denomination of $105 each, for the purpose of funding unpaid coupons. They were made payable, principal and interest, in gold, at the office of the Union Trust Company in the city of New York. In order to effect this arrangement for funding, the latter company was made a trustee to deliver the bonds of $105 each to

the parties surrendering the unpaid coupons. Of some of these bonds defendants in error, who are citizens of New York, became the holders. They were delivered to them at the city of New York. Upon their non-payment at maturity, the present suits at law were brought in one of the courts of that State, and judgment asked for the amount of the bonds. The railway company appeared, and upon its petition the suits were removed into the Circuit Court of the United States for the Southern District of New York. In the latter court an answer was filed, to which the plaintiff demurred. The demurrer being sustained and the company declining to answer further, judgment was rendered for the amount due on the bonds in suit.

What is the defence which my brethren have declared to be sufficient to deprive the plaintiffs of their right to judgment? That the company had paid the bonds in suit, in whole or in part? No. That, by the terms of the contract, it was discharged from liability to pay them? By no means. Its defence is placed wholly upon an act of the Parliament of Canada ratifying a certain scheme or arrangement, which is inconsistent with the contract between the parties, and to which a large minority of the bondholders and stockholders have never given their assent. That scheme provided for the surrender of the old bonds, bearing seven per cent. interest and the substitution of other bonds, maturing at a later date, and bearing a less rate of interest—three per cent. for the first three years, and five per cent. thereafter, the interest on the new bonds being guaranteed by the New York and Hudson River Railroad Company.

To this scheme the circuit court finds as a fact that the plaintiffs never assented. They stood, as they had the right to do, upon their contract with the company. But the Parliament of Canada declares that this scheme "*shall* be *deemed* to have been assented to by *all* the holders of the original first mortgage bonds of the company," and that this arrangement "*shall* be *binding* upon *all* the holders of the first and second mortgage bonds and coupons and bonds for interest thereon respectively, and upon all the shareholders of the company."

This defence, asserting the power of a foreign government, by its legislation, to destroy the contract rights of citizens of the United States, was well characterized, as it seems to me, by the learned circuit judge who tried this case, as a most extraordinary one to be made in a country where the obligation of contracts against impairment by legislative enactment, as well as the rights of persons and property, are carefully guarded by constitutional provisions. In this country, no State can pass any law impairing the obligation of contracts; the Constitution of the United States forbids such legislation. And the principle is founded in justice, independently of this constitutional provision. The statute of Canada here relied on disregards this principle, and openly and in terms impairs the obligation of the contract which each holder of these bonds has with this foreign railway company. It assumes, without a hearing and without the consent of those who hold its bonds, to discharge the railway company from all liability thereon. If any State in this Union should assume to pass a law with reference to a railway corporation she had created, requiring the holders of its bonds, for which they had paid value, to surrender them and take in their place others of less value, and payable at a different time, our courts, federal and State, would be constrained, by their obligation to support the Constitution of the United States, to declare such legislation to be in conflict with that instrument. More than that, a citizen of Canada, or even a railway corporation of that Dominion, could have the benefit, in our courts, of the constitutional inhibition upon State laws impairing the obligation of contracts.

In the *Sinking Fund Cases*, 99 U. S. 718, 719, we said that while the United States are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, yet "equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds

otherwise than according to the laws of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation."

But the laws of Canada, by the judgment now rendered, are given effect here, to the injury of our own citizens, notwithstanding those laws arbitrarily deprive them of their contract rights. This railroad company, under express authority conferred by its charter, executed bonds payable, as we have seen, in New York, and secured them by mortgage executed to citizens of the United States. It sent them to this country for sale and our people invested their money in them. Intrenched behind the arbitrary edict of a foreign government, it now says to American holders of its bonds, that it will not comply with its contract—that if they do not surrender those securities and take others of less value, they shall not receive anything.

It is claimed by my brethren that the Canada statute provides a scheme which, in its practical effect, resembles a composition in bankruptcy. It seems to me that there are several answers to this suggestion: 1. It does not purport to be a scheme of bankruptcy in the sense of the word bankruptcy as used either in England or America. 2. It is unlike a composition in bankruptcy in this: that whereas a composition is never had except upon notice, so that creditors may have their day in court, with opportunity to show that the proposed composition should not be made, here no such opportunity was given to the holders of this company's bonds, in any court or other tribunal, to show that the arrangement which the Canadian parliament sanctioned ought not, in justice, to be made; but the arrangement was, by legislative enactment, made absolutely binding upon every bondholder and stockholder, even those who are citizens of other countries.

It is said that the Canadian scheme is practically nothing

more than might be accomplished in foreclosure proceedings instituted in one of our own courts by or at the instance of the assenting bondholders. My answer is, that all bondholders and stockholders have their day in court, in such proceedings; and, when upon the judicial sale of a railway and its appurtenances, they fail to realize the full amount of their claims, they are not deprived of their property without due process of law.

Reference is made by the court to the act of the English parliament which authorizes such arrangements to be effected through courts of chancery. But, in such proceedings, all interested have their day in court, with opportunity to show that the proposed scheme should not receive judicial sanction.

In my judgment, the discharge in Canada, by statute, of this foreign railway company from all obligation to pay these bonds according to their terms—whatever may be the binding force of such legislation upon persons resident in that country, or upon those who may assert their rights under the original contract in the courts of Canada—can have no extra-territorial effect; certainly none as to persons who reside in a different State or country, where the contract is to be performed, and in the courts of which it becomes the subject of litigation.

In *Baldwin* v. *Hale*, 1 Wall. 223, it was held that a discharge obtained under the insolvent law of one State of the Union is not a bar to an action on a note even when given in and payable in the same State, the party to whom the note was given having been and being of a different State. Story, in his Conflict of Laws, says that should a State provide that the discharge of an insolvent debtor under her own laws was a discharge of all his contracts, even of those made in a foreign country, such a discharge, although binding upon the courts of that State, would or might be mere nullities in other countries. § 348. Chancellor Kent, referring to State insolvent laws, in operation when there is no national bankrupt statute, says:

"The discharge under a State law is no bar to a suit on a contract existing when the law was passed, nor to an action by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The

discharge under a State law will not discharge a debt due to a citizen of another State who does not make himself a party to a proceeding under the law. It will only operate upon contracts made within the State between its own citizens or suitors, subject to State power. The doctrine of the Supreme Court of the United States in *Ogden* v. *Saunders* is, that a discharge under the bankrupt law of one country does not affect contracts made or to be executed in another." 2 Kent, p. 392–3.

Such is the unvarying current of authority in this country. If a discharge by an insolvent law of one of the United States does not affect the contract rights of citizens of another State, how much stronger is the case where, by the terms of the contract, it is to be performed in a State or country other than that in which the discharge is granted. My brethren suggest, if I do not misapprehend their opinion, that the parties here suing must be understood to have purchased these bonds with reference to the power which the Canadian government has over corporations of its own creation. But this view, it seems to me, overlooks the principle, founded, says Story, in natural justice—and applicable here even if the bonds in suit had been purchased and delivered in Canada—that "where the contract is, either expressly or tacitly, to be performed in another place than where made, the rule is, in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." Story, Conflict of Laws, § 280; *Andrews* v. *Pond*, 13 Pet. 65; *Cook* v. *Moffatt*, 5 How. 307. Why should it not be presumed that the parties to these contracts made them with reference as well to that principle as to another principle which is thus forcibly stated by Kent?

"The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other States, it is upon a principle of comity, and only when neither the State nor its citizens would suffer any inconvenience from the application of the foreign law." 2 Kent, 406.

Story announces the same doctrine in the following language:

"And even in relation to a discharge according to the laws of the place where the contract is made, there are (as we have seen) some necessary limitations and exceptions ingrafted upon the general doctrine which every country will enforce, whenever those laws are manifestly unjust, or are injurious to the fair rights of its own citizens. It has been said by a learned judge with great force: 'As the laws of foreign countries are not admitted *ex proprio vigore*, but merely *ex comitate*, the judicial power will exercise a discretion with respect to the laws which they may be called upon to sanction; for should they be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected. Thus, if any State should enact that its citizens should be discharged from all debts due to creditors living without the State, such a provision would be so contrary to the common principles of justice that the most liberal spirit of comity would not require its adoption in any other State.'"

In Burge's Commentaries on Colonial and Foreign Laws, vol. 1, p. 5, the author says:

"It is established as a principle of international jurisprudence that effect should be given to the laws of another State whenever the rights of a litigant before its tribunals are derived from, or are dependent on, those laws, and when such recognition is not prejudicial to its own interests or the rights of its own subjects."

The same view is thus expressed by another American author:

"It [the State] must consult sound morals and the interests and public policy of its own people, and if to enforce the laws of another State or country would lead to their infringement, it would be treacherous to its own duties to lend aid to their execution." 1 Daniel on Negotiable Instruments, § 866.

In *Smith* v. *Buchanan*, 1 East, 6, 11, the question was whether a discharge of an English contract under an insolvent act of the State of Maryland, where the debtor resided, was a bar to a suit upon that contract in the courts of England. The point was there made that the discharge under the laws of Maryland was analogous and equivalent to a certificate of bank-

ruptcy in England; and having been issued by a competent jurisdiction in the case of subjects of Maryland residing there at the time, though it had not the binding force of law in England, yet the courts there should give effect to it "by adoption and courtesy of nations." But to that argument the court, speaking by Lord Kenyon, said:

"This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer is that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors." "But how," said he, "is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended he is bound by a condition to which he has given no assent either express or implied?" "In America," adds Story, referring to that case, "the same doctrine has obtained the fullest sanction." Story on Conflict of Laws, § 342.

So also in *Bartley* v. *Hodges*, 1 Best & Smith, 375, where the defendant pleaded, in a court of England, an insolvent discharge under the laws of Victoria, a British colony. The court said:

"No case has been cited to show that a discharge under the insolvent laws of Victoria is an answer to an action here, brought by an English subject on a bill of exchange drawn and payable in England. . . . It is true that the colony of Victoria is not a foreign country in one sense of the word, yet its laws are the laws of that colony only. . . . It might as well be said that the laws of the State of Maryland would apply here."

So also in *Phillips* v. *Allan*, 8 B. & C. 477, it was held that an insolvent discharge under the laws of Scotland was no bar to an action brought by an English subject in a court in England on a debt contracted in England, although it appeared that the English creditor had appeared in the Scottish proceedings for the purpose only of opposing the discharge.

The case, then, before us is one in which a foreign railway corporation pleads in discharge of its liability to pay its nego-

tiable securities, held by citizens of the United States, and which were delivered and are payable in this country, not that it had paid such securities; not that there had been a composition in bankruptcy embracing these claims; not that any court had given its sanction to the scheme in question; but that a statute of a foreign country, without the consent of those who did not approve such scheme, and without giving an opportunity before any authorized tribunal to show that such scheme ought not to be ratified, had absolved it from liability to meet its contract engagements. This defence my brethren feel obliged, upon grounds of international comity, to sustain. Thus an American court denies to American holders of foreign railway securities what an English court would not deny to English holders of American railway securities. An English court would not permit the rights of Englishmen, growing out of a contract between them and a foreign corporation, which is to be performed in England, to be injuriously affected by foreign laws in violation of the terms of that contract. I fully concur in what the circuit judge said:

"If any of our own States had passed such an act as the one under consideration, it would have been the duty of the courts of that State to treat it as an unlawful exercise of power; and certainly it cannot be expected that this court will tolerate legislation by a foreign State which it would not sanction if passed here, and which, if allowed to operate, would seriously prejudice the rights of a citizen of this State. Comity can ask no recognition of such unjust foreign legislation, and the case falls under the qualifications of a general rule, which prescribes that when the foreign law is repugnant to the fundamental principle of the *lex fori*, it will be ignored."

The principles for which I contend are not affected, in their application to this case, by the circumstance that the legislation of Canada relates to the contracts of a quasi public corporation and not to contracts wholly between individuals. For, in determining whether a statute impairs the obligation of a contract, within the meaning of our Constitution, it must be conceded that that instrument protects such obligation against

legislative impairment as well in cases of contracts with railway corporations as of contracts between individuals. It is equally clear that debts held against such corporations are property of which the citizen may not be deprived without due process of law. We said in *Pritchard* v. *Norton*, 106 U. S. 132, that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." Railway corporations are, undoubtedly, public instrumentalities employed by government to accomplish public purposes. But in this country the legislative department may not, under the guise of regulating such corporations, arbitrarily deprive creditors of the benefit of their claims against them, or impair the obligation of contracts which individuals have with them. This, perhaps, would not be disputed were this a contest between American citizens, or even citizens of Canada, and an American railway corporation.

As I do not think that a foreign railway corporation is entitled, upon principles of international comity, to have the benefit, in our courts—to the prejudice of our own people and in violation of their contract and property rights—of a foreign statute which could not be sustained had it been enacted by Congress or by any one of the United States, with reference to the negotiable securities of an American railway corporation; and, as I do not agree that an American court should accord to a foreign railway corporation the privilege of repudiating its contract obligations to American citizens, when it must deny any such privilege, under like circumstances, to our own railway corporations, I dissent from the opinion and judgment of the court.

Mr. Justice Field, not being present at the argument of this case, took no part in the decision.

SULLIVAN and Others *v.* IRON SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Submitted November 6th, 1883.—Decided December 17th, 1883.

Mineral Lands—Pleading—Statutes.

A demurrer admits all facts well pleaded.

Under the Colorado Code of Civil Procedure, as at common law, facts may be pleaded according to their legal effect, without setting out the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea.

In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under § 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode.

Mr. T. M. Patterson for plaintiffs in error.

Mr. G. G. Symes for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This action was brought by the Iron Silver Mining Company, owning a tract of land or mining claim, known as the Wells and Moyer placer claim, described by metes and bounds in the complaint, against Sullivan and others, to recover possession of part of the tract, likewise described, from which it had been ousted by the defendants. The answer originally filed was demurred to, and the demurrer sustained.

The defendants thereupon, by leave of the court, filed an amended answer, alleging that, on the 11th of March, 1879, the United States issued to Wells and Moyer, the grantors of the plaintiff, for the premises described in the complaint, and known as No. 281, upon the application for and entry of the premises as the Wells and Moyer placer claim, a placer patent, or patent of and for a placer mining claim, containing the following restrictions and exceptions:

"First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 281, as hereinbefore described, and to any veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may hereafter be discovered within said limits, and situate, and not claimed or known to exist at the date hereof.

"Second. That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The amended answer also alleged "that at the time of the location of said placer claim, and the survey thereof, and at the time of the application for said patent, and at the time of the entry of said land thereunder, and at the time and date of the issuing and granting of said patent, a lode, vein, or deposit of mineral ore in rock in place, carrying carbonates of lead and silver, and of great value, was known to exist, and was claimed to exist, within the boundaries and underneath the surface of said Wells and Moyer placer claim No. 281; and that the fact that said vein was claimed to exist, and did exist as aforesaid within said premises, was known to the patentees of said claim at all the times hereinbefore mentioned;" and "that the said application for said patent by said patentees and grantors of said plaintiff did not include any application whatever for a patent of or to said lode or vein within its boundaries aforesaid. Wherefore these defendants aver that the said failure to include said vein or lode in said application amounted to a conclusive declaration by said patentees that they made no claim whatever to said lode or vein, or any part thereof, and that the same was expressly excepted and excluded from, and did not pass with the grant of said premises in and by said patent for said premises."

The amended answer further alleged that on the 1st of January, 1883, the defendants, then and now being citizens of the United States, went upon the premises last described in the complaint, and sunk a shaft thereon, which uncovered and ex-

posed said lode, vein, or deposit; and thereupon proceeded to and did locate the same as a lode claim, by erecting a notice containing the name of the lode, the date of the location, and their own names as locators, and marked the surface boundaries by posts; and afterwards caused to be filed a location certificate containing the name of the lode, the names of the locators, the date of the location, the number of feet in length claimed on each side of the centre of the discovery shaft, and the general course and direction of said claim as near as might be. "Wherefore the defendants claim the right to occupy and possess the said premises in full accordance with, and by virtue of a full compliance with, the requirements of the laws of the United States, and of the State of Colorado, the said vein, lode, or deposit being a part and parcel of the unappropriated public mineral domain of the United States; and that the acts and doings of the defendants as hereinbefore set forth constitute the said supposed trespass complained of by the plaintiff."

The plaintiff demurred to the amended answer, because neither of its allegations set forth any defence; because it showed that neither the defendants nor their grantors had duly discovered, located, or recorded, any lode or vein such as is described in § 2320 of the Revised Statutes, at or before the time of the application for the placer patent, but that the defendants located their lode claim within the boundaries of the patented ground after the issuing of the placer patent; and because the applicants for the placer patent were not required to apply for the vein or lode claim, unless it had been duly discovered, located and recorded, and was owned by the applicants for the placer patent at the time of applying for the patent.

The circuit court sustained the demurrer to the amended answer, and gave judgment for the plaintiff, and the defendants sued out this writ of error.

The question in this case arises under § 2333 of the Revised Statutes, the different provisions of which will be more clearly distinguished from each other, without affecting the meaning of either, by separating them by periods, as follows:

"SECT. 2333. Where the same person, association or corporation

is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or load claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings. And where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim. But where the existence of the vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The section referred to in the third subdivision of this section is as follows:

"SECT. 2320. Mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

The counsel of both parties in their arguments have discussed the question whether a vein or lode included within the boundaries of a placer claim, the application for which does not include an application for the vein or lode claim, is excepted out of the patent for the placer claim, if at the time of the application it is known to the applicant to exist, but no claim to the vein or lode has been located.

In accordance with the view expressed by the circuit court in the opinion delivered on sustaining the demurrer to the original answer, and reported in 16 Fed. Rep. 829, the defendants in error maintain that by virtue of § 2333, taken in connection with § 2320 therein referred to, a vein or lode within the boundaries of a placer claim is not excepted from a patent for the placer claim, unless a claim for the vein or lode had previously been located according to § 2320.

The plaintiffs in error contend that if the existence of the vein or lode is known to the applicant for a placer claim, he must include in his application for the placer claim an application for the vein or lode claim, and pay for the latter at the higher rate, in order to obtain any title to it.

The circuit court treated the question of the construction of this statute as one of much difficulty and of some doubt, and as affecting numerous cases. This court should not express an opinion upon it, unless its determination is necessarily involved in the adjudication of the case at bar.

We are of opinion that the question is not presented for adjudication upon the record before us. The amended answer alleges that at the times of the location and survey of, entry upon, and application and patent for, the placer claim, the lode or vein was known to exist, and was claimed to exist, within the boundaries and underneath the surface of the placer claim, and the fact that the vein was claimed to exist and did exist within the premises was known to the patentees of that claim. The phrase "claimed to exist," as used in the amended answer, apparently intending to follow the form of patent therein set forth, is not indeed a statement that a claim for the vein or lode had been in due form made and located, but only that it was contended that the vein or lode existed. But the further

allegation in the answer, that the vein was known by the patentees to exist at the times mentioned, is an allegation, in the very words of the statute itself, of the fact which the statute declares shall be conclusive against any right of possession of the vein or lode claim in a claimant of the placer claim only.

Whether the words "known to exist," as used in the statute, are satisfied by actual knowledge of the applicant, or imply also a located claim for the vein or lode, the same meaning must be attributed to them in the amended answer; and the fact signified by the statute is well pleaded; for, by the elementary rules of pleading, facts may be pleaded according to their legal effect, without setting forth the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea. Bac. Ab. Pleas and Pleading, I., 7; Co. Lit. 303 *b*. The fact that the vein or lode was known to exist as contemplated by the statute being well pleaded, although in general terms, is admitted by the demurrer. *Eaton* v. *Southby*, Willes, 131; *Postmaster-General* v. *Ustick*, 4 Wash. C. C. 347; *Christmas* v. *Russell*, 5 Wall. 290. In order to present the issue discussed in argument, the plaintiff should either have traversed the allegation, or have replied that no claim for the vein or lode had been located at the time in question.

We find nothing in the statutes of Colorado which changes the rules of the common law in this respect. See Colorado Code of Civil Procedure of 1877, §§ 48, 49, 52, 61.

The judgment must therefore be reversed, and the case remanded to the circuit court, with liberty to either party to move in that court to amend the pleadings.

Judgment reversed.

Syllabus.

EX PARTE CROW DOG.

ORIGINAL.

Argued November 26th, 1883.—Decided December 17th, 1883.

Crimes—Indians—Indian Country—Repeal—Statutes—Treaties.

1. The 1st Judicial District Court of Dakota, sitting as a circuit court of the United States, has jurisdiction under the laws of the United States, over offences made punishable by those laws committed within that part of the Sioux reservation which is within the limits of the Territory.
2. In the interpretation of statutes, clauses which have been repealed may still be considered in construing provisions which remain in force.
3. The definition of the term "Indian Country," contained in c. 61, § 1 of the act of 1834, 4 Stat. 729, though not incorporated in the Revised Statutes, and though repealed simultaneously with their enactment, may be referred to in order to determine what is meant by the term when used in statutes; and it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act.
4. The legislation of the United States may be constitutionally extended over Indian country by mere force of a treaty, without legislative provisions.
5. Neither the provisions of article 1 in the treaty of 1868 with the Sioux, that "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws," nor any other provision in that act, nor the provision in article 8 of the agreement embodied in the act of February 28th, 1877, c. 72, 19 Stat. 256, that they "shall be subject to the laws of the United States," nor any other provision in that agreement or act, operated to repeal the provision of Rev. Stat. § 2146, which excepts from the general jurisdiction of courts of the United States over offences committed in Indian country, "crimes committed by one Indian against the person or property of another Indian," and offences committed in Indian country by an Indian who has been punished by the local law of the tribe; and offences where by treaty stipulations the exclusive jurisdiction over the same is or may be secured to the Indian tribes respectively.
6. The objects sought to be accomplished by the treaty of 1868 with the Sioux, and the humane purposes of Congress in the legislation of 1877, examined and shown to be inconsistent with the assumption of such a general jurisdiction by the courts of the United States.

7. The doctrine that courts do not favor repeals of statutes by implication reasserted and authorities referred to. Especially a court of limited and special jurisdiction should not take jurisdiction over a case involving human life, through an implied repeal of a statute denying it, when the words relied on are general and inconclusive: and the fact that to hold that a statute repeals by implication a previous act would reverse a well settled policy of Congress, justifies the courts in requiring a clear expression of the intention of Congress in the repealing act.

Petition for writs of habeas corpus and certiorari.

Mr. A. J. Plowman for petitioner.
Mr. Solicitor-General for United States.

Mr. Justice Matthews delivered the opinion of the court.

The petitioner is in the custody of the marshal of the United States for the Territory of Dakota, imprisoned in the jail of Lawrence County, in the First Judicial District of that Territory, under sentence of death, adjudged against him by the district court for that district, to be carried into execution January 14th, 1884. That judgment was rendered upon a conviction for the murder of an Indian of the Brule Sioux band of the Sioux nation of Indians, by the name of Sin-ta-ge-le-Scka, or in English, Spotted Tail, the prisoner also being an Indian, of the same band and nation, and the homicide having occurred as alleged in the indictment, in the Indian country, within a place and district of country under the exclusive jurisdiction of the United States and within the said judicial district. The judgment was affirmed, on a writ of error, by the Supreme Court of the Territory. It is claimed on behalf of the prisoner that the crime charged against him, and of which he stands convicted, is not an offence under the laws of the United States; that the district court had no jurisdiction to try him, and that its judgment and sentence are void. He therefore prays for a writ of habeas corpus, that he may be delivered from an imprisonment which he asserts to be illegal.

The indictment is framed upon section 5339 of the Revised Statutes. That section is found in title LXX., on the subject of crimes against the United States, and in chapter three, which treats of crimes arising within the maritime and territorial

jurisdiction of the United States. It provides that "every person who commits murder, . . . within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, . . . shall suffer death."

Title XXVIII. of the Revised Statutes relates to Indians, and the sub-title of chapter four is, Government of Indian Country. It embraces many provisions regulating the subject of intercourse and trade with the Indians in the Indian country, and imposes penalties and punishments for various violations of them. Section 2142 provides for the punishment of assaults with deadly weapons and intent, by Indians upon white persons, and by white persons upon Indians; section 2143, for the case of arson, in like cases; and section 2144 provides that "the general laws of the United States defining and prescribing punishments for forgery and depredations upon the mails shall extend to the Indian country."

The next two sections are as follows:

"Sec. 2145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Sec. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."

That part of section 2146 placed within brackets was in the act of 27th March, 1854, c. 26, § 3, 10 Stat. 270, was omitted by the revisers in the original revision, and restored by the act of 18th February, 1875, c. 80, 18 Stat. 318, and now appears in the second edition of the Revised Statutes. It is assumed for the purposes of this opinion that the omission in the original

revision was inadvertent, and that the restoration evinces no other intent on the part of Congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision.

The district courts of the Territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States as is vested in the circuit and district courts of the United States. Rev. Stat. §§ 1907–1910. The reservation of the Sioux Indians, lying within the exterior boundaries of the Territory of Dakota, was defined by Art. II. of the treaty concluded April 29th, 1868, 15 Stat. 635, and by § 1839 Rev. Stat. it is excepted out of and constitutes no part of that Territory. The object of this exception is stated to be to exclude the jurisdiction of any State or Territorial government over Indians, within its exterior lines, without their consent, where their rights have been reserved and remain unextinguished by treaty. But the district courts of the Territory having, by law, the jurisdiction of district and circuit courts of the United States, may, in that character, take cognizance of offences against the laws of the United States, although committed within an Indian reservation, when the latter is situate within the space which is constituted by the authority of the Territorial government the judicial district of such court. If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized Territorial government, it would require an act of Congress to attach it to a judicial district; of which there are many instances, the latest being the act of January 6th, 1883, by which a part of the Indian Territory was attached to the District of Kansas and a part to the Northern District of Texas. 22 Stat. 400. In the present case the Sioux reservation is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the Territorial government, the district court of that Territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offences made punishable by them committed within its limits. *United States* v. *Dawson*, 15 How. 467;

United States v. *Jackalow*, 1 Black, 484; *United States* v. *Rogers*, 4 How. 567; *United States* v. *Alberty*, Hempst. 444, opinion by Mr. Justice Daniel; *United States* v. *Starr*, Hempst. 469; *United States* v. *Ta-wan-ga-ca or Town Maker, an Osage Indian*, Hempst. 304.

The district court has two distinct jurisdictions. As a Territorial court it administers the local law of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the Territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, Laws of Dakota, 1833, ch. 9; and, in the other character, try another for a murder committed within the Indian reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death.

Sec. 2145 of the Revised Statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country, and it becomes necessary, therefore, to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

The first section of the Indian Intercourse Act of June 30th, 1834, 4 Stat. 729, defines the Indian country as follows:

> "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new States, and by the organization of Territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and

additions since made regulating intercourse with the Indian tribes, have, nevertheless, omitted all definition of what now must be taken to be "the Indian country." Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. Bramwell, L. J., in *Attorney-General* v. *Lamplough*, L. R. 3 Ex. D. 223–227; Hardcastle on Statutory Law, 217; *Bank for Savings* v. *Collector*, 3 Wall. 495–513; *Commonwealth* v. *Bailey*, 13 Allen, 541. This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204, decided at the October term, 1877. It was said in that case by Mr. Justice Miller, delivering the opinion of the court, that "it follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it,

under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. *United States* v. *McBratney*, 104 U. S. 621.

This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country.

It follows that the *locus in quo* of the alleged offence is within Indian country, over which, territorially, the District Court of the First Judicial District of Dakota, sitting with the authority of a Circuit Court of the United States, had jurisdiction.

But if § 2145 Rev. Stat. extends the act of Congress, § 5339, punishing murder, to the locality of the prisoner's offence, § 2146 expressly excepts from its operation "crimes committed by one Indian against the person or property of another Indian;" an exception which includes the case of the prisoner, and which, if it is effective and in force, makes his conviction illegal and void. This brings us at once to the main question of jurisdiction, deemed by Congress to be of such importance to the prisoner and the public, as to justify a special appropriation for the payment of the expenses incurred on his behalf in presenting it for decision in this proceeding to this court. 22 Stat. 624, ch. 143, March 3d, 1883.

The argument in support of the jurisdiction and conviction is, that the exception contained in § 2146 Rev. Stat. is repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians of April 29th, 1868, 15 Stat. 635; and an act of Congress, approved February 28th, 1877, to ratify an agreement with certain bands of the Sioux Indians, &c., 19 Stat. 254.

The following provisions of the treaty of 1868 are relied on:

"ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to

keep it. The Indians desire peace, and they now pledge their honor to maintain it.

"If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the commissioner of Indian affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws ; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the commissioner of Indian affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."

The second article defines the reservation which, it is stipulated, is

"set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them ; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over,

settle upon, or reside in the territory described in this article." . . .

"ARTICLE V. The United States agrees that the agent for said Indians shall in future make his home at the agency building; that he shall reside among them and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under their treaty stipulations, as also for the faithful discharge of other duties enjoined upon him by law. In all cases of depredation on person or property he shall cause evidence to be taken in writing and forwarded, together with his findings, to the commissioner of Indian affairs, whose decision, subject to the revision of the secretary of the interior, shall be binding on the parties to this treaty."

Other provisions of this treaty are intended to encourage the settlement of individuals and families upon separate agricultural reservations, and the education of children in schools to be established. The condition of the tribe in point of civilization is illustrated by stipulations on the part of the Indians, that they will not interfere with the construction of railroads on the plains or over their reservation, nor attack persons at home or travelling, nor disturb wagon trains, mules, or cattle belonging to the people of the United States, nor capture nor carry off white women or children from the settlements, nor kill nor scalp white men, nor attempt to do them harm.

By the Indian Appropriation Act of August 15th, 1876, Congress appropriated one million dollars for the subsistence of the Sioux Indians, in accordance with the treaty of 1868, and "for purposes of their civilization," 19 Stat. 192; but coupled it with certain conditions relative to a cession of a portion of the reservation, and with the proviso, "that no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting."

In pursuance of that provision the agreement was made, which was ratified in part by the act of Congress of February

28th, 1877. The enactment of this agreement by statute, instead of its ratification as a treaty, was in pursuance of the policy which had been declared for the first time in a proviso to the Indian Appropriation Act of March 3d, 1871, 16 Stat. 566, ch. 120, and permanently adopted in section 2079 of the Revised Statutes, that thereafter "no Indian nation or tribe within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," but without invalidating or impairing the obligation of subsisting treaties.

The instrument in which the agreement was embodied was signed by the commissioners, on the part of the United States, and by the representative chiefs and head men of the various Sioux tribes, but with certain exceptions on the part of some of the latter, and consisted of eleven articles.

The first defines the boundaries of the reservation; the second provides for wagon roads through it to the country lying west of it, and for the free navigation of the Mississippi River; the third for the places where annuities shall be received.

Article 4 was as follows:

"The government of the United States and the said Indians being mutually desirous that the latter should be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory, under the guidance and protection of suitable persons, to be appointed for that purpose by the department of the interior, with a view to selecting therein a permanent home for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the government may provide for them in the selection of a country suitable

for a permanent home where they may live like white men." 19 Stat. 255.

The fifth article recites that, in consideration of the foregoing cession of territory and rights, the United States agrees "to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools, and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868;" to provide subsistence, &c.

Article 8 is as follows:

"The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

"Article 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained; to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will, at all times, maintain peace with the citizens and government of the United States; that they will observe the laws thereof, and loyally endeavor to fulfil all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide."

By the 11th and last article it was provided that the term reservation, as therein used, should be held to apply to any country which should be selected under the authority of the United States as their future home.

The 4th article and part of the 6th article of the agreement,

which referred to the removal of the Indians to the Indian Territory, were omitted from its ratification, not having been agreed to by the Indians.

If this legislation has the effect contended for, to support the conviction in the present case, it also makes punishable, when committed within the Indian country by one Indian against the person or property or another Indian, the following offences, defined by the general laws of the United States as to crimes committed in places within their exclusive jurisdiction, viz.: manslaughter, § 5341; attempt to commit murder or manslaughter, § 5342; rape, § 5345; mayhem, § 5348; bigamy, § 5352; larceny, § 5356; and receiving stolen goods, § 5357.

That this legislation could constitutionally be extended to embrace Indians in the Indian country, by the mere force of a treaty, whenever it operates of itself, without the aid of any legislative provision, was decided by this court in the case of *The United States* v. 43 *Gallons of Whiskey*, 93 U. S. 188. See *Holden* v. *Joy*, 17 Wall. 211; *The Cherokee Tobacco*, 11 Wall. 616. It becomes necessary, therefore, to examine the particular provisions that are supposed to work this result.

The first of these is contained in the first article of the treaty of 1868, that "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws."

But it is quite clear from the context that this does not cover the present case of an alleged wrong committed by one Indian upon the person of another of the same tribe. The provision must be construed with its counterpart, just preceding it, which provides for the punishment by the United States of any bad men among the whites, or among other people subject to their authority, who shall commit any wrong upon the person or property of the Indians. Here are two parties,

among whom, respectively, there may be individuals guilty of a wrong against one of the other—one is the party of whites and their allies, the other is the tribe of Indians with whom the treaty is made. In each case the guilty party is to be tried and punished by the United States, and in case the offender is one of the Indians who are parties to the treaty, the agreement is that he shall be delivered up. In case of refusal, deduction is to be made from the annuities payable to the tribe, for compensation to the injured person, a provision which points quite distinctly to the conclusion that the injured person cannot himself be one of the same tribe. Similar provisions for the extradition of criminals are to be found in most of the treaties with the Indian tribes, as far back, at least, as that concluded at Hopewell with the Cherokees, November 28th, 1785, 7 Stat. 18.

The second of these provisions, that are supposed to justify the jurisdiction asserted in the present case, is the eighth article of the agreement, embodied in the act of 1877, in which it is declared:

"And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to

the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society. The laws to which they were declared to be subject were the laws then existing, and which applied to them as Indians, and, of course, included the very statute under consideration, which excepted from the operation of the general laws of the United States, otherwise applicable, the very case of the prisoner. Declaring them subject to the laws made them so, if it effected any change in their situation, only in respect to laws in force and existing, and did not effect any change in the laws themselves. The phrase cannot, we think, have any more extensive meaning than an acknowledgment of their allegiance as Indians to the laws of the United States, made or to be made in the exercise of legislative authority over them as such. The corresponding obligation of protection on the part of the government is immediately connected with it, in the declaration that each individual shall be protected in his rights of property, person, and life; and that obligation was to be fulfilled by the enforcement of the laws then existing appropriate to these objects, and by that future appropriate legislation which was promised to secure to them an orderly government. The expressions contained in these clauses must be taken in connection with the entire scheme of the agreement as framed, including those parts not finally adopted, as throwing light on the meaning of the remainder; and looking at the purpose so clearly disclosed in that, of the removal of the whole body of the Sioux nation to the Indian Territory proper, which was not consented to, it is manifest that the provisions had reference to their establishment as a people upon a defined reservation as a permanent home, who were to be urged, as far as it could successfully be done, into the

practice of agriculture, and whose children were to be taught the arts and industry of civilized life, and that it was no part of the design to treat the individuals as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States, outside of those which were enacted expressly with reference to them as members of an Indian tribe.

It must be remembered that the question before us is whether the express letter of § 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. *Wood* v. *The United States*, 16 Pet. 342; *Davies* v. *Fairbairn*, 3 How. 636; *United States* v. *Tynen*, 11 Wall. 88; *State* v. *Stoll*, 17 Wall. 425.

The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *generalia specialibus non derogant.* "The general principle to be applied," said Bovill, C. J., in *Thorpe* v. *Adams*, L. R. 6 C. P. 135, "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in *Fitzgerald* v. *Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. and Hem. 31–54, "that the legislature having had its attention directed to a special sub-

ject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

The nature and circumstances of this case strongly reinforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality. It is a case, too, of first impression, so far as we are advised, for, if the question has been mooted heretofore in any courts of the United States, the jurisdiction has never before been practically asserted as in the present instance. The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse Act of 1834, 4 Stat. 733. Prior to that, by the act of 1796, 1 Stat. 479, and the act of 1802, 2 Stat. 139, offences committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left

to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform. As was said by Mr. Justice Miller, delivering the opinion of the court in *United States* v. *Joseph*, 94 U. S. 614, 617:

"The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals."

To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.

It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal.

The writs of habeas corpus and certiorari prayed for will accordingly be issued.

YOUNG *v.* DUVALL and Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 16th, 19th, 1883.—Decided December 17th, 1883.

Acknowledgment—Deed—Husband and Wife.

In a suit to set aside a deed of trust executed to secure the payment of a note signed by husband and wife, and the acknowledgment of which was certified as required by law, it was in proof that the wife signed the note and the deed, having an opportunity to read both before signing them ; she was before an officer competent to take her acknowledgment, and he came into her presence, at the request of the husband, to take it ; and she knew, or could have ascertained, while in the presence of the officer, as well to what property the deed referred as the object of its execution : *Held*, that the certificate must stand against a mere conflict of evidence as to whether she willingly signed, sealed, and delivered the deed, or had its contents explained to her by the officer, or was examined privily and apart from her husband ; and that even if it be only *prima facie* evidence of the facts therein stated, it cannot be impeached, in respect to those facts, except upon proof which clearly and fully shows it to be false or fraudulent.

Bill in equity to set aside a deed of trust given by husband and wife of wife's real estate to secure payment of a debt of the husband. The following averment in the bill shows the ground of the action :

"7. Complainant charges and avers that said deed of trust (and the other paper, whatever it may be) is a fraud upon her rights ; that the same is void in law, in that she did not know its contents, and that she did not acknowledge the same in any manner, either in the presence or hearing of her husband, or separately and privately and apart from him ; that she never borrowed or ever received one cent or any other sum therefor or on account of said deed of trust ; that the whole transaction was fraudulent and void ; that said John Little is dead, and said Holtzman now claims to be the holder of said debt, and she is advised that her only remedy is in this court."

The case was mainly argued on the facts.

Mr. Enoch Totten for the appellant cited in regard to the acknowledgement and execution of a deed by a married woman.

Mott v. *Smith*, 16 Cal. 534; *Rumfelt* v. *Clements*, 46 Penn. State, 458; *Colburn* v. *Kelly*, 61 Penn. State, 314; *Clark* v. *Thompson*, 12 Penn. State, 274; *Rhea* v. *Rhenner*, 1 Pet. 105; *McCandless* v. *Engle*, 51 Penn. State, 309; *Louden* v. *Blythe*, 27 Penn. State, 22; and that a deed obtained from a married woman by coercion was void, *Richardson* v. *Hittle*, 31 Ind. 119; *Wiley* v. *Prince*, 21 Tex. 637; *Schrader* v. *Decker*, 9 Penn. State, 14; *O'Neill* v. *Robinson*, 45 Ala. 533–536; *Patterson* v. *Flanagan*, 37 Ala. 513; *Wilson* v. *Ball*, 10 Ohio, 250; *Drury* v. *Foster*, 2 Wall. 24; and that the acts of a married woman are absolutely void, *Elliott* v. *Peirsal*, 1 Pet. 328.

Mr. A. P. Duvall and *Mr. Joseph H. Bradley* for the appellees. The law is well settled that, as against the holder of the security, *bona fide*, for value, the certificate of acknowledgment is conclusive, unless in case of downright fraud or forgery, and unless the grantee knew the fraud and participated in it. Wells on Separate Est. Married Women, § 575; *Marston* v. *Brittenham*, 76 Ill. 617; *White* v. *Graves*, 107 Mass. 325; *Somes* v. *Brewer*, 2 Pick. 183; *Bissett* v. *Bissett*, 1 H. & McH. 211; *Ridgely* v. *Howard*, 3 H. & McH. 321; *Hogan* v. *Moore*, 48 Geo. 156; *Clark* v. *Pease*, 41 N. H. 414; *McNeely* v. *Rucker*, 6 Blackfd. 391; *Watson* v. *Thurber*, 11 Mich. 457; *Conn. L. I. Co.* v. *McCormick*, 45 Cal. 580; *Green* v. *Scranage*, 19 Iowa, 461; *Baldwin* v. *Snowden*, 11 Ohio St. 203; *Ins. Co.* v. *Nelson*, 103 U. S. 544, 547; *Fletcher* v. *Peck*, 6 Cranch, 133, 134; as to duress, see *Brown* v. *Pierce*, 7 Wall. 214; *Comegys* v. *Clark*, 44 Md. 108; *Radich* v. *Hutchins*, 95 U. S. 213.

Mr. Justice Harlan delivered the opinion of the court.

It is provided by the Revised Statutes of the United States, relating to the District of Columbia, that "when any married woman shall be a party executing a deed for the conveyance of real estate or interest therein, and shall only be relinquishing her right of dower, or when she shall be a party with her husband to any deed, it shall be the duty of the officer authorized to take acknowledgments, before whom she may appear, to examine her privily and apart from her husband, and to explain

to her the deed fully;" further, "if upon such privy examination and explanation, she shall acknowledge the deed to be her act and deed, and shall declare that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment, and declaration, by a certificate annexed to the deed and under his hand and seal," to the effect indicated in the form prescribed by the statute. R. S. Dist. Col. §§ 450, 451.

It is also provided that "when a privy examination, acknowledgment, and declaration of a married woman is taken and certified and delivered to the recorder of deeds for record, in accordance with the provisions of this [the 14th] chapter, the deed shall be as effectual in law as if she had been an unmarried woman; but no covenant contained in this deed shall in any manner operate upon her or her heirs, further than to convey effectually her right of dower or other interest in the real estate which she may have at the date of the deed." Ib. § 452.

These statutory provisions being in force, there was placed upon record in the proper office in the District of Columbia, on the 17th day of November, 1875, a deed of trust purporting to have been executed by Mark Young and Virginia Young, his wife, and to have been, on the same day, acknowledged before B. W. Ferguson, a justice of the peace in and for the District of Columbia. The certificate of that officer, under his hand and seal, shows that the grantors were personally known to him to be the persons who executed the deed; that they personally appeared before him, in this district, "and acknowledged the same to be their act and deed, and the said Virginia Young, wife of said Mark Young, being by me [him] examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it."

This deed of trust conveyed certain real estate, in the city of Washington, the property of Mrs. Young, to the appellees, Duvall and Holtzman, in trust to secure the payment of a note executed by the grantors, whereby they promised to pay to the order of John Little, two years after date, at the National

Metropolitan Bank, the sum of $8,000, with interest at the rate of ten per cent. until paid. Neither Little, nor the present holder of the note, had any knowledge of the circumstances attending the execution of the deed. Default having occurred in the payment of the debt so secured, the trustees advertised the property for sale at public auction. Thereupon Mrs. Young instituted this suit for the purpose of preventing such sale, and to obtain a decree declaring the deed of trust fraudulent and void, and requiring it to be surrendered for cancellation.

The bill sets forth several grounds upon which relief to that extent is asked, but those only deserve serious consideration which are embraced by averments to the following effect: That the contents of the deed were never explained to her; that she signed it because she was required, ordered and commanded to do so by her husband and a person who was with him; that its contents were never known or explained to her by the officer; that so far from her having been examined, in reference to the deed, privily and apart from her husband, the latter remained in the presence of herself and the officer on the occasion when it is claimed she signed, acknowledged, and delivered it.

It was in proof that Mrs. Young signed the note and the deed, having an opportunity to read the papers before signing them; she was before an officer competent under the law to take her acknowledgment, and he came into her presence for the purpose of receiving it; he so came at the request of the husband, who expected, by means of the executed deed of trust, to secure a loan from John Little of the amount specified in the note; and she knew, or could readily have ascertained while in the presence of the officer, as well to what property the deed referred as the object of its execution. There is, however, a conflict in the evidence as to whether she willingly signed, sealed, and delivered the deed, or had its contents fully or at all explained to her by the officer, or was examined privily and apart from her husband.

It is not necessary to enter upon a review of the adjudged cases bearing upon the general question of the effect to be given to the certificate of an officer taking an acknowledgment of a married woman to a conveyance of real estate; for, if it

be assumed, for the purposes of this case, that it is only *prima facie* evidence of the facts stated in it, we are of opinion that the integrity of the certificate before us has not been successfully impeached. The certificate of the officer states every fact essential, under the statute, to make the deed, upon its being delivered for record, as effectual in law as if Mrs. Young was an unmarried woman. The duties of that officer were plainly defined by statute. It was incumbent upon him to explain the deed fully to the wife, and to ascertain from her whether she willingly signed, sealed, and delivered the same, and wished not to retract it. The responsibility was upon him to guard her against coercion or undue influence upon the part of the husband, in respect of the execution and delivery of the deed. To that end he was required to examine her privily and apart from the husband. These facts were to be manifested by a certificate under his hand and seal. Of necessity, arising out of considerations of public policy, his certificate must, under the circumstances disclosed in this case, be regarded as an ascertainment, in the mode prescribed by law, of the facts essential to his authority to make it; and if, under such circumstances, it can be contradicted, to the injury of those who in good faith have acted upon it—upon which question we express no opinion—the proof to that end must be of such a character as will clearly and fully show the certificate to be false or fraudulent. *Insurance Company* v. *Nelson*, 103 U S. 544, 547. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity in the titles to real estate which would inevitably follow from one less rigorous.

It is sufficient for the disposition of this case to say that, even upon the assumption that the certificate is only *prima facie* evidence of the facts stated in it, the proof is not of that clear, complete, and satisfactory character which must be required to impeach the official statements of the officer who certified Mrs Young's acknowledgment of the deed in question.

The decree must, therefore, be affirmed.

It is so ordered.

PROVIDENCE & NEW YORK STEAMSHIP COMPANY *v.* HILL MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMON WEALTH OF MASSACHUSETTS.

Argued April 2d and 3d, 1883.—Decided December 17th, 1883.

Common Carriers—Conflict of Laws—Federal Courts—Jurisdiction—Limited Liability—Statutes—Vessels.

1. Proceedings in the district court of the United States under the act of 1851, 9 Stat. 635, to limit the liability of ship owners for loss or damage to goods, supersede all other actions and suits for the same loss or damage in the State or federal courts, upon the matter being properly pleaded therein.
2. The effect of such proceedings in superseding other actions and suits does not depend upon the award of an injunction by the district court, but upon the object and intrinsic character of the proceedings themselves, and the express language of the act of Congress.
3. The power of Congress to pass the act of 1851, and of this court to prescribe the rules adopted in December term, 1871, for regulating proceedings under the act, reaffirmed.
4. Loss and damage by fire on board of a ship are within the relief of the 3d, as well as the 1st, section of the act.
5. Goods transported by steamer from Providence to New York were injured by fire on board the vessel at her dock in the latter place, and suits for damage were commenced against the owners of the steamer in New York and Boston; thereupon proceedings were instituted by such owners in the district court of the United States for New York, under the act of 1851, to limit their liability: *Held*, that said proceedings, properly pleaded and verified, superseded the actions in other courts, and that it was error to proceed further therein.

Action in the Supreme Judicial Court of Massachusetts by the Hill Manufacturing Company, a corporation established under the laws of Maine, having a place of business in Boston, against the Providence & New York Steamship Company, a corporation established by the laws of Rhode Island, and having no place of business in Massachusetts, but having a debt due it from a Massachusetts corporation which was garnisheed. The suit was brought to recover the value of cotton goods transported from Providence to New York in one of the steamship company's vessels, and destroyed by fire in the vessel at the

dock in New York. The defendants denied liability. Pending proceedings the steamship company applied to the District Court of the United States for the Southern District of New York for the benefits of the limited liability act of 1851, 9 Stat. 635. Under that act the district court took jurisdiction of all claims against the vessel and its owners arising out of the destruction of the property on board, and issued an order restraining their prosecution elsewhere. This order was duly served on the Hill Manufacturing Company, and was pleaded and offered in evidence in this suit; but the court nevertheless proceeded to give judgment against the steamship company. The defendants brought their writ of error to reverse that judgment.

Mr. Joseph H. Choate and *Mr. Moorfield Storey* for plaintiffs in error.

Mr. Josiah G. Abbott and *Mr. Samuel A. B. Abbott* for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

The writ of error in this case brings up for consideration a judgment of the Supreme Judicial Court of Massachusetts rendered in an action brought by The Hill Manufacturing Company against the Providence and New York Steamship Company as common carriers, to recover damages for the loss of certain goods delivered by the plaintiffs to the defendants at Providence, Rhode Island, to be transported to the city of New York, which goods, it is alleged, were, by the negligence of the defendants, burned and injured by fire. The loss is stated to have occurred in May, 1868; the action was commenced in September, 1870. The defendants first put in an answer denying the allegations of the declarations; but averring that if the goods were delivered to them for the purpose stated, they were delivered to and received by them to be transported to the city of New York over Long Island Sound (not being river or inland navigation), and were safely transported to New York in their steamship Oceanus, and that the damage, if any, was caused by fire happening to said steamship at her dock in New

York, and said fire was not caused by the neglect or design of the defendants, who were the owners of said steamship, but occurred without their privity or knowledge; and they pleaded the first and third sections of the act of Congress, approved March 3d, 1851, 9 Stat. 635, entitled "An Act to limit the liability of ship owners, and for other purposes," the first section of which provided as follows, to wit:

"That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners."

And the third section of said act provided as follows, to wit:

"That the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board such ship or 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 or owners respectively in such ship or vessel and her freight then pending."

The defendants subsequently amended their answer by adding a particular statement of the manner in which the loss occurred, namely, by a fire at New York, which commenced in a building on the wharf or pier at which the steamship lay after her arrival, and was rapidly communicated to the vessel, which was burned to the water's edge, together with most of her cargo, including not only the goods of the plaintiffs, but a large quantity of goods of other persons, greatly exceeding in amount the value of the defendants' interest in the vessel and her freight then pending. The amended answer further stated, that the defendants having been sued in the

present case and in other cases in New York city and elsewhere, for injuries to said cargo by said fire, and desiring as well to contest their liability, and the liability of the steamer, for the loss and damage occasioned by the fire, as also to claim the benefit of the limitation of liability provided for in the third and fourth sections of said act of Congress, on May 14th, 1872, filed in the proper district court of the United States having jurisdiction thereof, to wit, the District Court for the Southern District of New York, pursuant to said act and the rules of the Supreme Court of the United States in that behalf, their libel and petition, setting forth the facts and circumstances on and by reason of which such exemption from and limitation of liability were claimed, and offering to pay into said district court the amount of the defendants' interest in said vessel and freight, or to give a stipulation with sureties for the payment thereof into said court whenever the same should be ordered, praying relief in that behalf, and further praying that said district court would cause due appraisement to be had of the amount or value of the interest of said defendants in said steamer and her freight for said voyage, and would either order the same to be paid into said district court, or a stipulation to be given by the defendants with sureties for the payment thereof into said district court whenever ordered, and that said district court would issue a monition against all persons claiming damages for the loss, destruction, damage, and injury occasioned by said fire on board of said vessel, citing them to appear before said district court and make due proof of their respective claims at a time to be therein named; and also praying that said district court would designate a commissioner, before whom such claims should be presented in pursuance of said monition; and that if, upon the coming in of the report of said commissioner and confirmation thereof, it should appear that said defendants were not liable for such loss, damage, destruction, and injury, it might be so finally decreed by said district court; otherwise, that the moneys paid or secured to be paid into said district court as aforesaid (after payment of the costs and expenses) should and might be divided pro rata amongst the several claimants in proportion to the amount of their re-

spective claims, and praying that in the meantime, and until the final judgment should be rendered, said district court would make an order restraining the further prosecution of all and any suit or suits against said defendants in respect to any such claim or claims; that upon said libel said district court caused due appraisement to be had and made of the amount or value of the interest of said defendants in said steamer and her freight for said voyage, and duly made an order for the giving by the defendants of a stipulation with sureties for payment thereof into court whenever the same should be ordered.

The answer further stated that the defendants, pursuant to the order of said district court, entered into a stipulation, with two sureties, to pay the value of said interest and freight as so appraised into said district court whenever ordered, which stipulation was approved, and said order having been complied with, a monition was thereupon issued by said district court against all persons claiming damages for the loss, destruction, damage, and injury occasioned by said fire on board said steamer, citing them to appear before said district court and make due proof of their respective claims at or before a certain time named in said monition, to wit, at or before the fifteenth day of October, A.D. 1872, which time was at least three months from the issuing of said monition; and designating George F. Betts, Esq., a commissioner of said district court, as the commissioner before whom such claims should be presented, in pursuance of said monition, and ordering public and other notice of said monition as therein set forth, and that said notice had been served on the said Hill Manufacturing Company, as well as on all other claimants, pursuant to said monition; and said district court duly made an order restraining the further prosecution of all and any suit or suits against the defendants in respect of any such claim or claims.

The answer then referred to a certified copy of the libel and the proceedings thereon, annexed to and made part of the answer, and also made profert of said libel and proceedings, and concluded as follows:

"And these defendants further say that said fire, and the injury

thereby caused or occasioned, was without the privity or knowledge of these defendants. And these defendants further answering, say that if the plaintiffs have any claim by reason of any injury to said cotton cloth, it cannot be enforced in this action, but can only be enforced in said suit in said district court, and then and there only under and pursuant to said act of Congress. And these defendants, further answering, say that said steamer Oceanus was not a canal boat, barge, or lighter, and was not used in rivers or inland navigation, and that said voyage from Providence to said city of New York was not in rivers or inland navigation; and that an injunction has been issued by said district court against said Hill Manufacturing Company, restraining and enjoining them from the further prosecution of this suit, and that said injunction has been duly served on said Hill Manufacturing Company; and further, that said Hill Manufacturing Company sued in this court the Boston & Lowell Railroad Company for the alleged loss and injury complained of in the declaration in this cause to the cotton cloth therein mentioned, and recovered therein a judgment against said Boston & Lowell Railroad Company for said alleged loss and injury, which judgment was settled, paid, and satisfied."

Upon the filing of this answer the case was opened to a jury, but before any verdict was taken the case was reserved, upon the report of the judge who presided at the trial, for the consideration of the full court. In September term, 1875, it was ordered by the Supreme Judicial Court that the case do stand for trial. Whereupon the defendants filed the following objections, viz.:

"And now, with the view of having this action taken to the Supreme Court of the United States upon a writ of error, if the final judgment therein in this honorable court shall be against the defendants, and for the purpose of saving the rights of the defendants, and so that their going to trial shall not be construed a waiver of their rights or of the objections herein, said defendants come and object to and protest against the ruling and decision of this honorable court ordering and directing said action to stand for trial, and also the ruling of this honorable court that if the loss complained of by the plaintiffs was occasioned by the neglect

of defendants it must have been with their privity or knowledge and was not within the act of Congress limiting the liability of ship owners; also the ruling that the proceedings in the district court of the United States did not affect the jurisdiction of this honorable court."

In April term, 1876, the cause came on for trial, and the defendants, by leave of the court, further amended their answer by setting forth, amongst other things, the final decree of the District Court of the United States for the Southern District of New York, made on the 16th of October, 1872, by which it was adjudged and decreed that the Hill Manufacturing Company (the plaintiffs in the present suit), among other parties, be forever debarred from prosecuting any claims for damages for any loss, damage, or injury occasioned by the fire on board the steamer Oceanus, on the 24th of May, 1868.

Thereupon the trial proceeded, and the evidence showed that the plaintiffs' goods were delivered to the defendants at Providence to be transported to New York, and were thus transported in the steamer Oceanus, upon Long Island Sound, and that the vessel safely arrived at New York with the goods on board, and was moored in a slip or dock on the North River side on a Sunday morning; and whilst lying there on that day, ready to be discharged, the fire occurred which caused the loss in question, commencing in a building on the wharf or pier which was used by the defendants in their transportation business. The plaintiffs adduced evidence tending to show that this building was not properly constructed and managed to avoid the risk of fire, and that the defendants were guilty of negligence in that behalf; and they contended that if the jury believed that the defendants were guilty of such negligence, they could not claim the benefit of the act of Congress, but were liable to respond for the loss of the goods. The defendants adduced counter proofs, tending to show that they were not guilty of any negligence; and also put in evidence the record of proceedings upon their libel and petition in the District Court of the United States for the Southern District of New York, corresponding to the statements of their

answer; and it was admitted that process and the restraining order issued in said suit had been duly served upon the plaintiffs. The record of proceedings in said suit is set forth in the transcript, but it is unnecessary to describe them in detail. They appear to be in conformity to the act of 1851, and to the orders made by this court relating to proceedings under said act for securing the benefit of limited liability provided for therein. They were instituted in the proper court, namely, the District Court of the United States for the Southern District of New York, in which district the steamer was found, or so much as remained of her after the fire. The libel and petition set forth the proper facts and made the proper allegations, as well to show that neither the libellants nor the steamer were liable for the injury caused by the fire, as to show that, if there was any liability, the libellants were only liable to the extent of their interest in the vessel and freight; and upon this libel and petition the proper proceedings were had, and the proper monition and process were issued, published and served, to ascertain the amount of the libellants' interest in the steamer and freight, and to bring all parties before the court who had any claims arising from the injury caused by the fire; and the said district court, on the 13th day of May, 1872, made an order restraining the further prosecution of the suits which had been commenced against the libellants in New York, which was duly served upon the respective parties concerned; and after the amount of the libellants' interest in the vessel and freight had been duly appraised on the 8th of July, 1872, a further order was made that a monition issue against all persons claiming damages for the loss and injury occasioned by the fire on board of said steamer, citing them to appear before said district court and make due proof of their respective claims at or before the 15th day of October, 1872; and that the monition be published, and personally served on the attorneys, proctors or solicitors of the plaintiffs or libellants in each of the suits brought and pending in any court in the United States against the libellants, or against said steamer Oceanus, to recover for any such damages. A monition was duly issued in pursuance of this order, and was served

on the attorney of the plaintiffs in this suit on the 30th day of July, 1872. On the 2d day of September, 1872, the district court made a further order against the different plaintiffs and libellants by name who had brought suits for damages, &c., and, amongst others, against the plaintiffs in this case, ordering them to refrain from the further prosecution of their respective suits, or any suit whatever, against the libellant (the defendants in this suit) to recover for any loss of cargo by the aforesaid fire on the steamship Oceanus; and that any further prosecution of such suits be and the same was by said order restrained. A certified copy of this order was served on the plaintiffs' attorney in this suit at Boston on the 7th day of October, 1872, and upon their treasurer at the same place, on the 9th of the same month. On the 16th of October, 1872, default was taken against the plaintiffs in this case, and divers other persons, for failing to appear and present their claims before the district court according to the monition in that behalf, and a decree was made forever debarring them from presenting, filing or prosecuting any claims for damages for any loss or injury occasioned by said fire.

After the evidence was closed, the defendants asked the court to rule that upon the whole evidence in the case the plaintiffs could not maintain their action, and that the jury must find for the defendants; but the court refused so to rule. The defendants then asked the court to instruct the jury, amongst other things, as follows:

"1. That under the proper construction of the act of Congress entitled 'An Act to limit the liability of ship owners, and for other purposes' (U. S. Stat. 1851, ch. 43), the libel and petition of the defendants filed in the District Court of the United States for the Southern District of New York, and the proceedings had thereon, the record of which has been put in evidence, are a bar to the plaintiffs' action.

"2. That under the proper construction of said act of Congress, the plaintiffs are precluded from maintaining their action by said proceedings in said district court.

"3. That by the decree of said district court, made upon said libel and petition, and the subsequent proceedings thereon, it has

been adjudged, as between the parties to the present suit, that the fire which caused the damage, for which the plaintiffs seek to recover, was not caused by the design or neglect of the defendants within the meaning of said act of Congress."

The court refused to give these instructions; but left it to the jury to find for the plaintiffs if they were satisfied from the evidence that the fire was caused by the negligence of the defendants, either in respect to the construction and equipment of the vessel, or in respect to the construction and management of the pier or buildings thereon.

To all the rulings of the court the defendants excepted; and the jury having found a verdict for the plaintiffs, the exceptions were argued before the supreme judicial court, and were overruled, and judgment was entered for the plaintiffs. To that judgment this writ of error is brought. The case, as decided by the Supreme Judicial Court of Massachusetts, is reported in 113 Mass. 495, and 125 Mass. 292.

The principal question in this case is, whether the institution of proceedings in the District Court of the United States, under the act of 1851, for procuring a decree of limited liability of the owners of the Oceanus (the defendants in the present action), for the losses and injuries to goods on board of the vessel, superseded the prosecution of claims for the same losses and injuries in other courts. It seems to us that this must be the necessary effect of such proceedings, and that this results as well from the language of the law, as from its object and purpose.

The first section of the act exempts ship owners from liability for losses on board of their ship by fire, "unless such fire is caused by the design or neglect of such owner or owners."

The second section relates to the shipping of precious metals and other valuables without giving notice of their character and value, and exempts the master and owners of the vessel, in such case, from liability as carriers.

The third section declares that the liability of ship owners for embezzlement, loss or destruction of goods on board of their ship by the master, crew, passengers or others, or for loss or

damage 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 or owners respectively in such ship or vessel and her freight then pending.

The fourth section of the law declares, "That if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares or merchandise, or any property whatever on the same voyage, and the whole value of the ship or vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease." 9 Stat. 635, 636.

By the last section of the act it is declared that it shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatever, used in rivers or inland navigation.

In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution

of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.

As the present case raises a question of great importance to the practical and successful working of the law, the decision of which, indeed, will determine whether it is to be of any real value, it will be proper to examine a little the grounds on which, as well the law itself as the proceedings adopted for carrying it into execution, rest for their support.

We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress "to regulate commerce." In the case of the *Lottawana*, 21 Wall. 558, speaking of the power to make changes in the maritime law of the country, we said:

"Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true; but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. . . . On this subject the remarks of Mr. Justice Nelson, in delivering the opinion of the court in *White's Bank* v. *Smith*, 7 Wall. 655 (which established the validity and effect of the act respecting the record-

ing of mortgages on vessels in the custom house) are pertinent. He says, 'Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1st, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen or citizens of the United States, and to be commanded by a citizen of the same. . . . Congress having created, as it were, this species of property and conferred upon it its chief value, under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the securing and protection of the rights and title of all persons dealing therein.'"

It need not be added that if Congress had power to pass the act of 1851, it is binding on all courts and jurisdictions throughout the United States.

We have said that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect.

Although the act was passed in 1851, it stood on the statute book for twenty years before a careful scrutiny of its provisions was demanded of this court. In the case of *The Norwich Transportation Company* v. *Wright*, decided in December term, 1871, and reported in 13 Wallace, 104, we were called upon to interpret the act, and to adopt some general rules for the better carrying of it into effect. On that occasion, a history of similar acts, both in England and this country, an examination of the general maritime law on the same subject, and the circumstances under which the act of 1851 was passed, were reviewed, and the general effect and construction of the

act were examined and discussed. The consideration given to the whole subject in the opinion delivered in that case, and in subsequent opinions of this court when the matter has been brought up for examination, notably in the cases of *The Benefactor*, 103 U. S. 239, and *The North Star*, 106 U. S. 17, supersedes the necessity of any minute examination of the law at this time. We will make one extract from the opinion in the case first referred to. It is there said:

"The proper course of proceeding for obtaining the benefit of the act would seem to be this: When a libel for damages is filed, either against the ship *in rem* or the owners *in personam*, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there), or give due stipulation for, such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the ship owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits. If an action should be brought in a State court, the ship owners should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State court, or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the district courts, we have prepared some rules which will be announced at an early day."

These rules were announced at a subsequent day of the same term, and will be found at the commencement of 13 Wallace, pages xii. xiii.

The substance of these rules, so far as relates to the purpose in hand, was as follows: that ship owners desiring to claim the benefit of limitation of liability provided for in the third and fourth sections of the act, may file a libel or petition in

the proper district court of the United States, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying relief in that behalf; and thereupon the court, having caused due appraisement to be had of the amount or value of the interest of said owners respectively in the ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court whenever the same shall be ordered; or, if the owners shall so elect, the court shall, without such appraisement, make an order for the transfer by them of their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of the act, and upon compliance with such order, the court shall issue a monition against all persons claiming damages for loss or injury to goods (respecting which the limited liability is sought), citing them to appear before the court and make due proof of their respective claims, at or before a certain time not less than three months from issuing the same; and public notice of the monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court in its discretion may direct; and the court shall also, on the application of the owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owners in respect of any such claims.

Provision is then made for proof of all claims before a commissioner to be appointed by the court, for a report thereon, and for a *pro rata* distribution of the money paid into court, or the proceeds of the ship and freight, amongst the several claimants.

The rules further provide that the ship owners, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that if liable they are entitled to a limitation of liability under the act; and that any parties claiming damages may contest the right of the ship owners to exemption from liability, or to the benefit of a limited liability.

Finally, the rules provide that the libel or petition shall be

filed and the said proceedings had in any district court of the United States in which the ship or vessel may be libelled to answer for any such loss or damage; or, if the vessel be not libelled, then in the district court of any district in which the owners may be sued; and if the ship have already been libelled and sold, the proceeds shall represent it.

The court had no doubt then, and has no doubt now, of its power to make these rules under the acts of Congress which authorized it to prescribe the forms of proceeding in equity and admiralty causes. The Process Acts of 1792 and 1828 had declared that the forms of writs and other process, and the forms and modes of proceeding in suits in equity and in those of admiralty and maritime jurisdiction, should be according to the principles, rules and usages which belong to courts of equity and admiralty respectively, as contradistinguished from courts of common law, except as modified by the Judiciary Act of 1789; but subject to such alterations and additions as the respective courts should in their discretion deem expedient, or to such regulations as the Supreme Court of the United States should think proper from time to time by rule to prescribe to any circuit or district court concerning the same. 1 Stat. 276; 4 Stat. 278. And the Process Act of 1842 gave the supreme court full power and authority to prescribe and regulate the forms of process in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings, in suits at law, in admiralty or in equity in said courts, and the forms and modes of taking evidence, and generally the forms and modes of proceeding to obtain relief, and of drawing up and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice of said courts. 5 Stat. 518.

We are clearly of opinion that the authority thus vested in this court was adequate and sufficient to enable it to make the rules before referred to. The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the sub-

ject-matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to ship owners its benefits, was therefore strictly within the powers conferred upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own.

We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants, against the ship owners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose.

In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted which should bring all the parties interested into one litigation, and all the claimants into concourse for a *pro rata* distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized. Cases might occur, it is true, in which the shipowners could avail themselves of those benefits, by way of defence alone, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they

would be liable to a diversity of suits, brought perhaps in different States, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals; whilst in the ordinary cases, where a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a *pro rata* distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute. The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all (if that point is contested and has not been decided), and secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and if it does (as happened in this case), the proceedings in the district court will be thwarted and rendered ineffective to secure to the ship owners the benefit of the statute.

This case is very different from that of two concurrent actions for a debt or other demand proceeding at the same time in different courts; though even that, in the English law, was matter for plea in abatement in the action last instituted. Still, as both actions in such case are prosecuted for the same end—the satisfaction of the debt—and as only one satisfaction can be had, no essential conflict arises between the two. But the very object of proceedings for limited liability is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving up, or submitting to pay the value of, all their interest in the ship and freight. Besides, it is obvious on the face of the thing, that proceedings for limited liability cannot be participated in by two jurisdictions, without interference and conflict between them, and cannot have any useful effect if a different court may inquire into and decide the same question, and execute a separate judgment independent of, and

perhaps contrary to, that of the court to which the inquiry properly belongs. Such a state of things would utterly defeat the purpose of the law. The judgment in one court would annul or render nugatory that of the other.

The inconveniences that may arise from preventing or arresting the prosecution of separate suits by the claimants are no greater in this case than in the case where proceedings at law are arrested for the purpose of having an investigation in a court of equity, or where distinct and separate suits are restrained for the purpose of settling a common controversy in a single proceeding, as in the case of bills for preventing a multiplicity of suits, and in cases of bankruptcy. By the Bankrupt Act of 1867 it was enacted that no creditor whose debt was provable under the act should be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge should have been determined; although, if the amount due the creditor was in dispute, the suit, by leave of the court in bankruptcy, might proceed to judgment for the purpose of ascertaining the amount, but execution should be stayed. See *Hill* v. *Harding*, 107 U. S. 631. None of the cases here referred to more imperatively require a cessation of proceedings in other suits for the same cause than that of the proceeding for a limitation of liability under the statute in question.

Nor is the inconvenience any greater than that which occurs when a case is removed from the State to a federal court. In that case, on the presentation of a petition for removal, duly verified and showing the proper grounds for removal, and accompanied with the bond required by the statute on that subject, the law declares "it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit." In the case before us, as well as in the cases of bankruptcy and of removal, the parties have a right to have their causes heard and determined by a court of the United States invested with appropriate jurisdiction, and capable of affording a proper mode of relief.

In England, where the forms and modes of proceeding in the courts of admiralty are (or formerly were) greatly hampered and

restricted, ship owners seeking a decree of limited liability under the law of that country, were forced to resort to the court of chancery for redress, and to call before that court the various parties interested. Here they were subjected to some onerous conditions before the court would exercise jurisdiction in their behalf, one of which was, that they must confess liability for the damages which they sought to have limited in accordance with the act of Parliament. But when this was done, and the amount of the confessed liability was paid into court, they were entitled to an injunction against all other suits and proceedings wherever instituted or pending; and the cause then proceeded, in due course, by reference to a master to take the proof of claims and make a report of the facts, and by a final decree of distribution.

Under recent English statutes, the High Court of Admiralty, as well as the court of chancery, is empowered to administer the law, when it has possession of the ship or its proceeds. In the 11th edition of Abbott on Shipping, published in 1867, it is stated as follows:

"In cases where several claims are made or apportioned against an owner for loss of life, personal injury, or loss or damage to ships, boats, or goods, the court of chancery, and the High Court of Admiralty, whenever any ship or proceeds thereof are under its arrest, in England and Ireland, and the Court of Session in Scotland, and any competent court in a British possession, are empowered to entertain proceedings at the suit of such owner for the purpose of determining the amount of his liability, and for the distribution ratably of such amount, and to stop all actions and suits pending in any other court in relation to the same subject-matter.*

It is believed that in all other countries except England, the courts of admiralty, or tribunals of commerce having cognizance of maritime causes, exclusively exercise this jurisdiction; and no other courts can really exercise it so conveniently and satisfactorily as those courts can. And the general course of pro-

* Referring to 24 Vict., c. 10, s. 13. For the previous practice see *The Saracen*, 2 W. Rob. 451; *S. C.* on appeal, 11 Jurist, 255; 6 Moore P. C. 56; *The Clara*, Swabey, 6.

ceeding, in whatever courts it is exercised, shows the necessity, everywhere acknowledged, that the court exercising the jurisdiction in any case should have exclusive control of the case.

In view of these considerations, and having no doubt of the jurisdiction of the district courts over the matter, as courts of admiralty, in the rules adopted in December term, 1871, the District Court of the district in which the vessel is libelled or found, or in which the owners are sued, was designated as the proper court in which to institute the proceedings for obtaining a decree of limited liability. When cases arise in which the vessel and freight have been totally lost, and no District Court has, or can have, possession of any fund to distribute, resort may probably be had with propriety to the District Court of the district in which the owners reside, or where the vessel perished. It will be time enough, however, to consider what is proper in such exceptional cases when they arise. In *Ex parte Slayton*, 105 U. S. 451, we held that jurisdiction accrued to the District Court of the district comprising the port to which the vessel was bound, although she had been sunk in the lake and only a few fragments were washed ashore, the proceeds of which, however, amounting to a trifling sum, were deposited in court. On this branch of the subject the following remarks were made in the opinion pronounced in the case of *Norwich Transportation Company* v. *Wright*, already cited:

"The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take '*the appropriate proceedings in any court*, for the purpose of apportioning the sum for which,' &c. Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, are brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore,

the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has framed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding." 13 Wall. at 123.

We see no reason to modify these views, and, in our judgment, the proper District Court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts; and its decrees, in cases subject to its jurisdiction, are valid and binding in all courts and places. In the present case, the proper court undoubtedly was the District Court of the United States for the Southern District of New York, where the remains of the vessel were situated, and where suits were brought against the owners. Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims.

But the power of the District Courts to issue an injunction to stay proceedings in a State court is questioned, since, by the Judiciary Act of 1793, 1 Stat. 335, it was declared that no writ of injunction shall be granted [by the United States courts] "to stay proceedings in any court of a State." But the act of 1851 was a subsequent statute, and by the 4th section of this act—after providing for proceedings to be had under it for the benefit of ship owners, and after declaring that it shall be deemed a sufficient compliance with its requirements on their part if they shall transfer their interest in ship and freight for

the benefit of the claimants to a trustee to be appointed by the court—it is expressly declared, that "from and after [such] transfer all claims and proceedings against the owners shall cease." Surely this injunction applies as well to "claims and proceedings" in State courts as to those in the federal courts; and whilst the District Court having jurisdiction of the case, for the purpose of enforcing the act of Congress and the rules adopted by this court in pursuance thereof, can only direct an injunction against the parties and not against the courts in which such "claims and proceedings" are prosecuted; yet, any further proceedings on the part of said courts, after being judicially informed by plea or suggestion duly made in the cause, of the action and proceedings in the District Court, would be against the express words of the act, and clearly erroneous. The operation of the act, in this behalf, cannot be regarded as confined to cases of actual "transfer" (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested.

This view of the statutory injunction, and of its effect upon separate actions and proceedings, renders it unnecessary to determine the question as to the legality of the writ of injunction issued by the District Court. Although we have little doubt of its legality, the question can only be properly raised on an application for an attachment for disobeying it. As the writ was issued prior to the adoption of the Revised Statutes, the power to issue it was not affected by any supposed change of the law introduced into the revision, by the 720th section of which the prohibition of the act of 1793 in regard to injunctions against proceedings in State courts has this exception appended to it: "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Under the rule of "*expressio unius*," this express exception may be urged as having the effect of excluding any other exception; though

it is observable that the injunction clause in the act of 1851 is preserved without change in section 4285 of the Revised Statutes, and will probably be construed as having its original effect, due to its chronological relation to the act of 1793.

But, as before indicated, the legality of the writ of injunction is not involved in this case. In our opinion the State court, in overruling the plea of the defendants, which set up the proceedings pending in the District Court, and in ordering the cause to stand for trial; and again, on the trial, in overruling as a defence the proceedings and decree of the District Court as set up in the amended answer, disregarded the due effect, as well as the express provisions, of the act of 1851, and therein committed error. It was the duty of the court, as well when the proceedings pending in the District Court were pleaded and verified by profert of the record, as when the decree of said court was pleaded and proved, to have obeyed the injunction of the act of Congress, which declared that "all claims and proceedings shall cease." When the plea only showed that proceedings for limited liability were pending and undetermined in the District Court, probably a stay of proceedings was all that the defendants could require; but when they set up and produced the final decree of that court, forever debarring the plaintiffs from prosecuting any claim for damages, they were entitled either to a verdict and judgment in their favor, or to a dismissal of the proceedings.

We have assumed in the foregoing discussion that the case of loss and damage by fire on board of a ship is within the provisions of the third and fourth sections of the act of 1851. This, however, is disputed, and it is necessary to examine the question. The language of the third section (which governs also the fourth) is certainly broad enough to embrace cases of loss by fire. It declares that the liability of the owner or owners of any ship or vessel "for any act, matter or thing, loss, damage, or forfeiture, 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 or owners respectively in such ship or vessel and her freight then pending." Why should liability for loss by fire be excepted

from the relief here prescribed? It is just as much within the reason of the law as any other liability; and it is within its terms. If it is excepted, it must be by virtue of some implication arising from other parts of the law. Such an implication is sought in the first section, which declares that no owner or owners of a ship or vessel shall be liable to answer for any loss or damage which may happen to any goods on board of such ship or vessel by reason or means of any fire happening to or on board of said ship or vessel, "unless such fire is caused by the design or neglect of such owner or owners." It is contended that this section covers the whole ground so far as liability for losses by fire is concerned, and therefore such liability must be impliedly excepted from the relief provided by section three. But we fail to see why this should necessarily follow. Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship owners, as common carriers, were held liable for any loss or damage caused thereby. The first section of the act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III., ch. 86, passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused "by the design or neglect" of the owners, was probably implied in the English statute without being expressed, as in ours. In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. They may not be able, under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different.

It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability

if they fail in the first defence; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other, and requires a different class or degree of proofs. That is all. In our judgment the case of loss or damage by fire is comprised within the terms and relief of the third and fourth sections of the act.

The judgment of the Supreme Judicial Court of Massachusetts is reversed and the cause remanded, with directions to take such further proceedings as may be in accordance with this opinion.

Mr. Justice Field, with whom Mr. Justice Gray concurred, dissenting.

I am not able to agree with the court in its disposition of this case. As I construe the act of 1851 to limit the liability of ship owners, the liability of the steamship company for the loss by fire of the goods of the plaintiff below, the Hill Manufacturing Company, rests upon the first section. In my judgment that section is not qualified, nor in any respect affected by the rest of the act; nor is an action to recover for losses by fire, caused by the design or neglect of the owner of the vessel, controlled by proceedings taken by him to limit his liability for losses from other causes. The opinion of the court proceeds on the assumption that cases of loss and damage by fire are within the provisions of the third section of the act; it so states expressly. Yet this assumption necessarily involves the conclusion that a fire, caused by the design or neglect of the owner, may occur without his privity or knowledge, which appears to me to be nothing less than saying that contradictory and inconsistent terms may be appropriately applied to the same transaction.

The object of the act was to change the rule of the common law as to the liability of the owners of vessels for losses and injuries, to which they did not contribute, either designedly or by their neglect, but which were attributable entirely to the acts or omissions of their officers or employes. The common law

placed a burdensome responsibility upon the owners for the acts or omissions of their agents or servants without their knowledge or assent; and to lighten this responsibility the statute in question was passed. It was not its purpose to limit the responsibility of the owners for the consequences of their own wrongful acts or omissions.

The first section exempts them from all liability for loss or damage by fire of goods shipped on board their vessels, unless such fire is caused by their design or neglect. When the fire is thus caused, the common-law rule of liability remains as before; and that extends to the whole value of the property if entirely lost, or to the extent to which it may be damaged, if only partially destroyed. The concluding provision of the section is equivalent to a declaration that the exemption provided in the preceding part shall not exist when the fire originated from the wrongful acts or omissions of the owners.

The third section prescribes a limited liability to the owners for losses from a great variety of acts. It does not exempt them from all liability, but restricts it in the cases mentioned to the value of their interest in the vessels and the freight then pending. It is as follows:

"That the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board such ship or 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 or owners respectively in such ship or vessel and her freight then pending."

The fourth section refers to the acts mentioned in the third, and declares that if any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods on the same voyage, and the whole value of the ship and freight shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner in proportion

to their respective losses; and for that purpose the freighters and owners of the property and the owner of the ship, or any of them, may take proceedings in any court for the purpose of apportioning the sum for which he may be liable among the parties thereto; and the owner may transfer his interest in the ship and freight, for the benefit of the claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such for the persons entitled thereto, after which transfer all claims and proceedings against him shall cease.

It seems clear that the various cases of damages and losses enumerated in section three are not intended to embrace losses by fire. This section first speaks of the liability of the owner for embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or other persons, of property shipped on board the vessel. It then speaks of his liability for any loss damage, or injury by collision; and, lastly, for any loss by any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without his privity or knowledge. It is conceded that the language of the first and second parts of the section does not include losses by fire, and the language of the concluding clause does not necessarily include them. It may be applied to other cases; and as losses by fire are specifically embraced by the first section, it must receive such application as will give to each section full force. This is a settled rule of construction. Besides, it cannot be contended, that an act done by the design of the owner could have been done without his privity or knowledge. It must necessarily have been done with both; and if the fire was caused by the neglect of the owner it must be presumed to have been caused with his knowledge. Where one is bound to do a thing or to see that certain things are done, he is presumed to know the direct consequence of his carelessness and neglect in those respects. Especially is this so where his doing the thing, or seeing that it is done, is necessary to the safety of life or property. He cannot shield himself from responsibility by saying that he did not know what would be the consequence of his carelessness and neglect. The law presumes that he does know it and intends it. The act speaks of neglect by the owner, not by any sub

ordinate officer or agent. It is therefore personal neglect which is meant, and it would be unreasonable to hold that the owner was ignorant of that which necessarily followed from his own personal conduct.

Not only would this be unreasonable, but there is an inconsistency in holding that the first section exempts the owner from all liability in cases of fire happening without his design or neglect, if by the third section a liability is fastened upon him to the extent of the value of the ship and freight in case of a fire occurring without his privity or knowledge. And yet, according to the position of the court, the owner is exempted by the first section from all liability if a fire occur without his knowledge and privity, and by the third section is subjected to liability to the extent of the value of the ship.

As stated by counsel of the plaintiff below, there can be no public policy in absolving common carriers by water from their full liability to others for property which has been entrusted to their care, and has been lost by their design or neglect. It certainly would require language, as he observes, so clear and plain that no subtlety of criticism can escape from the conclusion, before such a purpose can be ascribed to Congress. It would be establishing a limitation of liability against public policy, common right, and the universal feeling of justice. It would make the law one to protect wrongdoers, and to punish the innocent who had been injured by them while thus protected.

If, then, the first section is not affected by the other sections of the act, the liability of the owner of a vessel in case of fire caused by his design or neglect exists, as it always has existed at the common law; and that liability may be enforced in any court, State or federal, having jurisdiction of the parties. The other provisions by which the owner may seek to relieve himself from liability by surrendering his vessel and the freight earned have no application to such a case. It follows that the defence of a liability limited, as asserted by the District Court, goes to the ground.

There is also another consideration which leads to the same conclusion. By § 9 of the Judiciary Act of 1789, re-enacted in § 563, clause 8, of the Revised Statutes, a common-law remedy

is expressly reserved to suitors in all cases where the admiralty has jurisdiction, provided the common law also gives a remedy; and that the common law gives a remedy in cases of losses by fire where goods are entrusted to common carriers by water, there can be no doubt. Of such common-law remedy, the State courts have exclusive jurisdiction when the parties are citizens of the same State, and concurrent jurisdiction with the federal courts when the parties are citizens of different States. The State court, therefore, had jurisdiction of this case. It is a suit *in personam*, and even if a federal court might also take jurisdiction, that of the State court, having first attached, could not be subsequently defeated. *Wallace* v. *McConnell*, 13 Pet. 136; *Taylor* v. *Carryl*, 20 How. 583; *Mallett* v. *Dexter*, 1 Curtis, 178. The federal court could not issue any injunction against the parties which would affect the jurisdiction of the State court. The act of Congress of 1793 forbids any injunction from a federal court to restrain the prosecution of a suit in a State court; and this act has never been repealed, either expressly or by implication, except as to proceedings in bankruptcy. Rev. St. § 720; *Peck* v. *Jenness*, 7 How. 625; *Taylor* v. *Carryl*, 20 How. 583; *McKim* v. *Voorhies*, 7 Cranch, 279; *Diggs* v. *Walcott*, 7 Cranch, 179; *Watson* v. *Jones*, 13 Wall. 679; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340.

For these reasons, I am of opinion that the judgment of the State court should be affirmed, and I am authorized to say that Mr. Justice Gray concurs with me in this conclusion.

ROBERTSON and Others *v.* PICKRELL and Others.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 5th, 1883.—Decided December 17th, 1883.

District of Columbia—Estoppel—Evidence—Judgment—Probate—Transcript of Judgment—Will.

1. Records and judicial proceedings of each State affecting property or estate within it have in every other State the force and effect which they possess in the State of their origin : but as to similar property or estate situated in another State, they have no greater or other force than similar records or proceedings in the courts of that State.
2. The probate of a will in one State does not establish the validity of the will as a will devising real estate in another State, unless the laws of the latter State permit it. The validity of the will for that purpose must be determined by the laws of the State in which the property is situated.
3. A transcript of the record of a probate of a will in Virginia, sufficient to pass real estate there, is not proof of the validity of the will in the District of Columbia for the purpose of passing real estate there.
4. In order to pass real estate situated in the District of Columbia, a will must be executed as provided by the laws in force there, and its validity must be established in the manner provided by those laws.
5. Probate of a will in the District of Columbia is evidence of its validity only so far as it affects personal property. As a will devising real estate the instrument itself must be produced, with the evidence of the subscribing witnesses, or if they be dead, or their evidence legally unattainable, with proof of their handwriting.
6. The plaintiffs claimed as heirs of R. They showed a deed by R to S of an estate in the premises for the life of M, but without covenants by S to surrender to R or his heirs, or as to any further interest in R. They also showed that the life estate of S passed by mesne conveyances to the defendants : *Held*, that the defendants were not estopped from setting up an adverse superior title.

Suit to recover possession of a tract of land in the city of Washington.

Mr. J. G. Bigelow for the plaintiffs in error.
Mr. Samuel B. Paul for the defendants in error.

Mr. Justice Field delivered the opinion of the court.

This was an action of ejectment for a parcel of land in the city of Washington, District of Columbia. On the trial the

plaintiffs gave in evidence a conveyance of the premises from the United States to one Robert Moore, executed in June, 1800; and then endeavored to trace title from the grantee through a devise in his last will and testament, bearing date in July, 1803. For this purpose they produced and offered a transcript of proceedings in the Hustings Court of Petersburg, in the State of Virginia, containing a copy of the will and of its probate in that court in December, 1804.

By the law of Virginia then in force, that court was authorized to take the probate of wills, as well of real as of personal estate; and when a will was exhibited to be proved, it could proceed immediately to receive proofs, and to grant a certificate of its probate. Within seven years afterwards its validity was open to contestation in chancery by any person interested; but, if not contested within that period, the probate was to be deemed conclusive, except as to parties laboring at the time under certain disabilities, who were to have a like period to contest its validity after the removal of their disabilities.

The transcript was offered not merely as an exemplified copy of the record of the last will and testament of Robert Moore, and of its probate in the Hustings court, but also as conclusive proof of the validity of the will, and of all matters involved in its probate. Upon objection of the defendants' counsel, it was excluded, and an exception was taken to the exclusion. The ruling of the court constitutes the principal error assigned for a reversal of the judgment.

We think the ruling was correct. Looking at the transcript presented, we find that it shows only that a paper purporting to be the last will and testament of the deceased was admitted to record upon proof that the instrument and the signature to it were in his handwriting. No witnesses to its execution were called, no proof was offered of the genuineness of the signatures of the parties whose names are attached to it as witnesses, and no notice was given to parties interested of the proceedings in the Hustings court. As a record it furnishes no proof of an instrument executed as a last will and testament in a form to pass real estate in the District of Columbia. The execution of such a will must be attested by at least three

witnesses. It matters not how effective the instrument may be to pass real property in Virginia, it must be executed in the manner prescribed by the law in force in the district to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States in the Union a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common-law rule prevails on that subject. The Orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof by the subscribing witnesses; or, if they be not living, by proof of their handwriting.

So it matters not that the same effect is to be given in the courts of this district to the record of the Hustings court, which, by the law of Virginia, can be given to it there; that is, that it is to be received as sufficient to pass the title to real property situated in that State. The question still remains—is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings court, and by the law of Virginia cannot be removed, then it should have been proved under a commission, as other instruments out of the State are proved, when it is impossible to compel their production in court.

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall

have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 529.

It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg, was ever afterwards contested in a court of chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that State is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceedings in the Hustings court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other States, if they are wanting. Its validity as such will, in other States, depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Authority for these views is found in the cases of *McCormack* v. *Sullivant*, 10 Wheat. 192, and of *Darby* v. *Mayer*, 10 Wheat. 465. In the first of them it appeared that by the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the court of common pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws; in which case an authenticated copy can be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and this court held that such probate gave no validity to the will in respect to the real property in Ohio, as to which the deceased was to be considered as having died intestate. *McCormack* v. *Sullivant*, 10 Wheat. at 202, 203. In the second case, which was an action of ejectment for land in Tennes-

see, the defendant endeavored to trace title to the premises through the will of one Kitts. For that purpose a copy and probate of the will devising the property were produced in evidence, certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. This court held the record inadmissible, and in its opinion explained the common-law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in existence and could be produced, it was necessary to produce it; and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to; but that, whatever the proof, it was required to be made before the court which tried the cause, the proof before the ordinary being *ex parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate, which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. *Darby* v. *Mayer*, 10 Wheat. at 468, 469.

The first of these cases shows that the probate of a will of real property in one State is of no force in establishing the validity of the will in another State. That must be determined by the laws of the State where the property is situated. The second case shows that the proof of a devise of land in ejectment in Maryland—and its law obtains in this district—must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost, or cannot be produced, the proof must be made by secondary evidence of its execution and contents.

The plaintiffs contend that they can use the record of the Hustings court in Virginia as proof of the genuineness of the instrument, and then supplement that proof by parol evidence that the original was executed by three witnesses, and thus establish it as a will sufficient to pass real estate in the District

of Columbia. But in this contention they overlook a material circumstance. It is not sufficient to give effect to an instrument as a will of real property that its genuineness merely be established. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character and, if dead, their handwriting must be proved, as already stated. No other proof will answer; certainly not the probate of the will on *ex parte* testimony by a tribunal of another State or country.

When the record of the will and probate were excluded, the plaintiffs offered parol evidence to show that the copy of the will in the record was a true copy of the original now on file in the Hustings court. Upon objection the evidence was excluded, and we think properly so. The proof of such copy would not have established the validity of the original instrument as a will to pass real property in the District of Columbia. The law of Maryland of 1785, upon which the plaintiff relies, assuming that it is still in force, which may be doubted, was not designed to change the formalities required by the local law for the validity of wills of real property executed in other States; but to give to authenticated copies of such instruments, when recorded or filed with the register there, the same force and efficacy which would attend the originals if produced.

Failing to secure the introduction of the record of the Hustings court and the parol evidence mentioned, the plaintiffs insisted that the defendants were estopped from asserting an adverse title against them. To support their position they introduced a deed by one Robertson and his wife Maria, executed in 1839 to one Samuel Redfern, conveying the premises for the life of the said Maria, and then showed conveyances in fee of the property from Redfern to one Fraser, and from Fraser to one John Pickrell, then a devise of the property by him to Anna Pickrell, and by her to the defendants; and that the plaintiffs are heirs of Robertson and wife, who are dead, Maria having died in 1873; and they contended that the conveyance by Robertson and wife of a life estate to the grantor of parties through whom the defendants trace their interest, precluded

them from asserting any title against the right of the plaintiffs to the reversion as heirs of Robertson and wife. This position was assumed upon the notion that a party who receives a deed of a life estate, and all persons taking a subsequent conveyance in fee from him or his grantees, or deriving title by devise from such grantees, are estopped to deny that the reversion upon the termination of the life estate is vested in the grantor or his heirs.

There was here, of course, no estoppel *by deed* against Redfern, the grantee of the life estate, for he did not join in the execution of the instrument, nor is his seal annexed to it. If any estoppel was created against his acquisition of the reversion from other parties than his grantors or persons claiming under them, it was one *in pais;* and that can arise as between grantor and grantee only where from the relation of the parties there is implied in the acceptance of possession under the deed an obligation to restore the possession on the happening of certain events, or to hold the property for the grantor's benefit or persons designated by him, such as exists from the relation of landlord and tenant, of mortgagor and mortgagee, or the creator of a trust and trustee. *Gardner* v. *Greene*, 5 R. I. 164.

The doctrine that a lessee entering into possession under a lease is estopped, whilst retaining possession, to deny his landlord's title is familiar. That arises from the nature of the contract of lease, which is for the possession and use, for a prescribed period, of the lessor's property, upon considerations to him by way of rent or otherwise. It implies an obligation to surrender the premises to the lessor on the termination of the lease, that is at the expiration of the time during which the owner has stipulated that the lessee may have the use and possession of his property. As said by this court in *Blight's Lessee* v. *Rochester*, 7 Wheat. 535, "the title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his position. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that

possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation," page 547. And, in speaking in the same case of the relation between vendee and vendor, the court added:

"The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it," page 548.

See also *Wilson* v. *Watkins*, 3 Pet. 43; *Watkins* v. *Holman*, 16 Pet. 54, and Taylor on Landlord and Tenant, sec. 14.

To this general statement of the law there is this qualification, that a grantee cannot dispute his grantor's title at the time of conveyance so as to avoid payment of the purchase price of the property; nor can the grantee in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is sufficient for his protection, and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance. *Ives* v. *Sawyer*, 4 Dev. & Bat. Law, 51, and *Gilliam* v. *Bird*, 8 Iredell Law, 280. The case of *Board* v. *Board*, to which counsel refer, was decided upon similar grounds. There the defendant in ejectment, claiming as grantee under the devisee

of a life estate under a will, was held to be estopped from denying the validity of the will in an action by the grantees of the remainderman. Law Rep. 9 Queen's Bench, 48.

With exceptions or limitations of this character it will be found on examination of the authorities, particularly those of a modern date, that the doctrine of estoppel *in pais*, however it may have been applied formerly, cannot now be asserted to preclude the grantee from denying his grantor's title and acquiring a superior one, unless there exists such a relation of the parties to each other as would render the proceeding a breach of good faith and common honesty. No such relation exists between grantor and grantee in an absolute conveyance without recital or covenant, whether it be of the fee or of an estate for life. The grantee does not recognize by the acceptance of such a conveyance of an estate for the life of another, the possession of any greater estate in the grantor, or any obligation to hold the premises for him after the termination of the estate. So far as he is informed by such a conveyance he takes the entire interest of the grantor in the property. He does him, therefore, no wrong by purchasing any adverse claims which may strengthen his own title, or which may give him a title after the termination of the life estate. Covenants in the instrument intended for him, such as to restore and surrender the premises on the termination of the life estate, or recitals declaring the reversion to be in the grantor or others, would of course change the relations of the parties. Obligations from such covenants or recitals might arise which would control the action of the grantee. *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35. Here, as already stated, there is nothing of the kind. The conveyance is for the life of Maria and no longer, and without covenants or recitals as to any further interest of the grantors or of others. By taking a deed poll of this character no obligation to the grantors could arise, and, consequently, no estoppel precluding the grantee, and those claiming under him, from accepting conveyances from other sources to strengthen their existing interests or to acquire the reversion, and thus securing to themselves the absolute fee. In *Osterhout* v. *Shoemaker*, 3 Hill, 513, the Supreme Court of New York held a similar doctrine

as to the relation between grantor and grantee in fee. Speaking by Judge Bronson it said :

"There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time, or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title."

This language was subsequently cited with approval by the court of appeals of the State in the case of *Sparrow* v. *Kingman*, 1 N. Y. 242, and there is no reason why it should not apply with equal force to a grantee of an estate for life as to a grantee in fee. There is nothing in the nature of the estate which necessarily implies that the grantor is the owner of the reversion. The absence in the deed here of any reference to a reversionary interest would rather seem to negative such ownership. Be that as it may, there was no implied obligation from any relation of the parties to each other which could estop the grantee of the life estate, or persons claiming under him, from denying the title of his grantors to any greater estate than the one conveyed, or from acquiring title to the reversion from other sources.

We have considered in this opinion that Redfern took possession of the premises in controversy under the deed to him of the life estate, because on the argument that fact was assumed as established ; but there is no direct evidence on the point in the record.

Judgment affirmed.

Statement of Facts.

SWEENEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted November 13th, 1883.—Decided December 17th, 1883.

Contract.

1. When a contract with the United States for building a wall provides that payment for the work contracted for shall not be made until an agent, to be designated by the United States, certifies that it is in all respects as contracted for, and after completion of work the designated agent refuses to give the certificate, and there is no fraud, nor such gross mistake as would necessarily imply bad faith, nor failure to exercise honest judgment on the part of the agent, the engineer's certificate is a condition precedent to payment.
2. The ruling in *Kihlberg* v. *United States,* 97 U. S. 398, adhered to, and applied to this case.

Suit to recover the price of a wall built by the appellant around the National Cemetery, at Fort Harrison, Virginia.

The plaintiff contracted to construct the wall by a written agreement, of which the following were the material parts:

First. That the said A. W. Sweeney shall build a wall of brick at the National Military Cemetery at Fort Harrison, Virginia, according to the plans and specifications attached to this contract. . . .

Fourth. It is agreed that from time to time, and when completed, the said wall shall be inspected by an officer of the U. S. Army, or by a civil engineer or other agent, to be designated by the party of the first part, and after such officer, or civil engineer, or other agent, shall have certified that it is in all respects as contracted for, it shall be received and become the property of the United States. . . .

Sixth. It is agreed that upon inspection and report of materials furnished, or work done, during the performance of this contract, payment in part may be made to the contractor, said payment in no case to exceed 80 per cent. of the estimated value of the material and work actually furnished.

The following were the material findings of the court of

claims in regard to the work for which payment was demanded in this action.

XIII. After the completion of the wall as aforesaid the said Chenoweth, under orders, inspected the same, and made the following report :

RICHMOND, VA., *Oct.* 22d, 1874.

Col. A. F. ROCKWELL,

A. Q. M., U. S. A.:

SIR : I have the honor to report a visit this day, with Capt. T. J. Eckerson, to the Fort Harrison National Cemetery.

Mr. Sweeney, contractor for the enclosing wall, has entirely completed the work, without paying any attention whatever to the instructions given him relative to the material to be used, nor has he paid any attention to the order of the quartermaster-general with regard to the gate-posts.

The condemned material has been used, and I consider the workmanship is very unsatisfactory.

Very respectfully, your obedient servant,

G. D. CHENOWETH,
Civil Eng'r.

XIV. In consequence of this report the wall so constructed was taken down by order of the quartermaster-general, and a new wall, made of other material, was constructed in its place. The cost of the new wall was $7,829.03. It was not shown that the claimant had any notice of the intent to take down the wall constructed by him, or that any further opportunity was offered him to correct or remedy any defects or errors therein, or that there was any other attempt to complete the wall in accordance with the terms of the contract.

XV. It was not shown that there was any fraud, or any such gross mistake as would necessarily imply bad faith, or any failure to exercise an honest judgment on the part of the said Chenoweth in making the inspections hereinbefore referred to or set forth.

XVI. No officer of the army of the United States, nor civil engineer, nor other agent of the United States, has ever certified that the said wall constructed by the claimant was in all respects as contracted for, or in any respect as contracted for, other than as shown by the said reports of the said Chenoweth.

Opinion of the Court.

XVII. The claimant then offered evidence tending to show that the wall as completed by him was in compliance with the requirements of the contract; but the court refused to hear such evidence, or to make any finding on that subject.

Mr. Thomas W. Bartley and *Mr. Milton I. Southard* for appellant.

Mr. Assistant Attorney-General Maury for United States.

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

This judgment is affirmed on the authority of *Kihlberg* v. *United States*, 97 U. S. 398. It was provided in the contract that payment for the wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified, after inspection, "that it was in all respects as contracted for." The officer of the army designated under this authority expressly refused to give the necessary certificate, on the ground that neither the material nor the workmanship were such as the contract required. The court below found that there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections. The appellant was notified of the defective character of the material, and that it would not be accepted, before he put it into the wall, and after he had completed his work the wall which he constructed was taken down by order of the quartermaster-general and a new one made of other material built in its place.

Judgment affirmed.

COUNTY COMMISSIONERS OF THE COUNTY OF CHEROKEE *v.* WILSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Submitted December 5th, 1883.—Decided December 17th, 1883.

Appeals—Kansas—Mandamus—Municipal Corporations—Statutes.

A recovered judgment June 11th, 1881, against a township in Cherokee County, Kansas, on bonds issued in payment of a subscription by the township to stock in a railway company. The township had no trustee then or since. An alternative writ of mandamus having been sued out to compel the board of county commissioners for the county to levy a tax sufficient to pay the judgment, and to compel the county clerk to extend the tax when levied, and to compel the county treasurer to collect it when extended, and to pay it to A when collected, judgment was entered for a peremptory writ in accordance therewith. On appeal by the county commissioners, *Held:*

1. That by the statutes of Kansas which were in force at that time, it was made the duty of the board of county commissioners of Cherokee county in consequence of the vacancy in the office of trustee of the township, to levy a tax sufficient to pay the judgment recovered by A.
2. That the alternative writ of mandamus was not issued prematurely.
3. That the clerk and treasurer having taken no appeal, the writ of error brought up for review only the objections of the board of commissioners.

Mr. Wallace Pratt and *Mr. Charles W. Blairs* for plaintiff in error.

Mr. James S. Botsford, *Mr. Marcus T. C. Williams* and *Mr. Joseph Shippen* for defendant in error.

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

On the 11th of June, 1881, William C. Wilson, the defendant in error, recovered a judgment in the Circuit Court of the United States for the District of Kansas, against the township of Salamanca, Cherokee county, for $48,920.31. At that time the office of trustee of the township was vacant, and it has not been filled since. On the 24th of July, 1882, Wilson sued out of the same court an alternative writ of mandamus, returnable on the 9th of October, 1882, requiring the board of county commissioners of the county "to forthwith levy upon the tax-

able property . . . in said township . . . a tax sufficient in amount for the payment of the judgment . . . and cause the same to be certified to the county clerk of said county;" and requiring the clerk of the county "to extend said tax forthwith on the tax books of said county and deliver the same with said tax so levied and extended thereon to the county treasurer of said county," and the county treasurer forthwith, after the tax books shall have been delivered to him by the clerk, "to proceed to collect said taxes and pay the same, when so collected, to said William C. Wilson in payment of said judgment, interest, and costs," or show cause why they had not so done. This writ was served on the individual members of the board of county commissioners, and on the clerk and treasurer of the county, on the 26th of July. On the 27th of November, 1882, the respondents filed a motion to quash the writ, and on this motion raised two questions, to wit:

1. Whether the writ was not sued out prematurely; and,

2. Whether, under the statutes of Kansas, the county commissioners could legally do that which the writ sought to coerce them into doing.

Before this motion was disposed of the individual members of the board of county commissioners filed an answer, and after the testimony was closed, Wilson moved for a peremptory writ. Upon the hearing of this motion and the motion to quash, the judges holding the court were divided in opinion on the following questions:

1st. Whether said motions respectively should be sustained or overruled.

2d. Whether it is the legal duty of the board of county commissioners of Cherokee, under the statutes of the State of Kansas, to levy the tax as commanded by the alternative writ of mandamus herein, for the payment of the judgment of the relator against Salamanca township, in said county, based upon interest coupons detached from bonds issued by said township to pay shares of capital stock in a railroad company, which bonds were voted under the act of the General Assembly of the State of Kansas, entitled, "An Act to enable municipal townships to subscribe for stock in any railroad and to pro-

vide payment of the same," approved February 25th, 1870, and issued September 1st, 1872, under the act of said general assembly 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-powers, or other works of internal improvement, and providing for the registration of such bonds, and the repeal of all laws in conflict therewith," approved March 2d, 1872.

The circuit judge was of opinion that the motion to quash should be overruled, and that for the peremptory writ granted. A judgment awarding the writ was thereupon entered, and the questions as to which the difference of opinion arose were duly certified. The case is now here on a writ of error for an answer to these questions.

The act of February 25th, 1870, authorized the township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, and to issue bonds to pay the subscription. That was settled by the judgment against the township on account of which the mandamus is asked.

Every township in Kansas is a body corporate and politic (§ 1 [5965] Dassler's Comp. Laws, 977). The trustee is the principal officer of the township, and his duty is, among other things (§ 22 [5988] id. 980), to "superintend all the pecuniary concerns of his township," and at the July session of the board of county commissioners, annually, with the advice and consent of the board, to levy a tax on the property of the citizens of the township, for township, road, and other purposes, and report the same to the county clerk for entry on the tax roll, "but, in a failure of such trustee and commissioners to concur, then the board of county commissioners shall levy such township, road, and other taxes." The board of county commissioners are required by law to meet in regular session on the first Monday in July of each year. § 13 [1397] Dassler's Comp. Laws, 274. They must also meet on the first Monday in August in each year to estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes which they shall be required by law to levy. § 83 [5886] Dassler's Comp. Laws, 956. The county clerk must

make up the tax list immediately after the first Monday in August and deliver it to the treasurer for collection on or before the first Monday in November. § 84, id.

Sec. 6 of the act of February 25th, 1870, under which the bonds involved in this proceeding were issued, is as follows:

"SEC. 6. Whenever any bonds shall be issued in pursuance of the foregoing provision, it shall be the duty of the board of county commissioners annually to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as the same becomes due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected in cash or the coupons of such bonds which may be due; and such tax shall be collected as county and township taxes are collected and paid out by the treasurer on presentation of the coupons or bonds, when due; and the county clerk, treasurer, and other officers who may be required to do any act under the foregoing provisions, shall be entitled to the same fees as are allowed by law for similar services, and liable to the same fines and penalties for non-compliance."

The act of March 2d, 1872, referred to in the second question certified, was repealed, so far as affects this case, by the act of March 9th, 1874 (Session Laws of 1874, p. 41), §§ 7 and 13 of which are as follows:

"SEC. 7. It shall be the duty of the proper officers of any county, city or township, in which bonds have been heretofore voted for any of the purposes mentioned in the act to which this act is amendatory, annually, at the time when other taxes are levied, to levy and cause to be collected a sufficient tax to pay the interest on all such bonds as the same shall become due, and also for the purpose of creating a sinking fund for the final redemption of such bonds. . . .

"SEC. 13. It will be the duty of the board of county commissioners of any county in which railroad bonds shall be issued under the provisions of this act, annually, at the time when other taxes are levied, to levy and cause to be collected, as other taxes are levied and collected, a sufficient tax to pay the interest on all bonds issued for railroad purposes by such county, or any town-

ship therein, as the same falls due, and also for the purpose of creating a sinking fund for the final redemption of such bonds."

These statutes were in force when the alternative writ of mandamus was sued out in this case. The judgment against the township was rendered on the 11th of June, 1881. It therefore became the duty of the proper officers to levy the tax at the time fixed by law for that purpose in the year 1881. No such levy was made, and, consequently, all officers whose duty it was to make the levy were in default when the alternative writ was sued out in 1882. It follows that the writ was not prematurely issued if it was the duty of the board of county commissioners to make the levy when there was no trustee of the township. The fact that the board may not have had actual notice of the rendition of the judgment until November, 1881, does not affect their legal obligation to make the levy. It may be accepted as an excuse for not performing that duty, but it does not relieve them from the consequences of their legal default.

The township trustee is in law the principal officer of the township. It is his duty to superintend all the pecuniary concerns of the township, and, with the advice and concurrence of the board of county commissioners, to levy all taxes required to meet the liabilities of the township not otherwise provided for by law; but if he fails in this duty, the board must, as we think, make the necessary levies for him. To that extent the board is charged with the duty of caring for the interests of the township. Such is the fair meaning of section 22 [5988]. Under that section the township trustee is required to attend the meeting of the board in July of each year, and lay before them his recommendations for taxes to be levied. As his levy can only be made with the concurrence of the board, there must necessarily be an inquiry by the board into the pecuniary concerns of the township, so as to determine whether what is recommended by the trustee is enough or more than enough to meet its liabilities for the current year. If the trustee has omitted a tax for any purpose, which the law requires to be levied, it is the clear duty of the board to make the levy themselves if the trustee will not. The trustee and the commis-

sioners are made in law a tribunal to meet in July in each year to estimate and determine what taxes are required in the township for the year. If both the trustee and the commissioners are present at the meeting, and agree as to what should be done, the trustee reports the tax to the county clerk, but if the trustee is not present, or being present does not agree with the commissioners, the opinion of the commissioners prevails, and they may proceed without him. This is the evident purpose of the provision that, "in failure of such trustee and commissioners to concur," the board shall make the levy. The tax to pay the judgment in this case was one of the taxes to be levied on the property of the township to pay a township debt. It is true that this section of the law was enacted in substance years before the bonds involved in this suit were issued, but unless it has been in some way superseded by reason of the special acts connected with the particular obligation of these bonds, it governs this case. So far as we are advised, if the tribunal consisting of the trustee and county commissioners is relieved from its general supervision of the needs of the township in the way of taxation for these bonds, it is only to put that duty on the board alone. If on the board, it was clearly their duty to levy the tax without the trustee at the meeting in August, 1881, because the legal liability of the township had then been judicially established. If, however, it was a matter in respect to which the trustee should act conjointly with them, both they and the trustee were in default in July, 1881. In any view of the case, the obligation to levy the tax had been imposed on the county commissioners when the alternative writ was sued out, and they have shown no good cause why the levy was not made.

The board of county commissioners have alone brought this writ of error. So far as appears, the clerk and treasurer are satisfied with what has been done in reference to them. The board are in no condition to complain for the other officers, because, under the law, they must levy the tax before the others can act, and, if the levy is made, the duties of the clerk and treasurer are purely ministerial. The whole proceeding depends on the duty of the board to levy the tax.

Opinion of the Court.

We conclude, therefore, that the motion to quash should have been overruled, and the motion for judgment sustained. The first question is answered accordingly. The second question is answered in the affirmative.

As the judgment was in accordance with these answers, it is

Affirmed.

SALAMANCA TOWNSHIP *v.* WILSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Submitted December 5th, 1883.—Decided December 17th, 1883.

Kansas—Municipal Corporations, Officers of—Office, Resignation of—Service of Process—Statutes of Kansas.

The removal of a treasurer of a township in the State of Kansas from the limits of the township into the limits of an adjoining township, without resigning his office, does not vacate the office so as to invalidate service of summons upon him in his official capacity for the purpose of commencing an action against the township.

Mr. Wallace Pratt and *Mr. Charles W. Blair* for plaintiff in error.

Mr. James S. Botsford, *Mr. Marcus T. C. Williams* and *Mr. Joseph Shippen* for defendant in error.

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

In this case the judges holding the circuit court have certified a difference of opinion between them upon the hearing of a motion to set aside the service of summons on the plaintiff in error, being the defendant below. The return of service is in these words:

"Received the within writ September the 12th, 1882. I served the within summons on said Township of Salamanca, Cherokee county, State of Kansas, by delivering a true and certified copy thereof to Joseph A. Jones, the last elected and qualified treasurer of said Salamanca Township, in the county of Cherokee, State and District of Kansas; and I made diligent search and inquiry for,

but could not find, in the Township of Salamanca, or county of Cherokee, State and Dist. of Kansas, the last elected and qualified trustee or clerk of said within defendant, Township of Salamanca.

"All done this 18th day of September, A.D. 1882.

"B. F. SIMPSON,
"*U. S. M., Dist. of Kansas.*
"By J. H. SMITH, *Deputy.*"

The controlling question certified is as follows:

"2. Whether service of said summons upon Joseph A. Jones, the last elected and qualified treasurer of said township, after said Jones had removed out of said township and across the line into the adjoining township of Crawford, in said county of Cherokee, was good and sufficient service of said summons."

It is not denied that the service was good if Jones was, in law, the treasurer of the township when served. By the Constitution of Kansas, art. 9, sec. 4, township officers, except justices of the peace, hold their offices one year from the Monday next succeeding their election, and until their successors are qualified. Jones was, therefore, presumptively in office when served, unless his removal across the line into Crawford township of itself created a vacancy. *Boston* v. *Buck*, 8 Kan. 302; *Rheinhart* v. *The State*, 14 Kan. 318; *Hubbard* v. *Crawford*, 19 Kan. 570.

There is nothing in the Constitution or laws of Kansas which requires a township treasurer to be a resident of, or voter in, the township when elected or qualified; neither is there anything which vacates the office if the officer removes from the township during the term for which he was elected. Justices of the peace are township officers, and as to them it is expressly provided that they "shall reside and hold their office in the township for which they shall have been elected." Sec. 4 [5970], Dassler's Comp. Laws (1879), 978. As no similar provision is made in respect to any other township officer, the implication necessarily is that actual residence in the township is not required of them. *Expressio unius est exclusio alterius.* That residence, as a qualification for office, was in the minds of

the framers of the Constitution and of the legislature is apparent, for art. 3, sec. 11, of the Constitution, provides that all judicial officers "shall reside in their respective townships, counties, and districts during their respective terms of office;" art. 2, sec. 4, that "no person shall be a member of the legislature who is not at the time of his election a qualified voter of, and resident in, the county or district for which he is elected;" and sec. 218 [1643] of the general statutes (Dassler's Comp. Laws, 311), that "ceasing to be an inhabitant of the county for which he was elected or appointed" vacates the office of a county officer.

Undoubtedly the removal of a township treasurer from a township may, under some circumstances, vacate his office and authorize the county commissioners to fill the place (sec. 12 [5978], Dassler's Comp. Laws, 978), but we think it does not necessarily vacate the office under all circumstances. In the present case the question is whether moving "across the line" into an adjoining township of itself has that effect. In our opinion it does not, and consequently we answer the second question certified in the affirmative. The motion to set aside the service was, therefore, properly overruled, and the judgment is *Affirmed.*

EX PARTE BOYER & Another.

ORIGINAL.

Submitted December 17th, 1883.—Decided January 7th, 1884.

Admiralty—Jurisdiction.

The District Court of the United States for the Northern District of Illinois, as a court of admiralty, has jurisdiction of a suit *in rem* against a steam canal-boat, to recover damages caused by a collision between her and another canal-boat, while the two boats were navigating the Illinois and Lake Michigan canal, at a point about four miles from its Chicago end, and within the body of Cook county, Illinois, although the libellant's boat was bound from one place in Illinois to another place in Illinois.

Petition for a writ of prohibition to restrain the judge of the

District Court of the United States for the Northern District of Illinois from exercising jurisdiction and entering a final decree in a suit in admiralty in that court, growing out of a collision on the Illinois canal.

Mr. Robert Rae for petitioners.
Mr. C. E. Kremer opposing.

Mr. Justice Blatchford delivered the opinion of the court.

The owners of the canal-boat Brilliant and her cargo filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the steam canal-boat B and C, in a case of collision. The libel alleges that the Brilliant is a vessel of more than 20 tons burden, and was employed, at the time of the collision, in the business of commerce and navigation between ports and places in different States and Territories in the United States, upon the lakes and navigable waters connecting said lakes; that the B and C is a vessel of more than 20 tons burden, and was, at the time of the collision, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States; that, in August, 1882, the Brilliant, while bound from Morris, Illinois, to Chicago, Illinois, towed, with other canal-boats, by a steam canal-boat, and carrying the proper lights, and moving up the Illinois and Lake Michigan canal, about four miles south of the Chicago end of the canal, was, through the negligence of the B and C, struck and sunk, with her cargo, by the B and C, which was moving in the opposite direction, to the damage of the libellants $1,500. The owners and claimants of the B and C answered the libel, giving their version of the collision and alleging that it was wholly due to the faulty navigation of the Brilliant, and that it occurred on the Illinois and Michigan canal, at a place within the body of Cook county, in the State of Illinois. In November, 1883, the district court made an interlocutory decree, finding that both parties were in fault, and decreeing that they should each pay one-half of the

damages occasioned by the collision, to be thereafter ascertained and assessed by the court.

The owners of the B and C have now presented to this court a petition, praying that a writ of prohibition may issue to the judge of the said district court, prohibiting him from proceeding further in said suit. The ground alleged for the writ is the want of jurisdiction of the district court, as a court of admiralty, over the waters where the collision occurred.

The Illinois and Michigan canal is an artificial navigable water-way connecting Lake Michigan and the Chicago river with the Illinois river and the Mississippi river. By the act of Congress of March 30th, 1822, ch. 14, 3 Stat. 659, the use of certain public lands of the United States was vested in the State of Illinois forever, for a canal to connect the Illinois river with the southern bend of Lake Michigan. The act declared

> "That the said canal, when completed, shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through the same."

This declaration was repeated in the act of March 2d, 1827, ch. 51, 4 Stat. 234, granting more land to the State of Illinois to aid it in opening the canal. We take judicial notice of the historical fact that the canal, 96 miles long, was completed in 1848, and is 60 feet wide and 6 feet deep, and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi river to Lake Michigan and carry on inter-State commerce, although the canal is wholly within the territorial bounds of the State of Illinois. By the act of 1822, if the land granted thereby shall cease to be used for a canal suitable for navigation, the grant is to be void. It may properly be assumed that the district court found to be true the allegations of the libel, before cited, as to the character and employment of the two vessels, those allegations being put in issue by the answer.

Within the principles laid down by this court in the cases of *The Daniel Ball*, 10 Wall. 557, and *The Montello*, 20 Wall.

430, which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief*, 12 How. 443, *The Hine* v. *Trevor*, 4 Wall. 555, and *The Eagle*, 8 Wall. 15, we have no doubt of the jurisdiction of the district court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. *The Belfast*, 7 Wall. 624. Many of the embarrassments connected with the question of the extent of the jurisdiction of the admiralty disappeared when this court held, in the case of *The Eagle*, *ubi supra*, that all of the provisions of § 9 of the Judiciary Act of September 24th, 1789, ch. 20, 1 Stat. 77, which conferred admiralty and maritime jurisdiction upon the district courts were inoperative, except the simple clause giving to them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." That decision is carried out by the enactment in § 563 of the Revised Statutes, subdivision 8, that the district courts shall have jurisdiction of "all civil causes of admiralty and maritime jurisdiction," thus leaving out the inoperative provisions.

This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

The prayer of the petition is denied.

ESTEY & Others *v.* BURDETT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

Argued November 21st, 22d, 23d, 1883.—Decided January 7th, 1884.

Patent.

Claim 1 of letters patent No. 87,241, granted February 23d, 1869, to Riley Burdett, as inventor, for 17 years from August 24th, 1868, for an "improvement in reed organs," namely, "The arrangement, in a reed musical instrument, of the reed-board A, having the diapason set *a* and its octave set *b* and the additional set L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth," defined and construed.

A reed-board with two sets of reeds and a third partial set was made and put into an organ by one Dayton, prior to the invention of Burdett, and, such organ being put in evidence, it was held that the alleged infringing organs contained nothing which, so far as said claim 1 was concerned, was not found in such prior organ.

As to claim 2, namely, "The reed-board A, and foundation-board G, constructed with the contracted valve openings D F F, and the reeds arranged in relation thereto, all in the manner described," it was held, that, in view of the state of the art, there was no invention in making the length and size of the valve opening greater or less in a reed-board of a given width, or where the reed-board was made wider or narrower, or had more or less sets of reeds in it, either full or partial; and that the vibrating ends of the lowest and longest reeds in such prior organ were as near together as they were in the reed-boards of the alleged infringing organs.

On these views, a decree was entered in favor of the defendants.

Bill in equity for infringement of a patent for reed celeste organs.

Mr. Edward N. Dickerson and *Mr. William Maxwell Evarts* for appellants.

Mr. George Harding and *Mr. E. J. Phelps* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity brought for the infringement of letters patent No. 87,241, granted February 23d, 1869, to Riley Burdett, the plaintiff, for 17 years from August 24th, 1868, for an "improvement in reed organs." The specification of the patent is in these words:

Opinion of the Court.

"Figure 1 is a perspective view of one of my reed celeste organs. Figure 2 is a diagram plan, showing the relative arrangement of the reeds. Figure 3 is a vertical transverse section of my reed-boards, &c. This invention consists, first, in the arrangement of the reed-board; second, in a method of tuning, by which a peculiar quality of tone is produced, and by which the

Fig: 1.

Fig: 2

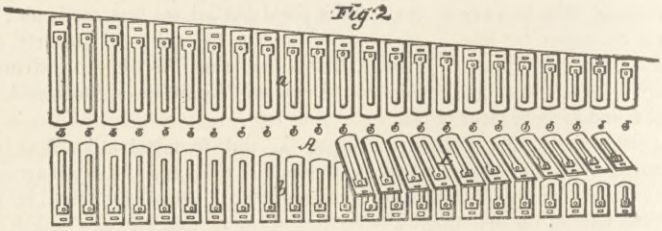
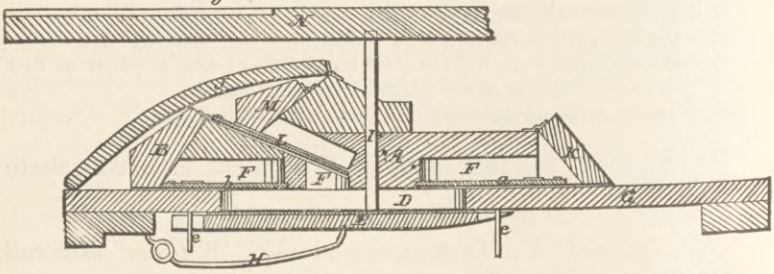


Fig: 3



power of the instrument is greatly increased without an increased resistance in the action, and without an increase of power being necessary to operate the bellows. The advantages gained by my peculiar arrangement are, a greatly increased power and variety of tone. This is effected by the use of an additional set of reeds, commencing at tenor F, or thereabouts, and running upward through the scale of the instrument, and tuning the same in the peculiar manner hereinafter described. No other reed

musical instrument containing the same number of reeds, so far as I know, has ever possessed so great a variety or pleasing quality of tone, while simplicity of construction, compactness of form, and ease of operation are other excellences of this arrangement not found in others. I will now describe particularly the construction of that part of my instrument which forms the subject of this patent. The case, bellows, pedals, &c., may be, in general construction and arrangement, like those in common use, and, therefore, no special description is required. The foundation of the reed-board is also constructed in the usual manner, but the reed-board proper, in itself, differs from the ordinary reed-board in the following particulars, viz. : the main board A contains two sets of reeds running through the entire scale, the back set of which is marked *a*, and is tuned as a unison or diapason, while the front or octave set, marked *b*, is tuned an octave above the diapason. In the arrangement of these reeds, it will be seen that the lowest and longest reeds in the diapason and the octave sets are placed with their vibrating ends as near together as they can be, with room only for the tracker-pin which communicates the motion of the key to the valve beneath the reeds. But, as the reeds continually shorten as they advance upward in the scale, there is necessarily a vacant space left between the diapason set *a* and the octave set *b*, which constantly enlarges itself, and has heretofore been regarded as useless. Within this space, commencing on tenor F and running upward through the scale, I have introduced a third set of reeds, L, which forms the distinguishing feature of this instrument. These are placed in the reed-board over the octave set *b*, and run obliquely to the foundation board G, as shown in Fig. 3, the vibrating ends resting on the same base as the other sets of reeds, *a* and *b*. These reeds are of the same size as the corresponding ones in the diapason *a*, and are tuned either a trifle above or below the diapason, but only sufficiently so to produce a slightly waving and undulating quality or effect, without producing any discord. A few trials will enable any tuner of reed instruments to tune these reeds so as to realize the best effect. This method of tuning will, when this set of reeds, which I have named the Harmonic Celeste, is drawn and used in connection with the diapason, produce a most wonderfully pleasing and captivating effect, while the power and beauty of both sets of reeds are greatly augmented and enriched, in a

manner which cannot be realized without being heard. Fig. 2 shows a top view of the reed-board proper, wherein the location of the reeds is shown with reference to the divergence of the reeds of the diapason set *a* and the octave set *b*, and also the space afforded for the introduction of the third set, L. Fig. 3 exhibits a transverse section of my reed and foundation board, showing the arrangement of my reeds and the valve connections. In this figure, A is the reed-board, G is the foundation board, D is the valve opening, E is the valve, and F F are the throats over which the reeds are located and placed. The valve E is retained in its proper place by the pins *e e* and spring H, and is operated by the tracker-pin I, which rests upon its upper surface, and passes upwards through the reed-board to the under surface of the key N. The swell-boards J and K and stop-dampers B and M are raised whenever desired, by the knee-stop C, Fig. 1, or by a hand draw-stop, or by some other convenient device. Another important advantage arising from the introduction of the Harmonic Celeste is, that a greater power and variety are attained than can be by the use of any of the octave coupling arrangements now in use. These, while they augment the power, by drawing down octaves to the keys actually played, are objectionable, inasmuch as they offer more than double the resistance to the key, and are thus often exceedingly undesirable. In my instrument, no such objection can ever arise, as the pressure upon the keys is always the same, whether one or all the sets of reeds are used. This is of prime importance to the performer, as the required exertion becomes involuntary, and not a matter of calculation, and thus the mind is not distracted from the proper feeling and expression of the music performed." The claims of the patent are as follows: "1. The arrangement, in a reed musical instrument, of the reed-board A, having the diapason set *a* and its octave set *b* and the additional set L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth. 2. The reed-board A and foundation board G, constructed with the contracted valve openings D F F, and the reeds arranged in relation thereto, all in the manner described. 3. The diapason *a* and its octave, or principal, *b*, arranged over the same valve opening, as described, so that the octave unison may be produced, when desired, without the use of coupler, and without any additional pressure upon the keys. 4. In connection with the reed-board A,

having the sets *a*, *b* and L, as described, the independent dampers B and M, as set forth."

The circuit court made an interlocutory decree declaring the patent to be valid so far as claims 1 and 2 are concerned; that those two claims had been infringed; that the plaintiff was not the original and first inventor of what is set forth in claim 4, and did not before the commencement of this suit file a disclaimer of what is claimed in claim 4, and had not unreasonably neglected to file such disclaimer, and had presented evidence of his having filed such disclaimer; that no evidence had been offered to show any infringement of claim 3; and that the plaintiff was entitled to recover profits and damages because of such infringement. A reference to a master to ascertain the same was ordered and a perpetual injunction was awarded as to claims 1 and 2. On the report of the master a final decree was made for the plaintiff, for $161,011.79, without costs to either party. The decisions of the circuit court in the case are reported in 15 Blatchford C. C. R. 349, 16 id. 105, and 19 id. 1. The defendants have appealed.

An examination of the text of the specification shows that the inventor purposed to cover by his patent two things: (1) a new arrangement of the reed-board; (2) a new method of tuning. In the application for the patent, claim 1 read as it does now, while claims 2, 3 and 4 had specific reference to the method of tuning described. The patent office rejected all the claims. The plaintiff then amended two of the claims relative to tuning, still retaining the tuning feature in them, and added the claims which are now claims 2, 3 and 4. The office then rejected all seven of the claims. On appeal to the examiners-in-chief, the decision rejecting the three tuning claims was affirmed, and that rejecting the other four claims was reversed, and the patent was issued accordingly. There is nothing in claims 1 and 2, as granted, which has any reference to any new method of tuning, unless it is to be intended, in accordance with the description, that the partial set is to be capable of being tuned a trifle above or below the diapason set. Except, perhaps, to that extent, all there is in the descriptive part of

the specification in relation to a new method of tuning may be dismissed from consideration, as it was introduced to lay a foundation for the original claims 2, 3 and 4, in reference to such new method of tuning. Claims 1 and 2, as they stand, relate only to the arrangement of the reed-board and the sets of reeds, in conjunction with the foundation board and the valve openings and the valves.

The specification shows that the inventor takes a reed-board having two sets of reeds running through the entire scale, a diapason set and an octave or principal set, and makes no change in the foundation board, or in the case, bellows, pedal, etc. The reed-board with the two sets was old. In its structure, as shown in Figure 2 of the drawings, and as described in the specification, the lowest and longest reeds in the two sets are placed so near together as to leave between them room only for the tracker-pin which communicates motion from the key to the valve; but, as the reeds shorten continually as the scale proceeds upward, there is a vacant space between the ends of the reeds in the two sets, which space continually grows wider. Within that space the inventor introduces a third set of reeds, commencing at or about tenor F and running upward through the scale. He places this third set over the octave set, and the reeds run downwardly in a direction oblique to the foundation board, and their vibrating ends, which are their lower ends, rest on the same base as that of the other two sets of reeds. They are of the same size as the corresponding reeds in the diapason set. The point of advantage in bringing down the vibrating ends of the reeds in the third set, so that they shall rest on the same base with the vibrating ends of the reeds in the other two sets, is shown by the evidence to be the same point of advantage which is set forth in the specification of the prior patent granted to the plaintiff on the 9th of January, 1866. In that the invention is stated to be to so make the reed-board that the three or four sets of reeds in it shall be acted upon instantly and simultaneously by the rush of air upon the opening of the valve; and it is set forth that that result is effected by placing two sets of reeds on the same horizontal plane, and placing the other sets on an inclined plane,

each with its base on the same level as the first and second sets, thus making the head of each reed equidistant from the valve and making each produce instantaneous concerted sound.

There was introduced in evidence a reed organ, known as Exhibit No. 21, containing a reed-board with two sets of reeds and a third partial set, alleged to have been made by one Dayton in 1866, prior to the plaintiff's invention. There was much testimony on the question as to whether the reed-board and reeds in this organ were made prior to the plaintiff's invention, in the shape in which they appeared when put in evidence. The circuit court decided that question in the affirmative, but nevertheless it held that the arrangement of reed-board and reeds found in No. 21 did not embrace the entire arrangement specified and claimed in claim 1 of the patent, because, although it had a reed-board no wider than was necessary for two full sets of reeds, and had an additional partial set of reeds put in on an incline, and although the reeds in that set may have been tuned flat in relation to the diapason set, yet such reeds did not rest on the same base as that of the other two sets of reeds. We concur with the circuit court in its conclusion as to the genuineness and the date of No. 21, but are of opinion that there is nothing found in the alleged infringing organs which, so far as claim 1 of the plaintiff's patent is concerned, is not found in No. 21. The vibrating reeds in the partial set in the alleged infringing organs do not rest on the same base as that of the other two sets of reeds, and occupy a position in that respect no different, in reference to any requirement of the plaintiff's patent, from that occupied by the vibrating ends of the partial set in No. 21. In all other respects in which the alleged infringing reed-board and reeds embrace what is covered by claim 1 of the plaintiff's patent, what they contain is found in No. 21.

The material point in claim 2 is the contraction of the valve openings. The idea is that the valve openings and passages for the two complete sets of reeds and the intermediate partial set are contracted or condensed within the same space which was usually occupied by the valve openings and passages for only two complete sets of reeds in an instrument of the usual

prior construction; and that, therefore, no more force is required to be applied to the keys to open the valves than where only two full sets of reeds are used. The circuit court was of opinion that the valve openings in No. 21 were not the contracted valve openings of the plaintiff's patent, because they were as large as the valve openings in a reed-board having three full sets of reeds; and that the lowest and longest reeds in No. 21 did not, as in the plaintiff's arrangement, have their vibrating ends as near together as they could be, with room between them only for the tracker-pin. Our conclusion is that the absolute length and size of the valve opening was a matter of judgment, in view of the state of the art shown, and that there was no invention in making its length and size greater or less in a reed-board of a given width, or where the reed-board was made wider or narrower, or had more or less sets of reeds in it, either full or partial. The dimensions of the valve opening and of the valve are regulated by the judgment of the manufacturer as to the quantity of air necessary, and the resistance to be overcome in working the valve, and the inconvenience of the leakage of air. We are also satisfied that the vibrating ends of the lowest and longest reeds in No. 21 were as near together as they are in the reed-boards of the alleged infringing organs.

It results from these considerations that

The decree of the circuit court must be reversed, and the case be remanded to that court, with direction to dismiss the bill.

CLEMENTS *v.* ODORLESS EXCAVATING APPARATUS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Argued December 5th, 1883.—Decided January 7th, 1884.

Patent.

Claims 1 and 3 of reissued letters patent No. 6,962, granted to Lewis R. Keizer, February 29th, 1876, for an "improvement in apparatus for cleaning privies" (the original patent, No. 115,565, having been granted, June 6th, 1871, to Henry C. Bull and Joseph M. Lowenstein, on the invention of said Bull, and the application for the reissue having been filed January 11th, 1876), namely, "1. A privy-vault cleaning apparatus, consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independently movable receiving cask, having an induction passage or opening, and also an air-opening for connection with the air-pump, and provided with screw-necks at each opening for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy and cask, and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth;" "3. The combination, with a portable night-soil cask, of a float-valve located at the air passage, substantially as described, whereby the fluid matter is prevented from entering the air-passage and clogging the suction air-pipe and pump, as set forth;" are invalid, because they are for inventions not indicated in the original patent as inventions, being for sub-combinations in combinations claimed in the original, and were made for the purpose of covering features described in patents issued to others during the interval between the granting of the original and the application for the reissue.

Those features are contained in the defendant's apparatus, and that apparatus does not infringe any claim in the original patent.

Mr. Hector T. Fenton for appellant.
Mr. Benjamin F. Price for appellee.

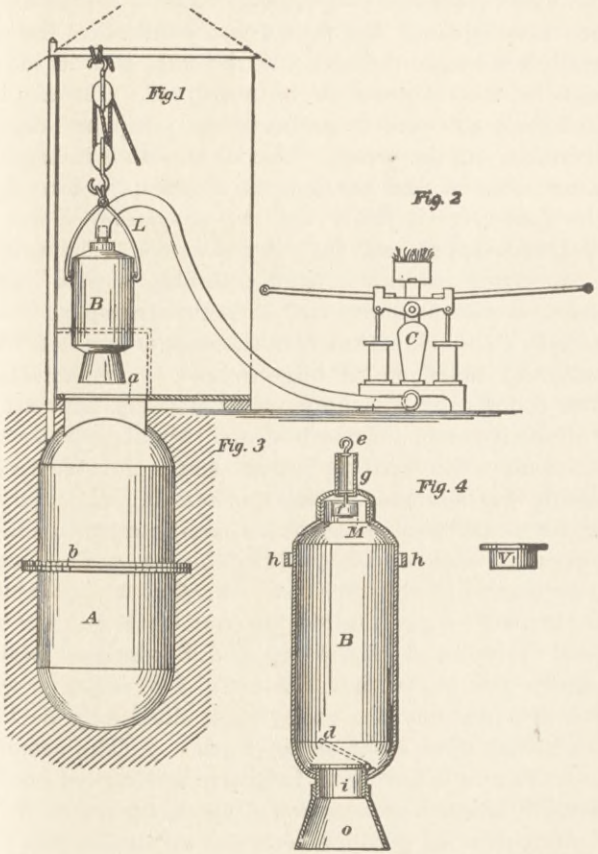
Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought for the infringement of reissued letters patent No. 6,962, granted to Lewis R. Keizer, February 29th, 1876, for an "improvement in apparatus for cleaning privies," the original patent, No. 115,565, having

been granted, June 6th, 1871, to Henry C. Bull and Joseph M. Lowenstein, on the invention of said Bull, and the application for the reissue having been filed January 11th, 1876. The specification says:

"My invention consists, mainly, in a sink-cleaning apparatus, consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independent or movable receiving cask, having an induction passage or opening, and also an air-passage for connecting with the air-pump, and provided with stench- and water-tight covers for both passages, whereby the movable cask may be located in any desired position with relation to the vault, and the air-pump and the deodorizer properly located with reference to the vault and cask, and also whereby the cask, when filled, may be trundled on its bilge or end, after the usual manner of handling casks or barrels. My invention consists, further, in the combination with the cask, of a flanged opening, a detachable suction-pump or funnel connected with the flange of the opening, and a check-valve located within the cask for retaining the offensive matter after passing through the valve. My invention still further consists in the combination with the air-passage of a night-soil cask, of a float-valve, whereby, when the cask is filled with fluid matters, the valve will be floated and closed, thereby indicating that the cask is filled, and preventing the fluid matter from entering the conducting-pipe and passing through the air-passage to the air-pump, which would otherwise be liable to have its valves clogged thereby and rendered inoperative. To more particularly describe my invention, I will refer to the accompanying drawings, in which Fig. 1 represents, in side view, a cask embodying several features of my invention, located within a privy. Fig. 2 represents, in side view, an air-pump connected with the cask by a flexible tube or suction-hose, and provided with a deodorizer. Fig. 3 represents a privy-vault. Fig. 4 represents, on an enlarged scale and in detail, in vertical central section, the cask shown in Fig. 1. A vault is indicated at A. It is provided with the usual entrance or opening, as at *a*. B denotes one of several casks or receptacles which are employed in connection with an air-pump, as at C, for removing the offensive matter from the vault. The cask B has at one end a screw-neck, *i*, and the check-valve *d*, which opens inwardly. Said cask also has another screw-neck, as at M, to

which is attached the suction-hose which communicates with the air-pump. Attached to this neck is also a float-valve, as at *f*, which guards the entrance to the suction-tube or hose. The spindle of the valve *f* is provided, in a well-known manner, with guiding devices. The lower portion of the float-valve is provided with cork or other light material, whereby, when the



cask is filled with fluid matter, the valve will be floated and effectually close the entrance to the suction air-pipe, preventing the latter, as well as the pump, from being clogged by said matter. The cask is shown to be provided with shoulders *h h*,

whereby the hoisting-clamps L may readily be made to engage with the cask. The induction-pipe O is secured to the proper screw-neck on the cask, and it constitutes a tubular connection with the cask, through which the offensive matter is conducted from the vault into the cask. In operation I proceed as follows: After removing the seat or floor of the privy, uncovering the entrance to the vault, the cask B is suspended by a block and tackle over the vault, connected by the suction-pipe to the air-pump, and then lowered until the funnel-pipe connection O (which is temporarily screwed to the neck *i* of the cask) is at its lower end immersed in the contents to be removed. The air is then exhausted from the cask by means of the pump, and deodorized by the furnace on the pump. The vacuum thus induced causes the matter to be sucked through the funnel-pipe into the cask until the float-valve is lifted and the air-passage closed. The pump is then stopped and the valve *d* closes. The cask, being wholly free from exterior contact with filth, is then lifted, the funnel and suction-pipe removed, and the screw-caps V applied to the necks *i* and M, after which the cask is handled like any filled cask, and rolled on its bilge or end." The reissue has 3 claims, as follows: "1. A privy-vault cleaning apparatus, consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independently movable receiving-cask, having an induction passage or opening, and also an air-opening for connection with the air-pump, and provided with screw-necks at each opening, for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy, and cask, and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth. 2. The combination with a portable cask, having an induction aperture at one end, of a check-valve, a screw-neck surrounding the aperture, a funnel-shaped pipe connected with the neck, and an air-eduction passage provided with a screw-neck, substantially as described. 3. The combination, with a portable night-soil cask, of a float-valve located at the air-passage, substantially as described, whereby the fluid matter is prevented from entering the air-passage and clogging the suction air-pipe and pump, as set forth."

The specification of the original patent was in these words, the drawings attached to the original and the reissue being alike:

"Figure 1 is a view in perspective of the cask or package, showing the method of suspending and operating the same. Fig. 2 is a side elevation of the suction-pump and furnace. Fig. 3 is a plan view of the vault. Fig. 4 is a vertical transverse section of the cask or receptacle shown in Fig. 1. My invention relates to an improvement in devices for cleaning or emptying privy-vaults, whereby the night-soil therein contained may be removed and utilized, and the disagreeable odors arising therefrom prevented. It consists of the vault A, receptacles or casks B, and the suction-pump with furnace C, constructed and operated as shown and described. A, a cylindrical privy-vault, constructed of metal or other suitable water-tight material, and provided with the neck *a* and the flange *b*, which latter is designed as an auxiliary for holding it in a vertical position, as also for strengthening the same. B represents one of several casks or receptacles, which are employed as adjuncts of the suction-pump C, for removing the fecal matter from the vault. It has located at its lower extremity the funnel O, which fits air-tight upon the neck *i*, and the valve *d*, which opens upwardly; and at its apex the float-valve *f* is provided, which screws upon or is otherwise caused to fit air-tight upon the neck M. The float-valve *f* consists of the rod *e* located vertically in the tube *g*, the said rod being guided by orifices provided in transverse bars in the upper and lower ends thereof. The lower part of the float-valve is made of cork or other light material, in order that, when the cask or receptacle becomes filled by the action of the suction-pump, it may press against the orifice of the tube and thereby prevent the contents of the vault A from overflowing or extending beyond the cask B. *h h* are shoulders rigidly attached to the cask B, and are designed for clutching with the clamps L. V represents one of a series of caps which are screwed upon the neck or necks of casks B, when filled by the action of the suction-pump. The method of operating my device is as follows: After removing the seat or floor, the receptacle B is suspended from a block and tackle over the opening, and the cask or receptacle B is then lowered into the vault until the funnel O enters the fecal matter about ten inches,

whereupon, by operating the suction-pump, the receptacle or cask becomes filled with the feces until it reaches the float-valve *f*, which presses against and closes the orifice of the tube leading to the pump. The valve *d* then falls and prevents the escape of the contents of the cask. In the mean time the air that is pumped out of the receptacle B is forced into a furnace located over the suction-pump, whereby the odor arising therefrom is destroyed. When one receptacle is thus filled, the valve *f* is removed and the cap V screwed thereon, whereupon the operation is repeated by the employment of another cask until the vault is emptied of its contents." The claims of the original patent are two in number, as follows: "1. The combination and arrangement of the funnel O, neck *i*, and valve *d*, with cask B, neck M, and float-valve *f*, substantially as shown and described. 2. The combination and arrangement of the vault A, cask B, and suction-pump C, substantially in the manner and for the purpose described."

Infringement of only claims 1 and 3 of the reissue is insisted on. It is set up as a defence, in the answer, that the reissue is not for the same invention as that described in the original patent. The apparatus used by the defendant is constructed in accordance with the description contained in two letters patent —one, No. 158,743, granted to Samuel R. Scharf, January 12th, 1875, for an "improvement in machines for cleaning privy-vaults;" the other, No. 179,993, granted to Jerome Bradley and Samuel R. Scharf, July 18th, 1876, for a "machine for cleaning privy-vaults and like places." In that apparatus there is an independently movable cask, having two necks in its upper head, as it stands. The suction-pipe from the vault is screwed to one neck, and the air-pipe, which leads to the pump, is screwed to the other neck. There is an air-pump, by means of which a vacuum can be formed and maintained in the cask, and a deodorizer, through which the air drawn into the pump is expelled by the working of the pump. The suction-pipe and the air-pipe are both of them tubular, flexible connections. There are caps for closing the necks after the barrel is filled. There is inside of the cask no check-valve, but there is a float-valve, so arranged with reference to the opening of the air-

pipe that the fecal matter lifts the valve and closes the passage when the barrel is sufficiently full.

It is quite apparent that the defendant's apparatus did not infringe either one of the 2 claims of the original patent. Claim 1 made the valve *d* in the bottom of the cask, opening to admit the entrance of material, and shutting when the orifice to the pump was closed by the float-valve, a necessary element in the combination covered by that claim. Without the valve *d* the peculiarly constructed cask of the patent could not be operated. So, as to claim 2, there could be no operative combination of vault, cask, and pump unless the cask should have the valve *d*, and that valve was a part of the combination covered by claim 2. The valve *d* is not found in the defendant's apparatus, nor is there any substitute or equivalent for it. The material is taken into the barrel through its head as it stands on its bottom, and hence there is no need of a check-valve.

There is not in the specification of the original patent any suggestion or indication of any invention other than the two combinations severally claimed in the two claims. In the reissue there are material enlargements of the scope of the invention described and claimed in the original patent, and, apparently, with a studied view to include and cover, by descriptive words and by broader claims, an apparatus like that used by the defendant. If claim 1 of the reissue be construed so as to exclude the check-valve from the combination covered by that claim, no warrant is found in the original specification for such a construction. It is apparent that the inventor contemplated the use of no other description of cask than one having such a check-valve as the original specification describes. If claim 1 of the reissue be construed so as to include only such a cask as is described, that is, one with a check-valve, there is no infringement of that claim.

Claim 3 of the reissue is for the combination of a float-valve with a cask of some kind. Whether it be a cask with a check-valve, or one without a check-valve, the claim is an expansion of the invention beyond anything indicated in the original specification as the invention. In claim 1 of the original patent four other elements are made necessary, with the cask and the

float-valve, to constitute the combination claimed. In claim 2 of the original, the cask and the pump cannot be combined, so as to practically co-operate in working, unless the float-valve is used. The original specification states that unless the float-valve is used the contents of the vault will overflow or extend beyond the cask. The specification of the reissue states that, in the absence of the float-valve, the fluid matter will enter the air-pipe, and pass through it to the air-pump, and tend to clog the air-pipe and the valves of the pump and render the latter inoperative. It is, moreover, as true of claim 3 of the reissue as it is of claim 1, that, if the cask of claim 3 be construed to be a cask without a check-valve, there is no ground in the original patent for such a construction; and that, if claim 3 includes no cask except one with a check-valve, it is not infringed.

The original specification indicates nothing but a cask having the entrance opening in its bottom, furnished with a check-valve to open and shut such entrance automatically, the cask suspended vertically over the vault and lowered into it until the funnel at the bottom is sufficiently immersed, the filling of the cask in that position, and the raising it and emptying it. The cask in the defendant's apparatus has the entrance opening in its top, has no check-valve, is not suspended over or lowered into the vault, is placed at a distance from the vault, and is connected with the vault by a flexible pipe. The patent to Scharf, No. 158,743, granted January 12th, 1875, a year before reissue No. 6,962 was applied for, shows an apparatus substantially the same as that used by the defendant. There is a barrel or tank, in the head of which, as it stands on its bottom, there are two short metallic pipes. A flexible pipe extends from one into the vault, and another flexible pipe extends from the other to an air-pump. There is a deodorizer connected with the air-pump by a third flexible pipe. The cask is filled by the action of the air-pump in creating a vacuum in it. The foul air passes through the cask and the pump into the deodorizer. The barrel and the air-pump are described as "independently movable about the vault," by reason of the flexibility of the pipes. The attempted expansion of the original Bull patent, to

cover what is shown in the Scharf patent, is manifest. The funnel O of the original patent is called, in the reissue, "an induction passage or opening." It is said, in the reissue, that "the movable cask may be located in any desired position with relation to the vault;" and that the operation may be performed "within or near the privy." In claim 1 of the reissue it is stated that "the movable cask may be located in any desired position with relation to the vault and privy." The effort was to obtain a reissue which should cover an apparatus having the cask located at a distance from the vault, with a flexible pipe from it to the vault, and a receiving opening in the top of the cask, and no check-valve—all of them features not indicated in the original patent, but all of them features existing in the Scharf patent granted after the original Bull patent and before the application for its reissue. The same observations apply to the patent to Frazier, No. 168,473, granted October 5th, 1875, more than three months before reissue No. 6,962 was applied for. That patent shows a portable receiving cask connected from its top, by a flexible pipe, with the vault, and by another flexible pipe with an air-pump, which has secured to it a deodorizing vessel. The air is exhausted from the cask and passes through the air-pump into the deodorizer, and the contents of the vault rise into the cask. The cask has no check-valve, and is described as placed suitably near the vault.

The foregoing state of facts brings this case within the principles laid down in *Miller* v. *Brass Co.*, 104 U. S. 350; and *James* v. *Campbell*, 104 U. S. 356. The suggested mistake in the original patent, that its two claims were not as broad as they might have been made, and that the combinations claimed were too narrow and contained too many elements, and that sub-combinations such as are found in claims 1 and 3 of the reissue might have been claimed in the original patent, in view of the state of the art and of the description and drawings of that patent, was, if a mistake at all, one apparent on the first inspection of that patent. The expansions in claims 1 and 3 of the reissue were after-thoughts, developed by the subsequent course of improvement in the Scharf and Frazier patents, and intended to cover matters appearing in those patents and not

claimed in the original patent, No. 115,565. No excuse is given for the delay in applying for the reissue, nor is any actual inadvertence, accident, or mistake shown. The omission to claim sub-combinations in the combinations claimed, the existence of such sub-combinations being apparent on the face of the original patent, was, in law, on the facts in this case, such a dedication of them, if new, to the public, that a reissue, to cover such sub-combinations, in revocation of such dedication, cannot be availed of to the prejudice of rights acquired by the public to what is shown in the Scharf and Frazier patents, issued before the reissue was applied for. The reissued patent must, for these reasons, be held to be invalid, as to claims 1 and 3.

The circuit court made an interlocutory decree declaring the validity of the reissue and its infringement and awarding a perpetual injunction and an account of profits and damages. By a final decree, a sum of money was awarded as damages. From that decree the defendant has appealed. The result of our consideration is, that

The decree must be reversed, and the case be remanded to the circuit court, with direction to dismiss the bill.

JOHN JOSEPH ALBRIGHT & Others *v.* EMERY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 12th and 13th, 1883.—Decided January 7th, 1884.

A decree of the Supreme Court of the District of Columbia, in general term, affirmed, on the facts.

Mr. A. S. Worthington for appellants.
Mr. John W. Ross and *Mr. S. S. Henkle* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

In a suit in equity brought in the Supreme Court of the District of Columbia, by the firm of Langdon, Albright & Company, against Samuel Emery, Senior, and five other persons,

that court, in special term, made a decree setting aside an assignment made to two of the defendants, directing the manner in which receivers in the suit should distribute a fund in their hands, directing the clerk to pay to the plaintiffs the whole of a fund in the registry of the court, directing the defendant Emery to pay to the plaintiffs $1,232.37, with interest from July 14th, 1879, adjudging Emery to be indebted to the plaintiffs in the further sum of $14,818.98, with interest from July 20th, 1877, and the defendant Sailer to be liable to them for the same amount, and awarding execution as at law, therefor, against them or either of them. From that decree Emery appealed to that court in general term, in his own behalf, Sailer declining, in open court, to appeal. The court in general term made a decree reversing the decree in special term so far as it charged Emery, and dismissing the bill as to him. From that decree the plaintiffs have appealed to this court.

It is not necessary to consider the question whether the bill, if demurred to, or if the facts alleged in it were sustained by the proofs, would lie, as setting forth a case for the cognizance of a court in equity, because we are of opinion that the proofs do not establish the allegations of the bill, so far as they affect Emery, in respect to any relief prayed against him in the bill, or any relief granted against him by the court in special term, and that no part of the relief contended for in the assignments of error made by the appellants is warranted by the proofs.

The decree of the court in general term is affirmed.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY *v.* FUNGE.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

Submitted December 6th, 1883.—Decided January 7th, 1884.

Contract.

For the purpose of settling a debt, the debtor gave to the creditor orders for 25 wagons, and the creditor gave to the debtor a written receipt, which he

Statement of Facts.

accepted, stating that the wagons were to be received in payment of the claim, provided they were delivered to the creditor in good condition and merchantable order, and that it was understood and agreed that if the wagons were so delivered in good condition they were to be sold for the highest prices that could be obtained for them, and the surplus, after paying the debt and cost of selling, should be refunded to the debtor; 21 of the wagons were delivered, but none of them were in good condition and merchantable order; the creditor sold 19 of them and made ineffectual efforts to sell the other 2, and, after crediting the net proceeds of sale, sued the debtor to recover the balance of the debt: *Held*, That the receiving the 21 wagons and proceeding to sell them was an acceptance of them *pro tanto* in payment of the claim; that the contract for the payment in wagons was unfulfilled as to the 4 wagons not delivered; and that the price for which the 19 wagons were sold, and the selling value of the 2 not sold, had no bearing on the case, unless there was a surplus of the proceeds of sale to be refunded to the debtor, under the contract.

This was an appeal from the Supreme Court of Utah Territory, in a suit brought in the First Judicial District Court of that Territory, in March, 1882, by the appellant, a Wisconsin corporation, against the appellee, to recover the sum of $1,444.90 and interest from the filing of the complaint. The complaint contained two counts. The first set forth that the appellee owed the appellant $2,832.40, for a balance of an account; that, for the purpose of settling such indebtedness, the appellee gave to the appellant's agents, on the 28th of October, 1880, six orders on six different parties in Utah Territory, for the delivery to such agents of wagons, 25 in number, the orders being severally for 1, 3, 2, 5, 9 and 5 wagons; that, at the same time, said agents executed and delivered to the appellee a receipt, which he accepted, as follows:

"Received from W. W. Funge orders on the respective parties named in the annexed list, for wagons therein mentioned, which wagons are to be received in payment of the claim of Winchester & Partridge Manufacturing Company against said Funge for twenty-eight hundred and thirty-two dollars and forty cents: Provided the said wagons are delivered to said Winchester & Partridge Manufacturing Company, or their agents, W. W. Burton & Co., in good condition and merchantable order, at the respective places named in said orders, on presentation thereof; and it is understood and agreed that if said

wagons are so delivered in good condition and promptly, as aforesaid, they are to be sold to the best advantage and for the highest prices that can be obtained for them, and any surplus of the proceeds thereof that may remain after paying said debt of $2,832.40, and the actual and necessary cost of selling the same, is to be refunded to said Funge, unless prior to that time he shall have been paid two hundred dollars ($200), which he agrees, at their option, to take in lieu of said surplus, and in full settlement of his account with said company."

That four of the wagons covered by the order for 9 wagons were not delivered; that 21 of the wagons were delivered, but were none of them in good condition and merchantable order; and that the appellant had sold 19 of them, for $1,807.43 net, and had made ineffectual efforts to sell the other 2. The second count set forth an indebtedness of the appellee to the appellant of $2,832.40, for a balance of an account, in August, 1880, and a credit thereon of the net proceeds of certain wagons, leaving due $1,444.90, with interest from the filing of the complaint.

The appellee filed a demurrer, and alleged therein as a ground of demurrer to the complaint, and to each count separately, that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and, the appellant electing to stand by its complaint, judgment was entered in favor of the appellee. The supreme court affirmed the judgment, and appeal was taken.

Mr. F. S. Richards, and *Mr. R. K Williams* for appellant.

Mr. James N. Kimball, *Mr. Abbot R. Heywood*, and *Mr. Enos D. Hoge* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

We are of opinion that, on the terms of the receipt which expressed the contract between the parties, the appellant or its agents were required to determine, on receiving the wagons, whether they were in good condition and merchantable order, and were at liberty to reject them if not meeting those conditions; that the receiving the 21 and proceeding to sell them

was an acceptance of the 21 in payment *pro tanto* of the claim; that the contract for the payment in wagons was unfulfilled as to the 4 wagons not delivered; and that the price for which the 19 wagons were sold, and the selling value of the 2 not sold, have no bearing on the case under the first count, unless there be a surplus of the proceeds of sale, to be refunded to the appellee under the contract.

As to the second count, it sets forth a good cause of action. That count does not involve on its face any question as to the contract evidenced by the receipt embodied in the first count.

The judgment of the supreme court is reversed, with direction to it to reverse the judgment of the district court, and to take or direct such further proceedings in the suit as may be according to law and in conformity with this opinion.

WYMAN, Treasurer, *v.* HALSTEAD, Administrator.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 13th, 14th, 1883.—Decided January 7th, 1884.

Administration—Claims against the United States—Conflict of Jurisdiction—District of Columbia—Mandamus—Treasurer of the United States.

For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable.

Debts due from the United States are not local assets at the seat of government only.

The treasurer of the United States cannot be compelled by writ of mandamus to pay to an administrator, appointed in the District of Columbia, of an inhabitant of one of the States of the Union, the amount of a draft payable to the intestate at the treasury out of an appropriation made by Congress, and held by such administrator.

Mr. Assistant Attorney-General Maury for the United States.

Mr. A. L. Merriman and *Mr. J. W. Cooksey* for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is a writ of error sued out by the Treasurer of the United

States, to reverse a judgment of the Supreme Court of the District of Columbia, ordering a peremptory writ of mandamus to issue against him upon the petition of Eminel P. Halstead, as administrator, appointed in the District, of the estates of John N. Pulliam and John J. Pulliam (each of whom was an inhabitant of the State of Tennessee at the time of his death), and as trustee appointed by that court, to compel the payment to him of the amount of certain drafts hereinafter mentioned.

The petition alleged, and the answer admitted, these facts: On June 17th, 1882, Wyman's predecessor as Treasurer of the United States, residing and transacting the business of his office at Washington in the District of Columbia, issued, under and by virtue of the act of Congress of May 1st, 1882, c. 114, making appropriations therefor, three drafts payable at the treasury in Washington, one for $3,020, payable to John J. Pulliam, executor of John N. Pulliam, or order, and two for $1,223 and $545 respectively, payable to John J. Pulliam or order; and the three drafts were delivered to Halstead on account of the payees. John J. Pulliam afterward died, and Halstead, having the drafts in his possession, applied for, and on August 2d, 1882, obtained, letters of administration in the District of Columbia upon the several estates of the two Pulliams. In September, 1882, Benjamin U. Keyser filed a bill on the equity side of the Supreme Court of the District against Halstead and others, claiming an equitable interest in these drafts or the proceeds thereof; and in March, 1883, obtained a decree directing Halstead, as administrator as aforesaid, and as trustee for that purpose, to indorse and collect the drafts, and to make distribution of the proceeds. In obedience to this decree, Halstead, on April 19th, 1883, indorsed the drafts, and demanded payment thereof of Wyman, as treasurer of the United States; but he, although having sufficient money in his possession, appropriated by Congress, refused to pay them without the indorsements of administrators appointed in the State of Tennessee, the domicil of the two deceased persons.

The opinions delivered in the court below, upon granting the writ of mandamus, are reported in 11 Washington Law Reporter, 370–377, 385–394.

Opinion of the Court.

The determination of this case does not depend upon the question whether administration was rightly taken out in the District of Columbia, nor upon the question whether an administrator appointed elsewhere could sue within the District upon debts payable here, but upon the question whether a payment by the United States to an administrator already or hereafter appointed in Tennessee, the domicil of the deceased, would be a good discharge of the debts, payment of which is now sought to be enforced.

The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable. *Yeomans* v. *Bradshaw*, Carth. 373; *S. C.* Comb. 392; Holt, 42; 3 Salk. 70, 164; Abinger, C. B., in *Attorney General* v. *Bouwens*, 4 M. & W. 171, 191; *S. C.* 1 Horn & Hurlstone, 319, 324; Parke, B., in *Mondel* v. *Steele*, 1 Dowl. (N. S.) 155, 157; *Slocum* v. *Sanford*, 2 Conn. 533; *Chapman* v. *Fish*, 6 Hill, 554; *Owen* v. *Miller*, 10 Ohio St. 136; *Pinney* v. *McGregory*, 102 Mass. 186.

An administrator is of course obliged to demand payment at the place where the bill or note is payable; and he may find difficulty, unless it is payable to bearer, in suing upon it in a place in which he has not taken out administration. But payment to the administrator appointed in the State in which the intestate had his domicil at the time of his death, whether made within or without that State, is good against any administrator appointed elsewhere. *Wilkins* v. *Ellett*, 9 Wall. 740, and 108 U. S.

As was said by Mr. Justice Story, in delivering the judgment of this court in *Vaughan* v. *Northup*, 15 Pet. 1, 6, and repeated by Mr. Justice McLean, in delivering judgment in *Mackey* v. *Coxe*, 18 How. 100, 105:

"The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicil, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicil. On the contrary, the administrator of a creditor of the government, duly appointed in the State where he was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it."

In *Vaughan* v. *Northup*, an administrator, appointed in Kentucky, of an inhabitant of that State who died there intestate and childless, received a sum of money from the treasury of the United States, for military services rendered by the intestate during the Revolutionary War; and a bill in equity, filed against him in the District of Columbia by the next of kin, for their distributive shares of the money, was dismissed for want of jurisdiction, because an administrator, appointed in and deriving his authority from one State, was not liable to be sued elsewhere, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration.

In that case, as in this, it was argued by counsel that the assets in question were not collected in the State of the intestate's domicil, "but were received as a debt due from the government at the Treasury Department at Washington, and so constituted local assets within this District." It was in declining to yield to that argument, that the court laid down the general principles above quoted, and added:

"If any other doctrine were to be recognized, the consequence would be, that before the personal representative of any deceased creditor, belonging to any State in the Union, would be entitled to receive payment of any debt due by the government, he would be compellable to take out letters of administration in this District for the due administration of such assets. Such a doctrine has never yet been sanctioned by any practice of the government,

and would be full of public as well as private inconvenience. It has not, in our judgment, any just foundation in the principles of law. We think that Northup, under the letters of administration taken out in Kentucky, was fully authorized to receive the debt from the government to his intestate; that the moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals in Kentucky; and that distribution thereof might have been, and should have been, sought there in the same manner as of any other debts due to the intestate in Kentucky."

The act of June 24th, 1812, c. 106, § 11 (since omitted in the Revision in 1874 of the Statutes of the District), by which executors or administrators appointed in any State or Territory were permitted to maintain any suit or action, or to prosecute and recover any claim, in the District of Columbia, as if they had been appointed here, was referred to in the opinion, not as the principal ground of decision, but as affording no support for the bill, and as fortifying rather than weakening the general principles of law upon the subject. 2 Stat. 758; 15 Pet. 7, 8.

In the case at bar, neither the fact that the drafts were made payable at the treasury of the United States in the city of Washington, nor the deposit, pursuant to § 307 of the Revised Statutes, of the money represented by the drafts in the treasury to the credit of the payees, affected the character or the locality of the debts. The deposit of the money gave the payees or their representatives no property in or lien upon it. The obligation of the United States was not to surrender to them any specific sums of money, but to pay to them sums equal to the amount credited to them, as in the case of any other liquidated debt. The creditors could not indeed insist upon payment without first demanding it at the treasury. But the United States, in their sovereign capacity, having no domicil in any one part of the Union rather than in any other, do not, by establishing at the national capital a treasury for the transaction of the principal business of the financial department of the government, and making their money obligations payable there, confine their presence or their powers to this spot. The

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United States having, in the phrase of Mr. Justice Story, "an ubiquity throughout the Union," may in their discretion, exercised through the appropriate officers, pay a debt, due to the estate of a deceased person, either to the administrator appointed in the State of his domicil, or to an ancillary administrator duly appointed in the District of Columbia; and the exercise of their discretion in this regard cannot be controlled by writ of mandamus.

It is hardly necessary to mention the proceedings in equity upon the suit of Keyser. Though referred to in the petition for the writ of mandamus in the general terms stated at the beginning of this opinion, they have not been printed in full in the record, as required by the eighth rule. The reason doubtless is, that both in the opinion of the court below and in the argument in this court, while it is said that the administrator appointed in Tennessee of the estate of John N. Pulliam was made a defendant in that suit, and the bill taken for confessed against him, it is admitted that he was not amenable as administrator to suit in this District, and that neither he, nor any administrator hereafter appointed in Tennessee of the estate of John J. Pulliam, could be concluded by that decree.

The result is, that the judgment of the Supreme Court of the District of Columbia awarding a peremptory writ of mandamus must be reversed, and the case remanded to that court, with directions to

Dismiss the petition.

BACHMAN & Others *v.* LAWSON & Others.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

Submitted December 14th, 1883.—Decided January 7th, 1884.

Alabama Claims—Assignment—Attorney and Counsel—Statutes.

An agreement made a fortnight before the Treaty of Washington of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser, the Florida, employed a person, whether an attorney at law or not, to use his best efforts to collect their "claim arising out of the capture," and

authorized him to employ such attorneys as he might think fit to prosecute it, and promised to pay him "a compensation equal to twenty-five per cent. of whatever sum shall be collected on the said claim," applies to a sum awarded to them by the Court of Commissioners of Alabama Claims, established by the act of June 23d, 1874, c. 459; and is not affected by § 18 of that act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counsellor and attorney for the claimant, and issue a warrant therefor, and that all other liens, or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void.

Action on a written contract to recover a commission agreed to be paid to the plaintiffs in the State court who are defendants here, for collecting a "claim arising out of the capture of the ship Commonweath and her cargo by the armed rebel cruiser The Florida."

Judgment was rendered for plaintiffs. Defendants then brought the cause here by writ of error.

Mr. Edward Jordan for plaintiffs in error.
Mr. Frederic B. Jennings, for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

This action was brought in the Superior Court of the City of New York, by the members of the firm of Lawson & Walker against the members of the firm of Bachman Brothers, to recover compensation for services performed under a written agreement between them, dated April 25th, 1871, which recited that the defendants had employed, and by power of attorney of the same date had authorized, the plaintiffs to collect their "claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser, the Florida;" and by which the plaintiffs agreed "to use their best efforts, at their own expense, to collect the said claim in the shortest practicable time;" and the defendants, in consideration of the premises, agreed to allow and pay to the plaintiffs "a compensation equal to twenty-five per cent. of whatever sum shall be collected on said claim."

By the power of attorney, referred to in this agreement, the defendants appointed the plaintiffs their attorneys to prosecute

and collect the claim by such lawful proceedings and means as to them might appear expedient, but at their own cost and charge; and authorized them to receive on the defendants' account whatever sums of money might be awarded on the claim, and to give in their name proper acquittances therefor; to execute all papers necessary to secure the transfer of the claim to any party, department, or government which might assume the payment thereof; and to employ for the prosecution of the claim such attorneys as they might think fit.

The plaintiffs, who are average adjusters, filed an abstract of the claim in the Department of State, and in accordance with the instructions issued by that Department, and from papers and information furnished by the defendants, prepared a memorial giving a full history of the circumstances relating to the claim; and afterwards went to Washington several times about this and other like claims; and after the passage of the act of Congress of June 23d, 1874, c. 459, 18 Stat. 245, establishing the Court of Commissioners of Alabama Claims, prepared and sent to the defendants for signature a petition to be presented to that court, which, although repeatedly asked for, was never returned; and the defendants, after endeavoring to induce the plaintiffs to release them from the agreement, employed an attorney at law to prosecute their claim before that court, which he did, and recovered thereon the sum of $3,034.16.

The plaintiffs brought this action to recover twenty-five per cent. of this sum, less $125, the estimated expense which they would have incurred had they proceeded and recovered the money. The defendants, besides other defences presenting no federal question, contended that the agreement sued on had been annulled and rescinded by the act of 1874. The judge presiding at the trial overruled the objection, and the jury returned a verdict for the plaintiffs, on which judgment was rendered. The defendants appealed to the general term of the Superior Court, at which the judgment was reversed, and a new trial ordered. The plaintiffs appealed to the Court of Appeals, which reversed the judgment of the general term, and remitted the case to the Superior Court for further proceedings. See 81 N. Y. 616. The Superior Court thereupon entered

judgment in accordance with the verdict, and the defendants sued out this writ of error.

In support of the writ of error it was contended that the agreement sued on had relation solely to the claim which existed at its date; that that claim was extinguished by the operation of the Treaty of Washington, the Geneva Award, and the payment by Great Britain to the United States of the sum awarded; and that the claim successfully prosecuted under the act of Congress and before the Court of Commissioners was a new claim, created by that act, and after the making of the agreement; or, if it could be treated in any respect as the same claim, was so changed in its character and circumstances that the agreement had no application to it.

But, as was said by Mr. Justice Story, delivering the judgment of this court, in a similar case:

"The right to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself." "The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government." "The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice." "It recognized an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as a matter of right, and as such it was granted by Spain." *Comegys* v. *Vasse*, 1 Pet. 193, 215–217.

The claim established before the Court of Commissioners of Alabam Calaims was manifestly the very claim contemplated by the agreement in suit. It is described in that agreement as a "claim arising out of the capture of the ship Commonwealth and her cargo by the armed rebel cruiser the Florida." The agreement bears date only a fortnight before the Treaty of

Washington was made and concluded, by which it was agreed between the United States and Great Britain that all claims growing out of acts committed by the Alabama and other vessels should be referred to a Tribunal of Arbitration. The Florida was one of the vessels which were determined by the Geneva Award to have put out from British ports through neglect of international duty on the part of Great Britain, and compensation for the wrongs done by which to these defendants and others was included in the sum awarded in favor of the United States. The claim of the defendants was one for which compensation was justly due to them from Great Britain; was demanded by the United States from Great Britain as a matter of right; as such was awarded to be paid and was paid by Great Britain to the United States, in accordance with the provisions of the treaty between the two nations, and with the determination of the Tribunal of Arbitration created by that treaty; and was paid by the United States to the defendants, out of the money received from Great Britain, pursuant to the directions of the act of Congress, and to the decision of the Court of Commissioners established by that act. The defendants were the original owners of the claim, and the money was granted and paid by the United States to them as such. The money so demanded and received by the United States from Great Britain, and paid by the United States to the defendants, was money collected on the claim described in the agreement. *Comegys* v. *Vasse*, above cited; *Phelps* v. *McDonald*, 99 U. S. 298; *Leonard* v. *Nye*, 125 Mass. 455.

The other points relied on in support of the writ of error, so far as they present any federal question, are based upon the following provisions of the act of 1874:

"SECT. 18. In case any judgment is rendered by said court for indemnity for any loss or claim hereinbefore mentioned against the United States, at the time of the giving of the judgment the court shall, upon motion of the attorney or counsel for the claimant, allow, out of the amount thereby awarded, such reasonable counsel and attorney fees, to the counsel and attorney employed by the claimant or claimants respectively, as the court shall de-

termine is just and reasonable, as compensation for the services rendered the claimant in prosecuting such claims, which allowance shall be entered as part of the judgment in such case, and shall be made specifically payable as a part of said judgment for indemnification to the attorney or counsel, or both, to whom the same shall be adjudged; and a warrant shall issue from the treasury in favor of the person to whom such allowance shall be made respectively, which shall be in full compensation to the counsel or attorney for prosecuting such claim; and all other liens upon, or assignments, sales, transfers, either absolute or conditional, for services rendered or to be rendered about any claim or part or parcel thereof provided for in this bill, heretofore or hereafter made or done before such judgment is awarded and the warrant issued therefor, shall be absolutely null and void and of none effect." 18 Stat. 249.

It was argued that the act, by prescribing a mode of proceeding for collecting the claim which required the services of attorneys at law, rendered the agreement in question inoperative, because the plaintiffs, not being such attorneys, were incapable of performing it. But the power of attorney executed at the same time as the agreement, and referred to therein, authorized the plaintiffs to use all such lawful means and proceedings, and to employ such attorneys, as they might think fit, for the prosecution of the claim.

It was further contended that the section above quoted rendered illegal and void all agreements, made before judgment, to pay compensation for services about any such claim. But the prohibition is clearly limited to liens, sales, or assignments, which create a right of property in the claim itself, and does not extend to a mere personal agreement to pay as compensation for such services a sum of money equal to a certain proportion of the amount which may be recovered.

The other points made in argument present no federal question, and therefore afford no ground upon which this court can revise the judgment of the State court. *Murdock* v. *Memphis*, 20 Wall. 590.

Judgment affirmed.

BENDEY & Wife *v.* TOWNSEND & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Argued November 13th, 1883.—Decided January 7th, 1884.

Assignee—Attorney at Law—Fees—Mortgage—Michigan—Statutes—Surety.

The maker of a promissory note executed, to one who for his accommodation signed his name on the back of the note before its delivery to the payee, a mortgage of real estate to indemnify him against all costs and charges arising from his contract, with a power of sale in case of the mortgagor's default in paying the note. The mortgagor failing to pay the note at maturity, the mortgagee paid the amount thereof to the payee, and entered it upon his books in general account against the mortgagor, and the payee indorsed the amount as a full payment on the note, and delivered up the note to the mortgagee. The mortgagee afterwards assigned to a third person the mortgage and the obligation therein mentioned: *Held*, That the assignee might maintain a bill in equity against the mortgagor for foreclosure and sale of the land under the mortgage, and for payment by the mortgagor personally of so much of the amount of the note as the proceeds of the sale under the foreclosure were insufficient to satisfy.

A stipulation, in a mortgage of real estate, that in case of foreclosure the mortgagor shall pay an attorney's or solicitor's fee of one hundred dollars, is unlawful and void by the law of Michigan, as declared by the Supreme Court of the State; and therefore cannot be enforced in the Circuit Court of the United States upon a bill in equity to foreclose a mortgage, made and payable in that State, of land therein.

Bill in equity to foreclose a mortgage. The suit was commenced in a State court, and was removed to the Circuit Court of the United States, where a foreclosure and sale were decreed. The defendants below appealed.

Mr. C. J. Walker for appellants.
Mr. W. H. Smith for appellees.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by James Bendey and wife from a decree for the foreclosure of a mortgage of land in Michigan, executed by them at Houghton in that State, on April 30th, 1873, to Samuel S. Smith and William Harris; expressed to be made in consideration of the indorsement by Smith and Harris of sev-

eral promissory notes of Bendey, therein described, payable to the order of Thomas W. Edwards, at the First National Bank of Houghton; conditioned that Bendey should pay the notes at maturity, and should save and keep harmless the mortgagees "of and from all costs and charges arising from or on account of said indorsements;" and empowering the mortgagees, in case of default by Bendey in the payment of the notes, or either of them, to sell the land by public auction and convey it to the purchasers, rendering the surplus money, if any, arising from the sale, to the mortgagors, after deducting the costs and charges of the sale, "and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture under the statute, and the same sum as a solicitor's fee, should any proceedings be taken to foreclose the same in chancery."

The other facts appearing by the record are as follows: Smith and Harris, who were partners, signed their partnership name upon the back of the notes before their delivery to Edwards. One of these notes, for $5,000, became payable on May 4th, 1876, and, not being paid by Bendey, was protested for non-payment, and an action was brought thereon by Edwards against Smith and Harris, who, before judgment in that action, paid the amount of the note, with interest. Edwards indorsed the amount as a full payment on the note, and delivered up the note to Smith and Harris; and they entered the amount paid by them upon their books in their general account against Bendey, and afterwards, on September 5th, 1877, assigned the mortgage, and the land therein described, "together with the note or obligation therein also mentioned," to "William Brigham and Amos Townsend, trustees." This assignment was, in fact, made in part payment of debts due from Smith and Harris to firms of which Townsend and Brigham were respectively members.

Townsend and Brigham, who were citizens of Ohio, filed a bill in equity against Bendey and wife, who were citizens of Michigan, in a court of this State, alleging the facts aforesaid, and praying for an account, for the foreclosure of the mortgage by sale of the land, for the payment by Bendey of any balance remain-

ing due to the plaintiff of the principal and interest of the note and mortgage, and for general relief. After the filing of answers and replication, the case was removed, on petition of the defendants, into the Circuit Court of the United States for the Western District of Michigan, and a hearing there had, upon which the facts above stated were proved, and a decree entered that the defendants pay to the plaintiffs the sum of $7,996.59 with interest, together with a solicitor's fee of $100, and that in default of such payment the land be sold by public auction, and conveyed under the direction of a master in chancery, and the proceeds of the sale applied to the payment of these sums, and that, if the proceeds of the sale should be insufficient for such payment, the amount of the deficiency, with interest, should be paid by Bendey to the plaintiff. From this decree the defendants appealed to this court.

The contract into which Smith and Harris entered, by signing their names on the back of the note before its delivery to the payee, though styled in the mortgage an indorsement, was rather, as towards the payee or a subsequent indorsee of the note, that of joint makers with Bendey. *Good* v. *Martin*, 95 U. S. 90; *Rothschild* v. *Grix*, 31 Mich. 150. But, whether their liability in that aspect should be treated as that of promisors, or of guarantors, or of indorsers, it is clear that, having signed their names to the note for the accommodation of Bendey, their relation towards him was that of sureties, and they had the right, upon being obliged to pay the amount of the note on his failure to pay it at maturity, to recover from him the sum so paid. The mortgage, containing a condition to indemnify them against all costs and charges arising from their contract, was security to them for the payment by the mortgagors to them of that sum. The entry, in the regular course of their book-keeping, of the amount so paid in general account against Bendey, did not merge or extinguish the mortgage or the personal liability of Bendey to them. The assignment by them to Townsend and Brigham of the mortgage, together with the obligation therein mentioned, was a valid assignment, in equity at least, of the mortgage, as well as of their claim against Bendey for the repayment of the sum paid by them on

the note. The assignees were therefore rightly held to be entitled to a decree for the foreclosure of the mortgage, and also, under the ninety-second rule in equity, to a decree against Bendey himself for so much of the sum paid by Smith and Harris, with interest, as the money obtained by the sale of the land under the foreclosure should be insufficient to satisfy.

The decree below is therefore right in all respects, except in allowing a solicitor's fee of $100. The land is in Michigan, the notes and mortgage were made and payable in Michigan; and by the law of Michigan, as settled by repeated and uniform decisions of the Supreme Court of that State, a stipulation in a mortgage to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in a foreclosure, either under the statutes of the State, or by bill in equity. *Bullock* v. *Taylor*, 39 Mich. 137; *Van Marter* v. *McMillan*, 39 Mich. 304; *Myer* v. *Hart*, 40 Mich. 517; *Vosburgh* v. *Lay*, 45 Mich. 455; *Botsford* v. *Botsford*, 49 Mich. 29. Upon such a question, affecting the validity and effect of a contract made and to be performed in Michigan, concerning land in Michigan, the law of the State must govern in proceedings to enforce the contract in a federal court held within the State. *Brine* v. *Insurance Co.*, 96 U. S. 627; *Connecticut Ins. Co.* v. *Cushman*, 108 U. S. 51; *Equator Co.* v. *Hall*, 106 U. S. 86.

The result is, that the decree must be reversed, without costs to either party in this court, and the case remanded to the Circuit Court with directions to enter a decree for the plaintiffs, with costs, modified by striking out the allowance of the solicitor's fee.

Decree accordingly.

SMITH *v.* GREENHOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Submitted November 19th, 1883.—Decided January 7th, 1884.

Constitutional Law—Jurisdiction.

The declaration contained a count in trespass for entering the plaintiff's premises and carrying away his goods. The plea set up that the goods were lawfully taken by the defendant as collector, to satisfy a tax due the State of Virginia ; the replication averred that the plaintiff before the levy, under authority of a law of that State enacted in 1879, tendered the defendant in payment of the taxes coupons cut from bonds of the State ; the rejoinder set up a subsequent law of the State forbidding him to receive in payment of taxes anything but gold, silver, United States treasury notes or national bank currency : to this rejoinder the plaintiff demurred : *Held,* That this raised a federal question sufficiently to lay the foundation for removing the cause from a State court to the Circuit Court of the United States.

Mr. William L. Royal and *Mr. Wager Swayne* for plaintiff in error.

Mr. Justice Matthews delivered the opinion of the court.

A writ of summons was issued out of the Circuit Court of the City of Richmond by the plaintiff in error, who was plaintiff below, against the defendant, on May 2d, 1883, service of which was acknowledged by the defendant on the same day. The writ was returnable on the first Monday in May, which was the seventh day. On that day the plaintiff filed his declaration in trespass *vi et armis*, for entering upon the premises of the plaintiff, and taking and carrying away his personal property, consisting of one table and one book-case, with the books therein, of the value of $100, and for remaining on the premises of the plaintiff for a long time, whereby the plaintiff was greatly disturbed and annoyed in the peaceable possession thereof, being his place of business, and hindered and prevented from carrying on and transacting his lawful and necessary affairs and business, and for other wrongs and injuries, laying the damage therefor at $6,000. To this declaration the defendant filed a plea in bar, justifying the alleged trespasses, by

setting out that the defendant, as treasurer of the city of Richmond, levied upon the personal property mentioned, in order to sell the same, in satisfaction of certain taxes then due and owing from the plaintiff to the State of Virginia, as by law it was his duty to do. To this plea the plaintiff filed a replication, alleging a previous tender, in payment of said taxes, of coupons cut from bonds issued by the State of Virginia, under the authority of an act of the general assembly of that State, approved March 28th, 1879, said coupons being by that law receivable in payment of said taxes; which, however, the defendant refused to accept in payment thereof. To this replication the defendant rejoined that, by the act of the general assembly of the State of Virginia, of January 26th, 1882, he was forbidden to receive the said coupons tendered in payment of said taxes; and to that rejoinder the plaintiff demurred. All these various pleadings, including the declaration, were filed on the same day, and on that day the plaintiff also filed his petition praying for the removal of the suit to the Circuit Court of the United States for the Eastern District of Virginia, on the ground that it arose under the Constitution of the United States, which was accordingly done. The cause was docketed in the circuit court, and on September 4th, 1883, it was, on motion of the defendant, remanded to the Circuit Court of the City of Richmond. To reverse the order of the Circuit Court of the United States remanding the cause to the State court, this writ of error is prosecuted.

The ground on which the order of the court below, remanding the cause, was placed, seems to have been that no federal question, such as is necessary to confer jurisdiction in the case upon the courts of the United States, appears to be necessarily involved in the issue raised by the pleadings. In this we think the court erred. The replication alleges that the coupons tendered contained an express promise, as required by law, of the State of Virginia, that they should be received in payment of all taxes due to the State. The rejoinder is that the act of January 26th, 1882, subsequently passed, expressly forbids the defendant from receiving such coupons in payment of taxes. The demurrer in effect denies the validity of that law, and upon

the record no ground of its invalidity can be inferred, except that it is avoided by the operation of that provision of the Constitution of the United States which forbids any State from passing laws which impair the obligation of contracts. It therefore sufficiently appears upon the record, that the plaintiff's case arises under the Constitution of the United States, within the rule as laid down in *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116–142.

There is a ground for remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the circuit court. The value of the property taken is stated in the declaration to be but $100, although the damages for the alleged trespass are laid at $6,000. The petition for removal does not allege the sum or value of the matter in dispute otherwise than by the statement of the amount of the claim for damages. We cannot, of course, assume as a matter of law, that the amount laid, or a less amount, greater than $500, is not recoverable upon the case stated in the declaration, and cannot therefore justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500. But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, so that, in the words of the 5th section of the act of 1875, it appeared that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," the order remanding it to the State court could have been sustained.

The order of the circuit court remanding the cause to the State court is reversed, and the cause is reinstated in that court, with directions to proceed therein in conformity with law.

And it is so ordered.

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POTOMAC STEAMBOAT COMPANY & Others *v.* UPPER POTOMAC STEAMBOAT COMPANY.

POTOMAC STEAMBOAT COMPANY *v.* INLAND AND SEABOARD COASTING COMPANY.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 26th, 27th, 28th, 1883.—Decided January 7th, 1884.

Deed—District of Columbia—Maryland—Riparian Rights—Statutes—Virginia—Washington, City of.

1. In 1791, one Young, then owning a tract of land containing about 400 acres on the Potomac, conveyed the same in fee simple with all its appurtenances to two trustees (who were also trustees with similar trusts, for other owners of land), as a site for the City of Washington. The trust provided that the lands laid out in streets, squares, etc., should be for the use of the United States forever, and that a fair and equal division of the remainder should be made. In 1794 the plan of the city was adopted and promulgated. On this plan a public street called Water street was represented as laid out on the margin of the river over the tract so conveyed by Young; but this street was not in fact constructed until after the close of the late civil war. In 1796 the trustees conveyed the tract so deeded to them (including Young's), "in fee simple subject to trusts yet remaining," to commissioners appointed to receive title, under the act of July 16th, 1790, entitled, "An Act for establishing the temporary and permanent seat of the government of the United States." 1 Stat. 130. In 1797 the commissioners, in execution of the trust, and in pursuance of a statute of the State of Maryland, recorded certificates in their record book, which stated that one tract, defined by metes and bounds, had been allotted to Young, and that another tract, in like manner defined, had been allotted to the United States. Each of these tracts was on the northerly side of Water street, and was described as bounded on that street. The title to both became subsequently vested in the plaintiffs: *Held*, That these transactions were equivalent to a conveyance by Young to the United States in fee simple of all his lands; and of a conveyance back by the United States, of the first tract described by metes and bounds, leaving in the United States the title in fee simple to the other tract and to the strip known as Water street. *Van Ness* v. *The Mayor, &c., of Washington*, 4 Pet. 232, approved and followed.
2. After the execution of the commissioners' certificate in 1797, allotting to Young a tract of land on the north side of Water street and to the United States another tract, also on the north side of that street, no wharfage rights remained connected with the use and enjoyment of those

lots, and not being thus connected with them, such right was not annexed as an incident to them, so as to become appurtenant to them.

3. The agreement of March 28th, 1785, between Virginia and Maryland, provided that citizens of each should have full property in the shores of the Potomac and the privilege of constructing wharves and improvements. The Maryland act of December 19th, 1791, authorized the commissioners appointed under the act of July 16th, 1790, 1 Stat. 130, to license the building of wharves on the Potomac: *Held*, That the United States, as owners in fee of Water street in the city of Washington, were in the enjoyment of all the rights which were attached to that property by this compact and by this legislation, or which belonged or appertained to it by virtue of general principles of law relating to riparian rights. The authorities in this court, and other federal courts, and in State courts and the courts of Great Britain, on that subject examined.

4. The act of the legislature of Maryland of December 28th, 1793, under which the commissioners entered in their record book the certificate to Young and to the United States, provided that they should "be sufficient and effectual to vest the legal estate in the purchasers, without any deed or formal conveyance:" *Held*, That parol evidence is only admissible to contradict, vary, or explain them, when it would have been admissible if they had been formal conveyances.

5. *Chesapeake & Ohio Canal Co.* v. *Union Bank of Georgetown*, 5 Cranch C. C. 509, cannot be regarded as the law of the District of Columbia on the point involved in this case. In so far as in conflict with it, the court in that case did not follow *Van Ness* v. *Mayor, &c., of Washington*, 4 Pet. 232, or *Kennedy* v. *Washington*, 3 Cranch C. C. 595.

Bill in equity to restrain the defendants below, who are the appellees in this court, from constructing piers and docks on the Potomac, at the city of Washington. The plaintiffs, being in possession of a tract of land bounded by Water street, which was on the margin of the river, claimed that the riparian rights on the side of the street opposite to their tract attached to it. The defendants denied the plaintiffs' title to such riparian rights, and justified their own acts under a license from the commissioners of the District of Columbia, who claimed title to the river front and riparian rights through deeds vesting the fee simple of Water street, in the city of Washington, in the United States.

The injunction prayed for was refused below. The plaintiff appealed.

Mr. Conway Robinson and *Mr. John Selden* for the appellants.

Mr. William Birney and *Mr. Nathaniel Wilson* for the appellees.

Mr. Justice Matthews delivered the opinion of the court.

These two cases were heard together in the court below and in this court. They involve the same questions and depend upon facts substantially the same, appearing in a single record.

The claim of the appellants, who were plaintiffs below, is that, being owners and in possession, in the first case, of square No. 472, and, in the second, of lot No. 13 in square No. 504, on the plan of the city of Washington, they are entitled to the exclusive right to make and use wharves and other similar improvements in the Potomac River opposite or in front of these lots, which are separated from it by Water street; and the object of the bills is to restrain the defendants, by a perpetual injunction, from intruding upon and disturbing the enjoyment of their right. This claim is denied by the defendants, who assert an adverse right under public authorities acting in the name of the United States. This issue was determined by the court below in favor of the defendants by decrees dismissing the bills, which decrees these appeals bring before us for review.

The plaintiffs derive title to the lots mentioned by mesne conveyances from Notley Young, who was the original proprietor of a tract of about four hundred acres, known as the Dudington Pastures, lying upon the Potomac River, and which became part of the site of the city of Washington, extending along the river from at or near the mouth of Tiber Creek to the grounds of the United States Arsenal.

The seventh clause of the compact between Virginia and Maryland of March 28th, 1785, declared that:

"The citizens of each State respectively shall have full property in the shores of the Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river."

The nature and extent of this compact were considered by this court in *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, where it was declared to be a compact between the States as such, to which the citizens of neither were parties, and, being subject to the will of the States, as to any changes in its stipulations, it was equally under the control of Congress, after the cession. It was provided, however, by the act of July 16th, 1790, 1 Stat. 130, accepting the District of Columbia as the seat of the government of the United States, "that the operation of the laws of the State within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."

It was therefore provided by the general assembly of Maryland, by an act of December 19th, 1791, sec. 12, that the commissioners of the District, appointed by the President under the act of Congress of July 16th, 1790,

"Shall, from time to time, until Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner, and of the extent they may judge durable, convenient, and agreeing with general order. But no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance." Davis, 64.

In pursuance of this authority, the commissioners adopted the following regulation on the subject, dated July 20th, 1795:

"That all the proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the Eastern Branch as they think convenient and proper, not injuring or interrupting navigation, leaving a space, wherever the general plan of the streets in the city requires it, of equal breadth with those streets, which, if made by an individual holding the adjacent prop-

erty shall be subject to his separate occupation and use until the public shall reimburse the expense of making such street, and where no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground; the buildings on said wharves or made ground to be subject to the general regulations for buildings in the city of Washington, as declared by the President. Wharves to be built of such materials as the proprietors may elect." Proceedings of Commissioners, 1791 to 1795, 408, 409.

This regulation was submitted to President Washington, who directed it to be published, by letter dated at Mt. Vernon, September 18th, 1795.

In the mean time, Notley Young and the other proprietors whose proposal had been accepted, by distinct conveyances, but in like form, had conveyed to Thomas Beall and John M. Gantt, as trustees, the several tracts of land which were to constitute the territory of the city of Washington. That of Notley Young was dated June 29th, 1791, and conveyed, in fee-simple, "all the lands of him, the said Notley Young," therein described, to have and to hold, "with their appurtenances," in consideration "of the uses and trusts" therein mentioned, and "to and for the special trusts following, and no other."

"That all the lands hereby bargained and sold, or such part thereof as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a federal city, with such streets, squares, parcels, and lots as the President of the United States for the time being shall approve; and that the said Thomas Beall, of George, and John M. Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the commissioners for the time being, appointed by virtue of the act of Congress, entitled 'An Act for establishing the temporary and permanent seat of the government of the United States,' and their successors, for the use of the United States forever, all the said streets and such of the said squares, parcels, and lots as the President shall deem proper, for the use of the United States; and that, as to the residue of said lots into which the said lands hereby bargained and sold shall have been laid off and divided, that a fair

and equal division of them shall be made ; and if no other mode of division shall be agreed on, by consent of the said Notley Young and the commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate to the said Notley Young ; and it shall in that event be determined by lot whether the said Notley Young shall begin with the lot of the least number laid out on the said lands or the following number ; and all the said lots which may in any manner be divided or assigned to the said Notley Young shall thereupon, together with any part of the said bargained and sold lands, if any, which shall not have been laid out on the said city, be conveyed by the said Thomas Beall of George and John M. Gantt, or the survivor of them, or the heirs of such survivor, to him, the said Notley Young, his heirs and assigns," &c.

It was also stipulated therein, that the said Beall and Gantt should, at the request of the President of the United States, convey all or any of said lands which should not then have been conveyed in execution of the trusts aforesaid to such persons as he should appoint, in fee simple, subject to the trusts remaining to be executed, and to the end that the same might be perfected. Accordingly, on October 3d, 1796, the President requested Beall and Gantt to convey all the unconveyed residue of the land granted by Notley Young to Scott, Thornton, and White, then commissioners, appointed under the act of July 16th, 1790, " in fee simple, subject to the trusts yet remaining to be executed ;" and on November 30th, 1796, Beall and Gantt accordingly conveyed by deed, in fee simple, to the commissioners last named.

In the mean time, however, the plan of the city had been adopted and promulgated, on maps of which were laid out the squares, lots, public grounds and streets; and, on October 18th, 1794, a division of the property had been made between Notley Young and the commissioners, in execution of the trusts of the deed from him to Beall and Gantt, by which square No. 504 fell to the public, and square No. 472 to Notley Young.

No deed was made by Beall and Gantt to Notley Young for square No. 472, but on January 13th, 1797, the commissioners

recorded in their book, which by law they were authorized to keep for that purpose, their certificate that they and Young had agreed "that the whole of the same square shall remain to the said Notley Young, agreeably to the deed of trust concerning lands in the said city," and attached thereto a plat of the square, with boundaries, as follows: "Bounded on the north by L street, four hundred and seventy-nine feet four inches; the south by M street south, three hundred and fifty-seven feet three inches; the east by 6th street west, two hundred and eighty-nine feet ten inches; the southwest by Water street, three hundred and fourteen feet three inches," as per return dated December 24th, 1793.

A similar entry and record were made in respect to square 504, the plat of which shows a subdivision of the entire square into lots, of which five, lot No. 13 being one of them, front on Water street, running back to an alley which separates them from all the other lots in the square.

The legal title to this and other squares allotted to the public passed to the commissioners of the District by deed from Beall and Gantt; and the legal estate to square 472 and the others allotted to Notley Young vested in him in fee simple, by virtue of the certificates recorded in the commissioners' book, under a law of Maryland of December 28th, 1793, Burch's Dig. 224, which gave effect to it, "according to the import of such certificates."

A similar certificate was made and recorded October 18th, 1794, to the effect that James Greenleaf had become the purchaser of 857 lots, for which he had fully paid, the legal title to which in fee simple had vested in him, and among them is enumerated square 504. The plaintiffs claim lot 13 in that square under Greenleaf's title.

It has been observed that both squares No. 472 and No. 504 are bounded on the southwest by Water street. This street was designated on the adopted plan of the city as occupying the whole line of the river front, and separating the line of the squares from the river for the entire distance from 14th street to the arsenal grounds. It is alleged in the bill in respect to this street that there was traced on the map of the city

"but a single line denoting its general course and direction; that the dimensions of said Water street, until the adoption, on the 22d day of February, 1839, of the certain plan of one William Elliott, as hereinafter more particularly mentioned, were never defined by law; and that the said Water street was never, in fact, laid out and made in the said city until some time after the close of the recent civil war; that before the commencement of said civil war one high bluff or cliff extended along the bank of said river, in said city of Washington, from Sixth street west to 14th street west; that to the edge thereof the said bluff or cliff, between the points aforesaid, was in the actual use and enjoyment of the owners of the land which it bounded towards the said river; that public travel between the two streets last above mentioned, along the said river, could only be accomplished by passing over a sandy beach, and then only when the tide was low; and that what is now the path of Water street, between the two streets aforesaid, was and has been made and fashioned by cutting down the said cliff or bluff and filling in the said stream adjacent thereto."

These allegations, in substance, are admitted in the answer to be true, with the qualification that the width of the street was left undefined because it constituted the whole space between the line of the squares and the river, whatever that might be determined to be from time to time, but that the commissioners, on March 22d, 1796, made an order directing it to be laid out eighty feet in width from square 1079 to square east of square 1025, and to "run out the squares next to the water and prepare them for division," and that it was so designated on maps of the city in 1803. If not, the inference is all the stronger that the whole space south of the line of the lots was intended to be the property and for the use of the public. *Barclay* v. *Howell's Lessees*, 6 Pet. 498. In *Rowan's Ex'rs* v. *Portland*, 8 B. Monroe, 232–239, that inference was declared to be the legal result of such a state of facts. It is quite certain that such a space was designated on the official map of the city as originally adopted, the division and sale of the squares and lots being made in reference to it. What the legal effect of that fact is we shall hereafter inquire, and while we do not

consider it to be qualified by the circumstances set forth as to the actual history of the street as made and used, they perhaps sufficiently account for the doubt and confusion in which the questions of right brought to issue in this litigation seem for so long a period to have been involved.

The transaction between Notley Young and the public authorities, as evidenced by the documents and circumstances thus far set forth, was equivalent in its result to a conveyance by him to the United States in fee simple of all his land described, with its appurtenances, and a conveyance back by the United States to him of square No. 472, and to Greenleaf of square No. 504, bounded and described as above set forth, leaving in the United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water street, intervening between the line of the squares as laid out and the Potomac river.

The very point as to the nature of this title was decided in the case of *Van Ness* v. *The Mayor, &c., of Washington*, 4 Pet. 232. It was there said by Mr. Justice Story, delivering the opinion of the court, p. 285:

"Here we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegations of mistake, and we are to construe that instrument according to the legal import of its terms. Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which by law are required to vest an absolute unconditional fee-simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land for any general purpose, they are the very words which the conveyance would adopt, in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument, which control in any manner the natural meaning of them. There are no objects avowed on the face of it which imply any limitation. How, then, can the court defeat the legal meaning and resort to a conjectural intent?"

It was accordingly decided in that case that the ownership of the land over which the streets in the city of Washington had been laid out on the original plan was vested by the deeds of the proprietors in the United States so completely and unconditionally that Congress might lawfully dispose of it to private persons, or otherwise convert it to any use whatever.

It was also decided in that case that the legal effect of the final instrument which defined and declared the intentions and rights of the parties, could not be modified or controlled by proof of any preliminary negotiations or agreement. "The general rule of law is," said the court, "that all preliminary negotiations and agreements are to be deemed merged in the final settled instruments executed by the parties, unless a clear mistake be established." This applies not only to the formal deeds from Notley Young to Beall and Gantt, and from them to the commissioners, but also to the certificates and plats made and recorded by the latter, which, under the Maryland act of December 28th, 1793, Burch's Dig. 224, "shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance." It is under and according to these certificates, granted to Notley Young and Greenleaf, that the plaintiffs derive their title; and parol evidence to contradict, vary, or explain them, is no more to be admitted than if they were formal conveyances. *Williams* v. *Ingell*, 21 Pick. 288.

For this reason we reject, as without legal value, the book called "Division Book No. 1," referred to as showing a list of the squares and lots assigned to Notley Young in the division, and containing an entry as to square 472 as having a water front of 314 feet, 3 inches. It is not well authenticated as a contemporary and original book, and is not one which it was the official duty of the commissioners to keep. However convenient, therefore, it may be as a book of reference for examiners of title in facilitating searches, it has not the quality of a public record.

What effect upon the riparian rights of Notley Young would have resulted from the creation of a perpetual easement for a

public way over Water street by a grant to the United States to that use alone, the title and right of possession in the soil for all other purposes remaining in the original proprietor, it is unnecessary to discuss. The decisive circumstance in the present case is, that the United States became the riparian proprietor, and succeeded to all the riparian rights of Notley Young, by becoming the owner in fee simple absolute of the strip of land that adjoined the river, and intervened between it and what remained to the original proprietor, Notley Young, after that conveyance; and the successors to his title had no other or greater rights in Water street, or the land on which it was laid out and eventually made, than any other individual members of the public. While it remained a street it was subject to their use as a highway merely, over which to pass and repass, and without the consent of the United States as proprietor was subject to no private use whatever. The right of wharfage remained appurtenant to it, because, as land adjacent to the river, that right was annexed to it by law, and could be exercised on it by the proprietor; but was severed, by the severance of the title, from the remainder of the original tract, to the whole of which it had formerly pertained.

In reference to the squares and lots lying north of the street, it may be said of the wharfage right claimed, as was said in *Linthicum* v. *Ray*, 9 Wall. 241, 243, "It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land, so as to become appurtenant to it."

A riparian proprietor, in the language of Mr. Justice Miller in *Yates* v. *Milwaukee*, 10 Wall. 497–504, is one "whose land is bounded by a navigable stream;" and among the rights he is entitled to as such, are "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

In Massachusetts, where it is held that, by virtue of the

ordinance of 1647, if lands be described as bounded by the sea, the grantee will hold the lands to low-water mark, so that he does not hold more than one hundred rods below high water mark; *Storer* v. *Freeman*, 6 Mass. 435; *Commonwealth* v. *Charlestown*, 1 Pick. 179; yet, it is also held, that where an ancient location or grant by the proprietors of a township bounded the land granted by a way, which way adjoined the sea shore, the ordinance did not pass the flats on the other side of the way to the grantee. *Codman* v. *Winslow*, 10 Mass. 146. And in Maine it was decided that a grantee, bounded by high-water mark, is not a riparian proprietor nor within the ordinance. *Lapish* v. *Bangor Bank*, 8 Greenleaf, 85. In New Jersey it is spoken of as "the right of an owner of lands upon tide waters to maintain his adjacency to it and to profit by this advantage," *Stevenson* v. *Paterson, &c., R. R. Co.*, 5 Vroom, 532–556, and as a right "in the riparian owner to preserve and improve the connection of his property with the navigable water." *Keyport Steamboat, &c., Co.* v. *Farmers' Transportation Co.*, 3 C. E. Green, 516. The riparian right "is the result of that full dominion which every one has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms." *Rowan's Ex'rs* v. *Portland*, 8 B. Monroe, 232. It is "a form of enjoyment of the land and of the river in connection with the land." Lord Cairns in *Lyon* v. *Fishmonger's Co.*, 1 Appeal Cas. 662, 672. "It seems to us clear," said Pollock, C. B., in *Stockport Water Works Co.* v. *Potter*, 3 Hurl. & Colt. 300–326, "that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights."

No inference in such a case arises against the riparian right of the grantee because the land has been granted for a street. On the contrary, as was said in *Barney* v. *Keokuk*, 94 U. S. 324–340, "a street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purposes of

access to the river and the usual accommodations of navigation in such a connection;" that is, as it appears by the decision in that case, to be used by the public for such purposes, as well as a highway, in contradistinction to the exclusive right of one claiming riparian rights as owner of the soil. *Godfrey* v. *The City of Alton*, 12 Ill. 29. "If the city," said this court in *New Orleans* v. *The United States*, 10 Pet. 662–717, "can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor."

Notley Young and the successor to his title had no property in the street, not even the right to insist that it should be maintained as such. The United States held its title to the land over which it was laid out, for its own use, and not in trust for any person or for any purpose. In that respect the case differs from *Railroad Company* v. *Schurmeir*, 7 Wall. 272, where it was held that, as the city held the title to the street only in trust for the purposes of its dedication as such, the title remained in the original proprietor for all other purposes, and with a property right in its use as a street for his adjacent land.

And it is immaterial that the ground laid out as a street was not in a condition to be used as a street, or that much labor was required to place it in that situation, or that, in fact, it had not been used as such for a long period of time. *Barclay* v. *Howell's Lessee*, 6 Pet. 498–505; *Boston* v. *Lecraw*, 17 How. 426. "A man cannot lose the title to his lands," it is said in this case, "by leaving them in their natural state without improvement, or forfeit them by non-user," p. 436. *McMurray* v. *Baltimore*, 54 Md. 103.

This denies no right that can be claimed by virtue of the compact between Virginia and Maryland of 1785, for that secured to their citizens "the privilege of making and carrying out wharves," as to the shores of the Potomac, only and so far as they were "adjoining their lands," and such had always been the law of Maryland, notwithstanding the language of the act of 1745, ch. 9, sec. 10, which was held to authorize the improvements therein spoken of, to be made by improvers in front of their own lots only. *Dugan* v. *Baltimore*, 5 Gill & Johns. 357; *Wilson's Lessee* v. *Inloes*, 11 Gill & Johns. 351. The

"full property in the shores of Potowmack river," spoken of in the compact, if it is not to be taken as a *seizin* of the land covered with water, but a right of occupation merely, properly termed a franchise, as said by Hosmer, C. J., in *East Haven* v. *Hemingway*, 7 Conn. 186–202, must be appurtenant to the land, the conveyance of which carries it as an incident; otherwise, if it implies an ownership in the soil of the shore between high and low-water mark, as land, it could not pass as an appurtenance by a deed conveying the adjoining land; for land cannot be appurtenant to land. *Harris* v. *Elliott*, 10 Pet. 25–54; *Storer* v. *Freeman*, 6 Mass. 435; *Commonwealth* v. *Alger*, 7 Cush. 53. And in this view the title of the plaintiffs fails, because they show no conveyance of the *locus in quo*, as parcel, and claim it only as an appurtenance.

An act of Maryland of January 22d, 1785, authorizing an addition to Georgetown of land, according to a plat and upon conditions prescribed by the proprietors, confirms this view of the state of the general law in Maryland, by making express statutory provision "that the proprietors of the lots fronting on the north side of Water street shall have and enjoy the exclusive right to the ground and water on the south side of their respective lots for the sole purpose of making wharves," &c. The inference is irresistible, that this was meant to give statutory sanction to an exception from the general rule. The same comment applies to the case of *Hazlehurst* v. *Baltimore*, 37 Md. 199, to which we are referred. There the street or highway that intervened between the wharf and the water was, by virtue of the statutes under which the work was executed, made part of the wharf itself, and subject to the right of the lot owner for the purposes of a wharf, and to that extent it was held he had a right of property in it, of which he could not be deprived for public use, except upon due compensation made.

It is not denied and never was questioned that, as to the streets whose termini abutted on the river, the water front was subject to the riparian rights of the public for use as wharf or dock or landing place. On what principle can a distinction be drawn between that case and the one in hand, where the line of the river constitutes the side of the street running along

the shore? The rights of the public are the same; especially where, as here, it was the owner of the soil of the street, as so much land, for all purposes. The true inference to be drawn from the plan of laying out such a street seems to us to be to secure to the public the very rights here in controversy, and to prevent private monopoly of the landing places for trade and commerce. For, as was said in *Dutton* v. *Strong*, 1 Black, 1–32:

"Piers or landing places and even wharves may be private,"—"or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use;" the question whether they are so, or are open to public use on payment of reasonable compensation as wharfage, depending in such cases "upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure."

Undoubtedly Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world besides. It can hardly be possible that the establishment of the city upon the plan adopted, including the highway on the river bank, could have left the right of establishing public wharves, so essential to a great centre of population and wealth, a matter altogether of private ownership; for even as to squares and lots that fell to the public on the division, it is equally contended by the appellants that those from whom they claim, with the lots also purchased the public riparian right appurtenant thereto, with power to convert it to private use.

It was for this reason held by the Court of Appeals of Kentucky, in the case of *Rowan's Ex'rs* v. *Portland*, 8 B. Monroe, 232, that where land along the river bank in a town had been laid out and dedicated by the proprietor for a public street, the dedication for that purpose carried with it, as a necessary incident, the right in the public to build wharves and charge wharfage for the use thereof, to the exclusion of the original

proprietor and his alienees of any private right of the same character.

To the same effect is the judgment of the same court in *Newport* v. *Taylor's Ex'rs*, 16 B. Monroe, 699–804.

Various considerations, however, are urged upon us in argument in support of the appellants' claim, which, so far as we deem important, and the limits of this opinion will permit, we will now notice in order.

1. It is urged that the construction of the rights of the parties which deprive the claimants under Notley Young and Greenleaf of the rights of wharfage opposite their property on the north side of Water street, in effect gives to the United States the entire water front on the Potomac river, without an equivalent, and thus violates that equality in the division which was expressly stipulated for in Notley Young's deed to Beall and Gantt.

But there is no dispute as to the division that was actually made, and each party received, so far as the conveyances are concerned, precisely what he agreed to take and was satisfied with. The supposed inequality arises from a construction of law upon the transaction, as it is admitted or proved to have taken place, and its legal effect is not dependent upon its actual results. The division, which it was agreed should be fair and equal, was of the lots into which the lands should be laid off; the grantor was to receive back any lands not so laid off, and the streets were to be the property of the United States, and, of course, with whatever appurtenant rights belonged to them as streets, or to the land over which they were laid out.

2. It is insisted, however, that the contemporaneous construction put by the parties themselves upon their own acts, requires a different conclusion.

It is impracticable to refer specifically to the numerous letters, maps, plans, documents, and records of different descriptions, which the diligent research of counsel on both sides has compiled and placed in the record of these cases, as throwing light on the history of the transaction, and as evidence of the views of the actors in it. We can notice but a few, with the general remark that a careful consideration of everything bear-

ing on the point to which our attention has been called, has failed to satisfy us that the conclusion reached, as the legal effect of the documents of title, is inconsistent with the actual intentions of the parties.

In a letter to the President, explaining their regulations of July 20th, 1795, the commissioners distinctly say, "that no wharves, except by the public, can be erected on the waters opposite the public appropriations, or on the streets at right angles with the water;" and that it is "proprietors of property lying on the water" that are to be permitted to build wharves. It is possible, indeed, that the commissioners did not, at that time, contemplate that a street laid out along the margin of the river, as Water street was, would be on the same footing with what they deemed to be "public appropriations;" and yet there is nothing in their communication inconsistent with that result, and the idea is clearly embraced in it when we apply the decision in the Van Ness case to its terms.

And their view to that effect is strongly implied in what they wrote to James Barry on October 5th, 1795. He had written to them, saying that,

"As Georgia avenue meets the water at 3d street, and can only begin again at the other side of the water, I request permission to erect a store or buildings, agreeably to the regulations of the water property of square 771, without adverting to the imaginary direction of Georgia avenue, which runs across my wharf, and would totally render useless said wharf."

The commissioners replied, saying:

"We think with you that an imaginary continuation of Georgia avenue through a considerable depth of tide water, thereby cutting off the water privilege of square 771 to wharf to the channel, too absurd to form a part of the plan of the city of Washington; that it never was a part of the plan that such streets should be continued through the water, and that your purchase in square 771 gives a perfect right to wharf to any extent in front or south of the property purchased by you, not injurious to navigation, and to erect buildings thereupon, agreeably to the regulations."

It is plainly to be inferred from this, that if, as was the case of Water street, the street was laid down on the map as a continuous street, abutting on the river, and called for as the south boundary of the lots fronting on it, it would have been regarded by them as forming part of the plan of the city, "thereby cutting off the water privilege" from the lots between which and the river it intervened.

But on June 25th, 1798, the commissioners had occasion to declare themselves explicitly on thevery point, in a letter to Nicholas King of that date, in answer to an inquiry from him in behalf of Robert Peter, requesting "to know the extent of wharfing and water privilege attached to what was called water lots and assigned to him on division." They replied as follows:

"SIR: We are favored with yours of the 22d instant, in behalf of Mr. Peter. When the commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act upon the subject. It appertains to the several courts of the State and the United States to determine upon the rights which such division may give. Any decision by us on the subject would be extra-judicial and nugatory. Of this, no doubt Mr. Peter, if applied to, would have informed you.

"With respect to square No. 22, we do not conceive that it is entitled to any water privilege, as a street intervenes between it and the water; but, as there is some high ground between the water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

A transaction between John Templeman and the commissioners on January 24th, 1794, is relied on as showing the rule acted upon in cases like the present. The commissioners, it is stated in the record of their proceedings of that date, sold to Templeman nine lots in square No. 8, and delivered him a certificate with the following indorsement thereon:

"It is the intention of this sale that the ground across the street

next to the water, with the privilege of wharfing beyond the street in front and of the breadth of the lots, pass with them agreeably to the general idea in similar instances."

On January 15th, 1798, the commissioners, it is recited in the same record of that date, executed a deed to Templeman of the lots named,

"Together with all the land in front from 27th street to river Potomac, with all rights of wharfing thereon, which deed is given by the request of Mr. Templeman in lieu of one dated the third instant, with the addition of lot 18 in square No. 8, and the water privilege in front of the lots conveyed in square No. 8, the former deed having been first given up and cancelled."

It will be observed that this is open to the construction that the wharfage privilege is appurtenant, not to the lots in square No. 8, but to the land sold with them on the opposite side of the street, and extending thence to the Potomac river, and which, of course, is riparian property.

There was, in fact, no contemporary agreement of opinion on the subject. On the contrary, there was diversity of view and conflict of interest from the beginning. Various questions arose relating to the mode in which the privilege of building wharves should be exercised by those entitled to it, as well as to what constituted "water lots," to which such privilege belonged, and some of them were left undecided. On some of these the opinion of Charles Lee, Attorney-General, was taken on January 7th, 1799; some were investigated and reported upon by a committee of the house of representatives on April 8th, 1802; some were discussed by Attorney-General Breckinridge in an opinion dated April 5th, 1806; the very matter of wharfing privileges was the subject of an opinion by Mr. Wirt, then attorney-general, July 8th, 1818, in which he expressed doubts as to the power of the commissioners to adopt the wharf regulation of July 20th, 1795. The whole subject had been presented in a very interesting manner, from the point of view opposed to that expressed by the commissioners, but showing that differences of opinion existed, by Nicholas King, in a letter

to the President, dated September 25th, 1803, and printed in Burch's Digest, 351. In that communication he attributed the doubt and uncertainty in which the matter was involved to the action of the commissioners. "In laying off the city," he says, "they stopped, as before observed, on the bank of the river, sold the lots on the high ground with a water privilege, without defining either what the privilege is or the extent or direction in which the purchasers were to wharf and improve."

3. A special ground is maintained in behalf of the claim under lot 13 in square 504 derived from Greenleaf.

On December 24th, 1793, the commissioners made a contract in writing with Morris and Greenleaf for the sale and conveyance of 6,000 lots, 4,500 to lie southwest of Massachusetts avenue, and of them Morris and Greenleaf were to have "the part of the city in Notley Young's land." By this contract, Morris and Greenleaf were excluded from selecting water lots, but with this proviso:

"Provided, and it is hereby agreed by and between the parties to these presents, that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, and of course to the privileges of wharfing annexed thereto, and that lots adjoining the canal are not reckoned water lots."

From this it is sought to draw the inference that the lots in Notley Young's land fronting on the north side of Water street, have the appurtenant wharfing privileges claimed. But there is no sufficient foundation for this conclusion. Even if it were proper to resort to this preliminary agreement to supply what is not contained in the subsequent grant, made in execution of it—which, we have seen, on the authority of the case of *Van Ness*, we are not at liberty to do—still, there is nothing to identify square 504 as a water lot out of the property of Notley Young. On October 18th, 1794, as has been stated, the commissioners transferred to Greenleaf, Morris consenting, by certificate, 857 of these lots, including the one in question, and it may be that many of them were water lots, but which of them were is to be determined by the actual facts as to each, and not

by any general description. There were lots in Notley Young's land as laid out, which answered the description without reference to those lying on the north side of Water Street.

That there was on the original plan of the city, and in the division made between the original proprietors and the United States, a classification of the squares and lots into "water lots," with riparian privileges, and the rest which were not, admits of no dispute. The exact nature of the difference is well pointed out in a very elaborate report made May 25th, 1846, to the common council of the city, by a committee appointed to investigate the subject, and their conclusions on the point seem to us supported by the records and documents of the time. They say:

"Squares in the water with water lots were laid off by the commissioners and divided with the proprietors on the navigable waters of the Eastern Branch, Potomac, and Rock Creek. Water lots were defined by metes and bounds on three sides, and were estimated originally in the division, since in sales, and now for assessment, by the front foot. . . . On the plan of the city all the streets are delineated and all the property laid off. Every owner of a lot in the city can tell by the description of it in his deed what are its bounds on all sides; if it has a water boundary, the deed says so, and he has a right to wharf out into the river; if it is bounded on all sides by the land, he has no such right, the right to wharf belonging only to land bounded by the water."

If there are any individual cases that are exceptions to these statements, nevertheless, their general accuracy we consider well established, and that they manifest the original intention of the parties to the transaction. Disputes undoubtedly arose, some quite early, not so much as to what rights belonged to "water lots," nor as to what properly constituted a "water lot," but, in regard to particular localities, whether that character attached to individual squares and lots. In part, at least, the uncertainty arose from the fact that the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and marked on the land. Complaints of that description, and of designed departures

from the plan, seem to have been made. It is also true, we think, that mistakes arose, as perhaps in the very case of the lots on the north side of Water street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project; property appearing to be riparian, because lying on the water's edge, which, when the street was actually made, had lost its river front. They were thought to be "water lots," because appearing to be so in fact, but were not so in law, because they were bounded by the street and not by the river.

4. The plaintiffs rely upon the decision of the former circuit court for this district in the case of *Chesapeake and Ohio Canal Co.* v. *Union Bank of Georgetown*, 5 Cranch C. C. 509, decided in 1838. The question in that case was whether the owner of lots in the city of Washington, lying on Rock Creek, was entitled to compensation for a wharf and water privilege which had been condemned for the use of the canal company. It was contended on behalf of the latter that the owner of the lots never had any water privilege as appurtenant to them, because they were cut off from the creek by 28th Street west, and as the streets belonged to the United States, the water privilege belonged to them also. It appeared that Harbaugh, the owner, had built, maintained, and used a wharf in connection with the premises for thirty years without interruption, and that no part of the bank of the creek and no dry land lay west of the street, one half of which was in the creek. It also appeared that he had bought from the United States, to whom the lots had been allotted in the division of the square between the public and the original proprietor, but the terms of the conveyance from the United States to Harbaugh are not stated. It was argued for the owner that the streets were conveyed to the United States only as highways, and did not deprive the riparian proprietors of their water rights, and reference was made to Nicholas King's letter in Burch's Digest, to the wharf regulations of the commissioners in 1795, and to the Maryland act of 1791, ch. 45, § 12. The court, it is stated, held that the title of Harbaugh to his wharf was good against the United States, claiming under a private citizen (R. Peter), the original

proprietor, but gave no reasons for its opinion. No allusion was made by counsel or court to the case of *Van Ness* v. *Mayor, &c., of Washington*, 4 Pet. 232, which had been decided in 1830, and in which the only point, in behalf of the prevailing party made by counsel in the case in the circuit court, had been ruled the other way. For that reason the judgment cannot be considered as evidence of the law of this District upon the question involved.

The question of wharfage had been before the same court in another form in 1829, in the case of *Kennedy* v. *Corporation of Washington*, 3 Cranch C. C. 595. That was an application for a *mandamus* to compel the corporation to make regulations prescribing the manner of erecting private wharves within the limits of the city, the showing in support of the motion for the rule being that the relator was the purchaser of lot No. 1 in square No. 329, and that he had applied to the authorities for leave to build a wharf on that lot, and for directions in regard to the plan and construction of the wharf, all of which they had refused. Mr. Wallach, for the corporation, argued that the power of the corporation over the subject was within its discretion, which the court would not control. Mr. Jones, on the same side, referred to the opinion of N. King, in Burch's Digest, argued that it appertained to the courts of the several States and of the United States to determine upon these rights, and contended that the power of the commissioners upon the subject ceased to exist by the assumption of jurisdiction by Congress, February 27th, 1801, 2 Stat. 103; the power given to the corporation being only to regulate the manner of erecting private wharves, not to limit the extent of them, or to interfere with the right of owners of the land adjoining the river. The court refused the *mandamus*, it is said in the report, for the reasons stated in the argument of Mr. Jones and Mr. Wallach.

5. The decision just referred to in the case of Kennedy's application for a *mandamus*, explains, probably, some subsequent action of the corporate authorities on the subject of wharfage, on which the appellants rely as evidence and confirmation of their claims. One of the practical difficulties experienced in the matter of building wharves arose from the fact that con-

flicts between private claimants, and with acknowledged public rights at the termination of streets upon the river, would exist, if the wharf rights were extended to the channel between lines prolonged from the sides of the lots. This followed partly because the general course of the channel, measured by its chord, was less by about 280 feet than that of the shore line, and because the streets leading to the river were not parallel with the line of the lots. If any system of improvement, public and private, should be adopted, it would require an adjustment of these conflicts, and the subject became a matter of discussion in the municipal government and in the public press. On April 2d, 1835, William Elliot, the surveyor of the city, made a report on the subject to the mayor and corporation. In this report, he reviewed the history of the subject from the beginning, and concluded as follows:

"Therefore, from the foregoing authorities and arguments the following facts are clearly deducible:

"1. That the channels of navigable rivers of the United States cannot be obstructed.

"2. That the openings for the east and west streets, lying on the Potomac River and Rock Creek, must not be interrupted, but must be carried to the channel in straight lines; and the openings for the north and south streets, facing on the Anacostia River, must also be left free to the channel.

"3. That the power to regulate the docks, wharves, &c., is vested in the corporation of Washington and the agents they may appoint.

"4. That no water privilege was specified or sold with the squares or lots, and that Water street was laid down on the plans of the city exhibited at the sales, and would appear to be the bounds of the lots and squares fronting the rivers.

"Having clearly established these powers and rights in the corporation, the following system of wharves and docks is respectfully submitted for consideration:

"1. Let Water street be laid down conformably to the plan of the city.

"2. Let openings of the streets be prolonged to the channel,

and in these openings, extending from Water street to the channel, let wharves be built upon piers.

"3. Let docks be formed in front of the squares.

"The result of this system would be that all the wharves and docks would belong to the city of Washington; that steamboats and other vessels would have deep water and sufficient room to lie at the end of the wharves or piers, and small craft and boats in the docks, the current of the river would not be interrupted, and the water would flow freely under the wharves, and prevent the accumulation of filth, the source of disease; and the whole system would be perfectly conformable to the original plan of the city as laid down by the commissioners.

"Although I consider the above plan the best, and ought to have been adopted at the commencement of the city, yet, having understood that at the sale of the lots facing the rivers there was an implied water privilege sold at the same time, though *neither expressed nor defined*, this therefore would require that the spaces in front of the squares extending to the channel should be considered as *water privileges;* and that openings left for the streets to the channel should be considered as docks, and belonging to the public; also that the spaces in front of the intersection of streets facing the rivers, or any other not facing private property, should be considered as belonging to the public, on which public wharves or docks may be built.

"A section of the last proposed plan may be seen at the surveyor's office."

Accordingly the surveyor submitted a map showing his plan, upon the second hypothesis, that the lots facing Water street were entitled to be recognized as having wharfing privileges, in which he exhibited that street as one hundred feet wide in the narrowest part.

On July 13th, 1835, the following resolution was considered in the board of common council of the city of Washington:

"*Resolved*, That the corporation of Washington never has admitted, and cannot, without injury to the general interests of the city, admit, the existence of 'water rights of individuals' between the Potomac bridge and the Anacostia, and therefore it is inexpedient to adopt any plan which can be construed into an admis-

sion of such rights, or to consider any proposition which claims such admission."

This resolution was indefinitely postponed by a majority of one vote.

Peter Force, a member of the council, well known in the public history of this city and country, by permission, entered on the journal the reasons for his dissent. These reasons were, briefly, that Water street belonged to the United States; that in the original plan of the city and division and sale of squares and lots, those only were recognized as water lots which were laid off running to the channels of Rock creek, the Potomac river, and the Eastern branch, respectively, all of which, on that account, were sold by the front foot, while all the others were laid off bounded by streets and avenues, without any water privileges, and were sold by the square foot; and, among others, that the motion for indefinite postponement of the resolution had been carried by the vote of a member who had a direct personal and pecuniary interest in the assertion of a private right involved in the resolution against that of the public.

In the meantime the discussion was transferred to the newspapers, Mr. Force representing one side of the controversy, and the mayor, Mr. Joseph H. Bradley, the other.

Nothing important seems to have been done by the city council until February 22d, 1839, when the following resolutions were adopted, and were approved by the President of the United States:

"Resolutions in relation to the manner in which wharves shall be laid out and constructed on the Potomac river.

"*Resolved, &c.*, That the plan No. 2, prepared by the late William Elliot, in eighteen hundred and thirty-five, while surveyor of the city of Washington, regulating the manner in which wharves on the Potomac, from the bridge to T street south, and the plan of Water street, shall be laid out, be, and the same is, adopted as the plan to be hereafter followed in laying out the wharves and the streets on the said river: *Provided*, The approbation of the President of the United States be obtained thereto.

"*Resolved, also,* That the wharves hereafter to be constructed between the points specified in the said plan shall be so built as to allow the water to pass freely under them; that is to say, they shall be erected on piers or piles from a wall running the whole distance on the water line of Water street."

But these resolutions decide nothing as to the right, even if the corporate authorities of Washington were competent to do so, which they were not. The resolutions are not, however, even a recognition of the existence of any private right of wharfing attached to the ownership of lots fronting on the north side of Water street. At the most, they recognize that there may be such rights. In point of law, they merely regulate the mode in which the right shall be exercised, whether private or public, leaving the question as to title, in each case, to be judicially decided; for that was the extent of the jurisdiction which the corporation of Washington had over the subject.

To notice further the many items of evidence which are contained in the record, and have been referred to by counsel in learned and laborious arguments, would prolong this opinion to an unnecessary and inexcusable length. Enough has been said to show that the rights of the parties respectively stand upon the legal effect of the original documents of title. According to them, as we have shown and now decide, the riparian rights claimed by the appellants, which originally were appurtenant to the land of Notley Young by virtue of its adjoining the Potomac river, passed to the United States by the conveyance which vested in them the ownership of the land on which Water street was laid out and has been built.

The decree below, therefore, was right, and it is accordingly

Affirmed.

Mr. Justice Bradley did not sit in these cases.

Mr. Justice Miller, with whom concurred Mr. Chief Justice Waite and Mr. Justice Gray, dissenting.

In these cases the Chief Justice, Mr. Justice Gray, and myself do not agree with the judgment of the court. We concur in nearly all that is said in the opinion, and in the general prop-

osition that where a town lot or other land is bounded on a street or road or other highway, the fee to which is in some other person than the lot owner, his rights as a land owner do not extend beyond the street, and in case the street occupies the bank of a river or other water-way, no riparian rights attach to the lot or its owner. But we think the court has erred in the application of this doctrine to the present case by failing to give due weight to one or two considerations which we shall mention.

1. Notley Young was the original and sole owner in fee simple of that part of the land on which Washington city was laid out, which includes the *locus in quo*, and there is no question that this ownership included the right to erect wharves on it on the Potomac river where the wharf now in contest is constructed. In pursuance of the scheme by which a city with streets, lots, and squares was laid out on this land, he conveyed it in trust to Beall and Gantt. They were to lay it out into streets, squares, and lots. When this was done, the title in fee of the streets, as well as of such squares as were to be reserved for public uses, was to vest in the United States. Of all this property, after that was done, there was to be a fair and equal division between Young and the government, and Young's part was to be conveyed to him, and the other half to commissioners to be named by the President.

The riparian rights of land owners on the Potomac river were understood at that time as well or perhaps better than they are now, and the value attached then, and especially to the right to construct wharves, is shown clearly by the record and by the act of the legislature of Maryland of December 19th, 1791, cited in the beginning of the court's opinion. It therefore could not have escaped attention, if the entire water-way of the river, and the right of approach to it and use of it in regard to wharves and landing places, was vested exclusively in the United States, that no equal division was made of this important right, unless it was by the right attaching to each lot which, but for Water street, would be bounded by the river.

No equivalent is given to Young for this valuable right, on

the supposition that it all vested in the United States; no express words are used conveying it to the United States or dedicating it to the public. It cannot be successfully maintained that the right attaches as appurtenant to the street. The uses of a street and of a wharf are entirely different, and while a dedication of a street to public use may not be inconsistent with the use of a part of it for a landing place, it cannot be said to have as appurtenant to it a right to build a wharf into the river. If such a street had a definite width, it must happen that there would, by reason of the irregular curvature of the river, be detached pieces of land between it and the water. To whom did this land belong, unless to the lot which would embrace it if its lines were extended to the water? And if the lot did not embrace it, what equal division of this valuable land has ever been made with Mr. Young? As it was the duty of the trustees to divide the whole land, it will be assumed that they did it, and this was their mode of doing it.

The cases of *Doane* v. *Broad Street Association*, 6 Mass. 332, and *Hathaway* v. *Wilson*, 123 Mass. 359, are directly in point. In the former case, a partition was made under which the parties claimed, and it was insisted that certain flats, which were the subject of the contest, did not pass as appurtenant to a wharf allotted to one of the parties, because both the wharf and the flats were land, and land cannot pass as appurtenant to land. But the court said that, though the flats were not specifically mentioned, yet the duty of the commissioners to partition them, and their relation to the wharf, which could not be used without passing over them, led to the fair inference that on the partition they were intended to pass as part of the wharf property.

2. This view is confirmed by the language of the commissioners who made the division with Young, in the certificate which they gave him. This was not in form a regular deed of conveyance, but is clearly intended to define the square or lots which fell to him in the division, and to remit him for his ownership to his original title, and for the nature of that ownership to the surrounding circumstances. Taking square No. 472, one of those now in controversy, the certificate says that "the

whole of said square shall remain to the said Notley Young, agreeably to the deed of trust concerning lands in the said city." Here is a plain remission of his original title and right which, but for Water street, must include riparian rights also. And though this certificate is accompanied by a plat which shows Water street as lying between the square and the river, we are not able to see that this circumstance excludes the original riparian rights of Young, in the absence of any evidence that those rights were allotted to the government in the partition, or that Young anywhere received an equivalent for those rights unless he obtained it by this statement, that the "square shall remain to Young agreeably to the deed of trust made by him." No such deed was executed by the commissioners to purchasers of lots from the United States.

This view of the matter was taken by Judge Cranch in the case of the *Chesapeake and Ohio Canal Company* v. *Union Bank of Georgetown*, 5 Cranch C. C. R. 509, decided in 1838, and though the case is not fully argued by the court, the eminent ability of the judge who decided it, and his well-known accuracy as a reporter, and his knowledge of the local laws and customs of the city of Washington, entitle it to very great weight, as what he intended to decide is quite clear.

The careful and elaborate letter of the commissioners to the president, of July 24th, 1795, which states that "no wharves, except by the public, can be erected on the waters opposite the public appropriations, or on the streets at right angles with the waters;" but "with respect to the private property on the water," lays down regulations by which "proprietors of property lying on the water" are to be permitted to build wharves, and to erect warehouses thereon, leaving spaces at certain distances for cross streets, evidently uses the words "public appropriations" as distinct from "streets," and as designating the lots and squares set apart with the President's approval for the public use; and by prohibiting the erection of private wharves at the end of "the streets at right angles with the water," and omitting to mention the shores by the side of other streets, clearly implies that such shores are not covered by the prohibition, but are to be treated as included in "the private property on the water."

Syllabus.

The lot set off to the United States, and afterwards sold to Morris and Greenleaf, is within the same principle.

The declaration in the preliminary contract of 1793, between the commissioners and them, that the latter were entitled "of course to the privilege of wharfing annexed" to these lots, while not evidence of a contract to control the terms of the subsequent more formal instrument, is of weight as showing what at that time was understood to be included in a description of the lots.

When to this we add that no act of Congress has ever asserted ownership of these wharves or landing places, or the rights of a riparian owner, while they have conferred on the authorities of the District the power of regulating wharves, private and public, we are forced to the conclusion that these rights are left with the owner of the squares certified to Notley Young in the division with the United States.

CHICAGO & ALTON RAILROAD COMPANY and Another *v.* UNION ROLLING MILL COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued December 6th, 1883.—Decided January 7th, 1884.

Contract—Equity—Lien—Practice—Rules.

1. Where, in a suit in equity several defendants have independent rights in the subject-matter of the controversy, and one defendant, having answered setting up his particular right, files a cross-bill to enforce it, and the causes proceed together and are heard together, and an interlocutory decree is entered to protect and enforce the rights thus set up, entitled as of both suits, the complainant in the original suit cannot, unless upon consent, dismiss his bill and thus deprive the defendant of the right acquired by the decree.
2. When one defendant in a suit in equity pleads to the jurisdiction, and another defendant answers setting up independent rights in the subject-matter of the controversy, and no notice is taken of the plea to the jurisdiction, and a final decree is entered sustaining the rights set up in the answer, the complainant cannot have his bill dismissed under the 38th

Statement of Facts.

Rule for failure to reply to the plea: especially when appeal has been taken and the defendant pleading to the jurisdiction is not party to the appeal.

3. Under the statutes of Illinois, Rev. Stat. Ill. ch. 82, § 51, a person who contracted to deliver rails to a railroad company for use in the construction of its road, the deliveries to extend over a period of time, and who complied with his contract, and who commenced proceedings within six months after the date of the last delivery to enforce a lien therefor under the statute, had a valid lien upon the property superior to that acquired by a trust created between the date of the last delivery of the rails and the commencement of the proceedings to enforce the lien; and such lien was not affected by a special agreement that the contractor should have a lien on the rails till payment, and that the possession of the railroad should be the possession of the contractor; nor by an agreement to give credit to the purchaser beyond the time within which the statutory lien should be enforced, when the purchaser failed to perform the conditions upon which that credit was agreed to be given.

4. Under the circumstances in this case there was no error in rendering a personal decree against the Chicago & Alton Railroad Company, and awarding execution against it in favor of the contractor.

The following statement of the case was prepared by the court to precede its opinion.

The original bill in this case was filed January 8th, 1876, by John B. Dumont, a citizen of the State of New Jersey, against the Chicago and Illinois River Railroad Company, the Chicago Railway Construction Company, the Chicago and Alton Railroad Company, and the Union Rolling Mill Company, which, for the sake of brevity, will be called respectively the Illinois River Railroad Company, the Construction Company, the Alton Railroad Company, and the Rolling Mill Company, all corporations organized under the laws of the State of Illinois, and Bradford Hancock, as receiver of the Construction Company, and Corydon Beckwith, both citizens of the State of Illinois.

The purpose of the bill was the foreclosure of a deed of trust. The bill averred in substance as follows: On March 1st, 1875, the Illinois River Railroad Company, claiming to be the owner of a railroad constructed and being constructed between Joliet, Will County, and Streator, in La Salle County, in the State of Illinois, and the Construction Company, claiming to be the owner of certain lands in Grundy County in the same State,

entered into an agreement with the Alton Railroad Company by which the Illinois River Railroad Company leased its right of way and its railroad constructed and to be constructed, and all its other property, except engines and cars, to the Alton Railroad Company forever, upon certain terms and conditions therein mentioned. Afterwards, on the same March 1st, 1875, the Illinois River Railroad Company executed and delivered its bonds of that date with interest coupons attached, one thousand in number, and for $1,000 each, payable thirty years after date, with interest at seven per cent., payable semi-annually, and on the same day, jointly with the Construction Company and John H. Rice, its trustee, executed a deed of trust to George Straut to secure the payment of the bonds. The deed of trust conveyed to Straut all the railroad owned or occupied by the Illinois River Railroad Company between Joliet and the Mazon River, and all the property of every kind (except engines, cars, and tools), however and whenever acquired by it between said points, and the railroad company covenanted by said trust deed that it had a perfect title to the railroad and other property so conveyed, subject only to the lease above mentioned. By the same deed the Construction Company and Rice, its trustee, conveyed to Straut its lands situate in Grundy County, Illinois, and covenanted that it had good title thereto, and that the lands were free from encumbrances.

Of said one thousand bonds, only those numbered from 1 to 474 inclusive, and from 701 to 1,000 inclusive, were issued. The interest on these bonds had not been paid. They were all held either by *bona fide* purchasers or pledgees.

The deed of trust provided that in case of default in the payment of any interest on the bonds, or in the performance of any covenant in said deed of trust contained to be performed by the Illinois River Company or the Construction Company, and in case such default should continue six months, then the trustee might take possession of the property conveyed by the deed of trust, and apply the issues and profits thereof to the payment of the liabilities of the Illinois River Railroad Company and the Construction Company, as therein provided. The covenants of seizin, for quiet enjoyment, and against

encumbrances, made by the Illinois River Railroad Company and the Construction Company in the deed of trust contained, were broken on March 1st, 1875, and such default had continued more than six months. On March 1st, 1875, the Illinois River Railroad Company and the Construction Company were indebted to the Rolling Mill Company in a large sum of money for materials furnished for the construction of said road, which the Rolling Mill Company claimed to be a lien thereon, but its claim was subject to the claims of bondholders represented by the complainant.

On September 13th, 1875, John F. Slater, being the holder and owner of bonds numbered from 1 to 474 inclusive, applied to Straut, the trustee, to take such action in the premises as he ought to or might take for the protection of his interest. But Straut, being unable or unwilling to act, resigned his trust, and the complainant was, on September 18th, 1875, in accordance with the provisions of the deed of trust, appointed trustee in his stead, and on September 20th, 1875, Straut conveyed to the complainant, as such trustee, all the property, rights, and powers vested in him by the trust deed.

The prayer of the bill was as follows:

"That an account may be taken of the sum due for principal and interest on said bonds, and of the sums due as liens upon said road, and that the premises described in the deed of trust to George Straut may, by order of this court, be sold for the payment of the same, and that your orator may have such other and further and different relief as to equity may seem meet."

Answers were filed by the Illinois River Railroad Company, the Construction Company, and the Alton Railroad Company, Corydon Beckwith, and Bradford Hancock, in which they took issue upon the averments of the bill.

On January 13th, 1876, the Rolling Mill Company filed an answer, claiming to have a first lien on the railroad and property of the Illinois River Railroad Company, averring that, on August 7th, 1874, it made a contract in writing, of that date, with the Illinois River Railroad Company and the Construction Company for the sale and delivery, at certain prices therein

specified, to said companies of 1,600 tons of steel and 2,500 tons of iron rails, and certain named quantities of iron splices, spikes, and bolts, all to be delivered by December 1st, 1874.

That contract provided that for these materials sixty thousand dollars in cash should be paid, and, for the balance of the price, the companies purchasing the same should give notes, payable in six, eight, ten and twelve months from their dates respectively, executed by the Illinois River Railroad Company and guaranteed in full by the Construction Company and by the stockholders of the Construction Company in proportion to their stock, and, for the further security of said notes, there should be pledged certain bonds of the Construction Company for an amount equal to the aggregate principal of said notes, and secured by a deed of trust, made April 1st, 1874, by the Illinois River Railroad Company and the Construction Company, on the property therein described, constituting the first lien thereon.

It also contains this clause:

"And it is also agreed by said party of the second part that the material so furnished by the said party of the first part shall be used and laid upon the road and road-bed belonging to said Chicago and Illinois River Railroad Company, between the cities of Joliet, in Will County, and Streator, in La Salle County, Illinois; and that until the same be fully paid for, and all of the notes given in payment therefor paid and cancelled, the said party of the first part shall have a lien upon said material furnished by it, and the use and possession of the same by said party of the second part, or either of the corporations constituting the same, or the assignee or assigns of one or both of them shall be the user and possession of said party of the first part."

The answer of the Rolling Mill Company further alleged that the company had delivered a large part of the rails, &c., under said contract; that upon the delivery of the last lot, on or about November 12th, 1874, the purchasing companies gave the Rolling Mill Company notice not to deliver any more rails or other material until the spring of 1875; that the Rolling Mill Company were always ready and willing to deliver the re-

mainder of said rails and other material mentioned in said contract, and that on May 7th, 1875, it gave notice to said purchasing companies that the residue of the rails, &c., were ready for delivery, but the companies did not provide cars or vessels for the transportation of said materials, and that, by the terms of the contract, such notice was equivalent to a delivery thereof; and that the Rolling Mill Company then and thereby complied with its contract, and was entitled to the consideration therein named.

It also alleged that the Rolling Mill Company had received in part payment of said consideration the sum of $95,000, and no more, and that the purchasing companies had wholly neglected and refused to pay the Rolling Mill Company any further sums of money on the contract, and had neglected and refused to deliver to it any of the notes or securities for deferred payments on the rails, &c., as provided in said contract, although requested to do so; and that thereby the whole amount of the purchase money for the rails, &c., had become due and payable.

It further alleged that on May 10th, 1875, the Rolling Mill Company, within the time prescribed by law, filed its bill in the Circuit Court of Will County, Illinois, for the purpose of enforcing its lien, under the statutes of Illinois, upon the railroad and its appurtenances, and that the bill was still pending and undetermined.

The answer still further alleged that the Rolling Mill Company not only had a statutory lien upon all the materials furnished under said contract, but by the contract it had an express contract lien upon the same, and that, by virtue of the contract and the facts set forth, it had a lien upon the Illinois River Railroad and its appurtenances paramount to the lien of the bondholders under said deed of trust and all other liens upon the road.

On the same day on which its answer was filed the Rolling Mill Company obtained leave to file, and did file, a cross-bill in the cause, setting up the same matters stated in its answer, and praying that upon the final hearing a decree might be entered requiring payment of the amount due to it within a certain

time to be fixed by the decree, and that in default thereof the railroad of the Illinois River Railroad Company and all its appurtenances might be sold, and out of the proceeds its claim might be paid in preference to the bondholders or any other persons.

The answers to the cross-bill of the Rolling Mill Company denied that said company had any lien for the materials furnished by it under said contract, either by virtue of the contract or the statutes of Illinois.

Afterwards, on May 31st, 1876, the master to whom the cause had been referred, filed his report upon the claims of the Rolling Mill Company, with the testimony in support thereof, by which he found due to the complainant in the cross-bill from the Illinois River Railroad Company and the Construction Company, for iron rails, &c., furnished under said contract, with interest, &c., the sum of $186,783.49, and for which he reported the Rolling Mill Company had a lien binding on all the defendants.

On June 27th, 1876, the report of the master was referred back to him by the following order, which was entitled both of the original and the cross-cause:

"By agreement of counsel the report of the master in said bill and cross-bill is referred back to Henry W. Bishop, the master in chancery of this court, with leave for the complainant in said bill and the defendants to take further proofs within eight (8) days from this date, and for the Union Rolling Mill to take further proofs, if desired, within twelve (12) days from this date, said master to report at the expiration of said twelve days."

On July 1st, 1876, Dumont, the complainant in the original bill, filed his supplemental bill, in which he averred that, since the filing of the original bill, coupons attached to the bonds mentioned, falling due on March 1st, 1876, had become due, and remained unpaid, although presented for payment; that he had paid out certain sums for right of way, for laying down side tracks and switches, and for taxes, and prayed that an account might be taken of the sums due on said coupons so fallen due, and of the sums paid out by complainant as aforesaid,

and that the latter might be declared a lien on the mortgaged premises.

On August 3d, 1876, the Illinois River Railroad Company filed its plea to the original and supplemental bills, in which it averred that at the date of the mortgage set forth in the original and supplemental bills, and at the beginning of this suit, the said George Straut, the trustee named in the deed of mortgage, was and ever since had been and still continued to be a citizen of the State of Illinois; that he was such citizen on September 13th, 1875, when he was applied to to foreclose the deed of trust, and on September 13th, 1875, when he resigned said trust; that from and after March 1st, 1875, until the commencement of this suit, all the defendants to the original and supplemental bills had been citizens of the State of Illinois, and had continuously remained such citizens until the filing of the plea. Wherefore, the said company averred that Dumont, as assignee of said chose in action, namely, said deed of trust, had no standing to prosecute the said suit, and set up the facts aforesaid in bar of the jurisdiction of the court.

No other plea, answer, or demurrer was ever filed to the supplemental bill by any of the defendants in the cause, nor was said plea to the original and supplemental bill ever replied to or set down for argument.

On June 26th, 1877, one year after the report first filed by him had been recommitted, the master, after re-examining the former testimony, and taking additional testimony, covering in all several hundred printed pages, and hearing the arguments of counsel, filed his second report, affirming his former findings, and sustaining the allegations of the cross-bill.

On July 16th, 1877, exceptions to this report were filed by Dumont, the complainant in the original bill, the main ground of the exceptions being that the master had erred in reporting that the Rolling Mill Company was entitled to a first lien on the mortgaged premises for the amount found to be due it.

October 15th, 1877, the following order was entered:

"Now come the parties by their solicitors, and thereupon the original, supplemental, and cross-bills were submitted to the court

on printed arguments to be furnished by Messrs. Beckwith and Smith by October 26th inst., by Messrs. Cooper and Packard and Henry Crawford by October 30th inst., by George Campbell by November 20th next, and by Messrs. Beckwith and Smith in reply by November 30th next."

On the 25th day of May, 1878, the Massachusetts Mutual Life Insurance Company, on leave of court, filed an intervening petition in the cause, stating, among other things, that it was the holder of some of the bonds secured by the trust deed to George Straut, and that the complainant, John B. Dumont, was threatening to foreclose the trust deed under the power of sale contained therein, and prayed for an injunction to prevent such sale, and, in accordance with this prayer, an order was entered in the cause on the 25th of May, 1878, restraining Dumont from selling the property included in the trust deed until the further order of the court.

Afterwards, on January 4th, 1878, by agreement of the parties by their solicitors, an order was entered setting aside the order of October 15th, 1877, submitting the exceptions to the master's report upon printed briefs. June 5th, 1878, the exceptions came up for hearing before the court. The hearing continued until June 11th, 1878, when the exceptions were taken under advisement.

On December 16th, 1878, the court entered an interlocutory decree upon the report of the master and the exceptions thereto. This decree was entitled thus:

"John B. Dumont *vs.* Chicago and Illinois River Railroad Company *et al.* and	In Chancery. Original Bill.
"Union Rolling Mill Company *vs.* John B. Dumont *et al.*	Cross-bill.

By this interlocutory decree the court found due the Rolling Mill Company $134,733.23 on account of rails and materials

used in the construction of the railroad and not paid for, and that this sum constituted a lien upon the railroad of the Illinois River Railroad Company, and "upon all its property, real, personal and mixed." The court further found that the Rolling Mill Company had delivered to said Illinois River Railroad Company and the Construction Company, iron rails, steel rails, &c., mentioned in the contracts with said Rolling Mill Company to a large amount, which had been sold by the Illinois River Railroad Company and the Construction Company to the Alton Railroad Company, with full knowledge of the lien of said Rolling Mill Company thereon. That the Alton Railroad Company had never specially paid for such material, but had converted the same to its own use, and that such rails and other materials were then of the value of $24,464.92. This sum the court found the Rolling Mill Company was entitled to have and recover from the Illinois River Railroad Company, the Construction Company, and the Alton Railroad Company, together with interest thereon, amounting at the date of the decree to the sum of $29,796.30; and the court reserved for further consideration all questions relative to the enforcement of the lien declared for the sum of $134,733.23, and relative to the sum of $29,796.30, found due from the Alton Railroad Company, the Construction Company, and the Illinois River Railroad Company.

Afterwards, on April 15th, 1879, the complainant in the original bill moved for leave to dismiss the same at his own costs, and on September 2d following, the consent of the Massachusetts Mutual Life Insurance Company and other defendants to the dismissal of the original bill was filed in the cause. On March 29th, 1880, John B. Dumont filed his disclaimer to further prosecute said cause, for the reason, as stated by him, that his interest in the same had ceased and terminated by a proceeding had in the Circuit Court of Will county, Illinois. On the same day the court rendered a final decree in the cause, which was entitled both of the original and cross-cause, and which began as follows:

"This day came the several parties to the said cause and cross-cause, by their respective solicitors." The decree then

proceeded to overrule the motion of the complainant Dumont for leave to dismiss the bill, and ordered the payment of the sum of $134,733.23 to the Rolling Mill Company, found due it by the interlocutory decree theretofore entered, with interest, and in default thereof, that all the railroad, with its appurtenances, of the Illinois River Railroad Company be sold free and clear of all encumbrances in favor of any of the parties to the suit; the proceeds to be applied, first, to the payment of costs; second, to the payment of the sum so found due the Rolling Mill Company; and the surplus, if any, to be paid to the clerk of the court. The court further decreed that the Rolling Mill Company have execution against the Alton Railroad Company, the Illinois River Railroad Company, and the Construction Company, for the sum of $29,796.30, together with interest thereon from the 16th day of December, 1878, found due to it by the interlocutory decree theretofore entered.

The Massachusetts Mutual Life Insurance Company, as an intervenor in the cause, on June 10th, 1880, took and perfected an appeal from the said decree, and on the next day Dumont and the Alton Railroad Company appealed from the same decree, the Illinois River Railroad Company, the Construction Company, Hancock and Beckwith having refused to join in said appeal.

By the appeal last mentioned the final decree of the circuit court was brought under review.

Mr. S. W. Packard and *Mr. C. Beckwith* for appellants.
Mr. Lyman Trumbull for appellee.

Mr. Justice Woods delivered the opinion of the court.

The appellants assign for error—

1. The refusal of the circuit court to dismiss the original bill and the rendition of the final decree in favor of the Rolling Mill Company and the ordering of the sale of the property of the company to satisfy the same.

2. The finding that the Rolling Mill Company had a lien upon the railroad and property of the Illinois River Railroad Company for the amount found to be due it, and that such

lien was paramount to the lien of the bonds secured by the trust deed to Straut.

3. The rendition of a personal decree against the Alton Railroad Company for $29,796.30, and the awarding of execution thereon.

We shall consider these assignments of error in the order in which they are stated.

The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed.:

"After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

The same writer, page 794, says, that,

"After a decree has been made, of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill."

The rule, as we have stated it, is sustained by many adjudi-

cated cases. It was laid down by the Lord Chancellor in *Cooper* v. *Lewis*, 2 Phillips Ch. 181, as follows:

"The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff."

In *Bank* v. *Rose*, 1 Rich. Eq. (S. C.) 294, it was said:

"But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted."

So in the case of *Connor* v. *Drake*, 1 Ohio St. 170, the Supreme Court of Ohio, declared:

"The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defence, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill."

Chancellor Walworth in the case of *Wall* v. *Crawford*, 11 Paige, 472, laid down the rule in these words:

"Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant

has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court."

See also *Guilbert* v. *Hawles*, 1 Ch. Cas. 40; *Bluck* v. *Colnaghi*, 9 Sim. Ch. 411; *Lashley* v. *Hogg*, 11 Ves. Jr. 602; *Booth* v. *Leycaster*, 1 Keen's Ch. 255; *Biscoe* v. *Brett*, 2 Vesey & B. 377; *Collins* v. *Greaves*, 5 Hare, 596; *Gregory* v. *Spencer*, 11 Beav. 143; *Carrington* v. *Holly*, 1 Dick. 280; *Anon.*, 11 Ves. Jr. 169; *Cozzens* v. *Sisson*, 5 R. I. 489; *Opdyke* v. *Doyle*, 7 R. I. 461; *The Atlas Bank* v. *The Nahant Bank*, 23 Pick. 491; *Bethia* v. *M'Kay*, Cheve's Eq. (S. C.) 96; *Sayer's Appeal*, 79 Penn. St.; *Seymour* v. *Jerome*, Walk. Mich. Ch. 356.

The authorities cited sustain the refusal of the circuit court to allow Dumont to dismiss his bill. The only really contested issue in the case was between Dumont, representing the bondholders, and the Rolling Mill Company. The answers of all the other defendants simply required proof of the averments of the bill, neither admitting nor denying them. The issue raised by the averments of the original bill and the answer of the Rolling Mill Company, and by the cross-bill of the Rolling Mill Company and the answer of Dumont, the complainant in the original bill, was whether the Rolling Mill Company had a lien upon the road and property of the Illinois River Railroad Company, and whether such lien was superior to that of the trust deed executed to Straut, which the original bill was filed to foreclose. The issues thus raised involved the rights of all the parties to the suit. This issue was referred to a master to take testimony and report. He filed a report which was entitled both of the original and cross-cause. The record shows that, "by agreement of counsel, the report of the master in said bill and cross-bill was referred back to him," with leave to the parties to take further proofs; that after taking a large mass of additional evidence, covering several hundred printed pages, the master reported that the Rolling Mill Company had a statutory lien

upon the property covered by the trust deed executed to Straut, and that the same was consequently the first lien upon the property. Joint exceptions were filed to this report by Dumont, the original complainant, and the Alton Railroad Company and the Illinois River Railroad Company, all of which were entitled both of the original and cross-cause. After full argument, the court overruled the exceptions and rendered an interlocutory decree in both the original and cross-cause, establishing the lien of the Rolling Mill Company as claimed in its answer to the original bill and in its cross-bill. After all these proceedings, and when the controversy between the parties was practically ended by the interlocutory decree of the court, the motion to dismiss his original bill was made by Dumont, the complainant therein. The Rolling Mill Company insisted that if the original bill, carrying with it the cross-bill, were dismissed, its claim would be barred by the statute of limitations. It would be hard to conceive of a clearer case for the application of the rule laid down by the authorities we have cited. If the court under these circumstances, had allowed the original bill to be dismissed without the consent of the Rolling Mill Company, it would have inflicted a palpable wrong on that company, and trifled with the administration of justice.

The fact that the Rolling Mill Company had been compelled to file a cross-bill in order to secure complete relief, only strengthens the case against the dismissal of the original bill. Several of the authorities cited to show that an original bill cannot be dismissed after decree, apply to cases where a cross-bill has been filed. *Bank* v. *Rose*, 1 Rich., and *Watt* v. *Crawford*, 11 Paige, *ubi supra*.

But counsel for appellants insist on the right of Dumont to dismiss his original bill, because a supplemental bill had been filed, to which, as well as to the original bill, the Illinois River Railroad Company had filed a plea denying the jurisdiction of the court; that the truth and sufficiency of this plea were admitted by the complainant, because he failed to reply thereto, or set it down for argument by the next succeeding rule day, or to obtain further time for that purpose from the court; and

that therefore, under the 38th equity rule, the bill should have been dismissed "as of course" by the court.

It is to be observed that the plea referred to was filed by the Illinois River Railroad Company, which is not a party to this appeal, and which never asked the dismissal of the original bill, because its plea had not been put at issue or set down for argument. Under these circumstances it would be a strange application of the 38th rule to hold that the complainant had the right to dismiss his bill after the cause had been decided against him.

It plainly appears from the record that after such plea was filed by the Illinois Railroad Company no notice was taken of it by any of the parties, the cause was allowed to proceed as if it had never been filed, and was decided upon the issues raised by the answer and cross-bill of the Rolling Mill Company. The complainant now insists that his bill should have been dismissed, carrying with it the decree of the court in favor of the Rolling Mill Company, the cross-bill, and the issues raised upon it, and the great mass of testimony in the case, in the taking of which he had participated, because of his own neglect to reply to a plea filed by another party, which itself never insisted upon the dismissal of the bill by reason of that neglect. The only party which could assign for error the refusal of the court to dismiss the bill on account of the default of the original complainant in not replying to or setting down the plea, is the Illinois River Railroad Company, by which the plea was filed. But it has never taken any exception to the refusal of the court to dismiss the bill, and is not a party to this appeal. For the reasons stated we think the circuit court did right in overruling the application of Dumont for leave to dismiss his bill.

It is next insisted that the court erred in entering a final decree in favor of the Rolling Mill Company and ordering a sale of the property of the railroad company to satisfy the same.

The ground of this contention is that the final decree was rendered upon the cross-bill only, and not upon the original bill, and that if the cross-bill only were considered the court had no jurisdiction thereof by reason of want of the requisite citizenship of the parties thereto, and that no decree could be ren-

dered upon the cross-bill, except as consequent upon a decree in the original cause. This objection proceeds upon an assumption not sustained by the record. The cause was heard at the same time upon both the original and cross-bills. The issue was whether or not the lien of the Rolling Mill Company was prior to the bonds secured by the deed of trust. This was raised both by the original and cross-bills. The prayer of the original bill was that an account might be taken of the sums due for principal and interest on the bonds secured by the trust deed to Straut, and of the sums due as liens upon the railroad, and that it might be sold for the payment of the same. The issues raised by the original bill and the answer of the Rolling Mill Company, and upon the cross-bill of the Rolling Mill Company, were found by the court in favor of the company upon a hearing of both the original and cross-bills. The court decided in favor of the Rolling Mill Company, granting it the relief prayed in its cross-bill. It is true the complainant, in his original bill, did not ask for a decree upon the final hearing in his favor. But the cause having been heard on both the original and cross-bills, he could not prevent the granting of the relief prayed by the cross-bill, either by dismissing his bill or by not asking for a decree.

The original bill was not dismissed, but is still pending, and the complainant in that bill may still apply in behalf of the holders of bonds secured by the trust deed to Straut for such part of the proceeds of the sale as the final decree orders to be paid to the clerk of the court. Our conclusion is, therefore, that it was competent for the court to render the final decree made in this case.

The next question presented by the assignments of error is whether the Rolling Mill Company had a lien upon the railroad and other property of the Illinois River Railroad Company superior to the deed of trust to Straut and the lease to the Alton Railroad Company.

The matter of liens upon railroads is regulated by the Revised Statutes of Illinois, chapter 82, sec. 51, in force when the contract of August 7th, 1874, for the delivery of iron rails was made, and on March 1st, 1875, when the trust deed to Straut was executed, which declares:

"That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation now existing, or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed, or shall hereafter do and perform, any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same shall have a lien upon all the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor, Provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

The Rolling Mill Company began to deliver to the Illinois River Railroad Company on September 1st, 1874, iron rails and other material to be used in the construction of its road, and continued such delivery until November 11th, 1874. The material so furnished, of the value of $107,785.09, was used in the construction of the railroad. Within less than six months from November 12th, 1874, the date when the last material was delivered, the Rolling Mill Company filed in the proper court its bill of complaint to enforce its lien under said statute. The lease of its road made by the Illinois River Railroad Company to the Alton Railroad Company, and its deed of trust to George Straut were not executed until March 1st, 1875, long after the delivery of said material had been commenced. The lien of the Rolling Mill Company under the statute would therefore seem to be complete and superior to that of the trust deed and lease.

The appellants, however, contend that the Rolling Mill Company waived its lien by the contract between it and the Construction Company and the Alton Railroad Company of August 7th, 1874, by which it was stipulated that the rails and other materials furnished by the Rolling Mill Company should be used

in the construction of the railroad of the Illinois River Railroad Company, and that until fully paid for the Rolling Mill Company should have a lien thereon, and that the possession thereof by the railroad company should be the possession of the Rolling Mill Company.

We do not think that this stipulation shows any purpose on the part of the Rolling Mill Company to waive its statutory lien. When the contract was made, the railroad for which the materials were to be furnished was in contemplation only. The survey of its route had not been completed, nor had the right of way been obtained. The evident purpose of the stipulation was to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad where they would be subject to the statutory lien, and the facts of this case show that this was a wise precaution. The contract, therefore, so far from showing a waiver of the statutory lien, shows a purpose on the part of the Rolling Mill Company to retain it. The statutory lien was, therefore, not lost. On this question the case of *Clark* v. *Moore*, 64 Ill. 279, is in point. In that case the Supreme Court of Illinois says:

"It is also insisted that appellees waived their lien when they sold the property, by reserving a lien upon it in a written contract; that they thereby received and held additional security, that operated to destroy any lien that would otherwise have attached. It is true that where a laborer or materialman receives security collateral to the property improved, whether the security be personal or a mortgage on or a pledge of other property or chose in action, the law presumes that it was intended to waive or release the lien upon the premises. In their effort to retain a lien on the machinery furnished by appellees, they took no collateral or independent security. It was but a futile effort to retain a superior lien on the property furnished over and above other lienholders. Had these parties taken a mortgage on these lots and the building, which the law would have adjudged void, would any one claim that they could not assert their lien? The lien attaches to and encumbers the property to improve which the material is furnished, and the effort to acquire a more specific and exclusive lien thereon in no wise manifests an intention to release the property from all

liens and look to other security for payment, but it shows the very opposite intention, an intention to hold, if possible, the property liable for the payment of their claim."

This authority decides the question in hand against the appellants, and is entitled to great, if not conclusive, weight in this court.

The appellants further contend that the Rolling Mill Company, by the contract of August 7th, 1874, gave credit for the materials to be purchased by it, which extended beyond the time within which suit would have to be brought to fix and enforce the statutory lien, and that this fact shows conclusively that the statutory lien was waived.

It is well settled that an agreement for the extension of credit by receiving a note of the party, or the independent security of a third person, falling due at a day beyond the period within which the lien must be asserted, will be no waiver when the agreement to give the note or security has not been performed by the promisor. To hold otherwise would be to say that the builder or materialman must have intended to waive his lien in the event of a refusal to comply with the agreement. On the debtor's refusal to keep the agreement, the builder or materialman ought not to be bound by it, but should be remitted to his rights, independently of the contract. *The Highlander*, 4 Blatch. 55.

It is clear from the terms of the contract that the Rolling Mill Company never agreed to extend credit for the materials furnished unless notes were given therefor, with the stockholders of the Construction Company as indorsers, and with the bonds of the Construction Company secured by the deed of trust to Norton as collateral security. The contract to give credit was clearly conditioned upon the delivery of the notes and bonds. It would be absurd to hold that, on the failure to deliver them, the Rolling Mill Company had nothing to show for its iron rails and other materials, but the promise of an insolvent railroad company and an insolvent construction company to deliver the notes and bonds. They were as impotent to deliver the notes and bonds as they were to

pay cash. Such could not have been the intention of the parties to the contract. On the failure of the companies to deliver the notes and bonds according to the contract, the Rolling Mill Company was entitled to immediate payment and to its statutory lien to secure it, because the credit was conditioned upon the giving of security, and the security was not given. It has been so held by the Supreme Court of Illinois in the case of *Gardner* v. *Hall*, 29 Ill. 277. Gardner filed his petition to enforce a mechanics' lien on a contract for doing certain work. The contract provided that payment of a certain instalment due upon a day named should be postponed for a period extending more than a year after the completion of the work in case a mortgage on the premises should be given to secure said instalment. The petition was demurred to, and the demurrer was sustained. On appeal this decree was reversed, and the supreme court said:

"An agreement was made to give a mortgage which would have destroyed the lien, but no mortgage was given, and hence the lien remained. So was an agreement made to extend the time of payment which would destroy the lien. But the mortgage was not executed, hence the time was never extended and the lien never waived thereby." See also *The Highlander*, 4 Blatchf. *ubi supra.*

We are of opinion, therefore, that as the purchasing companies did not perform the condition upon which credit was to be given, no credit at all was given, much less a credit extending beyond the time for the enforcement of the statutory lien.

It follows from these views that the contention of appellant that the suit begun May 10th, 1875, by the Rolling Mill Company to fix and foreclose its statutory lien, was brought before the cause of action accrued, and cannot, therefore, be treated as a compliance with the statute, cannot be sustained, for at that date the debt was due and the lien in force.

In our opinion the Rolling Mill Company had, under the statutes of Illinois, a lien upon the railroad and its appurtenances of the Illinois River Railroad Company for the value of the materials furnished by it and used in the construction of

the railroad, superior to the lien of the trust deed executed to George Straut on March 1st, 1875, and to the lease of said railroad executed on the same day to the Chicago & Alton Railroad Company, and that the decree of the circuit court ordering the railroad to be sold to pay the sum due for said materials so used was just and right.

It is, lastly, assigned for error, that the circuit court rendered a personal decree against the Alton Railroad Company in favor of the Rolling Mill Company, and awarded execution thereon.

The personal decree complained of was for $29,796.30. This sum was the value, with interest, of certain iron rails, &c., sold and delivered by the Rolling Mill Company to the Illinois River Railroad Company and the Construction Company, under the contract of August 7th, 1874, which were not used in the construction of the railroad, but were sold by the purchasing companies to the Alton Railroad Company, and by it converted to its own use.

The circuit court found that the Rolling Mill Company had a lien upon said materials; that the Alton Railroad Company bought said materials with notice thereof, and had never paid for the same, and had alleged, as a reason for its failure to pay, the want of title in the companies from which it purchased. The facts so found are clearly shown by the record, and do not seem to be disputed. The Alton Railroad Company, however, insists that there was no lien on said materials under the contract of August 7th, 1874, because the contract was not acknowledged and recorded as required by the law of Illinois relating to chattel mortgages.

That act provided as follows:

"That no mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be

deemed a chattel mortgage." Rev. Stat. of Ill., chap. 95, section 1.

The theory of the appellants is that the Illinois River Railroad Company and the Construction Company, being the owners by purchase of the iron rails, retained possession of the same, and by the contract of August 7th, 1874, gave to the Rolling Mill Company a chattel mortgage thereon, which was never acknowledged and recorded, and that consequently the lien fails. But the facts of the case are not in accord with this theory. When the contract referred to was made the iron rails were not the property of the purchasing companies. It does not appear that the rails were at that time in existence, and they were certainly not in possession of the purchasing companies. So that this is not the case contemplated by the Illinois statute, which clearly refers to a mortgage on personal property of which the mortgagor is owner and of which he is in possession and of which he wishes to retain possession. The case is that of the owner, namely, the Rolling Mill Company, of personal property, who sells it and delivers the physical possession to its vendee and by the bill of sale retains a contract lien thereon. In such a case it is clear that the original vendor can enforce the lien against a subsequent purchaser who had actual notice of the lien and had not paid for the property, and refused to pay for it on the ground that the first vendee from whom he bought had no title thereto. The chattel mortgage law above quoted can have no reference to such a case. Such an application of it would be unjust, inequitable, and unreasonable. The law has never been so applied by the courts of Illinois.

We find no error in the proceedings and decrees of the circuit court. They are, therefore, *Affirmed.*

Case No. 172. *The Massachusetts Mutual Life Insurance Company* v. *The Union Rolling Mill Company* is an appeal from the same decree affirmed in the preceding case.

The Insurance Company by leave filed an intervening petition, claiming to be the owner of forty-five of the bonds secured by the trust deed to George Straut. It has never proved its posses-

sion or ownership of any of said bonds either before the master or the court. If it had it would be in the same position as any other holder of said bonds, all of whom, so far as the questions raised by this appeal are concerned, were represented by Dumont, the complainant in the original bill. These questions have all been decided in the preceding case.

In this case also the decree appealed from must therefore be

Affirmed.

HOWARD *v.* CARUSI and Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 10th, 11th, 1883.—Decided January 7th, 1884.

Devise—Power—Trust.

1. A devise of real estate and bequest of personal property "to my brother S. C. to be held, used, and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that, at his death, the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend to my three beloved nieces P. E. C., G. E. C., and I. E. C., is, as to real estate, a devise to S. C. in fee simple, with no limitations over ; and creates no trust, executory or otherwise.
2. An execution of a power to name beneficiaries to take under a deed which designates A., his heirs, executors, administrators and assigns forever, with the hope and trust that he will not diminish the same, and a provision that at his death so much thereof as he shall not have disposed of by devise or sale shall descend to B., vests the fee simple absolute in A. with no remainder to B.

The pleadings and evidence in this case disclose the following facts: On March 18th, 1872, Lewis Carusi, a bachelor about 78 years of age, and a citizen of the city of Washington, in the District of Columbia, being seized in fee of certain real estate in said city, executed his last will and testament. In the first item of the will he directed his just debts and funeral expenses to be paid out of his personal estate. The second item of the will was as follows:

Statement of Facts.

"And as to all my property, real, personal, and mixed, after the payment of my just debts and funeral charges as aforesaid and the payment of the legacies hereinafter mentioned, I give, devise, and bequeath the same to my brother Samuel Carusi, to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces, Phillippa Estelle Caulfield, *née* Carusi, Genevieve E. Carusi, and Isolina E. Carusi, the daughters of my said brother Samuel Carusi, as follows: To the said Phillippa Estelle Caulfield, *née* Carusi, the sum of five thousand dollars ($5,000), the remainder of my estate to be divided between Genevieve E. Carusi and Isolina E. Carusi, to share and share alike as tenants in common and not as joint tenants, and so that they, and they alone, shall have the right to have, possess, use, and enjoy the same separate and apart from and independent of any husband either one of them may have at the time of my decease or at any time thereafter, and so that he or they shall have no right, privilege, or power to control or interfere with any part of my said estate in any manner whatsoever, and so that the same shall not be subject or liable to any debt that any such husband may have incurred.

"I further hope, trust, and desire that in the event either one of my said nieces, daughters of the said Samuel Carusi, shall not survive my said brother Samuel, that the share she might become entitled to had she survived him may be conferred and fall to the surviving niece or nieces. In no event shall any portion of my estate be subject to the control or interference of any husband either one of my said nieces may have at the time of my decease or at any time thereafter.

"I give and devise to my three nieces, daughters of my brother Nathaniel Carusi, the sum of two thousand dollars ($2,000.)"

By the third and last item of the will the testator appointed his brother, Samuel Carusi, the sole executor thereof.

Afterwards, on July 18th, 1872, the said Lewis Carusi, as party of the first part, executed a deed of that date which purported to convey to his brother, Samuel Carusi, party of the

second part, in fee simple, all his real estate in the city of Washington, upon trusts which were thus expressed:

"In trust nevertheless to, for, and upon the following uses and trusts, that is to say, in trust to sell and convey the whole or any part of the said pieces or parcels of ground and premises at the discretion of the said party of the second part, and to invest the moneys arising out of such sale or sales in other property or securities for the use and benefit of the said party of the first part; and in the event of the death of the said party of the first part, so much of said pieces or parcels of ground as may remain unsold, or such other property as may be purchased, or such securities as may be acquired, in manner aforesaid, to convey to such person or persons as the said party of the first part may, by his last will and testament or other paper-writing, under his hand and seal, by two persons witnessed, designate and direct."

The appellant averred, and the defendants denied, that this deed had been delivered by the grantor to the grantee therein named.

Subsequently, on October 17th, 1872, Lewis Carusi executed and delivered to his brother, Samuel Carusi, another deed, conveying to him absolutely in fee simple the same lands described in said will and in the deed of July 18, reserving to himself the rents and profits thereof during his life.

On October 25th, 1872, Lewis Carusi died, having made no will other than that of March 18th, 1872, above mentioned. After the death of Lewis, Samuel Carusi took possession of the real estate described in said will and deeds, claiming an absolute title in fee simple thereto by virtue of said will and the deed of October 17th, 1872, and continued in possession until his death. On March 23d, 1877, he duly executed his last will and testament, by which he devised to his wife, Adelaide S. Carusi, for her natural life, all his real estate, with remainder in fee at her death to his children, John McLean Carusi, Samuel P. Carusi, Thornton Carusi, Estelle Caulfield, Genevieve Carusi, and Isolina E. Howard, share and share alike, and appointed his wife, the said Adelaide S., and his son, the said John McLean Carusi, the executors thereof.

Statement of Facts.

Afterwards, on December 22d, 1877, Samuel Carusi died, and on January 8th, 1878, his will was admitted to probate and record in the Orphans Court of the District of Columbia.

The bill in this case was filed by Isolina E. Howard, one of the children and heirs at law of Samuel Carusi, against the defendants, who were her brothers and sisters and devisees under their said father's will. It averred the making by Lewis Carusi of his said will and of the deeds of July 18th and October 17th, 1872, and specially averred the delivery by Lewis Carusi to his brother Samuel of the first-mentioned deed. It averred that the deed of October 17th, 1872, was made by Lewis Carusi when he was physically so feeble as to be unable to sign his name, "and when he was mentally incompetent to execute a deed; that at the time said deed was made by him he had no legal title to the real estate therein described, having divested himself thereof by the deed of trust of July 18th, 1872, and that he was procured to make said deed of October 17th by Samuel Carusi, for whose benefit it was made."

The bill further alleged that the will of Lewis Carusi was propounded for probate and record in the proper court, but a caveat having been filed against the probate thereof, no proceedings were taken or decree made in reference thereto.

The bill charged that the will of Lewis Carusi fully designated the beneficiaries of the trusts created by the deed of trust of July 18th, 1872, and that Samuel Carusi had no estate in the property belonging to Lewis Carusi which he could dispose of by his last will so as to divest the plaintiff and her sisters of their rights under the last will and testament of Lewis Carusi, and that Samuel Carusi was only a trustee to hold the property during the lifetime of Lewis Carusi, and upon trust to convey the same upon the death of Lewis to the complainant and her sisters in manner set forth in Lewis Carusi's last will and in said deed of trust.

The bill further alleged that Samuel Carusi, with the purpose of defeating the provisions of the will and deed of trust executed by Lewis Carusi, did, during his own lifetime, suppress the deed of trust and claimed an absolute title in fee simple to all the estate of Lewis Carusi under the will of the latter and the deed

of October 17th, 1872. Finally, the bill alleged that Lewis Carusi, during his lifetime, repeatedly

"Declared, in most unmistakable terms, that it was his intention to leave his estate, by any testamentary disposition he should make thereof, to his nieces, to the exclusion entirely of any nephews that might survive him, and to the exclusion of the wife of the said Samuel Carusi, should she survive him; . . and that it was the intention of Lewis Carusi to make provision at all events for his said several nieces in preference to all persons and to every person who might, by reason of affinity, have any claim upon him or his estate."

The bill prayed for a decree declaring the deed of trust dated July 18th, 1872, to be in full force and effect, and that the will of Lewis Carusi was operative as designating the beneficiaries under the deed of trust, and its terms and conditions; that the will of Samuel Carusi, so far as it devises any part of the estate of which Lewis Carusi died seized, might be declared null and void; that a receiver be appointed to take charge of and manage the estate, and that the executors of the will of Samuel Carusi, might be enjoined from interfering with his estate, and for general relief. Defendants answered separately. Complainant replied. After issue joined the bill was dismissed, and plaintiff appealed.

Mr. William B. Webb for appellant.
Mr. L. G. Hine for appellees.

Mr. Justice Woods delivered the opinion of the court.

The case made by the bill of complaint is based on the will of Samuel Carusi, and upon the deed of trust alleged to have been executed and delivered July 18th, 1872. The contention of complainant is that, by the deed Lewis Carusi conveyed to Samuel Carusi all his real estate in trust to convey the same to such person or persons as the said Lewis Carusi might, "by his last will and testament, or other paper writing under his hand and seal, by two persons witnessed, designate and direct;" and that although the will was revoked by the trust deed, it was nevertheless effectual as a designation of the persons to whom

said real estate was to be conveyed by Samuel Carusi, the trustee; and that the complainant and her sister, Genevieve Carusi, were the persons who were so designated by the will. It is clear, therefore, that complainant's case can derive no aid from the declarations of the testator, Lewis Carusi, alleged to have been made before and after the execution of his will, in relation to the disposition which he intended to make of his property. It must stand or fall upon the designation made in the will.

It is clear, also, that the will is to receive precisely the same construction, as an instrument designating the beneficiaries of the trust deed, as it would have received as a last will duly proven and recorded. The question is, therefore, what estate did the testator intend to give the complainant by his will of March 18th, 1872?

This will gives, first, an estate in fee simple to Samuel Carusi; it contains, second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee simple, with an absolute power of disposition either by sale or devise clearly and unmistakably implied. Therefore, according to the adjudged cases, the limitation over to the nieces of the testator is void.

The rule is well established that, although generally an estate may be devised to one in fee simple or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.

Thus, in the case of *Attorney-General* v. *Hall*, Fitg-G. 314, there was a devise of real and personal estate to the testator's son and to the heirs of his body, and that if he should die leaving no heirs of his body, then so much of the real and personal estate as he should be possessed of at his death was devised over to the complainants in trust. The son in his lifetime suffered a common recovery of the real estate, and made a will as to the personal estate, and died without issue, and a bill was filed against his executor to account. It was held by Lord

Chancellor King, aided by the master of the rolls and the chief baron of the exchequer, that the devisee was tenant in tail of the real estate, and had barred the plaintiffs by the common recovery, and that the executrix was not to account for the personal estate to the persons claiming under the limitation, for that was void as repugnant to the absolute ownership and power of disposal given by the will.

In the case of *Ross* v. *Ross*, 1 Jac. & Walker, 154, a limitation over was declared void because it was limited upon the contingency that the first taker did not dispose of the property by will or otherwise. See also *Cuthbert* v. *Purrier*, Jac. 415; *Bourn* v. *Gibbs*, 1 Russ. & Mylne, 614; *Holmes* v. *Godson*, 8 DeG. M. & G. 152.

The American cases are to the same effect. Thus, in *Jackson* v. *Bull*, 10 Johns. 18, Charles Bull died seized of the premises in question. By his last will, after devising a certain lot of land to his son Moses, he declared: "In case my son Moses should die without lawful issue, the said property he died possessed of I will to my son Young, his lawful issue," &c. It was held that the limitation over was void as being repugnant to the absolute control over the estate which the testator intended to give.

In *Ide* v. *Ide*, 5 Mass. 500, the devise was to the testator's son Peleg, his heirs and assigns, with the following provision: "And further, it is my will that if my son Peleg shall die and leave no lawful heirs, what estate he shall leave to be equally divided between my son John Ide and my grandson Nathaniel Ide, to them and their heirs forever." Held that his limitation over to John and Nathaniel Ide was void because inconsistent with the absolute unqualified interest in the first devisee.

To the same effect is the case of *Bowen* v. *Dean*, 110 Mass. 432, where a man devised all his estate, real and personal, to his wife, "to hold to her and her assigns," but should she "die intestate and seized of any portion of said estate at the time of her death," then over. The wife took possession of the land and died having made a will by which she devised and bequeathed all her estate, real and personal. It was held, that the will of the husband gave the wife, by necessary implica-

tion, an absolute power of disposal, either by deed or will, and this power having been fully executed by her will, nothing remained upon which the devise over in the will of her husband could operate.

In *Melson* v. *Cooper*, 4 Leigh, 408, the case was this: John Cooper died in 1813 seized of the messuage and land in controversy, having, by his last will duly executed, devised, *inter alia*, as follows: "I give to my son, William Cooper, the plantation I live on, to him and his heirs forever. In case he should die without a son and not sell the land, I give the land to my son, George," &c. The plantation on which the testator lived was the land in controversy. George Cooper, the lessee of the plaintiff, was the testator's son George mentioned in the devise, who claimed the land under the limitation over to him therein contained. The testator's son William, to whom the land was devised in the first instance, attained to full age, married, and died, leaving issue one daughter, but without leaving or ever having had a son, and without having sold the land. The question referred to the court was whether, upon this state of facts, George Cooper was entitled to the land. The court held that a general, absolute, unlimited power to sell the land was given to William Cooper by the devise, and he took a fee simple, and that George Cooper was not entitled to recover. See also *Gifford* v. *Choate*, 100 Mass. 343; *Hale* v. *Marsh*, Ib. 468; *Ramsdell* v. *Ramsdell*, 21 Me. 288.

The rule is thus stated by Chancellor Kent: "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies *possessed* of the property without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should *leave*, or without *selling* or devising the same; in all such cases the remainder over is void as a remainder because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given, or necessarily implied by the will." 4 Kent's Com., 271.

If the will of Lewis Carusi had remained unrevoked and had been duly proven and recorded, and Samuel Carusi had died

intestate, with all the property devised to him by Lewis Carusi undisposed of, the complainant would be entitled to no relief, for she would have taken nothing by the will. If the will can be held to designate any beneficiary under the trust deed of July 18th, 1872, it designated Samuel Carusi and not the complainant and her sisters.

But by the terms of Lewis Carusi's will, the complainant and her sisters were only entitled to so much of the estate of Lewis as Samuel should "not have disposed of by devise or sale." The bill of complaint charges that Samuel Carusi, by his last will and testament, had devised to certain persons therein named, among them the complainant, all the property devised to him by the last will of Lewis Carusi. There was, therefore, no property of the estate of Lewis Carusi to which the supposed devise to complainant and her sisters could apply.

The case of complainant receives no support from the precatory words of the will of Lewis Carusi. These words express "the hope and trust that Samuel Carusi will not diminish the same (viz., the property devised to him by the will) to a greater extent than may answer for his comfortable support," and the testator then devises to complainant and her sisters what Samuel shall not have disposed of by devise or sale.

The words do not raise any trust in Samuel. He is not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed upon him. But even if the will had contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives Samuel Carusi the absolute power of disposal.

In *Knight* v. *Knight*, 3 Beavan, 148, it was said by the Master of the Rolls (Lord Langdale):

> "If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request, . . . it has been held that no trust was created."

And see *S. C.* nom. *Knight* v. *Boughton*, 11 Cl. & Fin. 513.

The rule is thus stated by Mr. Justice Story in his Commentaries on Equity Jurisprudence, § 1070:

"Whenever the objects of the supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, whenever the prior dispositions of the property import absolute and uncontrollable ownership, in all such cases courts of equity will not create a trust from words of this character."

See also *Wood* v. *Cox*, 2 Mylne & Craig, 684; *Wright* v. *Atkyns*, Turn. & Russ. 143; *Stead* v. *Mellor*, 5 Ch. D. 225; *Lambe* v. *Eames*, L. R. 10 Eq. 267; *S. C.* 6 Ch. D. 597; *Hess* v. *Singler*, 114 Mass. 56; *Pennock's Estate*, 20 Penn. St. 268; *Van Dyne* v. *Van Dyne*, 1 McCarter (N. J.), 397; 2 Pomeroy's Eq. Jur. §§ 1014, 1015, 1016, 1017, and notes.

The views we have expressed render it unnecessary to consider other questions argued by counsel. It is quite immaterial whether or not Lewis Carusi had mental capacity to execute the deed of October 17th, 1872, or whether he had any title to the property described therein. If that deed had never been executed the fact would not aid the complainant's case.

The result is that the decree of the Supreme Court of the District of Columbia in general term by which the decree of the special term dismissing the complainant's bill was affirmed was right, and must itself be

Affirmed.

SHERMAN COUNTY *v.* SIMONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Submitted December 10th, 1883.—Decided January 7th, 1884.

Estoppel—Municipal Bonds—Municipal Corporations—Nebraska.

1. A *bona fide* holder for value before maturity of a bond issued by a county is not bound to go behind the recitals in the bond to inquire whether the amount of the indebtedness of the corporation exceeds that authorized by law.
2. When a statute directs an officer to examine and determine the amount of the indebtedness of a county, for the purpose of further determining the amount of bonds to be issued by the county for a given purpose, and the officer performs the duty, the county cannot, in a suit by a holder of a bond issued as a result of the exercise of the power by the officer, set up that the finding was not true.
3. When the legislature of Nebraska authorized a county which was indebted to issue bonds for the amount of the indebtedness, that act was no infringement of the provision in the State Constitution then in force that, "the legislature shall pass no special act conferring corporate powers." The case of *Commissioners of Jefferson County* v. *The People*, 5 Neb. 127, followed.
4. The issuing of bonds under such authority was no violation of the provision in the present Constitution of Nebraska, that the legislature shall not pass any local or special laws "granting to any corporation, association or individual any exclusive privileges, immunities, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." A county is not a corporation within the meaning of this clause. *Woods* v. *Colfax County*, 10 Neb. 552, followed.

The court made the following statement of the case on which its opinion is founded.

This was a suit brought on the coupons of certain bonds issued by the commissioners of Sherman County, in the State of Nebraska, dated January 1st, 1876, under an act of the legislature of that State approved February 18th, 1875, entitled "An Act to authorize the commissioners of the counties of Colfax, Platt, Boone, Antelope, Howard, Greeley, and Sherman to issue bonds for the purpose of funding the warrants and orders of said counties."

The act referred to authorizes the commissioners of each of

the counties named to issue bonds of the county, and to sell and negotiate the same for money, and declares that the proceeds arising therefrom shall be used for the redemption of all warrants and other evidences of indebtedness drawn on the treasurer of the county, which were outstanding at the date of the approval of the act, or might be outstanding prior to the first day of January, 1875. The act contained the following provisos:

"Provided that no more of the bonds authorized to be issued by virtue of this act shall be issued than is necessary to pay off and redeem such warrants so outstanding; and provided further, that the said commissioners shall not issue of said bonds to exceed in value the amount of said indebtedness up to January 1st, 1875, nor shall said bonds be negotiated at a less price than eighty-five cents on the dollar."

The bonds recited on their face that they were issued by authority of said act.

The answer averred that bonds were issued under said act by the commissioners of said county of Sherman to the amount of $45,000, and that on January 1st, 1875, the debts of said county did not exceed the sum of $16,000, and that the said bonds were negotiated for less than eighty-five cents on the dollar. On this answer the plaintiff below took issue. The parties waived a trial by jury, and submitted the cause to the court, which made findings, from which the following facts appear:

On January 1st, 1876, the commissioners of Sherman County, in pursuance of the act of February 18th, 1875, issued among others the bonds and coupons described in the petition, and the same came into the possession of the plaintiff, who was a *bona fide* purchaser for value, without notice of defects other than appear on the face of the bonds, and was still the holder and owner of said bonds and coupons.

The record of the commissioners of Sherman County showed the allowance of $15,000 in claims against the county from the organization of the county to January 1st, 1875, for which warrants were drawn on the treasury, and no more, but they also showed that the commissioners at one of their meetings estimated the amount of the county indebtedness which might

be funded at the sum of $36,874.95, for which it would be necessary to issue bonds to the amount of $43,400, and that bonds were issued pursuant to such estimate, but it was not shown what the actual indebtedness of the county was at the time the bonds were issued.

Upon this finding the circuit court rendered judgment in favor of the plaintiff below for $5,671.60. To reverse that judgment this writ of error is prosecuted.

Mr. Turner M. Marquette, *Mr. Lewis A. Groff*, *Mr. C. S. Montgomery*, *Mr. Hamer*, and *Mr. Conner* for plaintiff in error.

Mr. Nathan S. Harwood, and *Mr. John H. Ames*, for defendants in error.

Mr. Justice Woods delivered the opinion of the court.

The plaintiff in error insists that the facts found by the court show an issue of bonds by the county in excess of the amount authorized by the statute, and that they are therefore void.

The defendant in error is found by the circuit court to be a *bona fide* holder for value. According to repeated decisions of this court, being such, he was not bound to go behind the law and the recital of the bonds to inquire into the amount of the county indebtedness. *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Humboldt Township* v. *Long*, Ib. 642; *Wilson* v. *Salamanca*, 92 U. S. 499.

But if it be conceded that a purchaser of the bonds was required to inspect the records of the county to ascertain the amount of its indebtedness, and whether there had been an overissue of bonds, it appears from the findings of fact that the records of the commissioners contained an estimate of the indebtedness of the county made by them for the express purpose of fixing the amount of bonds to be issued, and in pursuance of which they were issued, which showed that there was no overissue.

This was a decision by the very officers whose duty it was under the law to fix the amount of bonds which could be lawfully issued. A purchaser of bonds was not required to make further inquiry, and if the finding of the commissioners was

untrue, he could not be affected by its falsity. See cases above cited; also *Lynde* v. *The County*, 16 Wall. 6; *Commissioners* v. *January*, 94 U. S. 202; *County of Warren* v. *Marcy*, 97 U. S. 96; *Commissioners* v. *Bolles*, 94 U. S. 104; *Pana* v. *Bowler*, 107 U. S. 529.

The next contention of the plaintiff in error is that the act by which the issue of the bonds in suit was authorized was forbidden by section 1, article VIII., of the Constitution of Nebraska, which was in force at the date of the passage of the act. That section declares "the legislature shall pass no special act conferring corporate powers."

In the case of the *Commissioners of Jefferson County* v. *The People*, 5 Neb. 127, decided at the July term, 1876, the Supreme Court of Nebraska has conclusively settled this point against the plaintiff in error. In that case an act of the legislature, in all material respects similar to the act in question in this case, except that it related to but one county, was brought under consideration. The answer averred that the act was unconstitutional and void. Upon this point the court said:

"That Jefferson county is justly indebted to the relator for the amount of the warrants in question will not be controverted; and when such is the case, there is no doubt of the power of the legislature to require the county to issue its bonds for the amount of its indebtedness."

The question raised by this contention was also considered by this court in the case of *Read* v. *Plattsmouth*, 107 U. S. 568. In that case an act of the legislature of Nebraska, approved February 18th, 1873, was brought under review. The preamble of the act recited that the city council of the city of Plattsmouth had issued and sold certain bonds, and with the proceeds thereof had proceeded to let the contract for the erection of a school-house, and had appointed two persons, naming them, superintendents of the construction of the same, and that the work on said building had commenced. The first section then declared that all the acts and proceedings of the city council in relation to issuing said bonds and letting said con-

tract and the appointment of said superintendents, and all matters and proceedings connected therewith, which might in any way affect the validity of said bonds, should be, and the same were, thereby legalized, confirmed, and made valid in law. This act was attacked as in violation of the same section of the Constitution which the plaintiff in error invokes in this case. It was contended that the act in question, by legalizing bonds of the city, was void, because it had no power to issue them, was legally equivalent to an act conferring upon the city power to issue bonds, which was conferring corporate power, and, being a special act, was therefore unconstitutional. But this court, speaking by Mr. Justice Matthews, said:

"As the city of Plattsmouth was bound by force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and promises, cannot be said to be a special act conferring upon the city any new corporate powers. No addition is made to its enumerated or implied corporate faculties, no new obligation is, in fact, created."

And the court added that the very proposition there involved was maintained by the Supreme Court of Nebraska in the case of *Commissioners of Jefferson County* v. *The People*, 5 Neb. 127, above referred to. See also *Railroad Company* v. *County of Otoe*, 16 Wall. 667; *Foster* v. *Commissioners of Wood County*, 9 Ohio St. 540.

In the cases of *Clegg* v. *School District*, 8 Neb. 178, and *Dundy* v. *Richardson County*, Id. 508, cited by plaintiff in error, it was held that an act authorizing a school district or a city to contract a debt for the purpose of erecting a public building, and to issue bonds therefor, was forbidden by the Constitution because it was a special act conferring corporate powers. These cases are clearly distinguishable from those we have cited. In the latter, as in the case now under review, a debt already existed, and the statute simply authorized a change in the form of the obligation by which the debt was evidenced.

The distinction is clearly stated in *Read* v. *Plattsmouth*, *ubi supra*, the court remarking:

"The statute operates upon the transaction itself, which had already been consummated, and seeks to give it a character and effect different in its legal aspect from that which it had when it was in force;" and adds that such a result "is not affected by the supposed form of the enactment as a special or general act conferring corporate powers."

The cases cited effectually dispose of the point under consideration.

Lastly, the plaintiff in error contends that the act under which the bonds in suit were issued is repugnant to section 15, art. III., of the present Constitution of Nebraska, which went into effect November 1, 1875, after the law authorizing the issue of the bonds was passed, but before the bonds were issued. The section referred to declares:

"The legislature shall not pass any local or special laws in any of the following cases: . . . Granting to any corporation, association, or individual, any exclusive privileges, immunity, or franchise whatever. In all other cases, where a general law can be made applicable, no special law shall be enacted."

It is a sufficient answer to the contention to say that the word "corporation," as used in this section of the Constitution, does not apply to a county. If a county is a corporation at all, it is necessarily a municipal corporation. But the Supreme Court of Nebraska, in the case of *Woods* v. *Colfax County*, 10 Neb. 552, expressly held that in Nebraska, a county was not considered to be a municipal corporation. And it is clear that the authority given by the act of February 18th, 1875, to Sherman and other counties, to fund the indebtedness evidenced by county warrants, by giving their bonds in exchange therefor, does not of itself make them municipal corporations.

But it is unnecessary further to discuss this branch of the case. The decision of the Supreme Court of Nebraska in *The Commissioners of Jefferson County* v. *The People*, 5 Neb. 127, *ubi supra*, which, as before stated, was a case in all respects

similar to this, and in which the constitutionality of a similar act of the legislature was put in issue, is precisely in point and is conclusive of the question in hand.

We find no error in the record.

The judgment of the circuit court is affirmed.

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APPOINTMENT.

See CONSTITUTIONAL LAW, 12.

AMUSEMENT, PLACES OF.

See CONSTITUTIONAL LAW, 3, 4, 5, 6.

APPEAL.

CONSOLIDATION OF CORPORATIONS.

CONSTRUCTION OF STATUTES.

CONSTRUCTIVE NOTICE.

A, having acquired the right to occupy a tract of land in Salt Lake City, took possession of it and erected a public house thereon, and lived in it with his wife and B, his polygamous wife, carrying on a hotel there. He ceased to maintain relations with B, as his polygamous wife, but he being desirous to have the benefit of her services, both concealed this fact. He made a secret agreement with her, that if she would thus remain she should have one-half interest in the property. He acquired title to the property from the mayor under the provisions of the act of March 2d, 1867, 14 Stat. 541, without any disclosure of the secret agreement. Subsequently A's interest therein passed into the hands of innocent third parties for value, without notice of the claim of B under the secret agreement. *Held*, 1. That B had no rights in the premises as against innocent *bona fide* encumbrancers and purchasers without notice of her claim. 2. That the joint occupation of the premises by A and B, under the circumstances, was no constructive notice of B's claim of right. *Townsend* v. *Little*, 504.

CONTRACT.

1. The owners of three steam-tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for a compensation of $50 per hour for each boat, "to be continued until the boats

CORPORATION.

CUSTOM.

See INSURANCE, 3.

CUSTOMS DUTIES.

1. The rule that where words are used in an act imposing duties upon imports, which have acquired, by commercial use, a meaning different from their ordinary meaning, the latter may be controlled by the former, is not applicable when the language used in the statute is unequivocal. *Newman* v. *Arthur*, 132.
2. The fact that at the date of the passage of an act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the statute clearly and fairly includes them. *Id.*
3. The statute imposing duties divides foreign wool into three classes, and enacts, among other things, that the duty on wool of the first class, which shall be imported washed, shall be twice the amount of the duty to which it would be subjected if imported unwashed ; and further, that wools of that class shall pay a specific duty per pound, and an ad valorem duty in addition. *Held*, That the specific duty by weight is to be calculated on the same number of pounds in each case, and is to be twice the amount for washed wool that it is for unwashed ; and that the ad valorem duty on washed wool is to be twice the ad valorem duty on the same number of pounds of unwashed wool. *Arthur* v. *Pastor*, 139.
4. The common-law right of action against a collector to recover back duties illegally collected is taken away by statute, and a remedy given based on statutory liability which is exclusive. *Arnson* v. *Murphy*, 238.

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See EQUITY, 2;
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1. A transcript of the record of a probate of a will in Virginia, sufficient to pass real estate there, is not proof of the validity of the will in the District of Columbia for the same purpose there. *Robertson* v. *Pickrell*, 608.
2. In order to pass real estate situated in the District of Columbia, a will must be executed as provided by the laws in force there, and its validity must be established in the manner provided by those laws. *Id.*
3. Probate of a will in the District of Columbia is evidence of its validity only so far as it affects personal property. As a will devising real estate the instrument itself must be produced with the evidence of the ubscribing witnesses, or if they be dead, or their evidence legally unattainable, with proof of their handwriting. *Id.*
4. The treasurer of the United States cannot be compelled by writ of mandamus to pay to an administrator appointed in the District of Columbia, of an inhabitant of one of the States of the Union, the amount of a draft payable to the intestate at the treasury out of an appropriation made by Congress, and held by such administrator. *Wyman* v. *Halstead*, 654.

See ADMINISTRATOR DE BONIS NON, 1, 2; RECEIVER;
CONSTITUTIONAL LAW, 5; WASHINGTON CITY.

DIVISION OF OPINION.

This court cannot take cognizance of a division of opinion between the judges of a circuit court on a motion to quash an indictment. *United States* v. *Rosenburg*, 7 Wall. 580, approved and followed; *United States* v. *Hamilton*, 63.

DOMINION OF CANADA.

1. The Parliament of Canada has authority to grant to an embarrassed railway corporation within the Dominion power to make an arrangement with its mortgage creditors for the substitution of a new security in

ERROR.

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EXECUTIVE.

When the head of an executive department is required by law to give information on any subject to a citizen, he may ordinarily do this through subordinate officers in his department. *Miller* v. *Mayor, &c., of New York*, 385.

EXECUTOR AND ADMINISTRATOR.

EXPRESS BUSINESS.

The idea of regularity, as to route or time, or both, is involved in the words "express business," under § 104 of the act of June 30th, 1864, c. 173, 13 Stat. 276, and those words do not cover what is done by a person who carries goods solely on call and at special request, and does not run regular trips or over regular routes. *Retzer* v. *Wood*, 185.

FEES.

FLORIDA.

The legislature of Florida, acting under the Constitution of the State, passed an improvement act, exempting from taxation the capital stock of railroad companies accepting its provisions. The Alabama and Florida Railroad Company was organized, and constructed a railroad within the State limits, and became entitled to enjoy the exemption. In 1868 the State of Florida adopted a Constitution which provided for a uniform and equal rate of taxation, and that the prop-

INJUNCTION.

See INTERNAL REVENUE, 1;
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INNS.

See CONSTITUTIONAL LAW, 3, 4, 5, 6.

INSANITY.

See INSURANCE, 1.

INSURANCE.

1. A self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide, within the meaning of a condition in a policy of insurance upon his life, that the policy shall be void in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law. *Manhattan Life Ins. Co.* v. *Broughton*, 121.
2. A fire insurance policy contained this clause: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transactions relating to this insurance:" *Held*, That this clause imports nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy; that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured. *Grace* v. *American Central Ins. Co.*, 278.
3. Parol evidence of usage or custom among insurance men to give such notice to the person procuring the insurance was inadmissible to vary the terms of the contract. *Id.*

INTERNAL IMPROVEMENTS.

See FLORIDA;
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INTERNAL REVENUE.

1. A bill in equity will not lie to enjoin a collector of internal revenue from collecting a tax assessed by the commissioner of internal revenue against a manufacturer of tobacco, although the tax is alleged in the bill to have been illegally assessed. *Snyder* v. *Marks*, 189.
2. The remedy of a suit to recover back the tax after it is paid, which the statute provides, is exclusive. *Id.*

See EXPRESS BUSINESS.

IOWA.

See LAND GRANTS.

JUDGMENT.

1. A judgment of nonsuit is no bar to a new action, and of no weight as evidence at the trial of that action. *Manhattan Life Ins. Co.* v. *Broughton*, 121.
2. Defendants in error issued to A their bonds with interest coupons attached. A indorsed to B, and B indorsed to the plaintiff in error after the bonds were overdue. While the bonds were in B's possession, overdue, B was party defendant in a suit in chancery in a State court in which D, an owner of real estate alleged to be encumbered by a mortgage to secure payment of the bonds, sought to have them declared invalid ; and party plaintiff to a cross-bill in that suit in which it was sought to have the same bonds declared valid, and the mortgage foreclosed. In these proceedings the bonds were adjudged to be invalid for want of authority in the trustees to issue them. During the same period B, as holder of the bonds, applied to the State court for a writ of mandamus to compel the trustees of the township to levy a tax for payment of interest on the bonds. In this suit it was decided that the bonds were issued without legal authority. On these facts, *Held*, (1.) That the general rule that a purchaser of overdue bonds, after judgment rendered that the bonds are void, is bound by that judgment, applies here. (2.) That when a mandamus is refused on grounds that are conclusive against the right of the plaintiff to recover in any action whatever, the judgment is conclusive of that fact. (3.) When a proceeding in mandamus is used in an action at law to recover money, it is subject to the principles which govern money actions. (4.) The judgment of the State court that the bonds were void in the hands of B, is conclusive of that fact in the hands of his vendee and privy in action. (5.) If the parties have had a hearing and an opportunity of asserting their rights, they are concluded by final decree so far as it affects rights presented to the court and passed upon, even though all were defendants in the suit, and as between them no issue

KANSAS.

1. A recovered judgment June 11th, 1881, against a township in Cherokee County, Kansas, on bonds issued in payment of a subscription by the township to stock in a railway company. The township had no trustee then or since. An alternative writ of mandamus having been sued out to compel the board of county commissioners for the county to levy a tax sufficient to pay the judgment, and to compel the county clerk to extend the tax when levied, and to compel the county treasurer to collect it when extended, and to pay it to A when collected, judgment was entered for a peremptory writ in accordance therewith. On appeal by the county commissioners, *Held*, 1. That by the statutes of Kansas which were in force at that time, it was made the duty of the board of county commissioners of Cherokee County, in consequence of the vacancy in the office of trustee of the township, to levy a tax sufficient to pay the judgment recovered by A. 2. That the alternative writ of mandamus was not issued prematurely. 3. That the clerk and treasurer having taken no appeal, the writ of error brought up for review only the objections of the board of commissioners. *County Commissioner of Cherokee County* v. *Wilson*, 621.
2. The removal of a treasurer of a township in the State of Kansas from the limits of the township into the limits of an adjoining township, without resigning his office, does not vacate the office so as to invalidate service of summons upon him in his official capacity for the purpose of commencing an action against the township. *Salamanca Township* v. *Wilson*, 627.

LAND GRANTS.

Previous decisions of this court have settled: (1.) That the grant of lands in 1846 to Iowa Territory for the improvement of the Des Moines River did not extend above the Raccoon Fork. (2.) That the odd numbered sections within five miles of the river above Raccoon Fork and below the east branch, to which Indian title has been extinguished, did not pass under the act of 1856, granting lands to Iowa to aid in the construction of railroads. (3.) That the act of 1862 transferred the title from the United States and vested it in Iowa for the use of its grantees under the river grant. The court now decides: (4.) That when the act of 1862 took effect, there was no Indian title in the way of the grant, and the title of the defendants in error in this suit was perfected. (5.) That the reservation made by the executive under the act of 1846 is to have effect according to its terms, and not according to any mistaken interpretation which may at some time have been given to it. *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 329.

MORTGAGE.

See ACKNOWLEDGMENT;
ERROR, 1;
FORECLOSURE;
FRAUD ;
JUDGMENT, 2;
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MOTION TO ADVANCE.

MOTION TO AFFIRM.

On motion to dismiss, with which is united, under Rule 6, a motion to affirm, the motion to affirm will be granted when it appears that the questions presented are frivolous, and that the case is brought here for delay only. *Evans* v. *Brown*, 180.

MUNICIPAL BONDS.

1. A steam grist-mill is not a work of internal improvement within the meaning of the statute of Nebraska, approved February 15th, 1869, authorizing counties, cities, and precincts of organized counties to issue bonds in aid of the construction of any railroad or other work of internal improvement. *Osborne* v. *Adams County*, 106 U. S. 181, approved. *Osborne* v. *Adams County*, 1.
2. The court adheres to its former rulings in regard to the liability of municipal corporations in Missouri to innocent holders of the bonds of such corporations, issued in aid of railroads. *Green County* v. *Conness*, 104.
3. The rights of such holders are to be determined by the law as it was judicially construed to be when the bonds were put on the market as commercial paper. *Id.*
4. Bonds of the kind involved in these suits are debts of the county. Holders are entitled to payment out of the general funds of the county raised by taxation for ordinary use, after exhausting the special fund. The majority of the court adhere to the rulings in *United States* v. *Clark County*, 96 U. S. 211; *United States* v. *Macon County*, 99 U. S. 582, 589; and *Macon County* v. *Huidekoper*, 99 U. S. 592. *Knox County Court* v. *United States*, 229.
5. A *bona fide* holder for value before maturity of a bond issued by a county is not bound to go behind the recitals in the bond to inquire whether the amount of the indebtedness of the corporation exceeds that authorized by law. *Sherman County* v. *Simons*, 735.
6. When a statute directs an officer to examine and determine the amount of the indebtedness of a county, for the purpose of further determining the amount of bonds to be issued by the county for a given purpose, and the officer performs the duty, the county cannot, in a suit by a holder of a bond issued as a result of the exercise of the power by the officer, set up that the finding was not true. *Id.*

See JUDGMENT, 2; JURISDICTION, B, 4; KANSAS, 1; MISTAKE, 2. NEBRASKA, 1, 2.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 9, 11; CONTRACT, 5; JURISDICTION, B, 4; KANSAS, 1, 2; MUNICIPAL BONDS.

NAVIGABLE WATERS.

See CONSTITUTIONAL LAW, 14, 15, 16.

NEBRASKA.

1. When the legislature of Nebraska authorized a county which was indebted to issue bonds for the amount of the indebtedness, that act was no infringement of the provision in the State Constitution then in force that, "the legislature shall pass no special act conferring corporate powers." The case of *Commissioners of Jefferson County* v. *The People*, 5 Neb. 127, followed. *Sherman County* v. *Simons*, 735.
2. The issuing of bonds under such authority was no violation of the provision of the present Constitution of Nebraska, that the legislature shall not pass any local or special laws "granting to any corporation, association or individual any exclusive privileges, immunities, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." A county is not a corporation within the meaning of this clause. *Woods* v. *Colfax County*, 10 Neb. 552, followed. *Id.*

See MUNICIPAL BONDS, 1.

NEW ORLEANS.

In the absence of fraud, a compromise made between the city authorities of New Orleans and a railroad company, respecting a disputed grant of a user of part of the city property, known as the Batture, for railroad purposes, was sustained, as authorized by the laws of Louisiana. Under the statutes of that State, the city authorities had the right to make the compromise at the time it was made, and it remained valid, notwithstanding the powers conferred upon the board of liquidation of the city debt of New Orleans by the legislature. *Board of Liquidation, &c.*, v. *Louisville & Nashville Railroad Co.*, 221.

NEW TRIAL.

1 The action of the court below in refusing a new trial is not subject to review here. *Terre Haute & Indiana Railway Co.* v. *Struble*, 381.

NEW YORK.

See CONSTITUTIONAL LAW, 13;
CORPORATIONS, 1, 2, 3.

NUISANCE.

See CONSTITUTIONAL LAW, 13.

OFFICER.

See STATUTES, A, 1, 2, 3;
WRIT, 2, 3.

PARTIES.

See JUDGMENT, 2, (5);
JURISDICTION, B, 2, 4.

PATENT.

1. The reissued letters patent No. 2979, granted to the Rumford Chemical Works, June 9th, 1868, for an "improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes," claimed, in claim 1, "as a new manufacture, the above described pulverulent phosphoric acid," and; in claim 2, the manufacture of such acid, and, in claim 3, the mixing with flour of such acid and an alkaline carbonate, so as to make the compound self-raising on the application of moisture or heat, or both. There was transferred to M, by the Rumford Chemical Works, the exclusive right to make, sell, and use, in a specified territory, for five years, self-raising flour by the use of the acid, he agreeing to make the flour, and to use his skill to introduce it, and to purchase all the acid from the grantor. M died in less than three months from the date of the grant: *Held*, under the provisions of §§ 11 and 14 of the act of July 4th, 1836, 5 Stat. 121, 123, that the right acquired by M was only that of a licensee; that the instrument of license did not carry such right to any one but him personally; and that such right did not, on his death, pass to his administrator, so as to authorize a suit at law, founded on the license, to be brought in the name of the grantor, for the use of the administrator, to recover damages for an infringement of the patent committed after the death of M, by the manufacture and sale of self-raising flour, by the use of such acid, in said territory. *Oliver* v. *Rumford Chemical Works*, 75.
2. A specification describes a process for placing hair in small bundles and by a baling press uniting several into a bale: *Held*, That this description does not show a patentable invention. *King* v. *Gallun*, 99.
3. The first claim of letters patent No. 147,343, granted February 10th, 1874, to the Double-Pointed Tack Company, as assignee of Purches Miles, the inventor, for an "improvement in bail-cars," namely, "1. The compound staple-fastening *d*, for bails, made with the diagonally cut penetrating points 2 and 3, loop 4, and body 5, said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth," does not, in view of what existed before in the art, set forth any patentable invention. *Double-Pointed Tack Co.* v. *Two Rivers Mfg. Co.*, 117.
4. It was commonly known that the effect of a diagonal cut on a pene-

McKee, namely, "1. The frame A, A', A'', in combination with the lower arbor-bearing, said frame being constructed as herein described, with a depression, A''', permitting the ready removal of the arbor, as explained," is not infringed by an arrangement in which the depression does not leave exposed a seat which is entirely open upward, and the arbor-bearing cannot be removed without detaching the pulley from the arbor. *Id.*

10. Claim 2, namely, "2. The arrangement of frame A A' A'' A''', and of the horizontally and vertically adjustable arbor-bearing C, D, D', E, E', G, H, A," is not infringed by an arrangement which does not have the frame and depression of claim 1, or the elements D, D', or the same or equivalent means of adjusting such arbor-bearing either horizontally or vertically. *Id.*
11. Claim 3, namely, "3. The arrangement of step or saddle K and its contained box or bearing L L'," covers, as an element of the arrangement, among other things, a spring which carries the weight of the saddle, and gives an elastic tension to the saw, and is not infringed by an arrangement in which there is a rigid saddle and no spring. *Id.*
12. Claim 4, namely, "4. In combination with the upper arbor, L', the lower arbor-bearing, E, adjustable both vertically and horizontally, as shown and described and for the purpose set forth," is not infringed by an arrangement which does not infringe claims 2 and 3. *Id.*
13. Claim 1 of letters patent No. 87,241, granted February 23d, 1869, to Riley Burdett, as inventor, for 17 years from August 24th, 1868, for an "improvement in reed-organs," namely, "The arrangement, in a reed musical instrument, of the reed-board A, having the diapason set *a*, and its octave set *b*, and the additional set L, extending from about at tenor F upward through the scale, substantially as and to the effect set forth," defined and construed. A reed-board with two sets of reeds and a third partial set was made and put into an organ by one Dayton, prior to the invention of Burdett, and, such organ being put in evidence, it was held that the alleged infringing organs contained nothing which, so far as said claim 1 was concerned, was not found in such prior organ. As to claim 2, namely, "The reed-board A, and foundation-board G, constructed with the contracted valve openings D F F, and the reeds arranged in relation thereto, all in the manner described," it was held, that, in view of the state of the art, there was no invention in making the length and size of the valve opening greater or less in a reed-board of a given width, or where the reed-board was made wider or narrower, or had more or less sets of reeds in it, either full or partial; and that the vibrating ends of the lowest and longest reeds in such prior organ were as near together as they were in the reed-boards of the alleged infringing organs. On these views, a decree was entered in favor of the defendants. *Estey v. Burdett*, 633.

PENNSYLVANIA.

PILOT.

PLEADING.

particulars that lead to it ; and necessary circumstances implied by law need not be expressed in the plea. *Id.*

See JURISDICTION, B, 2, 3;
LIMITATIONS, 1, 2;
MINERAL LANDS, 3.

POWER.

1. A husband and wife join in a mortgage of the wife's real estate to secure a debt of the husband contracted simultaneously with the execution of the mortgage. The wife dies before maturity of the debt, leaving a will devising all her estate to her husband in trust to enjoy the income during his life, with remainder to her children at his decease:—*But provided*, That said Cyrenius Beers may encumber the same by way of mortgage or trust deed or otherwise, and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property. The will appointed the husband as sole executor, and waived all security: *Held*, That the executor was empowered by the will to extend the mortgage debt at maturity without notice to the devisees of the remainder, and without affecting the mortgage security. *Warner* v. *Connecticut Mutual Life Ins. Co.*, 357.
2. The husband, on the maturity of the debt secured by the mortgage, extended it by an instrument which did not refer to the will, or to the power which it conferred: *Held*, That, under the circumstances, it was to be construed as an execution of the power. *Id.*

POWER OF ATTORNEY.

Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by Congress or by the proper department, is good as between the government and such claimants, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of the act of July 29th, 1846, entitled "An Act in relation to the payment of claims," and the act of February 26th, 1853, entitled "An Act to prevent frauds upon the treasury of the United States." 9 Stat. 41, and 10 Stat. 170. *Bailey* v. *United States*, 432.

PRACTICE.

If, through fault of the party prosecuting a cause in this court, printed copies of the record are not furnished to the justices or parties, the writ on appeal will be dismissed for want of prosecution, unless good

cause be shown to the contrary. The fees of the clerk of this court must be paid in advance when demanded. *Steever* v. *Rickman*, 74.

See APPEAL, 3;
CRIMINAL LAW;
DIVISION OF OPINION;
EQUITY, 6, 7;
ERROR, 1, 2, 3;
FORECLOSURE;
JUDGMENT, 2;
JURISDICTION, B, 3;
LIMITATIONS, 1, 2;
MOTION TO ADVANCE;
MOTION TO AFFIRM;
NEW TRIAL;
RECEIVER;
VERDICT;
WRIT, 1.

PRINCIPAL AND AGENT.

1. Upon a negotiable promissory note, made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal. *Cragin* v. *Lovell*, 194.
2. In an action at law, the declaration alleged that the plaintiff sold land to a third person, who gave his notes for the purchase money, secured by mortgage of the land; that afterward the defendant, in a suit by him against that person, claimed the ownership of the land, and alleged that the other person, acting merely as his agent, illegally made the purchase in his own name, and that he was liable and ready to pay for the land; that he was thereupon adjudged to be the owner of the land, and took possession thereof; and that by reason of the premises the defendant was liable to the plaintiff in the full amount of the notes. *Held*, That the declaration showed no cause of action, even under art. 1890 of the Civil Code, and art. 35 of the Code of Practice of Louisiana. *Id.*

PROBATE OF WILLS.

See DISTRICT OF COLUMBIA, 1, 2, 8;
JURISDICTION, B, 6, 7, 8;
WILL.

PROHIBITION.

See WRIT, 1.

PROMISSORY NOTE.

See PRINCIPAL AND AGENT.

PUBLIC CONVEYANCES.

See CONSTITUTIONAL LAW, 3, 4, 5, 6.

RAILROADS.

1. A consolidation of two railroad corporations merges the franchises and privileges of each in the new company, so that they continue to exist in respect to the roads thus consolidated. *Green County* v. *Conness*, 104.

2. A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks; the lock of the switch was in the middle of the space; and the handle, when lying flat, extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track. *Held*, That there was no such proof of fault on the part of the railroad corporation, in the construction and arrangement of the switch, as would support an action against it for the injury. *Randall* v. *B. & O. Railroad Co.*, 478.

See ERROR, 1;
FLORIDA;
FRAUD;
LAND GRANTS;
MASTER AND SERVANT, 1, 2.

RECEIVER.

A, being entitled to a fund in the hands of the agent of Great Britain before the Mixed Claims Commission of 1873, B, his assignee in bankruptcy, filed a bill against him and C (C claiming the fund as purchaser), to restrain them from collecting the money. A restraining order first, and then a preliminary injunction were issued. D was then appointed receiver of the fund. Meanwhile E commenced suit in the same court against A and C, claiming one-fourth of the fund, and obtained preliminary injunction restraining them from collecting more than three-fourths. Subsequently an order was made in B's suit in which, after reciting that it was made by consent of parties in both suits, both restraining orders were vacated, payment of one-half of the fund was ordered to C discharged of claims of the plaintiffs in either suit, and the payment of the other half was ordered to D, and D was directed to hold it subject to the claims of B and E. This decree was carried out. Both bills were demurred to, and in each suit decree of dismissal was entered at special term on the demurrer. In B's suit appeal was taken and the decree was affirmed. In E's suit, the decree of dismissal was entered on the 24th June, 1875, and an appeal was taken on the same day. On the 28th of the same June the decree was amended by adding an order that the receiver pay the fund to C, and notice thereof was at once given to the receiver with demand of payment. The receiver repaired to the court, and asked

STATUTES.

1. In the interpretation of statutes, clauses which have been repealed may still be considered in construing provisions which remain in force. *Ex parte Crow Dog*, 556.
2. The doctrine that courts do not favor repeals of statutes by implication reasserted and authorities referred to. Especially a court of limited and special jurisdiction should not take jurisdiction over a case involving human life, through an implied repeal of a statute denying it, when the words relied on are general and inconclusive; and the fact that to hold that a statute repeals by implication a previous act would reverse a well settled policy of Congress justifies the courts in requiring a clear expression of the intention of Congress in the repealing act. *Id.*

A. STATUTES OF THE UNITED STATES.

1. When Congress appropriates a sum "in full compensation" of the salary of a public officer, the incumbent cannot recover an additional sum in the court of claims, notwithstanding a prior statute fixes the salary at a larger amount than the sum so appropriated. *United States* v. *Fisher*, 143.
2. In such case the earlier act is suspended for the time covered by the appropriation. *Id.*
3. The Revised Statutes fixed the annual salary of an interpreter at four hundred dollars. In 1877 Congress appropriated in gross for such offices "at three hundred dollars per annum," and repeated the appropriation in like form down to and including the appropriation act of March 3d, 1881. A served as such interpreter from July, 1878, to November, 1882, and was paid at the rate of $300 per annum. In a suit to recover at the rate fixed by the Revised Statutes: *Held*, That

Congress had expressed its purpose to reduce for the time being the salaries of interpreters, and that the claimant could not recover. *United States* v. *Mitchell*, 146.

4. The definition of the term "Indian Country," contained in c. 61, § 1, of the act of 1834, 4 Stat. 729, though not incorporated in the Revised Statutes, and though repealed simultaneously with their enactment, may be referred to in order to determine what is meant by the term when used in statutes; and it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act. *Ex parte Crow Dog*, 556.

See ALABAMA CLAIMS;
APPEAL, 1;
COMMON CARRIER;
CONSTITUTIONAL LAW, 1, 7, 12, 13;
CONSTRUCTIVE NOTICE;
CUSTOMS DUTIES, 1, 2, 3;
EQUITY, 4;
EXPRESS BUSINESS;
JURISDICTION, B, 4, 11;
MINERAL LANDS;
POWER OF ATTORNEY;
WITNESS.

B.—STATUTES OF STATES AND TERRITORIES.

Of Florida: *See* FLORIDA.
Of Illinois: *See* EVIDENCE, 2, 3; EQUITY, 8.
Of Kansas: *See* KANSAS.
Of Louisiana: *See* JURISDICTION, B, 9.
NEW ORLEANS.
Of Maryland: *See* WASHINGTON CITY, 1, 4.
Of Missouri: *See* RAILROADS, 1.
Of Nebraska: *See* MUNICIPAL BONDS, 1, NEBRASKA.
Of New York: *See* CONSTITUTIONAL LAW, 13.
CORPORATIONS, 1, 2, 3.
Of Tennessee: *See* LIMITATIONS, 6.
Of Texas: *See* APPEAL, 8.
TEXAS.
Of Utah: *See* CONSTRUCTIVE NOTICE.
Of West Virginia: *See* MASTER AND SERVANT, 2.
RAILROADS, 2.

C.—FOREIGN STATUTES.

See DOMINION OF CANADA.

SUPERSEDEAS.

See MORTGAGE, 1.
WRIT, 2.

SUICIDE.

See INSURANCE, 1.

SURETY.

See ADMINISTRATOR.

SURVIVORSHIP.

See PATENT, 1.

TAXATION.

See CONSTITUTIONAL LAW, 17, 18. FLORIDA.
MUNICIPAL BONDS, 4.

TAXES.

See INTERNAL REVENUE, 1, 2.

TERRITORIES.

See CONSTITUTIONAL LAW, 5.

TEXAS.

Prior to 1844, the Congress of Texas authorized contracts to be made for settling emigrant families on vacant lands to be designated in the contracts. Subsequently, that Congress passed an act to repeal this law, and presented it to the President of Texas for his signature. He vetoed the repealing act. Congress then passed it over the veto. While the repealing act was thus suspended, the President contracted with one Mercer and associates to settle families on a designated tract, capable of identification. Preston, the appellant in one suit and appellee in the other, was assignee under Mercer. In February, 1845, the Congress of Texas enacted that, on failure of the associates to have the tract surveyed and marked by the first day of the next April, the contract should be forfeited. In October following, suit was begun to have the contract annulled for non-compliance with these provisions. A decree was entered declaring it forfeited, but it did not appear that proper service of the subpœna, or other process or notice, was made to give the court jurisdiction. After lapse of several years, suit was brought against the commissioner of the land office of Texas to obtain certificates for location of land for which claim was made under the contract, either within the limits of the grant, or in case the land there had been appropriated, then land of equal value elsewhere. The bill also prayed for an injunction to restrain the commissioner from issuing patents for lands outside the grant, until the claims under the

WASHINGTON CITY.

1. In 1791, one Young, then owning a tract of land containing about 400 acres on the Potomac conveyed the same in fee simple with all its appurtenances to two trustees (who were also trustees with similar trusts, for other owners of land), as a site for the City of Washington. The trust provided that the lands laid out in streets, squares, etc., should be for the use of the United States forever, and that a fair and equal division of the remainder should be made. In 1794 the plan of the city was adopted and promulgated. On this plan a public street called Water street was represented as laid out on the margin of the river over the tract so conveyed by Young ; but this street was not in fact constructed until after the close of the late civil war. In 1796 the trustees conveyed the tract so deeded to them (including Young's), "in fee simple subject to trusts yet remaining," to commissioners appointed to receive title, under the act of July 16th, 1790, entitled, "An Act for establishing the temporary and permanent seat of the government of the United States." 1 Stat. 130. In 1797 the commissioners, in execution of the trust, and in pursuance of a statute of the State of Maryland, recorded certificates in their record book, which stated that one tract, defined by metes and bounds, had been allotted to Young, and that another tract, in like manner defined, had been allotted to the United States. Each of these tracts was on the northerly side of Water street, and was described as bounded on that street. The title to both became subsequently vested in the plaintiffs. *Held*, That these transactions were equivalent to a conveyance by Young to the United States in fee simple of all his lands ; and of a conveyance back by the United States of the first tract described by metes and bounds, leaving in the United States the title in fee simple to the other tract and to the strip known as Water street. *Van Ness* v. *The Mayor, &c., of Washington*, 4 Pet. 232 ; approved and followed. *Potomac Steamboat Company & others* v. *Upper Potomac Steamboat Company*, 672.
2. After the execution of the commissioners' certificate in 1797, allotting to Young a tract of land on the north side of Water street and to the United States another tract, also on the north side of that street, no wharfage rights remained connected with the use and enjoyment of those lots, and not being thus connected with them, such right was not annexed as an incident to them, so as to become appurtenant to them. *Id.*
3. The agreement of March 28th, 1785, between Virginia and Maryland, provides that citizens of each should have full property in the shores of the Potomac and the privilege of constructing wharves and improvements. The Maryland act of December 19th, 1791, authorized the commissioners appointed under the act of July 16th, 1790, 1 Stat. 130, to license the building of wharves on the Potomac. *Held*, That the United States, as owners in fee of Water street, in the city of

WRIT.

CORRECTIONS.

Page 51, line 11, for "that legislation," read "what legislation."
53, lines 22, 23, for "exercises," read "exertions."
59, line 22, omit "even upon grounds of race."
59, line 24, insert "even upon grounds of race," after "him."
74, in the Syllabus for "on," read "or."
75, line 12, for "on," read "or."
90, line 6 from bottom for "Storft," read "Swift."
99, line 2, for "bailing," read "baling."
106, for Syllabus substitute the statement in Index, Appeal, 1.
115, line 20, for "*W. J.*", read "*Mr. J.*"
148, line 16, for "9 Stat.," read "4 Stat."
189, line 4, for "November 15th," read "November 12th."
235, line 11, for "Shellaburger," read "Shellabarger."
255, line 19, for "Company, 1872," read "Company, in 1872."
261, line 14 from bottom for "*Mor,*" read "*T. B. Mon.*"
273, line 5 from bottom, for "2173." read "2163."
275, line 4 for "October 19th," read "November 19th."
335, line 29, for "lines" read "land."
341, last line, for "Courtlandt," read "Cortlandt."
370, line 8, for "title," read "letter."
371, line 12, for "November 20th," read "November 26th."
405, line 4, for "surround," read "surrounded."
416, lines 3 and 4, "There is only one claim in these words" in small pica.
426, line 3, for "been or," read "been mentioned or."
427, line 9, for "against," read "in favor of."
444, line 8 from bottom, for "Kent, 106," read "Kemp, 104."
480, lines 11 and 12, for "proved the following facts to the satisfaction of the court," read "as understood by this court conclusively proved these facts."
494, last line, for "in proving," read "by proving."
498, line 14, for "administer to it," read "administer it."
522, line 7 from bottom, for "*Wm. H. Ramsey,*" read "*Wm. M. Ramsey.*"
546, line 17, for "Burgess'" read "Burge's."
568, line 13 from bottom, for "the words," read "these words."
621, line 14 from bottom, for "*Blairs,*" read "*Blair.*"
636, lines 11 and 12 from bottom, "The claims of the patent are as follows:" should be in small pica.
644, lines 20 and 21, from bottom, "The reissue has 3 claims, as follows:" should be in small pica.
646, lines 11 and 12, "The claims of the original patent are two in number as follows:" should be in small pica.
652, line 23, before "appellee" insert "the."
655, line 10, for "Wyman then and still," read "Wyman's predecessor as."