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UNITED STATES REPORTS

VOLUME 110

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1883

J. C. BANCROFT DAVIS
REPORTER

NEW YORK AND ALBANY
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1884

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.

VOL. CX—A

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, on Saturday, the 16th of February, 1884, for the purpose of taking appropriate action with reference to the death of PHILIP PHILLIPS, Esq., late a member of the Bar.

The meeting was called to order by Mr. ASSISTANT ATTORNEY-GENERAL MAURY, and, on his motion, Mr. GEORGE F. EDMUNDS was elected Chairman, and Mr. CHARLES B. BEALL Secretary.

On motion of Mr. JOHN T. MORGAN, the Chairman was requested to appoint a committee of ten to report what action the meeting should take. The chairman appointed the following gentlemen as such committee: Mr. J. T. MORGAN, Mr. S. F. PHILLIPS, Mr. G. S. BOUTWELL, Mr. C. W. JONES, Mr. A. H. GARLAND, MR. L. Q. C. LAMAR, Mr. WM. A. MAURY, Mr. JOHN SELDEN, Mr. J. HUBLEY ASHTON, Mr. J. C. BANCROFT DAVIS.

The committee, after retiring for deliberation, reported to the meeting, through its chairman, Mr. MORGAN, the following resolutions:

Resolved, That in the death of PHILIP PHILLIPS the country has lost a jurist and statesman of rare ability, and the Supreme Court of the United States a member of its Bar whose labors and discussions were a large contribution to jurisprudence, and, at the same time, of invaluable assistance to that tribunal, in whose judgments they are imperishably preserved; and that we will always hold in reverential remembrance his eminent attainments, his pure and exalted character, and his admirable bearing as a member of this Bar.

Resolved, That we tender the family of the deceased our heartfelt sympathy.

Resolved, That the Chairman be, and he is hereby, requested to lay the proceedings of this meeting before the Supreme Court of the United States for such action as may be appropriate.

Resolved, That the Secretary be, and he is hereby, requested to send the family of the deceased a copy of the foregoing resolutions.

Mr. MORGAN moved the adoption of the resolutions, and after

remarks by Messrs. Morgan, Lamar, Jones, Maury, Tucker, and Reid, they were unanimously adopted.

On Tuesday, the 4th of March, 1884, upon the opening of Court, Mr. Edmunds addressed the Court as follows :

May it please the Court. I have had the honor to be requested by a meeting of the Bar of this Court recently held in memory of the death of our late brother Philip Phillips, to ask leave to present the resolutions of that meeting on the subject.

The proprieties of this occasion do not warrant me in any extended remarks, but I am sure I may be allowed to say that the Bar of this Court feels deeply the loss that the death of Mr. Phillips has brought both to his brothers and to the Bench. His most useful career, characterized always by learning, by fidelity, by industry, and by the candid courage of clear convictions, has come to a well rounded and honored close.

I beg to read the resolutions and to present them to the court.

Mr. Chief Justice Waite replied that the Court would cordially respond to the wishes of the Bar by directing the resolutions to be placed on the files of the Court, and it was ordered accordingly.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1883.

GOODWIN & Wife *v.* COLORADO MORTGAGE INVESTMENT COMPANY OF LONDON (Limited).

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

Submitted December 20th, 1883.—Decided January 7th, 1884.

Colorado—Corporations—Husband and Wife—Pleadings.

1. A certificate signed and acknowledged by the president and secretary of a foreign corporation, and filed with the Secretary of State and in the office of the recorder of deeds for the county in which it is proposed to carry on business, stating that "the principal place where the business shall be carried on in the State of Colorado shall be at Denver, in the County of Arapahoe, in said State, and that the general manager of said corporation, residing at the said principal place of business, is the agent upon whom process may be served in all suits that may be commenced against said corporation," is a sufficient compliance with the requirements of the Constitution and laws of Colorado in that respect.
2. The separate plea of a married woman which sets up the homestead law of Colorado as a defence against an action for the recovery of real estate is bad if it fails to aver that the word "homestead" is written on the margin of the recorded title of the premises occupied as a homestead, as required by law, even if it also aver a defective acknowledgment by the wife.

Action to recover possession of land. The plaintiffs claimed title through a sale under decree of foreclosure of a mortgage

of the premises executed by the defendants. Several defences were interposed, but the assignment of errors related only to the following. The defendant Elizabeth Goodwin, in her amended separate answer, answered:

"That at the time of execution of the said mortgage deed, the plaintiff well knew that said lands and premises were occupied by the said Harrison and Elizabeth as their homestead; and that the said Harrison was a householder, and that this defendant was the lawful wife of the said Harrison and residing with him."

The plaintiff demurred to this plea and the demurrer was sustained. This was one assigned error.

An amended joint answer made the following averments:

"And the said defendants in fact say that the said plaintiff long before and at the time of the execution of the said pretended deed conveyance of the said Harrison Goodwin unto the said David H. Maffat, jr., was and still is a foreign corporation, not organized or existing under any law of the State of Colorado, but organized and existing under the statutes of the United Kingdom of Great Britain and Ireland, and being such foreign corporation the said plaintiff, on or about the 29th day of August, A. D. 1877, caused to be filed in the office of the Secretary of State of the said State of Colorado and in the office of the recorder of Arapahoe County a certain certificate in words and figures as follows, to wit:

We, the undersigned, president and secretary of the Colorado Mortgage and Investment Company of London (Limited), hereby certify that the principal place where the business of said corporation shall be carried on in the State of Colorado shall be at Denver, in the County of Arapahoe, in said State, and that the general manager of said corporation residing at the said principal place of business is the agent upon whom process may be served in all suits that may be commenced against said corporation.

[Here follow the signatures and acknowledgment.]

And save as aforesaid the said plaintiff hath never at any time hitherto caused to be filed with the Secretary of the State of Colorado, nor in the office of the recorder of any county in said State, any certificate signed by the president and secretary of

said plaintiff, or acknowledged, designating the principal place where the business of the said corporation shall be carried on in this State, or any authorized agent in this State, residing at its principal place of business, upon whom process may be served, nor hath plaintiff at any time hereto filed in the office of the recorder of deeds of the said County of Boulder, any such certificate whatsoever signed by the president or secretary of the said plaintiff, designating the principal place where the business of said plaintiff will be carried on in this State, or any authorized agent or agents in this State, residing at its principal place of business upon whom process may be served—and the defendants say that the said pretended conveyance of the said Harrison so assumed and pretended to be executed to the said David H. Maffatt, Jr., was executed and delivered at the said County of Boulder and not elsewhere, and the moneys therein recited to be payable to the plaintiff, were moneys by the said plaintiff lent to the said Harrison at the said County of Boulder, contrary to the constitution of the State of Colorado, and the statute in such case made and provided.

Plaintiffs demurred to all of this answer, save the last paragraph, which demurrer was sustained. This was also assigned as error.

Judgment being rendered for plaintiff, defendants sued out their writ of error.

Mr. E. T. Wells for plaintiffs in error.

No appearance for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The Colorado Mortgage and Investment Company of London (Limited), a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, brought this action against Harrison Goodwin and Elizabeth Goodwin, his wife, to recover the possession of certain real estate in Colorado, and damages for withholding the same. In conformity with a written stipulation by the parties, the case was tried by the court without the intervention of a jury, and judgment rendered for the plaintiff.

The lands in controversy were conveyed by Harrison Goodwin to David H. Maffat, jr., in trust to secure certain promissory notes executed by the grantor to the plaintiff, and made payable at Denver, Colorado. The deed provided that in case of default in the payment of the principal or interest of either of the notes, the trustee, on application in writing of the legal holder of the notes, might sell the premises at public auction, after giving four weeks' previous notice of the time and place of sale by advertisement in any newspaper published in Boulder County (where, as we infer, the lands lie), and from the proceeds pay the principal and interest of the notes, whether due and payable by the tenor thereof or not.

There was such default, and under the authority given by the deed of trust the lands were sold, the plaintiff becoming the purchaser, and receiving a conveyance therefor from the trustee.

The wife of Goodwin filed a separate answer, in which, among other things, it is alleged, that at the time of the execution of the deed of trust, the premises in controversy were, as plaintiff well knew, occupied by her husband and herself as their homestead, and that her husband was a householder. By these allegations it was intended to question the validity, under the laws of Colorado, of the sale of the premises, in pursuance of the before-mentioned deed of trust.

The statutes of Colorado, General Laws of Colorado, 1877, ch. 46, provide that every householder in that State,

"being the head of a family, shall be entitled to a homestead not exceeding in value the sum of $2,000, exempt from execution and attachment arising from any debt, contract, or civil obligation entered into or incurred after the first day of February, in the year of our Lord 1868" § 1; that "to entitle any person to the benefits of this act, he shall cause the word '*homestead*' to be entered of record on the margin of his recorded title to the same" § 2; that "such homestead shall only be exempt, as provided in the first section of this act, while occupied as such by the owner thereof or his or her family" § 3; that "when any person dies seized of a homestead, leaving a widow, . . . such widow

. . . shall be entitled to the homestead" § 4; and that "nothing in this act shall be construed to prevent the owner and occupier of any homestead from voluntarily mortgaging the same: *Provided*, no such mortgage shall be binding against the wife of any married man who may be occupying the premises with him, unless she shall freely and voluntarily, separate and apart from her husband, sign and acknowledge the same, and the officer taking such acknowledgment shall fully apprise her of her rights and the effect of signing such mortgage" § 6.

The assignments of error do not present any question as to the sufficiency of that part of Mrs. Goodwin's answer which impeaches the truth of the officer's certificate of her acknowledgment of the trust deed. But had they done so, it is sufficient, upon this branch of the case, to say that no one is entitled to the benefits of the foregoing statutory provisions unless the word "homestead" be entered on the margin of the recorded title of the premises occupied as a homestead. Such are the express words of the statute, and there is no room left for construction. We are not at liberty to say that the legislature intended actual notice to creditors of the occupancy of particular premises as a homestead to be equivalent to the entry on the record of title of the word "homestead." The requirement that the record of the title shall show that the premises are occupied as a homestead before any person can become entitled to the benefits of the statute, is absolute and unconditional. As the answer of Mrs. Goodwin did not show a compliance, in that respect, with the statute, it was fatally defective.

The Constitution of Colorado provides, Art. XV. § 10, that

"no foreign corporation shall do any business in this [that] State without one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served."

The statutes of the State provide that

"foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate

signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business, upon whom process may be served." General Laws of Colorado, 1877, ch. 19, § 23.

Prior to the execution of the before-mentioned deed of trust or of the notes secured by it, the plaintiff caused to be filed in the office of the Secretary of State of Colorado and in the office of the recorder of Arapahoe County, a certificate signed by its president and secretary, and duly acknowledged, which stated

"that the principal place where the business of said corporation shall be carried on in the State of Colorado shall be at Denver, in the county of Arapahoe, in said State, and that the general manager of said corporation, residing at the said principal place of business, is the agent upon whom process may be served in all suits that may be commenced against [said] corporation."

The contention of plaintiffs in error is that this certificate is materially defective, in that it does not designate the particular individual by name upon whom, as the agent of the corporation, process may be served; that until this foreign corporation filed such a certificate as the statute required, it was prohibited by the Constitution and laws of Colorado from doing any business in that State; and, consequently, that this deed of trust, executed and delivered in Colorado, and upon which its title to the premises in controversy rests, was void.

We are of opinion that the certificate in question was in substantial conformity to the law. The requirement of the statute was met by the designation of the "general manager" of the corporation, residing at its principal place of business, as agent to receive service of process. It was not necessary, as we think, to give the name of the particular person who happened, at the date of the certificate, to fill that position. The object of the statute could be best subserved by a certificate of

the character filed, for the obvious reason that the death or resignation of the incumbent would not long interfere with the bringing of suits against the corporation. Had there been, when the certificate was filed, no such officer of the corporation as a general manager, there would have been ground to contend that it had not performed the condition essential to its authority to do business in the State. But the answer makes no claim of that kind, but assumes that it was necessary to give the name of some individual upon whom process against the corporation might be served. We do not concur in this construction of the statute.

None of the points made by counsel for plaintiffs in error can be sustained, and the judgment must be affirmed.

It is so ordered.

MARTIN, Sheriff, & Others *v.* WEBB & Others, Trustees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Submitted December 7th, 1883.—Decided January 7th, 1884.

Contract—Estoppel—Evidence—Principal and Agent.

1. Although a cashier of a bank ordinarily has no power to bind the bank except in the discharge of his customary duties; and although the ordinary business of a bank does not comprehend a contract made by a cashier without delegation of power from the board of directors, involving the payment of money not loaned by the bank in the customary way; nevertheless: (1.) A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors. (2.) His authority may be by parol and collected from circumstances or implied from the conduct or acquiescence of the directors. (3.) It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank; and (4.) When, during a series of years, or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has

acted in conformity with instructions received from those who have the right to control its operations.

2. That which directors ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business.

Mr. Eppa Hunton and *Mr. J. Chandler* for appellants.

Mr. R. T. Merrick and *Mr. M. F. Morris* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a decree in two suits in equity commenced in one of the courts of the State of Missouri and thence removed into the Circuit Court of the United States for the Western District of that State, where, by consent, they were consolidated for final hearing.

The question presented is whether the appellant, the Daviess County Savings Association, a banking corporation of Missouri, doing business at Gallatin, in that State, is, under the circumstances of this case, estopped to deny that the cancellation, in its name and by its cashier, of certain notes secured by trust deeds upon real estate, and the release of record of the liens given by those deeds, was by its authority and binding upon it.

The facts bearing upon this question, as they are disclosed by the pleadings, testimony and stipulations of counsel, are substantially as will be now stated.

On the 30th day of June, 1879, one Patrick S. Kenney was largely indebted to that association. The indebtedness was secured by recorded deeds of trust upon several tracts of land, in some of which, embracing a large part of this indebtedness to the bank, his wife had not joined. These deeds bore date, respectively, February 8th, 1872, November 17th, 1873, Dec. 20th, 1873, August 28th, 1874, September 21st, 1874, May 24th, 1875, and April 1st, 1876. In three of them the trustee was Robert L. Tomlin, who, at the date of their execution and during the entire period covered by the transactions to be hereafter recited, was a director and cashier of the bank. Kenney and wife had also executed and delivered a deed of trust upon a portion of the same lands, for the benefit of

James D. Powers, to secure a debt of $5,000 and interest. As to the lands therein described, it gave a lien superior to that created by any of the before-mentioned deeds, except the one of date February 8th, 1872.

On the 15th day of July, 1875, and 1st day of November of the same year, respectively, the Exchange Bank of Breckinridge, Missouri, and one Thomas Ryan, obtained judgments for money against Kenney, which, on June 30th, 1879, remained, or were believed by those interested in them to remain, liens superior to that given by the foregoing deed of April 1st, 1876.

It was desired by Tomlin, the cashier, to have Kenney's indebtedness to the bank in better shape than it was, and to secure further time on his indebtedness to other parties. He also deemed it important that the liens upon these lands (whether created by trust deeds or judgments), which were prior to those held by the bank, should be removed, and that Mrs. Kenney's signature be obtained to a trust deed or deeds in favor of the bank, covering all the lands of her husband. He therefore requested Kenney to obtain a loan of money sufficient to satisfy all liens prior to those held by the bank. Tomlin did not wish his bank to make further advancements to Kenney, believing the latter would be more prompt with strangers, than with the bank, in paying interest as it matured. In order to effect the desired result, application was made by the cashier to Frank & Darrow, of Corning, Iowa, for a loan to Kenney. After some negotiations, that firm made an arrangement with Albert S. Webb, R. L. Belknap, and William H. Kane, of New York, trustees under the will of Henry R. Remsen, for a loan of money to Kenney for five years, at eight per cent. interest, to be secured by a trust deed on his lands, which would give them a lien prior and superior to that held by all others, including the bank. It was expressly agreed between Frank & Darrow, representing the trustees of Remsen on one side, and Kenney and Tomlin, the latter representing his bank, on the other side, that the money thus obtained should be applied, as far as necessary, to the debts secured by the before-mentioned Powers deed of trust, and to the two

judgments against Kenney; that the balance should be paid to the bank, which should then cancel and surrender the notes held against Kenney, taking a new note from him, and enter of record satisfaction and release of its liens under the several deeds; that Kenney and wife should execute a deed of trust, giving a first lien to Remsen's trustees to secure the loan by them made; a like deed, giving a lien subordinate to that of Remsen's trustees, to secure Frank & Darrow in the sum of $1,000, the amount stipulated to be paid them for effecting the loan; that Kenney and wife should also make a deed of trust on the same lands to the Daviess County Savings Association, giving a lien subordinate to those given to Remsen's trustees and to Frank & Darrow, for the balance of their claims against Kenney remaining after crediting such portion of the $10,000 received from Remsen's trustees as should be paid to the bank.

No part of the sum received from Remsen's trustees was paid directly to or disbursed by Kenney; but, conformably to the agreement between the parties, $5,200 of it was applied in satisfaction of the debt secured by the Powers deed of trust, $1,689.86 in discharge of the two personal judgments against Kenney, and the balance, $3,110.14, was paid to the bank. A new note was then executed to the bank by Kenney, and the $3,110.14 entered on its books as a partial payment thereof. Satisfaction was entered of record in the name of the bank by its cashier of all the debts held against Kenney, and the old deeds of trust held were also cancelled of record in its name by the cashier. Deeds of trust executed by Kenney and wife, of date July 1st, 1879, were then placed upon record, all on August 6th, 1879, but distinctly giving liens upon the lands in the order already indicated.

The new deed to the bank, in addition, expressly provides that the lien thereby created is subordinate to that given Remsen's trustees.

The old notes of Kenney were marked by the cashier on the books of the bank as paid, and the new note entered as the one Kenney was to pay. The $3,110.14 went into the general funds of the bank, and was used in its business. The old notes and deeds, being first stamped by the cashier as "paid," were

placed by him in an envelope marked with Kenney's address. The cashier had promised when this arrangement was consummated to send them to Kenney, but finding the package containing them to be bulky they were held for delivery to him when he should call at the bank.

The Daviess County Savings Association was organized in 1865. Of its paid-up capital stock, at the time of these transactions, all, except a very small amount, was owned by McFerran, Hemry, and Tuggle—McFerran owning a majority of the whole stock. McFerran was elected president, and from some time in 1780 until January 1st, 1872, Tomlin was acting cashier, and from the latter date until January 1st, 1881, he was cashier. At the outset the business seemed to have been managed entirely by the cashier under the general supervision or direction of McFerran. But desiring to extend the field of his business operations the latter removed in 1873 to Colorado, and there engaged in banking business. He did not return to Missouri until February, 1881. During his absence, and up to 1879, he claimed to be the president of the association. But during the whole period of McFerran's absence, the exclusive management of the business of the bank seemed to have been left to the cashier, without interference from any quarter. This state of things continued even after the election of Hemry as president on the 1st day of January, 1879. Tuggle, one of the directors, says he never gave much attention to the affairs of the bank. He resided some distance from Gallatin; came to town about once a month, staying sometimes a week; was in the bank frequently, but never gave much attention to its affairs; when there he would inquire of the officers how it was "running" or "getting along," but he never examined its books, money, or notes; and when in town, did not, he says, do anything about "running the affairs of the bank." He testifies that the meetings of the board of directors were "simply for the purpose of electing officers and declaring dividends." He knew that the business of the bank was varied, presenting itself in different forms; that deeds of trust were taken from time to time; and that in the course of its business it was necessary to cancel such deeds. Upon cross-examination he said:

"Tomlin was attending to the business of the bank from 1873 up to the time this loan was made. . . . When a man applied to the bank for a loan, or to have a deed of trust changed, or the security changed, my understanding was that Tomlin attended to it. . . . I never questioned Tomlin's right to cancel a deed of trust from 1873 to 1879; never knew of any other director questioning his right during that time. . . . Tomlin was acting as cashier from 1865 up to the time of making this loan, and, so far as I know, was transacting generally all the business necessary to be transacted here at the bank."

When asked by whom he expected a deed of trust to be cancelled, when executed by one who applied to the bank for a loan, and gave other security, and wished that deed released, his answer was: "I expected Tomlin attended to it." When asked who he supposed had such authority from 1873 to the time of the loan in question, his answer was: "I understood he (Tomlin) was doing it. I never thought much of it, and knew nothing about his authority." Again, the same witness: "My understanding is that Tomlin was doing the business of the bank. Cannot say when it was I first heard of this loan. When I heard it I did not do anything." Hemry, the other director, and who was elected president of the bank for 1879, said that he did not, nor did any individual director, to his knowledge, give orders as to the release of securities. "To be very particular," said he, "I don't think of any particular case in which I directed or advised." It thus appears that from 1873 up to 1880, during McFerran's absence in Colorado, there could have been no supervision of the business by him, and that the local directors surrendered all control to the cashier, who was their co-director. If they did not abdicate all authority as directors, they acquiesced in the cashier's assumption of exclusive management of the bank's business.

Tomlin understood, and from the conduct of the directors had reason to understand, that he was invested with full authority to manage the operations of the bank according to his best judgment, and without disturbing the directors. This explains the fact—which is quite extraordinary in view of the

present position of the bank—that from 1873 to 1880, inclusive, Tomlin, as cashier, entered in the name of the bank, upon the proper records of the county, satisfaction of more than one hundred and fifty different deeds of trust executed to secure debts held by the corporation. In no instance did he receive previous orders to do so from the directors. His authority or duty to do so was never questioned to his knowledge or to the knowledge of any one having business with the bank. To all who came into the bank or had transactions with it his control seemed to be as absolute as if he were the owner of all the stock. His authority to make the arrangement with Kenney, Frank & Darrow and Remsen's trustees was never questioned by any one until February, 1880, when McFerran returned from Colorado on a visit to Missouri. Tomlin during his explanation of the details of that arrangement exhibited to him the old notes and trust deeds, they having remained in his possession in the package in which he originally placed them for Kenney. McFerran took possession of them, claiming that they were the property of the bank, although after the new deed of trust Kenney had given up the land to the bank and took back a lease from it.

The bank, having through Tomlin's management and with the money obtained from Remsen's trustees removed the lien given by the Powers deed of trust, and the lien or the claim of lien upon a part of the lands in virtue of the judgments obtained by the Exchange Bank of Breckinridge and Ryan, now ignores the new deed of trust, and seeks to foreclose the lien given by the original deeds, thereby defeating the prior lien given to Remsen's trustees by the deed of 1879; this, upon the ground that Tomlin as cashier, without authority and without their knowledge, had assumed to discharge the original debts, to cancel the original trust deeds, and to take a new note secured by a new deed of trust. It is to be observed that while the bank repudiates this arrangement, upon the faith of which Remsen's trustees parted with their money, it retains and does not offer to return, but has used in its business $3,110.14 of the sum loaned by those trustees through Frank & Darrow to Kenney. It is willing to accept all the benefits resulting

from the acts of its cashier, but endeavors to escape the burdens attached to it by the agreement of the parties.

We have stated with some fulness the circumstances disclosed by the record, so that the general expressions in this opinion may be interpreted by the facts of this case. To permit the bank, under these circumstances, to dispute the binding force of the arrangement made by its cashier in reference to Kenney's indebtedness, including the cancellation of the old note and trust deeds, and the acceptance of the new ones, would be a mockery of justice. It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way. *United States Bank* v. *Dunn*, 6 Pet. 51; *United States* v. *City Bank of Columbus*, 21 How. 356; *Merchants' Bank* v. *State Bank*, 10 Wall. 604. Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the cor-

poration, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

These principles govern the case before us, and lead necessarily to an affirmance of the decree adjudging the surrender cancellation of the old deeds and the notes given by Kenney, and declaring the liens in favor of Remsen's trustees and Frank & Darrow to be superior to that of the bank.

It is so ordered.

HOLLAND *v.* CHALLEN.

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

Submitted December 13th, 1883.—Decided January 7th, 1884.

Equity—Nebraska—Statutes.

1. A statute of Nebraska provided that an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons

Argument for the Appellee.

whether in actual possession or not, claiming the title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to such real estate: *Held*, That it dispensed with the general rule of courts of equity, that in order to maintain a bill to quiet title, it is necessary that the party should be in possession, and in most cases that his title should have been established by law, or founded on undisputed evidence, or long continued possession. *Clark* v. *Smith*, 13 Pet. 195, with reference to a Kentucky statute in some respects similar, approved.

2 Jurisdiction over proceedings to quiet title and prevent litigation is inherent in courts of equity ; and although the courts have imposed limitations upon its exercise, it is always competent for the legislative power to remove those restrictions.

3. While it is true that alterations in the jurisdiction of State courts cannot affect the jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain ; yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State.

4. Under the Nebraska statute cited above, a bill to quiet title which, on its face, presented a good title in the complainant, gave him the right to call upon the defendant to produce and disclose whatever estate he had in the premises in question, to the end that its validity might be determined, and, if adjudged invalid, that the title of the plaintiff might be quieted.

Bill in equity to quiet title. Plaintiff claimed under a tax sale, but did not aver possession. Defendant was owner prior to the tax sale. The bill charged:

"That said defendant is contriving now to wrong and injure your orator in the premises by claiming to be the owner of said real estate, and by trying to obtain, take, and keep possession thereof, and by denying and slandering your orator's title to and his right of possession thereof, all of which acts, doings, and pretences of said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises."

The defendants demurred, and the court below dismissed the bill. The plaintiff appealed.

Mr. Lewis A. Groff and *Mr. C. S. Montgomery* for appellant.

Mr. T. W. Marquett and *Mr. Geo. W. Doane* for appellee.

—I. This bill is exhibited by the holder of the tax titles to

have the same established as against the true owner, who claimed the fee-simple title, before the complainant acquired any interest in the property described in the bill, and who still claims it. The title so held by complainant, and the only title which he holds, as shown by the averments of his bill, is at best a very doubtful title, and the principle applied by courts of equity is, that where a complainant has himself a doubtful title, he cannot have the relief sought in a bill *quia timet*. *West* v. *Schuebley*, 54 Ill. 523; *Huntington* v. *Allen*, 44 Miss. 654; *Low* v. *Staples*, 2 Nev. 209.—II. The bill states no facts constituting grounds for equitable relief. It sets forth the tax deeds held by complainant, the adverse fee-simple title claimed by the defendant, that complainant is entitled to possession and that defendant is keeping him out of possession, or in the language of the bill, "trying to obtain, take and keep possession thereof," and denying the right of possession of complainant. These allegations are sufficient as the basis of an action at law to recover possession, but there is not an allegation in the bill showing any ground for equitable jurisdiction.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity to quiet the title of the plaintiff to certain real property in Nebraska as against the claim of the defendant to an adverse estate in the premises. It is founded upon a statute of that State which provides:

"That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate."

The bill alleges that the plaintiff is the owner in fee simple and entitled to the possession of the real property described. It then sets forth the origin of his title, particularly specifying the deeds by which it was obtained, and alleges that the defendant claims an adverse estate or interest in the premises;

that the claim so affects his title as to render a sale or other disposition of the property impossible, and that it disturbs him in his right of possession. It therefore prays that the defendant may be required to show the nature of the adverse estate or interest claimed by her; that the title of the plaintiff may be adjudged valid and quieted as against her and parties claiming under her, and his right of possession be thereby assured; and that the defendant may be decreed to have no estate in the premises and "be enjoined from in any manner injuring or hindering" the plaintiff in his title and possession.

The defendant demurred to the bill, on the ground that the plaintiff had not made or stated such a case as entitled him to the discovery or relief prayed. The court below sustained the demurrer and dismissed the bill. From this decree the case is brought here on appeal.

It does not appear from the record in what particulars it was contended in the court below that the bill is defective, that is, in what respect it fails to show a right to the relief prayed. We infer, however, from the briefs of counsel, that the same positions now urged in support of the decree were then urged against the bill, that is, that the title of the plaintiff to the property has not been by prior proceedings judicially adjudged to be valid, and that he is not in possession of the property—the contention of the defendant being, that when either of these conditions exists, a court of equity will not interpose its authority to remove a cloud upon the title of the plaintiff and determine his right to the possession of the property.

The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie.

A bill of peace against an individual reiterating an unsuccessful claim to real property would formerly lie only where the plaintiff was in possession and his right had been successfully maintained. The equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. Adams on Equity, 202; Pomeroy's Equity Jurisprudence, § 248; *Stark* v. *Starrs*, 6 Wall. 402; *Curtis* v. *Sutter*, 15 Cal. 259; *Shepley* v. *Rangeley*, 2 Ware, 242; *Devonsher* v. *Newenham*, 2 Schoales & Lef. 199.

In most of the States in this country, and Nebraska among them, the action of ejectment to recover the possession of real property as existing at common law has been abolished with all its fictions. Actions for the possession of such property are now not essentially different in form from actions for other property. It is no longer necessary to allege what is not true in fact and not essential to be proved. The names of the real contestants must appear as parties to the action, and it is generally sufficient for the plaintiff to allege the possession or

seizin by him of the premises in controversy, or of some estate therein, on some designated day, the subsequent entry of the defendant, and his withholding of the premises from the plaintiff; and although the plaintiff may in such cases recover, when a present right of possession is established, though the ownership be in another, yet such right may involve, and generally does involve, a consideration of the actual ownership of the property; and in such cases the judgment is as much a bar to future litigation between the parties with respect to the title as a judgment in other actions is a bar to future litigation upon the subjects determined. Where this new form of action is adopted, and this rule as to the effect of a judgment therein obtains, there can be no necessity of repeated adjudications at law upon the right of the plaintiff as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property.

A bill *quia timet*, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. Story's Equity, § 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Orton* v. *Smith*, 18 How. 263.

The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title.

It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several States, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the States should not be enforced by the federal courts, when the controversy to which it may give rise is between citizens of different States.

In *Clark* v. *Smith*, 13 Pet. 195, a doctrine is declared, with reference to the legislation of Kentucky as to the removal of clouds upon titles to land, which seems to us to be applicable here, and to be decisive of this point. A law of

that State, regulating proceedings in the courts of chancery, provided:

"That any person having both the legal title to and possession of land may institute a suit against any other person setting up a claim thereto, and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto and pay the complainant his costs, unless the defendant shall by answer disclaim all title to such lands, and offer to give such release to the complainant."

Under that act, the complainant Clark filed a bill in the Circuit Court of the United States to compel the defendant to release the title claimed by him to certain lands, under patents from the State of Kentucky, obtained years after the registration of the survey of the ancestor of the complainant and patent to him. The Circuit Court heard the evidence of the parties as to their respective claims, and was of opinion that the complainant had established a legal title to the premises under a valid grant from the commonwealth, and was in possession at the commencement of the suit, and that the defendant had not shown any right or title, either in law or in equity, to the land or any part of it; but being divided in opinion on the question of the jurisdiction of the court to compel the defendant to execute a conveyance, the bill was dismissed. On the case coming here, the decree below was reversed. In giving its decision this court referred to the unsettled condition of titles in Kentucky, and observed that,

"Conflicts of title were unfortunately so numerous that no one knew from whom to buy or take lands with safety, nor could improvements be made, without great hazard, by those in possession who had conflicting claims hanging over them, and which might thus continue for half a century; the writ of right being limited to fifty years in some cases, that is, where it was brought upon the seizin of an ancestor or predecessor, and to thirty years if on the demandant's own seizin. During all which time the party in possession had no power to litigate, much less to settle the title at law, though he might be harassed by many actions of ejectment and his peace and property destroyed, although always suc-

cessful, by no means an uncommon occurrence. This evil it was the object and policy of the legislature to cure, not so much by prescribing a mode of proceeding as by conferring a right on him who had the better title and the possession to draw to him the outstanding inferior claims." And again: "Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what should form a cloud on titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old process to a new equity created by the legislature, having its origin in the peculiar condition of the country." "The State legislatures," the court added, "certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States, but having created a right and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the State court; on the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation. And such is the constant course of the federal courts."

The opinion concludes with the observation:

"That when investigating and decreeing on titles in this country we must deal with them in practice as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case and the character of the equities involved in the controversy, so as to give effect to State legislation and State policy; not departing, however, from what legitimately belongs to the practice of a court of chancery."

That case differs from the one at bar in that the complainant was in possession of the premises at the commencement of the suit, and the law of Kentucky gave the right to the relief claimed only to persons having both the legal title and the possession. But the law did not require that such possession should have been disturbed by legal proceedings and that the title of the plaintiff should be sustained in them by judgments in his favor, before the court could entertain jurisdiction of the

case and grant the relief prayed; and therefore no such disturbance of his possession and adjudication sustaining his title were held to be essential to the maintenance of the suit. If the jurisdiction to grant the relief prayed remained unaffected when the legislature had thus dispensed with previous legal proceedings affecting the possession of the plaintiff, it would seem to follow that the jurisdiction would remain unimpaired if possession itself, as a condition of the institution of the suit, was also dispensed with.

The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity; and though conditions to its exercise have at different times been prescribed by that court, both in England and in this country, they may at any time be changed or dispensed with by the legislature without impairing the general authority of the court. Pomeroy's Equity Jurisprudence, § 1398. The equitable rights of parties in Nebraska claiming the legal title to real property are simply enlarged by its statute, not changed in character. And the language used by this court, speaking by Mr. Justice Bradley, in the *Broderick Will Case*, 21 Wall. 520, is appropriate here: "Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State." And it may be affirmed of this case, what was said as probably true of that one, that it is "a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding." "Indeed," as the court there observed, "much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the pos-

session—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity.

It does not follow that by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking. Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will properly rest with the court. Such, also, will generally be the case with the adverse estates or interests claimed by others. This was the character of the proofs establishing the title of the complainant in *Clark* v. *Smith*, already cited. But should proofs of a different character be produced, the controversy would still be one upon which a court of law could not act. It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved.

In the present case the plaintiff claims under a purchaser at a tax sale by the State, to whom deeds by the treasurer of the county in which the property is situated were executed. By the law of Nebraska the fee of real property, and not merely a term of years, may be sold for unpaid taxes. A certain time is allowed to the owner to redeem the property from such a sale, but if redemption is not made within the period designated, a deed is executed by the treasurer of the county to the purchaser, and such deed vests in him the right,

title, and estate of the former owner of the land and also of the State and county, and is evidence in all courts that the property conveyed was subject to the taxes for the years stated; that they were not paid, and that redemption was not made before the sale; that the property had been properly listed and assessed and the taxes properly levied; that the property was advertised for sale in the manner and for the length of time required, and was sold as stated in the deed, and that the grantee named was the purchaser or assignee of the purchaser of the property; and, indeed, that all the prerequisites of the law had been complied with by the officers whose duty it was to have taken any part in the transaction relating to or affecting the title conveyed. No person is permitted to question the title thus acquired without showing that he had title to the property at the time of the sale, or has since obtained the title from the United States, and that the property was not subject to taxation for the years named; or that the taxes had been paid before the sale, or that the property had never been assessed for taxation, or had been redeemed from the sale, or that there had been fraud committed by the officer in making the sale, or by the purchaser to defeat it.

The plaintiff, therefore, had a complete legal title to the premises in controversy, unless some one of the defects mentioned, affecting the validity of the assessment and sale of the property, existed at the time, or fraud had been committed by the officer or purchaser in the sale. Having an apparent legal title by the deeds, it was, of course, important to him and, indeed, necessary for the peaceable possession of the property and its improvement, to have any adverse claims, notwithstanding such deeds, considered and settled.

We think, therefore, that he was entitled, upon the statement made in his amended bill, the only one before us, to call upon the defendant to produce and disclose whatever estate she had in the premises in question, to the end that its validity may be determined; and if adjudged invalid, that the title of the plaintiff may be quieted. It follows that the decree of the court below must be reversed and the cause remanded, with leave to the defendant to answer the bill; and *It is so ordered.*

Syllabus.

CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY and Another *v.* HERRING.

SAME *v.* LAKE.

SAME *v.* IDDINGS.

SAME *v.* CUTLER.

SAME *v.* DUNDON.

SAME *v.* BROOKS.

SAME *v.* GREENSTREET.

SAME *v.* WOOSTER.

SAME *v.* BOYD.

SAME *v.* JEWELL & Others.

ALL IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued December 6th and 7th, 1883.—Decided January 7th, 1884.

Land Grants—Railroads—Statutes.

1. It has been the invariable policy of Congress to measure the amount of public lands granted to a land-grant railroad by the length of the road as actually constructed, and not by its length as originally located ; and there is nothing in the statutes of Congress or of the State of Iowa applicable to the grant of public lands in favor of the plaintiffs in error which indicates a different purpose, or which warrants the claim that the number of sections which they are entitled to receive is to be estimated by the standard of the original location of the road.
2. When Congress grants to a State for a railroad company every alternate section of land designated by odd numbers within a given distance from the line of the road, and directs the Secretary of the Interior, when a map shall be filed in that department, showing the location of the road, to reserve the sections, and further provides that in case it is found that the United States had disposed of any of these odd sections, or rights attached to them, by pre-emption or otherwise, the grantee may select other alternate odd sections within another and greater distance from that line, the filing of the map cuts off the right of entry of the odd sections within the first named distance ; but it confers no rights to specified tracts within the secondary or indemnity tract, until the

grantee's right of selection has been exercised ; and that right cannot be exercised until the entire road has been completed.

3. The act of June 2d, 1864, § 4, 13 Stat. 96, 97, construed.

These are ten writs of error to the Supreme Court of the State of Iowa to review judgments in that court of affirmance in favor of the parties named. The railroad company was plaintiff in the inferior State court, and on appeal in the Supreme Court of the State, and in the writs of error in this court.

The suit in the court of original jurisdiction was in the nature of a bill in chancery to quiet title, and to compel a conveyance of the legal title held by defendants under patents from the United States to plaintiff, who asserted title to it in equity.

The cases all depend on the same pleadings and evidence, and were consolidated in the inferior court, and have been considered and argued together in the Supreme Court of Iowa, and in this court, except No. 1139, the Jewell case, which is submitted in this court on the same argument.

Mr. E. S. Bailey and *Mr. W. L. Joy* for plaintiffs in error.

Mr. John S. Monk for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

The defendants are in possession of the land in controversy in each case under a purchase from the United States with a patent from the government, and the plaintiff, the railroad company, asserts a superior title, either legal or equitable, under certain land grants by act of Congress to aid in building railroads. The first of these acts is that of May 15th, 1856, 11 Stat. 9, by which Congress granted lands lying within the State of Iowa to that State to aid in building four principal railroads from the Mississippi to the Missouri River. One of these was for a road "from Lyons City, on the Mississippi River, to a point of intersection with the main line of the Iowa Central Air Line Railroad near Maquaketa, thence on said main line, running as near as practicable to the 42d parallel across the said State to the Missouri River." For each of

these roads there was given to the State of Iowa, "as soon as the road is completed, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads." And it was provided that if, when the line of a road was definitely located, it was found that the United States had disposed of any of these odd sections, or rights had attached to them by pre-emption or otherwise, an agent appointed by the State might, in lieu of these, select other alternate sections anywhere within fifteen miles of the line of the road.

The State of Iowa, by an act of the general assembly approved July 14th, 1856, accepted the trust reposed in it by the above act of Congress, and granted and conferred upon four corporations all these lands, under the terms and restrictions of the act of Congress. These corporations were to construct the roads across the State according to that act, and the corporation on whom was conferred the grant for a road from Lyons to the Missouri River was the Iowa Central Air Line Railroad Company.

The only result of this particular grant of the State was that the company received the 120 sections of land which this court held, in the case of the *Railroad Land Company* v. *Courtright*, 21 Wall. 310, could be secured before any road was built; but having built no road up to March 17th, 1860, the State, by an act of its legislature of that date, declared the grant forfeited and resumed control of it.

On the 26th of that month, by another act of assembly, the State granted the same lands to the Cedar Rapids and Missouri River Railroad Company—the plaintiff in error—upon conditions similar in all material respects to the grant to the Air Line Company.

The Air Line Company had before this time surveyed and located the line of the road from Lyons to the Missouri River through the town of Cedar Rapids, and the map of this survey and location had been accepted by the State of Iowa and the Land Office of the United States as the true line and as governing the location of the land grant for that road. A road had also been built by another company, the Chicago, Iowa

and Nebraska, which had no land grant, from a point on the Mississippi River within three miles of Lyons City to Cedar Rapids. Hence the grant of the State to the Cedar Rapids Company required them to build speedily from Cedar Rapids west along the line thus adopted to the Missouri River.

Under this arrangement the Cedar Rapids Company pushed its road on the designated line, so that it had completed about a hundred miles west of the town of that name by the year 1864, when several matters seemed to call for legislation by Congress in regard to it and to the other companies building roads across the State under the grants of the act of 1856.

As regards the Cedar Rapids Company, it had become clearly unnecessary to build another road from the Mississippi at Lyons to Cedar Rapids, along the line occupied by the Iowa and Nebraska road.

It had also become apparent that a shorter and better line to the Missouri River could be had from the point to which the road had now been constructed, and it was thought that a road from some point on its existing line to some point south of it, on the line of the Mississippi and Missouri River Railroad—one of the four land-grant roads—would be desirable. It had also been ascertained that the necessary quantity of lands in lieu of the odd sections disposed of within six miles could not be satisfied by *alternate* sections within the fifteen-mile limit.

In this condition of the matter Congress passed the statute on which the result of this litigation depends, which was approved June 2, 1864, 13 Stat. 95.

This statute, after granting certain relief to the Mississippi and Missouri Railroad Company, and to the Burlington and Missouri Railroad Company, two other of the land-grant roads in Iowa, proceeds in its fourth section to grant relief to the present plaintiff company.

The fourth section of that act—the one which we are required to construe—reads as follows:

"SEC. 4. *And be it further enacted*, That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said State

granted a portion of the land mentioned in the title of this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof, now on file in the General Land Office of the United States, so as to secure a better and more expeditious line to the Missouri River and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled, for such modified line, to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the same purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided,* That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land per mile granted, or intended to be granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified

line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonesboro, in Boone County, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford County: *And provided further*, That in case the main line shall be so changed and modified as not to reach the Missouri River at or near the 42d parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona County, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands as hereinbefore described, within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of said branch: *And provided further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one-third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said Secretary may convey to the said company another third of the lands for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the Secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however*, That no lands shall be conveyed to said company on account of said connecting branch road until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and

Missouri Railroad as laid down on a map on file in the General Land Office: *Provided, further*, That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient in the opinion of the Governor of Iowa, to secure the construction of a branch road from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton, in said State, until the Governor of said State shall certify that said branch railroad is completed according to the requirements of the laws of said State : *Provided, further*, That nothing herein contained shall be so construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further*, That nothing in this act shall be construed to interfere with or in any manner impair any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company ; nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a *bona fide* inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of said lands thus settled upon and improved by *bona fide* inhabitants in good faith under color of title as aforesaid."

We are of opinion that the purpose of this enactment was—

1. To relieve the company from the obligation to build that part of its line as found in the land office, between the Mississippi River and Cedar Rapids, because there already existed a road between those points built by another corporation.

2. To require the company to connect the city of Lyons with that corporation's road, so that it would be, as originally intended, the Mississippi terminus of the land-grant road across

the State. This required the construction of about two and a half miles of road.

3. To authorize the company to change the location of its road yet to be constructed west of Cedar Rapids for its convenience.

4. If this change left the city of Onawa, in Monona County, off the line of the road, they were to build a branch to that place.

5. To construct a new line connecting its existing road with the road from Davenport on the Mississippi River, to Council Bluffs, on the Missouri River.

6. To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selections might be made for the loss of that not found in place.

This latter it accomplished by declaring that *all* the sections within the fifteen-mile limits shall be subject to such selection on the same terms on which only alternate sections could previously be selected; and if this limit, which had exclusive reference to the line first located, did not satisfy the grant, then selection could be made within twenty miles of the new line.

Before proceeding further it is as well to say that the short road connecting the Iowa and Nebraska line with Lyons City was built, the connection with the Mississippi and Missouri River road was not built, and though the new line was located fifteen miles or more from Onawa, the branch to that city was not built. The road of this company, as originally located, from Lyons City to the Missouri River, was three hundred and forty-five (345) miles in length, and as constructed by the company, from Cedar Rapids to the Missouri River, it is two hundred and seventy-one (271) miles long, making a difference of seventy-four (74) miles.

The plaintiff in error insists that, under the act of 1864, it is entitled to six sections per mile, as measured by the original location of the road, while defendants assert that the length of the road, as constructed by the plaintiff, is to be taken as determining the quantum of the grant.

This is the first and most important question in the case, as

argued by counsel, and decided by the Supreme Court of Iowa in favor of the latter proposition, and its importance depends upon the fact asserted by defendants, that the company has received all the land it is entitled to, without resorting to that which they have purchased from the government, and for which they hold its patents. Manifestly, if this be so, plaintiff can have no just claim upon the lands of defendants, though they are all located within the fifteen-mile limit and outside of the six-mile limit.

It is believed that in no instance of the many grants of public land made by Congress to aid in building railroads, has the quantity been measured by any other rule than the length of the road constructed, or required to be constructed, by the grantee or its privy; and it would be the first departure from this principle known to us if in this case Congress intended to give the same amount per mile of land for road not constructed, and from the construction of which the grantee at its own request was released, as for road which it was required to build and which it actually built. In the case of the additional road required to be built, as the Onawa branch, and in the new branch authorized to connect the main line with the Mississippi and Missouri River road, the old rule is adhered to, and a grant made of six sections per mile of this additional road which should be actually constructed. It would therefore require very plain language in that part of the act of 1864 which defines the quantity of land to be taken by the company, under these new circumstances, to justify us in holding it to cover six sections per mile for road never to be constructed by this company, from the obligation to construct which it was relieved by this very act, and which was then already built by another company having no privity with the grantee in this case.

So far, however, from finding this plain language favoring that view, we are of opinion that its fair construction is in accord with the uniform policy of Congress on this subject, and with what the circumstances suggest as the reasonable intent of that body.

The section of the act which we have copied, after authorizing the change in the location of the line of the road and the

connection with the line of the Mississippi and Missouri Railroad Company, says:

"And the said Cedar Rapids and Missouri River Railroad Company shall be entitled *for such modified line* to the same lands, *and to the same amount of lands per mile*, and for such connecting branch to the *same amount of land per mile*, as originally granted to aid in the construction of its main line."

If Congress simply meant that the company, notwithstanding the change in the line of its road, should have the lands it would have had if it had built the whole of the original line, it would have been easy to express this purpose. In such case no description of the grant, as for such modified line, nor of the same amount of lands per mile, would have been necessary. If such was the purpose, the use of this language was unnecessary and was confusing. If, however, it was the purpose of Congress to measure this grant under the new circumstances by the length of the modified line and give the same number of sections per mile of the line thus modified, the language is, in our opinion, appropriate and unambiguous. The words "the same lands," which plaintiff's counsel insist mean *all* the lands of the old grant, are intended, we think, to show that the lands are to be taken along the line of the old survey; that the odd sections on each side of that old line which became vested in the State when it was established should be a part of the new grant to this company, and that the deficiencies should in like manner be made up by sections within the fifteen-mile limit of that line. This is confirmed by that part of the next sentence of this section, which directs the Secretary of the Interior, when the new line shall have been established, to reserve *all* the lands without regard to alternate sections within that limit, so far as may be necessary to satisfy these selections, for the loss of odd sections previously disposed of.

We see no error, therefore, in the ruling of the Supreme Court of Iowa that the quantity of the grant is to be determined by the length of the new lines, as constructed by the company.

The plaintiff, however, insists that, adopting this principle, there is still a deficiency of the grant of 292,019 acres, to supply which it is entitled to resort to the lands now in possession of defendant. The Supreme Court of Iowa, in the opinion delivered in the nine cases decided in 1879, conceded that the company had not received the full amount it was entitled to on this basis by about 5,000 acres, but as it had *selected* lands enough, not including those of defendants, and had not shown that those selections had been abandoned by the company, or disallowed by the land department, they had not shown a case for relief against the defendants.

In the case of Jewell, decided by that court in 1883, it is shown by a discussion of the deductions claimed by plaintiff, that 24,000 acres have been selected and claimed in excess of what the company is entitled to.

The questions on which these deductions depend, and what weight is to be given to the selection of other lands not yet certified to the company or approved by the Secretary of the Interior, are not free from difficulty, and are to us much more embarrassing than one which the Supreme Court in its last opinion seemed to have encountered and been unable to decide. In that opinion it is said:

"The counsel for the respective parties have discussed with great learning and ability the nature of the right which the railroad company acquired in the land in question by the passage of the act. We do not care to go into a consideration of this question. The company, doubtless, as against the United States, acquired, upon the construction of the road, the right to select and claim the land as a part of the intended indemnity, if the deficiency was such as to justify it. What right the company acquired previous to selection as against the defendant, a homestead settler, is a question which presents no little embarrassment, and upon which there is not, perhaps, entire harmony in the adjudication. As to this we are not at present entirely agreed. For the purpose of the opinion it may be conceded that the plaintiffs would be entitled to resort to this land if it were necessary to fill the required indemnity. But it will not be denied that if the indemnity has been filled, the interest in the land which the plain-

tiffs may have had prior thereto would be extinguished. As to whether it has been filled the parties differ widely. They differ, also, as to who has the burden of proof upon such question."

In the case of *Grinnell* v. *The Railroad Company*, 103 U. S. 739, this court said, in construing the granting clause of the original act of May 15th, 1856:

"So far as lands are found in place whenever this is done" (that is, the location of the road filed in the proper office), "not coming within the exceptions as sold or held under pre-emption, the title, or at least the right, to this land in place is at once vested in the State or in the company to which the State has granted it, and the means of ascertaining precisly what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute. As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section, until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer."

In the case of *Van Wyck* v. *Knevals*, 106 U. S. 360, the subject is discussed with exclusive reference to the old-numbered sections specifically granted, and it is there held that the adoption by the company of a surveyed line of the route of its road, and the filing of the map of the same with the Secretary of the Interior, cuts off the right of entry of these odd sections by any one else, whether there is a proclamation or order withdrawing them or not.

It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as have been previously disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection.

These latter, unlike the odd numbers within the six-mile limit, are not ascertained and made specific by the protraction

of the established line through the maps of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised.

This court, in construing the same clause of the grant to the California and Oregon Railroad Company, 14 Stat. 239, said:

"When the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed."

Again:

"It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose." *Ryan* v. *Railroad Company*, 99 U. S. 382.

But from what shall the selection be made, and how long a time may the grantee have to make his selection?

The question presents itself in two aspects, namely, the right to make these selections as against the United States, the grantor of this right, and the right as against a purchaser from the United States before the selection is made. As regards the former, it is only important to consider when it commences in the present case, and we are of opinion that no right of selection in any of these lands accrues until the entire line of the road to be built has been established by the company, and filed in the General Land Office at Washington, and that until then no duty devolves on the Secretary to withdraw or withhold the land from sale or pre-emption.

This is the necessary inference from the language both of the original grant of 1856 and the amendatory act of 1864. The first declares:

"In case it shall appear that the United States have, when the lines and routes of said roads are definitely fixed, sold any sections

or parts thereof granted as aforesaid, or that rights of pre-emption have attached to the same, *then* it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select other lands."

It is only when the line and routes of the roads are definitely fixed that any right of selection exists. This must necessarily be so, because until then the quantity of land lost by the previous disposition of the odd sections cannot be known, and the number of sections to be selected can only then be ascertained.

And the act of 1864, under which plaintiff's claim can alone exist, while it directs the Secretary to withdraw from sale the lands from which these selections are to be made, only requires this to be done after the new line of the road shall have been so established.

The language is:

"And it is further provided, that whenever said modified main line shall have been established, or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch as aforesaid, and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time as the work progresses on the main line, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, . . . within fifteen miles of the original main line, an amount equal to that originally authorized."

It seems to us quite plain that, as in the original grant, no obligation on the Secretary to reserve any of this land from sale arises until the new line is established, that is, surveyed, approved by the directors, and filed in the General Land Office. Such is the language of the statute, and the reason for it is the same as in the original statute, that, as the number of sections the company would be entitled to could not be known until this was done and the length of the road ascertained, the Secretary could not know how much land it was necessary to reserve to satisfy the demand. Of course until this was done the sec-

tions not included within the six-mile limit were open to sale and pre-emption. The time when it became the duty of the land officers to suspend these sales was under the control of the company, for whenever they established and filed in the General Land Office a map "*definitely showing this modified line of their road*," the duty of the Secretary arose, and not until then.

This was not done until December 1st, 1867, three years and a half after the passage of the act requiring it to be done, under which plaintiff's rights accrued. It is true a map of part of the line was filed in 1865, but this can in no sense be said to be a map definitely showing the modified line of the road. It showed only a part of it, and left the Secretary in ignorance where the road would yet be carried to, and what quantity of land it would be entitled to when finished. In all these cases the requirement has been of a map of the *line of the road*—of the whole road, not part of it; a complete, not a partial, map; a map definitely showing that line, as the language clearly means.

It was during this delay of three years and a half that the entries were made under which defendants hold the land and acquired the legal title, except in a single instance, made January 4th, 1868, before any action of the Secretary could be had to withdraw the lands, and it was not until March 16th, 1876, that any of the lands in controversy were selected by the company; an average of ten years after the rights of defendants had vested. We are of opinion that the defendants had the right to do this in regard to any but the odd sections within the six-mile limit; that there was no contract between the United States and plaintiff which forbade it. No right existed in plaintiff to all these lands, or to any specific sections of them, during this period. No obligation of the government to withdraw them from sale arose until plaintiff filed a map, definitely showing the entire line of its road, in the General Land Office. The defendants purchased from officers who had the power to sell. They acquired a valid title.

If plaintiff has been injured it is by its own laches. If there is no land to satisfy its demand, it is because it delayed over

three years to file its map to establish the line of its road, and for years afterwards to make selections. It is unreasonable to say that during all that time these valuable lands were to be kept out of the market, when the country was rapidly filling up with an agricultural population, settling and making valuable farms on them.

The judgments of the Supreme Court of Iowa are affirmed.

TAYLOR & Another *v.* BEMISS & Others by their next Friend.

BEMISS & Others by their next Friend *v.* TAYLOR & Another.

BEMISS *v.* BEMISS & Others by their next Friend.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 19th, 20th, 1883.—Decided January 7th, 1884.

Attorney—Claims against the United States—Contingent Fee—Guardian and Ward—Louisiana—Tutrix.

1. A citizen of Louisiana in his lifetime had a valid claim against the United States for the recovery of which a remedy was given in the Southern Claims Commission. After his decease his widow was duly appointed tutrix to his minor children and heirs: *Held*, That it was her duty to take legal steps to recover the money from the United States, and that whether the action was brought in her own name, or in hers jointly with the children, she was equally bound to prosecute it with diligence.
2. On the principles set forth in *Wyman* v. *United States*, 109 U. S. 654: *Held*, That a payment of a claim against the United States, to a tutrix appointed under the laws of Louisiana is a valid payment making her responsible to the minors, if wronged, for the receipt of the money by herself or by her authorized attorney.
3. A contract with an attorney to prosecute a claim for a contingent fee is not void; and under the circumstances of this case, the parties having agreed upon fifty per cent. of the claim as a contingent fee, the court is not prepared to assume that the division is extortionate. *Stanton* v. *Embrey*, 93 U. S. 548, approved and followed.

Mr. George S. Boutwell for Taylor and Another.

Mr. Enoch Totten for Mrs. Bemiss and the minor children.

Mr. Frank T. Browning for Laura J. Bemiss.

Mr. Justice Miller delivered the opinion of the court.

Laura J. Bemiss, widow of John Bemiss, having a claim against the United States pending before the commission commonly called the Southern Claims Commission, under the act of March 3d, 1871, employed George Taylor and F. C. Wood, attorneys-at-law, residing in Washington city, to prosecute said claim, and by an instrument in writing agreed to give them fifty per cent. of the amount which might be recovered. The sum recovered was $27,310.00, and, under a power of attorney given by her to Mr. Taylor, he received from the Treasury the sum of $14,598.33, and Mrs. Bemiss the balance of $12,711.67.

The present suit originates in a bill in chancery brought by Belle Bemiss, Elizabeth Bemiss, and Mattie Bemiss, minor children of Mrs. Bemiss and of her husband, John Bemiss, deceased, to recover of Taylor and Wood and of Mrs. Bemiss, the money thus received.

Mrs. Bemiss makes her answer a cross-bill against Taylor and Wood, and asserts the invalidity of her contract with them for compensation, and prays also that they may be required to refund the money which they received under it.

To the bill and cross-bill Taylor and Wood answer, under oath (and their answer is in no material matter disproved), that they were employed by Mrs. Bemiss, by a letter written from Louisiana, where she resided, asking them to accept a retainer in the case, by reason of a suggestion of a friend of hers in Louisiana, and she offered them fifty per cent. of the amount recovered as their compensation. To this they assented, and enclosed her a contract to that effect, which she signed and returned to them. She also executed a power of attorney to them, authorizing them to manage the case and to receive the sum awarded to her.

The answer further states that, without any suggestion from

them, Mrs. Bemiss employed, at different times, two other attorneys in Louisiana, to each of whom she agreed to pay ten per cent. of the amount of the award, and that defendants had advanced to Mrs. Bemiss, pending the litigation, the sum of $800, which, with interest to the time they received the money from the Treasury, was added to the one-half they were entitled to by the terms of the contract. They also paid the ten per cent. out of their share to each of the attorneys employed by her, so that, deducting this twenty per cent., and the money advanced to her and its interest, they received for their compensation only thirty per cent. of the money recovered, or $8,193.00.

It is urged against the validity of this contract of employment that Mrs. Bemiss had no authority to bind her children, the minor heirs of her deceased husband, by such a contract, and that as to their interest in the award it is void.

The bill of the minor heirs states that Mrs. Bemiss had been appointed by the proper court in Louisiana natural tutrix of these children. We are of opinion that this appointment made it her duty to take the necessary legal steps to obtain this money from the United States, and that, whether the suit was brought in her own name or in hers jointly with her children, she was equally bound to prosecute it with diligence, and to do all that was necessary to recover the money. It would be a queer condition of the law if, while it imposed this obligation upon her, it gave her no authority to employ counsel to prosecute the claim before the only legal tribunal which could allow it; and if she could employ counsel, it follows as a matter of course, she could make a contract for the amount of their compensation.

This agreement would bind her as tutrix as well as in her individual right, and it is in both characters she professes to contract.

Such undoubtedly is the law of Louisiana, which must govern as to her powers as tutrix, since it is there she was appointed, and there both she and her children resided when she made the agreement with Taylor and Wood.

Of her authority to make such a contract as tutrix we have no doubt.

Another objection raised is that, since by the act of Congress making the appropriation to pay the money, it is expressly made payable to Mrs. Bemiss and her children by name, her authority as tutrix under the Louisiana appointment did not authorize payment to her in the District of Columbia.

The subject of such payments by the United States to administrators appointed in the States is very fully discussed in the case of *Wyman* v. *The United States*, decided simultaneously with the present case, 109 U. S., 654, and, upon the principles there laid down, we are of opinion that payment to Mrs. Bemiss as tutrix under the Louisiana appointment is a valid payment, and that she is responsible under that appointment, and the receipt of the money by herself and by her authorized attorney, to these minors if they have been wronged. And this is a matter of accounting with them in her fiduciary character of tutrix.

It remains to be considered whether there is in this contract of employment anything which, after it has been fully executed on both sides, should require it to be declared void in a court of equity, and the money received under it returned. It was decided in the case *Stanton* v. *Embrey*, 93 U. S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in successful cases, where none is to be received in case of failure.

Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights.

This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to

extortion, the court will in a proper case protect the party aggrieved.

While fifty per cent. seems to be more than a fair proportion in the division between client and attorney in an ordinary case, we are not prepared to assume that it is extortionate for that reason alone, and the testimony of the lawyers on that subject, taken as experts, does not justify such a conclusion. In the case before us, it is beyond dispute that the attorneys of Mrs. Bemiss exercised no influence over her whatever in adjusting the amount of the fee stipulated in the agreement. They had never known her until this employment, and it was through no suggestion of theirs or any agent of theirs that she applied to them. Her first letter to them on the subject made the offer of fifty per cent., and no more was asked for by them.

The evidence of two of the judges who composed the court shows that the case was a difficult and complicated one, and that both Taylor and Wood attended to it vigorously, and gave it much time and attention, and that it was in court a considerable time.

It seems probable that Mrs. Bemiss was an impatient and not very wise woman, but there is no evidence of such weakness of mind as to incapacitate her from making a contract, and there is absolutely no evidence of any advantage taken of her at any stage of the proceeding. On the contrary, the payment by these principal attorneys of two-fifths of the fee they had contracted for to other attorneys employed by her without consulting them, for which she was bound while they were not, shows anything but harsh or oppressive conduct, and would go far to mitigate any objection to enforcing the contract founded on the idea of excessive compensation.

We are of opinion that on the appeal of Taylor and Wood the decree of the court below must be reversed, and as the minor children, plaintiffs below, assign no error, because they had no decree against their mother, a decree must be rendered in that court dismissing the bill.

GILMER & Another *v.* HIGLEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Argued December 10th, 1883.—Decided January 7th, 1884.

Common Carrier—Error—Evidence.

1. In a suit by a passenger on a stage coach against the proprietors as common carriers, to recover damages for personal injuries sustained by the upsetting of the coach, the plaintiff as witness stated that he was received by the driver as a passenger from Boulder to Helena without charge, and that one of the defendants had said since the accident that the driver had orders to carry him without fare to Helena. On cross-examination he was asked whether his fare was not demanded before the accident at Jefferson—a station between Boulder and Helena—whether he had not refused to pay it, or to leave the coach when required to do so. These cross-questions were objected to, and the objections sustained below. *Held*, That they related to the same transaction inquired of in chief, and should have been allowed.
2. When the record does not contain all the evidence in a case, the appellate court is not warranted in assuming that the refusal by the court at *nisi prius* to permit a question to be put to a witness worked no injury to the party questioning. The farthest that any court has gone has been to hold that when it can be seen affirmatively that the refusal worked no injury to party appealing, it will be disregarded.

Action in the nature of an action on the case to recover damages for injuries done to the plaintiff by the defendants as common carriers, through the upsetting of a stage coach in the Territory of Montana. Plea that the plaintiff was not a passenger, but was unlawfully on board the coach, and refused to pay his fare when demanded.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for plaintiffs in error.

Mr. R. T. Merrick and *Mr. M. F. Morris* for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This was an action in the Territorial Court of Montana, in which a judgment was rendered in favor of defendant in error against the plaintiffs in error for an injury received by the

upsetting of a stage coach used by the latter as common carriers of passengers.

The plaintiff below founds his action on this contract of carriage, and the negligent manner in which it was performed. He "alleges that on the day and year last aforesaid, at the said Boulder City, the said defendants received the said plaintiff as a passenger upon their coach, to be carried thence to said town of Helena."

The answer of defendants to this part of the declaration or petition is that "they deny that the said Higley was received as a passenger on their coach as in said complaint alleged, but say that from the city of Jefferson to the said town of Helena the said plaintiff was wrongfully and unlawfully thereon, and contrary to the request and demand of these defendants by their agent, who then and there having been refused, upon his request therefor, the fare of said Higley on said coach, did not consent or agree to his becoming a passenger of defendants thereon, but forbade him so to continue thereon, and did not consent thereto."

It will thus be seen that the issue was fairly raised whether the plaintiff was a trespasser in forcing himself into or on the stage of the defendants without paying his fare, or whether he was there under a contract of passenger carriage, either express or implied.

The following bill of exceptions was taken on the trial, and the ruling of the court thereon is assigned for error:

"Be it remembered that on the trial of this cause plaintiff, being a witness upon the stand, upon his examination in chief, testified that he had taken passage as a passenger from Boulder City to Helena, that the driver received him as such, and that after the accident had happened, and while he was sick in the hospital, that the defendant O. J. Salisbury said that he had ordered his drivers to receive him without paying fare until he got to Helena, and that he had frequently travelled over the road before without paying his fare until he arrived in Helena, was asked on cross-examination:

"What was said to you at Jefferson City, the first station on the road, by the agent in reference to your fare?

"Did he not demand it of you?
"Did you not refuse to pay it?
"Did he not demand you to get out or pay your fare?
"Did you not refuse to do either?
"Did you not tell him that he could not put you out?"

"To each question as propounded at the time plaintiff objected, and the court then and there sustained said objection to each of said questions when so separately propounded, and did not permit said witness to answer. To which rulings of the court defendants then and there duly excepted, and this his bill of exceptions is signed and sealed, and made a part of the record herein, this 16th day of December, A. D. 1878."

The pertinency of these questions to the issue we have just stated is so plain as to need no argument or illustration.

Jefferson City lies between Boulder City and Helena. The accident by which plaintiff was injured occurred between Jefferson City and Helena. If, getting in the stage at Boulder, plaintiff had not paid his fare, it was proper that the agent of the stage company at Jefferson should collect it. Certainly it was his duty to require the fare to be paid from Jefferson to Helena. Whether he had a right to ride free of charge was a question to be left to the jury, and unless he proved it to their satisfaction he was a trespasser if he refused to pay the fare to the agent. We are to presume that he would have answered the questions propounded to him, if required to answer them, so as to prove that he was told at Boulder that he must pay at Jefferson; that at Jefferson payment was demanded of him; that he refused to pay; that he was then requested to get out of the stage; that he refused either to pay his fare or get out of the stage, and that he told the agent he could not put him out.

It is idle to say, if these answers had been given, that he had a contract for passage, unless he proved it affirmatively in some other way.

But it is said that the questions were not legitimate cross-examination.

We are of a different opinion. Plaintiff, offering himself as a witness to show that he was rightfully in the coach as a regular

passenger under the usual conditions, told his story of how he got in at Boulder, that he was taken as a passenger by the driver, who received him as such, and that one of the defendants said he had ordered his drivers to receive him without fare.

It seems very clear that to require him to state whether his fare was demanded of him by the regular agent of this company, and on his refusal to pay he was ordered to leave the coach and refused, was an examination in regard to the very thing about which he testified in chief. To permit a party to the suit to tell his own tale of a transaction like this, and to conceal what is important to the defendant in regard to the same occurrence and at the same time, would be a gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf.

But it was said by the Supreme Court of Montana, on appeal, that since the record did not contain all the testimony, the court could not see that defendants were injured by the refusal to have the questions answered.

We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded. This court, in *Deery* v. *Cray*, 5 Wall. 807, used this language:

> "Wherever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights."

There was here manifest error, as we look at the issue and the questions asked. So far from being able to see that it worked no injury to defendants, it seems probable that if the questions had been answered as we have supposed, if not conclusive of the issue made by defendants, they would have very strongly supported their answer.

The judgment of the Supreme Court of Montana is reversed, with directions to order a new trial.

UNITED STATES *v.* CAREY & Another.

UNITED STATES *v.* CAREY.

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

Submitted December 12th, 1883.—Decided January 7th, 1884.

Error—Exceptions—Evidence—Practice.

When it appears that an exception to the rejection of evidence was taken after the trial was over, and at the time when the bill of exceptions was tendered for signature, it does not constitute a proper subject for assignment of error.

Petitions on distillers' bonds to recover taxes and penalties of the distillers and their sureties.

Mr. Assistant Attorney-General Maury for the United States.

Mr. J. D. Rouse and *Mr. William Grant* for defendants in error.

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

The judgment in each of these cases was rendered after a trial by jury on the 17th of March, 1880, during the November term, 1879, although it was not signed until May 20th, 1880. On the 19th of May, 1880, which was at the April term of that year, the district judge who presided at the trial signed a bill of exceptions, which sets forth that on the trial the United States offered in evidence a document which was annexed and purported to be a copy of an assessment made by the Commissioner of Internal Revenue for May, 1875, to the introduction of which the defendants objected, and that the objection was sustained. The bill of exceptions then proceeds as follows:

"To which ruling of the court plaintiff excepts, and tenders this his bill of exceptions, which is accordingly signed this 19th day of May, 1880."

The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise. *Phelps* v. *Mayer*, 15 How. 160; *United States* v. *Breitling*, 20 How. 252; *French* v. *Edwards*, 13 Wall. 506; *Stanton* v. *Embrey*, 93 U. S. 548; *Hunnicutt* v. *Peyton*, 102 U. S. 333. This clearly is not such a case. There is nothing whatever to indicate that any exception was taken to the rejection of the evidence complained of until the next term after the trial was over and the judgment rendered, though not signed. Even the liberal extension of the rule granted in *Simpson* v. *Dall*, 3 Wall. 460, is not enough to reach this defect. The language here implies an exception only at the time of tendering the bill of exceptions to be signed, which was not only long after the trial, but at a subsequent term of the court.

It follows that the errors assigned are not such as we can consider, and

The judgments are affirmed.

JENNESS *v.* CITIZENS' NATIONAL BANK OF ROME.

IN ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Submitted December 20th, 1883.—Decided January 7th, 1884.

Appeal—Jurisdiction.

When a judgment below is for an amount sufficient to give jurisdiction above, but it appears affirmatively on the record that after deducting from it an amount not in contest below, there remains less than the jurisdictional sum, this court has no jurisdiction.

Mr. W. B. Williams for the plaintiff in error.

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

The judgment in this case is for $7,275.16, but it appears

affirmatively on the face of the record that of this amount $2,669.03 was not disputed below. The defence related alone to the difference between these two amounts, which is less than $5,000. The dispute here is only in reference to the amount contested below. Such being the case, we have no jurisdiction. The cases of *Gray* v. *Blanchard*, 97 U. S. 564; *Tintsman* v. *National Bank*, 100 U. S. 6; and *Hilton* v. *Dickinson*, 108 U. S. 165, are conclusive to this effect.

Dismissed.

HOFF *v.* JASPER COUNTY.

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

Argued and submitted December 20th, 1883.—Decided January 7th, 1884.

Municipal Bonds—Holder for Value.

1. When a municipal corporation subscribes to the capital stock of a railroad company, and issues its bonds in payment therefor, the bonds must comply with the requisitions which the law makes necessary in respect of registration and certificate before they are issued; and innocent holders for value are charged with the duty of knowing these laws, and of inquiring whether they have been complied with.
2. A statute requiring a State auditor to register municipal bonds and to certify that all the conditions of law have been complied with in their issue calls for the exercise of no judicial functions on his part.
3. The rulings in *Anthony* v. *County of Jasper*, 101 U. S. 693, involving the same issue of bonds, adhered to. The additional facts shown in this case present no legal aspects to distinguish it from that case.

Suit to recover on coupons on bonds issued by a county in payment of subscription to stock of a railroad company by a township within the county. The facts were in all respects the same as those in *Anthony* v. *County of Jasper*, 101 U. S. 693, except that here it was expressly found that the subscription of the township which was voted had actually been made by the County Court and accepted by the railroad company before the act providing for the registration of bonds was approved, while there the acceptance of the subscription before

the approval of the act did not appear unless by implication. The vote of the township was taken on the 5th of March, 1872; the order of the County Court for the subscription entered on the 28th of March, and on the same day the subscription was actually made and accepted. The registration act was approved March 30th.

Mr. James S. Bottsford for plaintiff in error, argued.

Mr. E. J. Montague for the defendant in error, submitted on his brief.

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

Upon the additional fact found in this case it is insisted:

1. That if the registration act was applicable to the bonds now in question, it impaired the obligation of the contract of subscription, and is therefore, so far as such application is concerned, in contravention of art. I., sec. 10, clause 1, of the Constitution of the United States; and,

2. That it was retrospective in its operation, and therefore in contravention of art. I., sec. 28, of the Constitution of Missouri, which is:

"That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed."

It is also insisted that the 4th section of the act is in contravention of the Constitution of Missouri, because it delegates the exercise of judicial power to an executive officer of the State.

The first two objections may be considered together, and to our minds they are disposed of by the paragraph in the opinion in *Anthony* v. *County of Jasper*, which is as follows (p. 699):

"It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law, as it could have been before. All the legislature attempted to do was to provide what should be a

good bond when issued. There was nothing changed but the form of the execution."

That is clearly the true construction of the 4th section of the act. The contract of subscription undoubtedly gave the company the right to valid negotiable bonds executed in due form of law. The section simply provides that before any bond thereafter issued shall be deemed to have been completely executed, it must have upon it the requisite certificate of the Auditor of State. When so certified, if otherwise in proper form, it may be issued as a duly executed negotiable public security. The provision that the certificate of the auditor "shall be *prima facie* evidence only of the facts therein stated" does not of itself open the bonds to attack in the hands of a *bona fide* holder. Before this law a bond, in due form issued under a power conferred by the legislature, could not be impeached in the hands of a *bona fide* holder for fraud or irregularities in the execution of the power by those charged with that duty. The law does not interfere with this; it simply says that the certificate which the auditor is to give shall not prevent such an impeachment, that is to say, shall not operate as an estoppel. The certificate, so far from casting suspicion on the bond, gives additional credit, for it shows that an officer of the State specially charged with the duty has examined and certified officially "that all the conditions of the law have been complied with," "and also that the conditions of the contract under which they [the bonds] were ordered to be issued have also been complied with." Such a bond certainly can have no less credit in the market than it would have without the official certificate.

Neither, in our opinion, does the fact that one more officer must examine and certify the bond before it can be issued place such an additional burden on the parties to the subscription as to impair the obligation of their contract. It is in reality no more than providing that two officers shall sign a municipal bond instead of one before the body politic shall be bound by an instrument to be put on the market and sold as commercial paper. We cannot believe, if when the subscription was made, a bond, if signed by the presiding justice of the

County Court alone, would have been sufficient, it would be contended that the obligation of the contract of subscription was impaired by a law passed afterwards that required the signature of the clerk of the court to the bond as well as that of the presiding justice. In the view we take of the case, the requirement of the signature and certificate of the Auditor of State is nothing more in legal effect than that. By the contract of subscription the township agreed to take stock and pay for it in valid negotiable bonds, and the company agreed to take the bonds and give the stock. All the new law has done is to provide what shall be a valid negotiable bond of the township, and this by providing additional guaranties against fraudulent and irregular issues. Of such a provision honest parties cannot complain, for it is always to be presumed that a public officer will do whenever called on what the law requires of him.

As to the objection that the duties of the Auditor, in respect to his inquiries under the 4th section, are judicial rather than executive, it is sufficient to say that every executive officer, when called on to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do one thing or another. The due execution of these bonds was an executive act, and the Auditor of State was made by law one of the executive officers whose duty it was to take part in their execution. The inquiries he is required to make do not differ in their character from those the presiding justice of the County Court should have made when he affixed his signature. The certificate of the auditor being according to the statute *prima facie* evidence only of the facts stated, amounts to nothing more than that in his opinion the circumstances are such that the bonds may properly go out as commercial paper of the kind they appear on their face to be. It binds no one. It simply states the opinion of this executive officer on the questions he was called on to consider in his official capacity. It makes the bond complete in the form of its execution, and in law does nothing more.

We are of opinion that this case is in no respect distinguishable from *Anthony* v. *County of Jasper*, and upon that authority *The judgment is affirmed.*

SUSQUEHANNA BOOM COMPANY & Others *v.* WEST BRANCH BOOM COMPANY.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Submitted December 10th, 1883.—Decided January 7th, 1884.

Constitutional Law—Corporations—Practice.

Where the federal question insisted on in this court, respecting a contract between a State and a corporation in the grant of franchises by the former to the latter, was not raised at the trial in the State court, or where it does not appear unmistakably that the State court either knew or ought to have known prior to its judgment that the judgment, when rendered, would necessarily involve that question, this court cannot take jurisdiction of the case for the purpose of reviewing the judgment of the State court. It is not sufficient that the question was raised after judgment, on a motion for a rehearing. *Brown* v. *Colorado*, 106 U. S. 95, cited and approved.

Motion to dismiss a cause brought here from a State court by writ of error, on the ground that the federal question was not raised in the court below.

Mr. Seymour D. Ball for defendant in error, moving.

Mr. William A. Wallace for plaintiffs in error, opposing.

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

The Susquehanna Boom Company was incorporated by the General Assembly of Pennsylvania on the 26th of March, 1846, and as early as 1849 erected, under its charter, a boom in the West Branch of the Susquehanna River, at Williamsport, for the purpose of securing logs and other lumber floating in the river. Its charter did not purport to confer upon it any exclusive rights to the use of the river above the boom for bringing logs down.

On the 26th of March, 1849, the West Branch Boom Company was incorporated to construct and maintain a boom on the south side of the West Branch at Lock Haven, about twenty-five miles above Williamsport. Under its charter this company was not allowed to extend its boom more than half way across the river, but it could "erect such piers, side

branches, or sheer booms" as might be necessary. With this authority a sheer boom was constructed in the north half of the stream. This suit was begun in a State court of Pennsylvania to enjoin the West Branch Company from maintaining such a sheer boom, on the ground that under its charter no such structure could be placed by it on the north side of the branch. The Supreme Court of the State, on appeal, decided that it could put in and maintain such a sheer boom, and adjudged accordingly. To reverse that judgment this writ of error was brought. The West Branch Company now moves to dismiss the writ because no federal question is involved.

It is clear to our minds that we have no jurisdiction. The Constitution protects State corporations in such contracts with the State as their charters imply. The Susquehanna Company, whose rights are involved, was given full authority to erect and maintain its boom at Williamsport. That undoubtedly implied the right to use the river as others used it for bringing logs to the boom. The West Branch Company was also authorized to construct its boom in the south half of the river at Lock Haven. Whether it could under its charter put a sheer boom in the north half seems to have been a question with the Susquehanna Company, and this suit was brought to have that question settled. That is clearly all there was in the case up to the time of the final decision of the Supreme Court, whose judgment we are now called on to review. There is nowhere, either in the pleadings, the evidence, or the suggestions of counsel, prior to the judgment, so far as we have been able to discover, even an intimation that the Susquehanna Company claimed any contract right under its charter to exclude the West Branch Company from such use as that company was making of the north half of the stream. The only controversy apparently was about the right of the West Branch Company, under its charter, to such use at all.

"Certainly," as was said in *Brown* v. *Colorado*, 106 U. S. 95, "if the judgments of the courts of the States are to be reviewed here on such" [that is to say federal], "questions, it should only be when it appears unmistakably that the court either knew, or

ought to have known, that such a question was involved in the decision to be made."

The fact that on a petition for rehearing it was suggested that if the charter of the West Branch Company was so construed as to give it the right to maintain its sheer boom in the north half of the stream, that charter would impair the obligation of the contract of the State with the Susquehanna Company, is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests.

The motion to dismiss is granted.

HOLLAND *v.* CHAMBERS.

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

Submitted December 17th, 1883.—Decided January 7th, 1884.

Removal of Causes.

Under the act of March 3d, 1875, c. 137, 18 Stat. 470, a cause cannot be removed from a State court to a Circuit Court of the United States after a trial has been had in a State court, and judgment rendered and set aside, and new trial ordered, and the term passed at which this was done.

Motion to dismiss an appeal from the decision of a Circuit Court remanding a cause to a State court.

Mr. James O. Broadhead for defendant in error and mover.

Mr. S. M. Smith and *Mr. J. R. Sypher* attorneys of record for plaintiff in error. No brief filed.

Opinion of the Court.

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

This is a writ of error brought under sec. 5 of the act of March 3d, 1875, ch. 137, 18 Stat. 470, to review an order of the Circuit Court remanding a cause which had been removed from a State court. The facts are as follows:

The suit was begun in the State court on the 19th of July, 1879, by Chambers, as plaintiff, against C. M. Swope and Joseph B. Holland, defendants, to recover damages for writing and publishing an alleged libel. An answer was filed by Holland on the 6th of October, 1879, and an amended answer on January 24th, 1880. A reply was filed February 5th. At the April term, 1880, a trial was had, which resulted in a verdict and judgment for $20,000 in favor of Chambers. This judgment was afterwards set aside by the court and a new trial granted. On the 20th of January, 1882, Holland petitioned for the removal of the suit as against him to the Circuit Court of the United States for the Eastern District of Missouri. The petition set forth that Holland was a citizen of Illinois, and both Swope and Chambers citizens of Missouri:

"That said suit is one in which there can be a final determination of the controversy, so far as it concerns your petitioner, without the presence of the said defendant Swope as a party in said cause, and that your petitioner desires to remove said suit as against your petitioner, and so far as concerns him, into the Circuit Court, ... in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision second."

Upon these facts the order of the Circuit Court remanding the cause was clearly right. The second subdivision of sec. 639 was repealed by the act of March 3d, 1875, ch. 137. That was settled in *Hyde* v. *Ruble*, 104 U. S. 407, and *King* v. *Cornell*, 106 U. S. 395.

Under the act of 1875 the petition for removal must be filed in the State court before or at the term at which the cause could be first tried. This suit could not only have been tried, but it actually was tried once, nearly two years before the petition to remove. Such being the case, it is needless to in-

quire whether there might have been a removal under that act if an application had been made in time and in proper form.

The order remanding the cause is affirmed.

AMERICAN BIBLE SOCIETY & Others *v.* PRICE.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Submitted December 14th, 1883.—Decided January 7th, 1884.

Removal of Causes—Statutes.

1. Under the third subdivision of § 639 Rev. Stat., a suit cannot be removed from a State court, unless all parties on one side of the controversy are different citizens from those on the other. *Sewing Machine Companies*, 18 Wall. 553, and *Vannevar* v. *Bryant*, 21 Wall. 41, adhered to.
2. Where a daughter of a testator commenced suit in a State court to set aside the will, and the executors were trustees of a small trust fund under the will, the use of which was to be enjoyed by the daughter during her life, and which was to go to her children on her decease: *Held*, That the executors were necessary parties to the suit, and if they were citizens of the same State as the daughter, the cause could not be removed into the Circuit Court of the United States, under the third subdivision of § 639 Rev. Stat. even though the legatees and devisees of the great mass of the estate were citizens of other States.

Motion to dismiss an appeal from an order of the court below remanding the cause to the State court.

Mr. G. Kœrner for appellee and mover.

Mr. George P. Strong for appellants.

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

This is an appeal from an order remanding a cause which had been removed from a State court. The case is as follows:

Isaac Foreman, a citizen of Illinois, died on the 28th of October, 1878, leaving a will by which, after devising certain property to his wife Rebecca Foreman for life, he appointed John J. Thomas, Frederick H. Pieper, and Theophilus Harrison, all cit-

izens of Illinois, his executors. After directing his executors to convert all his property into money, he proceeded as follows:

"4th. After the payment of all my just debts, I give and bequeath to my said executors the sum of two thousand dollars ($2,000) in trust for the use and benefit of my daughter, Mary Price, during her natural life. I desire my said executors to safely loan on interest said sum of money, and pay to my said daughter the interest or profits thereof annually during her life, and after her death the proceeds or interest thereof to be paid annually for the maintenance and education of her child or children, and such principal sum to be paid to her child or children when he, she or they become of age. And should my said daughter die leaving no child or children, or should all of them die before coming of age, then the said sum of two thousand dollars shall be payable by my said executors, two-thirds thereof to the American Bible Society, and one-third thereof to the Missionary Society of the Methodist Episcopal Church of the United States of America."

All the residue of the proceeds of his property were to be paid over to the two societies in the same proportions.

This suit was begun by Mary Price, a citizen of Illinois, the daughter, on the 19th of November, 1878, to set aside the will on the ground that the testator was of unsound mind when it was made. The widow, the executors, and the two societies were all made defendants. A joint answer was filed by all the defendants on the 14th of January, 1879. On the 21st of September, 1880, the widow filed a separate answer, in which she set forth her election to renounce the will, and take her dower and legal share of the estate of her husband. She, therefore, disclaimed all interest in the controversy. Thereupon the two societies filed a petition for the removal of the suit to the Circuit Court of the United States for the Southern District of Illinois, under the third subdivision of sec. 639 of the Revised Statutes, on account of "prejudice and local influence." When the case got to the Circuit Court it was remanded, on the ground that the executors were necessary defendants and citizens of the same State with the complainant. To reverse that order this appeal was taken.

Syllabus.

That a suit cannot be removed under the third subdivision of sec. 639, unless all the parties on one side of the controversy are citizens of different States from those on the other, was settled in the case of the *Sewing Machine Companies*, 18 Wall. 553, and *Vannevar* v. *Bryant*, 21 Wall. 41, and that the executors were necessary parties we have no doubt. The sum of $2,000 was specifically bequeathed to them in trust for the complainant, Mrs. Price, during her life, and after her death for her children, or, in case of their death before coming of age, for the two societies. The interest of the children is left entirely to the protection of the executors, and is not represented either by the mother, who is complainant, or by the societies who are defendants. If the children had united with the mother in contesting the will the case might have been different, but they have not done so, and their interests must be treated accordingly.

Without, therefore, deciding any of the other questions,

The order remanding the case is affirmed.

FRELINGHUYSEN, Secretary of State, *v.* KEY.

LA ABRA SILVER MINING COMPANY *v.* FRELINGHUYSEN, Secretary of State.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 3d, 4th, 1883.—Decided January 7th, 1884.

Awards under Claims Convention with Mexico.

1. By the Claims Convention of July 4th, 1868, between the United States and Mexico, it was agreed that "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic" should be submitted to the decision of a commission to be created under the treaty; that it should "be competent for each government to name one person to attend the commission as agent on its behalf, to present and support claims on its behalf;" and that the parties would "consider the result of the proceedings of this commission as a full, perfect and final settlement:" *Held*, That, though the awards made by the Commissioners under this

Statement of Facts.

authority are on their face final and conclusive as between the United States and Mexico, they are only so until set aside by agreement between the two governments or otherwise; and that the United States may treat with Mexico for a retrial of any case decided by the commission, and that the President may withhold from any claimant his distributive share of any sums paid by Mexico under the treaty, while negotiating with that republic for a retrial of his case.

2. When it is alleged that a decision in an international tribunal against a foreign government was obtained by the use of fraud, no technical rules of pleading as applied in municipal courts should be allowed to stand in the way of the national power to do what is right.

3. The relations between a claimant in an international tribunal and the foreign government, and between the claimant and his own government examined and considered.

4. § 1, act of June 18th, 1878, ch. 262, 20 Stat. 144, authorized and required the Secretary of State to receive all sums paid by Mexico in pursuance of that convention, and to distribute them in ratable proportions among those in whose favor awards had been made: *Held*, That this only provided for the receipt and distribution of the sums paid without such a protest or reservation on the part of Mexico as in the opinion of the President was entitled to further consideration, and that it did not set new limits on executive power.

5. § 5 of that act requested the President to investigate charges of fraud made by Mexico respecting the proof of certain claims before the commission, and pointed out some subsequent executive acts that might be done in the premises: *Held*, That this was only an expression of the desire of Congress to have the charges investigated, but did not limit or increase the executive powers in that respect under preexisting laws.

These causes originated in petitions to the Supreme Court of the District of Columbia, for mandamus upon the Secretary of State to compel him to pay to the petitioners (representing claims proved before the commission established under the Claims Convention of July 4th, 1868, with Mexico), their distributive shares of certain payments made by Mexico to the United States in accordance with the terms of that convention. The following are the facts as recited by the court, and on which the opinion is based.

On the 4th of July, 1868, a convention between the United States and the Republic of Mexico, providing for the adjustment of the claims of citizens of either country against the other, was concluded, and, on 1st of February, 1869, proclaimed by the President of the United States, by and with

the advice and consent of the Senate. By this convention (Art. I.):

"All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic, upon the government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo, . . . and which yet remain unsettled, as well as any other such claims which may be presented within," a specified time, were to "be referred to two commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic."

Provision was then made for the appointment of an umpire. Arts. II., IV., and V., are as follows:

ART. II. "The commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, . . . but upon such evidence or information only as shall be furnished by or on behalf of their respective governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of, or in answer to any claim, and to hear, if required, one person on each side on behalf of each government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire . .; and such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the commissioners, shall decide thereupon finally and without appeal. . . It shall be competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf and to answer claims made upon it,

and to represent it generally in all matters connected with the investigation and decision thereof. The President of the United States . . . . and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decisions of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever. . . ."

ART. IV. "When decisions shall have been made by the commissioners and the arbiter in every case which shall have been laid before them, the total amount awarded in all the cases decided in favor of the citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of $300,000, shall be paid at the city of Mexico or at the city of Washington, . . . within twelve months from the close of the commission, to the government in favor of whose citizens the greater amount may have been awarded, without interest. . . . The residue of the said balance shall be paid in annual instalments to an amount not exceeding $300,000 . . . in any one year until the whole shall have been paid."

ART. V. "The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible." 15 Stat. 679.

Under this convention commissioners were appointed who entered on the performance of their duties. Benjamin Weil and the La Abra Silver Mining Company, citizens of the United States, presented to their government certain claims against Mexico. These claims were referred to the commissioners, and finally resulted in an award, on the 1st of October, 1875, in favor of Weil and against Mexico for $489,810.68, and

on the 27th of December, 1875, in favor of La Abra Silver Mining Company for $683,041.32. On the adjustment of balances under the provisions of Art. IV. of the convention it was found that the awards against Mexico exceeded largely those against the United States, and the government of Mexico has promptly and in good faith met its annual payments, though it seems from the beginning to have desired a re-examination of the Weil and La Abra claims.

On the 18th of June, 1878, Congress passed an act (c. 262, 20 Stat. 144), secs. 1 and 5 of which are as follows:

SEC. 1. "That the Secretary of State be, and he is hereby authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the convention between the United States and the Mexican Republic for the adjustment of claims; . . . and, whenever and as often as any instalments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto." . . .

SEC. 5. "And whereas the government of Mexico has called the attention of the government of the United States to the claims hereinafter named, with a view to a rehearing, therefore be it enacted that the President of the United [States] be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or

cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *provided* that nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them."

During the year 1879, President Hayes caused an investigation to be made of the charges of fraud presented by the Mexican government, and the conclusion he reached is thus stated in the report of Mr. Evarts, the then Secretary of State:

"I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal or under any new convention or negotiation respecting the same between the United States and Mexico.

"Second. I am, however, of opinion that the matters brought to the attention of this government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigation should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

"Third. The executive government is not furnished with the

means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the instalments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter."

This action of the President was communicated to Congress under date of April 15th, 1880, by his forwarding a copy of the report of the Secretary of State, which concludes as follows:

"Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rata with all other awards under the convention."

No definitive instructions were given by Congress in respect to the matter during that session, and after the close of the session payments were made on these awards by the direction of the President the same as on the others. Another instalment was paid by the Mexican government and distributed to these claimants with the rest during President Garfield's administration. In this way five instalments were distributed. After President Arthur came into office he examined the cases further, and, "believing that said award was obtained by fraud and perjury," negotiated a treaty with Mexico providing for a rehearing. This treaty is now pending before the Senate for ratification. On the 31st of January, 1882, the sixth instalment was paid by Mexico to Mr. Frelinghuysen, the present Secretary of State. A distribution of this instalment to these claimants has been withheld by order of the President on account of the pending treaty.

These suits were brought in the Supreme Court of the Dis-

trict of Columbia to obtain writs of mandamus requiring the Secretary of State to pay to the several relators the amounts distributable to them respectively upon their disputed awards from the instalment of 1882. The relator, Key, is the assignee of part of the Weil claim. In this case the Secretary filed an answer setting up the action of President Arthur in respect to this claim and the negotiation of the new treaty. To this the relator demurred. Upon the hearing the court below sustained the demurrer and awarded a peremptory writ as prayed for.

In the case of the La Abra Company a petition substantially like that of the relator Key was demurred to by the Secretary. Upon the hearing this demurrer was sustained and the petition dismissed. In this case, therefore, the action of President Arthur does not appear affirmatively on the face of the record, but it was conceded on the argument that it might properly be considered.

The writ of error in the Key case was brought by the Secretary of State, and in the other by the La Abra Company.

Mr. P. Phillips, for Key.

Mr. Samuel Shellabarger, for the La Abra Silver Mining Company.

Mr. Solicitor-General, for the United States.

Mr. Attorney-General, for the United States.

Mr. John Goode, for Key, and *Mr. Frederick P. Stanton*, for La Abra Company.

Mr. T. W. Bartley filed a brief for the La Abra Company, and *Mr. R. B. Warden* a brief for Key.

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

If we understand correctly the positions assumed by the different counsel for the relators, they are:

1. That the awards under the convention vested in the several claimants an absolute right to the amounts awarded them respectively, and that this right was property which neither

the United States alone, nor the United States and Mexico together, could take away; and,

2. That, if this were not so, the action of President Hayes, under the 5th section of the act of 1878, was conclusive on President Arthur, and deprived him of any right he might otherwise have had to investigate the charges of fraud presented by the Mexican government, or to withhold from the relators their distributive shares of any moneys thereafter paid to the Secretary of State under the authority of the first section.

1. There is no doubt that the provisions of the convention as to the conclusiveness of the awards are as strong as language can make them. The decision of the commissioners, or the umpire, on each claim, is to be "absolutely final and conclusive" and "without appeal." The President of the United States and the President of the Mexican Republic are "to give full effect to such decisions, without any objection, evasion, or delay whatsoever," and the result of the proceedings of the commission is to be considered "a full, perfect, and final settlement of every claim upon either government arising out of transactions prior to the exchange of the ratifications of the . . . . convention." But this is to be construed as language used in a compact of two nations "for the adjustment of the claims of the citizens of either . . . against the other," entered into "to increase the friendly feeling between" republics, and "so to strengthen the system and principles of republican government on the American continent." No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claimed to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico

were to be adjusted and paid, but those of citizens of Mexico against the United States as well. By the terms of the compact the individual claimants could not themselves submit their claims and proofs to the commission to be passed upon. Only such claims as were presented to the governments respectively could be "referred" to the commission, and the commissioners were not allowed to investigate or decide on any evidence or information except such as was furnished by or on behalf of the governments. After all the decisions were made and the business of the commission concluded, the total amount awarded to the citizens of one country was to be deducted from the amount awarded to the citizens of the other, and the balance only paid in money by the government in favor of whose citizens the smaller amount was awarded, and this payment was to be made, not to the citizens, but to their government. Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens.

As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do. Her payments have all been made promptly as they fell due, as far as these records show. What she asks is the consent of the United States to her release from liability under the convention on account of the particular awards now in dispute, because of the alleged fraudulent character of the proof in support of the claims which the United States were induced by the claimants to furnish for the consideration of the commission.

As to the right of the United States to treat with Mexico for a retrial, we entertain no doubt. Each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection as far as possible against frauds and impositions by the indi-

vidual claimants. It was for this reason that all claims were excluded from the consideration of the commission except such as should be referred by the several governments, and no evidence in support of or against a claim was to be submitted except through or by the governments. The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own government, and if that government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be not only its right but its duty, to repudiate the act and make reparation as far as possible for the consequences of its neglect if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. None of the cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the governments and into the hands of private parties. The language of the opinions must be construed in connection with this fact. The opinion of the Attorney-General in *Gibbes' Case*, 13 Opinions, 19, related to the authority of the executive officers to submit the claim of Gibbes to the second commission after it had been passed on by the first, without any new treaty between the governments to that effect; not to the power to make such a treaty.

2. The first section of the act of 1878 authorizes and requires the Secretary of State to receive the moneys paid by Mexico

under the convention, and to distribute them among the several claimants, but it manifests no disposition on the part of Congress to encroach on the power of the President and Senate to conclude another treaty with Mexico in respect to any or even all the claims allowed by the commission, if in their opinion the honor of the United States should demand it. At most, it only provides for receiving and distributing the sums paid without a protest or reservation, such as, in the opinion of the President, is entitled to further consideration. It does not undertake to set any new limits on the powers of the Executive.

The fifth section, as we construe it, is nothing more than an expression by Congress in a formal way of its desire that the President will, before he makes any payment on the Weil or La Abra claims, investigate the charges of fraud presented by Mexico,

"and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards, ... or either of them, should be opened and the cases retried," that he will "withhold payment . . . . until the case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress may otherwise direct."

From the beginning to the end it is, in form even, only a request from Congress to the Executive. This is far from making the President for the time being a *quasi* judicial tribunal to hear Mexico and the implicated claimants and determine once for all as between them, whether the charges which Mexico makes have been judicially established. In our opinion it would have been just as competent for President Hayes to have instituted the same inquiry without this request as with it, and his action with the statute in force is no more binding on his successor than it would have been without. But his action as reported by him to Congress is not at all inconsistent with what has since been done by President Arthur. He was of opinion that the disputed "cases should be further investigated by the United States to ascertain whether this government has

been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud," and, by implication at least, he asked Congress to provide him the means "of instituting and furnishing methods of investigation which can coerce the production of evidence or compel the examination of parties or witnesses." He did report officially that he had "grave doubt as to the substantial integrity of the Weil claim" and the "sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of La Abra . . . Company." The report of Mr. Evarts cannot be read without leaving the conviction that if the means had been afforded, the inquiries which Congress asked for would have been further prosecuted. The concluding paragraph of the report is nothing more than a notification by the President that unless the means are provided, he will consider that the wishes of Congress have been met, and that he will act on such evidence as he has been able to obtain without the help he wants. From the statements in the answer of Secretary Frelinghuysen in the Key case, it appears that further evidence has been found, and that President Arthur, upon this and what was before President Hayes, has become satisfied that the contested decisions should be opened and the claims retried. Consequently, the President, believing that the honor of the United States demands it, has negotiated a new treaty providing for such a re-examination of the claims, and submitted it to the Senate for ratification. Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject are finally concluded. That discretion of the Executive Department of the government cannot be controlled by the judiciary.

The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the commission. As between the United States and

the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made.

Of course, in what we have said we express no opinion on the merits of the controversy between Mexico and the relators. Of that we know nothing. All we decide is, that it was within the discretion of the President to negotiate again with Mexico in respect to the claims, and that as long as the two governments are treating on the questions involved, he may properly withhold from the relators their distributive shares of the moneys now in the hands of the Secretary of State.

The judgment in the case of the La Abra Company is affirmed with costs, and that in the case of Key is reversed with costs, and the cases remanded with instructions to dismiss the petition of Key.

SCHREIBER & Others *v.* SHARPLESS.

ORIGINAL.

Submitted December 17th, 1883.—Decided January 7th, 1884.

Abatement—Action—Copyright—Penalty—Statutes.

1. The rule at common law, that *qui tam* actions on penal statutes do not survive, prevails in the federal courts as to actions on penal statutes of the United States, even in States where the statutes of the State allow suits on State penal statutes to be prosecuted after the death of the offender.
2. An action to recover penalties and forfeitures for the infringement of a copyright under the provisions of § 4965 Rev. Stat. is abated by the death of the defendant.

Petition for mandamus to require the judge of the District Court of the United States for the Eastern District of Pennsylvania to reinstate a writ of scire facias sued out to bring in the executors of the will of Sharpless to defend an action commenced against him in his lifetime, under § 4965 Rev. Stat., to

recover penalties for infringing a copyright, which writ was quashed by the court after hearing the parties.

Mr. J. R. Paul, *Mr. A. Sydney Biddle*, *Mr. Henry P. Brown*, and *Mr. John K. Valentine* for the petitioners.—The question raised in this case is whether or not an action to recover a penalty imposed by Congress for the infringement of a copyright survives after the death of the defendant. By the statute law of Pennsylvania, an action for a penalty does not abate by the death of the defendant. Act of February 24, 1834, section 28 Pur. Dig., 424, pl. 96, P. L. 77. It was not questioned by the court, during the argument, that if the law of Pennsylvania with reference to the abatement and survival of actions was applicable to the case in hand, the action survived against the defendant's administrators; and during the argument on that point plaintiffs' counsel was stopped and directed to discuss the other question. The only question, therefore, for consideration, is whether or not the State law applies.—I. If the abatement or survival of an action, by reason of the death of a party, is a matter of procedure and practice, it is clear that by § 914 of the Revised Statutes, the State law governing such questions is the rule of the decision of the federal courts. "The *practice*, *pleadings*, and *forms and modes of proceeding* in civil causes other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." Rev. Stat. § 914. The question of abatement of an action by the death of a party is one of procedure. *Jones* v. *Van Zandt's Administrator*, 4 McLean, 604; *McCoul* v. *Le Kamp*, 2 Wheat. 111.—II. By the very terms too of § 955 Rev. Stat., this action survived. The section provides: "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or adminstrator of such deceased party may, *in case the cause of action survives by law*, prosecute or

defend any such suit to final judgment." This statute provides that all actions survive, after the death of a party, where "the cause of action survives *by law*." What law? There is no other federal law on the subject, this being the only statute dealing with the question of abatement by death, and no *common law* governing federal questions exists. Nor was it intended by Congress to incorporate the law of England as to abatement existing at the time of the passage of the Judiciary Act; for, if this were so, nearly all actions would at this day abate by the death of a party, if brought in a federal court. The only other law, therefore, which can be referred to in the phrase "survives by law" must be the law of the State in which the action is brought, and this natural construction has been repeatedly adopted in the decisions. See *Hatfield* v. *Bushnell*, 1 Blatchford, 393; *Barker* v. *Ladd*, 3 Sawyer, 44; *Trigg* v. *Conway*, Hempst., 711; *Hodge* v. *Railroad*, 1 Dillon, 104.—III. Even should it be held that the question under consideration is not one of procedure at all, but goes to the root of the action, then § 34 of the Judiciary Act of 1789, Rev. Stat. § 721, applies and the action survived against the executors of the defendant. That section reads as follows: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This section has been held not to apply to cases of procedure. Assuming that the abatement and survival of an action is not a question of practice or procedure, then by the terms of this section, the *State* laws regulating such matters must be "rules of decision" in cases where they apply. See *United States* v. *Mundell*, 1 Hughes, 415; *McCluny* v. *Silliman*, 3 Pet. 270; *Leffingwell* v. *Warren*, 2 Black, 599; *Parker* v. *Hawk*, 2 Fisher's Pat. Cas. 58; *Rich* v. *Ricketts*, 7 Blatchford, 230; *Howes* v. *Nute*, 4 Fisher's Pat. Cas. 263; *Sayles* v. *Oregon Central Railroad*, 6 Sawyer, 311; *Hayden* v. *Oriental Mills*, 15 Fed. Rep. 605.—IV. Mandamus is the proper remedy in a case like this. *Ex parte Bradstreet*, 7 Pet. 634; *Stafford* v. *Union Bank of Louisiana*, 17 How. 275. Without it the

plaintiffs have no remedy. § 1011 Rev. Stat.; *Toland* v. *Sprague*, 12 Pet. 300; High on Extraordinary Remedies, § 151; *Regina* v. *Kesteven*, 3 Ad. & El. 810; *Ex parte Shollenberger*, 96 U. S. 369; *Ex parte Bradstreet*, 7 Pet. 634; *Insurance Company* v. *Wilson*, 8 Pet. 291; *Ex parte Russell*, 13 Wall. 664; *Insurance Company* v. *Comstock*, 16 Wall. 258; *Railroad Company* v. *Wiswall*, 23 Wall. 507.

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

The petitioners sued Charles L. Sharpless in the District Court of the United States for the Eastern District of Pennsylvania to recover certain penalties and forfeitures claimed under the provisions of sec. 4965 of the Revised Statutes, for the infringement of a copyright. Sharpless died after issue joined, but before judgment. After his death had been suggested by his attorney in the cause, the petitioners sued out a *scire facias* against Anna R. Sharpless, executrix, and Charles W. Sharpless, executor of his will, requiring them to appear and become parties to the action, or show cause why they should not be made parties, by order of the court. Before this writ was served, the attorney for Sharpless during his life, moved that the writ be quashed. After argument the motion was granted, on the ground that the cause of action terminated with the death of the defendant, and did not survive as against his legal representatives.

The petitioners now ask for a rule on the District Court to show cause why a writ of mandamus should not issue requiring it to reinstate the writ of *scire facias* and proceed with the case.

Without considering whether a writ of mandamus may issue directly from this court to a District Court to enforce procedure in a case where the final judgment of the District Court is subject to review in the Circuit Court, we deny the rule asked for, because we are entirely satisfied with the action of the district judge. He was asked to send out a writ of *scire facias* to bring in and make parties to a *qui tam* action the personal representatives of a deceased defendant, who had been sued to recover the penalties and forfeitures which it was alleged he had subjected himself to, under an act of Congress, by the infringe-

ment of a copyright. The suit was not for the damages the plaintiffs had sustained by the infringement, but for penalties and forfeitures recoverable under the act of Congress for a violation of the copyright law. The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. Stat. § 955. At common law actions on penal statutes do not survive (Com. Dig. tit. Administration, B. 15), and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the State may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. §. 914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress cannot be changed by State laws, it follows that State statutes allowing suits on State penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress.

The rule is denied and petition dismissed.

CLAFLIN & Others *v.* COMMONWEALTH INSURANCE COMPANY.

SAME *v.* WESTERN ASSURANCE COMPANY.

SAME *v.* FRANKLIN INSURANCE COMPANY.

ALL: IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Argued and submitted October 16th, December 17th, 1883.—Decided January 14th, 1884.

Evidence—Insurance—Jurisdiction—Parties—Removal of Causes—Statutes.

1. It appearing on examination of the record after argument that the jurisdiction of the court over the cause is in doubt, the court of its own motion took notice of the question and ordered it argued.
2. § 1, ch. 137, act of March 3d, 1875, 18 Stat. 470, confers upon Circuit Courts of the United States original jurisdiction in controversies between citizens of different States, or citizens of a State and foreign States, citizens or subjects, where the matter in dispute exceeds, exclusive of costs, the sum of $500, and further provides as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange." § 2 of that act authorizes the removal of similar causes as to parties and amounts from State courts to Circuit Courts of the United States, but without imposing the restriction as to assignees and assignments. *Held,* That the restriction upon the commencement of suits contained in § 1 does not apply to the removal of suits under § 2.
3. When this court has given a construction to relative provisions in different parts of a statute, and Congress then makes a new enactment respecting the same subject-matter, with provisions in different sections bearing like relations to each other, and without indicating a purpose to vary from that construction, the court is bound to construe the two provisions in the different sections of the new statute in the same sense which, in previous statutes, had uniformly been given to them, and not invent a new application and relation of the two clauses.
4. A policy of insurance against loss by fire contained a clause to the effect that in case of loss the assured should submit to an examination under oath by the agent of the insurer, and that fraud or false swearing should forfeit the policy. The assured, after loss, submitted to such examination, and made false answers under oath respecting the purchase and payment of the goods assured. Although it appeared that the state-

Statement of Facts.

ments were not made for the purpose of deceiving the insurer, but for the purpose of covering up some false statements previously made to other parties: *Held*, That the motive which prompted them was immaterial, since the questions related to the ownership and value of the goods, and were material, and that the attempted fraud was a breach of the condition of the policy and a bar to recovery.

Suits on three policies of insurance made by the several defendants in favor of one Frances E. Barritt on a stock of goods, and by her assigned to one Murphy with consent of defendants after an alleged sale of the goods to him. After loss Murphy assigned to the plaintiffs. The answers set up fraud in procuring insurance on the goods in excess of their value, and in false representations as to their ownership; denied the injury to the amount claimed; set forth that the respective policies required the assured, in case of loss, to submit to examination under oath, and that fraud or attempt at fraud by false statements in such examination should cause a forfeiture of all claims under the policy; and averred that Murphy had been guilty of making such false statements, and that the claims under the policies respectively were forfeited. The plaintiffs were citizens of New York. One of the defendants was a corporation created under the laws of Massachusetts; one a corporation created under the laws of the Dominion of Canada, and one a corporation created under the laws of Missouri.

The suits were begun in a State court of Minnesota, and were removed thence on motion of the defendants to the Circuit Court of the United States for that district. In each case judgment was rendered for the defendant and a writ of error sued out by the plaintiff. The errors assigned referred to the matters set forth in the following extract from the record:

"These causes, having been duly ordered to be tried before the same jury by the court, came on for trial before the Hon. Samuel F. Miller and the Hon. Rensselaer R. Nelson, judges of said court, presiding at said trial, at a general term thereof begun and held at St. Paul, Minnesota, on the third Monday in June, A. D. 1880.

"The respective causes were brought by the plaintiffs on certain policies of insurance bearing date as follows: That of The

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Commonwealth Insurance Company of Boston, bearing date of 11th of January, 1877; that of The Western Assurance Company of Toronto, Canada, bearing date of 27th of December, 1876; and that of The Franklin Insurance Company of St. Louis, bearing date of 29th of December, 1876, the two latter being for $5,000 each, and the former for $2,500, insuring one Frances E. Barritt against loss or damage by fire on her stock of dry goods or other merchandise pertaining to her business, contained in the three-storied store, metal-roofed building, situated No. 37 East 3d street, St. Paul, Minnesota, for a period of three months after their respective dates, with the condition that $35,000 other insurance shall be allowed. The respective policies were assigned by Frances E. Barritt, the assured, to one William Murphy on the 7th day of February, 1877, with the consent and approval of the respective companies.

"On the 25th day of February, 1877, said stock of goods was damaged by fire to the amount of $11,804.72, as found and determined by the arbitrators appointed by the assured and the respective companies. The policy of The Western Assurance Company of Toronto, Canada, contained, among other things, the following provision: 'The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto when the same is reduced to writing,' and also 'all fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company, and be a perpetual bar to any recovery under this policy.'

"That of The Franklin Insurance Company of St. Louis contained, among others, the following provision, viz.: 'And the insured shall, if required, submit to an examination under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing;' and the further provision, to wit: 'All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy;' that of the defendant, The Commonwealth Insurance Company of Boston, contained, among others, the following provision, to wit: 'All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under this

policy ;' and the further provision, viz. : 'The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing.'

"Upon the trial of said causes there was evidence tending to show that the respective defendants required the assured, William Murphy, to appear before their appointed agent and submit to an examination under oath, and answer all questions touching his knowledge of anything relating to such loss or damage and his claim thereupon, and to subscribe such examination, the same being reduced to writing, which the said Murphy did, as required, and that upon said examination the question of the ownership of said goods by said Murphy was made by the defendants, and said Murphy examined at length upon the same, and he answered certain questions relating to the manner in which he paid one Frances E. Barritt, for said stock at the time of his alleged purchase thereof falsely, and there was evidence tending to show that he answered thus with no purpose to deceive and defraud the insurance companies, but for the purpose of showing himself, upon the examination, consistent with a statement that he had made about it a day or two subsequent to the purchase of said stock to R. G. Dunn & Co.'s commercial agency at St. Paul, Minnesota, with a view of obtaining a large commercial credit in eastern cities. There was evidence tending to show that on the 9th day of February, 1877, said William Murphy went to said agency and reported that he had bought the stock of Frances E. Barritt for $35,484.20 ; that he had paid for the same in cash and securities ; and plaintiffs claimed that if the false statements were made to the agents of the insurance company upon examination, even though made upon a material question, without intent to deceive or defraud the insurance companies, it would not prevent a recovery upon the policies, and requested the court upon that point to charge as follows :

"'If you find from the evidence that any incorrect statements made by William Murphy upon his examination were made for the purpose of protecting himself against the statements made by him to the commercial agency for the purpose of obtaining more credit than he was actually entitled to, and not for the purpose of deceiving and defrauding the defendants, then such statements constitute no defence to this action,' and also, 'No false state-

ments made by Murphy on his examination, under oath or otherwise, constitute a defence to this action, unless the same were made upon material issues between him and the defendants, and unless you are satisfied from the evidence that Mr. Murphy made them knowingly and wilfully, with intent thereby to deceive and defraud the defendants.'

"The court (his honor Judge Miller addressing the jury) refused to give said instructions, but told the jury in its charge that the said questions relating to the manner in which Mr. Murphy paid said Frances E. Barritt for said stock at the time of his alleged purchase thereof were upon a material point, upon which the defendants had a right to interrogate Mr. Murphy, and were material questions, to which they had a right to true answers from Murphy in said examinations, and upon the point in controversy upon which the said instructions were asked, charged the jury as follows, to wit: 'It is said here, and the point is urged with a good deal of force, that unless Mr. Murphy made these false statements, if they were false, and it is conceded that they were false, with the intent to deceive and defraud these corporations, and if he made them with the intent to deceive and defraud some one else, that it is immaterial to this issue. I don't think that is the law. I don't think it was necessary in order to avoid the policy that the statements by Mr. Murphy should have been made solely, or even partly, with a view to get money wrongfully out of the companies; however, that is a point I wish to draw your attention to. If these statements had been wholly immaterial, that doctrine may be right; if it was a matter that the company had no right to inquire into or interrogate him about, if he did swear falsely and intended to deceive some one else, that does not interfere with the policy; but these companies had a right to have from him the truth about every matter that was material as evidence to show whether he owned these goods or not; they had a right to have the truth from him, whatever his intentions might have been, that is, as far as the truth was material; and so far as his testimony before the notary had a tendency to mislead the companies on an important matter, it was false swearing and false testimony within the meaning of the policy, and would avoid the policy. If he stated that which was intended for their action, and which would probably influence their action, and these statements were false, then he swore falsely within the meaning of the

policy, though he didn't intend to cheat them, but intended to cheat somebody else, for, without looking to his motives, the company had a right to an honest statement from him to all questions that went to show whether he was the owner of these goods or not.'

"To which refusals to charge as requested, and to said charge as given, plaintiffs' counsel thereupon duly excepted, and, after the rendition of the verdict for the defendants, moved for a new trial on account thereof, and said motion was duly argued by John B. Sanborn, Esq., counsel for the plaintiffs, and Cushman K. Davis, Esq., counsel for the defendants, and after due consideration thereof the court denied the motion, and upon the question as to whether said instructions should be given to the jury as requested, or the jury instructed as in the said charge of the court, the opinions of the said judges were opposed.

"Whereupon, on motion of the plaintiffs H. B. Claflin & Co., by counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided,

"It is ordered that the foregoing state of the evidence and cases, and the questions on which the disagreement of opinion hath happened, which is made under the direction of the judges, be certified according to the request of the plaintiffs, by their counsel, and the law in that case made and provided."

The question raised by the assignment of errors was argued on the 16th of October, 1883, and on the 5th of the following November Mr. Chief Justice Waite announced as follows:

These suits were begun in a State court of Minnesota, by the present plaintiffs in error, citizens of New York, against the several defendants, corporations of Massachusetts, Canada, and Missouri, respectively, upon policies of fire insurance issued to Frances E. Barritt, and by her assigned, with the consent of the companies, to William Murphy. After a loss, Murphy assigned his claims against the several companies under the policies to the plaintiffs. The suits were removed by the defendants to the Circuit Court of the United States for the District of Minnesota. The record shows sufficiently that the

plaintiffs and defendants were citizens of different States, but the citizenship of Murphy, the assignor of the plaintiffs, is nowhere stated. The question is therefore presented, whether the Circuit Court had jurisdiction of the suits. This question was not alluded to by counsel either in their oral or written arguments. As it is one we do not feel authorized to overlook, counsel will be heard upon it either orally, or by printed arguments, as may best suit their convenience, at any time they may desire on or before the third Monday in December next.

Each party then filed a brief on the question of jurisdiction, and the cause was submitted.

Mr. John B. Sanborn, and *Mr. W. H. Sanborn*, for plaintiffs in error.

Mr. George B. Young, for the several defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

These actions were tried in the court below at the same time, before the same jury, and, by stipulation of parties, were heard in this court upon one record, the issues and questions in them respectively being the same.

They were originally commenced in the District Court of the State of Minnesota for the County of Ramsey, the plaintiffs in error being plaintiffs below. The suits were founded on policies of insurance against fire issued by the several defendants upon a stock of dry goods in St. Paul to Frances E. Barritt, who having sold the property insured to William Murphy, assigned to him, for his benefit, the several policies of insurance with the assent of the insurance companies, the defendants. After the loss, Murphy assigned the policies of insurance and his claims under the same, for value, to the plaintiffs in error, who brought suit thereon, February 11th, 1878. On March 7th, 1878, the several defendants filed petitions for the removal of the causes to the Circuit Court of the United States, alleging that the plaintiffs were citizens of the State of New York, and the defendants, respectively, citizens of Massachusetts, or Missouri, or aliens, subjects of Great Britain, in the Dominion of Canada, being corporations created by the laws

of those governments respectively. The record does not show anything respecting the citizenship of Murphy, the plaintiffs' assignor, and it does not appear, therefore, whether, in case the assignment had not been made, he could have brought suit upon the policies of insurance against the defendants in the Circuit Court of the United States.

No question concerning the jurisdiction of that court was made by counsel, either on the trial or in this court; but, after having been argued here at the bar on the merits, the doubt upon the right of the court below to entertain jurisdiction arose so seriously as in our opinion to require argument upon the point. That has now been submitted and considered, the conclusion we have reached requiring an affirmance of the jurisdiction.

The question is whether, under the second section of the act of March 3d, 1875, 18 Stat. 470, a suit of a civil nature, brought in a State court, where the matter in dispute exceeds the sum or value of $500, and in which there is a controversy between citizens of different States, or between citizens of a State and foreign States, citizens, or subjects, may be removed into the Circuit Court, which suit, because it is founded on a contract in favor of an assignee, could not have been brought in the Circuit Court if no assignment had been made, not being the case of a promissory note, negotiable by the law merchant, or of a bill of exchange. That section of the act is confined to the subject of removals of suits from the State to the Circuit Courts, and expressly provides that where there is a controversy between citizens of different States, or between citizens of a State and aliens, the suit in which it arises may be removed by either party; while the first section, providing that the Circuit Courts shall have original cognizance of the same character of cases, concurrent with the courts of the several States, nevertheless declares that they shall not "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

The exception out of the jurisdiction, as to suits begun in the Circuit Courts, contained in this clause, does not, by its terms, nor by the immediate context, apply to suits commenced in State courts and afterwards removed to the Circuit Courts; but it is argued that it must apply from the reason and necessity of the case. The ground of this argument is that no reason can be assigned for limiting the jurisdiction in suits first brought in the Circuit Courts, which does not apply equally to those removed into them from State courts; and that if the limitation is not applied to the latter the effect will be thereby to remove it from the former, by enabling parties, forbidden to commence their actions in the Circuit Court, to transfer them at will to that court, after first formally bringing them in a State court. Such, indeed, seems to be the result necessarily to be anticipated from this construction of the act, and the argument, *ab inconvenienti*, must be admitted to be cogent.

An attempt to meet it is made by seeking to limit, by construction, the right of removal given by the second section to both parties, without qualification, to the defendant only in cases where, if exercised by the plaintiff, it would create jurisdiction in the Circuit Court in favor of an assignee whose assignor could not have sued in that court originally. This proposed construction is based upon the words of the clause in the first section of the act which forbids the Circuit Court to take cognizance of any suit founded on contract in favor of an assignee, which, it is argued, may be taken to mean that when the jurisdiction is invoked by the defendant, by a removal from the State court, it cannot be deemed to be exerted in favor of the assignee, but rather in favor of the adverse party. But this, we think, is a refinement upon the language of the clause not justified by its natural import, nor by admitted rules of interpretation. The words "in favor of an assignee" were evidently used, not to distinguish between the plaintiff and the defendant in the suit, but between the assignee and his assignor, so as not to give the favor to the former of bringing a suit which was denied to the latter.

The question, however, we think, is satisfactorily answered by recurring to the state of the law as it existed under the Ju-

diciary Act of 1789, 1 Stat. 78, until the passage of the act of March 3d, 1875.

The 11th section of the Judiciary Act corresponds to the 1st section of the act of 1875, describing in similar terms the character of the suits of which the Circuit Courts should have original cognizance, and containing a similar exception out of that jurisdiction of suits "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."

The 12th section of the act of 1789 corresponds to the second section of the act of 1875, limiting, however, the right to remove a suit begun in a State court to the defendant alone, where he is an alien, or a citizen of a State other than that where the suit has been brought, and of which the plaintiff is a citizen.

It will be seen, therefore, on a comparison of the two statutes, that the chief differences between them are:

1. That the act of 1875 enlarges the original jurisdiction of Circuit Courts, based on the citizenship of the parties, to all cases of controversy between citizens of different States, and between citizens of a State and aliens, retaining substantially the same exception as to suits upon contracts brought by an assignee, when the assignee could not have sued in the Circuit Court, but not including negotiable paper; and,

2. That the act of 1875 gives to either party the right of removal from a State court to the Circuit Court, instead of confining it to the defendant.

The exception out of the original jurisdiction, as to assignees of non-negotiable contracts, occupies in both statutes the same relative position, qualifying the provisions of the section in which it is contained, as to suits commenced in the Circuit Court, and not being found in, nor necessarily connected with, that regulating the removal of suits from the State courts.

Under the Judiciary Act of 1789 the question was several times presented to this court for decision, whether the exceptions in the 11th section of the act applied to the right of re-

moval given in the 12th section, and was uniformly answered in the negative. The very question arose directly in *Green* v. *Custard*, 23 How. 484. Mr. Justice Grier, delivering the opinion of the court, said:

"If Green had been a citizen of Texas, and Custard had claimed a right as indorsee of a citizen of Texas to bring his suit in the courts of the United States, because he (Custard) was a citizen of another State, the case would have occurred which is included in the proviso to the 11th section of the act, which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case by virtue of the 12th section. It is a right plainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas in a State court of Texas, no matter what the cause of action may be, provided it demand over five hundred dollars. The exception of the 11th section could have no possible application to the case."

The same conclusion was reached in *Bushnell* v. *Kennedy*, 9 Wall. 387, in which, however, the prior decision in *Green* v. *Custard* does not appear to have been mentioned by counsel or court.

This was the established law at the time of the passage of the act of March 2d, 1867, 14 Stat. 558, known as the Local Prejudice Removal Act, which for the first time conferred upon a plaintiff as well as the defendant the right to remove a suit brought by him in a State court, when the controversy was between a citizen of the State where the suit was brought and a citizen of another State, upon making and filing an affidavit that he had reason to and did believe that, from prejudice or local influence, he would not be able to obtain justice in such State court. The case of the *City of Lexington* v. *Butler*, 14 Wall. 282, was removed by the plaintiff in the action, under this act, from the State court to the Circuit Court. The question of jurisdiction was raised on the ground that the suit, which was founded on interest coupons attached to bonds issued by the city of Lexington and payable to bearer, could not have been brought in the Circuit Court on account of the restriction contained in the 11th section of the Judiciary Act.

It was decided, however, that the case was not within that exception—the holder of such an instrument not being an assignee within the meaning of the act. But the court went further, and, speaking through Mr. Justice Clifford, said:

"Suppose, however, the rule is otherwise, still the objection must be overruled, as the suit was not originally commenced in the Circuit Court. Suits may properly be removed from a State court into the Circuit Court in cases where the jurisdiction of the Circuit Court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the Judiciary Act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the Circuit Courts. Since the decision in the case of *Bushnell* v. *Kennedy*, 9 Wall. 387, all doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the Judiciary Act has no application to cases removed into the Circuit Court from a State court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of Congress extending that privilege to other suitors not embraced in the twelfth section of the Judiciary Act."

By this construction of the act of 1867 it was placed within the power of a plaintiff, on filing the requisite affidavit, to transfer from the State court to the Circuit Court a suit which he could not have commenced in it; the precise objection which is made to the construction now given to the second section of the act of 1875.

It was in contemplation of these previous statutes, and of the judicial decisions construing them, that Congress passed the act of 1875, giving to plaintiffs as well as defendants unrestrained liberty to remove the cases specified in the second section from a State court to a Circuit Court, and we are bound to presume in full view and upon consideration of the very inconveniences which are now relied on as the ground for limiting the right of removal by force of the restrictive clauses in the first section of the act.

In our opinion this is not admissible. We are bound to take

the words of the law in their usual, ordinary, literal meaning, and to construe the two provisions in the different sections in the same sense which, in previous statutes, had uniformly been given to them, and not invent a new application and relation of the two clauses without any indication whatever of any intention on the part of Congress to that effect.

It was, perhaps, with foresight of possible practical inconveniences to result from the extension of the right of removal effected by the act of 1875, and in order to furnish means for preventing evasions of the limits of the jurisdiction of the courts of the United States under the forms of the law, that in the fifth section of the act it was provided, that if "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." However that may be, we cannot, on the mere ground of a policy of convenience, change the settled rules of construction according to which for so long a period these and similar statutes have been administered.

The question of jurisdiction having been thus answered in the affirmative, it becomes necessary to consider the errors assigned upon the rulings of the court at the trial. These appear from a bill of exceptions and a certificate of division of opinion between the judges before whom the trial was had, and which, to understand the exceptions, it is necessary to set out in full. It is as follows:

[The learned justice here recited the extract from the record quoted above, and continued:]

It was set out in the answer and relied on as a defence that the policy of original insurance made to Frances E. Barritt had been fraudulently procured for her by one Johnson upon false representations, greatly overvaluing the stock insured;

that Murphy received the assignment of the stock and policy with knowledge of the fraud, and that the pretended sale to him by Mrs. Barritt was without consideration and merely colorable and fictitious; that Murphy consequently never acquired or had any insurable interest in the stock and property insured; that after the fire, Murphy, in making proof of loss, stated under oath that the actual cash value of the property insured, at the time of the fire, amounted to $35,491.61, and that same belonged to him; that the property insured was injured to the amount of $26,827.06, and that of said amount $6,463.39 was the cost and value of goods totally destroyed, and $20,360.67 was the amount of the loss on that part of the stock damaged but not destroyed; whereas in truth and in fact the cash value of the goods insured, at the time of the fire, did not exceed $18,000, and the total amount of the loss and damage thereto by fire did not exceed $5,000, and that said goods did not belong to Murphy, as he well knew:

"That thereafter, the said Murphy was examined under oath, at the city of St. Paul, by an agent of the defendant, as provided in said policy, before J. D. O'Brien, Esq., and before R. B. Galusha, Esq., who were then and there respectively notaries public within and for the county of Ramsey, and in such examination the said Murphy did swear that he had purchased said stock from said Barritt, and that he was the sole owner thereof, and that no other person had any interest therein, and that he had fully paid for the same, each and every of which statements as to said purchase, ownership, interest, payment, and the manner thereof, were wholly false, as said Murphy well knew."

It is quite obvious that upon the issues, as made in the pleadings and actually tried, it was material to show what title and interest Murphy had at the time of the loss in the property insured. If he had no insurable interest, that certainly would have been a defence. The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in

regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and wilfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. "Fraud," said Mr. Justice Catron, in *Lord* v. *Goddard*, 13 How. 198, "means an intention to deceive." "Where one," said Shipley, Ch. J., in *Hammatt* v. *Emerson*, 27 Maine, 308–326, "has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive." "If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law." Bosanquet, J., in *Foster* v. *Charles*, 7 Bing. 105; *Polhill* v. *Walter*, 3 Barn. & Ad. 114; *Sleeper* v. *Insurance Company*, 56 N. H. 401; *Leach* v. *Republic Insurance Company*, 58 N. H. 245.

An attempt is made by counsel for the plaintiffs in error to distinguish between matters that are material only as evidence and matters material to the contract and liability of the defendants in error thereunder, and in argument the distinction is illustrated by the following statement:

"Where the question is as to the extent of the loss, and the

assured knowingly exaggerates his loss, and makes false statements concerning the same, his conduct must of necessity be held fraudulent, for he invites the company to take a false position, to assume new and unjust obligations, to pay a loss that has not been sustained and does not exist, to do that which will prejudice and damage the company. But if the assured had made a true statement of his actual loss, and then answered falsely, for personal reasons, as to the parties from whom he had purchased the goods, or the value of those purchased from a certain house, then there could be no fraud, because there could be no prejudice or damage. The questions would be *material as evidence*, but not *material as to the rights and liabilities of the company*."

But this position is untenable. The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we take to be simply this: that his motive for repeating the false statements to the insurance companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that but that he was induced to make statements, known to be false, intended to deceive the insurance companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers;

and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowingly and wilfully made, with the intent to deceive the defendants in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance.

Such we understand to be the precise effect of the rulings of the justice presiding at the trial of the case in the court below, in refusing the requests to instruct the jury as asked by the plaintiffs in error, and in giving the instructions contained in the charge excepted to; and, finding no error in them,

The judgment is affirmed.

HILTON & Another *v.* MERRITT, Collector.

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

Argued December 17th and 18th, 1883.—Decided January 14th, 1884.

Customs Duties.

1. The valuation of merchandise made by customs officers, under the statutes, for the purpose of levying duties thereon, is, in the absence of fraud on the part of the officers, conclusive on the importer.
2. §§ 2931, 3011, Rev. Stat., which give the right of appeal to the Secretary of the Treasury, when duties are alleged to have been illegally or erroneously exacted, and the right of trial by jury in case of adverse decision by the Secretary of the Treasury, do not relate to alleged errors in the appraisement of goods, but to the rate and amount of duties imposed upon them after appraisement.

Opinion of the Court.

This was a suit brought by the plaintiffs in error, who were plaintiffs in the Circuit Court, to recover the sum of $1,037.40, an alleged excess of duties exacted by the defendant as collector of customs at the port of New York, on two cases of kid gloves imported by plaintiffs from Paris, France, in the steamer Mosel, in June, 1878.

The complaint alleged that the plaintiffs made due protest at the time of paying such excessive duties, and made due and timely appeal to the Secretary of the Treasury, who affirmed the decision of defendant by which said duties were exacted.

The answer denied that the duties exacted were excessive, and averred that they were according to the rule imposed by law.

The case was tried by a jury, who, after hearing the evidence, returned, by direction of the court, a verdict for defendant, upon which judgment for costs was entered in his favor. To reverse that judgment this writ of error is prosecuted.

Mr. Henry E. Tremain for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

It appears from the bill of exceptions found in the record that the withdrawal entry of the packages on which the duty occasioning this controversy arose, was made October 23d, 1878. The local appraiser made and reported to the collector his appraisement of the goods. The importers being dissatisfied therewith, demanded a reappraisement according to law, which was allowed, and a merchant appraiser appointed to be associated with one of the general appraisers.

The merchant appraiser made an appraisement of the standard gloves at 42 francs per dozen, and of the invoice at 16,613.10 francs, which corresponded with the importer's invoice and entered valuation of the merchandise in question.

The general appraiser made a report of his appraisement on the same day, in which he put the value of the standard gloves at 52 francs, and the total valuation at 20,282.85 francs.

Upon receiving these and other appraisements, the collector

wrote to the general appraiser a letter, dated October 10th, 1878, in which he said:

"I have received the reports on the re-appraisement of gloves entered by Wilmerding, Hoguet & Co., per S. S. Lessing; Iselin, Neeser & Co., per S. S. Pereire; and A. T. Stewart & Co., per S. S. Mosel, together with a mass of testimony taken at the hearing, and a special report from yourself, giving in extenso your reasons for differing from the merchant appraisers in these cases. The merchant appraisers sustain the invoices or entered value, while you advance the value in two of the cases upwards of 20 per cent. The law requires the collector in cases of difference to decide between the merchant and general appraiser. I find that it has been the almost universal practice for the collector under these circumstances to adopt the higher valuation. Unwilling to accept this easy method of disposing of troublesome questions, and believing it to be the duty of a government officer, while carefully protecting the revenue, to see that no injustice is done to the merchant, I have personally devoted much time and attention to the examination of the evidence presented.

"It is a matter of surprise that three 'discreet' merchants should differ so widely from the general appraiser. With no disposition to evade the responsibility placed upon me by the law, I consider that the interests involved and the vexatious delays in reaching a satisfactory conclusion require that an effort should be made to fix a value which will remain unchallenged. I have therefore to suggest that you re-examine the evidence, in the hope that a result may be reached which shall not, on the one hand, make it appear that the merchants of New York cannot be relied upon to give a fair hearing and correct judgment on a question of value, or on the other hand, that the government seeks and enforces by its might that which is unjust.

"I would call your attention to the conflicting evidence as to the similarity of the glove marketed in London and New York.

"I would also call your attention to the amount to be added per button to represent the true value. I find it difficult from the evidence to fix this amount at five francs per dozen.

"The three reports are returned herewith."

To this letter the general appraiser replied, by letter of the same date, stating, among other things, as follows:

"As to the invoices under consideration I do not feel at liberty to formally withdraw the reports I have already presented, because they were found on the evidence received on the reappraisements, and I think it best that they should stand as expressing my convictions based on that evidence. If, however, you are willing to retain them as memoranda for that purpose, and will accept as substitutes therefor the additional reports which I present herewith and have designated as 'amended' reports, I shall feel that I have met, to the best of my ability, the considerations which your letter set forth."

The amended report of the general appraiser fixed the value of the merchandise in question in this case at 49 francs.

The collector, on October 23d, 1878, assessed the duty, 50 per cent. *ad valorem*, on the merchandise, based on the valuation of the standard glove at 49 francs, adopting the appraisement returned in the amended report of the general appraiser, that being an advance of the invoice value of 16.2 per cent., and imposed an additional duty of 20 per cent. *ad valorem* on account of undervaluation in the entry.

The importers, the plaintiffs in error, duly protested against the action of the collector and, under protest, paid the duties assessed and appealed to the Secretary of the Treasury, who, on November 11th, 1878, approved the decision of the collector, holding, however, that the correctness of the valuation was not a matter subject to appeal.

Upon the trial of the case the plaintiffs offered in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and various documents before those officers, and subsequently before the collector. They also offered the testimony of one Hildreth, an expert, and others, to show the foreign market value of gloves at the principal markets of France, whence the merchandise in question was imported. They also offered the testimony of the collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. They also offered to prove the cost of the manufacture of goods similar to those in question. All the evidence

so offered was excluded by the court, and the plaintiffs excepted.

It also appears from the bill of exceptions that the plaintiff's counsel claimed the right to go to the jury upon the questions: (1) Whether the collector, acting as appraiser, fully and fairly examined the goods. (2) Whether the goods were invoiced at their fair and actual value in the principal markets of France at the time of exportation. (3) Whether a fair examination of the goods was made by the general appraiser, associated with the merchant appraiser, when that matter was referred to him. (4) Whether the facts stated in the protests of the appraisers had been established by the evidence; and (5) whether the appraiser followed the evidence before him or disregarded it, and whether the collector disregarded the evidence or was negligent in his appraisal.

The plaintiffs also asked the court to charge the jury that if the collector did not fully and fairly examine the goods, then the verdict need not necessarily follow the appraisement; that the general appraiser not having re-examined the goods after he made his first report, the jury is not concluded by his report at 49 francs, or the collector's action therein.

The court refused to submit the questions aforesaid to the jury or to charge the jury as requested, and the plaintiffs excepted.

The bill of exceptions further states that no claim was made to submit to the jury any question of fraud on the part of the collector or appraiser, and that no claim was made during the trial that any excluded evidence was offered for the purpose of showing or did show or tended to show fraud on the part of the government officers.

The question presented by the exceptions of plaintiffs is whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest.

The solution of this question depends upon the provisions of

the acts of Congress regulating the subject, which are as follows:

Section 2900 declares in substance that the owner, &c., of any merchandise may, when he shall produce the original invoice to the collector and make and verify his written entry, and not afterward, make such addition to the cost or value given in the invoice as shall raise the same to the actual market value at the time of importation in the principal markets of the country from which the same has been imported, and the collector shall cause such actual market value to be appraised, and if such appraised value shall exceed by ten per centum or more the value declared in the entry, then there shall be collected in addition to the duties imposed by law a duty of twenty per cent. *ad valorem* on such appraised value.

Section 2902 declares:

"It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale price of every of them, as the case may require."

Section 2906 provides:

"When an *ad valorem* rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by or directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector . . . shall cause the actual market value or wholesale price thereof at the period of exportation to the United States in the principal markets of the country from which the same has been imported to be appraised, and such appraised value shall be considered the value on which the duty shall be assessed."

Section 2922 is as follows:

"The appraisers, or the collector and naval officer, as the case may be, may call before them and examine upon oath any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and require the production on oath to the collector, or to any permanent appraiser, of any letters, accounts or invoices in his possession relating to the same. All testimony in writing, or depositions, taken by virtue of this section, shall be filed in the collector's office, and preserved for future use or reference, to be transmitted to the Secretary of the Treasury when he shall require the same."

Section 2929 provides that the principal appraisers shall revise and correct the report of the assistant appraisers as they may judge proper, and report to the collector their decision thereon, who, if he deems any appraisement of goods too low, may order a reappraisement either by the principal appraisers or by three merchants designated by him for that purpose, and may cause the duties to be charged accordingly.

Section 2930 is as follows:

"If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them, and the appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly."

Section 2949 provides that the Secretary of the Treasury from time to time shall establish such rules and regulations,

not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisement of all merchandise imported into the United States, and just and proper entries of the actual market value or wholesale price thereof.

The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provisions for appeal have been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

The contention of the appellants is, that after the appraisal of merchandise has been made by the assistant appraiser, and has been reviewed by the general appraiser, and a protest has been entered against his action by the importer, and the collector has appointed a special tribunal, consisting of a general and merchant appraiser, to fix the value, and they have reported each a different valuation to the collector, who has decided between them and fixed the valuation upon which the duties were to be laid, that in every such case the importer is entitled to contest still further the appraisement and have it reviewed by a jury in an action at law to recover back the duties paid. After Congress has declared that the appraisement of the customs officers should be final for the purpose of levying duties, the right of the importer to take the verdict of a jury upon the correctness of the appraisement should be declared in clear and explicit terms. So far from this being the case, we do not find that Congress has given the right at all. If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods. The legislation of Congress, to which we have referred, was designed, as it ap-

pears to us, to exclude any such method of ascertaining the dutiable value of goods. This court, in referring to the general policy of the laws for the collection of duties, said in *Bartlett* v. *Kane*, 16 How. 263, "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion." And, referring to section 3 of the act of March 3d, 1851, which is reproduced in section 2930 Revised Statutes, this court declared, in *Belcher* v. *Linn*, 24 How. 508, that, in the absence of fraud, the decision of the customs officers "is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation." To the same effect see *Tappan* v. *United States*, 2 Mason, 393, and *Bailey* v. *Goodrich*, 2 Cliff. 597.

The appellants contend, however, that the right to review the appraisement of the customs officers by a jury trial is given to the importer by sections 2931 and 3011 of the Revised Statutes. The first of these sections provides that on the entry of any merchandise the decision of the collector as to the rate and amount of duties shall be final and conclusive unless the importer shall, within two days after the ascertainment and liquidation of the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto, and shall within thirty days after such ascertainment and liquidation appeal therefrom to the Secretary of the Treasury, and the decision of the Secretary in 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 such decision of the Secretary of the Treasury. Section 3011 provides that any person who shall have made payment under protest of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action, 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 2931.

The argument is that by these sections the appraisement which had been declared final by section 2930 is opened for review by a jury trial. Such is not, in our opinion, a fair construction of this legislation. Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duties may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted. The rate and amount of duties depends on the classification of the imported merchandise, that is to say, on what schedule it belongs to. Questions frequently arise whether an enumerated article belongs to one section or another, and section 2499 of the Revised Statutes provides that there shall be levied on every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned. In determining the rate and amount of duties, the value of the merchandise is one factor, the question what schedule it properly falls under is another.

Congress has said that the valuation of the customs officers shall be final, but there is still a field left for the operation of the sections on which the plaintiffs in error rely. Questions relating to the classification of imports, and consequently to the rate and amount of duty, are open to review in an action at law. This construction gives effect to both provisions of the law. If we yield to the contention and construction of plaintiffs in error, we must strike from the statute the clause which renders the valuation of dutiable merchandise final.

We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered

by the plaintiffs, and ruled out by the court, tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute, and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant.

The plaintiffs in error make the further point that the merchant appraiser having appraised the goods in question at 42 francs, and the general appraiser at 52 francs, the law which made it the duty of the collector to decide between them required him to adopt one valuation or the other, and did not authorize him to fix a valuation of his own between those made by the merchant and general appraisers, and that his appraisement at 49 francs was beyond his powers and unauthorized by law, and consequently void. Without deciding whether this construction of the law is the correct one, we reply that the bill of exceptions shows that after making his first report, the general appraiser filed an amended report, in which he placed his valuation at 49 francs, which was adopted by the collector. The right of the appraiser to amend his report was distinctly recognized in this court in *Bartlett* v. *Kane*, 16 Howard, *ubi supra*. The informal character of his amended report could not affect the power of the collector to act in the premises.

The plaintiffs in error contended further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise, is depriving the importer of his property without due process of law, and is therefore forbidden by the Constitution of the United States. The cases of *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272, and *Springer* v. *United States*, 102 U. S. 686, are conclusive on this point against the plaintiff in error.

We find no error in the record. The judgment of the Circuit Court must, therefore be

Affirmed.

Statement of Facts.

KELLOGG BRIDGE COMPANY *v.* HAMILTON.

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

Submitted October 31st, 1883.—Decided January 14th, 1884.

Contract—Implied Warranty.

A bridge company, having partially executed a contract for the construction of a bridge, entered into a written agreement with a person whereby the latter undertook, for a named sum and within a specified time, to complete its erection. The subcontractor agreed to assume and pay for all work done and material furnished up to that time by the company. Assuming this work to have been sufficient for the purposes for which it was designed, the subcontractor proceeded with his undertaking, but the insufficiency of the work previously done by the company was disclosed during the progress of the erection of the bridge. No statement or representation was made by the company as to the quality of the work it had done. Its insufficiency, however, was not apparent upon inspection, and could not have been discovered by the subcontractor until actually tested during the erection of the bridge: *Held*, That the law implied a warranty that the work sold or transferred to the subcontractor was reasonably sufficient for the purposes for which the company knew it was designed.

The Kellogg Bridge Company, the defendant below, undertook to construct, for the Lake Shore and Michigan Southern Railroad Company, an iron bridge across Maumee River at Toledo, Ohio. After doing a portion of the work it entered into a written contract with the defendant in error, for the completion of the bridge under its directions, containing among others, these stipulations:

"That the said party of the first part [Hamilton] hereby agrees to furnish and prepare all the necessary false work and erect the iron bridge now being constructed by the said party of the second part [the Kellogg Bridge Company] for the Lake Shore and Michigan Southern Railroad Company at Toledo, Ohio, over the Maumee River, receiving said bridge material as it arrives on the cars at the site of said bridge and erecting the same in the best manner, according to the design of said bridge and the directions of said second party from time to time, commencing the erection of said work when required to do so by said second party, and proceed-

ing with the same with a force sufficient to complete the entire work on or before the first day of March next; the said first party also agrees to assume and pay for all work done and materials furnished up to the time of executing this contract, including piling and piles, timber, and other materials and labor done on the same, but not including bolts and washers which have been furnished by the party of the second part, but to return said bolts and washers to the said second party, or pay for the same on completion of said bridge.

"And the said first party, in consideration of the payments hereinafter mentioned to be made by said second party, agrees to perform all the stipulations of this agreement in a thorough and workmanlike manner and to the satisfaction of the second party.

"And if at any time the said second party is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools or materials for false work as may be necessary, and charge the cost of the same to the said first party, who agrees to pay therefor."

In consideration of the faithful performance of these stipulations, Hamilton was to receive from the Bridge Company $900 on the completion of the first span, a like sum on the completion of the second span, $800 on the completion of the third span, and $1,403 on the completion of the draw and the entire work—such payments to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company.

The bridge which Hamilton undertook to erect consisted of three independent fixed spans, each to be one hundred and seventy-five feet six inches in length, suspended between and resting at each end of the span upon stone piers, which had been prepared to receive the same, and one draw span of one hundred and eighty-five feet in length, resting upon a pier in the centre, also then prepared. In erecting the several spans it was necessary to build and use what the contract described as 'false work,' which consisted of piles driven in the river be-

tween the piers upon which the spans were to rest, and upon which was placed a platform.

As indicated in the written contract, the Bridge Company had previously constructed a part of this false work between the first and second spans, the cost of which Hamilton paid, as by the contract he agreed to do. Assuming this work to be sufficient for the purposes for which it was designed, Hamilton proceeded to complete the erection of the bridge according to the plans furnished him.

There was evidence before the jury tending to establish the following facts:

A part of the false work or scaffolding put up by the company sank under the weight of the first span, and was replaced by Hamilton. When the second fixed span was about two-thirds completed, the ice, which before that had formed in the river, broke up in consequence of a flood, carrying away the false work under that span, and causing the whole of the iron material then in place on the span, or on the span ready to be put in place, to fall in the river, which at that place was about sixteen feet deep. If the piles driven by the Bridge Company had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood. In consequence of the insufficiency of the false work done by that company, Hamilton was delayed in the completion of the bridge and subjected to increased expense.

The bridge being completed, Hamilton brought suit in the State court to recover the contract price of the bridge, extra work claimed to have been done on it, and damages sustained by reason of the insufficiency of the false work constructed by the Bridge Company: in all $3,693.78. The cause was removed to the Circuit Court of the United States, where the Bridge Company answered, setting up a counterclaim for $6,619.70. Trial was had with verdict and judgment for plaintiff for $3,039.89. The defendant below brought a writ of error to reverse that judgment.

Mr. Richard Waite, and *Mr. E. T. Waite* for plaintiff in error.

Mr. John C. Lee for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

After reciting the foregoing facts, he continued: It is insisted by the defendant in error that the value of the matter really in dispute here is less than the amount requisite to give this court jurisdiction. Upon this ground a motion to dismiss was heretofore made, and was denied. To that ruling we adhere. Upon the pleadings it is apparent that the defendant asserts its right to judgment for $6,619.70 after crediting plaintiff, not only with the sum specified in the contract, but with every other sum to which he is entitled in the accounting. This is conclusive as to our jurisdiction upon this writ of error.

It was not claimed on the trial, nor is it contended here, that the company made any statement or representation as to the nature or character of the false work it did, and which, by the contract, Hamilton agreed to assume and pay for. But there was evidence tending to show that the insufficiency of that false work was unknown to Hamilton at the time the contract was made; was not apparent upon any examination he then made, or could have made; and was not discovered, indeed, could not have been discovered, until, during the progress of the erection of the bridge, the false work was practically tested.

The court, among other things, instructed the jury, at the request of plaintiff, and over the objections of the defendant, that by the contract—looking at all the circumstances attending its execution and giving to its terms a fair and reasonable interpretation—there was an implied warranty upon the part of the company that the false work it did, and which plaintiff agreed to assume and pay for, was suitable and proper for the purposes for which the Bridge Company knew it was to be used. This instruction was accompanied by the observation that if the evidence showed "that the particular work which was said to be defective was such that the plaintiff could not by examination ascertain its defects—for if they were apparent by mere examination of the false work it was the duty of the plaintiff to make that good—he had the right to rely upon the implied warranty; that is, if the defects were such that they could not

be, by ordinary observation and care on behalf of the plaintiff, ascertained and found out." That instruction presents the only question we deem it necessary to determine. Although there are several assignments of error, they depend, as counsel for plaintiff in error properly concede, upon the inquiry whether the court erred in ruling that by the terms of the contract there was an implied warranty that the false work constructed by the Bridge Company was suitable and proper for the purposes for which it was to be used by Hamilton.

The argument in behalf of plaintiff in error proceeds upon the ground that there was a simple transfer by the company of its ownership of the work and materials as they existed at the time of the contract; that Hamilton took the false work for what it was, and just as it stood; consequently, that the rule of *caveat emptor* applies with full force. The position of counsel for Hamilton is that, as in cases of sales of articles by those manufacturing or making them, there was an implied warranty by the Bridge Company that the work sold or transferred to Hamilton was reasonably fit for the purposes for which it was purchased.

The cases in which the general rule of *caveat emptor* applies are indicated in *Barnard* v. *Kellogg*, 10 Wall. 383, 388, where, speaking by Mr. Justice Davis, the court observed, that,

> "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies."

An examination of the ground upon which some of the cases have placed the general rule, as well as the reasons against its application, under particular circumstances, to sales of articles by those who have manufactured them, will aid us in determining how far the doctrines of those cases should control the one before us.

The counsel for the Bridge Company relies upon *Parkinson* v. *Lee*, 2 East, 314, as illustrating the rule applicable in ordinary sales of merchandise. That case arose out of a sale of five pockets of hops, samples of which were taken from each pocket and exhibited at the time of sale. The question was whether, under the circumstances of that case—there being no express warranty and no fraud by the seller—there was an implied warranty that the commodity was merchantable. It was resolved in the negative, upon the ground that it was the fault of the buyer that he did not insist on a warranty; the commodity was one which might or might not have a latent defect, a fact well known in the trade; and since a sample was fairly taken from the bulk, and the buyer must have known, as a dealer in the commodity, that it was subject to the latent defect afterwards appearing, he was held to have exercised his own judgment and bought at his own risk. But of that case, it was observed by Chief Justice Tindal, in *Shepherd* v. *Pybus*, 3 Man. & Gr. 868, that two of the judges participating in its decision laid "great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the hops had as full an opportunity of judgment of the quality of the hops as the seller himself." There was, consequently, nothing in the circumstances to justify the buyer in relying on the judgment of the seller as to the quality of the commodity. It is, also, worthy of remark, that in *Randall* v. *Newson*, 2 Q. B. 102, it was said of *Parkinson* v. *Lee*, that "either it does not determine the extent of the seller's liability on the contract, or it has been overruled."

In *Brown* v. *Edgington*, 2 Man. & Gr. 279, the plaintiff sought to recover damages resulting from the insufficiency of a rope furnished by the defendant upon plaintiff's order, to be used, as defendant knew, in raising pipes of wine from a cellar. The defendant did not himself manufacture the rope, but procured another to do so, in order that he, defendant, might furnish it in compliance with plaintiff's request. Tindal, C. J., said:

"It appears to me to be a distinction well founded, both in

reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required ; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

In *Shepherd* v. *Pybus*, already referred to, the question was whether, upon the sale of a barge by the builder, there was a warranty of fitness for the purpose for which it was known by the builder to have been purchased. It was held that the law implied such a warranty. The ground of the decision was that the purchaser had no opportunity of inspecting the barge during its construction, having seen it only after completion; that the defects afterwards discovered were not apparent upon inspection, and could only be detected upon trial.

In *Jones* v. *Just*, L. R. 3 Q. B. 197, upon an extended review of the authorities, the court classified the adjudged cases bearing upon the subject of implied warranty, and said that

"It must be taken as established that on the sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use or shall be merchantable, as the case may be."

Other cases might be cited, but these are sufficient to show the general current of decision in the English courts.

The decisions in the American courts do not indicate any substantial difference of doctrine. A leading case upon the subject, where the authorities were carefully examined and distinguished, is *Hoe* v. *Sanborn*, 21 N. Y. 552. The decision there was that

"Where one sells an article of his own manufacture which has a defect produced by the manufacturing process itself, the seller

must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice—unless he informs the purchaser of the defect —to indemnify him against it."

In *Cunningham* v. *Hall*, 4 Allen, 268, the cases of *Hoe* v. *Sanborn* and *Shepherd* v. *Pybus* and *Brown* v. *Edgington*, *ubi supra*, are cited with approval. In *Rodgers* v. *Niles*, 11 Ohio St. 48, 53, the Supreme Court of Ohio recognizes among the exceptions to the general rule cases

"Where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased, the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use."

So in *Leopold* v. *Vankirk*, 27 Wis. 152:

"The general rule of law with respect to implied warranties is well settled that when the manufacturer of an article sells it for a particular purpose, the purchaser, making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit and proper for such purpose and free from latent defects."

So also in in *Brenton* v. *Davis*, 8 Blackf. 317, 318:

"We consider the law to be settled that if a manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose; and that if, owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty."

2 Story on Contracts, § 1077, 5th edit., by Bigelow; 1 Chitty on Contracts, 11th American edit., 631–2, note *m*; Addison on Contracts, ch. 7, § 1, p. 212.

The authorities to which we have referred, although differing

in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.

Whether these principles control, or to what extent they are applicable, in the present case, we proceed to inquire.

Although the plaintiff in error is not a manufacturer in the common acceptation of that word, it made or constructed the false work which it sold to Hamilton. The transaction, if not technically a sale, created between the parties the relation of vendor and vendee. The business of the company was the construction of bridges. By its occupation, apart from its contract with the railroad company, it held itself out as reasonably competent to do work of that character. Having partially executed its contract with the railroad company, it made an arrangement with Hamilton, whereby the latter undertook, among other things, to prepare all necessary false work, and, by a day named, and in the best manner, to erect the bridge then being constructed by the Bridge Company—Hamilton to assume and pay for such work and materials as that company had up to that time done and furnished. Manifestly, it was contemplated by the parties that Hamilton should commence where the company left off. It certainly was not expected that he should incur the expense of removing the false work put up by the company and commence anew. On the contrary, he agreed to assume and pay for, and therefore it was expected by the company that he should use, such false work as it had previously prepared. It is unreasonable to suppose that he would buy that which he did not intend to use, or that the company would require him to assume and pay for that which it did not expect him to use, or which was unfit for use. It is suggested that, as Hamilton undertook to erect the bridge in a thorough and workmanlike manner, he was not bound to use the false work put up by the company, and that if he used it in execution of his contract, he did so at his own risk. This is only one mode of saying that, in the absence of an express warranty or fraud upon the part of the company, the law will not, under any circumstances, imply a warranty as to the quality or sufficiency of this false work. But the answer to this argument is that no question was raised as to its sufficiency; that, while Hamilton must be charged with knowledge of all defects apparent or discernible upon inspection, he could not

justly be charged with knowledge of latent defects which no inspection or examination, at or before the sale, could possibly have disclosed. The jury have, in effect, found the false work to have been insufficient, in that the piles were not driven deep enough; that had they been properly driven, the work would have answered the purposes for which Hamilton purchased it; and that he could not have ascertained such defects in advance of an actual test made during the erection of the bridge. It must be assumed that the company knew, at the time of sale, that Hamilton could not, by inspection, have discovered the latent defects which were subsequently disclosed. And if it be also assumed, as it fairly may be, that Hamilton, being himself a bridge builder, knew that there might be latent defects in this false work, caused by the mode of its construction, and beyond his power by mere inspection to ascertain, it must not be overlooked that he also knew that the company, by its agents or servants, were or should have been informed as to the mode in which the work had been done. That he did not exact an express warranty against latent defects not discoverable by inspection, constitutes, under the circumstances, no reason why a warranty may not be implied against such defects as were caused by the mode in which this false work was constructed. In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist on an express warranty against latent defects.

All the facts are present which, upon any view of the adjudged cases, must be held essential in an implied warranty. The transaction was, in effect, a sale of this false work, constructed by a company whose business it was to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time, discover; the buyer did not, because in the nature of things he

could not, rely on his own judgment; and, in view of the circumstances of the case, and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law, therefore, implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is instrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify its vendee against latent defects, arising from the mode of construction, and which the latter, as the company well knew, could not, by any inspection, discover for himself.

For the reasons stated, we are of opinion that the court did not err in the law of the case, and the judgment must be

Affirmed.

ALLEN & Another *v.* WITHROW & Another.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Argued December 11th and 12th, 1883.—Decided January 14th, 1884.

Deed—Equity—Frauds, Statute of—Iowa—Partnership—Statutes—Trust.

1. The facts in this case disclose no trust attached to the estate and property in the defendants' hands which a court of equity should enforce; at the best they show a promise—without consideration good or valuable—of a simple donation, to be subsequently made, with no relationship of blood or marriage between the parties, and therefore until executed, valueless.
2. A deed of real estate in blank in which the name of the grantee is not inserted, by the party authorized to fill it, before the deed is delivered, passes no interest.
3. Under the Statute of Frauds of Iowa in force when the transactions in controversy took place, a trust could not be created in relation to real estate, except by an instrument executed in the same manner as a deed of conveyance; but a trust of personalty could be created by parol, provided

the evidence of the trust was clear and convincing. Mere declarations of a purpose to create a trust were of no value, if not carried out.

4. Real estate owned by a partnership, purchased with partnership funds, is, for the purpose of settling the debts of the partnership, and of distributing its effects, treated in equity as partnership property.

Bill in equity by heirs at law of Thusie M. Allen to enforce a trust in relation to real and personal estate claimed to have been made in her favor in her lifetime. Answer denying the trust; and cross-bill by one defendant asking that plaintiffs might be perpetually restrained from setting up their claim. Judgment below for defendants in the original suit and sustaining the cross-bill. Plaintiffs in original suit and defendants in cross-suit, appealed.

Mr. C. C. Cole and *Mr. B. F. Kretzinger* for appellants.

Mr. George G. Wright for appellee.

Mr. Justice Field delivered the opinion of the court.

In November, 1875, one John F. Tracy, now deceased, executed to the defendant, Thomas F. Withrow, a deed of a large amount of property, real and personal, of great value, situated in Iowa. It is alleged that this deed, though absolute in form, was made in trust for one Thusie M. Allen, also now deceased, and the present suit is brought by her heirs-at-law to charge Withrow, as trustee, and compel him to account to them for the property. Withrow denies the alleged trust, and claims that he owns in his own right an undivided half interest in the property, and that the other undivided half belongs to his co-defendant, Wm. L. Scott, as assignee of Tracy. Scott has filed a cross-bill setting up his title and praying that it may be established. The court below sustained the claims of both defendants and dismissed the bill, and the case is brought here on appeal from its decree.

The facts which led to the execution of the deed in question, and upon which a trust is sought to be established, collected, so far as practicable, from a mass of conflicting testimony contained in a record of over 850 closely printed pages, are substantially as follows:

Opinion of the Court.

In the year 1868, when the Chicago, Rock Island & Pacific Railroad Company—a corporation created by the State of Illinois—was about to extend its road from Des Moines to Council Bluffs in Iowa, a company was formed, consisting of B. F. Allen, of Des Moines, Ebenezer Cook and John P. Cook, of Davenport in that State, to purchase land necessary for the stations and use of the railroad company between De Sota and Council Bluffs, and also other lands adjoining or near the several stations located by the engineer of the company. The agreement between the parties was at the time a verbal one, but in April, 1870, a memorandum was signed by them, giving its terms and reciting also the purchases which in the interval had been made. Among other things, it provided that Allen should furnish the money to make the purchases, and provide for the taxes and expenses; that the title to the property should be taken in his name as trustee for the joint account of the parties, and that the net proceeds should be divided between them as follows: one undivided half to Ebenezer Cook, one-fourth to Allen, and the remaining fourth to John P. Cook. The agreement also provided that Allen should keep an account of the amounts paid out by him, and of the sales, receipts, and expenses, so that from his books a statement might at any time be made showing the condition of the property, the amount sold, and the prices received; that the sales should be made by John P. Cook and Allen on the best terms they could obtain, and by their joint action when practicable; that from the proceeds of the sales Allen should retain the interest on his advances, the taxes on the property, and the expenses incurred, and then pay the advances made for the purchase of the property; and that the money and property remaining in his possession, including notes and contracts, after such payments, should be regarded as net profits, and be divided in kind, or converted into money and then distributed, and in either event according to the respective interests of the parties as mentioned above.

During this time Tracey was president of the railroad company, and though he is not named in the agreement, it is conceded that he was entitled to one-half of the interest represented by Ebenezer Cook, and had a right to control and dispose of it.

It appears that he had, previously to the formation of the land company, suggested to different parties that in case a litigation then pending, affecting the company, should terminate favorably, a good opportunity would be afforded to make a successful venture in the purchase and sale of land along the line of the road west of Des Moines; and that upon this suggestion the land company was formed. It appears, also, that in a conversation with Withrow, one of his counsel in the litigation referred to, upon the subject of a venture of this kind, Tracey had expressed a desire that his friends should be benefited by the venture; and that he, Withrow, should participate in it, advising him to bear this in mind in making out his bill for legal services. After the land company was formed, and the agreement made had been acted upon, Tracey was reminded by Withrow of this conversation, and of the understanding he had from it, that he was to have an interest in the venture. Tracey not only admitted a similar understanding on his part, but declared that Withrow had an interest in it, and in March, 1871, obtained from Ebenezer Cook a statement in writing to that effect. This statement, after referring to the agreement of the land company and the provision that one-half of the profits arising from the purchase and sale of real estate under it were to be his property; and reciting that it was understood that Withrow and one Johnson should have an interest in the profits of the venture, the amounts of which had not been specified, but were to be thereafter fixed by Tracey and himself, and that the remainder of said profits (if any) should be equally divided between Tracey and himself, declares that he, Cook, holds the interest specified in the agreement, and all amounts to be received thereon, in trust for the uses and purposes mentioned; that is to say, to pay from such receipts to Withrow and Johnson such amounts, respectively, as should be agreed upon as aforesaid, and to hold the one-half of the remainder in trust for Tracey, his heirs and assigns.

Subsequently, in October, 1872, Withrow, for the nominal consideration of one dollar, executed to Tracey a transfer of his interest in this contract and declaration of trust. In December following, Johnson executed to Tracey a similar transfer upon a like consideration.

Withrow testifies that this transfer was made by him not for the purpose of conveying the ownership of his interest to Tracey absolutely, but to facilitate a settlement with Allen of the affairs of the land company, which were embarrassed by improvident expenditures, and with an understanding that if Tracey realized anything out of the venture he should give Withrow his share. This testimony is corroborated by the statement contained in the deed subsequently executed by Tracey to Scott, that the transfer by Withrow was made upon an agreement that his interest should be protected for his benefit.

In November, 1875, Tracey executed to Withrow a deed of all the interest which he then had, or which might thereafter accrue to him, in the lands, notes, and bills receivable arising from the contracts, declaration of trust, and assignments mentioned. This deed recites the original agreement between Allen and the two Cooks, the subsequent declaration by Ebenezer Cook of the interest of Withrow, Johnson, and Tracey in the proceeds of the venture and the transfers executed in 1872 by Withrow and Johnson to Tracey, and in addition to conveying the property, authorizes the grantee, in his own name, to enforce a proper partition of it, and to collect for his own use any sums of money which might accrue to the grantor under the contracts, declaration of trust, and assignments mentioned.

Previously to the execution of this deed to Withrow, Allen had become bankrupt, and in due course of proceedings his property had been transferred to Hoyt Sherman, as assignee in bankruptcy. Subsequently a suit was commenced in the Circuit Court of the United States involving the title to the whole of the property of Allen in the land company. In that suit, the Charter Oak Life Insurance Company and others were complainants, and Allen and Sherman, his assignee in bankruptcy, were defendants. Withrow intervened and filed a cross-bill, claiming partition of the interest of Tracey held by him under the deed of November, 1875. By the decree of the court, entered in the fall term of 1877, which appears to have been made upon a compromise settlement, Withrow's

title to an interest of one-fourth in the property of the land company was recognized, and set apart to him in severalty. The value of this interest had been previously appraised by competent parties, acting under the authority of the court, at $80,000.

Tracey died in February, 1878. In December previously he addressed a communication to the defendant, William L. Scott, in which, after reciting that there had been reserved to him and parties interested with him a one-fourth interest in the land company, which he had deeded to Withrow, he says as follows:

"I hereby acknowledge that of the interest so belonging to me, you (William L. Scott) were the original owner of one-eighth of the entire company, or one-half owner of the interest standing in my name, and I hereby authorize T. F. Withrow to transfer and deed to you one-half of the interest conveyed by me to him, you paying Mr. Withrow one-half of all expenses and charges the interest held by me may be liable for."

Soon afterwards Tracey made a formal deed to Scott, conveying to him an undivided half of the lands, notes, contracts and mortgages awarded and set apart to Withrow by the decree of the Circuit Court of the United States under the deed of Tracey to him of November 16th, 1875, and instructing Withrow to transfer that interest to Scott. This deed recites, among other things, that Withrow had transferred his interest to Tracey under an agreement between them that the same should be protected by Tracey for his (Withrow's) benefit; that one-half of Tracey's interest in the lands and assets conveyed by his deed to Withrow was for the use of Withrow in his own right; that the other half was in trust for Tracey, his heirs and assigns; and that Withrow was "entitled, in his own right, to one-half, in value, of all lands, contracts, notes and mortgages which have been awarded and set apart to him, and holds the other one-half thereof in trust for the said John F. Tracey, his heirs, executors and assigns."

Upon these deeds of Tracey—the one to him of November 16th, 1875, and the deed to Scott of December 12th, 1877—the

defendant Withrow relies to defeat the suit of the complainants. Their ground for charging him as trustee is the alleged purpose of Tracey to give to Mrs. Allen the beneficial interest in the property held by him in the land company, and its execution by his deed to Withrow. Their story of this purpose and its supposed execution is this: that some time in June, 1875, Allen and his eldest daughter accompanied him, by his invitation, on an excursion to St. Paul, Minnesota, given by the directors of the Northwestern Railway Company; that during the excursion Tracey had several conversations respecting Allen's circumstances since his bankruptcy, and especially as to its effect upon the property and affairs of the land company, and that they resulted in Tracey's promising to give his interest in the property of that company to Mrs. Allen, with whom he was well acquainted, and of whom he had pleasant recollections; that after the return of Allen to Chicago he went to the office of Withrow and engaged him to prepare the deed for Tracey to sign; that Withrow accordingly drew a deed of transfer of Tracey's interest, specifying it to be one undivided fourth of the net profits arising from the joint account under the contracts and declaration of trust; that the name of the grantee was left in blank; that Allen went to New York, taking this deed with him, and that Tracey there, on the 11th day of October, 1875, signed and acknowledged it and delivered it to Allen; that Allen returned to Des Moines and delivered the deed to his wife; and that the reason why the name of the grantee was left in blank was because he feared the importunities of his creditors to obtain the property, and that Tracey authorized him to insert her name in the blank, or the name of any other person that might be deemed best.

The story further is, that afterwards Allen consulted Charles T. Ransom, an attorney at law at the time in Des Moines, respecting the insertion of the name of a grantee, and, whilst in consultation, another lawyer by the name of Edmunds came into his room, and, the whole matter of Tracey's rights in the property of the land company being discussed, it was the opinion of both Edmunds and Ransom that his interest was one-half; and for that reason it was resolved to procure a new deed

specifying such to be his interest instead of one-fourth; that the question of a proper person to whom such new conveyance should be made, was discussed, and the name of Withrow was finally settled upon as trustee; that Withrow was advised of this fact and assented to it; that thereupon another deed, substantially like the first, except that its recital showed Tracey's interest to be one-half, was prepared by Ransom and taken by him to New York, and was there executed by Tracey, to whom the reason for changing the form of the deed was explained; that Ransom brought this second deed to Iowa and handed it to Allen, who delivered it to his wife, and it was kept by them until February 24th, 1876, when it was sent to Ransom for his use in preparing a petition of intervention, and other pleadings, in the case of the Charter Oak Life Insurance Company and others against Allen and Sherman, his assignee, then pending in the Circuit Court; that it was not delivered to Withrow until about the time the decree was rendered in 1877; that, after that decree, Allen called upon Withrow to turn the property over to the heirs of his deceased wife; and that Withrow then, for the first time, claimed to own one-eighth of the property, or one-half of what had been recovered, in his own right, and refused to convey the other half except upon the written order of Tracey; and that he has ever since maintained this position.

The statement that the deed with a blank for the name of the grantee was drawn to transfer an interest to Mrs. Allen, or to create a trust in her favor, is contradicted by the testimony of Withrow, who says that it was a substitute for one drawn to Schuyler R. Ingham, recommended by him as a proper person to take charge and dispose of the interest of Tracey in the property of the land company; that the execution of the deed to Ingham having been delayed for a long time, Allen suggested that a new deed with the name of the grantee in blank should be sent to Tracey so that some other person, if Ingham was not acceptable to him, might be inserted, stating that Tracey had promised to convey his interest to Withrow, and that if, in winding up the affairs of the company, there was anything left of it, he would give it to Mrs. Allen. The deed itself shows, by its use of the masculine pronoun in all places

where reference to the grantee is made, that the draftsman never contemplated its execution to a woman.

Subsequently, according to the testimony of Withrow, the deed was shown to Ransom, who advised that the interest of Tracey in the property of the land company was one-half instead of one-fourth; and who, at the request of Allen, drew another deed for Tracey to sign similar to the one in blank, except that it represented Tracey's interest to be one-half of the property, and made Withrow the grantee.

The statement that Withrow consented to act as trustee of Mrs. Allen, or that the deed of Tracey to him was executed upon any trust for her, is also denied by Withrow; and it is inconsistent with the declarations and conduct of both himself and Tracey. Immediately upon the request of Allen for the property, and under date of December 8th, 1877, he wrote to Tracey, informing him of the decree of the Circuit Court, and the request of Allen and the refusal to comply with it in the absence of instructions from him.

"You will remember," he writes, "that one-eighth interest of the entire speculation was awarded to me. The other eighth of the property recovered by me I hold subject to your order. I have understood from Mr. Ransom, and have inferred from your conversation with me, that before the commencement of this suit you intended to be liberal to Mrs. Allen in disposing of your share; and Mr. Allen, relying upon this, has requested me to convey the one-eighth interest which I hold for you to him. In view of the fact that I have never received definite instructions from you to make any disposition of it, and the further fact that Mrs. Allen is now dead, I have not felt at liberty to make any conveyance without instructions from you in writing."

No answer was made to this letter, nor was any instruction given by Tracey as to his wishes or intentions on the subject, except such as are found in the paper addressed to William L. Scott, under date of December 12th, 1877, and in the deed executed to him soon afterwards; and these, as already seen, negative the idea that Withrow was to hold the property for the benefit of Mrs. Allen.

Opinion of the Court.

In this communication, it is seen, Withrow asserts a right to one-eighth interest in the entire property of the land company, as having been awarded to him. If this claim of an interest in the property had been a false and fraudulent one, set up to defraud others, we should expect some denial of it from Tracey; but instead of that we find its correctness affirmed by him. It is difficult to believe that a claim for property, estimated at the time to be worth $40,000, would have received recognition from one who, if the claim was fraudulent, knew it to be so. On the contrary, we should expect that it would meet with instant and indignant repudiation.

But if we admit the statement of the complainants as to the alleged promise of Tracey to give his interest in the property of the land company to Mrs. Allen, and as to the execution of the two deeds—the one in blank and the one to Withrow—there is no case shown for the relief prayed by the bill.

The promise alleged to have been made in conversation with Allen and his daughter on the trip to St. Paul was without consideration, good or valuable; there was no relationship, by blood or marriage, between Mrs. Allen and Tracey. It was the promise of a pure donation to be subsequently made; and, until executed, it was, in a legal view, valueless.

The deed in blank passed no interest, for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be, and probably is, the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank. *Swartz* v. *Ballou*, 47 Iowa, 188; *Van Etta* v. *Evenson*, 23 Wis. 33; *Field* v. *Stagg*, 52 Missouri 534. As said by this court in *Drury* v. *Foster*, 2 Wall. 24, at p. 33:

"Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is, that the power is sufficient."

But there are two conditions essential to make a deed thus

executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named. Allen, to whom it is stated the deed was handed, with authority to fill the blank and then deliver the deed, gave it to his wife without filling the blank, and she died with the blank unfilled.

The deed of Tracey to Withrow embraced real as well as personal property. It was for the purchase and sale of real property that the land company was formed, and by the terms of the contract of association all the property of the company remaining after payment of taxes, expenses, and advances, was to be deemed profits, and divided in kind or converted into money and then distributed. Though the declaration of trust by Ebenezer Cook speaks of the interest of Tracey in the land company as an interest in its "profits," that term is used with reference to its meaning as declared in the contract of association, to which that declaration of trust refers, and to which it is annexed.

In the partition by the decree of the Circuit Court of the United States of the interest conveyed to Withrow, "lands, lots, notes, contracts, and mortgages" are specified as awarded and set apart to him. So far as the real property is concerned, no trust in relation to it could be established under the Statute of Frauds of Iowa in force when the deed of Tracey was signed, except by an instrument in writing executed in the same manner as a deed of conveyance. The language of the statute is, "declarations, or creations of trust, or powers in relation to real estate, must be executed in the same manner as deeds of conveyance, but this provision does not apply to trusts resulting from the operation or construction of law." The statute also enumerates, among the contracts in reference to which no evidence is competent unless it be in writing and signed by the party or his lawfully authorized agents, "those for the creation or transfer of any interest in lands, except leases for a time not exceeding one year."

So far as the personal property conveyed to Withrow is concerned, it must be admitted that a trust may be established by

parol evidence; but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory, as in this case. The evidence must consist of something more than loose conversations with third parties. The declarations of the grantor relied upon must be made at the time of his conveyance or whilst he retains an interest in the property, and be so connected with the conveyance as to justify the conclusion that it was made or is held in execution of the purposes declared. Declarations of a purpose to create a trust not carried out are of no value, nor are direct promises to that effect unaccompanied with considerations turning them into contracts.

The deed of November 16th was handed to Ransom to be delivered to Withrow without any declaration from Tracey as to the purpose for which it was made or the considerations by which it was supported. Nothing was said at that time which could change the absolute character of the instrument, nor is there any evidence of any declarations subsequently made, by parol or in writing, by the grantor with respect to that deed, except such as are found in the communication to Scott and the deed to him.

It does not affect the conclusion, therefore, whether we treat the whole property conveyed to Withrow as real or personal property, or as consisting of both. Real property owned by a partnership and purchased with partnership funds is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property. It matters not whether it be so treated here. In any view, no legal trust was created with respect to the property in favor of Mrs. Allen which she could have enforced had she been living, or which can now be enforced by her heirs-at-law.

Decree affirmed.

Syllabus.

BUSSEY & Another *v.* EXCELSIOR MANUFACTURING COMPANY.

EXCELSIOR MANUFACTURING COMPANY *v.* BUSSEY & Another.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Argued January 8th, 1884.—Decided January 21st, 1884.

Patent.

The first four claims of reissued letters patent No. 3,815, granted to Esek Bussey and Charles A. McLeod, February 1st, 1870, for a "cooking-stove," the original patent, No. 56,686, having been granted to said Bussey, as inventor, July 24th, 1866, and reissued to him, as No. 3,649, September 28th, 1869, namely: "1. A diving-flue cooking stove with the exit-flue so constructed as to inclose on the sides and bottom the culinary boiler or hot-water reservoir B; 2. A diving-flue cooking-stove with the exit-flue constructed across the bottom and up the rear upright side of the culinary boiler or hot-water reservoir B; 3. A diving-flue cooking-stove constructed with an exit passage, F, below the top of the oven, and an exit-flue, E E', in combination with an uncased reservoir, B, attached to the rear of the stove, and placed just above such exit passage, and so arranged that the gases of combustion, in passing through such exit-flue, will impinge upon or come in direct contact with said reservoir, substantially as and for the purposes hereinbefore specified; 4. An exit-passage, F, constructed in the rear of a diving-flue cooking-stove and below the top of the oven, in combination with an uncased reservoir, B, attached to the rear of the stove, the bottom of which reservoir is also below the top of the oven, and so arranged that the gases of combustion will come in contact with, and heat such reservoir by, a direct draft from the fire-box to the smoke-pipe," are limited to a structure in which the front of the reservoir has no air space in front of it, and in which the exit-flue does not expand into a chamber at the bottom of the reservoir, and in which the vertical part of the exit-flue does not pass up through the reservoir.

Hence, those claims are not infringed by a stove in which, although there are three flues, and an exit-passage below the top of the oven, and a reservoir the bottom of which is below the top of the oven, no part of the rear-end vertical plate is removed so as to allow the gases of combustion to come into direct contact with the front of the reservoir, nor is any such plate employed as the plate *w w* of the patent, but there is a dead air-space between the rear plate of the flue and the front of the reservoir, and the exit-flue is not a narrow one, carried across the middle of the bottom of the

reservoir, as in the patent, but the products of combustion, on leaving the flue space, pass into a chamber beneath the reservoir, the area of which is co-extensive with the entire surface of the bottom of the reservoir, and the vertical passage out of such chamber is not one outside of the rear of the reservoir, but is one in and through the body of the reservoir, and removable with it.

The claim of letters patent No. 142,933, granted to David H. Nation and Ezekiel C. Little, as inventors, September 16th, 1873, for an "improvement in reservoir cooking-stoves," namely, "1. The combination, with the back-plate I of the cooking-stove A, of the reservoir C, arranged on a support about midway between the top and bottom plates of the stove, and the air-chamber *b* between the stove back and reservoir front, open at the top, and communicating with the air in the room, substantially as and for the purposes set forth; 2. The combination, with the stove A and reservoir, C, of the small opening *a*, the sheet-flue G under the entire bottom of the reservoir, and the small exit-passage or pipe E, all substantially as and for the purposes herein set forth," are void for want of novelty.

The claims of letters patent No. 142,934, granted to said Nation and Little, September 16th, 1873, for an "improvement in reservoir cooking-stoves," namely, "1. The detachable base-pan or flue-shell D, attached to the body at a point near the centre of the back plate of the stove, by means of hooks *a a* cast on the base-pan, and pins *b b* on the stove body, substantially for the purposes herein set forth; 2. The portable reservoir F, with the flue E in the rear side, in combination with the portable base-pan or flue-shell D, substantially as and for the purposes herein set forth; 3. The combination, with a three-flue stove having damper H arranged as described, of the portable base-pan or flue-shell D and warming-closet G, all substantially as and for the purposes herein set forth," are void for want of novelty.

There was no invention, in claim 1, in using, to attach the base-pan, an old mode used in attaching other projecting parts of the stove.

Claims 2 and 3 are merely for aggregations of parts and not for patentable combinations.

Mr. Charles J. Hunt for Bussey & Another.

Mr. S. A. Duncan for Excelsior Manufacturing Company.

Mr. Justice Blatchford delivered the opinion of the court.

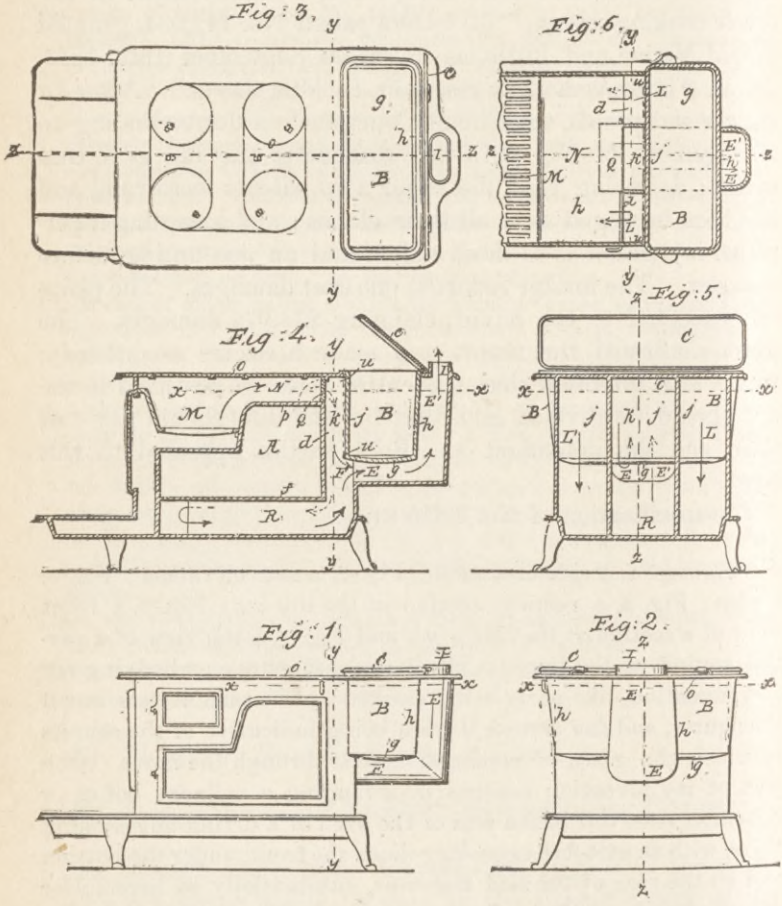
This is a suit in equity brought in the Circuit Court of the United States for the Eastern District of Missouri, by Esek Bussey and Charles A. McLeod against the Excelsior Manufacturing Company of St. Louis, a corporation, for the infringement of three several letters patent, being (1) reissue No. 3,815, granted to the plaintiffs, February 1st, 1870, for a "cooking-

stove," the original patent, No. 56,686, having been granted to said Bussey, as inventor, July 24th, 1866, and reissued to him, as No. 3,649, September 28th, 1869; (2) letters patent No. 142,933, granted to David H. Nation and Ezekiel C. Little, as inventors, September 16th, 1873, for an "improvement in reservoir cooking-stoves;" (3) letters patent No. 142,934, granted to said Nation and Little, as inventors, September 16th, 1873, for an "improvement in reservoir cooking-stoves." After an answer and proofs, the Circuit Court made a decree finding no infringement of No. 3,815 and dismissing the bill as to that patent; decreeing that the other two patents were valid and had been infringed as to all their claims; and awarding a perpetual injunction as to those claims and an accounting before a master. The master reported one cent damages. The plaintiffs excepted to the report, claiming $14,972 damages. The court confirmed the report and made a decree accordingly, which also provided that the entire costs to be taxed in the suit should be divided and that the plaintiffs should pay $\frac{5}{7}$ of them and the defendant $\frac{2}{7}$. Both parties appealed to this court.

The specification of No. 3,815 says:

"Figure 1 is a side elevation; Fig. 2, a rear elevation; Fig. 3, a plan; Fig. 4, a vertical section at the line *z z*; Fig. 5, a front view of a section at the line *y y*; and Fig. 6, a top view of a partial section at the line *x x*, all of a cooking-stove embodying my said invention, like parts being marked by the same letters in all the figures, and the arrows therein being indicative of the courses in which the gases of combustion pass through the stove. One part of my invention consists in arranging a culinary boiler or hot-water reservoir in the rear of the oven of a diving-flue cooking stove, with an exit-flue extending down the front, under the bottom and up the rear of the said reservoir, substantially as hereinafter described and specified. It also consists in arranging a culinary boiler or hot-water reservoir in the rear of the oven of a diving-flue cooking-stove, with an exit-flue leading from some point in the rear of the vertical flue or flues below the top of the said oven, and continuing under the bottom and up the rear side of said reservoir, substantially as hereinafter described and specified. It also con-

sists in the arrangement of a diving-flue cooking-stove, with an exit-passage constructed in the vertical rear flue or flues thereof, and below the top of the oven, in such a manner that the gases of combustion, after passing through such exit-passage, will impinge



upon or come in contact with the bottom or sides of a reservoir placed in the rear of the stove, and just above said exit-passage, substantially as hereinafter described and specified. It also consists in the employment of a thin plate or sheet of metal between the front plate of the reservoir and the rear-end vertical flues of

the said stove, substantially as shown and specified. In illustration of my invention, the aforesaid drawings represent a cooking-stove having an oven, A, a culinary boiler or hot-water reservoir, B, arranged opposite to the rear upright side or end *d* of the oven, and an exit-flue, E E′, extended from the central vertical flue K of said stove at a point below the top of the oven, under or across the bottom *g* of the reservoir, and from thence up along the rear upright side of said boiler or reservoir to the draft-pipe I. For the purpose of allowing the boiler to heat more readily, a portion of the rear-end vertical plate of said stove is removed, so as to uncover the upper portion of the rear-end vertical flues, and the front of the boiler is attached to the rear of said flues, in the manner shown and described in my reissued patent of July 24th, 1866. Between the inner side of the boiler B and the rear-end vertical flues K and L L′, a plate may be employed, indicated by dotted line *w w*. The object of this plate is as follows: It has been ascertained by experience that when, during the use of the oven for baking purposes, a large quantity of cold water is suddenly poured into the reservoir, and there is nothing between the front of the boiler and gases of combustion passing through the rear-end vertical flues, the heat of the said gases will be so much absorbed by the reservoir as to sensibly cool the oven and interfere with the process of baking. To obviate this I employ the thin plate *w w*, placed between the front of the reservoir and the said rear-end vertical flues, and which, while it allows sufficient heat to pass through it to aid in heating the boiler, protects the front thereof from the direct impact of the gases of combustion, and preserves an equable heat in the oven. In case the said plate is dispensed with the inner side J of the said boiler will form a part of the lateral rear casing of the said rear-end vertical flues, and will be heated by direct contact with the gases of combustion as they pass down and up the same. M is the fire-box, and N and R the top and bottom flues of said stove. The operation of my said invention is as follows: A fire being kindled in the fire-box M, and the damper Q at the top of the oven being open, so as to allow of a direct draft, the gases of combustion from the said fire-box will pass down the middle vertical flue K, through the exit-passage F and exit-flue E E′, to the smoke-pipe I, heating the contents of the reservoir in its passage through the exit-flue, as aforesaid. By this mode of construction I am enabled to obviate what

has been heretofore the greatest objection to reservoir-stoves of this class, namely, that the reservoirs would not heat with a direct draft. It will also be observed that, by this device of constructing the exit-passage below the top of the oven, I can at the same time by a direct draft heat the rear side of the oven and the reservoir, instead of wasting the heat by carrying it directly to the chimney. When the damper Q is closed, for the purpose of heating the oven, the gases of combustion will pass down the side vertical flues L L′ and under the bottom of the oven, returning through a central horizontal flue to the central vertical flue K, from which they pass through the exit-flue E E′, aforesaid. I am aware that cooking-stoves have been in use in which the reservoir has been incased or inclosed on all sides except the top by a kind of expanded flue, through which the gases of combustion are made to pass. The advantages of my plan over this device are twofold: First, it is much more economical, requiring far less material and labor to construct it; and, second, by confining the heat and gases of combustion to a small space at the bottom and rear of the reservoir, the contents thereof will be much more effectually heated than where the products of combustion are admitted to an extensive flue-space and permitted to rise and expend their heat at or near the top of the reservoir."

The claims of the patent, the first 4 only of which are alleged to have been infringed, are as follows:

"1. A diving-flue cooking-stove with the exit flue so constructed as to inclose on the sides and bottom the culinary boiler or hot-water reservoir B. 2. A diving-flue cooking-stove with the exit-flue constructed across the bottom and up the rear upright side of the culinary boiler or hot-water reservoir B. 3. A diving-flue cooking-stove constructed with an exit passage, F, below the top of the oven, and an exit-flue E E′, in combination with an uncased reservoir, B, attached to the rear of the stove, and placed just above such exit passage, and so arranged that the gases of combustion, in passing through such exit-flue, will impinge upon or come in direct contact with said reservoir, substantially as and for the purposes hereinbefore specified. 4. An exit-passage, F, constructed in the rear of a diving-flue cooking-stove and below the top of the oven, in combination with

an uncased reservoir, B, attached to the rear of the stove, the bottom of which reservoir is also below the top of the oven, and so arranged that the gases of combustion will come in contact with and heat such reservoir by, a direct draft from the fire-box to the smoke-pipe. 5. In a cooking-stove wherein the rear-end vertical plate, or a portion of the same, has been removed for the purpose of heating a reservoir placed in the rear thereof, the shield-plate *w w*, in combination with the uncased reservoir B and the rear-end vertical flues K, L, and L′, substantially as and for the purposes hereinbefore described and specified."

The defendant's stove has three flues and an exit-passage below the top of the oven, and a reservoir, the bottom of which is below the top of the oven; but no part of the rear-end vertical plate is removed so as to allow the gases of combustion to come into direct contact with the front of the reservoir, nor is any of such plate employed as the plate *w w* of the patent, but there is a dead air-space between the rear plate of the flue and the front of the reservoir. The exit-flue is not a narrow one, carried across the middle of the bottom of the reservoir, as in the patent, but the products of combustion, on leaving the flue-space, pass into a chamber beneath the reservoir, the area of which is co-extensive with the entire surface of the bottom of the reservoir; and the vertical passage out of such chamber is not one outside of the rear of the reservoir, but is one in and through the body of the reservoir, and removable with it. In view of the earlier patents put in evidence, we are of opinion that the 4 claims in question must be limited to a structure in which the front of the reservoir has no air-space in front of it, and in which the exit-flue does not expand into a chamber at the bottom of the reservoir, and in which the vertical part of the exit-flue does not pass up through the reservoir. Under this construction there is no infringement of No. 3,815.

Claim 1, in requiring that the exit-flue shall "inclose on the sides and bottom," the reservoir, requires, in the language of the text of the specification, that it shall extend "down the front, under the bottom and up the rear" of the reservoir;

and it does not admit of an air-space in front of the reservoir; nor is it limited to what is called a low-down boiler or reservoir. The Getz patent of 1840 shows an exit-flue passing under the bottom and up the rear side of a reservoir. The Spaulding or Paris patent of 1858 shows a diving-flue inclosing the bottom and one of the sides of a reservoir.

Claim 2 is not limited to a low-down boiler or reservoir. If a stove with an exit-flue constructed across the bottom and up the rear upright side of a boiler or reservoir existed before, there was nothing patentable in applying such construction to a diving-flue stove. The combination of exit-flue and reservoir with which claim 2 is concerned has no patentable relation to the arrangement of the internal flues of the stove. The Getz patent of 1840 shows an exit-flue extending across the bottom and up the rear upright side of a boiler. In the Stewart patent of 1859 the products of combustion enter a chamber under the reservoir and thence pass off by a pipe embraced within the walls of the reservoir. The exit-flue of claim 2 must, therefore, be limited to one which passes under the bottom of the reservoir without expanding into a chamber substantially co-extensive with the area of the bottom of the reservoir, as in the defendant's stove and in the Stewart patent of 1859; and also to one in which the escape-pipe is outside of the rear wall of the reservoir and not within the reservoir, as in the defendant's stove and in the Stewart patent of 1859.

Claim 3 adds to claim 2 only the feature of having the exit-passage or exit-orifice into the exit-flue, below the top of the oven. There is no patentable relation between the combination of exit-flue and reservoir and the location of the exit-passage with reference to the oven, in view of the state of the art. In the Stewart patent of 1859 the exit-opening was on a level with the top of the oven and led into a chamber under the reservoir. In the Spaulding or Paris patent of 1858, and in the Bussey patent of 1865, the bottom of the reservoir was below the top of the oven. There was no invention in causing the gases to act on a low-down reservoir in the same way in which they had acted before on an elevated reservoir; and no invention in lowering the exit opening to correspond

with the depression of the reservoir, even though the incidental effect was to heat by a direct draft, at the same time, the reservoir and the rear side of the oven.

Claim 4 adds to claim 3 only the feature of heating the reservoir by a direct draft from the fire-box to the smoke-pipe. This, however, is only a statement of the effect produced in a structure made according to the first three claims. In the Getz patent of 1840 and in the Stewart patent of 1859 the exit-pipe was in the rear of the reservoir, and the gases were brought into contact with the bottom of the reservoir, and it was heated by a direct draft. There is really nothing in claim 4 beyond what is found in claim 3.

The specification of No. 142,933 is as follows:

"Our invention relates to that class of cooking-stoves in which a water reservoir is situated at the rear end of the stove; and it consists in the arrangement of the reservoir upon an extended support at the rear of the stove, so that an air-chamber, opening at its top into the air of the room, is left between the back-plate of the stove and the front of the reservoir, thereby protecting the front of the same from becoming burned out by being in direct contact with the heat from the fire. It also consists in a broad sheet-flue arranged under the reservoir, the heated air for which enters through a small passage in the back-plate of the stove, and, after circulating in said flue, passes out through the small opening in the rear thereof, all as more fully hereinafter set forth. . . . Figure 1 is a longitudinal vertical section of our stove; Fig. 2 is a transverse vertical section of the same through the water-reservoir; Fig. 3 is a plan view of the reservoir; and Fig. 4 is a front view of the sheet-flue under the bottom of the reservoir. A represents the top plate of the stove. B is the oven; C, the water-reservoir; D, the centre one of the three flues of the stove; and E, the exit-flue, located in the rear of the reservoir C. This reservoir is located upon a support therefor, which extends rearward from a point about half way between the top and bottom plates of the stove, and which may either be attached to or form part of the stove, and a sheet-flue, G, is provided in the same under the bottom of the reservoir C. The heat, entering this flue,

passes through the small centre passage *a* in the stove-back I. It is there spread and retained under the reservoir until it gradually ascends through the small passage or exit-flue E. By this con-

Fig 1

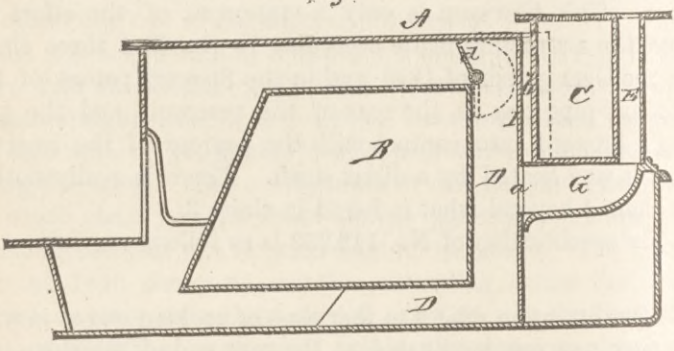


Fig 3

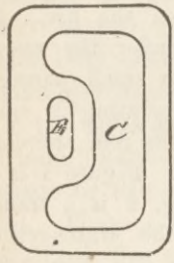


Fig 4

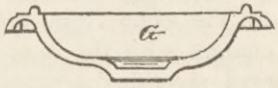
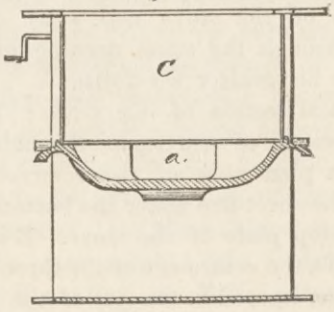


Fig 2



struction the rapid exit of the heated air from under the reservoir is prevented, and the heat, being retained under the bottom of the reservoir, causes the water in the same to become hot in a short time. The reservoir C is so arranged with respect to the

back-plate I of the stove that an air-space, *b*, communicating with the air of the room at the top, is left between the front of the reservoir and the back-plate. By this means the outside air will pass down between the back-plate and front of the reservoir and prevent the front of the reservoir from burning out, which would be the case if the parts were in direct contact, especially when the water in the reservoir becomes low. In the ordinary method the flame is made to strike directly upon the front surface of the reservoir, thereby rendering it liable to crack while replenishing with cold water upon the heated plates. The opening *a* in the back-plate I of the stove is of the same width as the centre-flue D, and the products of combustion pass through said opening into the sheet-flue G, which thus has a contracted entrance and a contracted exit. When using the direct draft the damper *d* of the centre flue D is turned downward and rests against the back-oven plate, as shown by the dotted lines in Fig. 1. At such times the heat passes down the centre-flue D of the back, through the opening *a* in the back-plate I, into the sheet-flue G under the bottom of the reservoir, and out of the exit-flue E. When the indirect draft is used, the damper *d* occupies the position shown in Fig. 1, and at such times the heat passes down the usual side flues and under the bottom of the oven to the front of the stove, where it turns into the centre-flue D and passes back through the opening *a* to the sheet-flue G under the bottom of the reservoir and out of the exit-flue. With a stove thus constructed, the reservoir is heated almost entirely from the bottom, and the heat acts upon the entire surface of the bottom of the reservoir, and when the reservoir is but partially filled there is no danger of the heat acting against, and burning out, the top part of the front side of the reservoir. We do not claim under this patent a flue-shell and rear central extension that is detachable from the stove-body by means of hooks on the one and catches or pins on the other, nor do we specifically claim a reservoir with a flue in its rear, as these elements of invention are the subject of a separate application for a patent, now pending; neither do we wish to be understood as claiming the arrangement of the reservoir and flues for heating the same in front of the fire-box of the stove, as shown in our patent of May 6th, 1873, No. 138,682."

The claims of No. 142,933 are 2 in number, as follows, and the infringement of both is admitted:

"1. The combination with the back-plate I of the cooking-stove A, of the reservoir C, arranged on a support about midway between the top and bottom plates of the stove, and the air-chamber *b* between the stove-back and reservoir-front, open at the top and communicating with the air in the room, substantially as and for the purposes set forth. 2. The combination, with the stove A and reservoir C, of the small opening *a*, the sheet-flue G under the entire bottom of the reservoir, and the small exit-passage or pipe E, all substantially as and for the purposes herein set forth."

The point of invention in claim 1 is in so arranging the reservoir as to have an air-space between the front plate of the reservoir and the back plate of the stove, to a sufficient extent to prevent the flame from striking against the upper part of the front plate of the reservoir, which it would do if the upper part of the back plate of the stove were cut away, and there were no such air-space. It is the upper part of the front side of the reservoir which, as the specification states, is liable to be burned out by the direct action of the flame, as the water in the reservoir is lowered. In the McDowell patent of 1871 all the upper part of the reservoir is protected by an air-space, open at the top, between the reservoir and the stove.

The point of invention in claim 2 is to take the gases through a small opening into a broad sheet-flue under the bottom of a reservoir and out through another small opening in the rear, so that they will circulate in the broad flue and act on the entire surface of the bottom of the reservoir. The Stewart patent of 1859 shows the same arrangement with an elevated reservoir, but there is no invention in applying it to a low-down reservoir. The Tiffany patent of 1869 shows the same arrangement with a low-down reservoir.

The specification of No. 142,934 says:

"The nature of our invention consists in the construction and arrangement of a cooking-stove with a portable base-pan or flue-shell, and the means for attaching the same, as will be hereinafter more fully set forth. . . . Figure 1 is a longitudinal vertical section of our improved cooking-stove; Fig. 2 is a side view of

the rear end of the same ; Fig. 3 is a plain view of a loose cover or plate for the base-pan ; and Fig. 4 is a perspective view of the portable base-pan or flue-shell. A represents the main baking-

Fig 1

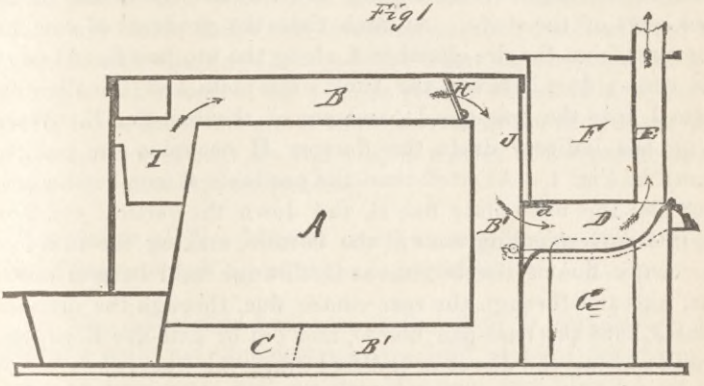


Fig 3

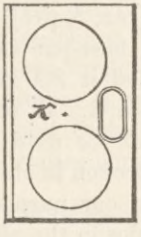
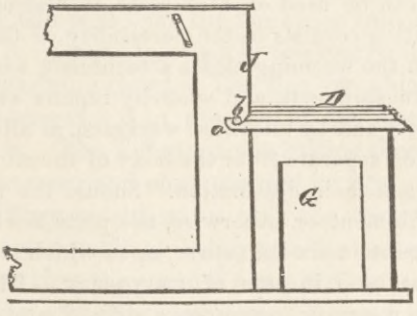


Fig 4

Fig 2



oven of the stove ; B is the top flue ; B B′, the vertical and horizontal side flues ; C is the centre flue ; D is the base-pan or flue-shell ; E, the exit-flue passing up the rear side of the reservoir ;

F is the reservoir; G, the warming-closet; H, the damper; I, the fire-chamber; and J, the division-plate. When using the direct draft, the damper H occupies a line parallel with the back plate of the main oven, hanging down in the centre flue of the back part of the stove. At such time the products of combustion pass from the fire chamber I, along the top flue B, and down the centre flue, between the back oven-plate and the division-plate J, into the base-pan D, and out of the exit-flue E. When using the indirect draft the damper H occupies the position shown in Fig. 1. At such time the products of combustion pass over the top oven-plate flue B, and down the vertical end flues B', into corresponding flues at the bottom, making the turn into the centre flue of the bottom at C, through said bottom centre flue, into and through the rear centre flue, through the division-plate J, into the base-pan flue D, and out of exit-flue E, so that, whether using the direct or indirect draft, the reservoir is heated only on its bottom surface. The base-pan D is made separate from the stove, and provided on each side with a hook projection, *a*, to be fastened on a pin, *b*, projecting from the side of the stove. By this means the base-pan can readily be attached and detached, and when attached it fits in the upper end and forms the top of the warming-oven G. K represents a plate with two boiler-holes in it, which can be used when the reservoir is removed or should become broken in shipment, thus converting it into a six-hole stove. It is our purpose to insert a loose centre piece between the boiler-holes in the plate K, so that an ordinary wash-boiler can be used on said plate, if desired. The novelty of this invention consists in the portability of the reservoir base-pan D and in the warming-closet attachment, whereby we economize space in shipment, and whereby repairs can be made at a very small cost and by unskilled workmen, as all the attachments will be shipped separate from the body of the stove, and mounted after they reach their destination. Should the reservoir become broken in shipment or otherwise, the plate K can be used, thus converting it into a six-hole stove, upon which an ordinary wash-boiler can be used in case of emergency. The front bottom corner of the reservoir rests upon a strip, *d*, attached to the division-plate J, which thus entirely shuts off the air-space at the bottom. By means of the base-pan flue D extending under the whole bottom of the reservoir F and the space between the reser-

voir and the division-plate J, the reservoir becomes heated only on its bottom surface, where there will always be water, if any in the reservoir at all. The exit-flue E passes up through and forms part of the reservoir F at the back or rear side, as shown. We do not claim, under this specification, the combination of the reservoir with the back of the stove when an air-space open at the top is left between the two, as seen in the drawings, nor do we claim the sheet-flue under the reservoir in the shell D, as both of these arrangements are the subject-matter of a separate application for a patent, now pending."

The claims of No. 142,934 are 3 in number, as follows, and the infringement of all of them is admitted:

"1. The detachable base-pan or flue-shell D, attached to the body at a point near the centre of the back plate of the stove, by means of hooks *a a* cast on the base-pan, and pins *b b* on the stove-body, substantially for the purposes herein set forth. 2. The portable reservoir F, with flue E in the rear side, in combination with the portable base-pan or flue-shell D, substantially as and for the purposes herein set forth. 3. The combination, with a three-flue stove, having damper H arranged as described, of the portable base-pan or flue-shell D and warming-closet G, all substantially as and for the purposes herein set forth."

The Tiffany patent of 1869 shows a low-down reservoir at the rear of a three-flue stove, and a warming closet below the reservoir. The gases pass from the flue-space into a base-pan or chamber which is immediately below the reservoir, and forms the top of the warming-closet. The flue by which the gases escape from the base-pan is in the rear of the reservoir and is removable with it. The Tiffany stove, having three flues, must have a damper to open and close the middle flue. The specification of the Tiffany patent states that the reservoir and the warming-closet are capable of being attached to and detached from the stove, so that the stove is complete without them and they are complete without being attached; and it also states that they may be attached to the stove by lugs or hooks, either cast in the back of the stove, with a corresponding eye in the side of the case surrounding the reservoir, or in the top and

side of the reservoir, or the hook and the eye may be reversed. A detachable base-pan existed before, and hearths and ash-pans existed attached by lugs and hooks in the same way as the defendant's base-pan. A portable reservoir was old, with an escape-pipe or flue forming a part of the reservoir. A damper for the middle flue was old. A warming-closet below a base-pan and that below a reservoir were old. In view of the state of the art there was no invention, in claim 1 of the patent, in using to attach the base-pan an old mode used in attaching other projecting parts of the stove. Claim 2 is merely for an aggregation of parts, and not for a patentable combination, there being no patentable relation between a portable reservoir with a flue in its rear side and the existence or portability of a base-pan beneath it. In claim 3 there is merely an aggregation of parts, there being no patentable relation between a damper for the middle flue of a three-flue stove, and the existence or portability of a base-pan or the existence of a warming-closet.

The decree of the Circuit Court is reversed, with costs in this court to the Excelsior Manufacturing Company on both appeals, and the case is remanded to the Circuit Court with direction to dismiss the bill, with costs.

UNITED STATES *v.* LAWTON.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 4th, 1884.—Decided January 21st, 1884.

Statutes—Tax-Sale.

Land subject to a direct tax was sold for its non-payment, and was bought in for the United States for the sum of $1,100, under section 7 of the act of June 7th, 1862, c. 98, as amended by the act of February 6th, 1863, c. 21, 12 Stat. 640, the tax, penalty, interest and costs being $170.50. No money was paid. The United States took possession of the land, and leased it, and afterwards sold all but 50 acres for $130, under the act of June 8th, 1872, c. 337, 17 Stat. 330. The land was not redeemed. Application by its owner was made to the Secretary of the Treasury for the $929.50 surplus,

and, no action being taken thereon, he sued in the Court of Claims to recover that sum : *Held,* That he was entitled to recover it.

Whether § 12 of the act of June 7th, 1862, c. 98, 12 Stat. 422, in regard to the disposition of one-half of the proceeds of the subsequent leases and sales of land struck off to the United States at a sale for the non-payment of the tax, applies to the land in this case—*quære.*

No question as to the disposition of such proceeds can affect the right of the claimant in this case to the $929.50.

The rulings in *United States* v. *Taylor,* 104 U. S. 216, applied to this case.

The appellee recovered a judgment in the Court of Claims against the United States for $929.50. *Lawton's Case,* 18 C. Cl. R. 595. That court found the following facts: In 1827, James Stoney, of South Carolina, died leaving a will, which was duly proved, and contained the following provision :

"The other equal part or share of my personal property, charged and chargeable with the payment of half of the said annuity to my beloved wife, Elizabeth, together with all the lands I possess on the south side of Broad Creek on the Island of Hilton Head, I give and devise unto such person or persons as I shall hereafter appoint my executor or executors, to and to the use of them or him, my executor or executors, their heirs, executors, and assigns, upon the trust nevertheless, and to and for the intent and purpose hereinafter expressed and declared of and concerning the same ; that is to say, upon trust for the sole benefit of my beloved daughter, Martha S. Barksdale, for and during her natural life, free from the debts, contracts, and engagements of any husband to whom she may be allied, or the claims of his creditors ; and upon the death of my said daughter, Martha S. Barksdale, it is my will, intention, and desire that the trusteeship above created in my executor or executors over the said part of my real estate and personal property shall immediately dissolve and expire ; and, if my said daughter, Martha S. Barksdale, shall have any lawful issue living at the time of her death, then I give and devise the said part of my real and personal property to such issue, him, her, or them and their heirs forever."

A tract of land known as the Hill Place, in St. Luke's Parish, South Carolina, was a part of the estate so devised. Martha S. Barksdale, named in the will, entered into possession

of the Hill Place, under the devise, and continued in possession until dispossessed, in consequence of the tax sale hereinafter mentioned. After the making of the will she became the lawful wife of Joseph A. Lawton. The appellee was her lawful and only living issue. In November, 1862, the direct tax commissioners of the United States assessed a direct tax on the Hill Place, amounting to $88, and in December, 1873 (a mistake, probably, for 1863), it was sold for non-payment of the tax. The amount of the tax, penalty, interest and costs, was $170.50. The property was "struck off for the United States by the tax commissioner," for the sum of $1,100, and a tax certificate, which was on file in the office of the Commissioner of Internal Revenue, was issued therefor, but no money was paid, "the tax commissioners having bid in the property for the United States." The board of tax commissioners took possession of the land in the name of the United States, and from time to time leased the same. The amount realized from the leasing does not appear. The United States are still in possession of 50 acres. The remainder was sold at public sale in December, 1875, for $130, under the provisions of the act of June 8th, 1872, c. 337, 17 Stat. 330. No application under that act and the acts supplementary thereto, for redemption of the property, was ever made. It did not appear that the appellee ever parted with his interest in the remainder of the tract, except as dispossessed by the tax sale, or that he ever assigned his right to receive the surplus remaining from the purchase money. Mrs. Lawton died in April, 1880. It did not appear that during her lifetime any demand was made upon the treasury for the surplus. In May, 1882, the appellee applied to the Secretary of the Treasury for any surplus proceeds of the sale which might be in the treasury. No action was taken thereon, and nothing has been paid to the appellee on such application.

Mr. Solicitor-General and *Mr. John S. Blair* for appellant.

Mr. William E. Earle for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court. After reciting the above stated facts he continued:

We think that this case is governed by the rulings of this court in *United States* v. *Taylor*, 104 U. S. 216. In that case the land sold for the non-payment of the tax was sold to a person who paid the purchase money to the United States, and the surplus proceeds were in the treasury. It was held that the provision of section 36 of the act of August 5th, 1861, ch. 46, 12 Stat. 292, in regard to the surplus of the proceeds of sale, was not repealed by anything in section 12 or any other section of the act of June 7th, 1862, ch. 98, 12 Stat. 422. It was also held that the Court of Claims had jurisdiction of a suit for such proceeds when the application to the Secretary of the Treasury and the bringing of the suit therefor both of them occurred more than six years after the sale for the non-payment of the tax.

The present case differs from the Taylor case only in this, that the land was in this case bought in by the tax commissioners for the United States, and no money was paid on the sale. It was so bought in for a sum which exceeded by $929.50 the tax, penalty, interest and costs. This was done under the authority of section 7 of the act of June 7th, 1862, as amended by the act of February 6th, 1863, ch. 21, 12 Stat. 640, which authorized the commissioners to bid off for the United States land sold for the tax at a sum not exceeding two-thirds of its assessed value, unless some person should bid a higher sum, and also provided that at a sale any land which might be selected, under the direction of the President, for government use, might be bid in by the commissioners, under the direction of the President, for, and struck off to, the United States. The land in the present case having been "struck off for," and "bid in" for, the United States at the sum of $1,100, we are of opinion that the surplus of that sum, beyond the $170.50 tax, penalty, interest and costs, must be regarded as being in the treasury of the United States, under the provisions of section 36 of the act of 1861, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person

for the non-payment of the tax. It was unnecessary to go through any form of paying money out of the treasury to any officer and then paying it in again to be held for the owner of the land. But, so far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person. If a third person had bid $1,099 in this case, there would have been a surplus of $928.50 paid into the treasury, and held for the owner. It can make no difference that the United States acquired the property by bidding $1 more. To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.

The appellants rely very much on the provisions of section 12 of the act of 1862, which require that one-half of the proceeds of subsequent leases and sales of land struck off to the United States at a sale for the non-payment of the tax, shall be, under certain circumstances, paid to the State in which the land lies; and contend that those provisions apply to the land in this case bought in under the act of 1863. The view urged is, that if the United States pays to the appellee the $929.50, and to the State one-half of the proceeds of subsequent leases and sales of the land, they will pay out more than the surplus of the proceeds of the original sale. It is not necessary to determine whether section 12 of the act of 1862 applies to the land in this case, even if it would be proper to do so in a case where the State is not represented as a claimant to the proceeds of leases and sales. No question as to the disposition of such proceeds can properly affect the right of the appellee to this surplus money. His claim is to the surplus money arising on the original sale, and not to any proceeds of any dealing with the land by the United States afterwards.

The application made to the Secretary of the Treasury for the surplus not having been complied with, the appellee was entitled to bring this suit, as on an implied contract to pay over

the surplus. It not having been paid to the trustees under the will, or to the life-tenant, the appellee, as remainderman, is clearly entitled to it.

The judgment of the Court of Claims is affirmed.

HART *v.* SANSOM & Another.

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

Submitted January 2d, 1884.—Decided January 21st, 1884.

Estoppel—Evidence—Judgment.

A decree of a State court for the removal of a cloud upon the title of land within the State, rendered against a citizen of another State, who has been cited by publication only, as directed by the local statutes, is no bar to an action by him in the Circuit Court of the United States to recover the land against the plaintiff in the former suit.

In a suit to recover land, and to remove a cloud upon the title thereof, brought in a court of the State in which the land is, against W, H and others, the petition alleged that W ejected the plaintiff and unlawfully withheld possession from him; that H set up some pretended claim or title to the land; that the other defendants held recorded deeds thereof, which were fraudulent and void; and that the pretended claims and deeds cast a cloud upon the plaintiff's title. Due service was made on the other defendants; and a citation to H, who was a citizen of another State, was published as directed by the local statutes. All the defendants were defaulted; and upon a writ of inquiry the jury found that H claimed the land, but had no title, of record or otherwise, and returned a verdict for the plaintiff. Judgment was rendered that the plaintiff recover the land of the defendants, and that the deeds mentioned in the petition be cancelled and annulled, and the cloud thereby removed and for costs, and that execution issue for the costs. *Held*, that this judgment was no bar to an action by H in the Circuit Court of the United States to recover the land against the plaintiff in the former suit.

Mr. W. Hallett Phillips and *Mr. H. J. Leavy* for the plaintiff in error.

Mr. A. S. Lathrop for the defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is a writ of error sued out by Edmond J. Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the Circuit Court of the United States for the Northern District of Texas, in an action brought by him against Marion Sansom and the heirs at law of Thomas M. League, citizens of Texas, to recover a tract of land in Johnson County in that State, of which they had dispossessed him.

At the trial, Hart proved his title under a patent from the Republic of Texas to League, and a deed with general covenants of warranty from League, dated August 19th, 1846, and both recorded on December 9th, 1879; and it appeared that the defendant Sansom held possession of the land under a lease from the other defendants, and as their tenant.

The defendants offered in evidence the record of a judgment rendered by the District Court of Johnson County, on August 24th, 1875, upon a petition filed June 11th, 1873, by the heirs at law of League (who died intestate November 5th, 1865) against Virgil Wilkerson, Orlando Dorsey and several other persons, and Hart, alleging that Wilkerson ejected the plaintiffs from this land, and unlawfully withheld possession thereof from them; that on October 29th, 1870, the defendant Dorsey, by deed, duly recorded, conveyed to some of the other defendants than Wilkerson and Hart three-fourths of the land, reserving in that deed the remaining fourth to himself, and that other deeds (particularly set forth) of parts of the land were afterwards made to the rest of such other defendants, and recorded; that the defendant Hart "set up some pretended claim and title to said land;" and that "the defendant Wilkerson is a naked trespasser upon the land of the plaintiffs; and that the several other defendants' several deeds, which appear upon the record of deeds of Johnson County as aforesaid, are fraudulent and void, and that the said pretended claims and deeds, and each and all of them, cast a cloud upon the title of the plaintiffs;" and praying "that they have judgment that the cloud upon the title of the plaintiffs, created by the several deeds aforesaid, be removed, and that the said deeds and each and all of them be declared null and void, and be cancelled and dis-

charged of record, and that the title of the plaintiffs in and to said premises and every part thereof may be confirmed and established as against said defendants and each and every of them and all persons claiming through or under them," and for a writ of possession, damages, and costs.

That record also showed the issue and due service of citations to all the defendants except Dorsey and Hart; the issue of a citation directing the sheriff to serve Hart, being a citizen of Louisiana, by publication, and the sheriff's return showing the execution of the citation by such publication in a newspaper of the county four successive weeks before the return day; and a like service by publication on Dorsey, a citizen of New York.

That record further showed a default of all the defendants; and that upon a writ of inquiry the jury assessed damages against Dorsey and Hart; found as facts the issue of the patent to League and the title of the plaintiffs as his heirs, that Hart "claimed said land," and that a deed was made by Dorsey, and recorded, as alleged in the petition, but that Hart and Dorsey respectively had no title, of record or otherwise; and returned a verdict "for the plaintiffs, and that they recover the land described in the petition."

That record finally showed a judgment "that the plaintiffs recover of the defendants the premises described," and "that the several deeds in the plaintiffs' petition mentioned be, and the same are hereby, annulled and cancelled, and for naught held, and the cloud thereby removed," and for costs; and that execution issue for the costs.

The Circuit Court, against the plaintiff's objection, admitted the judgment in evidence, instructed the jury that it divested the plaintiff of his title to the land, and directed a verdict for the defendants.

The plaintiff, deriving his title under a deed with covenants of general warranty from League, is entitled to maintain this action against League's heirs, who are estopped by those covenants, unless the former judgment in the action brought by them in the State court has adjudicated the title as between them and the present plaintiff. It is therefore necessary to consider the nature and effect of that judgment.

The petition combined, in accordance with the practice prevailing in that State, an action in the nature of ejectment to recover possession of the land, and a suit in equity to remove a cloud upon the plaintiffs' title; and the service by publication was in the form authorized by the local statutes against non-residents. 1 Paschal's Digest of Laws of Texas (4th ed.) art. 25.

The petition alleged that Wilkerson was in possession; and that the other defendants, except Hart, held recorded deeds, which were fraudulent and void, and cast a cloud upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession, or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and cancelled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession or *habere facias.*

It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed.

But if there is any judgment (except for costs) against Hart, it is, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and is no bar to the present action.

Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an

agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2d ed.) §§ 43, 184; *Massie* v. *Watts*, 6 Cranch, 148; *Orton* v. *Smith*, 18 How. 263; *Vandever* v. *Freeman*, 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. *Felch* v. *Hooper*, 119 Mass. 52; *Ager* v. *Murray*, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.

In the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title.

Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State; and it is of no greater force, as against a citizen of another State, in a court of the United States, though

held within the State in which the judgment was rendered. *Hollingsworth* v. *Barbour*, 4 Pet. 466, 475; *Boswell* v. *Otis*, 9 How. 336; *Bischoff* v. *Wethered*, 9 Wall. 812; *Knowles* v. *Gaslight Company*, 19 Wall. 58; *Pennoyer* v. *Neff*, 95 U. S. 714. See also *Schibsby* v. *Westenholtz*, L. R. 6 Q. B. 155; *The City of Mecca*, 6 P. D. 106.

The Circuit Court having ruled and instructed the jury otherwise, its judgment must be reversed, and the case remanded with directions to set aside the verdict, and to order a *New trial.*

UNITED STATES, on the relation of Chandler, *v.* COUNTY COMMISSIONERS OF DODGE COUNTY.

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

Submitted January 4th, 1884.—Decided January 21st, 1884.

Internal Improvements—Municipal Bonds—Nebraska—Statutes—Tax.

A wagon bridge across the Platte River is a work of internal improvement within the meaning of the statute of Nebraska of February 15th, 1869; and that statute makes it the duty of county commissioners to levy a tax on the taxable property within a precinct in whose behalf bonds have been issued under that statute to aid in constructing such a bridge, sufficient to pay the annual interest on the bonds, and without regard to any limit imposed by, or voted in accordance with chapter 9 of the Revised Statutes of 1866.

Petition for writ of mandamus; refused below, and brought up by writ of error.

Mr. William H. Munger for plaintiff in error.

Mr. J. T. Newton, *Mr. Lewis A. Groff*, and *Mr. C. S. Montgomery* for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

This is a writ of error to reverse a judgment of the Circuit Court of the United States for the District of Nebraska, deny-

ing a peremptory writ of mandamus to command the county commissioners of the county of Dodge, in the State of Nebraska, to levy a special tax upon the taxable property within Fremont Precinct, a local subdivision of that county, to pay and satisfy two judgments obtained by the petitioner against the county, in that court, upon interest coupons attached to bonds issued by the county commissioners in behalf of the precinct on September 1st, 1871, under the statute of Nebraska of February 15th, 1869, for the purpose of building a wagon bridge across the Platte River in that precinct, and purchased by the petitioner in good faith in the usual course of business, and without notice of any defects or infirmities; each of which judgments provided that they should be paid by such a levy.

To an alternative writ of mandamus, alleging the facts above stated, the county commissioners filed an answer, alleging that the bonds, which were signed and sealed by the county commissioners, were in this form:

"UNITED STATES OF AMERICA, STATE OF NEBRASKA.

"It is hereby certified that Fremont Precinct, in the county of Dodge, in the State of Nebraska, is indebted unto the bearer in the sum of one thousand dollars, payable on or before twenty years after date, with interest at the rate of ten per cent. per annum from date. Interest payable annually on the presentation of the proper coupons hereunto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge County, Nebraska; interest payable at the Ocean National Bank, in the City of New York.

"This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont Precinct at a special election held on the eleventh day of November, A.D. 1870, at which time the following proposition was submitted:

"'Shall the county commissioners of Dodge County, Nebraska, issue their special bonds on Fremont Precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across Platte River, in said precinct; said bonds to be made pay-

able on or before twenty years after date, bearing interest at the rate of ten per cent. per annum, payable annually?' Which proposition was duly elected, adopted, and accepted by a majority of the electors of said precinct voting in favor of the proposition.

"And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the necessary materials and to build and construct said bridge referred to in the foregoing proposition:

"Therefore this bond, with others, is issued in pursuance thereof, as well as under the provisions of an act of the legislature of the State of Nebraska, approved February 15th, A. D. 1869, entitled 'An Act to enable counties, cities, and precincts to borrow money on their bonds or to issue bonds, to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purposes.'

"In witness whereof, we, the said county commissioners of said Dodge County, have hereunto set our hands, this —— day of ——, A. D. 1871."

The answer further alleged that the proposition to vote the bonds, submitted to and voted upon by the voters of the precinct, contained a provision that the tax levied in any one year should not exceed one mill on a dollar of the valuation of the taxable property within the precinct, and was entered on the records of the county; and that a tax of one mill had since been annually levied. A general demurrer to the answer was overruled by the Circuit Court, and judgment entered accordingly; and thereupon this writ of error was sued out.

The decision of this case depends upon the peculiar provisions of the statutes of Nebraska, and an examination of those statutes leaves us in no doubt how it should be decided.

In the Revised Statutes of 1866, the ninth chapter, concerning county commissioners, contained the following provisions:

"SECT. 19. The said commissioners shall have power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or bridge, or to submit to the people of

the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition, as provided in this section.

"SECT. 20. When county warrants are at a depreciated value, the said commissioners may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied; and in all cases when an additional tax is laid, in pursuance of a vote of the people of the county, for the special purpose of repaying borrowed money, or of constructing or ordaining to construct any road or bridge, or for aiding in any enterprise contemplated by the preceding section, such special tax shall be paid in money and in no other manner.

"SECT. 21. The mode of submitting questions to the people, contemplated by the last two sections shall be the following: The whole question, including the sum to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least four weeks in some newspaper published in the county. If there is no such newspaper published, the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county. And in all cases the notices shall name the time when such question will be voted upon, and the form in which the question shall be taken; and a copy of the question submitted shall be posted up at each place of voting during the day of election.

"SECT. 22. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this chapter; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

"SECT. 23. The rate of tax to be levied in pursuance of the last four sections of this chapter shall in no case exceed three mills on the dollar of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the

rate shall be such as to pay the debt in ten years ; when the object is to construct or aid in constructing any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation ; and any special tax or taxes levied in pursuance of this chapter, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue laws of this Territory."

But the statute of February 15th, 1869, as amended by a statute of March 3d, 1870, and under which the bonds in question were issued, provides as follows:

"SECT. 1. Any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city: *Provided*, the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of the county the question of borrowing money.

"SECT. 2. The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due: *Provided*, that an additional amount shall be levied and collected to pay the principal of said bonds, when it shall become due; and *Provided further*, that no tax shall be levied or collected to pay any of the principal of said bonds until the year 1880.

"SECT. 3. The proposition shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable."

"SECT. 5. It shall be the duty of the proper officers of such county or city to cause to be annually levied, collected, and paid to the holders of such bonds a special tax on all taxable property within said county or city, sufficient to pay the annual interest as the same becomes due ; and when the principal of said bonds becomes due, such officers shall in like manner collect an additional

amount sufficient to pay the same as it becomes due;" with certain restrictions as to the amount to be levied and collected in any one year towards payment of the principal.

"SECT. 6. Any county or city, which shall have issued its bonds in pursuance of this act, shall be estopped from pleading want of consideration therefor; and the proper officers of such county or city may be compelled, by mandamus or otherwise, to levy the tax herein provided to pay the same.

"SECT. 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

Under either statute, the submission of the question to the people must be accompanied by a provision to levy a tax. But whereas the statute of 1866 provided that no vote adopting the question proposed should be valid unless it likewise adopted the amount of tax to be levied to meet the liability incurred, and that when the object was to construct or aid in constructing any road or bridge the annual rate should not exceed one mill on a dollar on the valuation, the statute of 1869, as amended by the statute of 1870, omits both these provisions, and peremptorily enacts that the proposition of the question shall be accompanied by a provision to levy a tax annually, sufficient for the payment of the interest as it becomes due; that it shall be the duty of the proper municipal officers to cause to be annually levied, collected, and paid to the holders of the bonds a special tax, sufficient so to pay the annual interest; and that they may be compelled, by mandamus or otherwise, to levy such a tax.

The later statute, as to objects included in it, clearly repeals to this extent the earlier statute, removes the limit imposed upon the amount to be levied, and takes away the power of

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the voters to limit that amount, and requires a tax to be levied and collected sufficient to pay the whole interest for the year; and it is equally clear that a bridge across the Platte River is a work of internal improvement, for the benefit of the public, and within the scope and the terms of the statute of 1869. *County Commissioners* v. *Chandler*, 96 U. S. 205; *Fremont Building Association* v. *Sherwin*, 6 Neb. 48.

The petitioner is therefore entitled to a peremptory writ of mandamus to the county commissioners to levy a tax on the taxable property of Fremont Precinct, sufficient to pay the amount of the judgments recovered in the Circuit Court for the interest due on the bonds held by him. *Davenport* v. *Dodge County*, 105 U. S. 237.

Judgment reversed.

BISSELL *v.* SPRING VALLEY TOWNSHIP.

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

Submitted January 2d, 1884.—Decided January 21st, 1884.

Estoppel—Kansas—Municipal Bonds—Statutes.

1. A statute of the State of Kansas directed county commissioners of a county (when the electors of a township in the county should have determined, in the manner provided in the act, to issue bonds in payment of a subscription to railway stock), to order the county clerk to make the subscription, and to cause the bonds to be issued in the name of the township, signed by the chairman of the board, and attested by the clerk under the seal of the county: *Held*, That the signature of the clerk was essential to the valid execution of the bonds, even though he had no discretion to withhold it.
2. When bonds have been issued by a township in payment of a subscription to railway stock, under a statute which makes the signature of a particular officer essential, without the signature of that officer they are not the bonds of the township; and the municipality is not estopped from disputing their validity by reason of recitals in the bond, setting forth the provisions of the statute and a compliance with them.
3. A statute of Kansas authorized the auditor of a State to receive from the holder of bonds issued by a township in payment of a subscription to

Statement of Facts.

railway stock his bonds, and to register the same, and directed the auditor to notify the officers issuing the bonds of the registration of the same; and further, directed such officers to enter the fact in a book kept by them for the purpose; and then provided that "the bonds shall thereafter be considered registered bonds:" *Held*, That until the notice to the township officers, and their entry of the registration in their books, the bonds were not to be regarded as registered bonds within the intent of the statute, and as entitled to the benefits of the act; and that no estoppel against disputing the validity of the bonds by reason of a certificate of registration arose. *Lewis* v. *Commissioners of Barbour County*, 105 U. S. 739, distinguished from this case.

This was an action brought by the plaintiff in error to recover the amount of certain interest coupons attached to municipal bonds, which, it is alleged in the petition or complaint, were made, issued, and delivered by the defendant, a municipal corporation of Kansas, to aid in the construction of a railroad running within and through its corporate limits, under and in pursuance of an act of the legislature of the State of Kansas entitled "An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25th, 1870, under and in pursuance of an order of the board of county commissioners of the county of Cherokee, and under and in pursuance of a vote of more than three-fifths of the qualified voters of the township, voting at an election duly held therein for such purpose, being negotiable bonds payable to bearer. It was further alleged:

"That afterwards, to wit, on December 15th, A. D. 1871, each of the said bonds, with all the interest coupons thereto attached, was put upon the market and sold and delivered to bona fide purchasers for value, the same passing from hand to hand like other negotiable securities.

"That afterwards, to wit, on April 11th, A. D. 1872, each of the said bonds, with all the interest coupons thereto attached, was duly registered in the office of the auditor of the State of Kansas, according to law, and the fact that each of the said bonds was so registered was then and there, under the hand and official seal of the said auditor, in writing duly certified and indorsed upon each of the said bonds, a copy of which said certificate and indorse-

ment is filed herewith, made part hereof, and marked 'Exhibit B.'"

It was also alleged that after the issuing and delivering of the said bonds, and before the maturity, either of the bonds or of any of the coupons sued upon, they were sold and delivered to the plaintiff for the price of ninety cents on the dollar thereof in cash.

The following is the form of the bond:

"No. .] UNITED STATES OF AMERICA. [$1,000.

"COUNTY OF CHEROKEE, STATE OF KANSAS.

"*Spring Valley Township Bonds.*

"Know all men by these presents that Spring Valley Township, county of Cherokee, State of Kansas, acknowledges itself and is firmly bound to the Atlantic and Pacific Railroad Company in the sum of one thousand dollars, which sum the said township therein promises to pay to the said Atlantic and Pacific Railroad Company, or bearer, at the office of Northrop & Chick, in the city of New York and State of New York, on the fifteenth day of December, 1886, together with the interest on the first day of July in each and every year until this bond matures, at the rate of seven per cent. per annum, which interest shall be payable annually on the presentation and delivery at said office of the coupons of interest hereto attached.

"This bond being issued under and pursuant to an order of the board of county commissioners of Cherokee County, in the State of Kansas, by virtue of an act of the legislature of the State of Kansas, approved February 25th, 1870, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same;' and authorized by a vote of the people taken on the 4th day of February, 1871, as required by law, upon the proposition to subscribe one hundred and fifty thousand dollars to aid in the construction of the said railroad, which proposition was voted upon on the day aforesaid, and three-fifths of the votes of said township being cast in favor of said proposition.

"In testimony whereof the said board of county commissioners of Cherokee County have executed this bond by the chairman of

said board, under the order thereof, signing his name hereunto, and by the clerk of said board attesting the same and affixing the seal of said board.

"This done at Columbus, Cherokee County, this 15th day of December, 1871.

" { SEAL OF CHEROKEE COUNTY, KANSAS. } WM. H. CLARK,

"*Chairman Board of County Commissioners.*

"J. G. DUNLAVY, *County Clerk.*"

The certificate of registration was as follows:

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature 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, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith, approved March 2d, 1872.

"Witness my hand and official seal this 11th day of April, 1872.

"[SEAL.] A. THOMAN, *Auditor of State.*"

The defendant in answer to the petition pleaded the following defence:

"That it ought not to be charged with the said supposed debt by virtue of the said supposed bonds and coupons, because it, by its attorneys, says that J. G. Dunlavy, whose name appears on said bonds and coupons as county clerk, never signed his name thereto or thereon, nor ever authorized any party or parties to sign his name thereto or thereon, and that said signature is not his signature.

"Nor did he affix or authorize to be affixed the seal of said county of Cherokee to said bonds or coupons."

To this the plaintiff demurred. The demurrer was overruled, and the plaintiff declining to reply, judgment was rendered for the defendant, to review which this writ of error was

prosecuted. The assignment of error relied on was that this defence being insufficient in law the demurrer thereto should have been sustained and judgment rendered for the plaintiff.

Mr. Alfred Ennis for plaintiff in error, among other contentions made the following: The seal of the county being affixed to the bonds, was *prima facie* evidence that it was so affixed by the proper authority, and the burden is upon the defendant in error to establish the contrary. 1 Kyd on Corporations, 268; Angell and Ames on Corporations, § 224; *Lovett* v. *Steam Saw Mill Association*, 6 Paige, 54, 60; *Clark* v. *Imperial Gas Light and Coke Company*, 4 B. & A. 315; *Solomon's Lodge* v. *Montmollin*, 58 Ga. 547; *Reed* v. *Bradley*, 17 Ill. 321; *St. John's Church* v. *Steinmetz*, 18 Penn. St. 273. The bonds having been issued and delivered by the legal representatives of the defendant in error, with the name of the county clerk signed, and the seal of the county affixed thereto, estops the defendant in error from denying the genuineness of the signature of such clerk, or the authority for affixing such seal, as against the plaintiff in error, a *bona fide* holder for value. *Town of Weyauwega* v. *Ayling*, 99 U. S. 112. The recitals upon the face of the bonds that they were issued according to law, and that the board of county commissioners had executed the same by the chairman of the board, under the order thereof, signing his name thereto, and by the county clerk attesting the same and affixing the seal of the county thereto, estops the defendant in error from denying the facts so recited, as against the plaintiff in error, a *bona fide* holder for value. *Insurance Company* v. *Bruce*, 105 U. S. 328; *Harter* v. *Kernochan*, 103 U. S. 562; *Menasha* v. *Hazard*, 102 U. S. 81; *Hackett* v. *Ottawa*, 99 U. S. 86; *Town of Weyauwega* v. *Ayling*, 99 U. S. 112; *Supervisors* v. *Galbraith*, 99 U. S. 214; *Wilson* v. *Salmanca Township*, 99 U. S. 499; *County of Warren* v. *Marcy*, 97 U. S. 96; *San Antonio* v. *Mehaffy*, 96 U. S. 312; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Town of Venice* v. *Murdock*, 92 U. S. 494; *County of Moultrie* v. *Rockingham Ten Cent Savings Bank*, 92 U. S. 631; *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Humboldt Township* v. *Long*, 92 U. S.

642; *Pompton* v. *Cooper Union*, 101 U. S. 196; *The Mayor* v. *Lord*, 9 Wall. 409; *Supervisor* v. *Schenck*, 5 Wall. 772; *Moran* v. *Commissioners Miami County*, 2 Black, 723; *Bissell* v. *Jeffersonville*, 24 How. 287; *Knox County* v. *Aspinwall*, 21 How. 539. The registration of the bonds in the office of the auditor of State, according to law, was a final and conclusive determination that the same had been regularly and legally issued, and that the signatures thereto were genuine, and such facts cannot now be inquired into, as against the plaintiff in error, a *bona fide* holder for value. See Bigelow on Estoppel, 464; Herman's Law of Estoppel, 509 and 512; *Moran* v. *The Commissioners of Miami County*, 2 Black, 722; *Zabriskie* v. *Cleveland, &c., Railroad Company*, 23 How. 400; *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; *Rogers* v. *Burlington*, 3 Wall. 654; *Pendleton County* v. *Amy*, 13 Wall. 297; *Keithsburg* v. *Frick*, 34 Ill. 405; *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327; *Hale* v. *Union, &c., Insurance Company*, 32 N. H. 295; *Trustees* v. *Mayor et al. of Aberdeen*, 13 S. & M. 645.

Mr. W. H. Rossington, *Mr. J. R. Hallowell*, and *Mr. Chas. B. Smith*, for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the above recited facts he continued:

The plaintiff in error contends that this judgment is erroneous on several grounds, which we proceed to consider in their order.

1. It is claimed, in the first place, that the defence is not sufficient, because the signature of the county clerk is not essential to the validity of the bonds, nor that the county seal should have been affixed thereto by him.

The statute of Kansas, Laws of Kansas of 1870, ch. 90, p. 189, under which the bonds in question purport to have been issued, contains the following provisions;

"Section 1. Whenever fifty of the qualified voters, they being freeholders, of any municipal township in any county in the State, shall petition in writing the board of county commissioners

of such county to submit to the qualified voters of such township a proposition to take stock, in the name of such township, in any railroad proposed to be constructed into or through such township, and shall in such petition designate the railroad company and the amount of stock proposed to be taken, and the mode and terms of payment for the same, together with the conditions of such subscription, if any, it shall be the duty of such board of county commissioners to cause an election to be held by the qualified voters of such township, to determine whether such subscription shall be made: *Provided*, That the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued.

"SECTION 5. If three-fifths of the electors voting at such election vote for the subscription of the stock, the board of county commisioners shall order the county clerk to make such subscription in the name of the township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county: *Provided*, That the commissioners shall not cause such bonds to be issued until the railroad shall have been completed through the township voting such bonds, or to such point in said township as may be conditioned in said bonds."

It is argued, as the board of county commissioners is the prescribed authority which orders every step to be taken to issue the bonds, and as the clerk acts only as directed by it, and signs and seals the bonds merely as a witness of its orders and acts, that it is only what that board does and directs which becomes important, and that if it issues bonds with the name of the clerk signed and the seal of the county attached, it is not material whether the clerk writes his name or affixes the seal, or whether it is done by another.

It is alleged in the petition that the defendant corporation, the municipal township, made, issued, and delivered the bonds on which the suit is founded, and that it was done under and in pursuance of an order of the board of county commissioners

of the county of Cherokee. But it is sufficient to say, that the power of the board of county commissioners to bind the township is conferred by the statute to be exercised only in the mode pointed out, and the attesting signature of the clerk is as material to the integrity and validity of the bonds as is that of the chairman of the board of county commissioners. The township had no power to bind itself for the purpose of aiding in the construction of a railroad, by subscription to its capital stock and the issue of bonds to pay for the same, except as authorized by this statute; the board of county commissioners of the county did not represent the township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law. That law required the bonds to be executed in a particular manner, and the signature of the clerk is essential to the valid execution of them, even though he had no discretion to withhold it. *Anthony* v. *County of Jasper*, 101 U. S. 693–697; *McGarrahan* v. *Mining Company*, 96 U. S. 316.

Admitting that the board could cause his signature to be affixed, without his assent, by another specially or generally appointed to do so; still, that it was so affixed in the present case does not appear as matter of fact; and if the fact could be supplied by supposition, the signature would still, in law, be the signature of the clerk. But the answer denies that fact, and the demurrer admits the truth of the denial. So that the defence set forth in the answer is, in law, that the bonds sued on are not the bonds of the township, and that is admitted by the demurrer to be true.

2. This disposes of the second ground of the contention of the plaintiff in error, which is, that the township defendant is estopped by the bonds and the recitals contained in them to dispute their validity.

But there can be no ground for such an estoppel unless the bonds, which are supposed to effect it, are the bonds of the defendant. We have just seen that, by the pleadings, they are admitted not to be such; and the position of the plaintiff in error is not improved by the supposition that he is an innocent holder for value. If the bonds are not the act and deed of the

defendant, they do not bind it at all, and cannot be made obligatory by their own contents.

3. It is argued, however, finally, that the defendant township is estopped to dispute the validity and obligation of these bonds by the fact and certificate of registration.

The statute of Kansas, Laws of Kansas of 1872, ch. 68, p. 110, to authorize counties, &c., to issue bonds, and providing for their registration, &c., contained ample and specific provisions, according to which municipal corporations were authorized to lend their credit to aid in the construction of works of internal improvement. It required that when bonds were to be issued for such purpose, the officers of the municipal body making them should deliver them in the first instance to the treasurer of State, to be held by him in escrow, or to an agent agreed on, until full compliance with the conditions of the agreement on which they were to issue, when the treasurer or agent was required to deliver them to the parties entitled to them. The officers of the municipal corporation were also required to make registration thereof in a book kept for that purpose, and to certify a statement of the same to the auditor of State; and, if within thirty days after their issue, the holder of such bonds should present them to the auditor of State for registration, he was required, upon being satisfied that such bonds had been issued according to the act, and that the signatures thereto of the officers signing the same were genuine, to register the same in his office, in a book kept for that purpose, in the same manner that such bonds were required to be registered by the officers issuing the same, and also to certify upon such bonds the fact that they had been regularly and legally issued, that the signatures thereto were genuine, and that such bonds had been registered in his office according to law.

The act also makes provision for the registration of bonds not issued under it, but issued either before its enactment or in pursuance of agreements entered into before it took effect. The fifteenth section is as follows:

"SECT. 15. That the holder of bonds heretofore issued, or that

may hereafter be issued, in pursuance of any contract heretofore made under any law in this State, may have the benefits of this act by having such bonds registered in the office of said auditor of State as provided herein for the registration of bonds (issued) by virtue hereof. It shall be the duty of the auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds."

Under this section it is claimed that the bonds sued on were registered, having been issued prior to the passage of the registration act of 1872; and it is insisted, upon the authority of the case of *Lewis* v. *Commissioners*, 105 U. S. 739, that the registration is conclusive of their validity, as against the defence made in the answer.

It is shown, however, by a comparison of the fifteenth section with the other sections of the act in reference to registration, that distinct and diverse provisions are made for different classes of bonds, those issued under the act and those previously issued or agreed to be issued under prior acts. As to the former class, the bonds authorized are to be registered, in the first instance, according to the mandate of the twelfth section, by the officers of the municipality acting in that behalf, who are required to transmit to the auditor of State a certified statement of the number, amount, and character of the bonds so issued, to whom issued, and for what purpose, which statement is required to be attested by the clerk of the municipal corporation issuing the same under its corporate seal. The registration thus provided for consists of two parts, that which is recorded by the officers of the corporation in their books and that which the auditor records in his own, and in that case the last step is taken by the auditor, who certifies it on the bonds themselves, presented by the holder for that purpose. This certificate is intended to be based not merely upon what the auditor himself has done, but upon the knowledge officially

certified to him of what had previously been done by the officers of the municipal corporation issuing the bonds.

But as to the other class of bonds, those not issued under the act of 1872, the order of the steps in registration is reversed. The first record is made by the auditor on presentation of the bonds by the holder for that purpose. Within ten days thereafter he is required by the fifteenth section of the act to notify the officers issuing the same of such registration by him, which fact, it is provided, shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds, the statute then proceeds to declare, shall thereafter be considered registered bonds. That necessarily means that they shall not be so considered until the happening of that event; and it is that complete and perfected registration, and that alone, which confers upon the holder of such bonds the benefits of the act.

The bonds that were in controversy in the case of *Lewis* v. *Commissioners*, 105 U. S. 739, were issued under the act of 1872, and their registration was governed by the provisions of the statute relating to that class. The bonds on which the present suit is based were issued under the act of 1870, and belong to the class the registration of which is governed by the provisions of the fifteenth section of the act.

It is alleged in the petition that "each of said bonds, with all the interest coupons thereto attached, was duly registered in the office of the auditor of the State of Kansas according to law, and the fact that each of the said bonds was so registered was then and there, under the hand and official seal of the said auditor, in writing, duly certified and indorsed upon each of the said bonds," and a copy of the certificate and indorsement is set out as already exhibited. But it is not alleged that the auditor notified the officers of Cherokee County of this record, nor that these officers entered the fact in the record kept by themselves; and without these additional steps, what was done by the auditor was incomplete and ineffective. Without showing compliance with these requisitions, the bonds cannot be considered registered bonds, nor entitled as such to the benefits of the act.

If complete and conclusive effect were, on the contrary, given

to the *ex parte* record of the auditor of State, as is claimed for it, the obvious design and just purpose of the statute would be not secured, but subverted; and municipal corporations might be subjected to liability for bonds purporting to be issued by them, which, in fact and in law, were not their obligations, by virtue of a proceeding of which they had no notice, resulting in an adjudication which they had no opportunity of contesting. A construction of the statute that necessarily leads to that conclusion is not warranted by its terms, and would be repugnant to fundamental principles of common right. If the registration of bonds issued under the act itself is to have the force of an adjudication by the auditor, the preliminary record by the officers of the municipal corporation transmitted to him must be the indispensable foundation of his jurisdiction, without which he cannot lawfully act; and as to bonds issued, as were these now in suit, under previous statutes, the action of the auditor is itself but the preliminary proceeding, of which confirmation by the subsequent record of the officers issuing them is essential to its efficacy as a registration. If these officers refuse to recognize the registry of the auditor, whether rightfully or wrongfully, the holder loses no rights. He has the bonds as he acquired them, and may test the liability of the corporation by judicial proceedings. If, on the other hand, the statute is construed to allow him, by a proceeding before the auditor, conclusively to fix the liability of the municipal corporation, without notice and without a hearing, certainly, in respect to bonds previously issued, it would be open to the gravest objections on constitutional grounds, for, if a law cannot impair the obligation of a contract, neither can it create one, or, by a mere *fiat*, take from a party an existing and meritorious defence.

It appears then, by the record in this cause, that the bonds sued on are not the obligations of the defendant in error.

The judgment in its favor is, therefore, affirmed.

REDFIELD, Executrix, *v.* YSTALYFERA IRON COMPANY.

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

Submitted January 4th, 1884.—Decided January 21st, 1884.

Damages—Error—Interest—Laches—Practice.

1. A verdict was taken, subject to the opinion of the court, upon a case to be made, with liberty to either party to turn the case into a bill of exceptions. A case was made setting forth the entire evidence at the trial, but it was not made an agreed statement of facts, nor were exceptions taken, nor was any finding of facts made: *Held*, That there was no basis for the assignment of errors.
2. A plaintiff obtained a verdict against the United States in the court below, subject to the opinion of the court on a case to be made, and then rested nearly thirty years before entry of judgment: *Held*, That under these circumstances interest should run only from the entry of the judgment.
3. Interest is recoverable of right when it is reserved in the contract; but when it is given as damages, it is within the discretion of the court to allow or disallow it, and it will not be allowed if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim.

Mr. Solicitor-General for plaintiffs in error.

Mr. A. W. Griswold for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This action was begun on December 30th, 1854, in the Supreme Court of New York by the defendant in error to recover from the collector of the port of New York money alleged to have been illegally exacted by him for customs dues and paid under protest. It was removed by *certiorari* to the Circuit Court of the United States for the Southern District of New York, in which, on December 15th, 1856, the testimony having been heard, it appears by the record that:

"By direction of the court and consent of counsel, the jury find a verdict for the plaintiff in the sum of fifteen hundred dollars, subject to the opinion of the court upon a case to be made, with liberty to either party to turn the same into a bill of exceptions, and subject to adjustment at the custom house as to the amount."

The next step in the cause taken in court was on June 9th, 1882, when, on motion of the plaintiffs' attorney, the plaintiffs in error, as personal representatives of the defendant, who had died, were made parties.

And then, on January 19th, 1883, it was ordered that the case, of which it appeared a copy had been served by the plaintiffs' attorney on the United States attorney in January, 1857, be considered as having been then agreed upon and settled between the parties, and that the same be filed in the office of the clerk as part of the record in the case.

On April 30th, 1883, the cause was heard upon that case made and served pursuant to the verdict of December 16th, 1856, and it was thereupon ordered that judgment be entered on the verdict for the sum of $715.70, with interest thereon from December 8th, 1854, and for costs; and on August 22d, 1883, a formal judgment was entered against the plaintiffs in error for the said sum and interest as aforesaid, amounting to $2,128.16 damages, besides costs. To reverse that judgment this writ of error is prosecuted.

The case made, which by the terms of the verdict either party was at liberty to turn into a bill of exceptions, sets forth the entire evidence adduced at the trial, but is not an agreed statement of facts, nor a special verdict, nor a finding of facts by the court, and contains no exceptions. It cannot, therefore, be treated as the basis for any assignment of errors, and the questions argued, as if arising thereon, must be dismissed without further consideration.

We are of opinion, however, that the court erred in allowing interest from December 8th, 1854, until the entry of judgment on August 22d, 1883—a period of nearly twenty-nine years—upon the amount found due to the defendant in error.

The delay in the prosecution of the suit must be attributed to the plaintiff below. It was the actor, and had come into court for the purpose of asserting and enforcing a right, which the defendant below contested and denied, and which it was necessary to determine and ascertain. The verdict was purely formal, and was entered by consent, after the hearing of the evidence, merely as a basis for further proceedings, which were

to consist in an adjudication by the court of the questions of fact and law arising upon the testimony, and liquidation of the amount to be recovered in case the legal liability was found to exist. No step for this purpose was taken by the plaintiff after January, 1857, when he served upon the defendant the case made, until January, 1883, when he procured the order to bring into court and file it, a period of twenty-six years. In the meantime the suit had abated by the death of the defendant, having been revived in the names of his personal representatives in June, 1882, after the lapse of what period, since the defendant's death, the record does not disclose.

This delay in prosecution would certainly have justified the court in dismissing the action on its own motion. So far as the rights of third parties might have been affected by it, as a *lis pendens*, it had lost its force without such a dismissal, for, as to innocent strangers, acquiring interests to be affected by it, it would have been treated as abandoned and obsolete. *Fox* v. *Reeder*, 28 Ohio State, 181. There is nothing in the record, by which alone we must be governed, to show any reasonable excuse for the unusual and extraordinary delay in the progress of the suit; and that delay, as we have said, must be attributed to the defendant in error.

Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion. In cases like the present, of recoveries for excessive duties paid under protest, it was held in *Erskine* v. *Van Arsdale*, 15 Wall. 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld. *Bann* v. *Dalzell*, 3 C. & P. 376; *Newell* v. *Keith*, 11 Vt. 214; *Adams Express Company* v. *Milton*, 11 Bush, 49.

The statute of New York allowing interest on verdicts, relied on in argument as applicable, was intended for the government of the ordinary practice of the court, and cannot furnish the rule for a case that is excepted from it by the unexplained negligence and delay of the plaintiff. The verdict, indeed, in the present instance was purely formal, as much so as the penalty of a bond, which does not represent the amount equitably due, but stands only as security for it. In ordinary practice it may be convenient, and certainly would not be improper nor unjust, that interest properly allowed, on the real amount subsequently ascertained, should be calculated from the date of such a verdict; but in such cases it is not interest on the verdict in fact, because, until the amount is liquidated by the subsequent action of the court, there is no sum certain due on which interest could be computed. The finding of the court fixing the amount due is, in fact and in contemplation of law, the equivalent for the verdict of the jury, upon which interest may be allowed; and when that has been, as in the present instance, unreasonably delayed by the neglect of the plaintiff, he cannot justly claim interest by way of damages for delay which has been altogether his own. The date of the order for judgment in the present case is April 30th, 1883, from which time only interest should have been allowed.

For this error, accordingly, the judgment is reversed, with costs in this court, and the cause remanded, with instructions to enter a judgment for the defendant in error for the sum of $715.70, *with interest thereon from April* 30*th*, 1883, *together with costs in the Circuit Court.*

Statement of Facts.

QUEBEC BANK OF TORONTO *v.* HELLMAN, Assignee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Argued January 4th, 7th, and 8th, 1884.—Decided January 21st, 1884.

Principal and Agent.

The deposit of a promissory note with the agent of a third party upon condition that it should be used by the agent's principal for a specified purpose, confers no authority upon the principal to hold the note for a different purpose.

An act passed by the legislature of the State of Ohio, respecting the administration of assignments by insolvent debtors, provides as follows:

"Creditors shall present their claims . . . . to the assignee for allowance, and the assignee shall indorse his allowance or rejection thereon, and claimants whose claims are rejected shall be required to bring suit against the assignee to enforce such claims, ... in which, if he recover, the judgment shall be against the assignee that he allow the same in the settlement of his trusts; *Provided, however*, That the assignee may make any defence to such action that the assignor might have made to a suit instituted against him before the assignment for the same cause of action."

The bill in this case was filed in pursuance of this statute. It was brought by the appellant, the Quebec Bank of Toronto, against Max Hellman, assignee of P. Weyand and D. Jung, partners as Weyand & Jung. The bill alleges an assignment by Weyand & Jung under the insolvent laws of the State, and the qualification of the assignee, and that Weyand & Jung, at the time of the assignment, were indebted to the Quebec Bank of Toronto upon a promissory note of which the following is a copy:

"CINCINNATI, February 7th, 1870.

"Sixty days after date we promise to pay to the order of George M. Bacon & Co. five thousand dollars at Merchants' National Bank. Value received.

$5,000. "P. WEYAND AND D. JUNG."

The note was indorsed as follows:

"George M. Bacon & Co.
John Hughes."

The bill further alleged that the note was indorsed and delivered to the plaintiff before maturity, for value; that the plaintiff was the owner thereof; that a claim based on the note had been presented to the assignee for allowance against the estate of Weyand & Jung and disallowed. The prayer of the bill was that the assignee be required to allow the claim of the plaintiff for the amount due on said note, to wit, five thousand dollars, with interest, in the settlement of his trust as assignee of Weyand & Jung.

Two defences were set up in the answer: first, that the appellant was not the owner of the note; and, second, that the note was without consideration and void.

Upon final hearing the Circuit Court made a decree dismissing the bill. The plaintiff appealed.

Mr. Joseph Wilby for appellant.

Mr. John F. Follett for appellee.

Mr. Justice Woods delivered the opinion of the court.

The record discloses the following facts: George M. Bacon & Co. were a firm dealing in barley and other brewers' supplies in Cincinnati, Ohio. They purchased barley at Toronto, Canada, and advanced a part of the price of the barley purchased. When a shipment was made a draft was drawn upon them by the consignor for the balance remaining unpaid on the shipment, which was usually a time draft, and accompanied by a bill of lading for the barley shipped.

On November 10th, 1869, a draft, accompanied by a bill of lading for 15,000 bushels of barley, was drawn on Bacon & Co. by Thomas Clarkson & Co., of Toronto, Canada, for the sum of $6,502.56, payable in gold twenty-five days after date. This draft was indorsed by Thomas Clarkson & Co., and on presentation to the drawees, Bacon & Co., was accepted by them. Upon the arrival of the barley in Cincinnati, Bacon & Co. received

and disposed of it. Before the draft matured Bacon & Co. made an arrangement with the appellant, the Quebec Bank of Toronto, which was the holder of the draft, by which the time for payment was to be extended forty-five days, on their giving a note with indorsers, which was to be substituted for the draft.

Bacon & Co. accordingly made their note, dated December 23d, 1869, for $6,616.35, payable in gold forty-five days after date, to the order of Thomas Clarkson & Co., and indorsed by John Hughes, which they forwarded to the Quebec Bank. The note was not acceptable to the bank, and was returned by it to its correspondent and agent at Cincinnati, the Merchants' National Bank, with the information that Bacon & Co. had been requested to furnish a new note, properly drawn, with another indorser besides Hughes.

No such note was made or forwarded by Bacon & Co., and on February 2d, 1870, the Quebec Bank instructed the Merchants' Bank to demand payment of Bacon & Co. of the draft accepted by them.

On February 7th, 1870, Bacon & Co. represented to Weyand & Jung, a firm doing business in Cincinnati, that they were embarrassed for want of means to pay the debt represented by the draft of November 10th, 1869, the extended credit on which was about to expire, and to aid in paying off said claim obtained from them the note in controversy in this suit, the same being an accommodation note for which Weyand & Jung received no consideration.

Bacon & Co. presented this note to the Merchants' Bank for discount on the morning of February 7th, with the purpose of having it applied to the payment of the claim of the Quebec Bank. The Merchants' Bank, after submitting the note to its discount committee at noon that day, refused to accept it, and it was handed back to Bacon & Co.

So far the facts are not disputed by either party. But here a controversy arises. The appellant contends that on the afternoon of that day, February 7th, Bacon & Co. again presented the note to the Merchants' Bank, which, acting for appellant, accepted it. The defendant insists that the note never was delivered to the Merchants' Bank, but that, on February 9th,

after Bacon & Co. had made an assignment for the benefit of their creditors, the cashier of the bank, having induced George M. Bacon to let him see the note, and thus getting it into his possession, fraudulently retained possession against the protest of Bacon & Co.

In the view we take of this case, it is unnecessary to settle the question whether or not there was a manual delivery of the note on February 7th. We shall assume that the note was left by Bacon & Co. with the Merchants' Bank, as agent of the appellant, on that day.

The purpose for which Bacon & Co. presented the note of Weyand & Jung to the Merchants' Bank is not left in doubt by the testimony. It was that the note or its proceeds might be credited on the claim against Bacon & Co. held by the appellant, the Quebec Bank of Toronto. They were of opinion that if they could thus reduce the amount due on the claim they would be able to raise money enough to pay off the residue, and thus save their credit and go on with their business. The note, assuming that it was left with the Merchants' Bank on February 7th, as claimed by appellant, was taken for the very purpose which Bacon & Co. had in view. On this point Fallis, the president of the Merchants' Bank testifies as follows:

"The note was left with us about that time. I told him (George M. Bacon of Bacon & Co.) it would not be discounted to check against, but we would take it and credit proceeds on claim of Quebec Bank, taking said note on account of said claim."

The testimony of Yerguson, the cashier of the Merchants' Bank, confirms the evidence of Fallis in respect to the terms on which the bank took the note of Weyand & Jung from Bacon & Co. If, therefore, there was a manual delivery of the note to the Merchants' Bank on February 17th, it was on the condition, as the officers of the bank concede, that either the note or its proceeds should be credited on the claim of the Quebec Bank of Toronto.

This condition was not performed. On the contrary, it is not disputed that the Merchants' Bank, as the agent of appel-

lant, after it had got possession of the note of Weyand & Jung, retained and still retains the draft of November 10th, 1869, for $6,502.56, accepted by Bacon & Co. with the bill of lading for 15,000 bushels of barley accompanying it, and also the note of Geo. M. Bacon & Co., indorsed by Hughes, for $6,616.35; that no credit whatever was ever indorsed on either said draft or note; that on February 9th, 1870, two days after the note of Weyand & Jung had been received by the Merchants' Bank, the note of Bacon & Co. for $6,616.35 was, at the instance of the Merchants' Bank, protested for non-payment, and on the same day Bacon & Co. executed a deed of assignment for the benefit of their creditors, for the reason, as they alleged and testified, that they were unable to pay said note or draft. On February 25th, 1870, suit was brought by the Quebec Bank of Toronto in the Superior Court of Cincinnati against Bacon & Co. as makers, and John Hughes as indorser, on the note above mentioned, for the full amount thereof, namely, $6,616.35, and interest.

It is clear that the deposit of a promissory note with an agent of a third party, on the condition that it should be used by the agent's principal for a specified purpose, will not confer title so as to authorize the principal to hold the note for a different purpose. Thus in *Smith* v. *Knox*, 3 Esp. 46, it was said by Lord Eldon:

"If a person give a bill for a particular purpose, and that is known to the party taking the bill, as, for example, to answer a particular demand, then the party taking the bill cannot apply it to a different purpose."

See also, *Delauny* v. *Mitchell*, 1 Stark. 439; *Puget de Bras* v. *Forbes*, 1 Esp. 117; *Evans* v. *Kymer*, 1 Barn. & Adol. 528.

Under such circumstances, without the performance of the condition, there is no delivery in the commercial sense, and no title passes. The present suit is an attempt by the appellant to use the note for a purpose not contemplated by either party when the manual delivery of the note took place. The case of appellant is not aided by the fact that on March 25th, 1871,

more than a year after Bacon & Co. had failed in business and made an assignment for the benefit of their creditors, it amended its petition in the suit brought on the note of Bacon & Co. for $6,616.35, by averring that the note of Weyand & Jung was taken as a payment on the note sued on in that case, and demanding judgment for only $1,616.35, the balance due after allowing the credit. According to the version of the appellant's witnesses, the understanding was that the credit should be made on February 7th, 1870, when the note of Weyand & Jung was handed to the Merchants' Bank. By the omission of the Merchants' Bank on that day to credit the proceeds of the note of Weyand & Jung on the claim of appellant, Bacon & Co. were deprived of all the advantages, to secure which the note was left with the bank.

The appellant is bound by the acts and omissions of its agent. Having failed in 1870 to use this note for the only purpose for which it was placed in the possession of its agent, it cannot now exact payment thereof as a *bona fide* holder.

Under the circumstances of this case we are of opinion that there was no delivery of the note of Weyand & Jung to the appellant, and that no title passed to it. As the controversy is between the original parties, and the appellant is not an innocent holder, it is not entitled to the relief prayed for in its bill. The decree of the Circuit Court by which the bill was dismissed was therefore right, and must be

Affirmed.

WHITE *v.* CROW & Others.

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

Submitted January 4th, 1884.—Decided January 21st, 1884.

Colorado—Execution—Judgment—Redemption.

When, in Colorado, the agent of an absent defendant, upon whom process had been duly served, appeared and consented to the entry of a judgment against the defendant before the time for filing answer had expired, and no

Statement of Facts.

fraud was shown: *Held*, On an attempt to attack the judgment collaterally by reason of entry before the time for answering had expired, that the court would make all necessary presumptions to sustain it.

When a judgment creditor in Colorado, prior in lien, received from the sheriff a certificate of sale of real estate sold to the creditor on execution issued on the judgment to satisfy the debt, which certificate recited that the property was subject to an execution issued on a judgment which was in fact junior in date to that under which it was sold: *Held*, That the recital was a mistake of which a person claiming title under a conveyance from the judgment debtor and redemption from the junior judgment could not take advantage.

In order to obtain equitable relief against a judgment alleged to have been fraudulently obtained it must be averred and shown that there is a valid defence on the merits.

This was a suit in equity. The facts disclosed by the pleadings and evidence were as follows: From September 1st, 1880, until December 1st, 1882, the Brittenstine Silver Mining Company, a corporation organized under the laws of the State of New York, was the owner of twelve mining claims and a tunnel site situate in Chaffee County, in the State of Colorado. These claims were in a group, and some of them intersected and overlapped each other, and the tunnel site extended across them. John B. Henslee was the authorized agent of the company under the laws of Colorado, upon whom service of process against the company could be made, and he was also a large stockholder therein, and attended, without compensation, to some of the business of the company.

The company became embarrassed and suits were brought against it by its creditors in January, 1882. It owed Henslee $1,500 for money advanced to it by him. Henslee assigned his claim to the defendant Joseph R. Crow, in part payment of money due from him to Crow, who brought suit on the claim in the County Court of Lake County, Colorado. The summons was served on Henslee, as State agent, on January 9th, 1882, and four days thereafter he appeared in open court, and, as the record of that case states, as general agent of the company, consented to the submission of the case, and judgment was thereupon rendered against the company in favor of Crow. A transcript of this judgment was filed with the recorder of Chaffee County on January 17th, 1882, and thereupon it be-

came a lien upon the property of the company in that county, and was the oldest and best lien thereon.

George M. Robison recovered a judgment against the company in the same court for $346.35. It became a lien on January 20th, 1882, and was the second lien on the property of the company. Henslee gave notice of these judgments to the officers of the company in New York, and, upon the promise that the company would pay them, the judgment creditors agreed to a stay of execution, and, in consequence, no execution was issued on either of them until four months after their rendition.

On June 17th, 1882, the property of the Brittenstine Mining Company was sold to Joseph R. Crow for the amount of the judgment in his favor on an execution issued thereon, and was again sold June 8th, 1882, to George M. Robison for the amount of the judgment in his favor and upon an execution issued thereon. Certificates of sale were delivered to each of the purchasers and duly recorded in the recording office of Chaffee County. The certificates specified the time within which the property could be redeemed, which was six months from the date of the sales respectively, to wit, from the sale to Crow on December 17th, 1882, and from the sale to Robison on January 8th, 1883. The certificate given to Crow stated that the sale to him was subject to the sale to Robison.

The officers and directors of the company in New York received notice from Henslee of these judgments and sales, and made efforts without success to raise money to pay off the liens. The judgments and certificates of sale were bought up by the defendants, L. C. Wilson, H. M. Noel, J. L. Loker, W. N. Loker, James Streeter, and O. H. Simons. They appear to be the only defendants who have any interest in this suit.

While the events above mentioned in reference to this property were happening in Colorado, the Supreme Court of the City and County of New York, in a suit therein pending against the company, on May 29th, 1882, appointed a receiver, to whom, on October 23d, 1882, the company, by order of the court, conveyed all its property. At a sale made by the receiver about December 1st, 1882, the appellant, John E. White,

became the purchaser of the property of the company in Chaffee County, Colorado, and on December 5th, received a deed therefor from the receiver, and on December 6th, a deed from the company. At the time of his purchase White knew of the liens against and sales of the property, and that the time for redemption was about to expire. He redeemed the property from the sale to Robison before the time for redemption expired, and paid off two judgments junior to those above mentioned. He, however, failed and refused to redeem the property from the sale to Crow within the time limited for redemption. After the time had expired White offered to redeem from the Crow sale, but the appellees refused to allow the property to be redeemed.

Thereupon, on February 12th, 1883, the appellant, John E. White, filed the bill in this case, to which Henslee, Crow, and the above-mentioned purchasers of said judgments, and Robert Ray, the sheriff of Chaffee County, were made parties. The bill prayed that Ray, the sheriff of Chaffee County, might be enjoined from making a deed to the owners of the certificate of sale issued to Joseph R. Crow, and that the certificate might be declared null and void, and that upon payment by the complainant of the amounts found due to Crow on his claim against the property he might be compelled to execute a deed of release to him for said property.

The only questions controverted on the final hearing were whether or not the judgment in favor of Crow and the certificate issued upon the sale made to him should be declared void, and whether the sheriff of Chaffee County should be enjoined from making a deed to him for the property in question, and whether the owners of the judgment and lien of Crow should, upon payment thereof, execute deeds of release to the appellant for said property.

The Circuit Court decided all these questions in the negative, and directed that the defendants in interest should repay to the complainant the sums paid by him to discharge the liens upon said property, and, upon such payment, decreed that the bill should be dismissed. This appeal brought that decree up for review.

Opinion of the Court.

Mr. C. Edgar Smith and *Mr. L. S. Dixon* for appellant.

Mr. L. N. Buck and *Mr. John D. Pope* for appellees.

Mr. Justice Woods delivered the opinion of the court.

The first assignment of error which we shall notice is, that the Circuit Court erred in not declaring the judgment recovered by Joseph R. Crow against the Brittenstine Silver Mining Company void, first, because fraudulently obtained, and, secondly, because the court was without jurisdiction to render it.

We have been unable to find in the record any support for the contention that the judgment was fraudulently obtained. All the alleged facts set out in the bill on which the charge of fraud is based are clearly disproven by the testimony. But if the Brittenstine Silver Mining Company were itself assailing the judgment as fraudulently procured, it could not have it enjoined in equity unless it could aver and prove that it had a good defence upon the merits. *Hair* v. *Lowe*, 19 Ala. 224; *Pearce* v. *Olney*, 20 Conn. 544; *Ableman* v. *Roth*, 12 Wis. 81. There is no pretence that the company had any defence. It has never complained of the judgment. On the contrary, it promised to pay it provided execution were stayed, and upon its promise of payment execution was stayed. Much less, therefore, does it lie in the mouth of appellant to complain of fraud in the obtaining of the judgment. On this point he has no standing in court.

The complainant insists, however, that the judgment was void because, on the fourth day after service of summons, and before the time for filing the answer had expired, Henslee appeared in court and consented that judgment might be entered in favor of Crow, against the Brittenstine Mining Company, for the sum due on the obligation upon which the suit was brought, and judgment was thereupon accordingly entered.

The Civil Code of Colorado, § 46, provides as follows:

"From the time of service of summons in a civil action the court shall be deemed to have acquired jurisdiction."

The summons in this case gave full and particular notice to

the defendant of the cause of action. It was served, as clearly appears from the return, in the county where the suit was brought. It was served on Henslee as the person appointed to receive service of process for the company. It is not pretended that it was not served in the county where the company had its principal office, or where its principal business was carried on, or that Henslee was not the right person on whom service should have been made. The service was regular and effectual.

The court, therefore, had jurisdiction of the parties. It had jurisdiction of the subject-matter, and the judgment which it rendered was within the jurisdiction conferred on it by law. The judgment which it rendered recited that Henslee was the general agent of the company, and as such consented that judgment might be entered against the defendant. The law, therefore, when the judgment is questioned, presumes that the court was satisfied by proof that the agent had authority to give the consent of the company to the rendition of the judgment. The fact that he was such general agent, and authorized to consent to the entry of judgment, is not denied in the bill, nor is there any proof in the record to show that he was not the agent of the company, fully authorized to consent to the rendition of the judgment.

But if he was not such agent, the question arises whether the rendition of the judgment before the time for filing defendant's answer had expired renders the judgment void. We are of opinion that it does not; that its rendition was simply erroneous and nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it. *Grignon's Lessee* v. *Astor*, 2 How. 319. The defendant being in court, was bound to take notice of its proceedings, and might have corrected the error at any time during the term. It did not move to set the judgment aside. It filed no answer. The presumption, therefore, which the law makes is either that it consented to a submission of the case before the time for answer expired, or that it subsequently waived the error by not seeking to correct it.

"It is of no avail," said the court in *Cooper* v. *Reynolds*, 10 Wall. 308, "to show that there are errors in the record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court and by all courts, and it takes rank as an axiom of law."

And in *Cornett* v. *Williams*, 20 Wall. 226, it was declared that

"The settled rule of law is, that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

See, also, *Kemp's Lessee* v. *Kennedy*, 5 Cranch, 173; *Thompson* v. *Tolmie*, 2 Pet. 157; *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Florentine* v. *Barton*, 2 Wall. 210; *McGoon* v. *Scales*, 9 Wall. 23; *Glover* v. *Holman*, 3 Heisk. 519; *West* v. *Williamson*, 1 Swan (Tenn.), 277.

The judgment, therefore, cannot be declared void. It could not be successfully attacked in this collateral way even by the defendant, much less by one not a party to it. We must assume the judgment to be valid and binding until reversed in a direct proceeding.

The next contention of the appellant is that the sale made to Crow under his judgment is void because the property was sold in bulk and not in parcels. This contention is based on the statute of Colorado, which provides as follows:

"When any property, real or personal, shall be taken in execution, if such property is susceptible of division, it shall be sold in such quantities as may be necessary to satisfy such execution and costs." General Laws, Chap. 53, sec. 1416, page 525.

There are two sufficient answers to this objection to the sale. In the first place, there is not a word of proof in the record to show that any part of the property would have sold for a sum sufficient to satisfy the execution and costs.

On the contrary, the record shows that the entire property was sold on execution four different times during the year 1882, and that in no instance did it bring more than the debt and costs, and that it brought more at the sale which is attacked in this case than at any of the others. At one sale it only brought $346; at another it only brought half the debt. At every sale it was bought in by the judgment creditor.

In the second place, the evidence shows that at the sale which is complained of in the bill the sheriff first offered the claims singly and separately and received no bids. He then offered and sold them *en masse*.

These facts make it unnecessary to inquire whether the objection to a sale *en masse* could be successfully made after the time for redemption had passed, where both the party making the objection and the party claiming under the sale were strangers to the judgment.

The next contention of appellant is that the certificate issued by the sheriff to Joseph R. Crow on the sale made to him June 17th, 1882, recited that said sale was made "subject to an execution in favor of George M. Robison," and that appellant having redeemed from what was thus recited to be the elder lien, the title thus acquired by him would be superior to that based on what he had reason to suppose was the younger lien of Crow.

It is not disputed that in fact the lien of the judgment in favor of Crow was the older lien. It became a lien on January 17th, 1882, when the transcript was filed in the office of the recorder of Chaffee County. § 215 Civil Code of Colorado. The levy of the Robison attachment was not recorded until January 20th, 1882; and it acquired a lien upon the property on that day. Civil Code, § 98. The sale on the judgment in favor of Crow took place June 17th, 1882, the sale on the judgment in favor of Robison took place on July 8th, 1882. These matters were all of public record, and were made such that all parties interested might have notice. The appellant cannot derive any advantage from the mistake in the sheriff's certificate, which the public records of the county corrected, and for which neither Crow nor his vendees were responsible.

Opinion of the Court.

But even if the judgment in favor of Robison had been the senior judgment, it would not aid the case of appellant. As grantee of the defendant company he would be required to redeem from all the sales. He could not acquire title to the property by redeeming it from a sale on the oldest lien, for in Colorado a redemption annuls the sale. The General Laws of Colorado, chap. 52, page 527, § 1419, provide as follows:

"On such sum," the redemption money, "being paid as aforesaid" to the purchaser or sheriff, "the said sale and the certificate thereupon granted shall be null and void."

The appellant might as well claim that the payment of the oldest encumbrance on real estate discharged all the subsequent encumbrances.

We are of opinion that there is no merit in the appellant's case. The judgment in favor of Crow against the Brittenstine Silver Mining Company was a valid judgment, rendered on a just demand; it was obtained without fraud; it has never been assailed, directly or indirectly, by the judgment debtor. The sale made under it was, so far as the record shows, fair and regular; the time within which the property sold could be redeemed was shown by the public records, it was well known to the agent of appellant. The appellant failed and refused to redeem the property within the time limited by law, and thereby lost his right to redeem, unless he is able to show some fraud or wrong on the part of the defendants by which a redemption was prevented. Without such showing he is not entitled to relief in equity. *Hay* v. *Baugh*, 77 Ill. 500. Nothing of the kind has been shown. We find no error in the record.

The decree of the Circuit Court is affirmed.

JONESBORO CITY *v.* CAIRO & ST. LOUIS RAILROAD COMPANY & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Submitted January 2d, 1884.—Decided January 21st, 1884.

Constitutional Law—Illinois—Municipal Bonds—Municipal Corporations.

1. Under the Constitution of Illinois in force in 1868, an act authorizing a city council to borrow money on the credit of the city, and issue bonds under the seal of the city therefor, did not confer authority to subscribe to the stock of a railroad company, and issue bonds therefor, even when the legal voters of the city at a regular election voted to authorize such subscription: but the want of power could be cured by an act declaring an election theretofore held to be binding, and granting power to issue bonds to pay for a subscription authorized thereat: and such a curative act was within the legislative power, and that power was not taken away by the Constitution of 1870.
2. An act entitled "An Act to amend the charter of the Cairo & St. Louis Railroad Company," which legalized an election previously held in a municipality, at which the people voted to subscribe to the stock of that company and to issue bonds for the payment of the subscription, and which granted authority to issue such bonds, is no violation of that provision in the Constitution of Illinois, which provides that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." Any provision in the title of a bill which calls attention to its subject, although in general terms, is all that is required by the Constitution.

Bill in equity to obtain an injunction against assessing and levying taxes to pay for the principal and interest of bonds issued by a municipal corporation in payment of a subscription to stock in a railroad company.

Mr. W. S. Day and *Mr. Sidney Grear* for appellant.

Mr. George A. Sanders for Graves, appellee.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a decree in the Circuit Court of the United States for the Southern District of Illinois, dismissing a bill in equity filed by the city of Jonesboro, in that State,

against the Cairo & St. Louis Railroad Company, an Illinois corporation, the auditor of State, the county clerk and sheriff of Union County, Illinois, and the "Unknown holders of the Jonesboro City bonds, issued in aid of the Cairo & St. Louis Railroad Company." The suit was commenced in one of the courts of the State. Its object was to obtain a decree perpetually enjoining the State and county officers, who were made defendants, from levying, certifying, and extending any tax for the payment either of the principal or interest of said bonds. There was no defence upon the part of those officers, and after publication against the "unknown holders" of the bonds in the mode prescribed by the local statute, a decree *pro confesso* was passed, giving the relief asked, and declaring the bonds invalid as against the city.

Subsequently Luther R. Graves, a citizen of Vermont, presented his petition, in conformity with the State law, alleging his ownership of some of the bonds, and asking that the default be set aside with permission to him to plead, demur, or answer under the orders of the court. The petition was granted, and he was made a party defendant. Thereafter, on his further petition, the cause was removed to the court from whose decree this appeal was taken.

The evidence shows that on the 2d day of March, 1868, a resolution was passed by the city council of Jonesboro submitting to the legal voters of that municipality, at its then next regular election, held April 6th, 1868, the question whether that city should, upon certain named conditions, subscribe $50,000 to the capital stock of the Cairo & St. Louis Railroad Company, payable in bonds within twenty years after date at the option of the city, with interest at the rate of eight per cent. per annum from the date of issue. The election was held at the time indicated.

Subsequently, by an act of the general assembly of Illinois, which became a law on March 3d, 1869, entitled "An Act to amend An act entitled 'An Act to incorporate the Cairo & St. Louis Railroad Company,'" approved February 16th, 1865, authority was given to the several towns, cities, and counties through or near which that railroad might pass, and to the

several townships in said counties which may have adopted, or might thereafter adopt, the township organization, to subscribe for and take stock in the company, or to make a donation in aid of the construction of the road, and issue bonds for such subscriptions or donations, to be paid by taxation upon the property of the municipality issuing them. It was provided that no subscription or donation should be made, nor bonds issued, nor tax levied, unless a majority of the legal voters of the municipality, voting at an election called and held as provided in the act should assent to the subscription or donation. But it was further provided in the same act

"that all elections heretofore had in any county, city, or town in reference to a subscription to said railroad, are hereby declared legal and binding, and the County Court of any county, and the corporate authorities of any city or town in which such elections have been already held, and a majority of the votes cast were for subscription, shall have authority to issue bonds for such an amount as was voted for, notwithstanding any insufficiency, informality, or irregularity in such election or in the notice thereof." Pri. Laws Ill. 1869, vol. 3, pp. 256–7–8.

By an ordinance of the city council of Jonesboro passed July 21st, 1871—which referred to the resolutions of March 2d, 1868, and recited that at the election of April 6th, 1868, all the votes cast favored the subscription—it was enacted that the proposed subscription of $50,000 "be, and is hereby, made upon the conditions specified in said resolutions," and that bonds be issued for the purpose of paying the same. The clerk was directed to have them prepared and delivered to John E. Naill, who by the ordinance was

"appointed agent on behalf of the city to receive from the clerk the said bonds and to deliver the same to the said company, its authorized agent or officer, upon compliance by the said company with the conditions in said resolutions specified, and at the same time to receive from the said company its certificate or certificates of stock (paid up) in said company to an amount equal to the amount of the bonds so delivered, and that he immediately deliver such certificate or certificates to the city council."

Under date of July 1st, 1872, there was executed and delivered to Naill $25,000 of the bonds directed to be issued. They purport to have been issued by the city, were signed by its mayor and countersigned by its treasurer and clerk, and made payable to the railroad company or bearer at the Bank of Commerce in New York. Each one recites that—

"This bond is issued under and by virtue of the charter of said city, and of ordinances passed in pursuance thereof, in payment of so much of the subscription by said city for fifty shares of the capital stock of said Cairo and St. Louis Railroad Company. The proposition to subscribe for said stock having been first submitted, as required by law, to the qualified voters of said city for their approval or rejection, at a special election regularly held for that purpose at the various voting precincts or wards in and of said city, on the 6th day of April, A. D. 1868, and more than two-thirds of said voters having at said election assented thereto, and said majority of voters also being a majority over all the votes cast at the last preceding regular election held in and for said city, and said Cairo and St. Louis Railroad Company having duly performed all the conditions of said subscription to be performed on its part before said bond was to be issued."

On the 13th day of October, 1874, there was filed in the office of the auditor of State the official sworn certificate of the then mayor of Jonesboro (who as clerk had attested the bonds when issued), attested by the city clerk, to the effect that the before-mentioned bonds, amounting to $25,000, were entitled to registration in the office of auditor under the act of April 16th, 1869, entitled "An Act to fund and provide for paying the railroad debts of counties," that they were issued by said city to said railroad company "under and by authority of the provisions of an act of the general assembly of Illinois approved March 3d, 1869, and by a vote of the people of said city at an election held on the 6th day of April, 1868." That certificate concluded:

"And I, as mayor of said city, do hereby certify that all the preliminary conditions in the act in force April 16th, 1869, required to be done to authorize the registration of these bonds, and

to entitle them to the benefits of said act last referred to, have been fully complied with to the best of my knowledge and belief."

On the day that certificate was filed the auditor of State indorsed on each bond that it had been registered in his office pursuant to the provisions of the said act in force April 16th, 1869.

It was stipulated in the cause that the interest on the bonds so issued had been regularly paid by the city from the date of their delivery to the issuing of the injunction by the State court in September, 1882.

1. It is entirely clear that when the vote of April 6th, 1868, was taken, the city of Jonesboro was not authorized by its charter, or by any statute of Illinois, to make a subscription to the capital stock of the Cairo and St. Louis Railroad Company. The power given to its city council "to borrow money on the credit of the city and issue their bonds under the seal of the city therefor," did not, alone, confer authority to subscribe to the stock of a railroad company, and issue bonds in payment thereof. The bonds upon their face showed that they were not issued for an ordinary municipal purpose. *Lewis* v. *Shreveport*, 108 U. S. 282.

2. But the act passed April 15th, 1869, and which became a law on March 3d, 1869, declared legal and binding *all* elections theretofore held in any county, city, or town, in reference to a subscription to the stock of the Cairo and St. Louis Railroad Company, and gave power to the County Court of any county, and the corporate authorities of any city or town in which such elections had already been held, and a majority of the votes cast were for subscription, to issue bonds for the amount voted, "notwithstanding any insufficiency, or informality, or irregularity in such election, or in the notice thereof." The election of April 6th, 1868, was something more than informal or irregular. It was insufficient, in itself, as authority for an issue of bonds. But its insufficiency was removed by the act of 1869, if the general assembly of Illinois had the power to do so. That it had such power cannot well be doubted. It

has been frequently decided by the Supreme Court of that State—and upon that point there has been no disagreement between that learned tribunal and the courts of the Union—that prior to the adoption of the Illinois Constitution of 1870, an incorporated city, its corporate authorities being thereunto authorized by the legislature, could make a subscription to the capital stock of a railroad company, without referring the question of subscription to a popular vote. *Keithsburg* v. *Frick*, 34 Ill. 405, 421; *Quincy, Missouri & Pacific Railroad Company* v. *Morris*, 84 Ib. 410; *Marshall* v. *Silliman*, 61 Ib. 218, 225; *Quincy* v. *Cook*, 107 U. S. 549. The legislature, therefore, could make the election of 1868 legal and binding as an expression of the popular will, and, upon the basis of the election thus legalized, empower or authorize the corporate authorities of the municipality to issue the bonds for the amount indicated by the popular vote.

There is no question here, such as has arisen in some cases in the Supreme Court of Illinois, and in this court, as to the power of the legislature, prior to the adoption of the Constitution of 1870, to compel the corporate authorities of a municipality to issue bonds in aid of the construction of a railroad. While the act of 1869 legalized the election of 1868, it did not require an issue of bonds, but only gave power to the corporate authorities of the municipality to do so; such authorities, in the case of an incorporated city, being, not the voters, but its mayor and council. *Williams* v. *Town of Roberts*, 88 Ill. 11; *Quincy* v. *Cooke*, *supra*. If the conditions attached to the subscription by popular vote, or by the ordinance of the city council of Jonesboro, had not been complied with when the curative act of 1869 was passed, then the railroad company would not have been entitled to have the bonds issued. This shows that the curative act does not belong to that class which the Supreme Court of the State, has, in some cases, held to be beyond the constitutional power of the legislature to pass.

3. The next question to be considered is whether the Constitution of Illinois adopted in 1870 took from the city of Jonesboro the power thereafter to issue the bonds voted by the

election of 1868 and authorized by the act of 1869. That instrument declares that

"no county, city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipality prior to such adoption."

We are of opinion that the right of the city to make the subscription in question, and to issue bonds in payment thereof, was saved by the proviso of that section. Before and at the time of the adoption of the Constitution of 1870, the city, by its corporate authorities, had power to subscribe to the stock of this railroad company. Power to that end was conferred by the act of 1869, which was itself based upon a vote of the people of Jonesboro. The vote, when taken, was, it is true, without legal sanction, but it was made effective as an expression of the popular will by the statute subsequently passed and in force before the Constitution of 1870 was adopted. The phrase "under existing laws," in the section of the Constitution referred to, relates, we think, to the time of the adoption of the Constitution rather than to the time when the vote of the people was in fact taken. Looking at the purpose of the proviso in the Constitution of 1870, we cannot suppose that the framers of that instrument intended to make a difference, in the operation of that proviso, between a subscription authorized by a vote legally taken, and a subscription authorized by a vote taken without legislative authority, but subsequently, and before the Constitution went into operation, legalized by a valid act of assembly.

4. But it is insisted that that part of the act of 1869 legalizing the election of 1868 and conferring authority to issue bonds for the amount voted at that election, was in violation of section 23 of article 3 of the Illinois Constitution of 1848, which provides that "no private or local law which may be

passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." The title of the act is "An Act to amend the charter of the Cairo and St. Louis Railroad Company." The contention is, that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the act. In this view we do not concur, and our conclusion is justified by the later decisions of the Supreme Court of Illinois construing a similar provision in the State Constitution of 1870. It was held in *Johnson* v. *People*, 83 Ill. 431, that the Constitution "does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required." *People* v. *Lowenthal*, 93 Ill. 191. The authority of municipalities to make subscriptions in aid of the construction of railroads in Illinois has frequently, if not generally, been given in the charters of the respective railroad corporations. Whether a particular municipality has legislative authority for a subscription to the stock of a particular railroad company can be determined, ordinarily, by referring to the charter of that company. The general subject of municipal subscriptions to the stock of this particular company was, therefore, germane to and fairly embraced by the title of the act of 1869. Upon like grounds a provision in the same act legalizing a previous election at which the people voted in favor of a subscription and giving authority to issue bonds for the amount indicated by the popular vote, was sufficiently covered by a title showing that the act in question was amendatory of the original charter of the company; this, because the validity of bonds so issued would depend upon the existence of legislative authority to issue them, and the existence of such authority would ordinarily be ascertained by reference to the charter and amended charter of the railroad corporation. Our decision in *Montclair* v. *Ramsdell*, 107 U. S. 147, expresses substantially the same views, upon this general subject, as those

announced by the Supreme Court of Illinois in *Johnson* v. *People*.

We are of opinion that no error was committed in dismissing the bill, so far as it questioned the authority of the State officers to assess, levy, and extend taxes in payment of the bonds held by the appellee Graves.

The decree is, consequently, affirmed. *It is so ordered.*

ZANE & Another *v.* SOFFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued October 24th, 1883.—Decided January 21st, 1884.

Evidence—Patent.

1. A patent was issued June 22d, 1865, to one Jennings (and subsequently assigned to appellants), for an improvement in self-acting cocks and faucets. The first claim was for a "screw follower H in combination with the valve of a self-closing faucet, substantially as set forth, and for the purpose described." This screw follower was a round stem "provided with a coarse screw thread or threads." It projected upward through the faucet, and terminated in a handle for the purpose of turning it downward to let on the water. At its lower end it rested upon a valve, which was supported by a spiral spring, the object of this spring being to keep the valve closed when the pressure was removed. It appearing that for ten or fifteen years before the date of J.'s patent B. had manufactured and sold faucets in which an inclined plane or cam was used as a means of producing the result upon the valve stem which was produced by J.'s screw: *Held*, That J.'s 1st claim must be limited to a screw follower, and could not be construed to embrace an arrangement for moving the valve.
2. Since the decision in *Loom Company* v. *Higgins*, 105 U. S. 580, it is *Held*, That under a general denial of the patentee's priority of invention, evidence of prior knowledge and use, taken without objection, is competent at the final hearing, not only as demonstrative of the state of the art, and therefore competent to limit the construction of the patent to the precise form of parts and mechanism described and claimed, but also on the question of the validity of the patent.

Bill in equity, setting forth an infringement of a patent for

self-closing cocks or faucets, and praying for a perpetual injunction, for an account for the payment of damages, and for a temporary injunction. Answer, denying the infringement and averring in substance that for ten or fifteen years prior to plaintiff's patent, a mechanism similar to that described in it had been in public use in New York and Brooklyn for purposes similar to those set forth in it. Decree below for defendant, from which plaintiffs appealed.

Mr. Thomas William Clarke for appellants.

Mr. Henry P. Wells for appellee.

Mr. Justice Bradley delivered the opinion of the court.

This writ was brought by Zane and Roach, as assignees of one Nathaniel Jenkins, against the defendant, Soffe, for infringing (as charged) certain letters patent granted to said Jenkins, June 22d, 1865, for an improvement in self-acting cocks or faucets.

The general features of the invention patented, so far as material to be considered, may be described as follows: The valve is situated in a chamber below the valve-seat, where the water is introduced by the induction-pipe and is kept in place against the valve-seat by a spiral spring underneath resting on the bottom of the chamber; on its upper side the valve is connected by a swivel with a stem which projects upward through the top of the faucet, where it is provided with a handle by which it may be turned; a screw is formed on the upper part of the stem, by which, when the stem is turned by the hand, it is forced downward and pushes the valve from its seat, thus permitting the water to flow out of the cock; on letting the handle go, the spiral spring below the valve, aided by the pressure of the water, forces the valve back to its seat, and the flow of water is stopped. In the specification the stem is called a screw follower. The patent has two claims, only the first of which is claimed to be infringed by the defendant, and this is in the following words, to wit:

"What I claim as new and desire to secure by letters patent is,

first, the screw follower H in combination with the valve of a self-closing faucet, substantially as set forth, and for the purpose described."

The defendant answered the bill, denying that Jenkins was the first inventor of the thing patented, denying infringement, and setting up a patent granted to defendant himself on the 10th of May, 1874, under and according to which the faucets manufactured by him were made, and which he alleges are no infringement of the Jenkins patent. The answer specifically refers to only one patent as anticipating the supposed invention of Jenkins, namely, a patent granted to one Frederick H. Bartholomew, in August, 1846, in which (as alleged) all the essential elements of the faucet patented to Jenkins are described and exhibited. The answer, however, contains the following general averment:

"This defendant, further answering, denies that the patent granted said Nathaniel Jenkins is valid; and alleges that prior to the invention described in said patent, a screw and spring, worked in opposition to each other, had been used to open and close faucets and hydrants, in which faucets and hydrants the screw did all the work of opening the faucets and hydrants, and the spring did all, or most, of the work of closing the valve of the faucets and hydrants. That faucets and hydrants operated in the above manner had been in public and general use and for sale in the cities of New York and Brooklyn, and in various other places long prior to, and at least fifteen years before, the date of the alleged invention of Nathaniel Jenkins; and defendant is advised and believes that, by reason of said prior public use and sale, the patent granted to said Jenkins is invalid."

This answer was not excepted to, and evidence was given by the defendant, without objection, showing that a large number of faucets and hydrants were made by Bartholomew and publicly used in the city of New York several years before the issuing of the patent sued on, differing in some respects from the specific device described in Bartholomew's patent, referred to in the answer, but relied on as anticipating the alleged in-

vention of Jenkins, or, at least, as containing all the essential elements of the faucets manufactured by the defendant.

The court below held that this evidence was competent to show the state of the art at the time Jenkins's patent was granted, and might be used for the purpose of limiting its construction, but not for the purpose of showing such a previous knowledge and use of the invention as would affect the validity of the patent. But since the decision of this case in the Circuit Court, we have held, in *Loom Company* v. *Higgins*, 105 U. S. 580, that under a general denial of the patentee's priority of invention, evidence of prior knowledge and use taken without objection is competent at the final hearing on the question of the validity of the patent. And, since in the present case there was neither an exception to the answer nor any objection to the evidence, except as to a single faucet marked Defendant's Exhibit No. 2 (which may be laid out of the case), we think that the remaining evidence of prior knowledge and use might well have been considered by the court on the question of priority as affecting the validity of the patent.

Viewing the evidence, however, with the court below, only as demonstrative of the state of the art, and therefore competent to limit the construction of the patent to the precise form of parts and mechanism described and claimed therein, it was amply sufficient to sustain the decree.

Self-closing cocks and faucets were no new thing in June, 1865, when the patent of Jenkins was issued. Bartholomew had manufactured and sold them for a period of ten or fifteen years before that time. As early as 1854, he had made and sold faucets in which the valve was kept on its seat by the pressure of a spiral spring, and when a flow of water was desired, the valve was lifted from its seat against the force of the spring by means of a stem, operated by a collar or cross-piece moving around on a fixed circular inclined plane or cam, having the same effect as a screw; when the handle, or thumb-piece, attached to the collar was liberated or let go, the spiral spring would force the valve back to its seat, and the flow of water would be stopped.

The improvement of Jenkins (or what was patented to him

as such), as we have seen, was the employment of a screw on the upper part of the valve stem, in lieu of the circular cam or inclined plane, to force the valve from its seat. This valve stem, called by him the screw follower, forced the valve not only against the pressure of the spring, but against that of the water, both of which were exerted in carrying the valve back to its seat as soon as the force operating upon the screw was removed. Now, in view of the fact that an inclined plane or cam was previously used by Bartholomew as a means of producing the same result upon the valve stem as that produced by the screw made upon it by Jenkins, it is clear that the claim of the latter in his patent, of "the screw follower H in combination with the valve of a self-closing faucet, substantially as set forth," must be limited to the precise form of mechanism designated. It must be limited to a screw follower, and cannot be construed to embrace a cam arrangement for moving the valve. Whether it is also to be limited to a valve which moves to its seat concurrently with, and not against, the pressure of the water, it is not necessary to determine. The limitation to the screw is sufficient to determine this case. In the faucet manufactured by the defendant the screw is not used, but the old cam device is employed for lifting the valve from its seat. It is true that the cam, instead of being placed at the top of the stem, on the outside of the faucet, as was done by Bartholomew, is placed at its lower extremity, by the valve, inside of the faucet; but this does not change the principle of its construction or operation. We concur with the court below in holding that, construed as the patent of Jenkins must be in view of the state of the art at the time of its issue, the defendant has not infringed it, and the bill of complaint was properly dismissed.

The decree of the Circuit Court dismissing the bill is, therefore, affirmed.

SIOUX CITY & PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

Submitted December 18th, 1883.—Decided January 21st, 1884.

Internal Revenue—Land Grant Railroads—Statutes—Taxation.

Under the act of July 1st, 1862, 12 Stat. 492-3, and the acts in addition to it, plaintiff in error received from defendant in error subsidy bonds, which were made by statute a lien upon its road : *Held,* That, in a suit to collect an internal revenue tax on the undivided net earnings of the road, carried to a fund or to construction account, the plaintiff was not entitled to have the interest upon these bonds deducted from its net earnings before settling the amount to be subject to the tax ; but that the amount of that interest, if earned and carried to a fund or charged to construction, was taxable.

Suit to recover an internal revenue tax on the undivided net earnings of the plaintiff's railroad. Defence that the company was not subject to the tax to the extent of the interest on the subsidy bonds issued to it under the act of July 1st, 1862, 12 Stat. 489, ch. 120.

Mr. E. S. Bailey for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought by the United States against the Sioux City & Pacific Railroad Company to recover certain arrears of taxes alleged to have accrued from November, 1868, to September, 1871, inclusive. The first count of the declaration states that for the eleven months ending September 30th, 1868, the gross receipts of the company from passengers were $51,786.12, on which it became liable to pay a tax of 2½ per cent., or $1,294.55 ; and that the undivided net earnings of the company for the same period, which were carried to the construction fund or account, were $43,889.39, on which the company became liable to pay a tax of 5 per cent., amounting to $2,194.41 ; that the

company paid the tax on gross receipts, but refused to pay the tax on net earnings carried to construction account. Three other counts for the following years showed an aggregate arrearage (including that stated in the first count) of over $11,000. There were four other counts for penalties, to which the statute of limitations was pleaded, and which are not the subject of controversy. Issue being taken on the first four counts, the parties entered into a stipulation for the purpose of showing the precise matter in dispute.

This stipulation, after stating the title of the cause, was as follows:

"The parties to the above-entitled action hereby stipulate to waive a jury on the trial thereof. For the purpose of the trial of this action the following facts are admitted:

"1. All the material facts alleged in the first count of the petition are true, subject to the following statement and exception, to wit: The amount of interest accrued during the period mentioned in said count on the subsidy bonds (so-called) issued by the United States to said defendant in pursuance of the act of Congress entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, 1862, and the amendments thereto, was the sum of thirty-six thousand dollars ($36,000). If the said sum of $36,000 is subject in law to be deducted from the gross receipts of the defendant in order to ascertain the net earnings thereof for the period named, then the amount of the net earnings liable to a tax of five per cent. is the sum of seven thousand eight hundred and eighty-eight and $\frac{39}{100}$ dollars ($7,888.39), and the tax on the same is three hundred ninety-four and $\frac{41}{100}$ dollars ($394.41), instead of the sum of $2,194.41, as claimed in said count."

Similar admissions were made with regard to the other counts, and the stipulation concluded as follows:

"If the court is of the opinion that the interest which accrued on the said subsidy bonds for the several periods named is subject to be

deducted from the gross receipts in order to ascertain the net earnings, then the plaintiff is entitled to recover—

On the first count only	$394 51
On the second count only	52 60
On the third count only	1,434 37
And on the fourth count	221 81
"Total	$2,103 29

"But if, on the other hand, the court should be of the opinion that the said interest accrued on said bonds is not subject to be deducted, the plaintiff is entitled to receive—

On the first count	$2,194 51
On the second count	3,944 77
On the third count	3,416 23
On the fourth count	221 81
"Making a total of	$9,777 32"

Upon this state of facts, the court gave judgment for the latter sum, and the company has brought this writ of error to review said judgment.

We think that the judgment was right. The accruing interest on the subsidy bonds loaned by the government to the company, is payable by the company at a future day, to wit, at the maturity of the bonds; and if a sufficient amount of the company's annual net earnings is laid aside (as it should be) to meet that interest when it shall become due, the amount so laid aside would be directly within the scope of the Internal Revenue Act, as it stood when the net earnings in question arose. The 122d section of that act, as amended in 1866, imposed a five per cent. tax, not only on all payments of interest due on bonds and on all dividends declared by any railroad or canal company, but also on "all profits of such company carried to the account of any fund, or used for construction." The profits here referred to are the profits arising from the operation of the road or canal, without deduction of interest paid to its bondholders or dividends paid to its stockholders, and correspond to the phrase "net earnings" used in the stipulation of the parties in this case. *Union Pacific Railroad Company* v. *United States*, 99 U. S. 402. The expression in

the act, "Profits carried to the account of any fund," would cover the exact case here if any portion of such net earnings had been carried to a fund created for meeting the interest to be paid on the subsidy bonds. It is very clear, therefore, that whether the whole of said net earnings were carried to construction account (as admitted in the stipulation) or a part of it were carried to account of such accruing interest fund, it would be expressly taxable by the Internal Revenue Act.

The same result, we think, would have followed had the interest in the subsidy bonds been payable by the company semi-annually as it fell due; for although the words of the Internal Revenue Act, as that act stood when the transactions in question occurred, 14 Stat. 138, imposed the five per cent. tax upon interest due and payable by a railroad or canal company only where such company was indebted for "money for which *bonds or other evidence of indebtedness have been issued*, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest;" which words may be regarded as literally referring only to "bonds or other evidence of indebtedness" issued by the company itself; yet, if the company had been obliged to pay the interest accruing on the subsidy bonds semi-annually as the same fell due, said bonds would have been, in effect, the bonds "or other evidence of indebtedness" of the company. Though in form government bonds, the subsidy act makes them a mortgage lien on the property of the company, and ultimately payable by the company, principal and interest, 12 Stat. 492, 493; and if an obligation had been imposed by the statute to pay both principal and interest as they respectively fell due, it would have made them substantially and in effect the bonds of the company, and fairly taxable under the Internal Revenue Act.

Be this, however, as it may, it is clear that where, as in the present case, the interest is to be provided for by a fund, in the nature of a sinking fund, to be laid by for the purpose, the case comes within the express terms of the Internal Revenue Act; and no deduction of such accruing interest can be made from the taxable net earnings of the company.

The judgment of the Circuit Court is affirmed.

DIMPFELL & Another *v.* OHIO & MISSISSIPPI RAILWAY COMPANY & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Argued November 28th, December 3d, 1883.—Decided January 21st, 1884.

Corporations—Equity.

In order to give a standing in a court of equity to a small minority of stockholders contesting as *ultra vires* an act of the directors against which a large majority makes no objection, it must appear that they have exhausted all the means within their reach to obtain redress of their grievances within the corporation itself, and that they were stockholders at the time of the transactions complained of, or that the shares have devolved on them since by operation of law.

Mr. Charles W. Hassler opened for appellants.

Mr. Edgar M. Johnson for Farmers' Loan & Trust Company, appellee.

Mr. B. Harrison for same.

Mr. Thomas N. McCarter closed for appellants.

Mr. Justice Field delivered the opinion of the court.

This suit was brought to set aside the contract by which the Ohio and Mississippi Railway Company became the owner of a portion of its road known as the Springfield Division, and to obtain a decree from the court declaring that the bonds issued by the company, and secured by a mortgage upon that division, are null and void. It was commenced by Dimpfell, an individual stockholder in the company, who stated in his bill, that it was filed on behalf of himself and such other stockholders as might join him in the suit. Callaghan, another stockholder, is the only one who joined him. The two claim to be the owners of fifteen hundred shares of the stock of the company. The whole number of shares is two hundred and forty thousand. The owners of the balance of this large number make no complaint of the transactions which the complainants seek to annul.

And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive.

But assuming that the complainants were the owners of the shares held by them when the transactions of which they complain took place, it does not appear that they made any attempt to prevent the purchase of the additional road, and the issue by the company of its bonds secured by a mortgage on that road. We are not informed of any appeal by them to the directors to stay their hands in this respect, nor of any representation to them of a want of power to make the purchase and issue the bonds, nor of any probable injury which would arise therefrom. The purchase was made in January, 1875, and this suit was not commenced until September 12th, 1878. In the meantime the new road purchased was operated as an integral part of the line of the Ohio and Mississippi Railway Company, without objection from any stockholder. During these three years and eight months the earnings of the new road went into the treasury of the company, and the bonds issued upon the mortgage of that road, executed by the company in payment of its purchase, passed into the hands of parties who bought them on the faith of contracts which had been carried out without complaint from any one. Objections now come with bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction. The purchase and the issue of the bonds were public acts known to them, and presumably to all the stockholders.

A stockholder must make a better showing of wrongs which he has suffered, and also of efforts to obtain relief against them, before a court of equity will interfere and set aside the trans-

actions of a railway company or of its directors. It is not enough that there may be a doubt as to the authority of the directors or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and before an individual stockholder can be heard he must show, in the language of this court, that "he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes." *Hawes* v. *Oakland*, 104 U. S. 450.

In that case the court added that the efforts to induce such action as he desired on the part of the directors or of the stockholders, when that was necessary, and the cause of his failure, should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law.

According to the rule thus declared, and its value and importance are constantly manifested, the complainants have no standing in court, and the demurrer was properly sustained for want of equity in the bill.

This view renders it unnecessary to consider whether, as held by the court below, the railway company had the right to acquire the Springfield Division and to execute the mortgage and issue the bonds mentioned by virtue of the legislation of Illinois.

The complainants have not shown any ground which would justify the Court, on this application, to inquire into the validity of the transaction.

Decree affirmed.

DISTRICT OF COLUMBIA *v.* CLEPHANE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 2d, 1884.—Decided January 21st, 1884.

Contract.

An agreement to lay down a certain kind of pavement in the streets of a city, and if at any time during the period of three years from the completion of the work any part shall become defective from imperfect or improper material or construction, and in the opinion of the other party shall require repair, then that the contractor will, on being notified thereof, commence and complete the same to the satisfaction of the other party, is not a warranty against effects of weather, or wear in use, or against defects resulting from other causes than those specified: and in a suit against the contractor to recover the cost of repairs made by the municipal authorities after notice to the contractor and neglect by him to make the repairs, it is necessary to prove that the alleged defects resulted from improper construction, or from the use of imperfect or improper materials.

Mr. A. G. Riddle for plaintiff in error.

Mr. W. F. Mattingly, *Mr. C. C. Cole*, and *Mr. William A. Cook* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

The defendant in error made a contract in writing with the Board of Public Works of the District of Columbia in 1872 for the paving of parts of certain streets in the city of Washington with the "Miller wood pavement." In that contract there was the following clause, on which this action is founded on account of its alleged violation by the defendant:

"Ninth. It is further agreed that if at any time during the period of three years from the completion of the work to be done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part; and in case of a failure or neglect of the said party so to do, the same shall be done under the

directions and orders of the said party of the first part at the cost and expense of the said party of the second part."

The plaintiff alleges that the defendant did not in good, sufficient, and workmanlike manner, nor in accordance with the specifications of the contract, execute the work therein mentioned, and that within three years from its completion a large part of it became defective from imperfect and improper material and construction. It is further alleged that defendant was duly notified of this and required to repair it, which he failed to do, whereupon plaintiff did so, at an expense of $40,517, for which judgment is asked against defendant. The answer is a substantial denial of these allegations, with some special matter in defence not material to be noticed here.

On the trial before a jury, after all the plaintiff's evidence was in, the defendant demurred to it as insufficient, and the court directed the jury to find a verdict for the defendant.

It appears from the bill of exceptions, which contained all the evidence offered, that within the three years after the completion of the work the pavement became so badly broken up and so imperfect as to require extensive repairs, and demand was made on defendant to repair it; that on his failure to do so the officers of the District who had charge of the matter determined to remove the wooden pavement on several squares of the streets and replace it with another kind of pavement, to wit, vulcanite concrete pavement. That the cost of this was $40,517, except that of this sum $1,242.92 was for taking up and relaying wood pavement and removing *débris*. No evidence was given that the material furnished by defendants was defective or unsound, or that the work was not well done in putting it down.

It is too plain for argument that the defendant did not agree that if his pavement should need repair within the three years, that the authorities of the District, because he failed to repair, could change the entire character of the pavement from a wooden to a stone or concrete or vulcanite or any other pavement, and place it where the one had been constructed by him, and charge the entire cost of the new and better class of pavement to him.

Even if it be conceded that defendant was bound at all hazard to keep his pavement in repair for the three years, or pay the District government for so doing, this meant repair, not a new pavement; such repairs as that kind of pavement was capable of and not a new and much more expensive one to be laid at his cost.

As plaintiff did not make such repairs, and offered no evidence of what it would have cost to make them, we do not see that there was any evidence on which a verdict could be rendered. It is true that it appears that plaintiff paid $1,242.92 for taking up and relaying wooden blocks, and if there had been any evidence that this was rendered necessary by the failure of the defendant to perform his contract well, it might have been left to the jury as to that much damage by reason of such failure.

But we concur with the court below, that the defendant did not contract for the perfection of his work for three years, nor that he would keep it good for that time.

His contract was to lay the Miller wood pavement, a patented invention. Of the capacity of this invention for resisting weather and use the Board of Public Works, and not he, took the responsibility. All his material was submitted to the inspection of the plaintiff's engineers, and all his work was done under their eyes, and he could only receive his pay on their certificate of work done and inspected.

The language of his agreement is, that if any parts thereof, that is, the pavement, "shall become defective from imperfect or improper material or construction," he will repair.

No evidence was offered that any of the material was imperfect or improper when placed there, or that any of this construction was improperly or defectively done. We think this was necessary to enable plaintiff to recover. It will not be presumed, because the work needed repair within three years, that the material furnished by plaintiff was originally imperfect, or that the construction was not well done.

The pavement may have become defective from improper and rough usage, from permitting water to stand on it and produce decay, or, what is far more likely, from the inherent

inability of the Miller wood pavement to resist the usual disintegrating forces to which all pavements are subjected. Against this defendant did not warrant, and for its consequences he did not agree to become responsible.

In the absence, therefore, of any evidence that the pavement became defective within three years from imperfect or improper material or construction used by defendant, there was no case against him, and the direction of the judge was correct.

The judgment of the Supreme Court of the District of Columbia is, therefore, affirmed.

VINAL *v.* WEST VIRGINIA OIL & OIL LAND COMPANY.

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

Submitted January 10th, 1884.—Decided January 21st, 1884.

Action—Error—Partnership.

Mr. John A. Hutchinson for plaintiff in error.

Mr. N. Goff, Jr., for defendant in error.

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

This judgment is affirmed. One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone against the debtor. That is the only question presented by the bill of exceptions in this case. The refusal of the court below to grant a new trial is not reviewable here.

Affirmed.

HAMBRO & Another *v.* CASEY, Receiver.

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

Submitted January 3d, 1884.—Decided January 21st, 1884.

Bill of Exchange—Damages—Protest.

When a bank, the owner and holder of a bill of exchange on a foreign country, remits it for collection to its correspondent abroad, and the bill is not paid at maturity, and is protested, the correspondent is not entitled to damages on the protest, as against the owner, even though the owner may have failed before maturity of the bill, being largely indebted to the correspondent.

Mr. Thomas L. Bayne for the plaintiffs in error.

Mr. J. D. Rouse and *Mr. William Grant* for defendant in error.

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

The controlling facts in this case are as follows: C. J. Hambro & Son, a banking firm in London, England, were the correspondents of the New Orleans National Banking Association, a national bank in New Orleans. The bank kept a running account with the firm, drawing upon them from time to time as occasion required, and remitting bills to cover its drafts. In the course of its business the bank became the owner of certain bills drawn by a New Orleans firm on their correspondents in France, amounting in the aggregate to 440,000 francs, or $93,121 in United States currency. These bills were indorsed by the bank and remitted to Hambro & Son for collection and credit, but before they matured the bank and the drawers and drawees all failed. The failure of the bank occurred on the 4th of October, 1873, and, on a statement of accounts a few days after, the bank was found in debt to Hambro & Son for the sum of $89,798.30. The bills which had been remitted were protested at maturity at an expense of $1,356, which was paid by Hambro & Son. This item was not included in the balance shown by the account stated.

Syllabus.

Under the laws of Louisiana the damages upon protest of foreign bills of exchange is ten per cent. on the principal sum specified in the bills. Suit was brought against the receiver of the bank to recover the charges for protest and the ten per cent. damages. Judgment was given against the receiver for the expenses of protest, but in his favor on the claim for damages. This writ of error was sued out by Hambro & Son to reverse that judgment so far as it was in favor of the receiver.

In our opinion the judgment was clearly right. The protested bills are the property of the bank, subject in the hands of Hambro & Son to their lien as bankers for the security of the balance due them on general account. All moneys collected by Hambro & Son on the bills, whether it be for principal, interest, or damages, must be passed as soon as collected to the credit of the bank. Hambro & Son are the holders of the bills, but in no legal sense the owners, though it may be their lien is for more than can be collected from the drawers or drawees. Clearly the law does not require the bank to pay the damages, when the payment, if made, must be passed to its own credit on the books of its collecting agents. That would be the operative effect of such a judgment as is now asked for.

Judgment affirmed.

AURRECOECHEA *v.* BANGS.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Submitted January 4th, 1884.—Decided January 21st, 1884.

Practice.

When counsel stipulate to submit a case, fixing a time for filing of argument by the plaintiff, and a time subsequently for filing the defendant's argument, and a time still later for plaintiff's reply, and the plaintiff failing to file an argument, the defendant files one within the time allowed to him and the plaintiff files no reply, the court will take the case as submitted under the rule.

Stipulations between counsel for submitting suits, when filed, cannot be withdrawn without consent of both parties. *Muller* v. *Dows*, 94 U. S. 277, approved and followed.

No appearance for plaintiff in error.

Mr. A. Chester for defendant in error.

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

The counsel on both sides stipulated in writing to submit this case under Rule 20. The stipulation bears date November 15th, 1883. It was filed here on the 12th of December. By its terms the counsel for the plaintiff in error was to have until the 12th of December to serve and file his printed argument; the counsel for the defendant in error until the 25th of December to serve and file his printed argument; and the counsel for the plaintiff in error ten days to reply. No argument has been filed in behalf of the plaintiff in error, but one was filed in behalf of the defendant in error on the 15th of December. On the last day for submitting cases under the rule, which was after the expiration of the time the plaintiff in error was entitled to for his reply, the defendant in error submitted the case under the stipulation.

In *Muller* v. *Dows*, 94 U. S. 277, it was decided that stipulations of the kind between counsel might be enforced, and that they could not be withdrawn by either party without the consent of the other, except by leave of the court upon cause shown. We, therefore, take the case as submitted under the rule, although there is no argument for the plaintiff in error, and without passing specially upon the several assignments of error, which were returned with the transcript in accordance with the requirements of section 997 of the Revised Statutes,

Affirm the judgment.

UNITED STATES *v.* GRAHAM.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 4th, 1884.—Decided January 21st, 1884.

Construction of Statutes—Mileage.

1. The act of 1835, 4 Stat. 755, which provided that ten cents a mile should be allowed to naval officers for travelling expenses while travelling under orders, made no distinction between travelling in and travelling out of the country. It was not repealed by the act of April 17th, 1866, 14 Stat. 38, nor by the act of July 15th, 1870, 16 Stat. 332, and was in force during the whole time that the travel was performed which is sued for, and its plain provisions are not affected by a contrary construction long put upon it by the Navy Department. *United States* v. *Temple*, 105 U. S. 97, approved and followed.
2. When there is ambiguity or doubt in a statute, a long continued construction of it in practice in a department would be in the highest degree persuasive, if not absolutely controlling in its effect. But when the language is clear and precise, and the meaning evident, there is no room for construction.

Suit in the Court of Claims for mileage at the rate of ten cents a mile under the act of March 3d, 1835, 4 Stat. 755. Judgment below for the claimant, from which the United States appealed. The issues and contentions are stated in the opinion of the court.

The case was submitted on briefs.

Mr. Solicitor-General and *Mr. Assistant Attorney-General Simons* for appellants.

Mr. Robert B. Lines and *Mr. John Paul Jones* for appellee.

Mr. Charles F. Benjamin also filed a brief for appellee.

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

We are unable to distinguish this case in principle from that of *United States* v. *Temple*, 105 U. S. 97, in which it was decided that an officer of the navy who, while engaged in public business, travelled under orders by land or sea, the travel by

sea not being in a public vessel of the United States, was entitled, under the act of June 30th, 1876, c. 159, 20 Stat. 65, to mileage at the rate of eight cents a mile for the whole distance travelled, whether by sea or land. The mileage sued for in this case accrued while the act of March 3d, 1835, c. 27, 4 Stat. 757, was in force. The language of that act, on which the question now presented arises, is as follows:

"It is hereby expressly declared that the yearly allowance provided for in this act is all the pay, compensation, and allowance that shall be received under any circumstances whatever, by any such officer or person, except for travelling expenses under orders, for which ten cents per mile shall be allowed."

That of the act of 1876, passed upon in Temple's case, was:

"And so much of the act of June 16th, 1874 . . . . as provides that only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to the officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses."

It is found as a fact in this case that on the 6th of April, 1835, which was only a little more than a month after the act of 1835 passed, circular instructions were issued from the Treasury Department to the effect that mileage at the rate of ten cents a mile was fixed by law and should be paid for travelling expenses within the United States, but that the usual and necessary passage money actually paid by officers returning from foreign service, under orders or on sick ticket, when they could not return in a public vessel, would be paid as theretofore, as well as the like expenses of officers going out. The navy regulations adopted in 1865, and in force in 1872, when the claim of Graham, the appellee, accrued, provided that "for travelling out of the United States the actual expenses only are allowed." It is also found that from the time of the passage of the act of 1835 until the decision of Temple's case in this court, the Navy and Treasury Departments had, with a single

exception, always held that the ten cents a mile did not apply to travel to, from, or in foreign countries, but only to travel in the United States. In Temple's case the long continued practice in the departments was relied on to justify the decision of the accounting officers of the treasury against him, but the fact of the actual existence of the practice was not found as it has been now.

The operative words in the act of 1876 are "the sum of eight cents per mile shall be allowed," and in the act of 1835, "for which ten cents per mile shall be allowed." In Temple's case it was said the language of the act of 1876 was so clear and explicit as not to be open to construction, and to our minds the same is true of the act of 1835. Under both acts all travelling expenses are to be paid by mileage, and there is not in either of them any indication of an intention of Congress to make a distinction between travel by sea or on land, in foreign countries or in the United States. As was remarked by Mr. Justice Woods, "the practice . . finds no higher warrant or sanction in the act of 1835 than in the act of 1876."

Such being the case, it matters not what the practice of the department smay have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Temple*, *supra*; *Swift Co.* v. *United States*, 105 U. S. 691; *Ruggles* v. *Illinois*, 108 U. S. 526.

The judgment is affirmed.

JENKINS, Assignee, *v.* LŒWENTHAL & Another.

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

Submitted January 7th, 1884.—Decided January 21st, 1884.

Error—Practice.

When the record discloses two defences to an action brought in a State court, one presenting a federal question, and one presenting no federal question, either of which if sustained was a complete defence to the suit, and that the State court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this court will affirm the judgment below without considering the federal question.

Mr. W. T. Burgess for plaintiff in error.

Mr. A. M. Pence for defendants in error.

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

This suit was brought by Robert E. Jenkins, as assignee in bankruptcy of Samuel J. Walker, a bankrupt, to recover certain lands conveyed by the bankrupt to Eli Kinney, on the alleged ground that the conveyances, though absolute on their face, were intended as mortgages. Two defences were interposed among others, one that the defendants, who are the present owners of the property, are innocent purchasers for a valuable consideration, without notice of any outstanding equities in the assignee or the bankrupt; and the other that the suit was not brought within two years after the alleged cause of action accrued to the assignee. Rev. Stat., § 5057. Either of these defences, if sustained, bars the action. The second involves a federal question, the other does not. The court in its decree sustained them both, and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree, even though the federal question involved in the other defence was decided wrong, we affirm the decree, without considering that question or expressing any opinion upon it. *Murdock* v. *City of Memphis*, 20 Wall. 590, sustains this practice.

Affirmed.

DOWS & Another *v.* JOHNSON.

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

Submitted January 7th, 1884.—Decided January 21st, 1884.

Jurisdiction.

When the value of the matter in dispute in this court is less than $5,000 the court is without jurisdiction of the cause, although an amount more than $5,000 may have been involved below. *Hilton* v. *Dickinson*, 108 U. S. 165, approved and followed.

Motion to dismiss. Case also submitted on the briefs.

Mr. Henry S. Monroe for plaintiffs in error and against the motion.

Mr. Samuel F. Chapman and *Mr. W. F. Sapp* for defendant in error and for the motion.

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

We have no jurisdiction in this case. The suit was brought by Dows & Co. to recover damages for the unlawful conversion of ten thousand bushels of corn, the value of which, according to the findings, did not exceed $6,000. With interest added to this sum from the date of the alleged conversion until the judgment, the most that could have been recovered, upon the special finding, was $6,360. A judgment was in fact rendered for $2,430. The matter in dispute in this court is the difference between these two sums, or only $3,930. In *Hilton* v. *Dickinson*, 108 U. S. 165, it was settled that our jurisdiction depends on the value of the matter in dispute here, and as that in the present case is less than $5,000, it follows that the suit must be dismissed; and it is so ordered.

Dismissed.

FIRST NATIONAL BANK OF OMAHA *v.* REDICK.

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

Submitted December 17th, 1883.—Decided January 21st, 1884.

Error—Jurisdiction.

When the plaintiff below in open court, by permission of court, remits all of the verdict in excess of $5,000 and judgment is entered for that sum and costs, the writ of error will be dismissed for want of jurisdiction.

Action below to recover penalty for taking usurious interest. On the trial verdict was rendered for the plaintiff for $6,013.32. Plaintiff

"thereupon in open court offered to remit from the amount of said verdict the sum of $1,013.32, and the court, upon due consideration thereof, allowed said remitter, and ordered the same to be duly entered of record, and thereupon it was ordered and adjudged by the court that the said plaintiff have and recover from the said defendant, the First National Bank of Omaha, the sum of five thousand dollars with costs of suit, etc."

Plaintiff brought the cause here by writ of error. Defendant in error moved to dismiss.

Mr. John I. Redick for himself in support of the motion.

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

This motion is granted on the authority of *Thompson* v. *Butler*, 95 U. S. 694, and *Alabama Gold Life Insurance Company* v. *Nichols*, 109 U. S. 232.

Dismissed.

UNITED STATES *v.* GRANT.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 17th, 1883.—Decided January 21st, 1884.

Appeal—Court of Claims—Statutes.

An act which directs the Court of Claims to reopen and readjudicate a claim, and in case it finds a further amount due that the same shall be a part of the original judgment, confers no right of appeal from the final action of the court under it; and if the time for the right of appeal from the original judgment has expired before appeal from such final action is claimed and taken, the appeal will be dismissed.

Motion to dismiss an appeal from the Court of Claims.

Mr. W. Hallett Phillips for the motion.

Mr. Solicitor-General and *Mr. Assistant Attorney-General Simons* against.

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

Grant & Co. sued the United States in the Court of Claims on the 2d of December, 1868, and on the 6th of December, 1869, recovered a judgment for $34,225.14. On the 5th of January, 1883, the following act was passed by Congress:

"Be it enacted . . . That the Court of Claims be, and it is hereby, directed to reopen and readjudicate the case of Albert Grant and Darius Jackson . . . upon the evidence heretofore submitted to the said court in said cause . . . , and if said court in such readjudication shall find from such evidence that the court gave judgment for a different sum than the evidence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and sixteen dollars and twenty-nine cents; and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the fifth Court of Claims report, page eighty."

Under this act Grant, on the 13th of January, 1883, applied

to the court to re-examine the case and to render a judgment *nunc pro tunc* for the additional sum of $14,016.29. Upon this application, the court, on due consideration, found that the original judgment was given for a different sum than was intended, and that, "in order to correct such error and adjudge to said Albert Grant such additional sum in this cause as the evidence justifies, he should receive a further sum of $14,016.29," and on the 11th of June, 1883, a judgment for that amount was rendered. From this judgment the United States took an appeal, which Grant now moves to dismiss on the ground that no appeal lies from an order or judgment entered in such a proceeding.

In our opinion, this motion should be granted. The act of Congress, in its legal effect, is nothing more than a direction to the Court of Claims to entertain an application to correct an error in the entry of one of its former judgments. The readjudication ordered is to be upon the old evidence, and, if an error is found, the correction is to be made, not by rendering a new judgment, but by amending the old one. The language is, "and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment." As, when the act was passed, an appeal from the original judgment was barred by lapse of time, we are satisfied it was the intention of Congress to make the action of the Court of Claims upon this readjudication final. Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate that the new part of the judgment can be separated from the old for the purposes of review here. By the correction the new judgment was merged in the old.

The motion to dismiss is granted.

PEUGH *v.* DAVIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 7th, 1884.—Decided January 21st, 1884.

Appeal—Supersedeas.

If a court in session and acting judicially allows an appeal which is entered of record without taking a bond within sixty days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time under the provisions of § 1007 Rev. Stat., but this is not to be construed as affecting appeals other than such as are allowed by the court acting judicially and in term time.

Mr. M. F. Morris and *Mr. J. T. Crittenden* for appellant.

Mr. A. G. Riddle for appellee.

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

This is an appeal from a decree of the Supreme Court of the District of Columbia, rendered on the 30th of October, 1882. At the foot of the decree as entered is the following:

"And from this decree the complainant, Samuel A. Peugh, prays an appeal to the Supreme Court of the United States, which is allowed."

No bond of any kind was executed under this allowance until the 10th of May, 1883, when Mr. Justice Miller granted a supersedeas and took the necessary security for that purpose. He at the same time signed a citation. On the same day another citation was signed by the Chief Justice of the Supreme Court of the District. Davis, the appellee, now moves to vacate the supersedeas because no appeal was perfected within sixty days after the rendition of the decree appealed from, and also to dismiss the appeal.

In *Kitchen* v. *Randolph*, 93 U. S., at 92, it was held that—

"The service of a writ of error or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an

indispensable prerequisite to a supersedeas, and that it is not within the power of a justice or judge of the appellate court to grant a stay on the judgment or decree, if this has not been done."

In referring to this case at the same term, in *Sage* v. *Central Railroad Company*, id, 416, it was spoken of as holding that, unless the writ of error was sued out and served, or the appeal *taken* within the sixty days, no supersedeas could be allowed. It thus appears that the words "perfected" and "taken" were used interchangeably, and were evidently intended to mean the same thing as "allowed." The rule established by these cases, when accurately stated, is therefore no more than that to give a justice or judge of the appellate court authority to grant a supersedeas after the expiration of the sixty days, a writ of error must have been issued and served, or an appeal allowed within that time.

In *Edmonson* v. *Bloomshire*, 7 Wall. 306, it was decided that a prayer for an appeal made in open court, and an order allowing it, constituted a valid appeal. Under such circumstances the allowance becomes the judicial act of the court in session, and the bond is not essential to the taking of the appeal, though it may be to its prosecution. As was said in the case last cited:

"It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court."

Anson Bangs & Co. v. *Blue Ridge Railroad*, 23 How. 1; *Brobst* v. *Brobst*, 2 Wall. 96; *Seymour* v. *Free*, 5 Wall. 822, are cases of that character. And in *The Dos Hermanos*, 10 Wheat. 306, where an appeal was prayed within the five years' limitation, and was actually allowed by the court within that period although the bond was not given until afterwards, Chief Justice Marshall said:

"It is true the security required by law was not given until after the lapse of the five years; and under such circumstances the court might have disallowed the appeal and refused the

security. But as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal."

We decided in *Railroad* v. *Blair*, 100 U. S. 661, that if an appeal was allowed by the court during the term at which the decree was entered, and the bond was not executed until after the term, a citation was necessary; but that related only to procedure under the appeal, and is not in conflict with the former decisions as to the effect of an allowance of an appeal by the judicial act of the court in session.

In view of these rulings we hold that if a court in session and acting judicially allows an appeal which is entered of record without taking a bond within sixty days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time, under the provisions of § 1007 of the Revised Statutes. Nothing here said is to be construed as affecting appeals other than such as are allowed by the court acting judicially and in term time.

The motion is denied.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* NATIONAL CAR-BRAKE SHOE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued January 9th, 10th, 1884.—Decided January 28th, 1884.

Patent.

In this case it was held, that, on the record herein, claim 2 of letters patent No. 40,156, granted to James Bing, October 6th, 1863, for an "improved shoe for car-brakes," namely, "The combination of shoe A, sole B, clevis D and bolt G, the whole being constructed and arranged substantially as specified," does not embody any lateral rocking motion in the shoe, as an element of the combination.

On such a construction, there was, on the record herein, patentable novelty in said claim ; and a structure having the same four parts in combination, with merely formal and not substantial mechanical differences, infringes said claim.

Mr. George Payson for appellant.

Mr. Thomas A. Banning (*Mr. Ephraim Banning* was with him), for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought by the National Car-Brake Shoe Company, a corporation, against the Lake Shore and Michigan Southern Railway Company, in the Circuit Court of the United States for the Northern District of Illinois, for the infringement of letters patent No. 40,156, granted to James Bing as inventor, October 6th, 1863, for 17 years, for an "improved shoe for car-brakes." The bill was filed June 7th, 1880, less than 4 months before the expiration of the patent. The answer, which was filed October 4th, 1880, 2 days before the patent expired, denies infringement and alleges that the thing patented had been in public use or on sale, with the consent and allowance of Bing, for more than 2 years prior to his application for the patent, and that the invention had been abandoned by him to the public. There is no defence of want of novelty or patentability set up in the answer. The replication was filed on the same day with the answer. No proofs were taken, but 5 days after the filing of the replication, and 3 days after the patent expired, the parties entered into the following written stipulation :

"It is hereby stipulated by and between the parties to the above entitled suit, for the purposes of said suit and no other, as follows, to wit : 1. That the patent sued on, No. 40,156, issued to James Bing, October 6th, 1863, may be considered as formally offered in evidence, and that complainant is the exclusive owner thereof. 2. That the small brass model offered by complainant, and marked 'Complainant's Exhibit Bing's Brake-Shoe,' is a correct representation of the invention described in said patent, except that defendant claims that said model has not enough rock-

ing motion. 3. That the small wooden model offered by defendant, and marked Defendant's Exhibit A, is also a correct representation of the said invention, except that complainant claims that said model has too much rocking motion. 4. That defendant has used two different kinds of brake-shoes, both of which are claimed by complainant to be infringements of the second claim of said patent, but as to both of which infringement is denied by defendant. 5. That the first of said brake-shoes is constructed in all respects like that described in said patent, except that the two parts, viz., the shoe and the sole, are fitted on each other so snugly as to have no rocking motion. 6. That the second of said shoes is correctly represented by the small wooden model marked Defendant's Exhibit B, and that it also has no rocking motion. 7. That brake-shoes having a detachable sole attached to the shoe by bolts passing through the shoe and sole at right angles to the face of the sole, one at the top and one at the bottom, and secured by nuts screwed on to the inner ends of said bolts, so that the sole could be taken off upon the removal of said bolts, had been known and used in the United States for some years prior to the said invention of said Bing, and that the small wooden model marked 'Defendant's Exhibit C' is a correct representation of said brake-shoes. 8. That said shoe last mentioned was suspended from the truck by a hanger or clevis attached to a bolt passing through a hole at the top of said shoe, as shown in said model. 9. That neither of said brake-shoes used by defendant has the lateral rocking motion described in said patent, or infringes the first claim of said patent. 10. That, if the court be of the opinion that said lateral rocking motion forms no part of the second claim of said patent, then the first of said defendant's brake-shoes above mentioned is admitted to be an infringement of said claim, and the decision as to that shoe shall be in favor of complainant, provided the court shall also be of the opinion that there is, on that construction, any patentable novelty in said claim. But, if the court be of the opinion that said lateral rocking motion does form a part of said second claim, or that there is no patentable novelty in said claim if so construed as to exclude said rocking motion, then, in either of these cases, the decision shall be in favor of defendant as to said first shoe. 11. That, if the court shall be of the opinion that said lateral rocking motion forms no part of the second claim, and

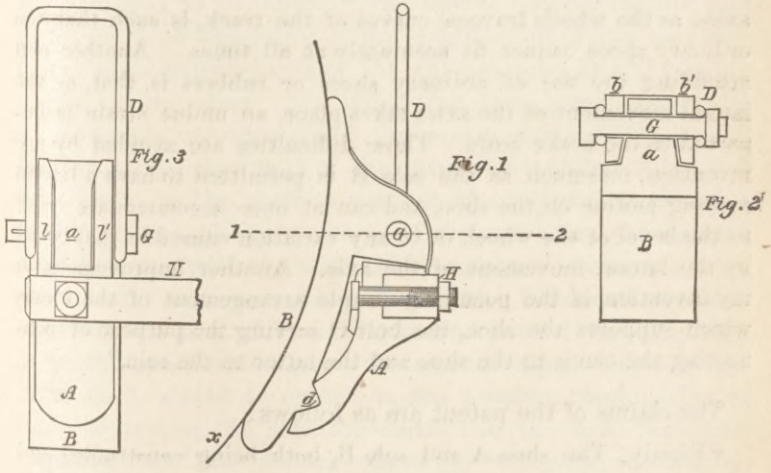
that defendant's second brake-shoe, viz., that the Defendant's Exhibit B, is, in its mechanical construction, substantially the same as the combination described in said claim, then the decision as to that shoe also shall be in favor of complainant, provided the court shall also be of opinion that there is any patentable novelty in said claim when so construed. But, if the court shall be of opinion, either that said lateral rocking motion does not form a part of said second claim, or that the mechanical construction of said shoe-brake is not substantially the same as that shown in said claim, or that there is no patentable novelty in said claim if so construed as to exclude said rocking motion, then, in either of said cases, the decision as to that shoe shall be in favor of defendant. 12. That, in case the court finds the issues in favor of the complainant, both parties waive a reference to the master, and agree that complainant's damages may be assessed at the sum of two hundred dollars. 13. That all the evidence in this case is comprised in this stipulation, the models therein referred to, and the said letters patent."

On that stipulation, and the models referred to in it, and the patent, the case was heard in the Circuit Court. That court filed a written opinion on the 26th of October following, 9 Bissell, 503, upon which a decree was entered on the same day, as of the preceding 9th of October, declaring the patent to be good and valid in law, so far as regards the second claim thereof, and to be owned by the plaintiff; that the defendant had infringed the patent by using the invention secured by the second claim; and that the plaintiff recover $200 damages, in accordance with the stipulation, the same to be in full satisfaction of all claims of the plaintiff against the defendant on account of the defendant's infringement of the patent. The defendant has appealed.

The specification of the patent is in these words:

"My invention relates to the construction of shoes or rubbers for car-wheels, and consists: Firstly. In constructing the shoe of two parts, in the peculiar manner described hereafter, so that the part in contact with the wheel can accommodate itself to the same. Secondly. In the peculiar combination, described hereafter,

of the two parts of the shoe, the clevis by which the shoe is suspended to the truck, and the bolt which secures the clevis to the shoe, and the two parts of the shoe to each other. In order to enable others skilled in this class of mechanism to make and apply my invention, I will now proceed to describe its construction and operation. On reference to the accompanying drawing, which forms a part of this specification, Fig. 1 is a vertical section of my improved shoe for railway car-brakes; Fig. 2 a sectional plan on the line 1, 2, Fig. 1; and Fig. 3 a front view of the shoe. Similar letters refer to similar parts throughout the several views.



A is the shoe, and B the sole, the latter being formed to fit the periphery of the car-wheel (part of which is shown by the line *x*), and having a lug *a*, which fits between the lugs *b b'* on the shoe. D is a clevis, the upper end of which is suspended to the truck of the railway car, the lower end being arranged to embrace the lugs *b* and *b'* of the shoe, a bolt, G, passing through the lower end of the clevis, through the lugs *b* and *b'* of the shoe, and through the lug *a* of the shoe B. It will be observed, on reference to Fig. 2, that the lug *a* is made tapering, and that the bolt G fits loosely in the said lug, as well as in the lugs *b* and *b'*, so that the sole is self-adjustable laterally, for a purpose described hereafter. A projection *d* on the sole B fits into a socket in the shoe, in such a manner that the sole can vibrate laterally in the said socket, while the

projection serves to maintain the shoe and sole in their proper relative positions. H is the usual brake beam, one end of which fits into a recess in, and is secured to, the shoe A, the other end of the beam being secured to a similar shoe on the opposite side of the car track. The peripheries of car-wheels are always bevelled or inclined, so that it becomes necessary to make the soles of the ordinary shoes or rubbers of a corresponding bevel, one shoe at one end of the beam being bevelled in one direction, and the other shoe at the opposite end of the beam being bevelled in a contrary direction. Even when the usual shoes are properly fitted to the bevelled peripheries of the wheels, the lateral movement of the axles, as the wheels traverse curves of the track, is such that the ordinary shoes cannot fit accurately at all times. Another evil attending the use of ordinary shoes or rubbers is, that, as the lateral movement of the axles takes place, an undue strain is imparted to the brake beam. These difficulties are avoided by my invention, inasmuch as the sole B is permitted to have a lateral rocking motion on the shoe, and can at once accommodate itself to the bevel of the wheel, or to any variation caused in that bevel by the lateral movement of the axle. Another improvement in my invention is the peculiarly simple arrangement of the clevis which supports the shoe, the bolt G serving the purpose of connecting the clevis to the shoe and the latter to the sole."

The claims of the patent are as follows:

"Firstly. The shoe A and sole B, both being constructed and adapted to each other substantially as described, so that the sole can have a lateral rocking movement on the shoe, for the purposes specified. Secondly. The combination of shoe A, sole B, clevis D, and bolt G, the whole being constructed and arranged substantially as specified."

It is stipulated that neither of the two brake-shoes of the defendant infringes the first claim of the patent, for the reason assigned in the stipulation, that neither of them has the lateral rocking motion described in the patent, although it is stipulated, as to one of them, that it is constructed in all respects like that described in the patent, except that the shoe and the sole are fitted to each other so snugly as to have no rocking motion.

Opinion of the Court.

1. The first question presented for decision, on the stipulation, is as to whether the lateral rocking motion forms a part of the second claim of the patent. The Circuit Court held that the second claim did not embody, as an essential element, the lateral rocking motion, and that such element need not be found in a car-brake shoe in order to make it an infringement of the second claim. The view urged on the part of the defendant is, that the combination of the shoe, the sole, the clevis, and the bolt cannot, as a whole, be "constructed and arranged substantially as specified," if the whole is not so constructed and arranged as to admit of the lateral rocking motion, and that there is no suggestion in the specification of any construction or arrangement in which the sole has not a lateral rocking motion on the shoe. We think that the Circuit Court was correct in its construction of the second claim, on the record before it. The first part of the invention is stated in the specification to be the peculiar manner of constructing the shoe proper and the sole in two parts, in such way that the sole can accommodate itself to the wheel by reason of its having a lateral rocking motion on the shoe proper. That is the subject-matter of the first claim. The second part of the invention, or, as the specification says, the second improvement in the invention, is stated to consist in the peculiar combination of the shoe proper, the sole, the clevis, and the bolt, the clevis suspending the shoe and its sole to the truck, and the bolt securing the clevis to the shoe proper and that to the sole. The combination of the mode of suspending by the clevis with the mode of securing by the bolt is the same, whether the sole has a lateral rocking motion or not. That combination, as a whole, is constructed and arranged substantially as specified, even where there is no lateral rocking motion to the sole. The words "substantially as specified" mean "substantially as specified in regard to the combination which is the subject of the claim." The adaptation of the shoe proper and the sole to each other in such way as to produce or allow of the lateral rocking motion was the subject of the first claim. The combination formed by the peculiar arrangement of the clevis and the bolt in reference to the shoe proper and the sole is a com-

bination which has no effect to produce or prevent the lateral rocking motion; and the stipulation states that this combination can be used constructed exactly as described in the patent when the shoe proper and the sole are so snugly fitted together that the sole has no rocking motion. In consonance with this view, the specification and the claims maintain a distinction between the arrangement for the rocking motion and the manner of combining together the shoe proper, the sole, the clevis, and the bolt. The stipulation declares that when the combination of the second claim is made there may be a lateral rocking motion in the sole or there may not, for it states that the exact structure of the patent may be copied and yet the fitting of the sole to the shoe proper may be so snug that there may be no lateral rocking motion in the sole, and so no infringement of the first claim. Hence, a loose fitting of the same parts in the same structure would produce a lateral rocking motion and an infringement of the first claim. There is no suggestion that the combination of the second claim was not new; and, there being nothing shown in the state of the art which requires any such construction of the second claim as that contended for by the defendant, and it being fairly susceptible of the opposite construction, and the latter being one which is commensurate with the real invention embraced in the second claim, and one which prevents the real substance of that invention from being bodily appropriated by an infringer, it is proper to give the claim such a construction.

2. The next question raised by the stipulation is as to whether there is any patentable novelty in the second claim, on such a construction. No question of novelty is raised in the answer, and nothing is introduced in evidence on that subject, or on the state of the art, except what is found in paragraphs 7 and 8 of the stipulation. The opinion of the Circuit Court, which is set forth in the record, speaks of "the various patents that have been put in evidence," but none such are before us; and the brief of the appellee states that the model marked "Defendant's Exhibit C" (mentioned in paragraph 7 of the stipulation) "has been selected as the nearest approach to the patented invention, from a large number used in the court below." This

would indicate that the full case presented to the court below is not presented here. As, however, the parties to this suit have stipulated as to what the record is, so far as anything in the controversy between them, in this suit, is concerned, and the stipulation states that it is a stipulation for the purposes of this suit and no other, and the clerk of the Circuit Court certifies the transcript to be "a true, correct, and complete transcript of the record of all the proceedings" had in the Circuit Court in this suit, "as appears from the files and records of" the court remaining in his custody and control, what is furnished to us must be accepted as sufficient for the purposes of this suit, leaving our decision in the case to stand, in its bearing in respect to other suits on the same patent, with only that weight which is due to it in view of the manner in which the case is presented in the record.

The brake-shoe described in paragraphs 7 and 8 of the stipulation and shown in "defendant's Exhibit C," it is very clear, does not contain what is covered by the second claim of the patent, as we have defined it, or destroy its patentable novelty. Bing accomplishes by one bolt what required three bolts in the prior structure. His whole structure can be taken off from the clevis by removing the one bolt, while in the prior structure it required the removal of two bolts to take off the sole from the shoe proper, and the removal of a third bolt to take off the shoe proper from the clevis.

3. On the foregoing views, it is admitted by paragraph 10 of the stipulation, that the first of the defendant's brake-shoes infringes the second claim, and there must be a decision, as to that shoe, in favor of the plaintiff.

4. The only remaining question is as to whether the defendant's other brake-shoe, Exhibit B, is, in its mechanical construction, substantially the same as the combination described or shown in the second claim. In the Bing brake-shoe, the clevis is a three-sided structure, the two lower ends of which embrace the two lugs of the shoe proper, and the bolt passes through the lower end of one arm of the clevis, then through one of the lugs on the shoe proper, then through the lug on the sole, then through the other lug on the shoe proper, and then through the

lower end of the other arm of the clevis, and the sole cannot be removed without first removing the bolt, because the lug on the sole fits in between the lugs on the shoe proper. In the defendant's structure there is no bolt-hole through the lug on the sole, but there is a curved depression made in its top, in which the curved lower end of the clevis rests. The clevis does not have two arms, the lower ends of which embrace the lugs of the shoe proper, and the bolt goes through one of those lugs, then through a hole in the lower end of the clevis (the clevis being a vertical piece without arms and not three-sided), and then through the other one of those lugs, but the bolt does not go through the lug on the sole. That lug is kept in place by the pressure on it of the curved lower end of the clevis, which cannot move out of position, because the bolt goes through it and holds it. The bolt alone, without the clevis, will not confine the lug on the sole. The lug on the sole cannot be removed until the bolt is removed and the clevis is detached. The shoe proper, the sole, and the clevis are combined by the single bolt which secures together the clevis, the shoe proper, and the sole. The bolt and the clevis perform the same office in the two structures, and the mechanical differences are merely formal and not substantial. The combination consists of the same four parts, differing only in form.

The decree of the Circuit Court is affirmed.

CHOUTEAU & Others *v.* BARLOW, Executor and Trustee.

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

Argued January 10th, 11th, 1884.—Decided January 28th, 1884.

The decree of the Circuit Court was reversed on a question of fact, as to whether an agreement of a certain character was made between the copartners in a firm, on its dissolution, as to the interest which the copartners should have in the future in a portion of its assets.

Opinion of the Court.

Mr. Melville C. Day and *Mr. Roscoe Conkling* for appellants.

Mr. W. D. Shipman and *Mr. W. P. Clough* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

The bill of complaint in this case was filed in January, 1876, in the Circuit Court of the United States for the District of Minnesota, by Samuel L. M. Barlow, sole surviving executor of the last will, and trustee of the estate, of John F. A. Sanford, deceased (his co-executor and co-trustee, Frederick C. Gebhard, having died in 1867), and the widow and two of the three children of Sanford, as plaintiffs, against the following defendants: Charles P. Chouteau and Julia Maffitt, the heirs at law and legatees and devisees of Pierre Chouteau, Jr., deceased; the executors of the will of said Pierre Chouteau, Jr.; the heirs at law and legatees and devisees of John B. Sarpy, deceased; the executors of the will of said Sarpy; the widow and residuary legatee and devisee of Joseph A. Sire, deceased; the sole surviving executor of the will of said Sire; Benjamin C. Sanford, the other child of Sanford; and numerous persons alleged to claim an interest in some of the land which is the principal subject of the suit. The averments of the bill, so far as they are material, are as follows: Pierre Chouteau, Jr., Sarpy, Sire and Sanford, in 1842, formed a copartnership, under the firm name of P. Chouteau, Jr., & Co., for the purpose of dealing in real and personal property at St. Louis, Missouri, and in the region of country lying to the northward of that city. The capital was to be furnished, and the profits and losses were to be shared, by the several copartners in the following proportions: Chouteau, 58 per cent.; Sarpy, 16; Sanford, 16; Sire, 10. In 1849 a change was made, whereby the assets were to be owned, and the profits and losses to be shared, in the following proportions: Chouteau, 48; Sarpy, 17⅓; Sanford, 17⅓; Sire, 17⅓. In 1852, the copartnership was dissolved by mutual consent. During its existence, it bought and paid for, with copartnership funds, acre lands and town lots in Wisconsin and Minnesota, to hold and sell for the profit and benefit of the copart-

nership, and among them certain lots named in schedules to the bill. As to some of the lots the title was taken in the name of one Borup, and, in September, 1855, he and his wife conveyed the same to said copartnership, with other lands belonging to it, which he held in the same way. As to others of the lots, the title was taken in the name of one Sibley, and, in September, 1855, and February, 1856, he and his wife conveyed the same to said copartnership, with other lands belonging to it, which he held in the same way. In March, 1857, one Robert conveyed to said copartnership other land in St. Paul, Minnesota, which it then purchased and paid for with copartnership funds. Besides the land named in schedules to the bill, town lots in various towns and villages, and acre lands in various counties in Minnesota, were purchased and paid for by said copartnership, and conveyed to it by deeds. The property so conveyed to it was the property of its said members, in the proportions last mentioned. Sire died in 1854 and Sarpy and Sanford died in 1857. In December, 1859, Benjamin C. Sanford released to the widow and the other two children of his father all his interest in the estate of his father. Pierre Chouteau, Jr., died in 1865.

The bill then contains the following averments, which set forth the particular question in controversy:

"The said copartnership was dissolved by the said John F. A. Sanford, deceased, retiring therefrom, and removing from St. Louis, where he then resided, to the city of New York, to there reside and carry on business in copartnership with the said Pierre Chouteau, Jr.; and, as your orators are informed and believe, it was agreed upon between the said Sanford and the other three copartners, and particularly the said Pierre Chouteau, Jr., as one of the conditions of the withdrawal of the said Sanford from the copartnership, that he, the said Sanford, should release to the said Chouteau all his interest in and to the assets of the said copartnership, except the lands and town lots thereof in Minnesota; and that, in consideration thereof, and of his withdrawal from the said copartnership, the said Chouteau should save him, the said Sanford, harmless on account of the debts of the said copartnership, and should assure to him, free from any debt or liability growing out

of the copartnership affairs, the share of him, the said Sanford, in and to the said lands and town lots, being seventeen and one-third one-hundredth (17⅓-100) parts thereof. In pursuance of such agreement the said Sanford did, as your orators are informed and believe, upon the dissolution of the said copartnership, and as part of the arrangement between the copartners for such dissolution, release to the said Pierre Chouteau, Jr., all his interest in the assets of said copartnership, except in the said lands and town lots; and the said Chouteau afterward, and in his lifetime, realized all said assets so released, and applied them to his own use."

The gravamen of these allegations is, that Pierre Chouteau, Jr., took from Sanford a release of all his interest in the copartnership assets, except the lands and lots in Minnesota, and was to save Sanford harmless from all debts of the copartnership, and Sanford was to have his 17⅓ per cent. of the said lands and lots, free from any debts or liability growing out of the copartnership affairs; and that Pierre Chouteau, Jr., realized all the assets so released and applied them to his own use. It is to enforce this claim to the proceeds of the Minnesota lands and lots, free from the debts of the copartnership, that this suit is especially brought.

The bill then sets forth the following matters: On the dissolution of the St. Louis copartnership, Sanford removed to the city of New York, and there engaged in business in copartnership with Pierre Chouteau, Jr., under the firm names of Pierre Chouteau, Jr., & Co., and Chouteau, Sanford & Co., in which copartnership he continued to carry on business until his death. After the death of Sanford, and after the issuing to Messrs. Gebhard and Barlow of letters testamentary on his will, and in November, 1859, Pierre Chouteau, Jr., and Messrs. Gebhard and Barlow, as such executors and trustees, entered into an agreement or compromise concerning all the mutual dealings between Chouteau and Sanford in relation to the business of the New York firms, and concerning all indebtedness and liability of every nature and kind of Sanford to Chouteau. By the terms of said agreement or compromise Messrs. Gebhard and Barlow were to release to Chouteau all the interest of Sanford in the assets of the New York firms,

and, in consideration thereof, Chouteau was to release to Messrs. Gebhard and Barlow, and to the heirs and legal representatives of Sanford, all claims and liabilities against Sanford or his estate, due or owing, or to become due or owing, to Chouteau, on account of any prior transactions between them. Upon the making of such agreement or compromise, Messrs. Gebhard and Barlow submitted the same to the Surrogate of the county of New York, and he, on November 25th, 1859, made an order allowing the agreement or compromise to be entered into and carried out. Afterwards, and on December 1st, 1859, Messrs. Gebhard and Barlow, to carry out said agreement or compromise, signed, sealed, and delivered to Pierre Chouteau, Jr., their deed, whereby they, as executors and trustees, released to him all the right, title, and interest which Sanford at the time of his death had in or to the assets of the New York firms; and Chouteau, on the same day, in pursuance of said agreement or compromise, and to carry it out on his part, signed, sealed, and delivered to Messrs. Gebhard and Barlow his deed, releasing the heirs, next of kin, legatees, devisees and legal representatives of Sanford from all causes of action, claims and demands, in law or equity, which he, Chouteau, ever had, or which he, his heirs, executors or administrators thereafter could or might have, against Sanford or against his heirs, next of kin, devisees, legatees, executors or administrators, by reason of any matter whatsoever.

The bill further avers, that no accounting or settlement of the affairs and business of said St. Louis copartnership had ever been had except as was thereinbefore stated. It further alleges as follows: Since the death of the four copartners, the defendants C. P. Chouteau and Mrs. Maffitt, claiming, as the heirs at law and devisees of Pierre Chouteau, Jr., to own all the said real estate of the copartnership, sold and conveyed to various persons certain of said lots and lands, and received therefor large sums of money, without the knowledge or consent of the heirs, devisees or legal representatives of Sanford, and in fraud of their rights, and for less than one-half of the actual value, at the time of sale, of the property sold, and for the purpose of defeating the rights of the plaintiffs in the

property, leaving certain lands and lots unsold; and that those made defendants as claiming an interest in some of the lots of land took such interest through conveyances from the defendants C. P. Chouteau and Mrs. Maffitt, with notice that the lots belonged to the heirs, devisees and legal representatives of Pierre Chouteau, Jr., Sire, Sarpy and Sanford, and not merely to their grantors, and with notice that the plaintiffs, as the successors in interest of Sanford, were the owners in fee simple of an undivided 17⅓-100th parts of said lots.

An answer on oath is waived. The prayer of the bill is (1) that the defendants may account touching the affairs and property of said copartnership and touching the proceeds of any of such property; (2) that there may be set off to the plaintiffs, as of the estate of Sanford, 17⅓-100th parts of the unsold lots described in the schedules to the bill, and of any other real property owned by the St. Louis copartnership, that had not been sold and conveyed by C. P. Chouteau and Mrs. Maffitt to parties other than the heirs, legatees and legal representatives of Sire and Sarpy, or to other parties for their use and benefit; (3) that the plaintiffs recover from C. P. Chouteau and Mrs. Maffitt, as part of the estate of Sanford, 17⅓-100th parts of the sums, whether in money or securities, received by them as the prices of the lands and lots so sold and conveyed by them, other than the lots and lands described in said schedules; that, for the amount of the plaintiffs' share of said money and securities, they be adjudged to have a lien on the interest of C. P. Chouteau and Mrs. Maffitt in and to the lots and lands described in said schedules; and that such interests be sold to satisfy such lien.

C. P. Chouteau and Mrs. Maffit, and the executors of Pierre Chouteau, Jr., the executors of Sarpy, the widow of Sire, his surviving executor, and Benjamin C. Sanford, put in a joint and several answer to the bill, not on oath. It denies that the copartnership bought or paid for with copartnership funds the lands referred to in the bill, for the purpose of holding or selling the same for its profit or benefit; but avers that all lots or lands, whether described or not in the bill or its schedules, which were held or owned by said copartnership at its dissolution,

were taken in payment of, or in settlement or compromise of, indebtedness due to it from persons then indebted to it, and not otherwise; and that all lots and lands held by it at the date of its dissolution were a part of its assets at that date, and were chargeable with the payment of its debts. It denies that the property mentioned in the bill as acquired by Borup was acquired by him for the benefit of said copartnership, and avers that he purchased said property and took the conveyance thereof in his own name, without the consent or knowledge of said copartnership, and conveyed the same to the new copartnership, formed after the dissolution, in settlement of his indebtedness, owing to said new copartnership. It denies that the title to the property mentioned in the bill as acquired by Sibley was taken in his name for the benefit of said copartnership, and avers that the property was received from Sibley in settlement of indebtedness owing to the new copartnership formed after the dissolution. As to the town lots and acre lands mentioned in the bill as being additional to the land named in the schedules to the bill, and owned by said copartnership prior to its dissolution, the answer avers that all those lots and lands were firm assets, taken, in the ordinary business of the firm, in payment or settlement of indebtedness theretofore owing to it. It denies that any part of the lots or lands referred to in the bill as having been conveyed after the dissolution of the firm was intended to be conveyed to any firm in which said Sanford was a member or interested. It then alleges as follows:

"On the contrary thereof, these defendants say, that, on the 31st day of December, 1852, said copartnership in said bill of complaint named was duly dissolved, and said John F. A. Sanford withdrew therefrom, and then and there, for a valuable consideration to him paid by said Pierre Chouteau, Jr., did sell, assign, transfer and set over unto the said Pierre Chouteau, Jr., all and singular his share and interest in and to the assets of said partnership, of all and every kind and description whatsoever, including his interest (if any he had) as a member of said firm, in and to the said lots and lands in said bill of complaint described, and all and every part and parcel thereof, and from thenceforth said Sanford

never had or claimed to have any interest in, or right to a share in, the proceeds of said lands or lots ; and that, after the withdrawal of said Sanford from said copartnership, the business theretofore transacted by said copartnership at St. Louis and in Minnesota was continued by said Pierre Chouteau, Jr., John B. Sarpy and Joseph A. Sire, under the same firm name of Pierre Chouteau, Jr., & Co., and all conveyances of land taken in such firm name, from and after the dissolution aforesaid, in any manner or for any purpose, were taken solely and exclusively for the benefit of said three last-named parties, as such firm, and not otherwise."

It denies that the agreement between Sanford and the other members of said copartnership, on its dissolution, is correctly stated in the bill, and avers that such agreement was, that, in consideration that Chouteau should save Sanford harmless on account of the debts of the St. Louis copartnership, Sanford would and did release and transfer to Chouteau all his interest in the assets and property of said copartnership, including his interest, if any, in said lands and town lots in Minnesota. It denies that Chouteau at any time agreed to assure to Sanford, free from any debts or liabilities growing out of said copartnership affairs, 17⅓-100ths, or any part, of said lands or lots in Minnesota. It avers that, by the deed of December 1st, 1859, named in the bill, executed by Chouteau to the plaintiffs, he expressly reserved his right to collect and dispose of, for his own use and benefit, all the assets of the dissolved St. Louis copartnership, in accordance with the transfer thereof to him by Sanford, before set forth in the answer. It avers that the copartnership, at the time of its dissolution, was indebted in the sum of $438,176.28; that the assets of the firm, exclusive of the interest, if any, of the copartnership in lands and lots in Minnesota and elsewhere, was insufficient to liquidate said indebtedness; that, on May 1st, 1860, there still remained an indebtedness of more than $212,000, which was advanced and paid by Pierre Chouteau, Jr., in his lifetime, with the assent of the executors of Sarpy and Sire; that it was agreed by those executors, that the amount of such indebtedness for which their estates were severally liable should be refunded to Chou-

teau from the proceeds of the sale of the unsold lands and lots in Minnesota; that this arrangement was not carried into effect during Chouteau's lifetime; that Charles P. Chouteau and Mrs. Maffitt subsequently sold and disposed of the remaining lands and lots and used the entire proceeds thereof to pay to themselves, as the heirs at law and sole legatees of Pierre Chouteau Jr., the amount remaining due to them by reason of his payment of said copartnership indebtedness; that the sales so made are the same sales mentioned in the bill; and that they were made at public auction, in good faith, for the full value of the lands and lots at the time, after having been duly advertised, and with the full knowledge of the plaintiffs. The answer further avers, by way of defence, that more than six years have elapsed since the accruing of any of the alleged causes of action set out in the bill.

After a replication to the answer, proofs were taken, and, after a hearing, the court made the following interlocutory decree, on August 13th, 1878:

"1. I find that, in 1852, the firm of P. Chouteau, Jr., & Co., No. 2, consisted of four persons, and the assets of the copartnership were owned, and the profits and loses were to be shared, in the following proportions: Pierre Chouteau, Jr., 48 per cent.; John B. Sarpy, 17⅓ per cent.; John F. A. Sanford, 17⅓ per cent.; Joseph A. Sire, 17⅓ per cent. 2. That the copartnership was dissolved in 1852, by the mutual agreement of all the parties. 3. That a large amount of real property was owned by the copartnership in the Territory (now State) of Minnesota, at the time of the dissolution, having been purchased with copartnership funds. 4. That the legal title to the property was at that time in Charles W. Borup and H. H. Sibley, persons acting for said copartnership, and was by them, in 1855, conveyed to the firm of Pierre Chouteau, Jr., & Co., composed of Chouteau, Sire, Sarpy, and Sanford; and also, in 1857, other real property, mentioned in the bill of complaint, was purchased for the benefit of the copartnership. 5. That, at the time of the dissolution of said copartnership, it was agreed between John F. A. Sanford and the other partners, *inter alia*, that he, the said Sanford, should release to Chouteau all his interest in and to the assets of the copartnership, except the real

property in Minnesota, and that, in consideration thereof and of his withdrawal from the said partnership, the said Chouteau should save him, the said Sanford, harmless on account of the said copartnership, and should assure to him, free from any debt or liability growing out of said copartnership affairs, the share of him, the said Sanford, in and to said real property, lands and town lots, being 17⅓-100th parts thereof. 6. That, in pursuance of the agreement, Sanford released his interest in the assets to Chouteau, except the lands and town lots, and during his lifetime Chouteau realized all the said assets. 7. That Sire died in 1854, Sarpy in 1857, Sanford in 1857, and Pierre Chouteau, Jr., in 1865, all leaving heirs, devisees and legal representatives, and there never has been any accounting of the business of the copartnership, except as stated in the bill of complaint, which is referred to. 8. That since the deaths of the said Sire, Sarpy, Sanford and Chouteau, and in the years 1866 and 1867, and since then, the defendants Charles P. Chouteau and Julia Maffitt, claiming, as the heirs at law and devisees of the said P. Chouteau, Jr., to be owners of said real property in Minnesota, town lots and lands, have sold property outside of the city of St. Paul, in Minnesota, and have received large sums in money and securities, and have also sold and conveyed to various persons, including the several defendants mentioned specially in the bill of complaint as purchasers, a large amount of property situated in the city of St. Paul aforesaid, and received therefor a large amount of money and securities, without the consent of the heirs or representatives of said Sanford, and without paying or tendering to them any part or portion thereof. 9. That the amount of real property remaining unsold, which was conveyed by said Borup and Sibley to the firm of P. Chouteau, Jr., & Co., and purchased for the benefit of the partnership, is large and of sufficient value to meet any and all claims made by complainants on account of the sale and conveyance of the property to the defendants named as purchasers in the bill of complaint, and admitted in the answer. *Conclusions.* By the terms of the dissolution of the copartnership of P. Chouteau, Jr., & Co., No. 2, Sanford was to retain his interest in the Minnesota real estate, being 17⅓-100th parts thereof; and the complainants, as the representatives of the estate of John F. A. Sanford, are entitled: 1st. To 17⅓-100th parts of all the real estate mentioned in the bill of complaint, or

in the schedules attached thereto, not sold to parties other than the representatives of Pierre Chouteau, Jr., Sarpy and Sire. 2d. It is ordered that an account be taken of all the real estate sold since the dissolution of the firm of P. Chouteau, Jr., & Co., by the retirement of J. F. A. Sanford, to parties other than the representatives of the said partners. 3d. That, in stating said account, the lands and town lots sold to third parties in 1866 and 1867 be valued at their present value, less improvements made by the purchasers. 4th. That in said account shall be stated the amount of all the taxes paid by Charles P. Chouteau and Julia Maffitt upon the property sold, at the time of the conveyance, and also the amount of taxes paid upon the property unsold to date, and such sum as may be necessarily expended in the care and custody of the property. 5th. That, after the deduction of the taxes and the amount necessarily expended for the management of the property, and on confirmation of the master's report, 6th. It is ordered and adjudged that a decree be entered in favor of complainants, against the said defendants Charles P. Chouteau and Julia Maffitt, for the amount of $17\frac{1}{3}$-100th parts of the remainder, which shall be enforced and satisfied out of the interest of said defendants in the real property described in the bill of complaint or schedules, unsold. 7th. That the bill of complaint against all parties defendants other than the representatives of P. Chouteau, Jr., Sarpy, and Sire, be dismissed, but without costs. 8th. That H. E. Mann, Esq., is appointed to take the account and report."

In pursuance of the interlocutory decree a hearing was had before the master, whose report was filed August 2d, 1880. Exceptions were taken by the defendants to the report of the master, as had also been done in reference to the interlocutory decree; and, on September 21st, 1880, the court made a final decree, in which it was decreed that the plaintiffs are the owners in fee simple, and are entitled to the possession, as tenants in common, of an undivided $17\frac{1}{3}$-100ths of certain lands in Minnesota described in the decree, and that partition be made of said lands between the plaintiffs and the defendants; that Charles P. Chouteau and Julia Maffitt pay to the plaintiffs the sum of $36,646.56, being $17\frac{1}{3}$-100ths of the value of

the lands sold by them in 1866 and in 1867; that Charles P. Chouteau individually pay to the plaintiffs $7,793.87, being 17⅓-100ths of the balance of the income of lands claimed to be held by him in severalty, and of the proceeds of lands sold by him since 1867; that Julia Maffitt pay to the plaintiffs the sum of $8,178,57, being 17⅓-100ths of the balance of the income of lands claimed to be held by her in severalty, and of the proceeds of lands sold by her since 1867; that the widow of Sire pay to the plaintiffs the sum of $1,214.08, being 17⅓-100ths of the income of that portion of the lands claimed to be held by her in severalty, and of the proceeds of lands sold by her since 1867; that the plaintiffs pay to the heirs and representatives of Sarpy the sum of $772.16, being 17⅓-100ths of the balance of expenditures over receipts on account of lands claimed to be held by the heirs of Sarpy in severalty. These different sums adjudged against the defendants, amounting to $53,833.08, are declared to constitute liens upon the property owned by them respectively. The decree further declares that the rights of the several parties in the said real estate, so far as rents, issues, and profits and expenditures are concerned, are to be regarded as having been determined by the decree only up to January 1st, 1879.

The dispute between the parties, as shown by the pleadings, is as to the terms of the agreement of dissolution of the copartnership in 1852. The plaintiffs allege in the bill, that Sanford released to Chouteau all his interest in the assets of the firm, except its lands and town lots in Minnesota, and that Chouteau agreed to relieve Sanford from the debts of the firm, and to assure to him his 17⅓-100ths of said lands and town lots, free from any debt or liability growing out of the copartnership affairs. The answer alleges that Chouteau agreed to relieve Sanford from the debts of the firm, and Sanford released to Chouteau all his interest in the assets of the firm, including his interest, if any, in the lands and town lots in Minnesota. The Circuit Court found the terms of the dissolution to be those alleged in the bill. The question is wholly one of fact. We are unable to concur with the decision arrived at by the Circuit Court on that question. The evidence is voluminous, and a minute dis-

cussion of it would be unprofitable. It consists of correspondence and documents and oral evidence, and we must content ourselves with indicating generally the grounds of our conclusion.

The agreement alleged in the bill is said to have been contained in two letters, one from the firm of P. Chouteau, Jr., & Co., No. 2, the firm which was being dissolved, to Sanford, and the other from Sanford to the firm, in reply, both written in 1852, at the time of the dissolution. Those letters are not produced, nor are copies of them furnished. The only witness for the plaintiffs who testifies to having seen them, or who states their contents, is Mr. Barlow, one of the plaintiffs. On his direct examination, he says that he saw them in 1858 and 1859, at the time when negotiations for a compromise were going on between Pierre Chouteau, Jr., and the executors of Sanford, in regard to the claims of Chouteau against the estate of Sanford for his share of the losses of their New York firm; and that the last time he saw them was in 1861, when the answer of the executors of Sanford was being prepared in a suit brought against them by Chouteau in a State court in Minnesota, seeking a sale of the lands in question. He states that he was cognizant for many years before Mr. Sanford's death of the existence of the contract shown by the letters, though he did not see the letters till after Sanford's death, when they were found among Sanford's papers, and were in the possession of Mr. Gebhard and the witness. That contract he states thus, on his direct examination:

"It was in the shape of a letter signed in the firm name of Pierre Chouteau, Junior, & Co., addressed to Mr. John F. A. Sanford, and responded to by him as of the same date, assenting to the terms proposed in the letter. These terms were, that from that date Mr. John F. A. Sanford should retire from all connection with the St. Louis house, with the view of establishing a house in New York in connection with Mr. Chouteau, in which neither Sarpy nor Sire would have any interest; and it was agreed that the remaining partners in the St. Louis house should be entitled to all the assets and property of that firm, should have sole

power to settle its business, that they would relieve Mr. Sanford from all liabilities and obligations connected with the St. Louis firm, and that his interest in the Minnesota lands owned by the said St. Louis firm should be retained by him absolutely."

It is alleged that the letters have been lost and cannot be found after proper search. Mr. Barlow states that the first letter was dated at St. Louis and was signed by Chouteau in the name of the firm, but was not in his handwriting; and that the other letter was signed by Sanford and may have been a signed copy of the original. On cross-examination he gives the form and language of the letters as follows:

"The first was dated at St. Louis, and addressed to Mr. John F. A. Sanford, and recited the fact that it had been agreed that from that date his interest in the firm of P. Chouteau, Junior, & Co., of St. Louis, should terminate, and that the assets and business of the firm should be continued for the benefit of the remaining partners, who agreed to assume all the responsibilities of the firm from that date, with a reservation at the close of the letter, that Mr. Sanford's interest in the Minnesota property or purchase, according to my recollection—I won't be certain whether it was property or lands—should remain in him. In one of the letters (I think the St. Louis), there was a reference to the fact that Mr. Sanford was about to or had established a firm in New York, in which Mr. Sanford and Mr. Chouteau alone were interested, to the exclusion of Sarpy and Sire. The fact appeared in the letter that a New York house was about to be established, or was established, in which Sarpy and Sire would have no interest. Sanford's response was exceedingly brief and contained merely an assent to the terms proposed or suggested in the first letter. That is as near as I can recollect the contents of the letter."

He further states, when asked "whether the reference to the Minnesota property in that letter spoke of interest in the Minnesota lands or in the Minnesota 'outfit:'"

"I am confident that it was not 'outfit.' It was either lands or property—Minnesota lands or Minnesota property—and not 'outfit,' I am confident."

He is asked the following question: "In reference to the agreement which you have spoken of as having been made by the firm of P. Chouteau, Jr., & Co., of St. Louis, and Mr. Sanford, at the time of Mr. Sanford's retirement in 1852, had you been informed of the existence of any such agreement before the matter of the compromise was entered upon?" His reply is:

"I knew that Mr. Sanford claimed an interest in the Minnesota lands in his lifetime. I do not know that I knew of any agreement about it at that time, or had even heard about it. The simple fact was referred to, the fact of Mr. Sanford's interest in the Minnesota lands was referred to, by Mr. Chouteau, in the course of the negotiations which led to the compromise after Mr. Sanford's death. I think I saw the agreement in question at the time of the preparation of the papers executed on this compromise, but I cannot positively say that I did. My first distinct recollection of seeing the agreement in question was at or about the time of the drafting of the answer of the executors to the bill filed by Mr. Chouteau for the partition of the lands in Minnesota, to which I have testified."

It may well be questioned whether sufficient evidence was given of proper search for the letters, and of their loss, to warrant the parol evidence given of their contents. The parties who searched for the letters in the places where it was supposed they might be, were not called as witnesses, and there is no testimony as to the character or extent of the search, but only evidence by Mr. Barlow of his direction to persons to search, and his statement of his understanding of the result. There is no evidence that the letter from Sanford was ever sent. It was found among his papers after his death. On search, no such letter has been found among the papers of the firm in St. Louis, nor does their letter-book show any copy of the letter to Sanford, although many letters both to and from the firm have been produced in evidence.

In the original answer filed in June, 1861, by the executors of Sanford, and sworn to by them June 15th, 1861, in the suit brought in the State court of Minnesota, by Chouteau and the

executors of Sarpy and Sire, in February, 1861, for a sale of the Minnesota lands to pay the debts of the firm, alleged to have amounted, on May 1st, 1860, to $212,000, the claim of the executors of Sanford was stated to be:

"That, upon the retirement of the said John F. A. Sanford from the firm mentioned in the complaint, he became a partner in another firm under the same name, in the city of New York, together with the said Pierre Chouteau, Junior, in which the said Sarpy and said Sire had been theretofore partners, and in which they thereupon ceased to be partners, and said John F. A. Sanford succeeded to their interests therein, and said Sarpy and Sire succeeded to his interest in said St. Louis firm, excepting his interest in said Minnesota lands, and that, by agreement between all the parties at the time of such exchange of interests, and in consideration thereof, said John F. A. Sanford and his interest in the Minnesota lands were to be exonerated and free from all liability for the debts and liabilities of said St. Louis firm or to any of his copartners therein, and to be indemnified and saved harmless in the premises."

This allegation was explicitely denied in the reply to the answer, which reply was put in in August, 1861. In an amended answer put in by the executors of Sanford, in September, 1861, not sworn to by them, but verified by their attorney in the suit, the above statement in the original answer was repeated, and these words were added:

"And that the said John F. A. Sanford was to have and to hold in fee simple, as tenant in common, seventeen and one-third one-hundredth (17⅓-100) parts of said land to his own sole use, freed from any claim for debts of said copartnership, or any liability for contribution in favor of any of the other partners."

The complaint in the suit in the Minnesota State court, after setting forth the facts about the St. Louis copartnership, and its dissolution December 31st, 1852, avers, that during its continuance it had, at St. Paul, Minnesota, an outpost or trading-house, to which it supplied merchandise; that the business at St. Paul was conducted under the name of the "Minnesota

Outfit," debits and credits being made to it, and it was a part of the copartnership business; that the copartnership, during its continuance, acquired lands in Minnesota, described in schedules to the complaint, and they were a part of its partnership assets, the title to them being taken in the name of Pierre Chouteau, Jr., in fee, he holding them in trust for said copartners; that at its dissolution said firm had outstanding debts or liabilities to the amount of $438,176.28; that that amount had since been reduced, and, on a full and final settlement and accounting between Chouteau and the executors of Sarpy and Sire, on May 1st, 1860, it was found that the debts and liabilities of said firm then owing and unpaid, and for which said copartners, or their legal representatives, were liable, amounted to $212,000, which sum was still due and owing by them and unpaid; that the assets of said firm at its dissolution consisted of real estate and divers accounts and notes, which were of little or no value; that said real estate was the only assets belonging to said copartners with which to pay said indebtedness; that, to discharge the same, Chouteau had paid 48-100ths of said $212,000, the executors of Sarpy 17⅓-100ths thereof, and the executors of Sire 17⅓-100ths thereof; that neither Sanford nor his executors had paid any part of his share of said $212,000; that their neglect to pay was a violation of the terms of the copartnership agreement; and that the remaining indebtedness of the firm could not be paid without a sale of said lands and the application of the proceeds of the sale to such purpose. The prayer of the complaint was that the amount of the unpaid debts and the assets of said firm be ascertained, and a receiver of its notes, accounts and choses in action be appointed, with power to sell the same, and that said real estate be sold and the proceeds be applied to pay the debts due and owing by said firm.

The events which immediately preceded the bringing of that suit in the State court of Minnesota were these: Pierre Chouteau, Jr., had become totally blind, and his business and correspondence were conducted by his son-in-law, William Maffitt. On the 6th of August, 1860, Maffitt wrote from St. Louis to Gebhard at New York, a letter, which is not produced, but in

which, judging from Gebhard's reply to it, he appears to have informed Gebhard that there was a large indebtedness due from the firm, and to have referred to the necessity of taking steps for its payment, in reference to Sanford's proportion of it. Gerhard's reply to Maffitt, under date of New York, September 15th, 1860, was as follows:

"Yours of the 6th ult. has remained unanswered, in order that I might consult with my co-executor, with whom I have just had an interview. We are both much surprised to hear for the first time of the large indebtedness to which you allude, as we understood from Mr. Chouteau's agent, at the time of our settlement in December last, that the Minnesota property would probably prove very valuable, sufficiently so to return to us as executors a handsome sum, and were not advised of any charge against the property which we should have to pay. Before determining as to our course, it is necessary that we should be fully advised of the nature of Mr. Chouteau's claim, and you will please send us a copy of the accounts of firm No. 2 and firm No. 3, to which you allude, and we will examine the same with the vouchers. Please also advise us as to the situation and present value of the Minnesota property to which you allude, and be kind enough to furnish us a copy of the undertaking or agreement with Mr. Sanford, made on the occasion of his retirement from firm No. 2, to which reference is made in the release from Mr. Chouteau to us, dated December, 1859."

To this letter Maffitt replied by a letter to Gebhard, dated St. Louis, October 4th, 1860, as follows:

"I was absent when your letter of the 15th ult. was received, or it would otherwise have had earlier attention. I do not see that the opinion said to have been expressed by Mr. Chouteau's agent in regard to the value of the Minnesota property authorized the inference that there was no charge against it. But, however this may be, Mr. Thompson, at least, was well informed as to its situation. In a letter written October 6th, 1859, I mentioned that 'this interest (the Minnesota) had been retained by Mr. Sanford in the transfer between him, Mr. Sarpy and Mr. Sire, but embarrassed by a very heavy debt.' I don't, however, consider this important. The accounts you ask for are entirely too voluminous

to furnish within any reasonable time. They embrace the largest part of the business of the house during a long period. The books, however, are open to your inspection, and we will afford you every facility to enable you to make a satisfactory examination of them. There was no written agreement that we know of on Mr. Sanford's withdrawal from the house. From the balance sheet made in December, 1852, it seems that the various outfits in the Upper Mississippi were indebted, in the aggregate, $438,176.28. As it was impossible, even approximately, to determine the value of this interest, for its assets consisted principally of debts which it was very questionable at the time would ever be realized, it was concluded by the parties that Mr. Sanford should retain his interest therein. From that time it required constant negotiations and great attention to save anything. Finally Mr. Chouteau, by his own personal exertions, in 1855, succeeded in obtaining a settlement, the result of which was what we now have in the Minnesota property. Mr. Chouteau's action in this matter is by no means voluntary. It has been forced upon him chiefly by the settlement recently had with the executors of his late partners. It was not to be expected that they would do more than pay their proportion of the amount chargeable to their property. They were all, however, jointly liable for the whole, and in the event of Mr. Sanford's estate being unable to pay its proportion, they would have been liable for their respective proportion of its (the estate's) share of the indebtedness. It became, therefore, incumbent on Mr. Chouteau, as surviving partner, to take the steps he now proposes, or to assume the part due from Mr. Sanford's estate. Such an alternative is out of the question, as the debt is already very large and constantly increasing by the interest. As regards the situation of the property at present, it is managed by Mr. Prince and Mr. Sibley. No income whatever is derived from it, and very little expense incurred beyond the salaries of the agents. Hoping to hear soon what your determination is in relation to this matter, I remain," &c.

The suit in the State Court of Minnesota was then brought, as stated. Before answering the complaint Gebhard wrote to his co-executor, Mr. Barlow, a letter dated New York June 3d, 1861, which says:

"It seems to me quite important, in answering the bill filed

against us, 1. To insist on the production of the original papers executed at the time Sanford retired from the St. Louis firm. 2. To allege that Sanford sold out his interest in the St. Louis firm, with all its liabilities, to Sarpy and Sire, and assumed their positions in the New York firm, reserving for himself, individually, his share of the St. Paul property, free of all liabilities, which was simply left in Mr. Chouteau's name, partly so as not to complicate matters, as well as from the implicit trust that Sanford had in Mr. Chouteau, that everything would be properly accounted for. 3. Allege that in the transfer each party agreed to assume the outstanding liabilities. 4. When Mr. Chouteau settled with the executors of Mr. Sanford, he distinctly stated that the release covered all debts of the deceased, except a few trifling ones in New York, which the executors have paid or settled for; and that Mr. Sanford's interest in the St. Paul property would be one of the assets that would revert to the estate and to the minor children."

The suit in the State court of Minnesota proceeded no further, but was discontinued. C. P. Chouteau states that the reason for this was that the executors of Sanford renewed propositions of settlement.

In February, 1869, Mr. Barlow, as surviving executor of Sanford, brought a suit in the Supreme Court of New York, against the executors of Pierre Chouteau, Jr. The complaint set forth the facts as to the firm and its business and the interests of its partners and its dissolution, by consent, in 1852, and averred that the firm, during its continuance, purchased with its funds lands in Minnesota, described in a schedule to the complaint, the legal title to which was, for convenience, taken in the name of Chouteau; that Chouteau and his executors had sold portions of the lands, and other portions remained unsold and undivided; that no account respecting the said lands had been adjusted with Sanford or his executors; and that the plaintiff was entitled to his due share of the proceeds of the lands sold, and his due proportion of the lands unsold, being the proportion thereof in which Sanford was interested in the firm. The complaint prayed for an account of the lands and of the proceeds of those sold, and for

payment and conveyance accordingly, and was verified by Mr. Barlow. It did not refer to any agreement as having been made between Sanford and the other partners at the time of the dissolution. The answer, verified by C. P. Chouteau, referred to the "Minnesota Outfit," as a business carried on for the benefit of the firm, and alleged that, when it was dissolved, its assets consisted of notes and accounts and of the Minnesota lands; that its liabilities were then $438,176.28, and, on the 1st of May, 1860, had been reduced to $212,724.23, which amount was advanced by Pierre Chouteau, Jr., out of his individual moneys; and that the estate of Sanford was liable for its proportion thereof. It denied that the plaintiff was entitled to any of the proceeds of the lands sold, or to any part of those unsold, and prayed for an account between the parties as to the business of the firm, and that the amount owing by the plaintiff to the defendants, on account of the losses and indebtedness of the firm or otherwise, might be established and adjusted against the plaintiff. In March, 1872, a stipulation was signed by the plaintiff's attorney, agreeing to admit at the trial that the debts of the firm at the dissolution were as stated in the answer; that Pierre Chouteau, Jr., had discharged all of them with his individual moneys, and became a creditor for that amount; that, before May 1st, 1860, the indebtedness of the firm to him had been, by sales of the lands and from assets, reduced to $212,724.23; and that neither Sanford nor his executors had contributed anything thereto; but the plaintiff was not to be precluded from requiring an account of all the assets of the firm applicable to the payment of its indebtedness, and the defendants agreed to furnish it at the trial. In September, 1872, the suit was referred to a referee for trial, and there were some meetings before him. Without any conclusion, the suit was discontinued March 30th, 1876, shortly after the present suit was begun.

This history of the record evidence furnished by the correspondence and the pleadings in the suits has been given in order to show what allegations have been made in deliberate form as to any special agreement between the parties at the time the firm was dissolved. It is not unlikely that letters may have

passed between the firm and Sanford at that time, which may have expressed, as stated by Maffitt in his letter of October 4th, 1860, the conclusion of the members of the firm that Sanford should "retain his interest" in "the various outfits in the Upper Mississippi," because "it was impossible, even approximately, to determine the value" of that interest, as "its assets consisted principally of debts which it was very questionable at the time would ever be realized." The language of the letters would be very material in determining the actual agreement. A slight difference in wording might change the meaning essentially. Maffitt asserted, in his letter to Gebhard of October 4th, 1860, that the Minnesota interest, retained by Sanford at the dissolution, was "embarrassed by a very heavy debt." The letters, or copies of them, were vital to the claim of Sanford's executors, after Gebhard received this letter from Maffitt. Yet we find Gebhard, in his letter of June 3d, 1861, to Mr. Barlow, after the suit foreshadowed by Maffitt had been brought, making suggestions as to matters for the answer and as to requiring the production of papers, which are far from implying that Sanford's executors had letters in their possession which would show the agreement now insisted on. They having the letters, if the letters would show such agreement, we should expect copies of them to be set forth in the answer in the suit in the State court of Minnesota, as a copy was set forth, in both the original and amended answers in that suit, of the release of December 1st, 1859, executed by Chouteau to the executors of Sanford, on the settlement then made between them of the affairs of the New York firms in which Chouteau and Sanford were partners. Both of the answers refer to an agreement to the effect claimed, but do not state that it was in writing, and set forth only its general purport. Mr. Barlow states that he examined the letters carefully at the time the original answer in the suit in the State court of Minnesota was drawn, and that he thinks they were in the possession of his counsel, Mr. Platt, when the amended answer in that suit was drawn. The subject would naturally be revived when the suit in New York was brought, in 1869, yet we do not find in the complaint in that suit any mention of the agree-

ment claimed to have been evidenced by the letters. The establishing in that suit, by the testimony of Mr. Barlow, of the agreement now set up, would have disposed of the controversy. Can more weight be given to his recollection seven years later, as to the contents of letters which he had last seen more than fifteen years before he testified? There never was any suit brought distinctly based on the agreement now set up, until the present suit, brought more than twenty-three years after the agreement is alleged to have been made, and more than fifteen years after the executors were fully notified by Maffitt, acting for and by the direction of Chouteau, of the claim made by Chouteau. That there were some letters which Mr. Barlow saw, and the contents of which he believes he states correctly, is not to be questioned; but, in view of all the testimony in the case, it cannot be held that the agreement set up as contained in the letters is proved with sufficient certainty to make it the foundation of the decree made by the Circuit Court.

It is proper here to refer to another matter. At the time of Sanford's death, in May, 1857, he was an equal partner with Pierre Chouteau, Jr., in the firm known as P. Chouteau, Jr., & Co., of New York; and he was also a partner, together with Pierre Chouteau, Jr., and three other persons, in the firm of P. Chouteau, Jr., Sanford & Co. In October, 1858, negotiations were begun between P. Chouteau, Jr., and Messrs. Barlow and Gebhard, as executors of Sanford, for a compromise of the affairs of those two firms. The executors, at the time, claimed that they had a right to a receivership of the assets of all the firms in which Mr. Sanford had been interested. On October 13th, 1858, Chouteau, being in New York, prepared and verified a petition, addressed to the Surrogate of New York County, wherein it was stated that the business of P. Chouteau, Jr., & Co., of New York, had resulted in heavy losses, owing to unfortunate operations undertaken in the lifetime of Sanford; that the business of P. Chouteau, Jr., Sanford & Co. had produced large profits; that the accounts of P. Chouteau, Jr., & Co., of New York, had been made up as accurately as it could be done; that, under the most favorable aspect, there would, on the winding up of the affairs of that

firm, remain an indebtedness from Sanford to the petitioner, of not less than $363,323,61; that the amount which Sanford's estate would receive from the firm of P. Chouteau, Jr., Sanford & Co. would not exceed $198,558.06; that the petitioner was willing to accept the balance of the share of the estate of Sanford in the assets of the firm of P. Chouteau, Jr., Sanford & Co., in compromise and satisfaction of all his claims against the estate of Sanford; and that this compromise would result in an advantage to the estate of Sanford in a sum not less than $164,765.55. The petition was not presented to the Surrogate, but the negotiations were continued, and, in October, 1859, the executors of Sanford presented a petition to the Surrogate, verified by Mr. Barlow, containing the same statements as the Chouteau petition, and, by an order made in November, 1859, by the Surrogate, the executors were authorized to carry out the compromise on the terms above mentioned, as is stated in the bill in this suit. Then Chouteau, on December 1st, 1859, executed the release stated in the bill. That release contained at its close this clause:

"Nothing herein contained is to affect the rights which the said Pierre Chouteau, Junior, now has, either as surviving partner or by assignment, to collect all the assets of any firm formerly existing at St. Louis, in the State of Missouri, in which the said John F. A. Sanford was formerly a partner, for his own sole use and benefit, according to the terms agreed upon on the retirement of said John F. A. Sanford from said firms, or to affect or impair the right of the said Pierre Chouteau, Junior, to said assets."

The executors of Sanford knew, from this reference in the release of December 1st, 1859, that some terms had been agreed upon on the retirement of Sanford from the St. Louis firm. If the letters in their possession showed as distinctly as is now claimed what those terms were, it was easy to ascertain those terms from the letters. Instead of doing so, we find Gebhard, in his letter to Maffitt of September 15th, 1860, asking Maffitt to furnish the executors with a copy of the agreement with Sanford referred to in Chouteau's release in De-

cember, 1859, as having been made when Sanford retired from the St. Louis firm.

As the case of the plaintiffs depends upon their affirmatively establishing the agreement set up, what most directly bears upon its existence has been especially alluded to. But the whole course of the evidence in the case fortifies the conclusion at which we have arrived. We can, however, only summarize it. Sanford at all times regarded himself as a party in interest in the winding up of the affairs of the St. Louis firm, and of the "outfits" in the charge of Borup and Sibley. He never claimed any independent interest in the Minnesota lands. The other copartners, after 1852, sent to him accounts of the affairs of the firm, and treated him as interested in its liquidation and entitled to know about such accounts. The arrangement really was that the "outfits" in the Upper Mississippi under the charge of Borup and Sibley, and which were part of the business of the dissolved firm, should continue to be carried on as part of that business till they could be wound up. All lands in Minnesota were an outcome of those outfits, and were thus a part of the assets of the firm. Sanford's interest in those outfits was continued, but it remained subject to the debts of the outfits and to the debts of the firm. Pierre Chouteau, Jr., acted always in accordance with that view. His son, Charles P. Chouteau, always had that understanding of the arrangement. The clause before cited, at the end of the release of December 1st, 1859, in saying that the release is not to affect the rights which Chouteau "now has" to collect all the assets of the St. Louis firm for his own use and benefit, or to affect his right to those assets, may be very well satisfied by applying the word "now" to the condition of things then existing, and to the claims set forth in the complaint in the suit in the State court of Minnesota, brought in February, 1861. He had individually advanced large sums, before that time, to pay the debts of the firm, and undoubtedly contemplated a deficiency of assets, including the real estate in Minnesota. That real estate was then held by him as part of the assets of the dissolved firm, and he always afterwards honestly and faithfully treated it as held by him in trust to liquidate the debts

of that firm. It was substantially the only resource in his hands in December, 1859, to repay him his advances. If the two letters then in the possession of Sanford's executors really showed such an agreement as they now claim, it is incredible that they would have accepted the release from Chouteau, with its comprehensive reservation of assets to Chouteau, and not have insisted on excepting from the assets the Minnesota real estate, which at that time was clearly assets of the firm. The entries in the books kept at St. Louis confirm the foregoing view.

On the whole case, we are of opinion, that, after the dissolution of the St. Louis firm, the members other than Sanford were entitled to collect and dispose of all its assets, including the Minnesota "outfit" and the Minnesota lands, to liquidate its affairs, without the interference of Sanford; that all claim on their part against Sanford individually was relinquished, leaving recourse only to those assets; and that, if there should be any surplus of those assets, after paying the debts of the firm and the advances of any of the other partners therefor, Sanford's executors would be entitled to his proper proportion of such surplus.

No judicial accounting has been had on the basis of the rights of the parties as we have defined them. The bill prays that the defendants may account touching the affairs and property of the copartnership and touching the proceeds of any such property. We think the plaintiffs are entitled to such an accounting, and are not barred from it by laches or by the operation of any statute of limitations. If necessary, the Circuit Court can, in its discretion, allow the pleadings to be amended, with a view to the attainment of justice, on the principles we have laid down. We do not deem it proper now to indicate any rule of accounting in respect to the lands which were not sold and conveyed by Charles P. Chouteau and Julia Maffitt to parties other than the representatives of Pierre Chouteau, Jr., Sarpy and Sire, but leave that question to be determined by the Circuit Court, on full consideration. As to the lands which were sold and conveyed to parties other than such representatives, the liability should be only for the sums

actually realized in good faith from the sales. The accounting may include the other remaining assets of the firm, if any.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with direction to enter a decree in accordance with this opinion, and to take such further proceedings as may be in conformity therewith.

FREEMAN, Trustee, *v.* DAWSON.

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

Argued January 16th, 1884.—Decided January 28th, 1884.

Execution—Judgment—Jurisdiction.

From a decree of the Circuit Court, awarding a fund of $6,000 to one claiming under a distinct title, the grantee in a deed of trust to secure debts to various other persons, exceeding that amount in all, but of less than $5,000 each, may appeal to this court.

A judgment duly recovered is not affected, nor the right to take out execution upon it impaired, by an application made to the court to set it aside, and "continued until the next term, without prejudice to either party."

All the proceedings under a levy of execution have relation back to the time of the seizure of the property.

A levy of execution, for a debt of the lessee, upon the leasehold estate, and upon a cotton press, with its engine, boilers and machinery, erected by him, under which the officer has seized the property, and given due notice of a sale thereof, is not defeated by an order from the clerk, under seal of the court, pursuant to a direction of the judge in vacation, without notice to the judgment creditor, requesting the officer to return the execution unexecuted; nor by the officer's, upon receiving such order, ceasing to keep actual possession of the property, and returning the execution, with his doings indorsed thereon, to the court, for further directions.

Mr. C. W. Metcalf for appellant.

Mr. W. K. Poston for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by the grantee in a deed of trust, from a decree of the Circuit Court of the United States for the West-

ern District of Tennessee, in favor of a judgment creditor of the grantor.

The undisputed facts of the case, as shown by the pleadings and the documentary evidence, are as follows:

In January, 1878, the owners of two lots of land in the city of Memphis, county of Shelby and State of Tennessee, executed to R. C. Daniel a lease thereof for the term of six years, at a certain rent, and with a provision that any improvements or machinery made or erected by the lessee might be removed by him at the end of the lease. Steers and Morse, under a contract with Daniel, erected upon the land a cotton press, engine, boilers, and machinery; and on August 8th, 1878, filed the original bill in this case against him, in the Chancery Court of Shelby County, to enforce a mechanic's lien, under the statutes of Tennessee, upon his leasehold interest in the land, and upon his interest in the press and machinery, and obtained a writ of attachment against the same.

On June 6th, 1878, A. H. H. Dawson duly recovered against Daniel two judgments at law, upon default, in the Circuit Court of the United States, amounting together to the sum of $5,629.91. At the same term, on June 13th, an application was made by Daniel to vacate each of those judgments, and was "continued until the next term of the court, without prejudice to either party." On July 5th writs of *fieri facias* upon both the judgments were issued by the clerk and delivered to the marshal. On July 9th the marshal, as appears by his indorsement thereon, levied each of these executions upon Daniel's interest in the land (particularly described) and upon all his interest "in and to the chattel property in, about and upon the foregoing described lots and parcels of land, consisting of a Morse improved Tyler cotton compress, with engines, boilers, machinery, &c., with all appurtenances thereto belonging;" and afterwards published and posted, and served upon Daniel, as required by law, notices of a sale to be made on August 8th in pursuance of the levy.

On August 5th the Circuit Judge sent to the clerk the following letter:

"Knoxville, Tennessee, August 5th, 1878.

"My Dear Sir: I have been furnished by Messrs. Gantt & Patterson, attorneys for Mr. R. C. Daniel, with certified copies of the record in the suits of A. H. H. Dawson *v.* Daniel, pending in your court. From this, as I construe it, judgments by default were rendered at the last term, and then an application made to set aside said judgments and permit defendant to plead, which application was continued to next term of the court. This leaves these cases pending undetermined. Yet Messrs. Gantt & Patterson, for their client, represent that executions have been issued and levied on Daniel's property. If this is so, the executions are without authority, and ought to be called in as improvidently issued. There is no final judgment on which they can rest. My suggestion is that you issue a paper to the marshal reciting the fact that executions were issued without authority, and request him to return the same unexecuted.

"I am, very truly, &c. JNO. BAXTER.

"Bell W. Etheridge, Esq.,

"U. S. Circuit Court, Memphis, Tenn."

On August 7th the clerk delivered to the marshal a paper headed "Circuit Court of the United States for the Western District of Tennessee," with the names of the cases and their numbers on the docket, and the rest of which was as follows:

"To the United States Marshal, Western District of Tennessee:

"In accordance with the instructions of Judge Baxter, communicated by letter, a copy of which is hereto attached, I notify you that the executions in the two above named cases were issued without authority, and request you to return the same unexecuted. You will therefore act accordingly.

"Witness my signature and the seal of said court, this the seventh day of August, 1878.

[SEAL.] "BELL W. ETHERIDGE, Clerk."

The marshal's return upon each execution, after stating the levy and notice, concluded as follows:

"And on 17th August, 1878, in obedience to an order of court issued by Hon. John Baxter, I return this writ without further proceedings."

The coroner of Shelby County thereupon, on the same day, took possession of the property under the writ of attachment issued upon the bill in equity of Steers and Morse.

On November 22d, Daniel executed a deed, which was recorded on the next day, of his interest in the leasehold, and in the cotton press with its engine, boiler, machinery and appurtenances, to John J. Freeman, in trust to secure, and to sell for the payment of, debts due from Daniel to various persons, in sums of $6,000, or less, and amounting in all to the sum of $18,370, for moneys borrowed by Daniel to pay for the leasehold and fixtures.

The Circuit Court, at a regular term, on January 6th, 1879, denied the applications of Daniel to vacate the judgments at law, and on February 8th granted motions of Dawson for writs of *venditioni exponas*. On February 10th such writs were issued accordingly, which recited that "said writs of *fieri facias* have been returned without any sale of the property levied on as aforesaid, which levies this court now adjudges as still in full force, and unabandoned by the marshal, and the property so levied on is still in his possession by virtue of said levies." The opinions delivered on the applications and motions are reported in *Dawson* v. *Daniel*, 2 Flippin, 301, 305.

The returns subsequently made by the marshal upon the writs of *venditioni exponas* show that, upon receiving them, he went upon the land, and found the cotton press being operated by, and under the control of, Charles Yerger, who claimed to be in possession, in behalf of the sheriff and coroner, under an order of the Chancery Court of Shelby County; that he exhibited his writs of *venditioni exponas*, and demanded of Yerger possession of the property, which was refused; that he was thereupon directed by the attorneys for Dawson to proceed under those writs to a sale of the property, and gave notice to Daniel of such a sale to take place on March 11th; and that on February 12th those attorneys "directed that all proceedings hereunder be suspended until further orders in the premises."

On February 13th Steers and Morse filed in the suit in equity an amended and supplemental bill against Dawson, Freeman,

trustee, and the beneficiaries under the trust deed; and on February 15th removed that suit into the Circuit Court of the United States, and there moved for a temporary injunction to restrain Dawson and the marshal from further proceeding against the property under the judgments and executions at law. On March 18th that court issued such an injunction, and ordered, with the consent of all the parties, "that the custody and possession by the marshal of said property shall remain as it is undisturbed, and that for the preservation of the property he may employ a day and night watchman for the same, but without in any manner affecting the rights or claim of any party hereto; and nothing herein contained shall be held in any manner to affect or release any lien that the defendant Dawson claims to have acquired under his said judgments, executions and liens."

On June 2d the marshal returned the writs of *venditioni exponas*, "without further proceedings."

On June 13th, 1879, after answers filed by Dawson, and answers and cross-bills filed by Freeman and the beneficiaries under the trust deed, the suit in equity came to a final hearing in the Circuit Court, and a decree was entered, by consent, ordering and confirming a sale of the leasehold, and of the press and machinery, establishing the priority of the lien of Steers and Morse, and applying to the satisfaction of that lien, and to the payment of the accrued rent and taxes, the proceeds of the sale, except the sum of $6,000, which was reserved to abide the result of the litigation between Dawson and Freeman. And on July 28th, 1880, a final decree was entered, affirming the validity of the judgments and executions, and awarding the fund of $6,000 to Dawson. The opinion is reported in *Steers* v. *Daniel*, 2 Flippin, 310. Freeman thereupon appealed to this court.

By the marshal's deposition, and the weight of the whole evidence, the other material facts in the case appear to be as follows: The marshal, on July 9th, 1878, at the time of levying the executions issued upon the judgments at law, and, with the consent and at the expense of Dawson's attorneys, put a watchman in possession of the premises to protect the property

against fire and depredation; and on August 8th showed the letter of the Circuit Judge, and the paper received from the clerk, to Dawson's attorneys, and was told by them that actual possession was not required by law to maintain the levies, and thereupon by their direction withdrew the watchman, knowing that the coroner was about to levy the attachment granted by the State court on the bill in equity of Steers and Morse; and the marshal did not afterwards retain possession in fact of the property. But he did not intend to abandon the levies; and he suspended further proceedings merely in obedience to the order received from the clerk, and for the purpose of submitting to the court the question of the validity of the executions and levies.

The appellee has moved to dismiss the appeal, for want of a sufficient amount in controversy to sustain the jurisdiction of this court. The reason assigned for the motion is, that if the appellant's position is maintained, no one of the creditors secured by the trust deed will receive so much as $5,000 out of the fund of $6,000 in court. But it is admitted that the whole amount of debts secured by the deed of trust exceeds that fund; the sole question at issue on this appeal is of the legal title to the whole fund, as between Dawson, the judgment creditor, on the one hand, and Freeman, the grantee in the deed of trust, on the other; and no question of payment to or distribution among the several *cestuis que trust* is presented. The motion to dismiss must therefore be overruled. *Ex parte Baltimore & Ohio Railroad Co.*, 106 U. S. 5, and cases there cited.

Upon the merits, the priority of the mechanic's lien having been established by the Circuit Court with the consent of the parties, the single question is whether the title of Dawson, under the judgments rendered against Daniel and the executions levied on the property, is to be preferred to the title of Freeman under the deed of trust to him from the judgment debtor.

The judgments were duly recovered. The filing of applications to set them aside did not affect the validity of the judgments, nor suspend the right to take out executions thereon. The continuance of those applications to the next term, "with-

out prejudice to either party," left both parties in *statu quo*, the applications of the judgment debtor to set aside the judgments undetermined, and the right of the judgment creditor to enforce the judgments unaffected.

The levies were duly made by the marshal, and indorsed by him on the executions. The law of Tennessee, following the rule established in the colonies by the English statute of 5 Geo. II., ch. 7, § 4, authorizes real estate, as well as personal property, to be levied upon and sold under a writ of *fieri facias*. Code of Tennessee, § 2999; *Russell* v. *Stinson*, 3 Haywood, 1; *Pillow* v. *Love*, 5 Haywood, 109.

The action of the Circuit Judge in directing the recall of the executions in vacation, out of court, without notice to the judgment creditor, was irregular and unauthorized, and of no legal validity. The levy of an execution takes effect from the time when it is made by seizing the property, and is not defeated by a subsequent writ of *supersedeas*, but all the proceedings, by sale or otherwise, in the due course and completion of the levy, for collecting the debt out of the property, have relation back to the time of the seizure. *Boyle* v. *Zacharie*, 6 Pet. 648, 659; *United States* v. *Dashiel*, 3 Wall. 688; *Batdorff* v. *Focht*, 44 Penn. St. 195; *Bond* v. *Willett*, 31 N. Y. 102; *Capen* v. *Doty*, 13 Allen, 262.

By the common law, a leasehold interest in land is personal property. Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, yet may, during the term of the lease, be severed by the lessee, or by one deriving title from him, and thus reconverted to their original condition of chattels. At any time before the expiration of the term, therefore, both the leasehold and the fixtures may be taken on execution against the lessee, like other personal property. *Dalzell* v. *Lynch*, 4 W. & S. 255; *Kutter* v. *Smith*, 2 Wall. 491; *Van Ness* v. *Pacard*, 2 Pet. 137; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Guthrie* v. *Jones*, 108 Mass. 191.

It is argued for the appellee that by the law of Tennessee the rule is different as to both leasehold and fixtures, or at least as to the leasehold. But we have not found it necessary, for

the purposes of this case, to decide whether by the local law the leasehold and fixtures, or either of them, should be treated as real estate, or as personal property, in levying an execution on them for the debt of the lessee.

If, as the appellee contends, the property levied on should be considered as real estate, the judgments, having been recovered in the county in which the debtor resided, created a lien from the time they were rendered, which was continued in force by the taking out of the executions and the sale of the property within a year after the rendition of the judgments. Code of Tennessee, §§ 2980, 2982.

If, as the appellant contends, the leasehold and fixtures were personal property, the case stands thus:

The leasehold interest, though personal property, is an interest in land. The lessee's interest in the fixtures arises out of the agreement contained in the lease, and of the manner and purpose of their annexation to the land, from which they could not be separated and removed without much labor and expense. It was not necessary that the officer should retain actual possession in order to keep alive a levy upon such property. *Ashmun* v. *Williams*, 8 Pick. 402.

The executions have never been legally recalled or set aside. The officer, in deference to the supposed order of the court staying the executions, suspended further proceedings for the conversion of the property into money to satisfy the judgment debts, and returned the executions to the court with indorsements showing all the proceedings under them, thereby submitting the regularity of his proceedings and the validity of the levies to the judgment of the court; and it was after this return that the property was taken possession of by the coroner, under the writ of attachment from the State court, and was conveyed by the judgment debtor to the appellant.

The possession so taken by the coroner, and the conveyance so made by the debtor, cannot impair the validity of the levies. The judgment creditor and the marshal had done everything in their power to perfect them. All the proceedings of the marshal had been indorsed by him on the executions and returned to the court, and thus appeared of record. The levies

having been once duly made, and never abandoned or intended to be abandoned, and not needing a continuance of actual possession by the marshal to maintain them, had not been defeated by any extrinsic facts. And the court, upon motion and hearing, determined that the levies continued in force, and ordered writs of *venditioni exponas* to issue.

The marshal was prevented from taking possession of and selling the property under those writs by the fact of its being in possession of the officer of the State court, under the attachment issued in the present suit to enforce the mechanic's lien. But by the removal of this suit into the Circuit Court of the United States all danger of conflict between the federal process and State process was avoided; and the Circuit Court, having all the parties and all the processes before it, rightly held that the levies of the executions upon the judgments at law continued in force, and gave the judgment creditor a priority over the grantee of the judgment debtor.

Decree affirmed.

JAMES, Administratrix, *v.* HICKS.

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

Submitted January 4th, 1884.—Decided January 28th, 1884.

Internal Revenue—Limitation—Statutes—Tax.

1. An action to recover back a tax illegally exacted, when the commissioner of internal revenue, on appeal, delays his decision more than six months from date of the appeal, may be brought within twelve months from that date, whether a decision shall then have been made or not; or the claimant may wait for the decision, and bring his action at any time within six months thereafter.
2. An appeal to the commissioner of internal revenue against a tax alleged to have been illegally exacted being rejected by him for informality in the preparation of the papers, a second appeal was taken within the proper period, and rejected: *Held*, That, in fixing a date when a suit to recover back the tax alleged to have been illegally exacted would be barred by the statute of limitations, the second appeal was the one contemplated by the statute.

Statement of Facts.

This action was brought by Hicks, the defendant in error, on August 15th, 1879, to recover $3,292.95 for taxes alleged to have been illegally exacted by the intestate as collector of internal revenue on October 31st, 1865. The only question made was that the suit was not brought within the time allowed by law.

The plaintiff, in his declaration, alleged that he appealed to the commissioner of internal revenue to refund the tax illegally collected, and that his appeal was rejected by the commissioner on January 22d, 1879. To this declaration the defendant pleaded that the appeal to the commissioner to refund the money exacted was filed in his office on February 8th, 1866, and was rejected on May 7th, 1866. To this the plaintiff replied that the appeal referred to in the plea was not duly made, and that it was not rejected on its merits, but because it had not been made and certified on proper forms as required by the treasury regulations; and that afterwards, on January 8th, 1868, he made an appeal in due form, which was entertained by the commissioner, and finally decided and rejected on January 22d, 1879. The finding of fact on this issue by the court was as follows:

"The issues in fact being tried and determined by the court in this cause upon a stipulation in writing by the parties through their respective counsel, filed under section 649 Revised Statutes of the United States, the court find the facts as proved, under the special plea of the statute of limitations, to be that the suit was brought within six months after the final rejection of the plaintiff's appeal made to the commissioner of internal revenue at Washington, the same having been pending before the commissioner from the time the appeal was perfected on Form 46, according to the provisions of law and the regulations of the Secretary of the Treasury made in pursuance thereof. It is further found that the delay in the consideration of the appeal by the commissioner after its perfection on Form 46 and the signature of the proper officers required by law was occasioned by the loss of the original papers filed with the department by the plaintiff or his attorney and required by law to be kept there."

Judgment was rendered in favor of the plaintiff below, to reverse which a writ of error was brought.

Opinion of the Court.

Mr. Solicitor-General for plaintiff in error.

Mr. W. P. Burwell for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the above language, he continued: It is alleged as error, in the first place, that the court should have treated the appeal rejected for informality as the basis for determining the time within which the suit ought to have been brought. But that appeal was not so treated by the commissioner, who rejected it for mere informality and entertained the subsequent appeal, made in proper form, as rightly prosecuted. The latter, in our opinion, was the appeal contemplated by the statute.

It is further insisted, however, that treating the appeal of January 8th, 1868, as the only one to be considered, the action was barred by lapse of time.

Section 19 of the act of July 13th, 1866, ch. 184, 14 Stat. 152, is:

"That 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."

§ 3227 Rev. Stat., which was first adopted in the act of June 6th, 1872, provides that:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of ac-

tion accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

It is argued now, by the Solicitor-General, that the action was barred by the act of 1866, because not brought within twelve months from the date of the appeal. The terms of that act require, as conditions precedent to the right to bring any such suit, first, an appeal to the commissioner of internal revenue; second, a decision thereon by him; and not then unless it shall be brought within six months after such decision, or within that time after the act takes effect. The proviso is, that if the decision is delayed more than six months from the date of the appeal, the suit may be brought at any time within twelve months from the date of such appeal, that is, although no decision may have, in the meantime, been made. Such was the construction of similar provisions in § 2931 Rev. Stat., adopted in *Arnson* v. *Murphy*, 109 U. S. 238. The plaintiff is not bound to sue until a decision on the appeal has actually been made, but must sue within six months thereafter. If he does not choose to wait for a decision, he may nevertheless bring suit before it is made if it is delayed more than six months from the date of the appeal, provided, however, in that case, he sues within twelve months from the date of the appeal.

In the present case, the plaintiff chose to wait, as he had the right to do, until a decision upon his appeal had been made. It had not been made on June 6th, 1872, when the act of that date took effect, being § 3227 Rev. Stat. The claim, therefore, was pending before the commissioner at that time. It continued to be so until January 22d, 1879, when it was decided. By the terms of § 3227, he had one year after that decision within which to bring his suit, which he did.

The judgment of the Circuit Court was, therefore, right, and is accordingly *Affirmed.*

Statement of Facts.

KRIPPENDORF *v.* HYDE & Another.

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

Submitted January 2d, 1884.—Decided January 28th, 1884.

Equity—Jurisdiction—Officers of the Court—Parties.

A bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, not being an original suit, but ancillary and dependent, supplementary merely to an original suit out of which it arose, can be maintained without reference to the citizenship or residence of the parties. *Freeman* v. *Howe*, 24 How. 450, followed, and the language of NELSON, J., in the opinion of the court adopted.

The powers both of courts of equity and courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient: as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law.

When property in the possession of a third person claiming ownership is attached by a marshal on mesne process issuing out of a Circuit Court of the United States as the property of a defendant, citizen of the same State as the person claiming it, such person has no adequate remedy against the marshal in the State court, and may seek redress in the Circuit Court having custody of the property by ancillary proceedings; as, for instance, if the original proceeding is in equity, by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances; or if it is at common law, by a summary motion or by a proceeding in the nature of an interpleader; or if proceedings authorized by statutes of the State in which the cause is pending afford an adequate remedy, by adopting them as part of the practice of the court.

In equity.—In September, 1882, two of the defendants, partners as Hyde & Brothers, brought an action at law in the Cir- Court against Lewis C. Frey and Jacob C. Maag, partners as Frey & Maag, to recover an amount alleged to be due for goods and merchandise sold, and levied a writ of attachment issued therein on a stock of goods in the city of Indianapolis, as the property of Frey & Maag, which was in the possession of the appellant, and of which, at that time, as he alleged, he was owner. The property was appraised as required by the statutes of Indiana, and its value returned at the sum of $13,165.64. The goods were returned to the appellant on his

giving to the marshal a delivery bond, conditioned to properly keep and take care of the property, and deliver the same to the marshal on demand, or so much thereof as might be required to be sold on execution to satisfy any judgment which might be recovered against the defendants in the action, or to pay the appraised value of the property, not exceeding the amount of the judgment and costs. The appellant was made on his own motion a party defendant to the suit in order to assert his title, but on motion of the plaintiff, his name was stricken from the record without prejudice to his right to enforce his claim in some other form. Such further proceedings were then had, that, as provided by the statute, a large number of the creditors of Frey & Maag came into the attachment suit for the purpose of obtaining judgments and participating in the distribution of the fund arising from the sale of the attached property. Judgment was subsequently rendered therein in favor of the original plaintiffs, and of these several creditors respectively, and it was ordered that the attached property be sold by the marshal for the satisfaction thereof. The appellant, as required by the condition of his bond, not being able to return the specific property attached, paid to the marshal the full amount of its appraised value. He thereupon, the money being in the marshal's hands, undistributed, filed his bill, to which all the parties in the attachment suit and the marshal were made defendants, praying that the marshal be restrained from paying the said fund, or any part thereof, to the creditors in the attachment suit, and that the same be adjudged to belong to the appellant, and paid to him accordingly.

It was alleged that all the attachment creditors were non-residents of the State of Indiana; but it did not appear from the record what was the citizenship of any of the parties to the bill.

The Circuit Court dismissed the bill for want of equity, on the ground that the complainant had a plain and adequate remedy at law; from which decree an appeal was taken.

Mr. D. V. Burns for appellant.

Argument for Appellee.

Mr. Lew Wallace and *Mr. A. W. Hatch* for appellee.—Under the statutes of the State of Indiana, which would control in any action brought to recover the possession of the goods seized by the marshal, Krippendorf could have obtained the specific property and also damages for its detention. Rev. Stat. of Indiana, 1881, § 1266. That such an action would lie, see Drake on Attachment, § 340; *Louthain* v. *Fitzer*, 78 Ind. 449. Replevin was appellant's proper remedy. Still, in the abundance of legal redress, he is permitted a choice, and may now maintain, upon the facts averred, an action in trespass against the marshal for the wrongful seizure. There is no impediment to such proceedings shown, and no claim in the bill or in argument that the marshal is unable to respond in damages. It seems to us not only that the legal remedy is adequate, but that the relief at law is the very same as the relief afforded by a court of equity. It is elementary that where the legal remedy is adequate and certain, equity has no jurisdiction. Appellant's counsel attempt to break the force of this conclusion by insisting that as the court of equity only supplements the proceedings at law, the usual prerequisites of original jurisdiction need not exist. This is true as applied to parties, but is far from true if made to govern principles. We have selected from the vast number of cases upon this subject those similar to that under consideration, and we refer the court to such authorities with the conviction that this subject is no longer a matter for controversy. *Miller* v. *Crews*, 2 Leigh (Va.), 576; *Hamilton* v. *Shrewsbury*, 4 Randolph (Va.), 427; *Bowyer* v. *Creigh*, 3 Randolph (Va.), 25; *Allen* v. *Freeland*, 3 Randolph (Va.), 170; *Whitman* v. *Willis*, 51 Texas, 429; *Henderson* v. *Morrill*, 12 Texas, 1; *Davidson* v. *Seegar*, 15 Florida, 671; *Akin* v. *Davis*, 14 Kansas, 143; *Baker* v. *Rinehard*, 11 W. Va. 238; *Stilwell* v. *Oliver*, 35 Arkansas, 184; *Sheldon* v. *Stokes*, 7 Stewart (N. J.), 87; *Dawes* v. *Taylor*, 8 Stewart (N. J.), 40; *Freeman* v. *Elmendorf*, 3 Halsted Ch. (N. J.) 475, 655; *Greenup* v. *Brown*, Breese (Ill.), 252; *Coughron* v. *Swift*, 18 Illinois, 414; *Winch's Appeal*, 61 Penn. St. 424; *Imlay* v. *Carpentier*, 14 California, 173; *Markley* v. *Rand*, 12 California, 275; *Johnson* v. *Bank*, 21

Connecticut, 148; *Watkins* v. *Logan*, 3 T. B. Monroe (Ky.), 21; *Bouldin* v. *Alexander*, 7 id. 425; *Hall* v. *Davis*, 5 J. J. Marshall (Ky.), 290; *Gurby* v. *Bell*, 40 Georgia, 133; *McIndoe* v. *Hazleton*, 19 Wisconsin, 567; *Macy* v. *Lloyd*, 23 Ind. 60; *Lewis* v. *Levy*, 16 Maryland, 85; *Freeland* v. *Reynolds*, 16 Id. 416; *Chappell* v. *Cox*, 18 Id. 513; *Hammond* v. *St. John*, 4 Yerger (Tenn.), 107; *Du Pre* v. *Williams*, 5 Jones Eq. (N. C.) 96; *Howell* v. *Howell*, 5 Iredel Eq. (N. C.) 258; *Garstin* v. *Asplin*, 1 Maddock Ch. 150. In *Pennock* v. *Coe*, 23 How. 117, and in *Freeman* v. *Howe*, above cited, the complainants had equitable claims to the property, and there was thus no doubt as to the jurisdiction. In *Gue* v. *The Tide Water Canal Company*, 24 How. 257, the relief was granted because a court of law could not fully protect all interests. Mr. Justice Nelson did not intend to make his remarks of universal application, but had in mind only the case before him. This same comment has been made upon *Freeman* v. *Howe*, by this court, in *Buck* v. *Colbath*, 3 Wall. 334, and *Christmas* v. *Russell*, 14 Wall. 69. In *Buck* v. *Colbath*, commenting upon what was said of equitable proceedings in *Freeman* v. *Howe*, this court said: "The proceeding here alluded to is one unusual in any court, and is only to be resorted to in the federal courts, in extraordinary cases where it is essential to prevent injustice by an abuse of the process of the court, *which cannot otherwise be remedied*." Taking all these cases together, we see nothing in them entrenching upon our position. The law, as well settled is, that to supplement proceedings at law, equity will only interfere in proper cases for equitable relief; and the test is whether the remedy at law is adequate and certain. That Krippendorf upon the facts stated in his bill has such remedy at law, is not an open question in this court. See *Buck* v. *Colbath*, above cited, and *Sharpe* v. *Doyle*, 102 U. S. 686.

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

According to the law of Indiana, the giving of the delivery bond did not divest the lien of the attachment upon the goods,

which remained, in contemplation of law, in the possession of the officer, *Gass* v. *Williams*, 46 Ind. 253; so that if the proceedings had been in the State court the appellant, while the goods remained in specie, on demand and refusal of a return of the property to him by the officer, might have maintained an action of replevin on proof of title. *Louthain* v. *Fitzer*, 78 Ind. 449.

Having disposed of the goods, so that he could not return them in specie, it would seem that no action of replevin could thereafter be brought, and, on general principles, he could not set up his ownership as a defence to an action on the bond. Drake on Attachment, § 340. Under the practice in Indiana he would not be permitted to become a party to the suit in order to have his title there determined. *Risher* v. *Gilpin*, 29 Ind. 53. And, accordingly, in the attachment suit of Hyde Brothers against Frey & Maag, as stated in the bill, the appellant, having been at first made a party on his own motion, was subsequently dismissed from it. Payment of the appraised value of the attached property to the marshal, which, by the terms of the delivery bond, he was bound to make, it can hardly be insisted deprived him of his title to the goods and their proceeds. Without giving the delivery bond, it is true, the owner could have brought suit against the marshal for trespass, although that would not in all cases furnish an adequate remedy by giving damages for the value of the property taken. *Watson* v. *Sutherland*, 5 Wall. 74.

The only legal remedy which can be said to be adequate for the purpose of protecting and preserving his right to the possession of his property was an action of replevin. Of this remedy at law in the State court he was deprived by the fact that the proceedings in attachment were pending in a court of the United States, because the property attached, being in the hands of the marshal, is regarded as in the custody of the court. This was the point decided in *Freeman* v. *Howe*, 24 How. 450, the doctrine of which must be considered as fully and firmly established in this court. In meeting the objections made in argument to the conclusion of the court in that case, Mr. Justice Nelson, delivering its opinion, used the following language:

Opinion of the Court.

"Another misapprehension under which the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievance complained of. It was supposed that they were utterly remediless in the federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the federal courts have found no difficulty in applying a remedy, and one much more effectual than replevin, and more consistent with the order and harmony of judicial proceedings, as may be seen by reference to the following cases: 23 How. 117; *Pennock et al.* v. *Coe*; *Robert Gue* v. *The Tide Water Canal Company*, 24 How. 257; 12 Pet. 164; 8 id. 1; 5 Cranch, 288.

"The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to an original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties."

"The case in 8 Pet. 1, which was among the first which came before the court, deserves, perhaps, a word of explanation. It would seem, from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law."

It has been sometimes said that this statement was *obiter dictum*, and not to be treated as the law of the case; but it was, in point of fact, a substantial part of the argument in support of the judgment, and, on consideration, we feel bound to confirm it in substance as logically necessary to it. For if we affirm, as that decision does, the exclusive right of the Circuit Court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and, as this may

not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong.

This principle was illustrated and applied in the case of *Bank* v. *Turnbull*, 16 Wall. 190. There, under a statute of Virginia, the claimant of property taken in execution upon a judgment rendered against another, gave to the sheriff a suspending and forthcoming bond, which stayed the sale and maintained his possession of the property until the title could be determined by a statutory interpleader. This issue having been properly directed in the State court, between parties who were citizens of different States, a petition was filed for its removal to the Circuit Court of the United States, under the removal act of March 2d, 1867. The order of removal was reversed by this court on the ground that the suit "was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation;" that "it was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officers. It was intended to enable the court, the plaintiff in the original action, and the claimant to reach the final and proper result by a processs at once speedy, informal, and inexpensive."

No one, even in equity, is entitled to be made or to become a party to the suit unless he has an interest in its object, Calvert on Parties, 13; yet it is the common practice of the court to permit strangers to the litigation, claiming an interest in its subject-matter, to intervene on their own behalf to assert their titles.

"When any person," says Mr. Daniel, Chancery Practice, ch. XXVI., § 7, p. 1057, "claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered. This inquiry is called an examination *pro interesse suo ;* and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate. Thus, in *Martin* v. *Willis*, 1 Fowl. Ex. Pr. 160, a person claiming title to goods seized under a sequestration, obtained an order for an examination *pro interesse suo*, and in the meantime that the goods might be restored to him on his giving security."

The same practice prevails in cases where property is put into the hands of a receiver. Daniel, Ch. Pr., ch. XXXIX., § 4, p. 1744. The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court.

So the equitable powers of courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law, *Buck* v. *Colbath*, 3 Wall. 334; *Hagan* v. *Lucas*, 10 Pet. 400; and when in the exercise of that power it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by

treating the intervention of the stranger to the action in his own interest, as what Mr. Justice Story calls, in *Clarke* v. *Mathewson*, 12 Pet. 164–172, a dependent bill.

In the original action of Hyde Brothers against Frey and Maag, in which the attachment was issued and levied, the jurisdiction of the Circuit Court attached by reason of the citizenship of the parties. But the statute of Indiana granting and regulating the process of attachment, provides, § 943 Rev. Stat. of 1881, that after the institution of the suit, and at any time before final judgment, any creditor of the defendant may file and prove his claim, with the right to participate in the distribution of the proceeds of the attached property. In the present case that actually took place, and it is shown, on the face of the bill, that a large number of persons, as to whom it is not stated that they were citizens of other States, competent to bring an original action in the Circuit Court, and as to whom it does affirmatively appear, that the judgments upon their claims in their favor are less than the jurisdictional sum of $500, nevertheless, filed their claims, obtained judgments, and will be entitled on distribution to divide with the plaintiff and among themselves the money paid into court by the appellant. So that, unless he is allowed to intervene by his present bill to stay the distribution of the fund, which, by the demurrer, is admitted to be his own, the anomaly will be presented, in judicial proceedings, of an award, dividing property among claimants, from which the only person excluded is the one whose sole and paramount title is confessed; and he will be compelled to stand idly by to witness the dissipation of his property into many unknown hands, by a court, to whose jurisdiction he has submitted himself from the beginning, and which now remits him to an action for damages against its own officer who has simply acted under its order.

This court has uniformly resisted the tendency to confuse the boundaries of law and equity in its procedure, and maintained the distinction between the two systems, so deeply imbedded in our jurisprudence; and in the present instance, is not to be considered as departing from the consistent course of precedents in which that distinction has been maintained. The

bill in this case is not be treated as an original bill in equity, for, as such, it could not be maintained. It is altogether ancillary to the principal action at law in which the attachment issued, and should be regarded as merely a petition in that cause, or dependent upon it and connected with it, as a petition *pro interesse suo*, or of intervention in an equity or an admiralty suit, asserting a claim to property or a fund in court, the subject of the litigation, which, owing to the peculiar relations between the courts of the States and of the United States, is a necessary resort to prevent a failure of justice, and furnishes in such cases a certain, adequate, and complete remedy against injurious abuses of the process of the court, by supplying a means, in the principal suit, of trying the title to property in the custody of the law.

The character of the bill as related to the principal case is well explained in *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609–633, where it is stated,

"that the question is not whether the proceeding is supplemental and ancillary, or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the State courts. No one, for instance, would hesitate to say, that according to the English chancery practice a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet, this court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment."

And in speaking of the application of the principle to the case then before it, the court, Mr. Justice Miller delivering its opinion, continued:

"The case before us is analogous. An unjust advantage has

been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property, which is the subject of the contest, is still within the control of the court and subject to its order."

The question was discussed in *Van Norden* v. *Morton*, 99 U. S. 378, where the court pointed out the mode of reconciling the distinction between original legal and equitable rights and remedies, as administered in the courts of the United States, and ancillary proceedings to restrain and control their process. Referring to the statutory injunction given by the law of Louisiana to restrain "the sheriff in the execution of a judgment" when "he has seized property not belonging to the defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner," Mr. Justice Miller, delivering the opinion of the court, said:

"Now this obviously refers to the control of the court over its own officer, in the execution of its own writs, and is as applicable to other misconduct of that officer in the execution of his official duties, as in cases of seizures of property not liable under an execution in his hands. The remedy needs no formal chancery proceeding, but a petition or motion, with notice to the sheriff, is not only all that is required, but is the most speedy and appropriate mode of obtaining relief. This relief does not depend upon any inadequacy of an action for damages or by sequestration. It is a short, summary proceeding before the court under whose authority the officer is acting, gives speedy relief, and is very analogous to the statutory remedy given in many of the Western States in similar cases to try the right of property at the instance of the party whose property is wrongfully seized."

It is in this light, we think, that the court below should have regarded the present bill, not as an original bill invoking the general jurisdiction of the court in equity, but as an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself, incident to and dependent upon it.

Opinion of the Court.

The form of the proceeding, indeed, must be determined by the circumstances of the case. If the original cause, in which the process has issued or the property or fund is held, is in equity, the intervention will be by petition *pro interesse suo*, or by a more formal, but dependent bill in equity, if necessary. Relief, either in a suit in equity, or an action at law, may properly be given, in some cases, in a summary way, by motion merely, supported by affidavits. In actions at law, where goods have been taken in execution after judgment, or upon attachment before, a proceeding in the nature of an interpleader might be appropriately ordered by the court, such as was given in the English practice to the officer by the statute of 1 & 2 Will. 4, c. 58; 2 Lush's Pr. by Dixon, 777; and in that the respective rights of the claimants to the property could generally be tried as in an action at law by a jury, upon a formal issue framed for that purpose, or with the consent of the parties by the court; or, if the claim was such as that it could be determined only upon principles of equity, as administered in courts of that general jurisdiction, it would be proper to provide relief upon a bill of that nature, filed for that purpose. If the statutes of the State contained provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the court, as contemplated by §§ 914, 915, 916 of the Revised Statutes. In whatever form, however, the remedy is administered, whether according to a procedure in equity or at law, the rights of the parties will be preserved and protected against judicial error, and the final decree or judgment will be reviewable, by appeal or writ of error, according to the nature of the case.

For the reasons given, we are of opinion that the Circuit Court should have overruled the demurrer to the bill, and required the parties to try the issue tendered by the appellant. The decree dismissing the bill is accordingly reversed, and the cause remanded with direction to take such further proceeding therein, in conformity with this opinion, as justice and equity require.

It is accordingly so ordered.

Statement of Facts.

AMERICAN FILE COMPANY & Another *v.* GARRETT & Another.

SAYLES & Another *v.* GARRETT & Another.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Argued January 16th, 17th, 1884.—Decided January 28th, 1884.

Assignee in Bankruptcy—Corporation.

A, residing in Maryland, and a stockholder in a manufacturing corporation in Rhode Island, pledged with B, also residing in Maryland, as security for a debt due from A to B, bonds of the company secured by mortgage of all its property. The company became embarrassed and unable to pay its debts, and its stockholders became individually liable to its creditors. A became bankrupt, and B agreed with the assignee to receive the bonds and a sum of money in payment of A's debt, and to indemnify the assignee against loss or damage as holder of the stock. B then instituted proceedings to enforce the individual liability of other stockholders: *Held*, That, the agreement with the assignee was not an agreement to save A harmless against liability as stockholder; that neither the assignee in bankruptcy nor the bankrupt's property in his hands was subject to the liability which attached to the stock, and that B assumed no liability which could be set up by a stockholder as a defence against his individual liability to B.

The American File Company was a manufacturing corporation created by a special act of the legislature of Rhode Island, passed in May, 1863, and carried on its business in the town of Lincoln, in that State. The company purchased a patent under which the manufacture of files had before been carried on in the city of Baltimore, and the persons, among them one Allen A. Chapman, who sold the patent, took nearly half the stock of the company.

The business of the company was carried on at a loss. About the beginning of the year 1870 it owed a large sum of money, which was evidenced by promissory notes of the company, indorsed by the stockholders in Rhode Island, and Chapman and other stockholders in Baltimore—all the stockholders being under the statutes of Rhode Island individually liable for the debts of the company by reason of its omission to file certain

statements respecting its business in the office of the clerk of the town. In this state of its affairs the company resolved to issue its bonds, to be secured by a mortgage on all its property, real and personal. They were to be offered to the stockholders in proportion to the stock held by them, and such as were not taken were to be disposed of in "the order of applicants." The bonds were issued accordingly. They were payable to bearer five years after January 1st, 1870.

The bonds for Chapman and the other Baltimore stockholders, for which Chapman had subscribed, were sent to him and charged against him on the books of the company, and the bonds were paid for by him by the surrender of a like amount of the promissory notes of the company. The notes so surrendered were the property of the firm of Kirkland, Chase & Co., merchants, of the city of Baltimore, of which Chapman was a member. Some of the Baltimore stockholders refused to subscribe for the bonds, and their share of them was taken by Chapman or his firm.

The firm of Kirkland, Chase & Co., on May 2d, 1872, borrowed of the firm of Robert Garrett & Sons, bankers of the same city, $50,000, and pledged as security therefor certain promissory notes which were afterwards, on May 28th, withdrawn and a cargo of sugar, stored in a warehouse in Baltimore, was pledged in lieu thereof and the warehouse receipt deposited with Garrett & Sons. Besides the $50,000, Kirkland, Chase & Co. at this time owed Garrett & Sons more than $500,000, and it was the agreement between them that all securities pledged were to be held, not only for the specific loan for which they were pledged, but for the general balance due from the pledgers to the pledgees.

On September 12th, 1872, Kirkland, Chase & Co. failed, and the firm and each of its members were subsequently adjudicated bankrupts, and their property, copartnership and individual, was assigned for the benefit of their creditors.

On the day of the failure, Chapman informed Garrett & Sons that on May 30th, Kirkland, Chase & Co. had withdrawn and sold the cargo of sugar pledged as security for the loan of $50,000, and that bonds of the American File Company to the

amount of $81,500 had been substituted therefor, and handed to his son previous to September 12th to be delivered to them. On September 12th the bonds were delivered into the manual possession of Garrett & Sons in lieu of the cargo of sugar so withdrawn and sold.

The assignees in bankruptcy of Kirkland, Chase & Co. disputed the title of Garrett & Sons to these bonds and some other securities on the ground that their transfer was a fraudulent preference. The assignees and Garrett & Sons settled all their controversies growing out of the bankruptcy of Kirkland, Chase & Co. by an agreement in writing dated May 4th, 1874, whereby the assignees relinquished all claim upon the "collaterals" of every nature, or the proceeds thereof, held by Garrett & Sons on the debts due them by the bankrupts, and agreed to pay Garrett & Sons $5,000, and the latter relinquished all claim to dividends declared and to be declared on the estate of Kirkland, Chase & Co. by the assignees or their successors. The settlement also contained this stipulation:

"And said Robert Garrett & Sons likewise further agree, that whereas said assignees have been offered the sum of fifty cents in the dollar for certain bonds of the American File Company (now held by Messrs. Robert Garrett & Sons, which were received as collaterals from Messrs. Kirkland, Chase & Company), and an indemnification against loss or damage of any kind as holders of certain stock of said American File Company, as assignees of A. A. Chapman and Kirkland, Chase & Company, said Robert Garrett & Sons hereby agree to indemnify the said assignees against loss or damage of any kind as holders of the stock aforesaid; and in consideration of said acts of said assignees, said Robert Garrett & Sons do also hereby agree to indemnify the said assignees and said estate of Kirkland, Chase & Company and the estate of A. A. Chapman against loss or damage of any kind for releasing their claim to the said bonds of the American File Company, now held by Messrs. Robert Garrett & Sons, and agree to hold said assignees and said estate harmless for said transfer and release."

Garrett & Sons, on June 23d, 1876, recovered a judgment in the Supreme Court of the State of Rhode Island against

the File Company on the bonds transferred to them by Chapman or the firm of Kirkland, Chase & Co., for the sum of $132,611.33, the principal and interest due on the same. At that time, by the statute law of Rhode Island, the creditors who recovered a judgment against a corporation whose stockholders were individually liable for its debts, could take out execution thereon and seize the persons and property of the stockholders in satisfaction thereof, in the same manner as on executions issued against them for their individual debts.

Before either of the cases brought up by these appeals was commenced, the affairs of Kirkland, Chase & Co. had been nearly settled and the bankrupts discharged. After the recovery of the judgment by Garrett & Sons, William F. Sayles and other Rhode Island stockholders, about November 9th, 1876, filed a bill in equity against them in the Supreme Court of Rhode Island to enjoin them from levying execution upon the persons or property of the complainants. The bill alleged that when the bonds of the File Company were issued in 1870, there was an agreement between the stockholders that the bonds were to be taken by them in proportion to the stock which they held respectively, and that they were to be a final payment of the debts of the company, relieving the stockholders from liability, and requiring the holders to look for payment of their bonds to the property which was mortgaged to secure them, or to the property of the company, and not to the individual liability of the stockholders; that Garrett & Sons had notice of this agreement when they acquired the bonds, and had no better right to enforce the individual liability of the stockholders than Chapman or Kirkland, Chase & Co., from whom they derived title; and that they, Garrett & Sons, had agreed to indemnify the assignees in bankruptcy of Chapman and Kirkland, Chase & Co., and thereby had discharged the complainants from any liability, if any such existed, by reason of said bonds, and that in equity and of right their said guaranty inured to the benefit of the complainants, and the court should enforce it in that suit, and thereby avoid the circuity of action which would ensue if the complainants

should call on the assignees for contribution, and they on Garrett & Sons for indemnity.

After this cause was put at issue by the answer of Garrett & Sons, and by the replication of complainants, it was removed to the Circuit Court of the United States for the District of Rhode Island.

In the year 1877 an act was passed by the legislature of Rhode Island taking away the right of the judgment creditors of a corporation, whose stockholders were individually liable, to issue execution against them, and substituting a bill in equity or an action of debt to enforce the liability of the stockholder.

In pursuance of this statute, Garrett & Sons, on April 6th, 1878, filed their bill in the United States Circuit Court for the District of Rhode Island, against the American File Company and all the stockholders thereof who were citizens of the State of Rhode Island, to enforce their individual liability to pay the judgment recovered against the American File Company.

The stockholders against whom this liability was sought to be enforced filed their joint answer to the bill, in which they set up by way of defence the same matters, in substance, as they had alleged in their bill against Garrett & Sons.

These two cases, which involved substantially the same questions and controversies, were heard at the same time and upon the same evidence. In the case of *Garrett & Sons* v. *The American File Company and others*, the Circuit Court decreed that the defendants were jointly and severally liable for the payment of the judgment recovered by Garrett & Sons against The American File Company, and that the complainants have and recover of said stockholders the sum of $165,440.65, that being the amount due on the judgment.

In the case of *William F. Sayles and others* v. *Garrett & Sons*, the Circuit Court dismissed the bill. Appeals were taken from both decrees; by the complainants in the case of *Sayles and others* v. *Garrett & Sons*, and in the case of *Garrett & Sons* v. *The American File Company*, by William F. Sayles and other stockholders against whom the decree was rendered. Both cases were argued together in this court.

Mr. A. D. Payne and *Mr. Abraham Payne* for appellants.

Mr. E. T. D. Cross and *Mr. John K. Cowen* for appellees.

Mr. Justice Woods delivered the opinion of the court.

We shall consider the questions raised by these appeals as presented by the record in the case of *William F. Sayles and others* v. *Robert Garrett & Sons.*

The first contention of the appellants is that the bonds of the American File Company issued in 1870 were taken by its stockholders in proportion substantially to the stock held by them respectively, on the agreement between themselves that the bonds should extinguish their individual liability, and the bondholders should look to the property mortgaged to secure the bonds and the other property of the company for payment, and that Garrett & Sons were bound by this agreement.

If it be conceded, what in our opinion the record fails to show, that the bonds were issued on any such understanding, it would remain for the appellants to prove notice thereof to Garrett & Sons before the title of the latter to the bonds could be affected by it.

The bill in this case having charged that when Garrett & Sons took the bonds they had actual notice of all the circumstances under which they were issued to the stockholders, and of all and singular the rights and equities subsisting between the stockholders of the company in relation thereto, and having called for the answer of defendants under oath, the defendants answered under oath, and alleged that they took the bonds in the course of business for value before maturity, and that at the time they acquired title thereto they were ignorant of the fact that Allan A. Chapman was a stockholder in the American File Company, and had no knowledge or notice of the manner or circumstances of the issue of said bonds. The testimony of each one of the defendants was taken by deposition, in which they reiterate the denial of knowledge or notice contained in their answers. The answers and depositions of the defendants on this point stand uncontradicted by any evidence, direct or circumstantial, in the record. The truth of their denial must therefore be taken as an established fact in the case.

If, therefore, Garrett & Sons, having acquired the bonds before maturity, paid value for them, they can hold them unaffected by any equities between Allan A. Chapman and the American File Company or its stockholders. The evidence in the record shows beyond controversy that Garrett & Sons took the bonds as collateral security for a valid debt for which they held no other security, and which the bonds fell far short of securing; that after applying these and other assets to the debts for which they were pledged, there remained due to them from Kirkland, Chase & Co. more than $200,000. They were therefore purchasers for value, and are entitled to all the rights of *bona fide* holders for value, among which is the right to enforce payment from the stockholders of the American File Company. *Swift* v. *Tyson*, 16 Pet. 1; *Oates* v. *National Bank*, 100 U. S. 239; *Railroad Company* v. *National Bank*, 102 U. S. 14.

But the appellants insist (and this is their second contention) that, conceding Garrett & Sons to be *bona fide* holders of the bonds for value without notice of any equities or defences as against the first holders, they have nevertheless lost their right to enforce the individual liability of the stockholders by reason of the agreement between them and the assignees of Chapman, whereby they assumed the liability of stockholders and made themselves liable through the assignees to contribute to the other stockholders the money which they might collect from them on the bonds of the company.

It is clear that Garrett & Sons did not by this contract agree to become stockholders of the corporation or to indemnify Chapman against his individual liability as a stockholder. The agreement will bear no such interpretation. The contract was made for the benefit of the assignees, by which they took an indemnity for themselves and the bankrupt estate. If, therefore, the assignees themselves are not liable as stockholders, Garrett & Sons by this contract of indemnity assumed no liability, and they hold the bonds in question unfettered by any equities or conditions.

It is well settled that under the circumstances of the case neither the assignees nor the assets in their hands are subject

to the individual liability which attaches to stocks held by the bankrupt. The evidence does not show that the assignees acted in any way as stockholders, that they ever attended any meetings of the corporation, or that their names appeared upon its books, or that they treated the stock standing in Chapman's name as an asset of his estate. They merely had in their possession the certificates of stock, and yielded to Garrett & Sons any claim to the bonds of the American File Company belonging to Chapman or his firm, and took an indemnity against any supposed liability which might attach to them as holders of the stock belonging to the estate of Chapman.

In *Gray* v. *Coffin*, 9 Cush. 192, the Supreme Court of Massachusetts, having under consideration a law of that State almost identical with the Rhode Island statutes, held that the individual liability of "stockholders did not attach when their assignee had attended and voted at meetings of the corporation and done other acts of unequivocal ownership." The same result would follow under the bankrupt law. It has long been a recognized principle of the bankrupt laws that the assignees were not bound to accept property of an onerous or unprofitable character. *South Staffordshire Railway Company* v. *Burnside*, 5 Ex. 129; *Furdoonjee's Case*, 3 Ch. Div. 268; *Ex parte Davis*, 3 Ch. Div. 463; *Streeter* v. *Sumner*, 31 N. H. 542; *Amory* v. *Lawrence*, 3 Cliff. 523; *Rugely & Harrison* v. *Robinson*, 19 Ala. 404. As the assignees of Chapman never accepted the stock, and never consented to become stockholders in the American File Company, it follows that neither they nor the assets of Chapman in their hands are subject to the individual liability of stockholders for the debt of the corporation. The contract of indemnity did not, therefore, subject Garrett & Sons to any such liability. It follows that they took the bonds unaffected by any agreement in respect thereto between Chapman and his co-stockholders.

The result of these views is, that the decree in both cases must be affirmed, and it is so ordered.

WHITESIDE *v.* HASELTON & Others.

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

Argued January 14th, 15th, 1884.—Decided January 28th, 1884.

Appeal—Estoppel—Evidence—Jurisdiction—Lis Pendens—Practice.

1. The relief sought for in equity was partition of real estate in defendant's possession with denial of plaintiff's title, accounting, and recovery of rents in arrear. The record did not show affirmatively that the amount in controversy exceeded $5,000. On a motion to dismiss the appeal for want of jurisdiction, the court received affidavits as to the value of the property, and finding it established at over $5,000, retained jurisdiction of the cause.
2. B and E were tenants, under a lease from W, of an undivided interest in a mine. After the expiration of the lease they remained in possession of the property recognizing the superior title to the whole mine of H, owner of another undivided interest therein, and denying the title of W. W then filed in the State court of Tennessee a bill in equity, charging that B, E, and H had confederated together to defraud W of the property and of the rents and profits, and praying for affirmance of his title and other affirmative relief. The defendants appeared and answered, and a decree was entered recognizing and enforcing the rights of W. Pending the litigation a corporation, of which H was president, organized under the laws of another State, was put in possession of the whole mine and property. In a suit in equity by W against B, E, H, and the corporation to obtain partition, and an accounting, and such rents in arrear as might be found due : *Held*, That the decree in the former suit was conclusive of the rights of W, as against B, E, H, and the corporation.

Mr. W. H. De Witt for appellant.

Mr. George Norris for appellees.

Mr. Justice Miller delivered the opinion of the court.

The suit in this case was brought originally in the Chancery Court of Marion County, Tennessee, by V. A. Gaskill and his wife, who is now the appellant, H. L. Whiteside.

The defendants were J. C. Haselton, The Bartow Iron Company, of which he was president, James P. Boyce, in his own right and also as executor of Ker Boyce, deceased.

The principal allegation of the bill with which we have to

deal is, that plaintiffs, in right of the wife, were the owners of one undivided half of certain mines, known as the Vulcan Coal Mines; that the half interest of plaintiffs was leased for five years to Badge and Eaton, against whom they had recovered judgments for rent unpaid, and that J. C. Haselton and The Bartow Iron Company had obtained possession of said mine and were operating the same, and refused to recognize plaintiffs' title to the land or interest in the mine, and were confederating with Badge and Eaton to defraud plaintiffs of their lien on the tools, implements, and machinery used in mining, and to keep them out of possession of the property. These mines are situated on section three (3), township two (2), range six (6), and plaintiffs, conceding the title of Haselton, or of The Bartow Iron Company, under him, to the other undivided half of this land, pray for a partition, for an account of the rents, and for general relief, and for a temporary injunction, appointment of a receiver, &c.

The case was removed, on the petition of Haselton and The Bartow Iron Company, into the Circuit Court of the United States for the Eastern District of Tennessee, where, after a hearing on the merits, the bill of the plaintiffs was dismissed.

A motion was made in this court to dismiss the appeal from that decree on the ground that the amount in controversy does not exceed $5,000.

There being no distinct statement anywhere in the record of the value of the property in controversy, the parties were permitted to file affidavits here on that subject. Appellant has accordingly produced the affidavit of R. L. Watkins, who swears he knows the property well, and that the undivided half interest in it claimed by appellant is worth over $5,000, and was so when the suit was brought, aside from the $2,500 for rents claimed by her. The examination of the record makes this very probable, and, as there is no denial on oath of this affidavit, we think the amount in controversy is sufficiently proved to be over $5,000.

The Bartow Iron Company answers the bill—the answer being sworn to by Haselton as its president—and asserts its ownership of the mine, and of the entire quarter section in

which it is found, by purchase from Haselton; and it denies that plaintiffs have any interest whatever in the same.

Haselton also answers and alleges that he was the owner of the property when he sold and conveyed the same to The Bartow Company, and that plaintiffs have no interest in it. He gives a history of the title and previous litigation about it, which, in the view we take of the case, is unimportant.

Upon this issue mainly the case was heard. Much evidence was introduced and is found in the record in the way of depositions, deeds, other suits, decrees, &c.

The common source of title was Erasmus Alley, who, in 1859, conveyed the land in dispute, with many other tracts, to J. Holmes Agnew and James C. Haselton. It embraced a thousand acres and many distinct tracts. In the registration of the deed the southeast quarter of section 3 was omitted, as it is supposed, by accident. It is under this deed that appellant has for years claimed to own the undivided half of the land, and was in possession when the lease to Badge and Eaton was made. Other interests, however, intervened, and the question of innocent purchasers, without notice, embarrasses the case in some of its aspects.

But on the trial there was introduced, by agreement of the parties, the record of a suit about this same land and the same title in the State Chancery Court of Hamilton County, or so much of that record as is necessary to this case.

That suit was brought by Gaskill and wife, December 5th, 1874, against Badge, Eaton, Haselton, and others, prior to the conveyance by Haselton to The Bartow Iron Company, and as there was a decree in favor of plaintiffs it is relied on as conclusive of their rights in this suit against Haselton and The Bartow Company.

We are unable to see why it should not be so.

It was, like the present suit, a bill in chancery to enforce the lien of the plaintiffs for rents under the lease of plaintiffs to Badge and Eaton.

Haselton was made a defendant there, as he is here, on the ground that he had induced Badge and Eaton to recognize his claim and was confederating with them to defraud plaintiffs

out of their rents. Plaintiffs in that suit asserted title to an undivided half of the mine and of the quarter section on which it is located.

Haselton in his answer denied any interest in plaintiffs in the land. He gave an exhibit of the title, whereby he asserted it to be in himself, or nearly all of it, and admitted that he held Badge and Eaton accountable to himself for the rents of the property.

After full hearing, and on the exhibits as to title and other evidence, the court rendered a decree in favor of plaintiffs. This decree was rendered on the 15th day of December, 1876. It says:

"This cause came on to be heard on the original, amended, and supplemental bills, exhibits thereto attached, and the answers and exhibits thereto attached, and the proofs and other exhibits in the cause, and from all which it appears to the court, and the court adjudges and decrees, that plaintiffs are entitled to the relief prayed in their bill; that the title to the lands embraced by the terms of the lease, Exhibit A to complainant's original bill and described in the deed from E. Alley to H. L. Whiteside, dated 26th April, 1870 (Ex. A), is and was at that date in complainant Whiteside and superior to the title of the defendants, and that she was on that day . . . in actual possession of said land and premises." . . . "And it further appearing to the court that the said lease of June 1st, 1870, has expired during the proceedings of this litigation, and that the defendants Badge and Eaton decline and refuse to demand or accept a renewal lease as provided for in said Ex. (A), and it further appearing pending this litigation, the said defendants Badge and Eaton have combined and confederated with defendant J. C. Haselton to injure and defraud complainants, and to carry into effect such object delivered over into custody and possession of J. C. Haselton the said leasehold premises, who now, in violation of the rights of complainant, is holding and claiming possession of the same illegally and wrongfully: The chancellor, therefore, upon this branch of the case, and in view of the whole case, declares that the said complainants recover from the defendants the possession of all said leasehold premises, including said Vulcan mines and the

property thereon mentioned in said 'Ex. A,' to be returned to complainant H. L. Whiteside at the termination of said lease, to wit, all the buildings, houses, tramways, tracks, entries, and approaches to said mines and upon said lands, the same having, with the mines and leasehold premises, been agreed and covenanted by defendants Badge and Eaton to be delivered up in good condition to complainant H. L. Whiteside at the expiration of said lease, and a writ of possession will issue, upon demand of complainants, by the clerk and master of this court, to put complainants in the peaceable and quiet, undisturbed possession of the same, and as to all said property the injunction in this cause is made absolute."

Here was an issue raised between Mrs. Whiteside and Haselton as to the title to this property—the same issue and the same title now in question. It was necessary in that case that it should be decided, for if the plaintiff had no title to the land she had no right to recover, and the decree in her favor is that she had such title; that it was paramount or superior to that of defendants, including Haselton; and as by fraudulent confederacy of the lessees with Haselton the latter had possession, a decree for its restoration to plaintiffs was made.

That such a decree is, if the court had jurisdiction to render it, which cannot be questioned, conclusive upon the parties before the court is not doubted. Until reversed, set aside, or annulled by some appropriate judicial proceeding, it concludes Haselton and his privies.

To this it is objected that the suit was between Badge and Eaton and Mrs. Whiteside, as landlord and tenant, and could not bind Haselton.

The answer is, that Haselton had induced Badge and Eaton to acknowledge his title and deny plaintiff's, and when sued and brought into court he accepted the issue, denied plaintiff's title and asserted his own, and his right to the allegiance of the tenants. On that issue of title the decree was clear and full against him, and he must abide by it.

It is argued that it does not bind The Bartow Iron Company, who were innocent purchasers from Haselton.

Syllabus

But they bought *pendente lite*, and by the well-known rule on that subject, are bound by this decree. The suit was commenced December 5th, 1874, Haselton's answer filed April 14th, 1875, and the deed, though without date, from Haselton to the company is acknowledged September 8th, 1875.

It is apparent also that during all the time Haselton was president of The Bartow Iron Company. The fact that the corporation was organized under the laws of another State does not, under these circumstances, relieve it from the rule which governs purchasers of property pending litigation about the title.

We are of opinion that, as this case is presented to us, the decree of the Chancery Court of Hamilton County, Tennessee, is conclusive of the rights of all the parties to this suit.

The decree of the Circuit Court is reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* TURRILL, Administratrix.

MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY *v.* Same.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued January 11th, 14th, 1884.—Decided January 28th, 1884.

Abatement—Interest—Judgment—Patent.

1. In 1876 a decree was made affirming the principles of a decree below in a suit in equity for relief against infringement of a patent, but sending the case back to ascertain and correct the amount of the damages, on principles laid down by the court. The master reported in 1879. *Held*, That under the circumstances it was equitable to allow interest on the amount from the date of the report.
2. A suit in equity seeking relief against an infringement of a patent does not abate by the death of the plaintiff, but may be prosecuted to final judgment by his legal representative.

Mr. George Payson for appellant.

Mr. Lester L. Bond and *Mr. Chauncy Smith* for appellee.

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

The effect of the judgments in these cases, when here on the former appeals, as reported under the name of the *Cawood Patent*, 94 U. S. 695, was to affirm the decrees then appealed from, so far as they charged these appellants respectively with the profits made from the use of the infringing machines known as the "Illinois Central," the "Etheridge," and the "Whitcomb," and to reverse as to the profits made by the use of the "Bayonet Vise," the "Michigan Southern," and the "Bebee & Smith," which were adjudged to be non-infringing machines. The total amount of profits arising from the use of all the machines, infringing and non-infringing, was settled, and the judgment of the court was that the profits had properly been estimated by comparing the cost of mending on the machines with the cost of mending on a common anvil. This was found to be about thirty-six cents per foot mended; in favor of the machines. Nothing was left open for further inquiry but the amounts of the former recoveries for the use of the non-infringing machines. It was quite right, therefore, for the Circuit Court, when the cases went back, to direct the master to ascertain from the old evidence, if possible, and, if not, from new, how much should be deducted from the old decrees on account of the erroneous recoveries. The true way of determining this clearly was to find out what part of the profits for which the original decrees were rendered had been made by the use of the non-infringing machines. This the master attempted to do, and in the case of the Illinois Central Company there is no doubt in our minds that the conclusion he reached was entirely correct. In fact, we do not understand that this is disputed. It is argued that a sufficient allowance was not made in the accounting for cut rails; but that question was settled by the original decree, and could not be re-examined on this reference. The inquiry now is limited to the amount of mending done by the use of the non-infringing machines and its comparative cost.

In the case of the Michigan Southern and Northern Indiana Company, the evidence is not as satisfactory as in that of the Illinois Central. The shop books in which the accounts for repairing rails were kept, if kept at all, were not produced, and had probably been destroyed as of no value before the accounting took place. In their absence it is difficult to determine with accuracy what the facts were, but upon full consideration we are satisfied the Circuit Court did not in its decree under-estimate the amount of deduction to be made in favor of this company.

In making up the decree interest was added from the date of the master's report on the balances found due after the ascertained deductions had been made, and this is assigned for error. As a general rule a patentee is not entitled to interest on profits made by an infringer. The reason is that profits are regarded in the light of unliquidated damages. *Parks* v. *Booth*, 102 U. S. 96, but in many of the cases it is said that circumstances may arise in which it would be proper to add interest. *Mowry* v. *Whitney*, 14 Wall. 620; *Littlefield* v. *Perry*, 21 Wall. 205. Here, as has been seen, in effect, the original decrees rendered in July, 1874, were affirmed in 1876, to the extent of the present recoveries. The cases were only sent back to ascertain how much should be deducted from those decrees for errors in the accounts as then stated. If the decrees had been entered originally for the present amounts, the patentee would have been entitled to interest from 1874. That was settled in *Railroad Company* v. *Turrill*, 101 U. S. 836, which was one of the cases affirmed in whole at the former hearing in this court. Under these circumstances, it seems to us not at all inequitable to allow interest on the corrected amounts from the date of the master's report in 1879. The cases are entirely different in this particular from what they would have been if the original decrees had been reversed for error in the principles of the accounting. Those decrees may very properly be considered as affirmed in part and reversed in part, the new reference being had only to find out the exact extent of the reversals.

Since the present appeals were taken the patentee has died, and the appellants now suggest that the causes of action do not survive, and the suits cannot be further prosecuted in the name

of the legal representatives of the decedent. As to this, it is sufficient to say that what was called by Chief Justice Marshall, in *Gordon* v. *Ogden*, 3 Pet. 33, "the silent practice of the court" has always been the other way. It is every-day practice to revive such suits, and the books are full of cases in which this has been silently done, no one apparently entertaining a doubt of its propriety.

The decree in each of the cases is affirmed.

Mr. Justice Blatchford did not sit in these cases and took no part in their decision.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *v.* KNOX.

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

Submitted January 14th, 1884.—Decided January 28th, 1884.

When the amount in dispute in this court is less than $5,000 the court cannot take jurisdiction.

Motion to dismiss.

Mr. V. Warner for the motion and for defendant in error.

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

The judgment in this case was for $5,237.15, but the record shows in many ways that of this amount $727.42 was admitted to be due. A formal tender of that sum was made on the 26th of February, 1883, and the money deposited in court for Knox, the plaintiff, where it remained until the 14th of March, nine days after the judgment was rendered, when it was withdrawn by the railroad company, without prejudice, on the order of the court and with the consent and agreement of Knox. The bill of exceptions also shows an admitted liability of the company for the amount of the tender. The case is, therefore, in all material respects, like that of *Tintsman* v. *National Bank*, 100 U. S. 6, where the writ was dismissed, although the judg-

ment was for $8,233.59, because, by an agreeed statement of facts in the record, it appeared that the defendant admitted he owed $5,099.59 of the amount recovered. To the same effect is *Jenness* v. *Citizens' National Bank of Rome*, *ante*, 52. The amount in dispute here is no more than was in dispute below, and that was less than $5,000.

The motion to dismiss is granted.

JEFFRIES, Administrator, *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

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

Argued and submitted January 16th, 1884.—Decided February 4th, 1884.

Error—Contract—Copartnership.

K. died in Missouri, in 1871, having a policy of insurance on his life. J. was appointed there his administrator. L. and T., copartners as attorneys at law, brought a suit on the policy, in which, after a long litigation, there was a judgment for the plaintiff for $13,495, in 1877, in a Circuit Court of the United States. J. had died in 1873, and C. had been appointed administrator in his place, and substituted as plaintiff. The case was brought into this court, by the defendant, by a writ of error. Before it was heard here L. compromised the judgment with the defendant, in 1879, receiving in full $9,401.42, and entered satisfaction of the judgment on the record. C. then moved the Circuit Court to vacate the satisfaction, on the grounds that L. had no authority to enter it, and had been notified by C., after the compromise had been made and before the satisfaction had been entered, that he would not ratify the compromise, and that the compromise was unlawful because not authorized by the Probate Court. The Circuit Court heard the motion on affidavits, and found as a fact, that J. while administrator, entered into a contract with L. and T., whereby they agreed to prosecute the claim for a portion of the proceeds, with full power to compromise it as they should please, and that the claim was a doubtful one, and held that the compromise was rightly made, and that the plaintiff was bound by the contract of J. and denied the motion. On a writ of error by the plaintiff: *Held*, 1. This court cannot review such finding of fact, there being evidence on both sides, and the error, if any, not being an error of law; 2. The contract made was not champertous or unlawful, and J. had authority to make it; 3. The contract having given to L. and T. a power

coupled with an interest, the death of J. did not impair the authority to compromise, and C. was bound by it; 4. L. having continued to be a co-partner with T. so far as this case was concerned, had authority to make the compromise without the co-operation or consent of T.

Mr. T. W. B. Crews (*Mr. John W. Booth* was with him), argued for appellant.

Mr. S. T. Glover and *Mr. John R. Shepley* for appellee, submitted on their brief.

Mr. Justice Blatchford delivered the opinion of the court.

On the 19th of August, 1871, one Allan A. Kennedy died in Franklin County, Missouri, having two policies of insurance on his life, one in the Economical Life Insurance Company, of Providence, R. I., for $5,000, and the other in the Mutual Life Insurance Company, of New York, the defendant in error, for $10,000. Charles W. Jeffries was appointed administrator of Kennedy, by the Probate Court of Franklin County. At that time Joseph S. Laurie and Thomas W. B. Crews were attorneys at law, and copartners as such, in St. Louis, Missouri. The policies were put into their hands for suit, and they brought a suit on each in the name of Jeffries, as plaintiff, in a State court of Missouri. The suits were both of them removed into the Circuit Court of the United States for the Eastern District of Missouri. In each suit an answer was put in setting up a breach of warranty by the assured, in that, in the application for the insurance, he stated that he was a single man when he was a married man. In the suit against the Economical Company there was a demurrer to the answer, on the ground that the answer failed to allege that the misstatement was material to the risk. The demurrer was overruled by the Circuit Court and a judgment was entered for the defendant. On a writ of error, this court affirmed the judgment, at October term, 1874, 22 Wall. 47. In the suit against the defendant in error, which is the suit now before us, there was a reply to the answer, alleging that, under the policy, the misstatement was not a breach of warranty, and that the statement was the representation of the agent of the company, and not that of the as-

sured. In January, 1873, Charles W. Jeffries died, and the plaintiff in error, Cuthbert S. Jeffries, was appointed in his place administrator of Kennedy, and was substituted as plaintiff in this suit in March, 1873. In November, 1873, while the suit against the Economical Company was pending in this court, this suit was tried in the Circuit Court before the court without a jury. That court rendered a judgment for the plaintiff. The defendant brought the case to this court by a writ of error, and at October term, 1875, the judgment was reversed on the authority of the case in 22 Wall., and a new trial was awarded. In April, 1877, the case was again tried, and before a jury, which found a verdict for the plaintiff, but the Circuit Court set it aside. The case was tried again before a jury, in October, 1877, and a verdict was rendered for the plaintiff, on which a judgment in his favor was entered, October 9th, 1877, for $13,495. On the 27th of October, 1877, the defendant sued out a writ of error returnable to this court at October term, 1878. The case was docketed here, and the appearance of Joseph S. Laurie was entered for the defendant in error, the present plaintiff in error, and that of O. H. Palmer for the plaintiff in error, the present defendant in error. In February, 1879, Mr. Laurie compromised the judgment with the Mutual Company. Interest at 6 per cent. was computed on the judgment from its entry to November 22d, 1878, and added, and an abatement of $5,000 was then made, and the remainder, $9,401.42, was paid by the company to Mr. Laurie. He surrendered the policy to the company, a stipulation signed by Mr. Laurie and by Mr. Palmer, agreeing that the suit might be dismissed from the docket of this court without costs to either party as against the other, was presented to this court and filed, and, on the 11th of March, 1879, an order was made by this court dismissing the writ of error, each party to pay his own costs. On the 15th of December, 1879, Mr. Laurie, as attorney for the plaintiff, entered satisfaction of the judgment on the margin of the record of the judgment, in the law record book in the office of the clerk of the Circuit Court, in the presence of the deputy clerk, who signed the entry as a witness, the entry being as follows: "I hereby enter satisfac-

tion of this judgment in full, this 15th day of December, 1879. C. S. Jeffries, adm'r, &c., by Joseph S. Laurie, his att'y." The plaintiff immediately filed a motion in the Circuit Court to vacate the entry of satisfaction, alleging, as grounds therefor, that the entry was made by Laurie without authority from the plaintiff, and in fraud of his rights, and without consulting him, and after Laurie had been notified that the plaintiff would not ratify the said compromise; that the plaintiff had learned only a few days previously of the dismissal of the writ of error in March, 1879, and of the compromise made by Laurie, and had at once notified Laurie and the defendant that the compromise was made without authority from him and he would not ratify it; and that he could not authorize a compromise without the order of the Probate Court of Franklin County, which order had not been made. The motion was supported and opposed by affidavits, the defendant appearing by counsel. The court, as appears from its opinion, which is set forth in the record, found, as a fact, from the evidence before it, which evidence is before us, that Charles W. Jeffries, while administrator, entered into a contract with Mr. Laurie and Mr. Crews, whereby they agreed to prosecute the claim for a portion of the proceeds, with full power to compromise it as they should please, and that the claim was a doubtful one. On the ground of such express authority and of the doubtfulness of the claim, the court held that the compromise was rightly made, notwithstanding the judgment. It also held that the plaintiff was bound by the contract made by his predecessor. An order was made overruling the motion, and afterwards a motion for a rehearing, founded on further affidavits, was denied. A bill of exceptions setting forth all the papers used on both motions, and containing proper exceptions, was signed. Thereupon the plaintiff has brought the case to this court, on a writ of error.

It is contended for the plaintiff in error that the evidence was insufficient to warrant the finding that there was any contract between the first administrator and Mr. Laurie and Mr. Crews, authorizing a compromise; that the first administrator had no authority to make such a contract, or to make a compromise, without the sanction of the Probate Court; that the

plaintiff was not bound by the contract made by the first administrator; and that Laurie had no authority to compromise without the co-operation of Crews.

As to the finding of fact that there was a contract by the first administrator giving to the attorneys an interest in the proceeds of the claim, with authority to compromise it, this court is prohibited, by § 1011 of the Revised Statutes, from reversing a case on a writ of error for any error in fact. In this case there was a dispute as to the fact, and evidence on both sides, and it was a fair exercise of the judgment of the court, on the evidence before it, to make the finding of fact it did. Under such circumstances, an erroneous finding of the fact cannot be held to be an error of law. *Hyde* v. *Booraem*, 16 Pet. 169, 176; *Parks* v. *Turner*, 12 How. 39, 43.

There is nothing to show that the Circuit Court was not correct in its conclusion that the right of recovery in the suit was very doubtful, notwithstanding the judgment. This being so, as the writ of error was pending, the compromise would seem to have been a proper one for the interests of the estate. It was said by this court, in *Holker* v. *Parker*, 7 Cranch, 436, 452, speaking by Chief Justice Marshall:

"Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised in the case."

We do not perceive that there was any want of authority in the first administrator to make the contract he did. The contract was not champertous under the laws of Missouri. *Duke* v. *Harper*, 66 Mo. 51. The attorneys did not agree to pay any part of the costs or expenses of the litigation. Nor do we find in the statutes of Missouri which are cited, nor in any of its judicial decisions, anything which forbids the making of such a contract as the Circuit Court found to have been made in this case. The administrator had the usual power of a trustee over the estate, under his responsibility for a breach of his trust.

Perry on Trusts, § 482; *Overfield* v. *Bullitt*, 1 Mo. 537. The authority given to him by statute, Wag. Stat., vol. 1, p. 87, sec. 26, to commence and prosecute actions fairly includes the power to make such reasonable contracts in regard to compensation and the compromising of actions on doubtful claims as the circumstances of particular cases may justify. The fact of the enactment in Missouri of a statute, which went into effect November 1st, 1879, Rev. Stat. of Missouri, of 1879, vol. 1, p. 37, sec. 242, giving power to an administrator to compound with a debtor, with the approbation of the judge of probate, does not imply that the power did not exist before without such approbation. This transaction occurred before such enactment. An administrator has general power to dispose of the personal effects of his intestate, 2 Williams on Exrs., 6th Am. ed., p. 998; and to compound a debt, if it is for the benefit of the trust estate. 3 Id., p. 1900, and note g^2. And, even when statutes exist providing for compromises with debtors with the approval of a Probate Court, it is held that the right to compromise which before existed is not taken away, but may be exercised subject to the burden of showing that the compromise was beneficial to the estate. *Wyman's Appeal*, 13 N. H. 18; *Chouteau* v. *Suydam*, 21 N. Y. 179; *Chadbourne* v. *Chadbourne*, 9 Allen, 173.

The contract made by the first administrator having given to the attorneys a power coupled with an interest, the authority to compromise was not impaired by the death of the first administrator, and his successor was bound by the contract. Story on Agency, §§ 476, 477.

It is apparent, from the record, that Mr. Laurie continued to be a copartner with Mr. Crews so far as this case was concerned. That being so, he had authority to make the compromise in question without the co-operation or consent of Mr. Crews.

No error of law is found in the proceedings in the Circuit Court, and its orders, made January 26th, 1880, and March 10th, 1880, are

Affirmed.

VOGEL, Executor, *v.* GRUAZ.

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

Argued January 17th, 18th, 1884.—Decided February 4th, 1884.

Privileged Communication—Slander.

A communication made to a State's attorney, in Illinois, his duty being to "commence and prosecute" all criminal prosecutions, by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot, in a suit against such person to recover damages for speaking words charging larceny, be testified to by the State's attorney, even though there be evidence of the speaking of the same words to other persons than such attorney.

Mr. James K. Edsall (*Mr. John B. Hawley* was with him) for plaintiff in error.

Mr. H. S. Greene (*Mr. F. W. Barnett* was with him) for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action on the case, brought by Timothy Gruaz against Rudolph Bircher, to recover damages for the speaking and publishing of false, malicious, scandalous and defamatory words, charging the plaintiff with being a thief, and with having stolen the money of the defendant, meaning the crime of larceny. The suit was commenced in a State court of Illinois, and was removed by the defendant into the Circuit Court of the United States for the Southern District of Illinois. At the trial before a jury a verdict was rendered for the plaintiff, June 6th, 1879, for $6,000 damages. On the next day the defendant filed a motion for a new trial. On the 14th of June the defendant died, on the 12th of July an order abating the case was moved for, on behalf of the defendant, and on the 16th of August the court overruled the motion for a new trial and the motion for an order of abatement, and entered a judgment for the plaintiff, against Bircher, for $6,000 and costs, as of June

7th, 1879. The order for judgment recited that the hearing by the court of the motion for a new trial was, when it was filed, postponed to a then future and convenient day of the same term, and that the defendant died pending the hearing of the motion. Leave was given to the executor of the defendant to prepare a bill of exceptions and to take a writ of error. The bill of exceptions being signed, it was filed by the executor, and the writ of error was issued. Various errors are assigned, and among them that the Circuit Court did not grant the motion to abate the suit, and that it rendered a judgment against Bircher after his death. But it is unnecessary to pass on those questions, because we are of opinion that the judgment must be reversed for another error committed at the trial.

Three witnesses for the plaintiff gave evidence tending to prove the speaking to them by the defendant of more or less of the words set forth in the declaration; and afterwards C. L. Cook was sworn as a witness for the plaintiff, and testified that he was State's attorney for Madison County, Illinois; that he had a slight acquaintance with Bircher; and that he knew Gruaz. The following proceedings then occurred:

"Q. I will ask you if you had any conversation with Doctor Bircher with regard to Gruaz, and, if so, when was it? Counsel for defence asked witness if at that time he was occupying the same position he now holds. A. Yes, sir. Q. It was communicated to you while you held that position and were acting in that capacity, whatever was communicated to you by Bircher? A. Yes, sir. (Defendant's counsel object to the witness testifying to matters disclosed to him by the defendant under the circumstances stated, on the ground that such communications are to be treated as privileged.) The Court. I will ask the witness if he regarded it professionally as a privileged communication? A. I had never met defendant before, he was introduced to me by a citizen of our place, and he informed me that he wanted to talk with me with regard to a matter he wanted to bring before the grand jury. (Objected to.) The Court. I will allow the witness to state what the doctor said on that occasion. Of course, if he made the communication to the witness in good faith, there would be no malice about it, and I shall instruct the jury to dis-

regard it. The objection is overruled. To which ruling of the court the defendant at the time excepted. A. As I stated, I had at that time no acquaintance with defendant whatever. He inquired for the State's attorney, and was introduced to me, and he spoke of his affairs. He said he wanted to bring a matter before the grand jury in regard to Mr. Gruaz. I talked with him in regard to the nature of the matter, and he talked pretty freely in regard to it, and I directed him to the grand jury room. He said a good many things. He was evidently in earnest at the time, expressed himself very freely in regard to him. I would not like to swear to the exact words used, or that anybody used at the time. I can give the substance of what he said, I suppose. He wanted to prosecute Gruaz for stealing, was the amount of it. I recollect this : he charged him with having stolen his money, and I asked him how, and he told me how it had been done. Gruaz was his agent and handled his funds, rented his farms, and had failed to account for a large amount of money, he told me, and he charged him in this conversation with having stolen his money, and he said he wanted to know if there was any law in this State to prosecute a man for that. I have no objection to state any words. I remember his making the charge that he had stolen his money, but I can't swear that the word 'thief' was used at that time ; that it was in substance, undoubtedly. My impression is that this was the March term, 1878, of the Circuit Court of Madison County, either that or October term, 1877 ; my recollection and decided impression is that it was the spring term, 1878. Dr. Bircher went into the grand jury room and gave his statement to the grand jury. He was anxious, of course, to have the indictment found, and he evidently believed or so expressed himself. Counsel for defendant objected to witness stating his opinion about what defendant evidently believed. The Court. He said he went before the grand jury, and said he seemed to be in earnest in his movements, but he didn't say what took place before the grand jury. Don't know, I suppose. Witness. No, I don't know. Cross-examination. Major Prickett introduced Bircher to me ; never saw him before in my life. I was certain he came to see me as prosecuting attorney, in good faith. That was his business, as he stated it to me. After he made his statement to me I advised him to go before the grand jury ; directed him to their room. He went there by my advice. Hold on—I don't

say that; I advised him that he had a good case. He came to me and I showed him where the grand jury room was. He stated his case to me as State's attorney. I then directed him where to go, and said I should prosecute it as vigorously as possible, if the indictment was found. In regard to the advice I gave him, I rather encouraged him to drop the thing; I told him he better sue Mr. Gruaz first, and see if he couldn't get judgment against him, and so put it in a better shape to prosecute him. He stated his case, and I thought from his statement that he would have few, if any, witnesses besides himself, and that it would be doubtful, however honestly he might believe that he had cause, it would be doubtful whether the jury would bring a bill; so I advised him to bring a civil suit; but, said I, you are here, and you mustn't think hardly of me if the grand jury don't find a bill; and I directed him to the grand jury room."

The bill of exceptions also contains the following:

"In reference to the testimony of State's attorney C. L. Cook, the court instructed the jury as follows: 'I admitted that evidence with an explanation, and with the explanation made in the admission of it I think I am content, and I think the jury may take it into consideration; but, if they think the defendant was actuated by honest motives, in making the declaration he did, they will disregard it.' To the giving of which last instruction the defendant excepted, for the reason that the instruction ignores the element of want of probable cause, and for the reason, also, that the jury should have been instructed to disregard Cook's testimony entirely."

We are of opinion that what was said by Bircher to Mr. Cook, was an absolutely privileged communication. It was said to Mr. Cook while he was State's attorney, or prosecutor of crimes, for the county, and while he was acting in that capacity. Bircher inquired for the State's attorney, and was introduced to him, and stated to him that he wanted to talk with him about a matter he wanted to bring before the grand jury in regard to Gruaz. He laid the matter before Mr. Cook, and charged Gruaz with having stolen his money, and was asked how, and stated

how, and inquired of Mr. Cook if there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had a good case, and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly, the communication would have been privileged, and not to be disclosed against the objection of Bircher. Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him, on a statement of his case, to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for information or advice, did not destroy the relation which the law established between them. It made that relation more sacred, on the ground of public policy. The avenue to the grand jury should always be free and unobstructed. Bircher might have gone directly before it, without consulting with Mr. Cook, but, if he chose to consult him, instead of a private counsel, there was great propriety in his doing so. Any person who desires to pursue the same course should not be deterred by the fear of having what he may say in the confidence of a consultation with a professional adviser, supposed to be the best qualified for the purpose, disclosed afterwards in a civil suit, against his objection. *Oliver* v. *Pate*, 43 Ind. 132. By the statute of Illinois in force at the time of this occurrence, it was made the duty of each State's attorney to "commence and prosecute" all criminal actions, suits, indictments, and prosecutions, in any court of record in his county, in which the people of the State or county might be concerned. Rev. Stat. of 1874, chap. 14, § 5, subd. 1. Under this provision it was the province and the privilege of any person who knew of facts tending to show the commission of a crime, to lay those facts before the public officer whose duty it was to commence a prosecution for the crime. Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the

ground being, that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them. Mr. Cook learned from Bircher the things to which he testified because he occupied the position of public prosecuting officer, and because he was acting at the time as the legal adviser of Bircher in respect to the matter in question which Bircher was laying before him. The free and unembarrassed administration of justice in respect to the criminal law, in which the public is concerned, is involved in a case like the present, in addition to the considerations which ordinarily apply in communications from client to counsel in matters of purely private concern. Bircher made his communication to Mr. Cook for the purpose of obtaining professional advice as to his right, and that of the public through him, to have a criminal prosecution commenced by Mr. Cook, by the intervention of the grand jury, against Gruaz.

But there is another view of the subject. The matter concerned the administration of penal justice, and the principle of public safety justifies and demands the rule of exclusion. In *Worthington* v. *Scribner*, 109 Mass. 487, an action for maliciously and falsely representing to the Treasury Department of the United States that the plaintiff was intending to defraud the revenue, it was held that the defendant could not be compelled to answer whether he did not give to the department information of supposed or alleged frauds on the revenue contemplated by the plaintiff. The principle laid down in that case was, that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. The authorities are collected and reviewed in that case. The case of *Dawkins* v. *Rokeby*, L. R. 8 Q. B. 255, there cited, was affirmed by the House of Lords,

L. R. 7 H. L. 744. See also, 1 Greenleaf on Evidence, § 250; *Black* v. *Holmes*, 1 Fox & Smith, 28.

It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook, and that the speaking of them to Mr. Cook was not the sole ground of action or of recovery. The evidence was incompetent, and it must be inferred that it affected the minds of the jury both on the main issue and on the question of damages.

It results from these views that the judgment below cannot be upheld, and that it must be reversed, and

The case be remanded to the Circuit Court, with direction to set aside the verdict and vacate the judgment and take such further proceedings as may be according to law and not inconsistent with this opinion.

CORKER *v.* JONES, Executor, & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Argued and Submitted January 18th, 21st, 1884.—Decided February 4th, 1884.

Georgia—Guardian and Ward.

A being executor of the estate of C and testamentary guardian of D, minor son of deceased, purchased on behalf of D, but with his own money, a parcel of real estate of deceased which had been devised to another heir. While D was still a minor a bill was filed in the State court of Georgia, where the property was situated and the parties resided, in the name of D, suing by his mother as next friend, praying to have the purchase set aside as to D, and the estate decreed to be the individual property of A, and a final decree to that effect was made and A went into possession. Subsequently D, by his next friend, filed a bill setting up title to the property, and praying to have the cloud upon his title removed, and for an accounting: *Held*, That the State court of Georgia had jurisdiction to make the decree which it made; that it was not voidable as to D; and that, notwithstanding the relations between the parties, the judgment was conclusive in the absence of an impeachment for unfairness and fraud.

Mr. Henry B. Tompkins argued for appellants.

Opinion of the Court.

Mr. Randall Hagner submitted on his brief for appellees.

Mr. Justice Matthews delivered the opinion of the court.

Malcolm D. Jones, of whom Francis A. Jones, the appellee, is executor, in his lifetime was executor of the last will of Drury Corker, deceased, and testamentary guardian of the person and estate of the testator's son, Ernest D. Corker, the appellant, one of the devisees, then a minor, who arrived at age since filing the present bill. While acting as such, on July 24th, 1863, Malcolm D. Jones, as guardian, purchased a tract of land known as the Gilstrop and Watson place, part of the estate of Drury Corker, from the trustees of Mrs. S. C. Hart, a daughter of the testator, to whom he had devised it, with power to sell. The consideration paid was $15,600 in Confederate money, which was advanced by Malcolm D. Jones from his own funds. The conveyance was to him as guardian of the appellant, the latter being charged in account by the guardian with the amount of the advance. In 1867, while the appellant was still an infant about eleven years of age, and living with his mother, a bill in equity was filed in the Superior Court of Burke County, where they resided, a court of general jurisdiction at law and in equity, in the name of the appellant, suing by his mother and next friend, to which Malcolm D. Jones was made defendant, praying for a rescission of the transaction as between the guardian and ward, so that the former should take the land and the latter be relieved from the payment of the consideration. The pleadings in that case are not exhibited in the present record, as it is stated, because they have been lost or destroyed; but the matter was submitted to a jury, who found that "it is to the interest of Ernest D. Corker, the minor, under his circumstances, that said purchase be rescinded and deed be cancelled and set aside as to said Ernest D., leaving it to stand as against the makers and in favor of said Malcolm D. individually; and that, if necessary, said Ernest D. make and deliver a proper conveyance of said land to said Malcolm D." And upon this verdict, on January 1st, 1868, it was by the court ordered and decreed "that said deed be, and is hereby, set aside and cancelled as to said Ernest

D. only, and that it stand good against the makers thereof, and for the use and benefit of said Malcolm D. individually, and said Ernest D. make any, all necessary, and proper conveyances of the land referred to, to said Malcolm D.; that said Malcolm D. also pay one-half of the costs of this proceeding, and said Ernest D. the other half thereof."

Thereafter Malcolm D. Jones went into possession of the land, claiming title thereto in his own right, and since his death his executor, Francis A. Jones, one of the appellees, has sold the same in parcels under judicial proceedings in the Superior Court of Burke County, as the property of Malcolm D. Jones, deceased, to the several other appellees. These purchasers claim to be protected as such against any equities of the appellant, but the latter insists that they had not acquired the legal title nor fully paid the purchase money at the time he filed his bill, and consequently are not innocent purchasers.

Without reference to that question, however, the appellant claims that he has the legal estate in the land in controversy by virtue of the deed to his guardian from the trustees of his sister, and that it was not divested by the decree of the Superior Court of Burke County, of January 1st, 1868, for the reason that that court had no jurisdiction in the case, and the proceedings and decree therein were *coram non judice* and void.

This is urged on the ground that the Court of Ordinary in Georgia has jurisdiction, exclusive of the Superior Court, to deal with the property of minors, and various provisions of the Code of that State are cited in support of that proposition. Among others, sec. 1837 provides that

"The guardian cannot borrow money and bind his ward therefor, nor can he, by any contract other than those specifically allowed by law, bind his ward's property or create any lien thereon."

It would be difficult under this section, or any others to be found relating to the subject, to discover any authority for the purchase by Jones, the guardian, of the real estate in controversy for his ward, on credit, advancing the money as a loan for that purpose; and the question whether it was a transaction

that should stand or be cancelled, as between guardian and ward, was not one arising in the ordinary course of administration for settlement as a mere matter of account in the Court of Ordinary, but, as we think, was one more appropriately dealt with in the more formal procedure of a court of general jurisdiction with equity powers. The question is not one relating to the sale or disposition of any part of the ward's estate which had come under the control of the guardian, but was whether, under the circumstances, the purchase made by the guardian should be treated as made for the benefit of his ward, or whether its burdens and risk should be borne by him individually. It was peculiarly a case for cognizance in equity, and the Superior Court of Burke County, we think, had jurisdiction to make the decree directing the title to remain in Malcolm D. Jones for his own use.

It is further urged, however, that the decree is voidable, because it was taken against an infant, without the protection of a *guardian ad litem*. If the infant had been defendant, the objection could only be taken on appeal, or by bill of review, and not collaterally; but the infant was plaintiff, and sued by his next friend, which was proper, and there is no more ground for saying that the decree was against the infant than in his favor. He was relieved from the burden of the purchase, which was the object of the suit.

But it is also claimed that the relation of the parties was such that the guardian could not acquire an interest adverse to his ward, and that the attempt to do so will convert him into a trustee by construction. But the transaction was judicial, the parties standing at arm's length as avowed litigants; the plaintiff being represented by his mother, appearing on the record with him as his next friend, and the court deciding between them. That judgment must be conclusive, unless it can be impeached for unfairness and fraud.

This charge is in fact made, it being alleged that the suit was collusive. The only proof of this is, that the mother of the infant agreed with the guardian that it was best to submit the question of the purchase to the decision of the court. Their co-operation in this is not sufficient, in our opinion, to raise the

suspicion of fraud. Outside of this circumstance there is no proof.

It is finally alleged that, upon a settlement of accounts between the guardian and ward, a larger amount should have been found due to the latter than was awarded by the court below. But the decree on that point is in conformity with the evidence.

We find no error in the record, and the decree is affirmed.

EAST ST. LOUIS & THE TREASURER OF EAST ST. LOUIS *v.* UNITED STATES *ex rel.* ZEBLEY.

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

Submitted January 23d, 1884.—Decided February 4th, 1884.

Illinois Statute—Municipal Corporation—Taxation.

The charter of East St. Louis limited the right of taxation for all purposes to one per centum per annum on the assessed value of all taxable property in the city, and required the city council to levy a tax of three mills on the dollar on each assessment for general purposes, and apply it to the interest and sinking fund on its bonded debt: *Held,* That the use of the remaining seven-tenths was within the discretion of the municipal authorities, and was not subject to judicial order in advance of an ascertained surplus.

Mr. J. M. Freels and *Mr. B. H. Canby* for plaintiffs in error.

Mr. T. C. Mather for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The relator having recovered judgments in the Circuit Court of the United States for the Southern District of Illinois upon bonds issued by the city of East St. Louis, a municipal corporation of that State, was awarded in this proceeding a peremptory mandamus. The directions of the judgment are as follows:

"That said defendant, the city of East St. Louis, do, through its proper corporate authorities, levy and collect full one per cent.

per annum taxes upon the assessed and equalized valuation of all the real and personal taxable property of said city for the year A. D. 1883, and subsequent years, until the full payment and discharge of all balance due upon said judgments in said petition mentioned, with lawful interest thereon, and the costs of said suits wherein said judgments were obtained, as also the costs of this suit.

"It is hereby further ordered and adjudged that said city do, through its proper corporate authorities, annually, commencing with the year A. D. 1883, appropriate and set apart three thousand dollars out of three-tenths of said one per cent. levy, and the sum of ten thousand dollars out of the remaining seven-tenths of said one per cent. levy, as a special fund for the payment of said judgments, interests and costs until the same are fully paid and discharged.

"It is further ordered and adjudged that said city annually, through its proper corporate authorities, pay over said sums, so soon as collected, to petitioner's attorney of record, to be applied toward the payment of said judgments, interest, and costs.

"It is further ordered and adjudged that said city do annually, for the year A. D. 1883 and subsequent years, until said judgments, interest, and costs are fully paid, exercise, through its proper corporate authorities, to the full extent of its charter provisions, all its powers and resources of taxation and revenue derivable from all sources whatever; and that it do, through its said corporate authorities, appropriate, use, and expend its said revenues in the most rigid and economical administration of its municipal affairs, to the end that said judgments, interest and costs may be paid as speedily as possible. And it is ordered and adjudged that whatever funds remain at the end of each fiscal year, if any, after such economical administration of its affairs, as above ordered, that it apply the same in further liquidation of said judgments."

The cause having been duly submitted to the court without the intervention of a jury, the court made the following special findings:

"1st. That said city of East St. Louis is organized and existing under a special act of the legislature of Illinois, approved March 26th, 1869, entitled 'An Act to reduce the charter of East St. Louis, and the several acts amendatory thereto, into one act, and

to revise the same,' and that the bonds upon which the judgments of relator were rendered were issued under and in pursuance of said act.

"2d. That said city, by its said charter, is limited in its power to tax for all purposes to an 'annual tax not exceeding one per centum per annum' upon the assessed value of all the taxable property in said city.

"3d. That said charter requires that a registry shall be kept of all bonds issued, and that the city council shall levy and collect a tax not exceeding three mills on the dollar upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, and to provide a sinking fund to liquidate the same.

"4th. That said city has no power of taxation other than said annual tax of one per cent. above mentioned, and no other source of revenue except that derived from licenses, which amount annually to the sum of $35,000, of which sum $16,000 is derived from the licensing of dram-shops, and one-half of this sum is required by said charter to be paid over to the treasurer of school township No. 2 north, range 10 west, in St. Clair County, Illinois, for the use and benefit of the public school fund.

"5th. That the assessed valuation of all the taxable property in said city is $3,500,000.00.

"6th. That the bonded debt of said city is $300,000.

"7th. That petitioner's judgments aggregate the sum of $55,000.00.

"8th. That said city has no money or surplus funds in its treasury with which to pay petitioner's judgments, or any part thereof, and no means of paying them except that derived from taxation and licenses.

"9th. That said city has heretofore expended the sum of, to wit, $75,000 per annum, to defray the current expenses of the city government and the different departments thereof, but the court finds that such sum is not necessary for the present and future years.

"10th. And, finally, the court find from the evidence that the $10,000 ordered to be appropriated from the seven-tenths of one per cent. of the tax levy of 1883 and subsequent years, and applied to the payment of said judgments, is not required to defray the necessary current expenses of said city, and further find that the

three thousand dollars ordered to be appropriated from the three-tenths of one per cent. and applied to the payment of said judgments is petitioner's pro rata share of said three-tenths of said one per cent."

The plaintiff in error has no reason to complain of so much of the command of this judgment as requires it to levy and collect an annual tax to the full amount of one per cent. upon the assessed value of the taxable property subject thereto, and to apply three thousand dollars out of three-tenths thereof to the payment of the interest and principal of the relator's judgments. That levy is authorized by its charter, and that proportion of it is expressly pledged to the payment of the interest on, and redemption of its bonded debt, and the particular sum mentioned and appropriated to the relator's judgments is only the proper proportion to which they are entitled.

The further award of the annual sum of ten thousand dollars to the relator, payable out of the remaining seven-tenths of the one per cent. levy cannot be justified. That fund, by the terms of the charter of the city, under which the bonds were issued, is authorized for the purpose of paying the necessary current expenses of administration, not including payments on account of the bonds of the municipal corporation. And admitting that any surplus of such fund, in any year, remaining after payment of such expenses, ought to be applied to the payment of the interest and principal of the bonds, that could only be required when such surplus should have been ascertained to exist. In the present judgment the court has undertaken to foresee it, and by mandamus to compel the city, by limiting its expenditures for its general purposes, to create the surplus which it appropriates. But the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance,

is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities.

Because the judgment orders the payment to the relator of the sum of ten thousand dollars, annually, out of the seven-tenths of the levy of one per cent., it is reversed with costs in this court;

And the cause is remanded, with direction to enter a judgment in conformity with this opinion.

UNITED STATES *v.* ALEXANDER & Others.

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

Argued January 22d, 1884.—Decided February 4th, 1884.

Internal Revenue.

The Secretary of the Treasury, under authority derived from the act of May 27th, 1872, 17 Stat. 162, abated taxes on spirit in a bonded warehouse destroyed by fire. The commissioner of internal revenue notified the principal and sureties of the distillery warehouse bond of this decision: *Held*, That this was a virtual cancellation of the bond.

This was an action at law brought on a distillery warehouse bond against William S. Alexander and James H. Reynolds, principals, and Edward S. Allen and Mahlon C. Atkinson, their sureties.

The defendants pleaded that the taxes, to recover which the suit was brought, had been abated by the Secretary of the Treasury, pursuant to law, by an order of which the following is a copy:

"TREASURY DEPARTMENT,
"WASHINGTON, D. C., *Aug.* 5, 1875.

"Under authority conferred by act of Congress approved May 27, 1872, I hereby abate the taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were destroyed by fire on the 6th or 7th day of March, 1875, while in the bonded warehouse

of Messrs. Alexander and Reynolds, distillers in the 4th collection district of Tennessee.

"C. F. BURNAM,
"*Acting Secretary.*

"To the Commissioner of Internal Revenue."

And that the same was delivered to the defendants by the commissioner of internal revenue, and the Secretary of the Treasury did thereby release and free the defendants from their liability in the premises.

To this plea the plaintiffs replied that on October 13th, 1875, the Secretary of the Treasury did withdraw the said order of abatement and remission dated August 5th, 1875, as pleaded.

Upon this issue the case was tried. It appears from the bill of exceptions that the defendants, to sustain their defence, introduced proof tending to show the abatement of the taxes for which the warehouse bond sued on was given, as set out in their plea; that notice of the abatement was given to the commissioner of internal revenue, who gave notice thereof to one Bryant, the collector of internal revenue, with directions to take credit therefor on his bonded account as such collector, which he did; and that he gave notice of the remission of the taxes to Alexander & Reynolds, the principals on the bond; and that they had accepted the abatement and release, and had sent to their sureties on the bond copies of the order of abatement.

Thereupon the plaintiffs introduced evidence tending to show that on October 13th, 1875, the Secretary of the Treasury withdrew the abatement of the taxes by the following order:

"TREASURY DEPARTMENT,
"WASHINGTON, D. C., *October* 23, 1875.

"SIR: In the matter of Alexander & Reynolds, for abatement of taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were destroyed by fire on the 6th or 7th of March, 1875, while in the bonded warehouse of said firm, in the 4th collection district of Tennessee, in view of the papers now on file in the case, the order for abatement of said taxes, dated August 5,

1875, is hereby withdrawn until a further consideration of said claim can be had.

"Very respectfully,

"B. H. BRISTOW, *Secretary.*

"Hon. D. D. PRATT,

" *Commissioner of Internal Revenue.*"

There is no proof in the record that this order withdrawing the abatement of the taxes ever came to the knowledge of the obligors upon the bond until it was produced on the trial.

Upon this evidence the court charged the jury as follows:

"If you believe from the evidence that on the 5th day of August, 1875, the Secretary of the Treasury abated said taxes, and notified the commissioner of internal revenue thereof, and he notified the collector, and he notified the defendants, the action of the acting Secretary of the Treasury so taken was final, and any attempted suspension or withdrawal thereof would be invalid, and it would be your duty to find for the defendants."

To this charge the plaintiffs excepted. The jury returned a verdict for defendants, and a writ of error sued out by the plaintiffs brought up the case for review.

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

No appearance for defendants in error.

MR. JUSTICE WOODS delivered the opinion of the court.

The act of May 27th, 1872, 17 Stat. 162, under authority of which the abatement of taxes pleaded by defendants was made, provides as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized, upon the production of satisfactory proof to him of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits on which the tax, at the time of the destruction of said spirits, had not been paid, and while the same remained in the custody of any officer of internal revenue, in any distillery, warehouse, or bonded warehouse of the United States, to abate

the amount of internal revenue taxes accruing thereon, and to cancel any warehouse bond, or enter satisfaction thereon in whole or in part, as the case may be."

We are of opinion that the action of the Secretary of the Treasury shown by the bill of exceptions was a virtual cancellation of the bond sued on in this case.

It is clear that after the Secretary had abated the taxes, and had given notice thereof to the collector of internal revenue, with directions to take credit therefor in his accounts, which he had done, and official notice of the abatement had been given to the principals upon the warehouse distillers' bond, and they had given notice to their sureties, no suit could be maintained upon the bond. Its obligation was gone, and both the principals and sureties were discharged.

The question is, therefore, whether the obligation of the bond could be restored by an order of the Secretary of the Treasury, not communicated to the makers, revoking the abatement. It may be conceded, and we think that the Secretary of the Treasury might, on new evidence or further consideration, reimpose the taxes. But his reassessment would only subject the spirits and the distiller to a liability for their payment; it could not restore the obligation of the distillers' bond.

If we yield to the contention of the appellants in this case, we must hold that the Secretary of the Treasury may, at his discretion and at any time, subject the obligors, both principals and sureties, upon a bond which had once been discharged, to a new liability, by an order of which they had no notice. It may be fairly presumed that sureties take indemnity from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they were sureties, and when their relations to their principals may have entirely changed, and their indemnity been surrendered, it is within the power of the Secretary of the Treasury, without notice to them, to revive the bond and reimpose its obligation upon them. We do not think that the statute which authorizes the abatement of taxes and the cancellation of the bond gives authority to the

Secretary of the Treasury to retry the question of abatement so as to keep alive the liability of the obligors upon the bond after the taxes have once been abated and they have received notice thereof.

The only ground upon which the liability of the defendants in error can be maintained is that the abatement of the taxes and the cancellation of the bond were conditional and subject to the power of the Secretary to retry the question whether the spirits had been destroyed without the fraud, collusion, or negligence of the owner. We find no warrant in its language for such a construction of the statute. If the power had been given some terms or limit of time would have been imposed on its exercise. If it exists no restraint is imposed upon it. It may be exercised at any time, no matter how remote, without notice to the makers of the bond, and at the discretion or caprice of the Secretary for the time being. We do not think that any such unlimited power is conferred by the statute. The Secretary, having once decided the question of abatement, his authority was exhausted, so far as it concerned the tax secured by the bond.

In the case of *The Floyd Acceptances*, 7 Wall. 666, it was held by this court that, under our system of government, the powers and duties of all its officers are limited and defined either by statutory or constitutional law. Applying this rule to the present case, we are unable to find in the statute any authority for the action of the Secretary of the Treasury in revoking the abatement of taxes once made by him, and must conclude that the authority does not exist. He might re-assess the tax, but the bond given for the tax which had been abated would not be security for the re-assessed tax. As this view was substantially embodied in the charge to the jury of the Circuit Court, which is assigned for error, we are of opinion that the charge was right, and that

The judgment must be affirmed.

Statement of Facts.

TAYLOR & Another *v.* DAVIS' ADMINISTRATRIX.

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

Argued January 21st, 22d, 1884.—Decided February 4th, 1884.

Contract.

Real estate and personal property were held in trust by two trustees. One trustee at the request of the other and of a third person resigned his trust, without requiring previous payment of his demands against the trust estate, and the third person was appointed trustee in his place. The two trustees then executed a written agreement with the outgoing trustee, undertaking to apply to the payment of his said claims "all the moneys which shall come into our hands as trustees as aforesaid after first paying therefrom all taxes and current expenses of said property and trust:" *Held*, That this was a contract to be enforced at law, against the parties individually, and not a trust to be enforced in a court of equity; and that the current expenses of the trust did not include the construction of fire-proof buildings and unusual expenditures for protecting the property.

The defendant in error, administratrix, devisee, and legatee of Charles Davis, deceased, was plaintiff in the court below. The declaration alleged that on October 4th, 1861, the defendants, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, executed and delivered to Charles Davis, then in life but since deceased, a contract in writing, of which the following is a copy:

"Whereas Charles Davis, late one of the trustees of the Cairo City property, has agreed to transfer to the present trustees of said property, S. Staats Taylor and Edwin Parsons, at their request, all of said property remaining in his hands, without requiring previous payment of his demands against said property: Now, in consideration of the premises, and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, hereby promise and agree to and with the said Charles Davis, his executors, administrators, or assigns, that we will apply, from time to time, to the payment of all the just claims and demands of said Charles Davis against said Cairo City property, including the sum of $7,382.60, audited October 1st, 1860, until the same shall be fully paid, all the moneys which

shall come and remain in our hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust actually imposed or incurred. But said claims and demands of said Davis, his executors or administrators, shall not be preferred to like claims of his co-trustee, John H. Wright.

"October 4th, 1861. "S. STAATS TAYLOR,

"EDWIN PARSONS,

"*Trustees of the Cairo City Property.*"

The declaration further alleged that at the date of the execution and delivery of the contract there was due to Davis on just claims and demands against the Cairo City property, which had been audited and allowed, the sum of $7,382.60; that on March 1st, 1867, Davis departed this life, leaving a last will and testament, which was afterwards duly proven, whereby he devised and bequeathed all his estate to the plaintiff; that afterwards, on September 30th, 1867, the defendants, in consideration of the premises, executed and delivered to the plaintiff another contract, whereby they renewed and confirmed the contract of October 4th, 1861, between them and Davis, and agreed to pay the plaintiff, as his administratrix, the amounts due his estate in the same manner and form as in the instrument of October 4th, 1861, is particularly set forth; and that although large sums of money had come into the hands of the defendants as such trustees, over and above the amounts necessary to pay all the taxes and current expenses of the property and trust actually imposed or incurred, they had neglected and refused to pay said sum of money or any part of it.

The defendants pleaded non-assumpsit. The parties waived a trial by jury and submitted the issues of fact as well as of law to the court, which made a special finding of facts upon which it rendered judgment against the defendants in the sum of $12,957.57, that being the principal sum due Davis from the Cairo City property on October 4th, 1861, with interest from that date.

To reverse that judgment a writ of error was sued out.

Mr. Wager Swayne for plaintiff in error.

Mr. J. Hubley Ashton for defendant in error.

Opinion of the Court.

MR. JUSTICE WOODS delivered the opinion of the court.

The findings of the Circuit Court show the following facts: The contracts of October 4th, 1861, and of September 30th, 1867, were executed and delivered by the plaintiffs in error, as averred in the declaration; the said Charles Davis and one Thomas S. Taylor had, previous to the execution of the first-mentioned instrument, been trustees of the Cairo City property under and by virtue of a declaration of trust dated September 29th, 1846. That instrument, after reciting the conveyance to Taylor and Davis of about nine thousand acres of land situate in the State of Illinois at and near the confluence of the Mississippi and Ohio Rivers, declared that the property was held in trust by them to, for, and upon the terms, conditions, uses, interests, and purposes therein pointed out. The fourth section of the instrument defined the powers of the trustees as follows:

"The said Taylor and Davis and their successors shall have the general management and control of all the property aforesaid, and of the proceeds thereof, pay the taxes thereon when in funds, and all the expenses incident to the creation and execution of the trust hereby declared. They may make such contracts, execute such instruments and obligations, employ such agents and laborers, make such erections and improvements on said lands, and such purchases and sales of real and personal estate, leases, donations, and investments as may be necessary and expedient to promote the interests of the shareholders," &c.

The principal object of the co-owners of the land described in the declaration of trust was to build a city thereon. In the exercise of their powers the trustees caused—

"The erection of levees of sufficient size and height to protect the city to be commenced; the old hotel was repaired; river bank protected from abrasion; roads were cut through the timber; part of the land cleared; a new hotel built at an expense to the trust of about twenty thousand dollars, and grounds were laid out for a cemetery; a steamboat was bought and run on the business of this trust; a quarry operated, also a ferry; newspapers were established; the city and additions were platted;

lots were donated as compensation to persons who assisted in protecting the property from adverse legislation ; wharves were constructed and improved ; all these expenses were paid out of the trust fund."

About September 1st, 1860, the plaintiffs in error were, by regular conveyances, made the successors of Taylor and Davis as trustees. By virtue of the powers expressed in the fourth clause of the declaration of trust they executed the agreement of October 4th, 1861, in order to obtain from Davis a transfer of the trust estate.

In order to carry out the purposes of the trust, the plaintiffs in error, on October 1st, 1863, borrowed $75,000, and on October 1st, 1867, $50,000, to secure which they executed mortgages on all the real estate of the trust, which were afterwards foreclosed and the property sold, and the proceeds of the sale were insufficient to pay the amount due on the mortgage by $47,572.27.

During the trusteeship of the plaintiffs in error they faithfully applied all the moneys received by them to the purposes of the trust and in discharging what in their opinion were the current expenses of the trust and in the exercise of a fair and reasonable judgment therein. Between September 1st, 1860, and the year 1874, the plaintiffs in error expended in improvements on the trust property, including the fire-proof office mentioned in the 8th finding, the sum of $298,226.91, and during the same period the additional sum of $343,226.94 in building levees on the Ohio and Mississippi Rivers, and in protecting the Mississippi River bank, and, as appears from the accounts made part of the findings, much the greater part of these sums were expended after October 4th, 1881. On September 30th, 1867, the time of the execution of the obligation to the defendant in error and at the commencement of this suit, they had no money of the trust fund in their hands, but the fund was indebted to them in a sum exceeding $8,000.

This eighth finding established the following facts:

About the winter of 1863 and spring of 1864 the plaintiffs in error, as trustees, erected, at a cost of about $35,000, a fire-

proof office, which they deemed to be absolutely necessary for the safe keeping of the valuable papers and the transaction of the business of the trust. But the court was of the opinion that said expenditure was not the current expenses of the trust.

The court further found that the plaintiffs in error "at divers days and dates in the years 1863, 1864, 1865, 1866, 1873, and 1874 had in their hands moneys belonging to said trust fund sufficient to pay the amount due the plaintiff, after paying therefrom all taxes on said trust property and the ordinary expenses of said trust, as appears from the accounts herein contained; and that the plaintiff on divers occasions prior to the bringing of this suit, and prior to January 1st, 1868, demanded of the defendants payment of the amount due on said contract, which was not paid."

Upon these facts the plaintiffs in error contend that the instruments sued on, construed in connection with the declaration of trust and the administration of the trust estate by them, create between the parties the relation of trustees and *cestui que trust*, and that a court of law could not entertain jurisdiction of the suit against a trustee in his trust capacity, and that the Circuit Court erred in rendering judgment against the plaintiffs in error in their individual capacity.

In our opinion, the relation of trustees and *cestui que trust* did not arise between the plaintiffs in error and Davis upon the contract of October 4th, 1861. It is true the plaintiffs in error are trustees of the Cairo City property, but they are not trustees for Davis or the administratrix of his estate. This is, in substance, the case of trustees promising to repay money which they had borrowed of a stranger for the benefit of the trust estate. Their undertaking was subsequent to the time when they assumed the duties of the trust. The declaration of trust expressed fully the powers and duties of the trustees, and the contract sued on did not and could not modify it. The defendant in error did not sue as a *cestui que trust*, or base her claim on any trust, express or implied, undertaken by the plaintiffs in error for her benefit.

A trustee is not an agent. An agent represents and acts for

his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof.

If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. There are, no doubt, cases where persons occupy the position of quasi trustees, under the appointment of a court, such as receivers charged with the performance of active duties, in which it would involve much hardship to make them personally liable. But in such cases, as the parties have the right to prove their claims against the common fund, and have them allowed by the court, the officer may have the protection of the court by which he is appointed, restraining parties from bringing suits against him, except where leave is given for the purpose of fixing the amount due. *Barton* v. *Barbour*, 104 U. S. 126.

In this case the contract is the personal contract of the plaintiffs in error. Before it was made the trust estate and the plaintiffs in error, in their capacity of trustees, were already bound for the debt due to Davis, and he had the right to keep possession of the trust estate until he was paid. It is clear,

from the contract and the circumstances under which it was made, that Davis consented to yield possession of the trust property on condition that he received some security for his payment other than the mere liability of the trust estate. He therefore took the contract in suit, and yielded the possession of the trust estate without exacting payment of his demands.

The designation of the plaintiffs in error as trustees in the contract and in the pleadings was merely descriptive of their persons. The contract was their personal undertaking. It is true it was their promise to pay the claim of Davis out of the trust funds. But this was simply a limitation upon the contract; it was none the less their personal obligation. They personally undertook to pay a conceded balance due to Davis, whenever there should be a certain surplus of trust funds in their hands sufficient for that purpose, and they are personally liable for the breach of their undertaking.

The case of *Duvall* v. *Craig*, 2 Wheat. 45, supports these views. The suit was an action at law upon the covenants of warranty in a deed. The deed was executed by John Craig and by Robert Johnson and Elijah Craig as his trustees. The trustees described themselves as trustees of John Craig in the granting clause of the deed and in the covenants of warranty, and subscribed their names as such. The Circuit Court sustained a demurrer to the declaration. In this court it was contended for the defendant in error that, Johnson and Elijah Craig having covenanted as trustees, a court of equity was the only forum in which they could be sued, and that no individual judgment could be rendered against them.

But the court, speaking by Mr. Justice Story, said:

"If a trustee chooses to bind himself by a personal covenant, he is liable at law for a breach thereof in the same manner as any other person, although he describes himself as covenanting as trustee, for in such case the covenant binds him personally, and the addition of the words 'as trustee' is but matter of description to show the character in which he acts for his own protection, and in no degree affects the rights or remedies of the other party." The court added: "The reasoning upon this point disposes also of the second, that the covenant being made by Johnson and Elijah

Craig as trustees, no individual judgment can be rendered against them. It is plain . . there could have been no other judgment rendered against them, for at law a judgment against a trustee in such special capacity is utterly unknown."

The same learned judge, in his work on Promissory Notes, declares:

"As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are by our law generally held personally liable on promissory notes, because they have no authority to bind *ex directo* the persons for whom, or for whose benefit, or for whose estate, they act, and hence, to give any validity to the note, they must be deemed personally bound as makers." § 63.

See also *Thacher* v. *Dinsmore*, 5 Mass. 299; *Forster* v. *Fuller*, 6 id. 58; *Hills* v. *Bannister*, 8 Cowen, 31; *Eaton* v. *Bell*, 5 B. & Ald. 34.

The cases cited show that whether the obligation of a trustee is under seal or not is an immaterial fact, so far as it concerns his personal liability thereon.

We are of opinion, therefore, that the plaintiffs in error, having assumed a personal liability, the suit was well brought against them in a court of law, and that the court did not err in rendering judgment against them in their individual capacity.

The next assignment of error is that the facts found by the court do not sustain the judgment. The contention is that the findings do not show that there was any surplus fund remaining in the hands of the trustees "after paying therefrom all taxes and current expenses."

The findings of the court expressly state that in the years 1863, 1864, 1865, 1866, 1873, and 1874 the plaintiffs in error had in their hands moneys belonging to the trust fund sufficient to pay the amount due the defendant in error, after paying therefrom all taxes on the trust property and the ordinary expenses of the trust. These findings are fully sustained by the accounts therein referred to, unless there should be included in the current expenses of the trust the large sums expended by

the trustees in the erection of the fire-proof office and other improvements, and in building and protecting the levees. We are of opinion that these and like expenditures are not current expenses of the trust, within the meaning of the contract of October 4th, 1861. By that contract even the payment of taxes is not classed as among current expenses. If the expenditures referred to can be called expenses at all, they are extraordinary expenses. In our view they are investments of the capital of the Cairo City property, as much so as the purchase of land or the construction of water works, gas works, or a system of sewerage. It could scarcely have been the purpose of Davis, when he exacted from the plaintiffs in error the contract of October 4th, 1861, in consideration of his yielding possession of the trust property, on which he had a lien, and from which he could have enforced immediate satisfaction of his debt, to postpone its payment for an indefinite period, and until the large sums which the plaintiffs in error expended in substantial and permanent improvements on the trust property had been paid. We think the correct interpretation of the phrase "current expenses" was that given it by the Circuit Court, namely, ordinary expenses. The contract of the plaintiffs in error being thus construed, their liability to the defendant in error upon the facts found is clear. We are of opinion that there is no error in the record. The judgment of the Circuit Court is, therefore,

Affirmed.

UNITED STATES *v.* BEHAN.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 18th, 1883.—Decided February 4th, 1884.

Contract—Damages—Estoppel.

When one party enters upon the performance of a contract, and incurs expense therein, and being willing to perform, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage: 1st, his outlay and expenses, less the value of ma-

terials on hand; 2d, the profits he might have realized by performance; which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering it. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative.

In an action for breach of a contract by wrongfully putting an end to it, the party committing the wrong is estopped from denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred.

If, in a suit in the Court of Claims for breach of contract by the United States by preventing the petitioner from performing his contract, the petition prays judgment for damages arising from the loss of profits, and also for outlay and expenses, the petitioner may recover for such part of the outlay and expenses as he may prove, although he may fail to establish that there would have been any profits.

If a party injured by the stoppage of a contract elects to rescind the contract, he cannot recover either for outlay or for loss of profits; but only for the value of services actually performed, as upon a quantum meruit.

The case is stated in the opinion of the court.

Mr. Solicitor-General (*Mr. John S. Blair* was with him) for appellant.

Mr. J. W. Douglass for appellee.

Mr. Justice Bradley delivered the opinion of the court.

Behan, the appellee and claimant, filed a petition in the court below, setting forth that on the 26th of December, 1879, one John Roy entered into a contract with C. W. Howell, major of engineers of the United States army, to make certain improvements in the harbor of New Orleans (describing the same), and that the claimant and two other persons named became bondsmen for the faithful performance of the work; that on February 10th, 1881, the contract with Roy was annulled by the engineer office, and the bondsmen were notified that they had a right to continue the work under the contract if they desired to do so, and that the claimant complied with this suggestion and undertook the work; that he went to great expense in providing the requisite machinery, materials, and labor for fulfilling the contract, but that in September, 1881, it being found, by the report of a board of engineers, that the plan of improve-

ment was a failure, without any fault of the claimant, the work was ordered to cease; that thereupon the claimant stopped all operations, and disposed of the machinery and materials on hand upon the best terms possible, and sent to the War Department an account of his outlay and expenses, and the value of his own time, claiming as due to him, after all just credits and offsets, the sum of $36,347.94, for which sum he prayed judgment.

The claimant afterwards filed an amended petition, in which the various transactions, and his operations under the contract, were set forth in greater detail, showing amongst other things, that the amount of his expenses for machinery and tools, for materials, and for labor and operations carried on, after deducting the proceeds realized from the sale of the plant remaining when the work was suspended, amounted to the sum of $33,192.90. The petition further alleged that the claimant could have completed the work contemplated by the contract by a further expense of $10,000, and that the amount which would then have been due therefor would have been $52,000, leaving a profit to him of $8,807.10.

The petition concluded as follows:

"Your petitioner therefore respectfully shows that his reasonable and necessary expenditures upon the work above described amounted to $33,192.90, which sum represents the losses actually sustained by petitioner by reason of the defendants' breach of the contract. And petitioner further sets forth that the reasonable and legitimate profits which he might have obtained but for the said breach of contract may be properly computed at $8,807.10, assuming $52,000 as the amount to be paid for the completed work. And petitioner further shows that he has not received one dollar from the defendants on account of said work, but that his claim and accompanying accounts, presented to the engineer department, have been transmitted to this court by the Secretary of War.

"Your petitioner therefore alleges that he is entitled to receive from the United States the sum of forty-two thousand dollars ($42,000) over and above all just credits and offsets. Wherefore he prays judgment for that amount."

The Court of Claims found the material facts to be substan-

tially as stated in the petition. The contract of Roy is set forth in full in the findings, from which it appears that the contracting party was required to furnish and lay down an artificial covering of cane-mats over the sloping portion of the river-bed of the Mississippi in front of the third district of New Orleans, to extend outward to a depth in the river not exceeding 100 feet, and to be paid therefor at the rate of 65 cents per square yard. The court finds that Roy prosecuted the work under the contract during the year 1880, but his progress not being satisfactory to the engineer officers, the contract was formally annulled, and the bondsmen notified as stated in the petition. In March, 1881, Behan, the claimant, gave notice to Major Howell that he would undertake the work, and at his request the major gave him a description of the work to be done, estimated as not exceeding 77,000 or 80,000 square yards, which, at the contract price, would amount to from $50,000 to $52,000. The court further finds as follows:

"The contract was of such a character as to require extensive preparations and a large initial expenditure. The claimant made the necessary preparations for carrying on the work to completion and in procuring boats, tools, materials, and apparatus for its prosecution. He engaged actively in carrying out the contract on his part, incurred large expenditure for labor and materials, and had for some time proceeded with the work when the undertaking was abandoned by the defendants and the work stopped without fault of the claimant, as set forth in the following letters."

Then follows a copy of correspondence between the officers and the department of engineers, showing that a board of engineer officers was appointed to examine and report upon the plan of improvement under which the work of the claimant was being carried on, and that this board, on the 23d of September, 1881, reported their unanimous opinion that the object sought to be accomplished by the improvement had not been attained, and that under the then existing plan of operations, it could not be attained. On the 29th of September, 1881, the claimant received notice to discontinue the work, which he did at once, and gave Major Howell notice to that effect, and called his

attention to the exposed situation of the machinery, materials, and other property on hand, and requested instructions respecting the same. No instructions appear to have been given. The court then finds as follows:

"The claimant thereupon closed up his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses.

"The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition, $33,192.20.

"It does not appear from the evidence thereon on the one side and the other whether or not the claimant would have made any actual profit over and above expenditures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

"CONCLUSION OF LAW.

"Upon the foregoing findings of facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of $33,192.20."

The government has appealed from this decree and complains of the rule of damages adopted by the court below. Counsel contend that, by making a claim for profits, the claimant asserts the existence of the contract as opposed to its rescission; and that in such case, the rule of damages, as settled in *Speed's Case*, 8 Wall. 77, is "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable reduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." And when such a claim is made, they contend that the burden of proof is on the claimant to show what the profits would have been; and as the Court of Claims expressly finds that it does not appear from the evidence whether or not the claimant would have made any profits, or would have incurred loss, therefore the

claimant was not entitled to judgment for any amount whatever.

The manner in which this subject was viewed by the Court of Claims is shown by the following extract from its opinion:

"Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration. *Sickels' Case*, 1 C. Cls. R. 214; *Speed's Case*, 2 C. Cls. R. 429; affirmed on appeal, 8 Wall. 77, and 7 C. Cls. R. 93; *Wilder's Case*, 5 C. Cls. R. 468; *Bulkley's Case*, 7 C. Cls. R. 543; 19 Wall. 37; and 9 C. Cls. R. 81; *Parish's Case*, 100 U. S. 500; *Field's Case*, 16 C. Cls. R. 434; *Moore & Krone's Case*, 17 C. Cls. R. 17; *Power's Case*, 18 C. Cls. R. 493; *Masterson* v. *Mayor, &c., of Brooklyn*, 7 Hill, 61.

"The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So, for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damages proved to have resulted to him from the defendants' breach of contract, and they are, therefore, the proper measure of damages under all the circumstances of the case."

We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when

the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses.

The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson* v. *Mayor of Brooklyn*, 7 Hill, 69, they are "the direct and immediate fruits of the contract," they are free from this objection; they are then "part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation." Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to re-

cover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

The rule as stated in Speed's case is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's case, and his *profits* will be measured by "the difference between the cost of doing the work and what he was to receive for it," &c. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits.

When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after mak-

ing allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

It is unnecessary to review the authorities on this subject. Some of them are referred to in the extract made from the opinion of the court below; others may be found referred to in Sedgwick on the Measure of Damages, in Smith's Leading Cases, vol. 2, p. 36, &c. (notes to *Cutter* v. *Powell*); Addison on Contracts, §§ 881, 897. The cases usually referred to, and which, with many others, have been carefully examined, are *Planché* v. *Colburn*, 5 C. & P. 58; *S. C.* 8 Bing. 14; *Masterson* v. *Mayor, &c., of Brooklyn*, 7 Hill (N. Y.), 61; *Goodman* v. *Pocock*, 15 A. & E. 576; *Hadley* v. *Baxendale*, 9 Excheq. 341; *Fletcher* v. *Tayleur*, 17 C. B. 21; *Smeed* v. *Ford*, 1 El. & El. 602; *Inchbald* v. *Western, &c., Coffee Company*, 17 C. B. N. S. 733; *Griffen* v. *Colver*, 16 N. Y. 489; and the case of *United States* v. *Speed*, before referred to.

It is to be observed that when it is said in some of the books, that where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been

damaged to the extent of his actual loss and outlay fairly incurred.

The particular form of the petition in this case ought not to preclude the claimant from not recovering what was fairly shown by the evidence to be the damage sustained by him. Though it is true that he does pray judgment for damages arising from loss of profits, yet he also prays judgment for the amount of his outlay and expenses less the amount realized from the sale of materials on hand. The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition.

We think that the judgment of the Court of Claims was right, and it

Is affirmed.

SPRING VALLEY WATER WORKS *v.* SCHOTTLER & Others, Supervisors.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Argued November 20th, 21st, 1883.—Decided February 4th, 1884.

Constitutional Law—Corporations.

Laws requiring gas companies, water companies and other corporations of like character to supply their customers at prices fixed by the municipal authorities of the locality, are within the scope of legislative power unless prohibited by constitutional limitation or valid contract obligation.

The Constitution of a State provided that corporations might be formed under general laws, and should not be created by special act, except for munic-

ipal purposes, and that all laws, general and special, passed pursuant to that provision might be from time to time altered and repealed. A general law was enacted by the legislature for the formation of corporations for supplying cities, counties and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners to be appointed in part by the corporations and in part by municipal authorities. The Constitution and laws of the State were subsequently changed so as to take away from corporations which had been organized and put into operation under the old Constitution and laws the power to name members of the boards of commissioners, and so as to place in municipal authorities the sole power of fixing rates for water: *Held*, That these changes violated no provision of the Constitution of the United States.

The plaintiffs in error were petitioners in the courts of California for a writ of mandamus against the defendants in error. The constitutional question at issue was the right of the State of California to alter the plaintiff's charter. The facts making the case to raise this question are stated in the opinion of the court.

Mr. Charles N. Fox for plaintiff in error.

Mr. Francis G. Newlands for same.

Mr. A. L. Rhodes for defendants in error.

Mr. George F. Edmunds for plaintiff in error.

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

Art. IV., sec. 31, of the Constitution of California adopted in 1849 is as follows:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Acts were passed by the legislature under this authority on the 14th of April, 1853, and the 30th of April, 1855, providing for the formation of corporations for certain purposes, and on the 22d of April, 1858, these acts were extended so as to include the formation of corporations for the purpose of supplying cities, counties, and towns with water. Under this exten-

sion water companies were empowered to acquire lands and waters for their works by purchase and condemnation, and, subject to the reasonable direction of the public authorities, to use streets, ways, alleys, and public roads for laying their pipes; but it was expressly provided, by an amendment enacted in 1861—

"That all canals, reservoirs, ditches, pipes, aqueducts, and all conduits . . . shall be used exclusively for the purpose of supplying any city or county, or any cities or towns, in this State, or the inhabitants thereof, with pure, fresh water."

Sec. 4 is as follows:

"SEC. 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this act and the laws and Constitution of this State."

The Spring Valley Water Works Company was formed under this act on the 19th of June, 1858, and since that time has expended a very large amount of money in the erection of extensive and substantial works for the supply of the city and

county of San Francisco with water. In January, 1878, the board of supervisors of the city and county appointed Isaac B. Friedlander and H. B. Williams, and the company appointed W. F. Babcock and Charles Webb Howard, and these four afterwards appointed Jerome Lincoln, to constitute a board of commissioners to determine, under the provisions of section 4, the rates to be charged by the company for water. This board met and fixed the tariff of rates to go into effect on the 1st of June, 1878. In July, of the same year, Friedlander, one of the commissioners appointed by the supervisors, died. By his death a vacancy was created in the board which has never been filled.

In 1879 the people of California adopted a new Constitution, which went into effect on the 1st of January, 1880. Art. XIV., §§ 1 and 2 of this Constitution are as follows:

"ARTICLE XIV.

"*Water and Water Rights.*

"SECTION 1. The uses of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: *Provided*, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this

State, otherwise than as so established, shall forfeit the franchises and water works, of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use.

"SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Under this provision of the Constitution and the legislation based thereon, the board of supervisors claim the right and power to fix the rates to be charged by the company for water, and refuse to appoint a member to fill the vacancy in the board of commissioners occasioned by the death of the former incumbent. This suit was begun in the Supreme Court of the State for a writ of mandamus requiring the board of supervisors to take action in the matter and fill the vacancy. The court on final hearing refused the writ and dismissed the petition. This writ of error was brought by the company to review that judgment.

The general question involved in this case is whether water companies in California, formed under the act of 1858 before the adoption of the Constitution of 1879, have a right, which the State is prohibited by the Constitution of the United States from impairing or taking away, to charge their customers such prices for water as may from time to time be fixed by a commission made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four, or by the sheriff of the county. The Spring Valley Company claims no rights of this character that may not also be claimed by every other company formed under the same act.

That the companies must sell at reasonable prices all the water they are able to furnish consumers, and that the prices fixed for the time being by the honest judgment of such a commission as was specially provided for in the act, must be deemed reasonable, both by the company and the public, is not denied. The dispute is as to the power of the State, under the prohibitions of

the Constitution of the United States, to substitute for this commission another, selected without the co-operation of the company, or some other tribunal of a different character, like the municipal authorities of the locality. The Spring Valley Company claims that it has, under its charter, a right to the maintenance of the commission which was created by the requisite appointments in 1878, and the object of this suit is to compel the board of supervisors to perpetuate that commission by filling the vacancy that exists in its membership. So that the whole controversy here is as to the right of water companies that availed themselves of the privileges of the act of 1858 to secure a virtual monopoly of trade in water at a particular place, to demand the appointment of the commission provided for in that act, notwithstanding the Constitution of 1879 and the legislation under it.

The Spring Valley Company is an artificial being created by or under the authority of the legislature of California. The people of the State, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. The reservation of power to alter or repeal the charters of corporations was not new, for almost immediately after the judgment of this court in the Dartmouth College Case (*Dartmouth College* v. *Woodward*, 4 Wheat. 518), the States, many of them, in granting charters acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and inserted provisions by which such authority was expressly retained. Even before this decision it was intimated by the Supreme Judicial Court of Massachusetts in *Wales* v. *Stetson*, 2 Mass. 143, that such a reservation would save to the State its power of control. In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body.

Water for domestic uses was difficult to be got in some parts of the State. Large amounts of money were needed to secure

a sufficient supply for the inhabitants in many localities, and as a means of combining capital for such purposes the act of 1858 was passed. Other statutes had been enacted before to effect the same object, but it is said they were not such as a company with capital enough to supply San Francisco was willing to accept. The act of 1858 was thought sufficiently favorable, and the Spring Valley Company, after organizing under it, expended a large amount of money to provide the means of supplying the territory on which San Francisco is built, and make it possible to support a great population there. All this was done in the face of the limitations of the Constitution on the power of the legislature to create a private corporation and put it beyond the reach of legislative control, not only as to its continued existence, but as to its privileges and franchises. One of the obligations the company assumed was to sell water at reasonable prices, and the law provided for a special commission to determine what should be deemed reasonable both by the consumers and the company, but there is nowhere to be found any evidence of even a willingness to contract away the power of the legislature to prescribe another mode of settling the same question if it should be considered desirable. In the *Sinking Fund Cases*, 99 U. S. 700, it was said that whatever rules for the government of the affairs of a corporation might have been put into the charter when granted could afterwards be established by the legislature under its reserved power of amendment. Long before the Constitution of 1879 was adopted in California, statutes had been passed in many of the States requiring water companies, gas companies, and other companies of like character to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we see no reason why such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the legislature, not the courts.

It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is in effect appointing the buyers themselves, since the buyers elect the officers, and

that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality, and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government, and in so doing to provide that all shall so conduct themselves, and so use their own property, as not unnecessarily to injure others. They are elected by the people for that purpose, and whatever is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature. That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the Constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule. And here again it is to be kept in mind that the question before us is not as to the penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price; not whether the company shall forfeit its property and franchises to the city and county if it fails to meet the requirements of the Constitution, but whether the prices it shall

charge may be established in the way provided for in that instrument. It will be time enough to consider the consequences of the omissions of the company when a case involving such questions shall be presented.

But it is argued that as the laws in force before 1858, for the formation of water companies, which provided for fixing the rates by the municipal authorities, were not accepted by the Spring Valley Company, and that of 1858, without such a provision, was, it is to be inferred that the State contracted with this company not to subject it to the judgment of such authorities in a matter so vital to its interests. If the question were one of construction only, this argument might have force, but the dispute now is as to legislative power, not legislative action. The Constitution of California adopted in 1849 prohibited one legislature from bargaining away the power of succeeding legislatures to control the administration of the affairs of a private corporation formed under the laws of the State. Of this legislative disability the Spring Valley Company had notice when it accepted the privileges of the act of 1858, and it must be presumed to have built its works and expended its moneys in the hope that neither a succeeding legislature, nor the people in their collective capacity when framing a Constitution, would ever deem it expedient to return to the old mode of fixing rates, rather than on any want of power to do so, if found desirable. The question here is not between the buyer and the seller as to prices, but between the State and one of its corporations as to what corporate privileges have been granted. The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with authority to make them.

The organization of the Spring Valley Company was not a business arrangement between the State and the company as contracting parties, but the creation of a new corporation to do business within the State and to be governed as natural persons or other corporations were or might be. Neither are the chartered rights acquired by the company under the law to be

looked upon as contracts with the city and county of San Francisco. The corporation was created by the State. All its powers came from the State and none from the city or county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may, from time to time, be made by proper authority. The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal.

It follows that the court below was right in refusing to award the writ of mandamus which was prayed, and its judgment to that effect is

Affirmed.

Mr. Justice Field, dissenting.

I am not able to concur with the court in its decision, nor can I assent to the reasons assigned for it. It seems to me that it goes beyond all former adjudications in sanctioning legislation impairing the obligation of contracts made by a State with corporations. It declares, in effect, that whenever a corporation is created with the reservation that the legislature may alter or repeal its charter, or under a law or Constitution which imposes such a reservation of power, no contract can be made between it and the State, which shall bind the State any longer than she may choose to be bound; that she may provide that certain rights shall be secured, or that certain payments shall be made in consideration of work to be performed or capital to be advanced by a corporation created under her laws; and when the work is done and the capital is expended, she may legally, constitutionally, repudiate her pledges. In other words, the decision seems to me to sanction the doctrine, that a contract between a State and a corporation, created with the reservation mentioned, is binding only

upon the corporation. I shall endeavor to show that this doctrine is unsound, believing that in this case, and in all others where it is asserted, it will work injustice.

By a general law of California, passed April 14th, 1853, provision was made for the formation of corporations for manufacturing, mining, mechanical, and chemical purposes, or for the purpose of engaging *in any species of trade or commerce*, foreign or domestic. It enacted that three or more persons, who desired to form a company for any of the purposes mentioned, should make, sign, and acknowledge, before some officer competent to take the acknowledgments of deeds, a certificate stating the corporate name of the company, the objects of its formation, the amount of its capital stock, the time of its existence, which could not exceed fifty years, the number of shares of which the stock was to consist, the number of trustees and their names, who should manage the concerns of the company for the first three months, and the name of the city, or town, or county in which the principal place of business of the company was to be located, and file the certificate in the office of the clerk of the county in which such principal place of business was located, and a certified copy thereof, under the hand of the clerk and seal of the County Court, in the office of the Secretary of State; and that upon filing such certificate, the persons signing and acknowledging it, and their successors, should be a body politic and corporate by the name stated in the certificate, and have succession for the period limited, and also such powers as are usually conferred upon corporate bodies.

Under this act, and an amendatory act of 1855, corporations were formed for the purpose of supplying the inhabitants of the city and county of San Francisco with pure, fresh water. Doubts were however expressed in some quarters whether supplying the water was engaging *in any species of trade or commerce* within the meaning of those acts. *Heyneman* v. *Blake*, 19 Cal. 579. Accordingly, on the 22d of April, 1858, a general law was passed for the incorporation of water companies, which referred to the provisions of the act of 1853, and of the amendatory act of 1855; and declared that they should apply

to all corporations, already formed or that might afterwards be formed *under said acts*, for the purpose of supplying any city and county, or any cities or towns, in the State, or the inhabitants thereof, with pure, fresh water. On the following day, April 23d, 1858, another act was passed, which authorized George H. Ensign and other owners of the Spring Valley Water Works to lay down water pipes in the public streets of the city and county of San Francisco. On the 19th of June, 1858, the plaintiff was organized as a corporation, referring in its certificate to these last two acts; but as the special act relating to Ensign and others was subsequently declared unconstitutional by the Supreme Court of the State, the incorporation of the plaintiff rests upon the act of April 22d, 1858, or rather upon the acts of 1853 and of 1855, to which it refers. This act of 1858 gave the corporation thus formed the right to purchase or to appropriate and take possession of, and use and hold all such lands and waters as might be required for the purposes of the company, upon making compensation therefor; with a proviso, however, that all reservoirs, canals, ditches, pipes, aqueducts, and conduits constructed by the corporation, should be used exclusively for the purpose of supplying the city and county and the inhabitants thereof with pure, fresh water.

Having provided for the incorporation of the company, the act of 1858 proceeded to prescribe the terms upon which water should be supplied to the city and county, and to their inhabitants, and the compensation which the company should receive therefor. It declared that the company should furnish pure, fresh water to the inhabitants for family uses, so long as the supply permitted, at reasonable rates, and without distinction of persons, upon proper demand therefor, and should furnish water, to the extent of its means, to the city and county, "in case of fire or other great necessity, free of charge." The act further declared that the rates to be charged for water should be determined by a board of commissioners, to be selected as follows: two by the city and county authorities, and two by the water company; and in case the four could not agree to the valuation, then, in that case, the four should choose a fifth

person, and he should become a member of the board; and if the four commissioners could not agree upon a fifth, then the sheriff of the county should appoint him; and that the decision of a majority of the board should determine the rates to be charged for water for one year, and until new rates should be established. The act also declared that the board of supervisors might prescribe such other proper rules relating to the delivery of water, not inconsistent with the act and the laws and Constitution of the State; and that the corporation should have the right, subject to the reasonable direction of the city authorities as to the mode and manner of exercising it, to use so much of the streets, ways, and alleys of the city and county, or of the public road therein, as might be necessary for laying its pipes for conducting water into the city or county, or through any part thereof.

The certificate of incorporation of the plaintiff declared that the objects for which the company was formed were to introduce pure, fresh water into the city and county of San Francisco, and into any part thereof, from any point or place, for the purpose of supplying the inhabitants of the city and county with the same, and to do and transact all such business relating thereto as might be necessary and proper, not inconsistent with the laws and Constitution of the State.

The necessary supply of water could not be obtained from any natural streams or lakes on the peninsula, upon the upper end of which the city and county are situated. A small lake near the city furnished an insufficient supply and of inferior quality. The company, therefore, soon after its incorporation, undertook to collect the required quantity in artificial reservoirs, as it descended in rain from the heavens.

At a distance of about twenty miles from the city, there is a natural ravine lying between the mountains near the ocean and the hills bordering the Bay of San Francisco. The company acquired the lands within this ravine and on its sides, amounting, as represented by counsel, to eighteen thousand acres, and erected in it heavy walls at long distances apart, thus making great reservoirs, into which the water was collected until lakes were formed extending several miles in length.

With aqueducts, pipes, and other conduits the water thus collected was carried to the city and distributed in mains. It is said that the cost of these works to the company amounted to nearly fifteen millions of dollars. Before their construction and the introduction of this water, the inhabitants of the city were poorly and inadequately supplied. With the completion of the works of the plaintiff all this was changed. Water was furnished to all persons calling for it at their houses, and if desired in every room; and to the city in abundance for all its needs.

The law of 1858, as stated, required the corporation to furnish water, to the extent of its means, to the city and county, "in case of fire or other great necessity, free of charge." This provision has been construed by the Supreme Court of the State to require the company also to furnish, without charge, water to sprinkle the streets of the city, to flush its sewers, and to irrigate its public squares and parks. Its effect will be only partially appreciated by those who judge merely from the size of the city, and the fact that the residences are chiefly constructed of wood. There are other uses for a much larger supply of water. The city is situated at the upper end of a peninsula whose width is only a little over six miles. The land there consists principally of a succession of sand hills, and the daily breezes of the ocean keep the sand in almost constant motion, except where vegetation has fixed its roots. For this vegetation water is essential. With it, every plant will thrive, even in the sand, and shrubs and trees will grow in great luxuriance. The absence of water from them for even a few months will cause the plants and shrubs to droop, wither, and perish. The public squares of the city are numerous, and the park—termed the "Golden Gate Park," because it is near the entrance of the bay which is termed the "Golden Gate" —covers more than a mile square of these sand hills. On these squares and this park, the constant use of water from the reservoirs of the plaintiff is necessary to keep the grasses, plants, and shrubs alive. Yet all water needed for these purposes is, by the law in question, to be furnished without charge. That was one of the burdens imposed upon the plaintiff, in

addition to the requirement that its costly works, consisting of aqueducts extending nearly thirty miles out of the city, and mains within it exceeding one hundred miles, should be used exclusively for the purpose of supplying the city and county with water. The reasonable rates allowed for the water furnished to the inhabitants of the city and county constituted the only compensation of the company for the enormous outlay to which it was necessarily subjected, and for all the benefits it undertook to confer. The law in declaring that a company formed under it should supply water to the city and county in cases of great necessity free of charge, and to their inhabitants on demand at reasonable rates, in effect declared that the company complying with such terms should receive those rates for water thus supplied to the inhabitants. When, therefore, the plaintiff organized under the law introduced the water, a contract was completed between it on the one part and the State on the other, that so long as it existed and furnished the water as required it should receive this compensation. The provision for the creation of an impartial tribunal to determine each year what rates should be deemed reasonable, was the very life of the stipulation for a reasonable compensation. It would not have done to leave the compensation to be fixed by the company alone, as it might thus make its charges exorbitant; it would not have done to leave the rate to be fixed by the city authorities alone, as they would be constantly under a great pressure to reduce the rates below remunerative prices, as the representatives of the city, itself a large consumer for public buildings, and as representatives of individual consumers, by whom they were elected and to whom they were to look for the approval of their acts, and because the individuals composing those authorities would also be consumers of the water equally with their constituents. It was, therefore, provided that the rates should be fixed by commissioners, to be selected as stated above.

It would be difficult to conceive of a tribunal fairer in its organization, or more likely to act justly and wisely for both parties, and guard equally against extortion in prices on the one hand and their unjust reduction on the other. Such a

tribunal was formed and, from time to time, reasonable rates for water were established by it. But in 1879 the people of California formed a new Constitution, which declared that the use of all water then appropriated, or that might thereafter be appropriated, for sale, rental, or distribution, was a public use, and subject to the regulation and control of the State in the manner to be prescribed by law; that the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county, or to its inhabitants, should be fixed annually by the board of supervisors of the city and county, or other governing body of the same, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and should continue in force for one year and no longer; that such ordinances or resolutions should be passed in the month of February of each year, and take effect on the first day of July thereafter. And it further declared that any board or body failing to pass the necessary ordinances or resolutions fixing water rates, when necessary, within such time, should be subject to peremptory process to compel action at the suit of any party interested, and should be liable to such further processes and penalties as the legislature might prescribe; and that any person, company, or corporation collecting water rates in any city and county, otherwise than as so established, should forfeit its franchises and water works to the city and county where the same are collected, for public use. (Art. XIV., sec. 1.)

In July, 1878, a vacancy occurred in the board of commissioners, which the city authorities, after the adoption of the new Constitution, refused to fill, contending that, under its provisions, they were authorized to fix the water rates. The present proceeding was to compel them to proceed and complete the board; and the question is whether that Constitution, in vesting the entire power in the board of supervisors—the governing authority of the city and county of San Francisco—impairs the contract between the State and the company, within the prohibition of the federal Constitution. There is no question of the continuance of a virtual monopoly in water,

as supposed by the court. There is nothing relating to a monopoly in the case. Any five or more persons in California can, at any time, form themselves into a corporation to bring water into the city and county of San Francisco on the same terms with the plaintiff; and such new corporation can, in the same way, form reservoirs in the ravines in the hills and collect water for sale, or bring water from the mountain lakes. Until within a few years any three or more persons could form such a corporation. The statement that the plaintiff has a monopoly of any kind in water, and desires to secure forever certain charges, must therefore be taken as one inadvertently made, without due consideration of the facts. The only contention in the case is, whether the clause of the new Constitution abrogating the stipulation for reasonable rates to be established by a commission created as mentioned, is a valid exercise of power by the State.

That the provision of the law of 1858, making that stipulation, was a part of the contract between the State and the company, is not denied by the court; nor is it denied that it was also a part of the contract that the "reasonable rates" should be determined by the commissioners designated. But the position taken, if I understand it, is, that the provision for their appointment is only that the rates shall be established by an impartial tribunal, not necessarily by one created as there prescribed; and that the State has a right to determine what tribunal shall be deemed an impartial one, and, by the fourteenth article of the new Constitution, has done so and made the board of supervisors that tribunal; and that this action was within the power reserved by the original act of incorporation.

Of course this view destroys all the substance and value of the stipulation for reasonable rates and renders it utterly delusive. The very object of the creation of the tribunal designated in the law of 1858 was to take the establishment of the rates from the city authorities, who, it was believed then, as it is known now, would be influenced and controlled by their relation as representatives of the consumers by whom they are elected, as well as by the fact that the individual members

composing those authorities would be themselves consumers. Admitting for the argument that the meaning of the provision is only that the company shall have an impartial tribunal, and not necessarily the one created as designated, it seems to me to be plain that such new tribunal cannot consist of the city authorities, against whose exclusive control the original contract expressly stipulated. Placing the regulation of rates with them is not furnishing another tribunal equally impartial with the one mentioned. From the very nature of its creation and its relation to others, the board of supervisors, an elective body, cannot be impartial. No tribunal, however honorable and high the character of the persons composing it may be, is, or can be, in a legal sense, impartial, when they are individually interested, and the tribunal itself, in its representative character, is interested in the determination to be made.

It need hardly be said that it is an elementary principle of natural justice that no man shall sit in judgment where he is interested, no matter how unimpeachable his personal integrity. The principle is not limited to cases arising in the ordinary courts of law in the regular administration of justice, but extends to all cases where a tribunal of any kind is established to decide upon the rights of different parties.

In *City of London* v. *Wood*, 12 Modern, 669, it was held by the King's Bench that an action in the names of the mayor and commonalty of London could not be brought before the court held by the mayor and aldermen; for, said Chief Justice Holt, "it is against all laws that the same person should be party and judge in the same cause;" and to the objection that the Lord Mayor, as the head of the corporation, acted in his political capacity and judged in his natural capacity, he answered: "It is true he acts in different capacities, yet the person is the same, and the difference in the capacities in which he acts does not make a difference," which would remove the disqualification.

The true doctrine on this subject is stated with great clearness by the Supreme Court of Massachusetts in the recent cases of *Hall* v. *Thayer*, 105 Mass. 219, where it was held that the judge of probate was disqualified by personal interest

to appoint his wife's brother administrator of the estate of a deceased person of which her father was principal creditor. Referring to the provision of article 29 of the Declaration of Rights of that State, "that it is the right of every citizen to be tried by judges as fair, impartial and independent as the lot of humanity will admit," the court said:

"The provision rests upon a principle so obviously just and so necessary for the protection of the citizen against injustice that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates one to act as judge in a matter in which he has any pecuniary interest, or in which his near relative or connection is one of the parties. It applies to civil as well as criminal causes, and not only to judges of courts of common law and equity and probate, but to special tribunals and *to persons authorized on a special occasion to decide between parties in respect to their rights.*" And, after referring to several decisions where the principle had been applied, the court said: "These decisions show that the provision is to have no technical or strict construction, but it is to be broadly applied to all classes of cases where one is appointed to decide the rights of his fellow-citizens."

I admit that the interest which will disqualify a special tribunal from acting in a matter affecting conflicting rights of parties must be a direct pecuniary interest either in its members or in the persons represented by it, which may be increased or diminished by the determination reached. Such is the precise condition of the board of supervisors of the city and county of San Francisco with respect to the prices to be paid for the water furnished by the plaintiff. The consumers of the water constitute, with few exceptions where a well may have been sunk, the entire people of that district, including the supervisors themselves, and they are all, therefore, directly interested to reduce its price. If the board were to seek to acquire land whereon to open a new street, or to erect public buildings, no one would pretend that the compensation which it would be necessary to make to the owner, could be fixed by the board, or by appraisers whom it should appoint. It would

be on that subject an interested party, and, therefore, on the principle already stated, could not act in the matter where the rights of others were concerned.

The Supreme Court of Wisconsin held a provision of law void which authorized the common council of a municipal corporation to appoint jurors to assess damages to the owner of property taken for public uses of the city, in the place of others previously appointed for that purpose by a judge of the Circuit or County Court, but who had neglected or refused to serve.

"A majority," said the court, "or even all of the jurors selected to establish the necessity of taking the property, may refuse to act in fixing the amount of damages, in which case the common council, one of the parties, *ex parte*, may appoint a jury which shall determine the amount of damages the city must pay. It is impossible to comment in a proper manner upon such a provision which confounds all our notions of fairness, justice, and right." *Lumsden* v. *Milwaukee City*, 8 Wis. 485, 494.

If instead of land the board should desire to acquire personal property—fuel for the public buildings of the city, paving material for its streets, engines for its fire department, or any other property for its needs—no one would pretend, independently of any law on the subject, that there would be any justice or fairness in allowing that body alone to determine the price to be paid.

There will always be, as I have said, a great pressure upon the board by the people electing it to regulate the price of the water in their interest, without regard to that of the company. The influence thus exerted to warp the judgment of the members and change the character of the body from that of an impartial tribunal to one acting in the interest of its constituents, every practical man dealing with the corporation would appreciate and act upon. All the influences usually brought to bear at elections to secure the choice of those who will carry out the wishes of the voters, we should expect to see applied to secure the election of candidates thus empowered to fix the price of the article which the voters daily consume. And

what we might thus expect has occurred at every election since the new Constitution went into effect. A suit was recently brought by the plaintiff in the Circuit Court of the United States for the District of California against the mayor and supervisors of San Francisco to enjoin the passage of an ordinance, then proposed, to fix the price of its water under this new Constitution. Among other reasons urged upon the consideration of the court was the fact that the mayor and supervisors, before the election, had pledged themselves to make a material reduction in the rates, which, if carried out, the company contended would be destructive of its interests. The fact that such pledges were made was not controverted, but the court answered that

"If it be competent at all, under the provision in question, for the people of San Francisco through their representatives in the board of supervisors to pass the proposed ordinance, it is difficult to perceive why, in looking around for agents or representatives to carry out their will, it is unlawful to ask in advance whether those seeking to represent them will obey their command in these particulars, or to require a pledge to that effect before committing the trust to them."

And in the same case the court referred to the clause in the new Constitution declaring that any corporation collecting water rates in any city and county otherwise than as established by the board of supervisors of the district, should forfeit its franchises and water works to the city and county for the use of the public, and said:

"It would seem to be only necessary to make this brief statement of the case to enable one of ordinary intelligence, endowed with a reasonable share of moral sense, to perceive the monstrous injustice of thus placing the large investments of complainant, made under the stimulus of the inducement held out by the act of 1858, at the absolute mercy of an irresponsible public sentiment, or of public cupidity. This last provision would seem to offer a large premium for the perpetration of a wrong—a large inducement to the purchaser (the consumer) to fix the price at unremunerative rates, in order to secure the large property by for-

feiture and confiscation, or to so largely diminish its value as to force a sale to the city at a price far below its real value. It was alleged in the argument, and not denied, to be a matter of public history and public notoriety, of which we are authorized to take notice, that such designs have been openly and publicly avowed and advocated by public speakers."

It is difficult to understand how any just man, carefully considering what has been thus stated, can hold that the board constitutes an impartial tribunal such as the law of 1858 assured the plaintiff, as an inducement for its large expenditures, it should always have to determine what rates are reasonable. The great wrong and injustice done to the plaintiff by subjecting the determination of the rates it shall receive for its property to the judgment of a tribunal thus deeply interested against it, and impelled to reduce them by an exacting and constantly pressing constituency, are declared by the court to be justified by the law and Constitution of the State, and in no way forbidden by the contract clause of the federal Constitution which was designed to insure the observance of good faith in the stipulation of parties against State action. Authority to interfere with and destroy the contract rights of the plaintiff is claimed, as already stated, under the power reserved to the State by its Constitution, in force at the time, to alter or repeal the law pursuant to which the plaintiff was incorporated. Such authority is also asserted from the public interest which the State is alleged to have acquired in the use of the water furnished by the plaintiff.

Upon each of these grounds I have a few words to say. The clause of the State Constitution referred to in the first of them is in these words:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

It is contended that the right thus reserved to alter or repeal the general law, under which the plaintiff was incorporated,

authorized the State to exercise greater control over the business and property of the company than it could have exercised over like business and property of natural persons; that as the repeal of the general law would put an end to the corporation, the State could prescribe the conditions of its continued existence, and, therefore, could legitimately impose any restrictions and limitations, however burdensome, upon the subsequent possession and use of its property, and require the corporation to comply with them. Indeed, there seems to be an impression in the minds of counsel, and, from the language not infrequently used by some judges, in their minds also, that the reservation in charters of corporations and in laws authorizing the formation of corporations, of a power to alter or repeal such charters or laws, operates as a gift to the State and to the legislature of uncontrolled authority over the business and property of the corporations. And yet no doctrine is more unfounded in principle or less supported by authority. When carried out in practice, it is utterly destructive of all rights of property of corporate bodies. Those who entertain it overlook the occasion which led to the adoption of the clause containing the reservation, and the object it was designed to accomplish.

When this court, in the Dartmouth College case, decided that the charter of a private corporation was a contract between the State and the corporators, and therefore within the protection of the inhibition of the federal Constitution against impairment of contracts by State legislation, it was suggested by Judge Story, who concurred in the decision, that this unalterable and irrepealable character of the contract might be avoided by a reservation of power in the original charter.

"In my judgment," he said, "it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent, is a violation of the obligation of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation, and I

am, therefore, bound to declare that the acts of the legislature of New Hampshire now in question do impair the obligation of that charter, and are consequently unconstitutional and void." 4 Wheat. 712.

In another part of his opinion he refers to an early decision of the Supreme Court of Massachusetts, which had declared that the rights legally vested in a corporation could not be controlled or destroyed by a subsequent statute, "*unless a power for* that purpose be reserved to the *legislature in the act of incorporation.*" 4 Wheat. 708.

When the general character of the decision in the Dartmouth College case became known, the States acted very generally upon the suggestion of Judge Story, and few charters were subsequently granted without a clause reserving to the legislature the power to alter or repeal them. In some instances a general law was enacted, declaring that all corporations subsequently created should be subject to this reserved power; and in some cases, where a new Constitution was adopted by a State, a clause of similar import was inserted. The object of the reservation, in whatever form expressed, was to preserve to the State control over the corporate franchises, rights, and privileges which, in her sovereign or legislative capacity, she had called into existence; in other words, to enable her to annul or modify that which she had created. It was not its object to interfere with contracts which the corporation, when once created, might make, nor with the property which it might acquire.

Such is the purport of our language in *Tomlinson* v. *Jessup*, 15 Wall. 454, where we stated the object of the reservation to be "to prevent *a grant of corporate rights and privileges* in a form which will preclude legislative interference with their exercise, if the public interest should, at any time, require such interference;" and that

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities *derived, by its charter, directly from the State.*"

In *Railroad Company* v. *Maine*, 96 U. S. 499, where a law containing a similar reservation was under consideration, we expressed substantially the same thing; that by the reservation the State retains the power to alter the act of incorporation in all particulars constituting the grant to it of "*corporate rights, privileges, and immunities;*" and that "the existence of the corporation and its franchises and immunities, derived directly from the State," are thus kept under her control, adding, however, "that rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing."

As thus seen, the reservation applies only to the contract of incorporation, to the corporate existence, franchises, and privileges granted by the State. With respect to everything else, it gives no power that the State would not have had without it. Necessarily it cannot apply to that which the State never possessed or created, and, therefore, could not grant. It leaves the corporation, its business and property, exactly where they would have been, had the Supreme Court held, in the Dartmouth College case, that charters are not contracts within the constitutional prohibition against legislative impairment. It accomplished nothing more; and any doctrine going beyond this would be subversive of the security by which the property of corporations is held, and in the end would destroy the security of all private rights. Behind the artificial body created by the legislature stand the corporators, natural persons, who have united their means to accomplish an object beyond their individual resources, and who are as much entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held as before they had associated themselves together. Whatever power the State may possess over corporations in their creation or in passing or amending the laws under which they are formed and altered, it cannot withdraw them from the guarantees of the Federal Constitution. As I said on another occasion:

"The State cannot impose the condition that the corporation shall not resort to the courts of law for the redress of injuries or

the protection of its property; [or when in court, that it shall be subjected to different rules of evidence and be required to prove by two witnesses what individuals may establish by one;] that it shall make no complaint if its goods are plundered and its premises invaded; that it shall ask no indemnity if its lands be seized for public use, or be taken without due process of law, or that it shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon it; that, in other words, towards it and its property the State may exercise unlimited and irresponsible power. Whatever the State may do even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business, and of having perpetual succession in its members. It may make its grant in these respects revocable at pleasure; it may make it subject to modifications; it may impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporation acquires in the exercise of the capacities conferred, it holds under the same guarantees which protect the property of individuals from spoliation. It cannot be taken for public use without compensation; it cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

In *Detroit* v. *Howell Plank Road Company*, 43 Mich. 140, 147, the Supreme Court of Michigan, in considering this subject, uses similar language. Speaking by Mr. Justice Cooley, it said:

"But for the provision of the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from

either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the 'law of the land.'"

Applying these views to the case before us it will be seen that the right asserted by the State, with respect to the property of the Spring Valley Water Company, cannot be upheld. The State gave to certain parties the right to form themselves into that corporation for the purpose of conveying pure and fresh water to the city and county of San Francisco. It did not grant to them the reservoirs by which that water is accumulated; it did not grant to them the aqueducts by which the water is carried to the city and county; it did not grant to them the pipes by which the water is distributed through the city; it only gave facilities for the conveyance of the water to the city and for its distribution. It could not, therefore, under its reserved power over the corporation, appropriate these reservoirs, aqueducts, and mains without making compensation for them; nor could it divert them, except upon like terms, from the purposes for which they were constructed, to the supplying of the city and county with salt instead of fresh water, or with gas or oil, or devote them to other uses.

The water itself is the property of the company. It was not taken from a running stream; nor from any lake; nor from any source where the government could assert that it alone had the right to control and use it. It was collected by the company as it descended from the heavens. Whatever may be the differences of opinion as to the ownership of running waters, or of waters of navigable streams, or of lakes, it has never been doubted that water collected by individual agency, from the roof of one's house, or in hogsheads, barrels, or reservoirs, as it descends from the clouds, is as much private property

as anything else that is reduced to possession, which otherwise would be lost to the uses of man. Indeed, it is a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by individual labor a right of property in it is acquired by such labor. The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the waters and brings it to light has property in the gem. He has, by his own labor, reduced it to possession, and in all communities and by all law his right to it is recognized. So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in christendom would maintain it. So when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him. It was in conformity with this principle that this court, in *Atchison* v. *Peterson*, 20 Wall., 507, 512, in speaking of the general occupation of the public lands made free for mining, and the rights of the first appropriator of lands containing mines, said that

"He who first connects his own labor with property thus situated, and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners, on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, everywhere recognize the inherent justice of this principle, and the principle itself was, at an early day, recognized by legislation and enforced by the courts of those States and Territories."

When the plaintiff brought water to the city of San Francisco, it had a right to sell the property at such reasonable prices as it could obtain, as it might have sold grain, or fruit, or coal, had it brought those articles to market. If the State could interfere and insist that such reasonable prices should be determined by other authority than the company, that authority must also have been other than that of the consumers or of their agents. Of the limitations upon the power of the State in this respect, independently of its contract, and for what compensation it can compel the company to sell its property, I shall hereafter speak. It is sufficient at present to say that the power reserved over the act of incorporation gave the State no control over such compensation which it did not possess without the reservation. Its control here is limited by the stipulations of the contract with the company. The legislature can, of course, repeal the act under which the plaintiff was incorporated, and thus put an end to its corporate existence, but so long as the corporation remains the contract remains with all its binding force.

The contract between the State and the corporators, by which the plaintiff became a corporation, is not to be confounded with the contract between the State and the corporation when created. Although the two contracts are contained in the same law, they are to be treated as separate and distinct from each other as if they were embraced in different statutes. Private corporations, by the Constitution of California, can be formed only under general laws; but all that is embraced by a general law of that character may not necessarily be a part of the contract of incorporation of parties forming themselves into a corporate body under it. It may refer to matters having no relation to corporate bodies, such as rules of evidence, forms of procedure, or descent of property; and it may contain contracts for specific work by the corporation created. No greater legislative control over such matters would result from their association in the same law which authorized the formation of the corporation, than if they were contained in separate acts. If, for example, the plaintiff had been incorporated to bring to the city and county of San Francisco, instead of water from its res-

ervoirs, granite from its quarries, and the act had provided that, having brought the granite, it should sell it to individuals at a designated price per cubic foot for paving the sidewalks, and to the city for the construction of a court room, or a public hall; would it be pretended that by virtue of its reserved power over the corporation the State could compel the sale and delivery of the granite at a different price? The natural and just answer would be that the contract with the corporation for the purchase of the granite is a different matter from the contract by which the corporators became a corporation; and would the answer be less just and perfect if the contract had stipulated that the price of the stone should be fixed by a commission of stone-cutters, or parties familiar with the value of the material? The different mode of reaching the price would work no change in the binding force of the contract.

Again, suppose that the plaintiff had been incorporated with power to loan money under an act requiring it to make a loan to the city at a specified rate of interest, and acting upon the authority, it had made a loan for years at such rate, could the State, by virtue of its reserved power over the corporation created, compel it to receive a less rate of interest than that stipulated, and make further loans at such reduced rates? The obvious answer to such a question would be that the contract authorized by the law was not the contract by which the lender became a corporation, and it is to the latter alone that the reserved power applies. Would it make any difference if the contract had stipulated that the interest should be annually fixed by the Secretary of the Treasury, or a commission appointed by him? The mode of reaching the rate of interest would not affect the binding character of the contract. The cases thus supposed in no respect differ in principle from the one before us. If the contract in this case cannot be upheld, the contracts in those could not be. Indeed, no contract between the State and a corporation created with the reservation mentioned could bind the State, though every term of obligation and every pledge of honor which language could express should be embodied in it.

It must be, that it is within the competence of the sovereign

power of a State to make a bargain which it cannot break. As observed by one of the distinguished counsel who argued this case, the very notion of the existence of a State—and it does not require a constitutional provision for that—is that, being a political body, it has a right to make a business arrangement with a particular party, corporate or personal, about a particular thing, which shall bind both. And in my judgment it is the plain duty of the court, when such an arrangement comes up for consideration, to assert its binding character and, so far as practicable, hold the parties to it.

I proceed to consider the position that the public of California had acquired such an interest in the water of the plaintiff as to authorize the State to fix the rates at which it shall be sold. The new Constitution declares in its fourteenth article that the use of all water appropriated for sale, rental, or distribution is a public use, and subject to the regulation and control of the State. I do not suppose that by this declaration the State intended to take possession of or assert an interest in all the water within its limits appropriated for sale, rental, or distribution, without regard to the rights of individuals who may have collected it in reservoirs, or stored it in other ways to enable them to dispose of it advantageously. A proceeding to enforce such a declaration would be open to constitutional objections against taking private property for public use without compensation to the owners. The object of the constitutional declaration, as I understand it, was to assert such a control by the State over the sale and distribution of water as to prevent it from being diverted by those who had appropriated, or might appropriate it, from the necessary uses of the public, or from being held at extravagant prices. To such a declaration no one can reasonably object, and if carried out with the observance of the rules which govern in other cases where private property is taken for public use, no legal obstacle can be raised to its enforcement.

The right to take private property for public use is inherent in all governments. It requires no constitutional declaration for its recognition; it appertains to sovereignty. The conditions upon which it shall be exercised are the only matters

requiring constitutional guarantees, and those conditions are that just compensation shall be made to the owner of the property, and that this compensation shall be ascertained by an impartial tribunal. A compliance with these conditions is essential, without which the taking of the property would be a mere exercise of arbitrary power not recognized as legitimate by any principles obtaining in the government of this country, State or federal.

When the use is public—and within certain limits, the State may determine that it is so—any property which the State may deem necessary for that use it may appropriate. The necessity or expediency of the appropriation is not a matter for judicial inquiry. The supplying of pure water to a city and its inhabitants is a matter of public concern. The taking of water held by private parties for that purpose is an appropriation of it for a public use; and the same conditions for its lawful appropriation must be followed as when property of a different character is thus taken. There must be the just compensation for it to the owner, and the impartial tribunal to appraise its value and determine the amount of the compensation. In *Gardner* v. *The Trustees of the Village of Newburg*, 2 Johns. Ch. 162, Chancellor Kent held that the owner of land over which a stream of water ran had a legal right to the use of the water, of which he could not be deprived against his consent without just compensation for it. A statute of New York had authorized the trustees of the village to supply its inhabitants with water, and the chancellor enjoined them from diverting for that purpose the water of a stream which ran through the plaintiff's land, because the statute had made no provision for compensation for it. What gives special significance to this decision, is the fact that the Constitution of New York at that time contained no provision, such as is found in all State Constitutions since adopted, against taking private property for public use without compensation. The chancellor showed that on general principles of justice recognized by all free governments, and by the writings of eminent jurists, such a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property. And he said that

Dissenting Opinion: Field, J.

"A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by lawful judgment of his peers, or by due process of law."

If water cannot be taken by the State for public purposes from a stream running through the land of a private party without just compensation to him, surely the water collected in reservoirs on the lands of the plaintiff as it descends from the heavens cannot be taken for public uses without like compensation. The water thus collected, as already stated, is the property of the plaintiff, to which its title is as perfect as to the reservoirs and aqueducts which it has constructed. It is taken for public use; the use of the city and county, and of their inhabitants. If the plaintiff were dealing with the city or city and county alone, and were compelled to deliver its water at a prescribed price per gallon or hogshead, or according to some other mode of measurement, there could be no question that it would be a case of appropriating private property to public use. Is the character of the transaction at all changed because the water is to be delivered in part to the city and county, and in part to individual consumers, and that the latter are required to make compensation for what they take? There is the same appropriation of the property for public use in the one case as in the other, and it is for the protection of the owner, that he may not be despoiled of his property, that the constitutional guaranty was adopted. It matters not to whom the law may compel the delivery of the property, whether to one or many, if it is appropriated to public use. Water cannot be applied for the purposes required by the city and county or by their inhabitants, without being consumed. So that language employed with respect to regulating compensation for the use of articles of a durable character, such as vehicles, cars, and roads, is inappropriate and misleading when applied to water used for domestic purposes, or for sprinkling streets, extinguishing fires, flushing sewers, and irrigating parks. Regulating the price to be paid for the use of water in such cases is determining the compensation to be made to the

owner for transferring his title. The body of the water passes by its use from his ownership. In all such cases the great principle applies as when property of a durable character is appropriated for public use, that compensation, to be ascertained by an impartial tribunal, must be made to the owner.

As in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166–177, in considering whether, in the execution by a public improvement authorized by law, a flooding by water of land so as to deprive its owner of its use was a taking of it in the sense of the Constitution so as to entitle him to compensation, 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 taking it for the public use."

So I say it would be a very curious and unsatisfactory result if in construing this constitutional provision, designed to protect the property of the citizen against spoliation by the government, and to insure to him when taken for public uses just compensation, to be ascertained by an impartial tribunal, it should be held that when the owner is required to surrender the property taken in parcels to different parties and receive compensation as delivered to them, such compensation need be only such as the government in its discretion may think proper to prescribe. As stated in the Pumpelly case, it would make the constitutional provision an authority for the invasion of private rights under the pretext of the public good, which has no warrant in the laws and practice of our ancestors.

All the authorities lay down the doctrine that the property must be appraised and compensation therefor fixed by an impartial tribunal. It need not be a court of law; it may be composed of commissioners appointed for the special purpose. Whatever its form, its members must be free from interest and should be uninfluenced by prejudice, passion, or partisanship. And its proceedings must be conducted in some fair and just mode, either with or without a jury, as may be provided by law, with opportunity to the parties interested to present evidence as to the value of the property, and to be heard thereon. The legislature which determines the public purpose to be accomplished and designates the property to be taken, cannot act as such tribunal and fix the compensation, for that would be equivalent to allowing the legislature to take the property on its own terms.

"The proceeding" to assess the compensation, says Cooley, "is judicial in its character, and the party in interest is entitled to have an impartial tribunal and the usual rights and privileges which attend judicial investigations. It is not competent for the State to fix the compensation through the legislature, for this would make it the judge in its own cause." Constitutional Limitations, 704.

For the same reason a corporation which has the power to condemn cannot fix the compensation. It would thus become a purchaser at its own price, without regard to the estimate of others as to the value of the property taken. Nor can the corporation appoint the appraisers of the property, for they would, in that case, be its agents, and as such disqualified. Relationship to the parties whose property is to be appropriated, or interest in the property, would disqualify the members of the tribunal as it would jurors before a court.

An act of the legislature of Minnesota provided for taking certain property for public use, and appointed, without the consent of the owners, three persons as commissioners to determine the compensation to be made, without requiring any notice to the owners of the proceeding or providing that they might at any stage appear before the commissioners, and the

Supreme Court of the State held the law to be unconstitutional and void. The Constitution of the State contained no express provision as to the mode by which the compensation to be paid should be determined, and the court said:

"While the legislature is the judge of the necessity or expediency of the exercise of the power of eminent domain, it is not the judge of the amount or justness of the compensation to be made when the power is exercised;" and again: "While, therefore, the Constitution prescribes no proper mode in which the compensation shall be determined, it would seem to follow that as to the question of the amount of compensation, the owner of the land taken for public use has a right to require that an impartial tribunal be provided for its determination, and that the government is bound in such cases to provide such tribunal, before which both parties may meet and discuss their claims on equal terms. And such seems to be the tenor of the authorities upon this question. The act in question does not provide such a tribunal. The commissioners to determine the compensation are private citizens, appointed directly by the legislature, without the consent of the persons whose land is taken by the public. No notice of the proceedings before the commissioners is given; the land owner is not authorized to appear at any stage of the proceedings to object to the commissioners; to introduce any proof or allegation before them. The proceedings are entirely *ex parte*. It certainly cannot be said that this is a just or equitable mode to determine the compensation due to a citizen for property taken for public use." *Langford* v. *County Commissioners of Ramsey County*, 16 Minn. 375.

Objections are often made in the courts of law to the reports of commissioners of appraisement, upon application to set them aside, on the ground that the members have been improperly influenced by others, and have allowed their judgment to be warped by solicitations, or by prejudice or partisanship, and when such objections have been sustained by proper proofs the reports have been adjudged invalid.

If, in the light of these decisions, we turn to the board of supervisors of San Francisco, it would seem impossible for us

to hesitate in declaring that in no respect can it be deemed an impartial tribunal, however honest its members may personally be, to determine the compensation which the owners of the water delivered to the city and its inhabitants should receive. Interested as its members are, as consumers of the water, as agents of the city, also a large consumer, and elected by constituents, every one of whom is a daily consumer, it is wanting in every essential particular to render it, in a legal sense, an impartial tribunal. If, therefore, as I have attempted to show, and I think have shown, the water of the plaintiff is its property, and when it is taken under the law of the State for public use, the plaintiff is entitled to just compensation, that board is incompetent to act in determining what that compensation shall be. It is difficult to conceive of any tribunal more liable to be controlled by external influences against the interests of the company.

Upon the action of the supervisors with reference to all other matters, it has been found necessary, for the protection of the public, to impose numerous restrictions. Without them, improvident contracts on behalf of the city and county would be made, extravagant schemes of supposed improvement undertaken, and its treasury be depleted. And yet this body, which, without any imputation upon the personal integrity of its members, but out of regard to the common weakness of humanity, the community will not trust in other matters without guards against its improvidence, and which is exposed to every influence which can warp its judgment and pervert its action, is allowed almost unlimited control over the property of the plaintiff and the compensation to be paid for it, and respecting which the plaintiff is not permitted to be heard except as a matter of favor.

So in every aspect in which this case can be exhibited—whether we regard the contract contained in the act of 1858, or treat the compulsory delivery of the property as a taking of it for public use—there is no feature in the acts authorized by the new Constitution with respect to its property which does not violate the constitutional rights of the plaintiff. In the enforced sale of its property at prices to be fixed by the agents

of the consumers, the line is passed which separates regulation from spoliation.

For the reasons thus stated I cannot assent to the judgment of the court.

HOWARD COUNTY *v.* PADDOCK.

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

Argued January 22d, 1884.—Decided February 4th, 1884.

Missouri—Municipal Bonds—Municipal Corporation.

The Louisiana and Missouri Railroad, through Howard County, Missouri, was constructed under authority derived from the original charter granted in 1859, and the power conferred by that act upon the county to subscribe to the capital stock of the railroad company without a vote of the people was not affected by the amendment to the Constitution in 1865. *Callaway County* v. *Foster*, 93 U. S. 567, affirmed and followed.

Mr. John D. Stevenson for plaintiff in error.

Mr. John H. Overall for defendant in error.

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

It was conceded on the argument of this case that under the original charter of the Louisiana and Missouri River Railroad Company granted in 1859, Howard County had authority to subscribe to the capital stock of the company without a vote of the people, and that this authority was not taken away by the Constitution of 1865. The claim is, however, that the amending act of 1868 so changed the original charter as to subject it to the prohibitions of the Constitution as to municipal subscriptions made after that act was passed and accepted by the company. As to this it is sufficient to say that in *County of Callaway* v. *Foster*, 93 U. S. 567, it was decided otherwise. By the act of 1868 power was given to build a branch through Callaway County, and to extend the road across the Missouri River, but no change was made in the direction of the main line.

That was left to the discretion of the directors, who retained their original authority to build through Howard County on the way to the Missouri. The original authority of Howard County to subscribe to the stock was consequently unimpaired. The fact that the branch through Callaway County was located, and the subscription of that county received, before Howard County made its subscription, is unimportant in this case, because the line through Callaway County was located as a branch, while that through Howard County was designated in express terms as the main line. If either part of the road was built under new authority conferred on the company by the act of 1868, it certainly was not the main line as located. The power to build the main line was clearly conferred by the act of 1859.

It follows that the judgment of the Circuit Court was right, and it is consequently

Affirmed.

EX PARTE CLODOMIRO COTA.

ON CERTIFICATE OF DIVISION OF OPINION FROM THE DISTRICT OF CALIFORNIA.

Submitted January 22d, 1884.—Decided February 4th, 1884.

Division of Opinion—Jurisdiction.

This court cannot take jurisdiction of a certificate of division in opinion in proceedings under writ of habeas corpus, until entry of final judgment, *Ex parte Tom Tong*, 108 U. S. 556—approved and followed.

Mr. Assistant Attorney-General Maury for the United States.

No counsel appeared for Clodomiro Cota.

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

It was decided at the last term in *Ex parte Tom Tong*, 108 U. S. 556, that this court could not take jurisdiction of a certificate of division in opinion between the judges of a Circuit Court

in proceedings under a writ of habeas corpus until final judgment had been rendered in accordance with the opinion of the presiding justice or judge. This is such a case, and it is consequently remanded to the Circuit Court for further proceedings according to law.

WEBSTER & Another *v.* BUFFALO INSURANCE COMPANY.

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

Argued January 24th, 1884.—Decided February 4th, 1884.

Jurisdiction.

When the pleadings plainly show that a sum below the jurisdictional amount is in controversy, the court cannot accept a stipulation of the parties that judgment may be entered for a sum in excess of that amount.

The case is stated in the opinion of the court. The question of jurisdiction, decided in the case, was not raised by the parties, but was suggested by the court of its own motion during the argument.

Mr. Jefferson Chandler for plaintiffs in error.

Mr. O. B. Sansum for defendant in error.

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

This is a suit upon an open cargo policy of insurance issued by the Buffalo Insurance Company to the firm of Webster, Heinicke & Coglin "on shipments of merchandise to them at St. Louis, . . . they stipulating to report all such shipments and modes of transit to this office as soon as advised thereof." The aggregate amount of the company's liabilities under the policy was in no case to exceed $5,000 on one vessel at any one time, unless special arrangements were mutually agreed upon for amounts exceeding that sum. One of the conditions of the

policy was that, "in case of total loss, the adjustments of the same shall be made upon the valuations specified in the policy, if any; but in the absence of a valuation, then upon the invoice price, without reference to the market value of the article insured."

The allegation of Webster & Coglin in their pleading is, that:

"On the 26th day of February, 1879, they notified defendant at its office in said city of St. Louis of the shipment to them at the said city of St. Louis, from the port of Liverpool, England, on some steamboat whose name was then unknown to said firm, of the merchandise mentioned in the plaintiffs' petition, and requested defendant to enter said shipment on defendant's books at the valuation of four thousand dollars, and then and there delivered to defendant a written and printed application for entering said merchandise under said policy upon a blank form furnished by defendant therefor. Whereupon the defendant, by and through their agents . . . accepted said notice, and then and there agreed to accept said risk for said firm under said policy of insurance . . . and to cover the merchandise mentioned in plaintiffs' petition under said policy in the sum of four thousand dollars."

The goods were lost on the voyage, and this suit was begun on the 1st of May, 1879. The further allegation is that the goods were worth $5,010, and a judgment is asked for that amount. The defence is that the policy did not include the ocean risk, and was limited to "river cargo" and nothing else.

On the 23d of April, 1880, the following stipulation was filed in the cause:

"The plaintiffs and defendants agree that the value of the merchandise described in the plaintiffs' said petition is the sum of $4,800, and that upon the trial of this cause neither party shall give any evidence as to said value. Also, that if the court shall be of opinion that the plaintiffs are entitled to judgment, the judgment shall be entered for the sum of $5,010. But this agreement is expressly limited to the single fact of value, and is not to

be taken as admitting any right of the plaintiffs to recover in this case. It being well understood by the plaintiffs that as to all facts necessary to be proved by the plaintiffs to entitle them to judgment they must make legal proof thereof, excepting only the value of the merchandise aforesaid."

Judgment was given for the company on facts found, and to reverse that judgment this writ of error was brought.

It was decided in *Lee* v. *Watson*, 1 Wall. 337, 339, that—

"In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction on a writ of error sued out by the plaintiff."

Such is now the established rule. *Schacker* v. *Hartford Fire Insurance Company*, 93 U. S. 241; *Gray* v. *Blanchard*, 97 U. S. 564; *Tintsman* v. *National Bank*, 100 U. S. 6; *Banking Association* v. *Insurance Association*, 102 U. S. 121; *Hilton* v. *Dickinson*, 108 U. S. 65. In the present case, although the value of the goods is alleged to have been $5,010 and a judgment is asked for that amount, it appears distinctly, both in the petition of the plaintiffs and their reply to the answer of the defendant, that the insurance was for $4,000 and no more. The loss occurred at some time after February 26th, 1879, and the judgment was rendered January 4th, 1881, so that if the plaintiffs had recovered according to their claim as stated in the pleadings, their judgment, after interest was added to the amount of the insurance, would have been less than $5,000. Although it was agreed that the goods were actually worth more than $4,000 and the loss was total, it was one of the conditions of the insurance that the adjustment should be made upon the valuation specified in the policy. The actual value of the goods at the time of the insurance or of the loss is therefore unimportant.

We cannot accept the stipulation of the parties, that judgment might be entered for $5,010, if the court should be of

opinion that the plaintiffs were entitled to recover at all, as giving us jurisdiction. The dispute, as developed in the pleadings, was as to the liability of the company upon a contract of insurance for $4,000, and no more. Arrangements between parties contradictory to their pleadings, and so evidently made for the purpose of enlarging the case sufficiently to bring it within the jurisdiction of this court, cannot be recognized here. It follows that the writ should be dismissed for want of jurisdiction; and it is so ordered.

Dismissed.

CABLE *v.* ELLIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted January 14th, 1884.—Decided February 4th, 1884.

Removal of Causes.

After a suit in equity involving title to real estate and priority of lien had been long pending in a State court, and the highest court in the State had decided some of the points in controversy, and had remanded the cause to the court below to have other issues determined, A became interested in the property by grant from one of the parties to the suit, and intervened in it by leave of the State court to protect his rights at a time when the right of removing the cause from the State court to the Federal court had expired as to all the parties: *Held*, that under the circumstances the intervention of A was to be regarded as incident to the original suit; and that he was subject to the disabilities resting on the party from whom he took title; and that the time for removal having expired before he intervened, his right of removal was barred by that fact.

Bill in equity to determine priority of liens upon real estate in Illinois and for other relief. The only question decided was as to the right of removal of the cause from a State Court to a Circuit Court of the United States. The facts which make up the case are stated in the opinion of the court.

Mr. Charles M. Osborn for appellant.

Mr. George W. Spahr for appellee.

Opinion of the Court.

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

This is an appeal from an order of the Circuit Court remanding a suit removed from a State court. From the confused mass of pleadings, exhibits, proofs, orders, and decrees, making a volume of more than five hundred printed pages, sent here as a transcript of the record below, and the reports of the decisions of the Supreme Court of Illinois in *Sumner* v. *Waugh*, 56 Ill. 531, *Cable* v. *Ellis*, 86 Ill. 525, and *Ellis* v. *Sisson*, 96 Ill. 105, referred to on both sides as part of the case, we have, with the help of the briefs of counsel, extracted the following facts, which, in our opinion, are decisive of the present controversy:

On the 3d of June, 1858, Thomas B. Ellis bought of John M. Waugh and Henry B. Ellis certain lands and mill property in Illinois. Waugh and Henry B. Ellis were at the time indebted to Thomas B. Ellis to the amount of $8,000 or thereabouts, and the mill property was encumbered by a mortgage to Benjamin T. Sisson for $9,280. Thomas B. Ellis paid for the property by releasing the debt due himself, assuming the mortgage to Sisson, and giving his own notes to Waugh and Henry B. Ellis, secured by mortgage on the property for $14,984.54. On the 30th of September, 1858, Thomas B. Ellis entered into a written contract with Sisson and John B. Rathbun for the sale, release, and conveyance of "all his paid in interest" in the property, for which the purchasers were to pay as in the agreement specified, including with the rest such a sum to Thomas B. Ellis personally as from authenticated bills it should appear he had "paid in." To secure the payment of such sum as should be found to be due him a mortgage was to be given on the property. Under this contract possession was delivered to the purchasers.

Disputes having arisen as to the amount of the "authenticated bills," Thomas B. Ellis, on the 21st of March, 1861, filed a bill in chancery in the Mercer County Circuit Court to enforce a specific performance of the contract. To this bill Waugh, Sisson, and Rathbun were made defendants, and the prayer was that the mortgages of Waugh and Henry B. Ellis to Sisson, and Thomas B. Ellis to Waugh and Henry B. Ellis

might be cancelled, and that the amount of purchase money due Thomas B. Ellis from Sisson and Rathbun might be ascertained and adjudged to be the paramount lien on the property in the hands of the purchasers. As to Waugh, the averments were, in substance, that he was "in fact and in equity" a purchaser of the property with Sisson and Rathbun, and that by the terms of the contract, the notes and mortgage of Thomas B. Ellis, then held by Waugh, and the mortgage to Sisson, were to be cancelled and a first lien on the property given to Thomas B. Ellis as security for the purchase money to be paid to him.

In 1862 Sisson assigned his notes and mortgages to Austin, Sumner & Co., and in 1864 they began a suit for foreclosure in the Mercer County Circuit Court, making Waugh, Sisson, Thomas B. Ellis, and Henry B. Ellis defendants. Thomas B. Ellis answered, and also filed a cross-bill, in which he set up his sale of the property and a cancellation under that sale of the mortgage to Sisson before the transfer to Austin, Sumner & Co. The Circuit Court decreed against Austin, Sumner & Co., and dismissed their bill, but upon appeal to the Supreme Court, the decree dismissing the bill was reversed in 1869, but the lien of Austin, Sumner & Co. was postponed to that of Thomas B. Ellis for the purchase-money under his contract of sale. As to the mortgage of Thomas B. Ellis to Waugh and Henry B. Ellis, the language of the opinion is as follows:

"This contract postponed also the mortgage in question to the mortgage executed by T. B. Ellis to Waugh and H. B. Ellis. They were not parties to it, and could not be bound by its provisions. Although the contract seems to contemplate that their mortgage was also to be cancelled, it does not appear how or in what mode, and not being parties to the agreement, they cannot be affected by it. It is, therefore, the first lien on the property, and must be so held. The whole case, somewhat complicated, it is true, shows a contest between equities. That the complainants have some which should have been regarded by the Circuit Court and decreed to them, we cannot doubt. The bill should not, therefore, have been dismissed. In order that the equities of the complainants may be enforced, it seems necessary that there should be a foreclosure of the Waugh and Ellis mortgage. . . .

The pleadings are not framed with a view to any relief as to the Waugh and Ellis mortgage, or as to any substitution of the complainants to the rights of Waugh in the Waugh and Ellis mortgage. Leave will be given to amend the pleadings as the parties may be advised, and to take further proofs." *Sumner* v. *Waugh*, 56 Ill. 541, 542.

The case was then remanded for further proceedings in conformity with the opinion, in which suggestions were made as to what should be done if the Waugh and Ellis mortgage should be found to be a valid and subsisting lien.

After this decision Philander L. Cable took from Waugh an assignment of the note and mortgage of Thomas B. Ellis to Waugh and Henry B. Ellis, and in 1872 began a suit in the Mercer County Circuit Court for a foreclosure. To this suit Thomas B. Ellis, Sisson, and Austin, Sumner & Co. were made defendants. Thomas B. Ellis answered, setting up his contract of sale, and claiming a cancellation of the mortgage thereby.

On the 6th of May, 1873, an order was entered in the Circuit Court consolidating the three suits, to wit, that of Thomas B. Ellis, that of Austin, Sumner & Co., and that of Philander L. Cable. From that time these three suits were proceeded in as one and involving the same general matter. On the 10th of June, 1875, the Circuit Court entered a decree establishing the claim of Thomas B. Ellis as against Cable. From this decree Cable appealed to the Supreme Court, where, in 1877, after holding that the Sisson mortgage could not be enforced as against Thomas B. Ellis, it was said in the opinion delivered:

"It was doubtless the intention of the contract of September 30th that the latter mortgage also [that to Waugh and Ellis,] as well as the former [that of Sisson] should be cancelled, so as to give T. B. Ellis a superior lien upon the property for the security of the payment of his paid-in interest, and for the carrying out of such intention, and being impressed with the justice of the claim of T. B. Ellis that he should have such security, we have anxiously sought for some satisfactory ground upon which we might rest the support of such a claim, but we have not been able to discover any. . . . The written contract of September

30th, 1858, was not signed by Waugh, and we cannot hold him as bound by that contract to discharge and release his mortgage, although we may strongly suspect there was a secret understanding to that effect." *Cable* v. *Ellis*, 86 Ill. 539, 540.

The result was a decision that the Waugh and Ellis mortgage should be first paid, and an order was entered remanding the suit to the Circuit Court for further proceedings in accordance with the opinion.

The case was redocketed in the Circuit Court at or before the May term, 1878, and on the 25th of November, Thomas B. Ellis, by leave of the court, filed an amended bill, in which it was averred, in substance, that while Waugh did not sign the contract of purchase by Sisson and Rathbun, he did in fact agree with Ellis at the time that if the sale was made on the terms proposed, he would postpone his mortgage on the property to the lien of Ellis for the purchase money and release Ellis from the payment of the notes. Answers were filed and new testimony taken. Upon the hearing in the Circuit Court the lien of Cable, in preference to that of Thomas B. Ellis, was established, and Ellis appealed. In 1880 the Supreme Court reversed the decree of the Circuit Court, and in the opinion, when speaking of the former decision in the case, it was said:

"There was no proof of such a joint written contract, or of such a joint contract by Waugh, Sisson and Rathbun as alleged. The allegations and proofs did not agree. The amendment which has been made to the bill of Ellis, since the case was remanded, removes the difficulty which before existed. It sets up a separate verbal agreement on the part of Waugh to release the mortgage."

Then, after an examination of the testimony, the opinion proceeds:

"We are satisfied, from the evidence, that outside of this written agreement there was a verbal agreement between Waugh and Ellis to the purport that if Ellis would sell out to Sisson and Rathbun, he, Waugh, would accept such sale in satisfaction of the debt of Ellis to Waugh and H. B. Ellis. We think that by virtue of this agreement, and the transfer of the property, which

was made by T. B. Ellis, and the full enjoyment of it ever since by Sisson, Rathbun, and Waugh among them, the notes and mortgage to Waugh and H. B. Ellis were satisfied ; and as those to Sisson are also satisfied, that T. B. Ellis is entitled to the first lien on the property for his paid-in interest."

Cable thereupon filed a petition for rehearing, and from the opinion it appears that one of the grounds relied on was that the court below had no right to allow the amendment of the bill after the decision on the former appeal, by setting up in substance that the agreement of Waugh was by parol instead of in writing, as was originally alleged ; but this petition was overruled and the case remanded to the Circuit Court for further proceedings in accordance with the opinion. *Ellis* v. *Sisson*, 96 Ill., at 114, 119, 122.

When the case got back to the Circuit Court, on the 10th of February, 1881, a receiver of the property was appointed on the application of Thomas B. Ellis and against the objections of Cable.

During the year 1876, while the several suits were pending, Philander L. Cable caused a small part of the property to be laid off into lots, one of which went into the possession of Hiram Cable. On the 14th of May, 1881, after the receiver was appointed, Hiram Cable filed in the Circuit Court his petition of intervention in the cause, on the ground that he was "pecuniarily interested in the subject-matter of the litigation, . . . and that the orders and decrees that may be entered concerning the same may very materially affect him pecuniarily and conclude him with respect to his rights in the premises." He then states in substance that

"on or about the — day of December, 1876, Philander L. Cable was in the actual and exclusive possession of part of the premises described in the pleadings, and represented that he had bought the Waugh and Ellis mortgage ; that the mortgage had been declared by the Supreme Court to be a first lien on the property ; that in a short time there would be a final and conclusive decree for a sale of the property ; that he should buy the property at

the sale, and that in that way and others he would acquire an indefeasible title in the course of two or three years at the most."

Relying on these representations, Hiram Cable, "on the said—day of December, 1876," orally agreed with Philander Cable to purchase one of the lots that had been laid out, and to pay the reasonable and fair value thereof when a title was made. Under this agreement, with the leave of Philander, he went into the possession of the lot, relying on

"the said decision and determination of the said Supreme Court, and then being fully advised by the pleadings and proceedings herein of the extent and character of the claim of the said Thomas B. Ellis in and to said premises, and fully believing the said claim of the said Ellis was not other or different than he had himself stated the same in his pleadings, and that he would forever thereafter be estopped in equity and right, as against your petitioner or the said Cable, to assert and maintain that the same was other or different than as stated in his said pleadings herein, your petitioner did enter upon and take possession of said lot and parcel of said premises and has ever since remained in possession of the same."

After entering into possession, and while the rights of the parties remained the same, he erected on the property permanent and lasting improvements of the value of $1,800. He then charges that long after the improvements were made it was adjudged and determined by said Supreme Court:

"upon and by virtue of a new and distinct claim (not germane to or consistent with his original claim in the premises) made and asserted by said Ellis, in and by an amendment to his pleadings, long since said improvements were so made, . . . that the said mortgage so purchased by said Cable from said Waugh was not a first lien upon said premises, but that the same was in equity . . . satisfied and discharged,"

and the lien of Ellis was established for more than the property and all the improvements thereon were worth.

"But your petitioner says that the said Ellis ought not to be allowed in a court of equity to insist and maintain, as against your

petitioner, such a new claim, so made by his amendment aforesaid, but that in equity and good conscience he ought to be stayed and estopped from so interposing the same. That the said Cable has in all things acted in good faith and fairly with your petitioner, and has strenuously endeavored to maintain his claimed rights in the premises, but that, as your petitioner believes, in case such premises shall be sold in behalf of the said claim of the said Ellis, without the decree and direction of this court that the value of said improvements shall be first paid to your petitioner out of the proceeds of such sale, your petitioner will wholly lose all costs, disbursements, labor, and expenses he has incurred in making the same, as in such case the said Cable will not purchase said premises at such sale, and, as your petitioner is advised, that under the facts and circumstances aforesaid, the said Cable will not be liable in law or equity to your petitioner for the same, or in any respect, on account of said agreement so made with him as aforesaid."

He then asserted the priority of the lien of the Waugh mortgage over that of Sisson, and that, although Ellis had notice of his acts and proceedings, no objection was made to what he did in the way of improvements. After referring to the pleadings and proceedings in the cause for further particulars, he submitted his rights to the court, and prayed that, if the premises should be sold under the decree,

"it shall be ordered and directed that out of the proceeds of such sale there shall be paid to your petitioner such part thereof as shall bear the same ratio to the whole amount of the proceeds of such sale, as the value of said improvements shall bear to the whole value of said premises, or an amount equal to the value of said improvements, such ratio or value of said improvements to be first determined, as the court shall order and direct, in accordance with chancery practice, and for such other and further relief in the premises as shall seem meet and proper."

This petition was answered by Ellis on the 21st of July, and by the other parties in opposition within a few days after, but on the 29th of July Ellis moved to strike the intervening petition from the files for reasons stated. Before this motion was disposed of, and at the same term, to wit, on the 30th of July,

Opinion of the Court.

Hiram Cable filed his petition for the removal of the causes as consolidated to the Circuit Court of the United States for the Northern District of Illinois, alleging that the value of the matter in dispute exceeded $500; that he was a citizen of Iowa and Ellis a citizen of Missouri, and Austin, Sumner & Company citizens of Massachusetts; that none of the other parties to the causes were citizens of Iowa; that "there is a controversy presented and made by his intervening petition . . . which is wholly between citizens of different States, and which can be fully determined as between the sole parties interested therein in the Circuit Court of the United States," and that such controversy was solely between him and Ellis and Austin, Sumner & Co.

On the 29th of August the State court made an order staying all further proceedings in that court and transferring the causes to the Circuit Court of the United States. Afterwards all parties entered their appearance in the Circuit Court, and thereupon Ellis moved to remand. This motion was granted on the 6th of April, 1882, and from that order the present appeal was taken.

Both Philander Cable and Hiram Cable acquired their respective interests in the property involved in this litigation during the pendency of the suit brought by Thomas B. Ellis in 1861, to establish his alleged superior lien. Philander Cable is concluded by all that has been done, because he was and is an actual party to the suit. There has been no time since the first term of the Mercer County Circuit Court, after the act of March 3d, 1875, c. 137, was passed, that he could remove the suit from the State court. *Removal Cases*, 100 U. S. 457. Hiram Cable made the arrangement with Philander Cable on which all his rights depend long after that time had gone by. In fact, the decree of June 13th, 1875, was the result of a hearing begun after the act went into effect. So that the question here is whether Hiram Cable has by his petition of intervention, after twenty years of litigation between the original parties, introduced a new and separate controversy into the suit, which entitles him on his own application to transfer the whole case to the Circuit Court of the United States.

Syllabus.

If Hiram Cable is not to be concluded by anything done in his absence, he ought not to be allowed to force himself into the suit at this late day. No sale made under a decree to which he is not actually or constructively a party can cut off his rights. If he can be bound by a decree in his absence, it is because he has been all the time represented in the suit by Philander Cable, under whom he claims, and as an intervenor he can do nothing that might not have been done for him by his representative without his intervention. He took his place by intervention in the suit subject to all the disabilities that rested at the time on the party in whose stead he is to act. If his application to have his rights in respect to the improvements he has put on the property settled in this suit can be entertained at all, it will be only as an incident to the original controversy, and whatever would bar a removal of suit before he intervened will bar him afterwards, even though by his intervention he may have raised a separate controversy.

This disposes of the case, for, as has already been seen, the right to remove this suit was barred long before Hiram Cable intervened. Without, therefore, determining whether Hiram Cable can claim the benefit of his improvements, notwithstanding the pendency of the suit, or whether, if his petition had been filed in time, he would have been entitled to a removal of the suit on the showing made,

We affirm the order remanding the cause.

TUPPER & Another *v.* WISE.

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

Submitted January 28th, 1884.—Decided February 4th, 1884.

Jurisdiction.

Distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction.

Motion to dismiss, with which is united a motion to affirm.

Mr. Henry Beard and *Mr. Charles H. Armes* for the motion.

No brief filed *contra.*

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

This was a suit brought by Wise, the defendant in error, against the plaintiffs in error and others to recover the possession of sec. 21, T. 3 N., R. 8 E., Mount Diablo base and meridian, containing 640 acres of land. Tupper answered, denying that he was in possession of any part of the section except the N. E. $\frac{1}{4}$, and to that he set up a pre-emption claim and settlement. Lenfesty made the same answer and claim as to the S. E. $\frac{1}{4}$. There was no joint ownership or joint possession. Each defendant claimed a separate and distinct interest in a separate and distinct part of the land. The jury found that the "defendants were each severally in the wrongful possession of the lands respectively described in their several answers and no others, and that the value of the rents and profits of the lands so held and possessed by defendant Tupper is $100, of the land so held and possessed by defendant Lenfesty $100, and that the value of each one of said tracts of 160 acres is $3,000, and of the two of them $6,000." Judgment was thereupon rendered against Tupper for the possession of his tract and $100 damages, and against Lenfesty in the same way. Tupper and Lenfesty then sued out this writ of error, which Wise moves to dismiss, because the claims of the several plaintiffs in error are separate and distinct, and the value of the matter in dispute with either of them does not exceed $5,000.

This motion is granted. The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction. The whole subject was fully considered at the last term in *Ex parte Baltimore & Ohio Railroad Company*, 106 U. S. 5; *Farmers' Loan & Trust Company* v. *Waterman*, id. 265; *Adams* v. *Crittenden*, id. 576; *Schwed* v. *Smith*, id. 188. The stipulation as to the value of the property which is found in the record cannot alter the case, for it states that the aggregate value of

the two quarter sections exceeds $5,100, and the verdict fixes the value of each quarter at $3,000.

Dismissed.

Lynch & Another v. *Bailey* & Another. This, like the case of *Tupper* v. *Wise*, just decided, was a suit to recover the possession of a whole section of land. Each of the plaintiffs in error was in possession of a separate quarter-section under a pre-emption claim. Their defences were separate and distinct, and the recovery against each was for the land that he separately claimed and occupied. The value of the recovery from either of the defendants does not exceed five thousand dollars, though the aggregate against all is more.

The motion to dismiss is granted for the reasons stated in the other case.

THE STATE, RUCKMAN Prosecutor, *v.* DEMAREST, Collector.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Submitted January 10th, 1884.—Decided February 4th, 1884.

Error—Practice.

Grigsby v. *Purcell*, 99 U. S. 505, followed; holding that if the transcript is not filed and the cause docketed during the term to which it is made returnable, or some sufficient excuse given for the delay, the writ of error or appeal becomes inoperative, and the cause may be dismissed by the court of its own motion or on motion of the defendant in error or the appellee.

Motion by a defendant in error to docket and dismiss a case.

Mr. Peter W. Stagg for the mover.

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

This is a motion by Cornelius N. Durie, the successor in office of Demarest, the defendant in error, to docket and dismiss a case. From the motion papers it appears that Demarest, as collector of the township, recovered a judgment against the State, Ruckman prosecutor, in the Court of Errors and Appeals

of New Jersey, on the 11th of July, 1866, and that Ruckman sued out a writ of error from this court, gave bond and had citation signed, but never docketed the case here. Ruckman died on the 5th of November, 1882, and Demarest in the summer of 1883.

Upon these facts it is clear that the writ of error had become inoperative for want of prosecution long before it abated by the death of the parties. *Grigsby* v. *Purcell*, 99 U. S. 505, and cases there cited. The exact date when the writ was sued out is not stated, but if it had been delayed until five years after the judgment, there was no time within ten years before the death of Ruckman that he would have been allowed to docket the case in this court, since that could only be done during the term to which the writ was returnable. It seems to us proper, therefore, to declare the suit abated by the death of the parties, and leave the representatives of those in interest to proceed accordingly. An order to that effect may be entered.

BEAN & Another *v.* PATTERSON & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Submitted January 28th, 1884.—Decided February 4th, 1884.

Fees—Practice.

When a party has printed the transcript of the record at his own expense, the case may be docketed without security for the fee allowed the clerk by Rule 24, § 7: but the printed copies cannot be delivered to the justice or the parties for use on final hearing or on any motion in the progress of the cause unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies.

Motion for leave to docket an appeal, without security for payment of fees for printing.

Mr. James S. Botsford for the motion.

No counsel opposing.

Opinion of the Court.

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

In this case the appellants have delivered to the clerk the requisite number of copies of the record in print, and they ask to docket the cause without securing the payment of the fee chargeable under the present rules in connection with the printing.

The act of March 3, 1883, c. 143, 22 Stat. 631, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1884, made an entire change in the emoluments of the clerk of this court. Before that act the clerk collected the fees of his office, paid the expenses, and kept what remained as his own compensation. He was not accountable to the government or to any one else for the income. The act of 1883 established a maximum for his annual compensation, and required him to pay into the Treasury all the fees and emoluments of the office over his salary, necessary clerk hire, and incidental expenses.

The same act made it the duty of the court to prepare a table of fees to be charged by the clerk. This was done, and among the rest is the following:

"For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio." Rule 24, sec. 7.

The clerk is responsible to the court for the correctness and proper indexing of the printed copies of the record, for their presentation to the justices in the form and of the size prescribed by the rules, and for their delivery when required to the parties entitled thereto. As he must now account to the Treasury for the fees and emoluments of his office, he may demand payment in advance. *Steever* v. *Rickman*, 109 U. S. 74. If the printing is actually done under his supervision he may require the payment of the fee chargeable under the rule before the printing is done. If the parties themselves furnish the printed copies, the fee must be paid, if demanded, in time to enable him to make the necessary examinations and be ready to deliver the copies to the parties or their counsel and to the

court when needed for any purpose in the progress of the cause. The fee is for the service specified in this item of the table, and is indivisible. Consequently, if the clerk performs any part of the service he is entitled to collect the whole fee; and if the printed record is used at all, it must be examined by him to see if it conforms to the copy certified below and on file as the transcript of the record. So that if the printed copies are used for any purpose in the progress of the cause the whole fee is chargeable. As the law now stands the fees and emoluments of the office belong to the government, subject only to the payment of the annual salary of the clerk, necessary clerk hire, and incidental expenses, and the clerk is the collecting agent for the government.

As this record has been printed the case may be docketed without security for this fee, but the printed copies cannot be delivered to the justices or the parties for use on the final hearing or on any motion in the progress of the cause unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies.

Rule 31 relates only to the form and size of the printed records, briefs, and arguments, and has nothing to do with the fee now in question.

CONRO & Another *v.* CRANE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued January 24th, 25th, 1884.—Decided March 3d, 1884.

Bankruptcy—Sale.

Property was sold to H, by order of a court of bankruptcy. He not paying for it, the court, without notice to him, vacated the order of sale, and made an order selling it to C, who paid for it, and went into possession of it. Afterwards, on review, the sale to C was set aside, and the sale to H reinstated. H, having paid for the property, received possession of it, and afterwards the money paid by C was repaid to him: *Held*, that C was not liable to pay to H the profits derived by him from the use of the property while he had it.

Statement of Facts.

On the 5th of June, 1875, Harry Fox and William B. Howard, co-partners as Fox & Howard, were adjudged bankrupts, on the petition of their creditors, by the District Court of the United States for the Northern District of Illinois. On the 16th of June, Bradford Hancock was appointed by that court provisional assignee. He took possession of the property hereinafter mentioned, and, on his petition, the court made an order, on June 19th, directing him to advertise for sealed bids for the purchase of the property, either as a whole or in parcels, the bids to be opened by the judge of the court on July 1st. The property consisted of tug-boats, dredges, pile-drivers, and scows, and articles used in connection therewith. On July 2d the assignee reported to the court a bid of $40,000 by Jefferson Hodgkins, for certain of the property, and recommended its acceptance. On July 9th the court made an order approving of and confirming the sale, and directing the assignee, on the receipt of the $40,000, to execute to Hodgkins all transfers necessary to vest in him the title of the bankrupts to the property, and to deliver to him the immediate possession thereof, and to pay the $40,000 into court. On the 12th of July, the assignee presented to the court a sworn petition, setting forth that he had repeatedly called on Hodgkins to pay over to him the purchase-money, and had on July 10th presented to Hodgkins a certified copy of the order confirming the sale and demanded payment of the $40,000, or a deposit on account thereof, and offered delivery of the property on payment; that Hodgkins had neither paid nor deposited anything; that Conro & Carkin (a firm composed of Albert Conro and Willard S. Carkin) had made a bid of $40,500 for the same property, agreeing to assume certain charges; and that he believed it to be for the best interest of the estate that the order confirming the sale to Hodgkins should be set aside, and that the property be sold to Conro & Carkin. On the same day the court made an order *ex parte*, setting aside the order of sale to Hodgkins, annulling such sale, accepting the bid of Conro & Carkin, and directing that the property included in the bid of Hodgkins be sold to Conro & Carkin for $40,500, on the terms of their bid, and that the assignee deliver the property to them, with proper bills of

sale, on their paying to him the $40,500. On the same day Conro & Carkin paid to the assignee the $40,500, and he delivered to them a bill of sale of the property and put the property into their possession.

On the 10th of August Hodgkins filed in the Circuit Court of the United States for the Northern District of Illinois a petition for the review of the order made by the District Court on July 12th. That petition alleged that Charles S. Crane was the principal in the Hodgkins bid. On the 13th of August, the Circuit Court, on a hearing on the petition of review, made an order stating that it was of opinion that the District Court should not have made the order of July 12th without giving Hodgkins or Crane an opportunity to be heard, and directing the District Court to open and set aside that order, and give Hodgkins or Crane an opportunity to be heard on the application to set aside or vacate the order of July 9th, and that in the meantime and until the action of the District Court thereon nothing should be done in relation to the property, by any of the parties, prejudicial to the rights of Hodgkins or Crane.

On the 18th of August, Hodgkins and Crane filed their joint petition in the District Court, praying that the order of July 12th be set aside; that the property be delivered to them; and that Conro & Carkin, the bankrupts, and the assignee pay to them the value of the use of the property from July 12th. The petition alleged that the bid of Hodgkins was made on behalf of and by the direction of Crane, and that the assignee and Conro & Carkin had acted in bad faith. Hancock had been duly appointed assignee in bankruptcy, and he and Conro & Carkin and the bankrupts were made parties to the proceedings, by a rule to show cause. The assignee answered the petition on the 27th of August. Under an order of the district judge the petitioners paid into the District Court, on the 6th of September, the sum of $40,000. On the 13th of September, Conro & Carkin filed a joint answer to the petition. Testimony was taken before a register on the issues raised. The matter was heard by the District Court on the 4th of November, and on the 6th of March, 1876, it made an order dismissing the petition on the merits. On the same day

Crane and Hodgkins filed in the Circuit Court a petition of review, praying for a reversal of the action of the District Court. On the 10th of April, the Circuit Court made an order reversing and setting aside the orders made by the District Court July 12th, 1875, and March 6th, 1876, and confirming its own order of August 13th, 1885. On the 24th of April, the Circuit Court made a further order vacating the order made by the District Court July 12th, 1875, and decreeing that the order made by the District Court July 9th, 1875, remain in full force and effect as originally made, and then proceeding as follows:

"And it appearing that the sum of forty thousand dollars has been paid into the District Court on the sale confirmed to the said Hodgkins on the ninth day of July, A. D. eighteen hundred and seventy-five, and this court being of opinion that upon the payment of the purchase money by the said Hodgkins the order of the ninth day of July aforesaid vested in him from that date all the right, title, and interest of the bankrupts in the property, the District Court is hereby directed to order the assignee to execute and deliver to the said Hodgkins the necessary papers to show the title in the said property, and to cause the assignee to deliver the said property to the said Hodgkins or to the said Crane. And the District Court is hereby directed and required to make all needful rules and orders, summary or otherwise, to carry into effect the said confirmatory order of July ninth, A. D. eighteen hundred and seventy-five. And the District Court is directed to return, subject to the conditions hereinafter stated, to the said Conro & Carkin, the sum of forty thousand five hundred dollars, the amount of purchase money paid by them, the sale to them being hereby annulled and set aside. . . . And there being a question raised as to the rights of the parties growing out of the possession for a time of the property by Conro & Carkin, and of certain moneys paid by them for claims thereon, expenses, improvements, and repairs, as well as the profits, it is ordered that the said Conro and Carkin, or the assignee, or the said Crane and Hodgkins, or either of them, may have the right to file a bill or to commence other legal proceedings in any court having jurisdiction thereof, as they may be advised, to determine the rights or equities of the parties. And the District Court, may, on

the application for that purpose, retain any part of the money now in the District Court and belonging to Conro & Carkin, or require security, before the said money is paid to them, from the said Conro & Carkin, to answer for any claim due from them, growing out of the possession and use of the property, to any party or parties entitled thereto."

Conro & Carkin and the assignee took an appeal, May 3d, 1876, to this court, from that order. On the 5th of May, 1876, Crane and Hodgkins obtained possession of nearly all the property in question by means of a writ of replevin issued from a court of the State of Illinois, and on the 9th of May, 1877, they obtained possession of a pile-driver, a part of the property. The case in this court was docketed here, but was, on motion of the appellees, dismissed for want of jurisdiction, on March 19th, 1877. *Conro* v. *Crane*, 94 U. S. 441. On the 24th of May, 1877, the District Court made an order that Conro & Carkin have leave to withdraw the $40,500 on their giving a bond in the penalty of $30,000, which they gave, with three sureties, conditioned that they would appear without delay to any suit or bill which might be brought against them, by any person concerned, touching the premises, and would pay all claims due from them to any parties entitled thereto, growing out of the use of the property in question. On the same day the $40,500 was paid back to them and the bill in this suit was filed by Crane and Hodgkins, in the Circuit Court of the United States for the Northern District of Illinois, against Conro & Carkin and the assignee.

The bill sets forth the foregoing matters and charges fraud and conspiracy, and alleges that Conro & Carkin derived profits from the use of the property and were the constructive trustees of the plaintiffs in using it, and prays for an account of such profits, and of the expenses incurred in using the property, and of the fair rental value of the property, and of the value of its use, and of the expenses of the plaintiffs in defending their title and obtaining possession of the property, and for a decree against the defendants therefor. The defendants answered the bill, and there were replications to the answers.

The proofs so taken before the register in bankruptcy were used in evidence, and further proofs were taken on both sides. An order of reference to a master was made in June, 1879, under which, after taking further evidence, he reported as to the rental value of the property from July 12th, 1875, during the time Conro & Carkin had it, and as to the amount of profits they derived from it while they had it, and also as to what they paid for repairs on it, and as to what Crane and Hodgkins had paid for fees and expenses in recovering or defending the title to the property in the previous litigations. The appellants and the appellees excepted to the report, and the court made a final decree which contained the following provisions:

"That the said defendants Albert Conro and Willard S. Carkin be held to account for the reasonable value of the use of said property in the pleadings described, while the same was withheld from the possession of the said complainants by the defendants Conro & Carkin, which value, in the judgment of the court, is, in this case, equal to the net profits realized by them from the use of said property other than pile-driver No. 6, from July 12, 1875, to May 5, 1876, being, as the master reports, the sum of fourteen thousand six hundred and ninety-three dollars and seventy-nine cents ($14,693.79), the report of the said master in that behalf being hereby confirmed; and that the said complainants ought to have and recover of the said Albert Conro and Willard S. Carkin the said last mentioned sum, with interest thereon at the rate of 6 per cent. per annum from May 5, 1876; and also that the said complainants are entitled to a decree against the said Albert Conro and Willard S. Carkin for the further sum of three hundred dollars ($300) for the use of pile-driver No. 6, with like interest from the 9th day of May, 1877; and that the said complainants ought to have and recover of the said Albert Conro and Willard S. Carkin the said last mentioned sum with interest as aforesaid. And it further appearing to the court that the said two sums of money and interest thereon as aforesaid amount, at the date of the entry of this decree, to the sum of eighteen thousand and seventy dollars ($18,070.00), it is thereupon further ordered, adjudged, and decreed by the court, that the said com-

plainants do have and recover of the said defendants Albert Conro and Willard S. Carkin the said last mentioned sum of eighteen thousand and seventy dollars, besides the costs of this suit, to be taxed."

From that decree Conro & Carkin appealed to this court.

Mr. Lyman Trumbull for appellants.

Mr. John S. Cooper for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

He recited the facts in the foregoing language and continued: It is contended by the appellants that the Circuit Court had no jurisdiction of this suit because the assignee was a citizen of the same State with the plaintiffs. But no relief was granted against him by the final decree, and, although the suit was not formally dismissed as to him, it is evident that he was treated throughout as only a formal party. There was jurisdiction by citizenship as to the other parties, and the real controversy was between them. The record does not show that the appellants raised this question in the Circuit Court. Under these circumstances, it is not proper to allow the jurisdiction between the real parties to be now challenged on this ground.

It is also contended that the remedy of the appellees was at law and not in equity. Waiving the consideration of this question, we prefer to dispose of the case on its merits.

We are unable to perceive any relation of trust between the appellants and the appellees. The former were clothed with no fiduciary character as respects the latter, by reason of any relation existing between them prior to the making by the appellants of their bid, nor did the holding of the property by the appellants create such relation. The appellants received the property and paid their $40,500 under the sanction of an order of the court, which not only authorized the sale to them but set aside the order of sale to Hodgkins and annulled such sale. They purchased at a judicial sale, and received the property from the hands of the court. The court made the second order of sale without notice to Hodgkins or Crane. That was

held to be erroneous. On a hearing, the District Court maintained the propriety of the order. On review, the decision was reversed, and the Circuit Court, being of opinion that, on the payment by Hodgkins of the purchase-money, the original order of sale to him vested in him, from July 9th, 1875, all the right, title, and interest of the bankrupts in the property, directed that the District Court order the assignee to deliver to Hodgkins the necessary title papers of the property, and cause the assignee to deliver the property to Hodgkins or Crane. It also directed the District Court to return to Conro & Carkin their $40,500, the order saying, "the sale to them being hereby annulled and set aside." The order did not conclude or determine anything as to any liability of the appellants to any one for profits or rent or value of use of the property. On the contrary, it gave to all parties, the appellants, or the appellees, or the assignee, the right to institute legal proceedings in any competent court to determine the rights or equities of the parties growing out of the possession of the property by the appellants, and out of their having paid moneys for claims, expenses, improvements, and repairs thereon, and out of the profits, as to all of which matters it stated a question was raised. The declaration in the order of the Circuit Court, that Hodgkins, having paid his $40,000, was vested, by the order of July 9th, 1875, from that date, with the title of the bankrupts to the property, did not confer on Hodgkins or the appellees the right to collect rent, or value or profits of use, from the appellants, for the time they had the property. Nor did the provision of the order in regard to the retention by the District Court of part of the money paid by the appellants, or the giving of security by them, have that effect. The question of their liability depended on many other considerations.

There was no privity of contract between the appellees and the appellants. The latter held the property adversely to the former for 8 months and 29 days, and all the time under the authority of an order of the District Court. The appellees recovered possession of nearly all of the property 25 days after the order of the Circuit Court was made. The appellants were

deprived of the use of their $40,500 from July 12th, 1875, to May 24th, 1877, a period extending beyond the time during which they held any of the property, and the money was returned to them only on their giving a bond with three sureties. The appellees succeeded to the title of the bankrupt and the assignee to the property from July 9th, 1875, according to the order of the Circuit Court, but they could have no greater rights in respect to recovering from the appellants for the use of the property after that date than the assignee could have, because they held under him and derived all their rights from him; and he could have none so long as he withheld the $40,500 from the appellants. He could not keep the money and still have rent for the property. That would be to keep the money and virtually the property too, by recovering for the use of the latter. The legal presumption is that the appellants could, by the use of the money, have procured like property, and made out of it the profits decreed against them.

The rights in question which the appellants acquired by the judicial sale are to be protected so long as the order of sale was in force. Moreover, during the entire period, after the order was reversed as well as before, the court and the assignee retained the money of the appellants. The title of the appellants to the property and their right to keep it as purchasers were, undoubtedly, subject to the result of the litigation had. But a rescission of the sale and the destruction of their title involved, as a necessary element, the return to them of their money, so far certainly as any claim for rent or profits was concerned.

We do not think it necessary to refer to the voluminous testimony adduced on the question of bad faith and fraud. We see no sufficient evidence to impeach the good faith of the appellants, nor do we understand from the opinion of the Circuit Court on the review in bankruptcy, that that court questioned their good faith or fair dealing, whatever views it expressed as to the conduct of the assignee.

The present case has no resemblance to one in which a purchaser has been held entitled to a rebate or allowance from the purchase money of land, for occupation or rent while kept out of possession by a plaintiff, on a sale made by the court in the

suit, and for expenses of obtaining possession. *Thomas* v. *Burton*, L. R. 8 Eq. 120. If the appellees might have been entitled to a deduction from the amount of their bid because of the action of the assignee, the bankrupt estate could not reimburse itself for its loss from such action by making the appellants responsible for it.

Nor does the doctrine applied to a purchaser who buys land with notice of a prior equitable estate apply to the appellants. The District Court vacated the prior sale by the same order which accepted the bid of the appellants, and the order referred to the petition of the assignee, which set forth that Hodgkins had not paid his bid, and there was annexed to the petition a copy of the bid of the appellants, which stated that they made it understanding that Hodgkins had not complied with his proposition. As to the appellants there was, at the time they paid their money, no outstanding contract with or sale to Hodgkins by the assignee. Nor is there any analogy between this case and one of liability by a grantee in a voluntary conveyance held void as made in fraud of creditors, for rents and profits from the property.

The appellees cite the case of *Raun* v. *Reynolds*, 15 Cal. 460. The history of that case, gathered from the above report, and from 11 Cal. 14, and 18 Cal. 275, and *Reynolds* v. *Harris*, 14 Cal. 667, shows that a decree foreclosing two mortgages on land had directed that two different parcels, one covered by one of the mortgages and the other by the other, should be sold together, although one parcel was owned by one mortgagor, and the other by him and another person jointly, as mortgagors, such other person being merely a surety. The property was sold under the decree, at auction, by the sheriff, the two parcels being sold together to the plaintiff. He then sold and assigned the decree, and his rights as purchaser, and the sheriff's certificate of sale, to one Harris. After that the defendants appealed from the decree. The decree was reversed for error in the above directions as to the sale. The time for redemption from the sale having expired without any redemption, Harris obtained possession of the property by a writ of assistance. On an application by the defendants to have the sale set aside and

to be restored to possession, it was held that the plaintiff could obtain no advantage by a purchase under his own erroneous judgment; that Harris was not within the protection of an innocent purchaser without notice; and that he took the plaintiff's claim subject to the defendant's right of appeal and reversal, and occupied the plaintiff's position, with all his rights, as well in the decree and the debt as in the purchase, the decree being unaffected by any payment resulting from the sale. The application of the defendants was granted, and they were restored to possession. A question then arose as to the rents and profits while they were out of possession. Under the foregoing views and as the mortgage still remained valid, to be enforced by Harris, under the decree, the court held that Harris must be treated as a mortgagee in possession, and was bound to credit on the mortgage the amount he had received out of the property. This case is wholly unlike the one before us and affords no support to the claim of the appellees. If anything it goes to show that the appellees might properly have claimed that the assignee should credit on their purchase money the rents and profits of the property during the time they were kept out of its possession by the action of the assignee, which was in the end held to have been unlawful. The case of *Lupton* v. *Almy*, 4 Wis. 242, was a similar one, of a purchaser who owned the decree at the time of the sale, and took possession of the property after the sale had been set aside, and was treated as a mortgagee in possession, and held liable for rents and profits.

The decree of the Circuit Court must be reversed and the case be remanded to that court, with direction to dismiss the bill.

Statement of Facts.

ALEXANDER *v.* BRYAN.

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

Argued January 25th, 1884.—Decided March 3d, 1884.

Executor and Administrator—Limitations—Pleading—Surety.

In Alabama a plea which denies the execution by the defendant of an instrument in writing which is the foundation of the suit, must be verified by affidavit; and the want of such affidavit may be reached by a demurrer.

In Alabama, the plea of *nil debet* in an action of debt on a bond with condition, where breaches are assigned, is bad on demurrer.

In Alabama, by statute, an action against the surety of an executor, for any misfeasance or malfeasance of his principal, must be brought within six years after the cause of action has accrued, and not afterwards, the time to be computed from the act done or omitted by the principal, which fixes the liability of the surety; and, until there is a judicial ascertainment of the default of the principal, the liability of the surety is not fixed.

Such judicial ascertainment must be something more than an auditing of accounts, or an ascertainment or judgment that a distributee's share is so much, or that the distributee is entitled to so much. There must be a decree ordering payment and on which process to collect can issue against the principal.

A decree of a Probate Court, in Alabama, in 1864, finding that a distributee's share was so much, expressed in money, and had been invested in Confederate bonds, and ordering the executor to pay the amount in such bonds, was not a decree on which the executor could be sued to pay in anything but the bonds, or one on which a surety on the bond of the executor could be sued to pay in lawful money of the United States, and a failure of the executor to comply with such decree did not fix the liability of the surety.

Where a complaint in a suit against such surety does not state any facts to show the application of the limitation of such statute, a plea which does not state such facts is bad on demurrer.

An action by a legatee under a will against a surety on the executor's bond, to recover the amount of a legacy alleged to have been wasted by the executor. Plea *nil debet* and the statute of limitations.

Mr. W. Hallett Phillips for plaintiff in error.

Mr. H. Pillans for defendant in error.

Opinion of the Court.

Mr. Justice Blatchford delivered the opinion of the court. On the 22d of November, 1858, John A. C. Horn, having been appointed by the judge of the Probate Court of Marengo County, Alabama, executor of the last will and testament of John Horn, executed, with John D. Alexander and W. B. Lessuer, as sureties, a bond or writing obligatory, under seal, to said judge, in the penalty of $100,000, conditioned that said executor should well and truly perform all the duties which were or might by law be required of him. This suit was brought by Frances L. Bryan against the surety Alexander, in the Circuit Court of the United States for the Southern District of Alabama, on the 12th of February, 1879. The complaint sets forth that the plaintiff obtained a final decree in that court against said executor, June 10th, 1877, for $4,292.12, and costs, in a suit in equity brought by legatees of John Horn against said executor and others, and alleges the non-payment of the decree and a breach of the condition of the bond. The defendant pleaded several unverified pleas, to each of which the plaintiff demurred. The demurrers were sustained. The defendant did not plead further, and the court rendered a judgment for the plaintiff, for $5,207.26. The defendant has brought the case here by a writ of error.

The first plea alleges that the defendant

"did not undertake in manner and form as in said complaint alleged and set forth, and that he does not owe the debt claimed of him in said complaint."

The grounds of demurrer to this plea are (1) that the plea that the defendant did not undertake amounts only to a denial of the execution of the bond and is not verified by oath; (2) that the plea is not verified; (3) that the averment that the defendant does not owe the sum sued for cannot be legally pleaded and tenders no legal issue. By the Code of Alabama (§ 2989) a plea which denies the execution by the defendant of an instrument in writing which is the foundation of the suit, must be verified by affidavit. It is admitted that the want of such affidavit may be reached by a demurrer. But it is contended that the plea is not a plea of *non est factum*. If the

allegation that the defendant did not undertake in manner and form as alleged is not a denial of the execution of the bond, but merely a denial of its operation or effect, it is a bad plea, 2 Chitty Pl. 483, and equivalent only to the plea of *nil debet*, which follows, and bad with that. Indeed, the plaintiff in error contends that all the plea does is to deny liability for a breach of the bond at the time the suit was commenced. In Alabama, the plea of *nil debet* in an action of debt on a bond with condition, where breaches are assigned, is bad on demurrer. *Reid* v. *Nash*, 23 Ala. 733.

The other pleas raise the question of the statute of limitations. The Code of Alabama provides that actions against the sureties of executors for any misfeasance or malfeasance of their principal must be brought within six years after the cause of action has accrued, and not afterwards, "the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety." § 3223, 2898; § 3226, 2901. In order to apply the provisions of this statute it is necessary to state the facts of the case, as set forth in the pleas.

On the 21st of May, 1860, the Probate Court of Marengo County made a decree on partial settlement of the accounts of the executor, in which it was found that there remained due to Frances L. Bryan, as a legatee, $2,700.18, for which she was entitled to a decree. Other sums were found to be due to other legatees, and it was decreed that they should recover those sums of the executor; but in regard to Frances L. Bryan the decree stated that it appeared there was a suit pending between her and her husband respecting the right of possession of the property therein ascertained to be her share, and it ordered that the executor should hold the balance in cash so ascertained to be due to her, subject to the further decree of the court to be made on the determination of said suit. The legatees and the executor were parties to this decree.

Proceedings for a final accounting were afterwards had in the Probate Court, and, on the 2d of May, 1864, it made a decree, stating that the executor had fully administered the estate and had a balance of money for distribution, which he had

invested in four per cent. bonds of the Confederate States, and ordering that of this amount he should pay to Frances L. Bryan, as her share, due to her, $995.78, in said Confederate bonds, this sum being in addition to the prior sum of $2,700.18. It ordered the payment of four other shares in such Confederate bonds, and that the resignation of the executor, then filed, should be recorded.

On the 15th of November, 1867, Sarah Lockhart, one of the legatees, and her husband, and Narcissa Lockhart, another legatee, filed a bill in equity in said Circuit Court against the executor, making as defendants also the other legatees, devisees and heirs of the testator, and others, including Frances L. Bryan and her husband, alleging the failure of the executor to pay to the legatees, including Frances L. Bryan, the moneys so decreed to them, and praying an enforcement of their payment, and a decree therefor against the executor, and against James D. Alexander, as surety on his bond. On the 2d of June, 1871, the court decreed that the executor pay to the plaintiffs in the suit, in lawful money of the United States, the several amounts adjudged to be due to them by the decree of the Probate Court of May 2d, 1864, with interest; and that the remaining defendants be authorized to apply for such order and relief as they might be entitled to ask on the principles of said decree. The executor appealed to this court, and the decree was affirmed at October Term, 1873, *Horn* v. *Lockhart*, 17 Wall. 570, it being held that the executor could not exonerate himself from liability for the moneys adjudged to be due to the legatees, by paying the same in Confederate bonds. In the opinion of the court it was said:

"The validity of the action of the Probate Court of Alabama in the present case, in the settlement of the accounts of the executor, we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States."

On the 1st of April, 1874, Frances L. Bryan filed her pe-

tition in the Circuit Court, in the said suit in equity therein, under the provisions of the decree, praying for the recovery of the moneys so ascertained to be due to her by the decrees of the Probate Court, against the executor and against Alexander. The petition set forth that the moneys were her separate estate and that she had been divorced from her husband. The court, on June 10th, 1877, made a decree adjudging that no recovery could be had against Alexander, and dismissing the petition as to him, but without prejudice, and decreeing that the petitioner recover, with interest and costs, from the executor, $4,292.12, which was the amount found to be due to her by the report of a master, as the amount, with interest, of the decrees in her favor in the Probate Court.

On these facts the question arises as to when the act was done or omitted by the executor which fixed the liability of the surety, so that the cause of action had accrued against the surety, and the six years had commenced to run.

The plaintiff in error contends that the probate decree of 1864 enabled Mrs. Bryan then to sue him, because the provision as to payment in Confederate bonds was void and could and should have been so treated by her; and that thus there was then an absolute decree against the executor to pay the money, which fixed the liability of the surety at that time. If this be not so, then it is contended that his liability was fixed by the equity decree of June 2d, 1871.

It is very plain that the probate decree of 1860, which directed the executor to retain the share of Mrs. Bryan, $2,700.18, till further order, and did not direct him to pay it to her, cannot affect the question before us. It is settled law in Alabama, that, until there is a judicial ascertainment of the default of the principal, the liability of the surety is not fixed, within the statute; that the bar in favor of the surety must be computed from the time of such ascertainment of such default; that the words "act done," in the statute, mean such judicial ascertainment; and that it is that only which creates a cause of action against the surety, and authorizes a suit against him on his bond. *Fretwell* v. *McLemore*, 52 Ala. 124, 136. There must be something more than an auditing of accounts, or an

ascertainment or judgment that the distributee's share is so much, or that the distributee is entitled to so much. There must be a decree ordering payment and on which process to collect can issue against the principal. *Gilbreath* v. *Manning*, 23 Ala. 418.

As to the probate decree of 1864, the effect of the decision of this court in 17 Wall. 570, was, to leave that decree a valid decree so far as it ascertained that the $995.78 was the amount of the share of Mrs. Bryan, but to declare it invalid so far as it directed anything as to payment. All it directed as to payment was to order the executor to pay the $995.78 in Confederate bonds. This was no direction to pay in lawful money of the United States. It was only an order to turn over the bonds. The direction as to the bonds being invalid the entire direction as to payment fell. Under that decree, so long as the direction to pay in the bonds stood, not abrogated by judicial action, the executor could not be sued to pay in anything but the bonds. Hence the surety could not be sued to pay in lawful money of the United States. This court, in saying that the direction as to payment in bonds was "an absolute nullity," said nothing in conflict with these views. The ascertainment that $995.78 remained due to Mrs. Bryan as her share was coupled with the direction to pay in the bonds, and until the latter was got rid of by judicial action there was only a qualified decree as to the share. The two parts of the decree were not so unconnected that the former could be allowed to operate as a distinct money judgment by rejecting the latter. The clause as to payment was a whole, and directed that the executor pay to Mrs. Bryan the $995.78 "so remaining due her as aforesaid, in bonds as aforesaid." This was preceded by the finding that the executor had received so much money and had invested it "in four per cent. Confederate bonds." Hence, the direction as to payment had immediate reference to the acquittance of the executor by enabling him to discharge his liability to Mrs. Bryan by turning the bonds over to her, and it is not to be presumed the Probate Court intended to say he should pay in any other way. It did not so say. Therefore, Mrs. Bryan could not have maintained any suit against the surety, based on that decree.

The equity decree of 1871 gave to Mrs. Bryan no greater right to sue the surety than she had before. It was a money decree only for the plaintiffs in it, conferring on her, as a defendant, the right to apply in the suit for like relief. She could obtain no relief in the Probate Court, as was held in *Bryan* v. *Horn*, 42 Ala. 496, because that court had no jurisdiction after the settlement of the administration and the resignation of the executor in 1864. Her decree of 1877, in the equity suit, was the first judicial ascertainment of the default of the executor. That decree dismissed her petition as against the surety, "but without prejudice." This showed that it was not dismissed on the merits, but for some defect which was allowed to be obviated by another suit. *County of Mobile* v. *Kimball*, 102 U. S. 691, 705.

The above views dispose of the defence on the merits. The second plea alleges that more than six years from the time of any act done or omitted by the executor, which fixed the liability of the surety on the bond, had elapsed before the commencement of the suit, and that the right of the plaintiff did not accrue within six years before the commencement of the suit, and that the suit and the plaintiff's right of recovery are barred by the six years' statute of limitations. This plea asserts only a conclusion of law, without averring any facts. The complaint alleges merely the giving of the bond, the decree of 1877, and the non-payment of the money, as a breach of the condition of the bond. The suit being brought in 1879, no facts appeared in the complaint to show the application of the limitation on which the plea is based. That being so, the plea must state the facts. *Winston* v. *Trustees*, 1 Ala. 124. This ground of demurrer is stated in the demurrer to the second plea.

By a stipulation in the record, the decree of 1864 is to be considered as set forth *in hæc verba* in the third plea, and the omission to copy it as part of the plea, as agreed by the stipulation, is a clerical error. It appears in the other pleas.

These are all the errors assigned, and

The judgment of the Circuit Court is affirmed.

LEGAL TENDER CASE.

JUILLIARD *v.* GREENMAN.

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

Submitted January 22d, 1884.—Decided March 3d, 1884.

Constitutional Law—Legal Tender Notes—Statutes.

Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war.

Under the act of May 31st, 1878, ch. 146, which enacts that when any United States legal tender notes may be redeemed or received into the Treasury, and shall belong to the United States, they shall be reissued and paid out again, and kept in circulation, notes so reissued are a legal tender.

Juilliard, a citizen of New York, brought an action against Greenman, a citizen of Connecticut, in the Circuit Court of the United States for the Southern District of New York, alleging that the plaintiff sold and delivered to the defendant, at his special instance and request, one hundred bales of cotton, of the value and for the agreed price of $5,122.90; and that the defendant agreed to pay that sum in cash on the delivery of the cotton, and had not paid the same or any part thereof, except that he had paid the sum of $22.90 on account, and was now justly indebted to the plaintiff therefor in the sum of $5,100; and demanding judgment for this sum with interest and costs.

The defendant in his answer admitted the citizenship of the parties, the purchase and delivery of the cotton, and the agreement to pay therefor, as alleged; and averred that, after the delivery of the cotton, he offered and tendered to the plaintiff, in full payment, $22.50 in gold coin of the United States, forty cents in silver coin of the United States, and two United States notes, one of the denomination of $5,000, and the other of the denomination of $100, of the description known as United States legal tender notes, purporting by recital thereon to be

legal tender, at their respective face values, for all debts, public and private, except duties on imports and interest on the public debt, and which, after having been presented for payment, and redeemed and paid in gold coin, since January 1st, 1879, at the United States sub-treasury in New York, had been reissued and kept in circulation under and in pursuance of the act of Congress of May 31st, 1878, ch. 146; that at the time of offering and tendering these notes and coin to the plaintiff, the sum of $5,122.90 was the entire amount due and owing in payment for the cotton, but the plaintiff declined to receive the notes in payment of $5,100 thereof; and that the defendant had ever since remained, and still was, ready and willing to pay to the plaintiff the sum of $5,100 in these notes, and brought these notes into court, ready to be paid to the plaintiff, if he would accept them.

The plaintiff demurred to the answer, upon the grounds that the defence, consisting of new matter, was insufficient in law upon its face, and that the facts stated in the answer did not constitute any defence to the cause of action alleged.

The Circuit Court overruled the demurrer and gave judgment for the defendant, and the plaintiff sued out this writ of error.

Mr. George F. Edmunds and *Mr. William Allen Butler* for plaintiff in error.—The question presented by the assignment of errors are: 1st. That the act of May 31st, 1878, entitled "an act to prevent the further retirement of United States legal tender notes," cannot be construed as giving to the United States notes required by the act to be issued, paid out, and kept in circulation, the incident or quality of legal tender; and 2d, That if said act must be so construed, then it is, to that extent, unconstitutional and void.

I.—The questions above stated, involving the construction and validity of the act of May 31st, 1878, are open questions in this court not controlled by the decision in the legal tender cases, which related solely to the legal tender clauses of the acts of 1862 and 1863, and upheld them solely in view of the public exigency in reference to which they were enacted. The legal tender clauses of the acts of February 25th, 1862, July

11th, 1862, and March 3d, 1863, applied only to the United States notes authorized by those acts to be issued by the Secretary of the Treasury as therein provided, and to be reissued by him from time to time as the exigencies of the public service might require. These clauses were enacted by Congress, were approved by the Executive, and were upheld by this court in the *Legal Tender cases*, 12 Wall. 457, as war measures, exceptional in their character, not authorized by any express grant of power to Congress contained in the Constitution, but as not prohibited by its terms, and as justified in view of the great public exigencies which required their adoption. When the act of 1862, which first made treasury notes a legal tender, was under consideration, the committee of the House in charge of the bill consulted the Secretary of the Treasury, who replied:

"It is not unknown to them that I have felt, nor do I wish to conceal that I now feel, great aversion to making anything but coin a legal tender in payment of debts. It has been my anxious wish to avoid the necessity of such legislation. It is, however, at present, impossible, in consequence of the large expenditures entailed by the war, and the suspension of the banks, to procure sufficient coin for disbursements; and it has, therefore, become indispensably necessary that we should resort to the issue of United States notes. . . . The committee, doubtless, feel the necessity of accompanying this measure by legislation necessary to secure the highest credit as well as the largest currency of these notes. This security can be found, in my judgment, by proper provisions for funding them in interest-bearing bonds; by well-guarded legislation authorizing banking associations with circulation based on the bonds in which the notes are funded; and by a judicious system of adequate taxation."

The proposed legal tender clauses of the bill provoked protracted and earnest debate in the House of Representatives. They were vigorously opposed, on the ground of unconstitutionality as well as impolicy, by leading representatives of both political parties. The provision for making the notes a legal tender was pressed by all its advocates as a war measure of imperative necessity; as a means of national self-preservation,

justified and required by the end to be attained. The bill finally passed the House under pressure of impending ruin to the credit of the government, by a vote of 93 to 59. It then passed the Senate, with amendments, after a motion to strike out the legal tender clause had failed, by a vote of 17 to 22, and, as the result of conference, was again passed by the House of Representatives, February 25th, 1862, and on the same day was approved by President Lincoln.

After noticing the acts of 1863 and 1864, counsel next referred to the legislation of 1865 and 1866, as showing no authority to issue new legal tender notes, and as indicating a purpose of gradually retiring those outstanding, and to the legislation of 1868 as showing an intent to stop the reduction and to permit reissues in place of mutilated notes. They cited *Lane County* v. *Oregon*, 7 Wall. 71; *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Thompson* v. *Riggs*, 5 Wall. 663; *Willard* v. *Tayloe*, 8 Wall. 557, and *Veazie Bank* v. *Fenno*, 8 Wall, 533; in which the court held that the tax on State bank circulation was constitutional. Shortly after this *Hepburn* v. *Griswold*, 8 Wall. 603, was decided. The discussion of the questions involved in that case embraced the whole subject of the power of Congress under the Constitution to pass the Legal Tender Acts. The court as constituted at the time of the argument and of the announcement of the decision, under the operation of the act of July 23, 1866, was composed of a chief justice and six associate justices. The opinion of the court, delivered by Chief Justice Chase, Associate Justices Nelson, Clifford, and Field concurring, and also Mr. Justice Grier, who was a member of the court when the cause was decided in conference (November 27th, 1869), and when the opinion was directed to be read (January 29th, 1870), was adverse to the constitutionality of the legal tender clauses 8 Wall. 604. Associate Justices Miller, Swayne and Davis dissented.

After the announcement of this decision a motion was made to this court by the Attorney-General to reconsider the question of the constitutionality of the Legal Tender Acts. The constitution of the court had, in the interval between the decision of *Hepburn* v. *Griswold* and the application for a reargument, been

changed by the act of April 10th, 1869, 16 Stat. 44, increasing the number of associate judges to nine, which took effect on the first Monday of December, 1869, and a motion for a reconsideration of the question was made before the court as thus reconstituted. Subsequently a majority of the court (four judges dissenting) made an order that counsel for the parties denying the validity of the legal tender clauses, and the Attorney-General, be heard upon the following questions: 1. Is the Act of Congress, known as the Legal Tender Act, constitutional as to contracts made before its passage? 2. Is it valid as applicable to transactions since its passage? On April 18th, 1871, argument was accordingly again heard upon the above-stated questions, not in the case of *Hepburn* v. *Griswold*, but in two cases pending in the court involving the question of the power of Congress to make Treasury notes a legal tender between private persons in the discharge of pre-existing debts, one of which involved the question of the application of the legal tender clause in respect to contracts made after its passage. On May 1st, 1871, the decision of the court was announced, adjudging both of the above questions in the affirmative, 11 Wall. 682; 12 Wall. 528; thereby overruling the case of *Hepburn* v. *Griswold*, and sustaining the constitutionality and validity of the legal tender clauses of the acts of 1862 and 1863, both as to contracts made before and after their passage. The action of Congress in the passage of the first Legal Tender Act was, as already exhibited, placed distinctly upon the ground of the existing imperative needs of the government, and the legal tender clause was urged and adopted as a war measure. The action of the Executive department rested on the same ground. Its uniformly declared policy, as already shown, whenever the question arose requiring Executive action, was to treat the legal tender quality of the Treasury notes as a temporary expedient, necessary as a means of averting national destruction, but otherwise unjustifiable. The Judicial department went no further in the decision last above cited. Of the ten eminent members of this court, before whom the question was argued, five deny the existence in Congress of any constitutional power to give to Treasury notes a legal tender quality for the payment of

debts, and five assert and sanction the power as exercised in 1862 and 1863 by the passage of the so-called Legal Tender Acts in those years of the war.

In the retrospect and review of this sharp conflict of judicial opinion, in which the voices of the members of this court are equal, it is noteworthy that the learned judges and jurists who condemned the acts of 1862 and 1863, did so upon grounds which wholly prohibited Congress from ever exercising the power exerted by those avowedly war measures.

In a large majority of the States represented in the Thirty-seventh Congress (1861–1863) the question of the Constitutionality of the legal tender clauses of the acts of 1862 and 1863 had arisen in various cases of private contract, and had been passed upon in many instances after much deliberation and research, by the judges of the courts of last resort. These courts, by votes of the majority of the members composing them, and in some instances with the concurrence of all the judges, had declined to introduce into the transactions of the people and the affairs of the country any such embarrassment as might result from decisions of State courts, that a currency, created in view of a great national emergency, and which for several years had practically constituted the money of the country, was unauthorized and invalid. In only two States, New Jersey and Kentucky, were final decisions rendered adverse to the validity of the legal tender provisions of the acts. See 20 N. J. Eq. 421; 2 Duvall, Ky. 26.

II.—The course of Congressional legislation, since the decision of the Legal Tender Cases, culminating in the act of May 31st, 1878, 20 Stat. 87, which compels a post-redemption issue of the so-called "Legal Tender notes," raises for the first time the question of the power of Congress to direct the issue of United States notes as currency, with the quality of legal tender, in time of peace, and in the absence of any public exigency. The following is the text of the act:

"An act to forbid the further retirement of United States legal tender notes.

"*Be it enacted by the Senate and House of Representatives of*

the United States of America, in Congress assembled, That from and after the passage of this act it shall not be lawful for the Secretary of the Treasury, or other officer under him, to cancel or retire any more of the United States legal tender notes, and when any of said notes may be redeemed or be received into the treasury, under any law, from any source whatever, and shall belong to the United States, they shall not be retired, canceled or destroyed; but they shall be reissued and paid out again, and kept in circulation; *Provided*, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law.

"All acts and parts of acts in conflict herewith are hereby repealed."

Approved May 31st, 1882.

On January 1st, 1879, the resumption of specie payments began, and all the United States notes then and since presented for redemption in coin, in the manner provided by the resumption act, have been paid. Under the construction given by the Treasury Department to section 3579 of the Revised Statutes coupled with the act of May 31st, 1878, all the United States notes returned into the Treasury as worn and mutilated notes, as well as those redeemed in coin, are treated in the report of the Treasurer of the United States as "redeemed," and during each year since the passage of the Act of May 31st, 1878, there have been issued and paid out by the Treasury Department, the precise amount in United States notes which have been so "redeemed," but not in notes of the same denominations. This course can only be justified by holding that Congress has the power to direct the reissue of redeemed treasury notes, and to continue their legal tender quality at its own will and pleasure.

III.—The act of May 31st, 1878, taken in connection with the unrepealed provisions of the Resumption Act requiring the redemption in coin on and after January 1st, 1879, of all the United States legal tender notes then outstanding, can be upheld as a constitutional exercise of power only by construing

it to require a new issue of such notes, after redemption, as a circulating medium, without the quality of legal tender. The Resumption Act, passed January 14th, 1875, required all the United States legal tender notes outstanding January 1st, 1879, to be redeemed in coin on presentation on and after that date. It repealed all "provisions of law inconsistent" with its own provisions. The only "provisions of laws" relating to the United States legal tender notes which were in force January 14th, 1875, were sections 3571, 3579, 3582 and 3588 of the Revised Statutes. All previous laws had been repealed. The Revised Statutes contain and express the whole statute law of the United States as it was on December 31st, 1873. *United States* v. *Bowen*, 100 U. S. 508; *Arthur* v. *Dodge*, 101 Id. 34; *Victor* v. *Arthur*, 104 Id. 428. The provisions of the Resumption Act applied to the same United States legal tender notes to which the above cited sections of the Revised Statutes applied. It directed the same notes to be redeemed in coin, and contained no saving clause as to any future use of the notes after redemption. The redemption of the government paper in coin meant the retirement and extinguishment of so much of the debt as it represented The act of 1878 is the sole authority for the use by the Treasury of this redeemed debt. There is no provision in that act that the notes shall when again issued be a legal tender for any purpose. Viewed as evidences of debt they constituted a part of the debt of the United States for payment of which in money Congress had made provision by the Resumption Act. Viewed as currency, aside from the quality of legal tender they were none the less evidences of debt, with this additional function imposed upon them, and continued subject to the provisions of that act. The repeal by the Resumption Act of all the statutes which created or continued the legal tender element of the treasury note currency (including section 3579 of the Revised Statutes), was as absolute as the provision for the redemption of that currency, and the fact of redemption, in respect to every note redeemed, executed the law, and worked *pro tanto* a discharge of the debt with all its incidents. The act of 1878 did not attempt to continue the existing debt because it contemplated the redemption of the notes

given for the debt. It described them according to their well-known and statutory designation as "legal tender notes," and it directed their use after redemption as obligations of the government and as a circulating medium, but without any re-enactment of the legal tender provisions which applied to the notes before their redemption. The general repealing clause of the act, "All acts and parts of acts in conflict herewith are repealed," does not revive the legal-tender clause, because (1) there is no conflict between an act authorizing treasury notes to be used as a circulating medium, and another act prohibiting their use as a legal tender, and (2) the act itself, by applying its provisions to ".redeemed" notes, must be deemed to be consistent with and not in conflict with the Resumption Act.

It must, therefore, be concluded that Congress did not intend by the Act of May 31st, 1878, to give to the new issue of the paid-off United States notes which it required the legal tender element. The act may be well construed as authorizing a circulation of United States notes, without the quality of legal tender, because this quality is not essential or necessary to the notes as a circulating medium. The power to issue notes in the form of the present "greenback" is unquestioned. Like bank notes, they are "bills of credit." While the Federal Convention struck out from the clause in the draft of the Constitution as reported, giving Congress the power "to borrow money and *emit bills on the credit of the United States*," the power to emit bills, the debate clearly shows that the thing aimed at was not the issuing of bills, but their issue as a legal tender. Madison Papers, vol. 3, p. 1343–1346, and note to p. 1346.

IV.—If the act of May 31st, 1878, was intended to direct the keeping in circulation of the United States notes therein described, with the legal tender quality, it was to that extent unconstitutional and void, and should be so declared by this court. Accepting as final the results of the previous discussion, we confine ourselves to maintaining that the Constitution vests no power in Congress, either by express grant, or as the result of any one or all the powers which it confers, to create at will, and in the absence of any national exigency, a legal tender paper

currency, to exist for an indefinite period, and to be an enforced substitute for coin in the payment of public and private debts. The existence of a public exigency is the sole basis on which the power of Congress to pass legal tender laws has been maintained. *The Legal Tender Cases*, 12 Wall. 457. The question of the constitutionality of an act of Congress, as well as the question of its construction, must be considered in the light of the history of the time when it was enacted. And whenever the power sought to be exercised depends, or must be predicated, upon a given state of facts, the existence of the power is a judicial question to be determined upon the facts. The growth of the assumption of admiralty jurisdiction by the United States is a striking instance of this. *Waring* v. *Clarke*, 5 How. 441. Taney, C. J., in the *Genesee Chief* v. *Fitzhugh*, 12 How. 443–456; *The Belfast*, 7 Wall. 624; *The Magnolia*, 20 How. 296; *Insurance Company* v. *Dunham*, 11 Wall. 1; *The Lottawanna*, 20 Wall. 201. The same doctrine is maintained in the *Slaughter-house Cases*, 16 Wall. 36. Without multiplying citations, a general reference may suffice to the numerous cases in which the constitutionality of acts of Congress passed during the civil war, and the validity of proceedings taken under them, have been considered and decided by this court in view of the facts on which they were based. *Miller* v. *United States*, 11 Wall. 268; *Tyler* v. *Defrees*, Id. 331. *Civil Rights Cases—Strauder* v. *West Virginia*, 100 U. S. 303; *West Virginia* v. *Rives*, Id. 313. *Ex parte Virginia*, Id. 339; *Neal* v. *Delaware*, 103 U. S. 370.

The exercise of jurisdiction by a court or a legislature assumes the existence of the jurisdiction in the tribunal or body exercising it. When the jurisdiction actually exists, its exercise cannot be attacked collaterally; but where it is dependent on a given state of facts, and these do not exist, the judgment or the statute is absolutely void, and may be assailed collaterally.

In the absence of public exigency, legal tender legislation is not a means appropriate to any legitimate end of government. While, as to all express and enumerated powers vested in Congress by the Constitution, it has been often held that it is the province of Congress to judge as to the extent to which

they are to be exercised, *Wheeling-Bridge Case*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina* v. *Georgia*, 93 U. S. 4, at page 12; *Gilman* v. *Philadelphia*, 3 Wall. 713, the rule is otherwise where the power is not given by express terms, but is claimed to be implied as a necessary or proper means to some legitimate end within the scope of the Constitution. The question whether the end is legitimate and within the purview of the Constitution, and whether the means are appropriate and not prohibited by but consistent with the letter and spirit of the Constitution, is a judicial question, to be determined by this court, and has been so determined whenever occasion required, from the case of *Marbury* v. *Madison*, 1 Cranch, 137, to the present day. This is necessarily involved in the often quoted and universally accepted dictum of Chief-Justice Marshall, in *McCulloch* v. *State of Maryland*, 4 Wheat. 316, p. 421.

"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 the spirit of the Constitution, are constitutional."

On the basis of the proposition thus formulated this court, in the case last cited, involving the question of the power of Congress to incorporate a bank, proceeded to inquire and to decide, in the particular case before it, whether in fact a bank was an appropriate means adapted to a legitimate end of the government, and not prohibited by the Constitution.

In the present case the question turns chiefly upon the same point. If the creation in any way, and by any means, of a permanent legal tender paper currency as a practical substitute for coin, is a legitimate end of our constitutional government in its ordinary administration, irrespective of any existing and pressing exigency, then the action of Congress in directing the printing and issuing of treasury notes and in providing by general terms that they shall be lawful money, and a legal tender in payment of debts, public and private, and that they shall never be retired or cancelled, but as fast as they return

into the Treasury shall be again paid out and kept in circulation, are appropriate means to such an end, and it needs only for Congress to remove the existing limit of the issue and increase the amount in order to flood the country with a volume of paper, utterly destructive of any other debt-paying medium.

But if, on the contrary, such was not the intent of the Constitution, and the power to make bills of credit a legal tender is only to be implied in the presence of some existing and apparent necessity, then the fact of the existence of such necessity as the basis of the existence of the power is a question for judicial determination. Congress being clothed only with delegated powers, and the power in question not being expressly delegated, but derived from the general scope of those expressly delegated, and to be used as a means to an end, the inquiry whether the end sought to be attained is a legitimate one, must properly be pursued in the judicial department of the government. Otherwise the assertion and exercise by Congress of any implied power, irrespective of facts or circumstances, would destroy all limitations, and give to the implied powers a greater force than the express powers themselves.

It is not necessary to claim that the power upheld in reference to the acts of 1862 and 1863 is exclusively a war power. The definition would probably be sufficiently accurate, although not necessarily complete. It is safe, however, to call it, as sanctioned by this court, an extraordinary power. And it is safe to say that it can be attributed to Congress only when shown to be a means appropriate to a legitimate end of the government. As such a means adapted to secure the most important ends, including the preservation of the imperilled union of the States, this court upheld it, in view of the extraordinary circumstances under which it was exerted. However derived, or however defined, the power itself was exhausted when the occasion which evoked it ceased. The forced loans of 1862 and 1863, in the form of legal tender notes, were vital forces in the struggle for the national supremacy. They formed a part of the public debt of the United States, the validity of which is solemnly established by the Fourteenth Amendment to the Constitution. Their legal ten-

der quality and their character of currency were due solely to the war. To the war was due not only the exercise of the power to give this quality and character, but the power itself.

The Resumption Act directed the forced loans authorized by the acts of 1862 and 1863, and continued by the Revised Statutes of 1874, to be redeemed and paid on demand on and after January 1st, 1879.

The Resumption Act also fixed the limit of time beyond which the currency which evidenced the loans should not be irredeemable. After January 1st, 1879, it was redeemable in coin, and this quality of redeemability thenceforth inhered in every United States note described in the Resumption Act. It was not taken away by the act of May 31st, 1878, and could not be taken away, because the promise to pay the sum expressed in the treasury notes had been made by the Resumption Act a promise to pay in coin. Nothing short of a repeal of the Resumption Act, and a repudiation of the obligation which it created, could change the character of the promise. After the Resumption Act was approved, every note outstanding was as much a promise to pay in coin, on demand, on and after January 1st, 1879, the sum specified, as if those words had been printed on its face.

It has never been possible to divorce the question of the constitutional power to coin the public credit into money, and make it an instrument of discharging debts, from the history of legal tender paper money and its consequences. Nor is it possible now.

Facts have nowhere shown themselves to be more stubborn than in this discussion. The strange anomaly is presented, that while the mischiefs of the existing legal tender currency are established beyond contradiction by the voice of history, the teachings of experience, the recorded testimony of its authors, and the repeated decisions of the court, we now find it domesticated among us as an integral part of our national economy, under legislation which, unless arrested by this court, will warrant its perpetual continuance as a part of the ordinary administration of the government.

It is matter of undisputed fact that, as to the legal tender

quality, no public exigency required or justified the passage of the act of May 21st, 1878.

It is equally plain that, as to the legal tender quality, in the absence of a public exigency, no aid is derived to the act of May 31st, 1878, from any of the powers granted by the Constitution to Congress.

It cannot be claimed, as to the legal tender quality, that the prohibition to retire the United States notes when redeemed, and the direction to issue them after redemption, irrespective of any need of the government, was a legitimate exercise of the power "to borrow money." The use of the legal tender element was wholly unnecessary as a means of borrowing, and, in fact, the whole public debt was provided for by the funding measures, and the Resumption Act had explicitly directed that portion of it which was represented by the legal tender notes to be redeemed in coin. The legal tender quality was, therefore, not required as an incident or aid of the borrowing power. The credit of the government was a sufficient guaranty for the debt.

Nor can the issue of currency attempted by the act be brought within the power "to coin money and regulate the value thereof." Whatever may have been claimed under this provision as to the original issue, it can have no application here. The promise of the outstanding unredeemed legal tender notes on May 31st, 1878, as enlarged by the Resumption Act, had become a promise to pay on demand, in coin, the sum specified by the notes respectively, and this obligation was not interfered with by the act in question.

The act of May 31st, 1878, is, of course, unsupported by any of the powers given to Congress to "declare war," or to "raise and support armies" and "a navy," nor can public emergency of any kind be pleaded as an excuse for its enactment. The plea of the Secretary of the Treasury that the continuance of the legal tender would be a safeguard against future emergencies, was an admission that no present emergency existed which required its continuance or creation.

The claim for the exercise of the power attempted by the act of May 31st, 1878, on the ground that it was intended to

supply a currency for the people, simply revives the question whether making the "legal tender" and "lawful money" qualities an attribute of such a currency is within the scope of the powers of Congress. If we are right in claiming that these qualities are wholly independent of the proper elements of United States notes, when issued under ordinary conditions, then the power to issue such notes does not imply or carry with it the power to connect these qualities with the notes, save in the exigency which creates the power.

The government of the United States has no power of inherent sovereignty, but only such sovereign powers as were delegated to it by a written Constitution, which carefully and expressly declared that all powers not delegated by that instrument were reserved to the States and people. So that it would follow that the power to create a legal paper currency, if it exist at all, must exist by force of a delegation, and not by force of inherent sovereignty. On this principle it was that the Supreme Court held the old war legal tenders to be valid, as a measure incidental to the delegated war powers. The absence, therefore, of an express prohibition against Congress making anything but gold and silver a legal tender, as was made in respect of the States, furnishes no evidence that such a power was intended to be left with Congress. For the States without the prohibition would have had the inherent sovereign power that belonged to perfect political autonomies. This idea is illustrated by the analogous provision that no State shall pass any law impairing the obligation of a contract, and by the historic fact that it has always been held and admitted that Congress has no power to pass any law impairing the obligation of a contract otherwise than in the exertion of some power expressly conferred, the effect of which would be to accomplish that result; as the power to pass uniform bankruptcy laws, one of the incidents of which would be to impair the obligation of a contract.

Mr. Benjamin F. Butler, *Mr. Thomas H. Talbot*, and *Mr. James McKeen* for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

The amount which the plaintiff seeks to recover, and which, if the tender pleaded is insufficient in law, he is entitled to recover, is $5,100. There can, therefore, be no doubt of the jurisdiction of this court to revise the judgment of the Circuit Court. Act of February 16th, 1875, ch. 77, § 3; 18 Stat. 315.

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25th, 1862, ch. 33, July 11th, 1862, ch. 142, and March 3d, 1863, ch. 73, passed during the war of the rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat. 345, 532, 709.

The provisions of the earlier acts of Congress, so far as it is necessary, for the understanding of the recent statutes, to quote them, are re-enacted in the following provisions of the Revised Statutes:

"SECT. 3579. When any United States notes are returned to the Treasury, they may be reissued, from time to time, as the exigencies of the public interest may require.

"SECT. 3580. When any United States notes returned to the Treasury are so mutilated or otherwise injured as to be unfit for use, the Secretary of the Treasury is authorized to replace the same with others of the same character and amounts.

"SECT. 3581. Mutilated United States notes, when replaced according to law, and all other notes which by law are required to be taken up and not reissued, when taken up shall be destroyed in such manner and under such regulations as the Secretary of the Treasury may prescribe.

"SECT. 3582. The authority given to the Secretary of the Treasury to make any reduction of the currency, by retiring and cancelling United States notes, is suspended."

"SECT. 3588. United States notes shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."

The act of January 14th, 1875, ch. 15, "to provide for the re-

sumption of specie payments," enacted that on and after January 1st, 1879, "the Secretary of the Treasury shall redeem in coin the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the City of New York, in sums of not less than fifty dollars," and authorized him to use for that purpose any surplus revenues in the Treasury and the proceeds of the sales of certain bonds of the United States. 18 Stat. 296.

The act of May 31st, 1878, ch. 146, under which the notes in question were reissued, is entitled "An act to forbid the further retirement of United States legal tender notes," and enacts as follows:

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat. 87.

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the

Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the *Legal Tender Cases*, 12 Wall. 457; *Dooley* v. *Smith*, 13 Wall. 604; *Railroad Company* v. *Johnson*, 15 Wall. 195; and *Maryland* v. *Railroad Company*, 22 Wall. 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the *Legal Tender Cases*, and in the earlier case of *Hepburn* v. *Griswold*, 8 Wall. 603, which those cases overruled, forcibly present the arguments on either side of the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts. Without undertaking to deal with all those arguments, the court has thought it fit that the grounds of its judgment in the case at bar should be fully stated.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch* v. *Maryland*, 4 Wheat. 316, by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a national government, with sovereign powers, legislative, executive and judicial. "The government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme law of the land." "Among the enumerated powers of government, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and

the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government." 4 Wheat. 405, 406, 407.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is *a constitution* we are expounding." 4 Wheat. 107. See also page 415.

The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses:

"The Congress shall have power

"To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;"

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United States as a sovereign government. But, in which ever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of *United States* v. *Fisher*, 2 Cranch, 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England gave to debts due the Crown.

In delivering judgment in that case, Chief Justice Marshall expounded the clause giving Congress power to make all necessary and proper laws, as follows: "In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized

which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. 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 government is to pay the debt of the Union, and must be authorized to use the means which appear to itself the most eligible to effect that object." 2 Cranch, 396.

In *McCulloch* v. *Maryland*, he more fully developed the same view, concluding thus: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution 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." 4 Wheat. 421.

The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts.

The other judgments delivered by Chief Justice Marshall contain nothing adverse to the power of Congress to issue legal tender notes.

By the Articles of Confederation of 1777, the United States in Congress assembled were authorized "to borrow money or emit bills on the credit of the United States;" but it was declared that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is

not by this confederation expressly delegated to the United States in Congress assembled." Art. 2; art. 9, § 5; 1 Stat. 4, 7. Yet, upon the question whether, under those articles, Congress, by virtue of the power to emit bills on the credit of the United States, had the power to make bills so emitted a legal tender, Chief Justice Marshall spoke very guardedly, saying: "Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States" *Craig* v. *Missouri*, 4 Pet. 410, 435. But in the Constitution, as he had before observed in *McCulloch* v. *Maryland*, "there is no phrase which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments." 4 Wheat. 406, 407.

The sentence sometimes quoted from his opinion in *Sturges* v. *Crowninshield* had exclusive relation to the restrictions imposed by the Constitution on the powers of the States, and especial reference to the effect of the clause prohibiting the States from passing laws impairing the obligation of contracts, as will clearly appear by quoting the whole paragraph: "Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no State shall 'emit bills of credit;' neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular pro-

vision is made. Nothing but gold and silver coin can be made a tender in payment of debts." 4 Wheat. 122, 204.

Such reports as have come down to us of the debates in the Convention that framed the Constitution afford no proof of any general concurrence of opinion upon the subject before us. The adoption of the motion to strike out the words "and emit bills" from the clause "to borrow money and emit bills on the credit of the United States" is quite inconclusive. The philippic delivered before the Assembly of Maryland by Mr. Martin, one of the delegates from that State, who voted against the motion, and who declined to sign the Constitution, can hardly be accepted as satisfactory evidence of the reasons or the motives of the majority of the Convention. See 1 Elliot's Debates, 345, 370, 376. Some of the members of the Convention, indeed, as appears by Mr. Madison's minutes of the debates, expressed the strongest opposition to paper money. And Mr. Madison has disclosed the grounds of his own action, by recording that "this vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." But he has not explained why he thought that striking out the words "and emit bills" would leave the power to emit bills, and deny the power to make them a tender in payment of debts. And it cannot be known how many of the other delegates, by whose vote the motion was adopted, intended neither to proclaim nor to deny the power to emit paper money, and were influenced by the argument of Mr. Gorham, who "was for striking out, without inserting any prohibition," and who said: "If the words stand, they may suggest and lead to the emission." "The power, so far as it will be necessary or safe, will be involved in that of borrowing." 5 Elliot's Debates, 434, 435, and note. And after the first clause of the tenth section of the first article had been reported in the form in which it now stands, forbidding the States to make anything but gold or silver coin a tender in payment of debts, or to pass

any law impairing the obligation of contracts, when Mr. Gerry, as reported by Mr. Madison, "entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, alleging that Congress ought to be laid under the like prohibitions," and made a motion to that effect, he was not seconded. Ib. 546. As an illustration of the danger of giving too much weight, upon such a question, to the debates and the votes in the Convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regarded banks, and defeated. Ib. 440, 543, 544. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established by decisions to which we shall presently refer.

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several States. *Weston* v. *Charleston City Council*, 2 Pet. 449; *Banks* v. *Mayor*, 7 Wall. 16; *Bank* v. *Supervisors*, 7 Wall. 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may

provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the *Legal Tender Cases*, as well as by those who concurred in that decision. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *Hepburn* v. *Griswold*, 8 Wall. 616, 636; *Legal Tender Cases*, 12 Wall. 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333, 347; *Ward* v. *Smith*, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in *McCulloch* v. *Maryland*, 4 Wheat. 316, and in *Osborn* v. *United States Bank*, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat. 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the currency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib. 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a

circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. *Veazie Bank* v. *Fenno*, above cited; *National Bank* v. *United States*, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are

neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder or *ex post facto* law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized, to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. *Austria* v. *Day*, 2 Giff. 628, and 3 D. F. & J. 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this coun-

try by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See *Craig* v. *Missouri*, 4 Pet. 435, 453; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 313, 334–336; *Legal Tender Cases*, 12 Wall. 557, 558, 622; Phillips on American Paper Currency, *passim*. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this.

Upon the issue of stock, bonds, bills or notes of the United States, the States are deprived of their power of taxation to the extent of the property invested by individuals in such obliga-

tions, and the burden of State taxation upon other private property is correspondingly increased. The ten per cent. tax, imposed by Congress on notes of State banks and of private bankers, not only lessens the value of such notes, but tends to drive them, and all State banks of issue, out of existence. The priority given to debts due to the United States over the private debts of an insolvent debtor diminishes the value of these debts, and the amount which their holders may receive out of the debtor's estate.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28th, 1834, ch. 95, and with regard to silver by the act of February 28th, 1878, ch. 20) issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C. 192–194; Bac. Ab. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, Nos. 204, 205; *Searight* v. *Calbraith*, 4 Dall. 324. As observed by Mr. Justice Strong, in delivering the opinion of the court in the *Legal Tender Cases*, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall. 549.

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and

to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in *McCulloch* v. *Maryland:* "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat. 423.

It follows that the act of May 31st, 1878, ch. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff.

Judgment affirmed.

Mr. Justice Field, dissenting.

From the judgment of the court in this case, and from all the positions advanced in its support, I dissent. The question of the power of Congress to impart the quality of legal tender to the notes of the United States, and thus make them money and a standard of value, is not new here. Unfortunately it has been too frequently before the court, and its latest decision, previous to this one, has never been entirely accepted and approved by the country. Nor should this excite surprise; for whenever it is declared that this government, ordained to establish justice, has the power to alter the condition of contracts between private parties, and authorize their payment or discharge in something different from that which the parties stipulated, thus disturbing the relations of commerce and the business of the community generally, the doctrine will not and ought not to be readily accepted. There will be many who will adhere to the teachings and abide by the faith of their fathers. So the question has come again, and will continue to come until it is settled so as to uphold and not impair the contracts of parties, to promote and not defeat justice.

If there be anything in the history of the Constitution which can be established with moral certainty, it is that the framers of that instrument intended to prohibit the issue of legal tender notes both by the general government and by the States; and thus prevent interference with the contracts of private parties. During the Revolution and the period of the old Confederation, the Continental Congress issued bills of credit, and upon its recommendation the States made them a legal tender, and the refusal to receive them an extinguishment of the debts for which they were offered. They also enacted severe penalties against those who refused to accept them at their nominal value, as equal to coin, in exchange for commodities. And previously, as early as January, 1776, Congress had declared that, if any person should be "so lost to all virtue and regard for his country" as to refuse to receive in payment the bills then issued, he should, on conviction thereof, be "deemed, published, and treated as an enemy of his country, and pre-

cluded from all trade and intercourse with the inhabitants of the colonies."

Yet, this legislation proved ineffectual; the universal law of currency prevailed, which makes promises of money valuable only as they are convertible into coin. The notes depreciated until they became valueless in the hands of their possessors. So it always will be; legislative declaration cannot make the promise of a thing the equivalent of the thing itself.

The legislation to which the States were thus induced to resort was not confined to the attempt to make paper money a legal tender for debts; but the principle that private contracts could be legally impaired, and their obligation disregarded, being once established, other measures equally dishonest and destructive of good faith between parties were adopted. What followed is thus stated by Mr. Justice Story, in his Commentaries:

"The history, indeed," he says, "of the various laws which were passed by the States, in their colonial and independent character, upon this subject, is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions, and others of a like nature, were the ordinary results of legislation during the Revolutionary War and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the country, and introduced a system of fraud, chicanery, and profligacy which destroyed all private confidence and all industry and enterprise." 2 Story on the Constitution, § 1371.

To put an end to this vicious system of legislation which only encouraged fraud, thus graphically described by Story, the clauses which forbid the States from emitting bills of credit or making anything but gold and silver a tender in payment of debts, or passing any law impairing the obligation of contracts, were inserted in the Constitution.

"The attention of the Convention, therefore," says Chief Justice Marshall, "was particularly directed to paper money and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed, but in the opinion of the Convention much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 206.

It would be difficult to believe, even in the absence of the historical evidence we have on the subject, that the framers of the Constitution, profoundly impressed by the evils resulting from this kind of legislation, ever intended that the new government, ordained to establish justice, should possess the power of making its bills a legal tender, which they were unwilling should remain with the States, and which in the past had proved so dangerous to the peace of the community, so disturbing to the business of the people, and so destructive of their morality.

The great historian of our country has recently given to the world a history of the Convention, the result of years of labor in the examination of all public documents relating to its formation and of the recorded opinions of its framers; and thus he writes:

"With the full recollection of the need or seeming need of paper money in the Revolution, with the menace of danger in future time of war from its prohibition, authority to issue bills of

credit that should be legal tender was refused to the general government by the vote of nine States against New Jersey and Maryland. It was Madison who decided the vote of Virginia, and he has left his testimony that 'the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts, was cut off.' This is the interpretation of the clause made at the time of its adoption, alike by its authors and by its opponents, accepted by all the statesmen of that age, not open to dispute because too clear for argument, and never disputed so long as any one man who took part in framing the Constitution remained alive. History cannot name a man who has gained enduring honor by causing the issue of paper money. Wherever such paper has been employed it has in every case thrown upon its authors the burden of exculpation under the plea of pressing necessity." Bancroft's History of the Formation of the Constitution, 2 vol., 134.

And when the Convention came to the prohibition upon the States, the historian says that the clause, "No State shall make anything but gold and silver a tender in payment of debts," was accepted without a dissentient State:

"So the adoption of the Constitution," he adds, "is to be the end forever of paper money, whether issued by the several States or by the United States, if the Constitution shall be rightly interpreted and honestly obeyed." Id. 137.

For nearly three-quarters of a century after the adoption of the Constitution, and until the legislation during the recent civil war, no jurist and no statesman of any position in the country ever pretended that a power to impart the quality of legal tender to its notes was vested in the general government. There is no recorded word of even one in favor of its possessing the power. All conceded, as an axiom of constitutional law, that the power did not exist.

Mr. Webster, from his first entrance into public life in 1812, gave great consideration to the subject of the currency, and in an elaborate speech on that subject, made in the Senate in 1836, then sitting in this room, he said:

"Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business; but if we understand by currency the legal money of the country, and that which constitutes a legal tender for debts, and is the standard measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain and of the highest importance. The States are expressly prohibited from making anything but gold and silver a legal tender in payment of debts, and although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches; it has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown. To overthrow it would shake the whole system." 4 Webster's Works, 271.

When the idea of imparting the legal tender quality to the notes of the United States issued under the first act of 1862 was first broached, the advocates of the measure rested their support of it on the ground that it was a war measure, to which the country was compelled to resort by the exigencies of its condition, being then sorely pressed by the Confederate forces, and requiring the daily expenditure of enormous sums to maintain its army and navy and to carry on the government. The representative who introduced the bill in the House, declared that it was a measure of that nature, "one of necessity and not of choice;" that the times were extraordinary and that extraordinary measures must be resorted to in order to save our government and preserve our nationality. Speech of Spauld-

ing, of New York, Cong. Globe, 1861–62, Part 1, 523. Other members of the House frankly confessed their doubt as to its constitutionality, but yielded their support of it under the pressure of this supposed necessity.

In the Senate also the measure was pressed for the same reasons. When the act was reported by the committee on finance, its chairman, while opposing the legal tender provision, said:

"It is put on the ground of absolute, overwhelming necessity; that the government has now arrived at that point when it must have funds, and those funds are not to be obtained from ordinary sources, or from any of the expedients to which we have heretofore had recourse, and therefore, this new, anomalous, and remarkable provision must be resorted to in order to enable the government to pay off the debt that it now owes and afford circulation which will be available for other purposes." Cong. Globe, 1861–62, Part 1, 764.

And upon that ground the provision was adopted, some of the senators stating that in the exigency then existing money must be had, and they, therefore, sustained the measure, although they apprehended danger from the experiment. "The medicine of the Constitution," said Senator Sumner, "must not become its daily food." Id. 800. A similar necessity was urged upon the State tribunals and this court in justification of the measure, when its validity was questioned. The dissenting opinion in *Hepburn* v. *Griswold* referred to the pressure that was upon the government at the time to enable it to raise and support an army and to provide and maintain a navy. Chief Justice Chase, who gave the prevailing opinion in that case, also spoke of the existence of the feeling when the bill was passed that the provision was necessary. He favored the provision on that ground when Secretary of the Treasury, although he had come to that conclusion with reluctance, and recommended its adoption by Congress. When the question as to its validity reached this court, this expression of favor was referred to, and by many it was supposed that it would control his judicial action. But after long pondering upon the

subject, after listening to repeated arguments by able counsel, he decided against the constitutionality of the provision; and, holding in his hands the casting vote, he determined the judgment of the court. He thus preferred to preserve his integrity as a judicial officer rather than his consistency as a statesman. In his opinion he thus referred to his previous views:

"It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution." 8 Wall. 625.

It must be evident, however, upon reflection that if there were any power in the government of the United States to impart the quality of legal tender to its promissory notes, it was for Congress to determine when the necessity for its exercise existed; that war merely increased the urgency for money; it did not add to the powers of the government nor change their nature; that if the power existed it might be equally exercised when a loan was made to meet ordinary expenses in time of peace as when vast sums were needed to support an army or a navy in time of war. The wants of the government could never be the measure of its powers. But in the excitement and apprehensions of the war these considerations were unheeded; the measure was passed as one of overruling

necessity in a perilous crisis of the country. Now, it is no longer advocated as one of necessity, but as one that may be adopted at any time. Never before was it contended by any jurist or commentator on the Constitution that the government, in full receipt of ample income, with a treasury overflowing, with more money on hand than it knows what to do with, could issue paper money as a legal tender. What was in 1862 called the "medicine of the Constitution" has now become its daily bread. So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.

The advocates of the measure have not been consistent in the designation of the power upon which they have supported its validity, some placing it on the power to borrow money, some on the coining power, and some have claimed it as an incident to the general powers of the government. In the present case it is placed by the court upon the power to borrow money, and the alleged sovereignty of the United States over the currency. It is assumed that this power, when exercised by the government, is something different from what it is when exercised by corporations or individuals, and that the government has, by the legal tender provision, the power to enforce loans of money because the sovereign governments of European countries have claimed and exercised such power.

"The words to borrow money," says the court, "are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute or in an authority conferred by law or by contract upon trustees or agents for private purposes." And it adds that "the power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The govern-

ments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin," and that "the exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States."

As to the terms *to borrow money*, where, I would ask, does the court find any authority for giving to them a different interpretation in the Constitution from what they receive when used in other instruments, as in the charters of municipal bodies or of private corporations, or in the contracts of individuals? They are not ambiguous; they have a well-settled meaning in other instruments. If the court may change that in the Constitution, so it may the meaning of all other clauses; and the powers which the government may exercise will be found declared, not by plain words in the organic law, but by words of a new significance resting in the minds of the judges. Until some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced, I must believe that the terms have the same meaning in all instruments wherever they are used; that they mean a power only to contract for a loan of money, upon considerations to be agreed between the parties. The conditions of the loan, or whether any particular security shall be given to the lender, are matters of arrangement between the parties; they do not concern any one else. They do not imply that the borrower can give to his promise to refund the money any security to the lender outside of property or rights which he possesses. The transaction is completed when the lender parts with his money and the borrower gives his promise to pay at the time and in the manner and with the securities agreed upon. Whatever stipulations may be made, to add to the value of the promise or to secure its fulfilment, must necessarily be limited to the property, rights, and privileges which the borrower possesses. Whether he can add to his promises any element which will induce others

to receive them beyond the security which he gives for their payment, depends upon his power to control such element. If he has a right to put a limitation upon the use of other persons' property, or to enforce an exaction of some benefit from them, he may give such privilege to the lender; but if he has no right thus to interfere with the property or possessions of others of course he can give none. It will hardly be pretended that the government of the United States has any power to enter into an engagement that, as security for its notes, the lender shall have special privileges with respect to the visible property of others, shall be able to occupy a portion of their lands or their houses, and thus interfere with the possession and use of their property. If the government cannot do that, how can it step in and say, as a condition of loaning money, that the lender shall have a right to interfere with contracts between private parties? A large proportion of the property of the world exists in contracts, and the government has no more right to deprive one of their value by legislation operating directly upon them, than it has a right to deprive one of the value of any visible and tangible property. No one, I think, will pretend that individuals or corporations possess the power to impart to their evidences of indebtedness any quality by which the holder will be able to affect the contracts of other parties, strangers to the loan; nor would any one pretend that Congress possesses the power to impart any such quality to the notes of the United States, except from the clause authorizing it to make laws necessary and proper to the execution of its powers. That clause, however, does not enlarge the expressly designated powers; it merely states what Congress could have done without its insertion in the Constitution. Without it Congress could have adopted any appropriate means to borrow; but that can only be appropriate for that purpose which has some relation of fitness to the end, which has respect to the terms essential to the contract, or to the securities which the borrower may furnish for the repayment of the loan. The quality of legal tender does not touch the terms of the contract; that is complete without it; nor does it stand as a security for the loan, for

a security is a thing pledged, over which the borrower has some control, or in which he holds some interest.

The argument presented by the advocates of legal tender is, in substance, this: The object of borrowing is to raise funds, the addition of the quality of legal tender to the notes of the government will induce parties to take them, and funds will thereby be more readily loaned. But the same thing may be said of the addition of any other quality which would give to the holder of the notes some advantage over the property of others, as, for instance, that the notes should serve as a pass on the public conveyances of the country, or as a ticket to places of amusement, or should exempt his property from State and municipal taxation or entitle him to the free use of the telegraph lines, or to a percentage from the revenues of private corporations. The same consequence, a ready acceptance of the notes, would follow: and yet no one would pretend that the addition of privileges of this kind with respect to the property of others, over which the borrower has no control, would be in any sense an appropriate measure to the execution of the power to borrow.

Undoubtedly the power to borrow includes the power to give evidences of the loan in bonds, treasury notes, or in such other form as may be agreed between the parties. These may be issued in such amounts as will fit them for circulation, and for that purpose may be made payable to bearer, and transferable by delivery. Experience has shown that the form best fitted to secure their ready acceptance is that of notes payable to bearer, in such amounts as may suit the ability of the lender. The government, in substance, says to parties with whom it deals: lend us your money, or furnish us with your products or your labor, and we will ultimately pay you, and as evidence of it we will give you our notes, in such form and amount as may suit your convenience, and enable you to transfer them; we will also receive them for certain demands due to us. In all this matter there is only a dealing between the government and the individuals who trust it. The transaction concerns no others. The power which authorizes it is a very different one from a

power to deal between parties to private contracts in which the government is not interested, and to compel the receipt of these promises to pay in place of the money for which the contracts stipulated. This latter power is not an incident to the former; it is a distinct and far greater power. There is no legal connection between the two; between the power to borrow from those willing to lend and the power to interfere with the independent contracts of others. The possession of this latter power would justify the interference of the government with any rights of property of other parties, under the pretence that its allowance to the holders of the notes would lead to their more ready acceptance, and thus furnish the needed means.

The power vested in Congress to coin money does not in my judgment fortify the position of the court as its opinion affirms. So far from deducing from that power any authority to impress the notes of the government with the quality of legal tender, its existence seems to me inconsistent with a power to make anything but coin a legal tender. The meaning of the terms "to coin money" is not at all doubtful. It is to mould metallic substances into forms convenient for circulation and to stamp them with the impress of the government authority indicating their value with reference to the unit of value established by law. Coins are pieces of metal of definite weight and value, stamped such by the authority of the government. If any doubt could exist that the power has reference to metallic substances only it would be removed by the language which immediately follows, authorizing Congress to regulate the value of money thus coined and of foreign coin, and also by clauses making a distinction between coin and the obligations of the general government and of the States. Thus, in the clause authorizing Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States," a distinction is made between the obligations and the coin of the government.

Money is not only a medium of exchange, but it is a standard of value. Nothing can be such standard which has not intrin-

sic value, or which is subject to frequent changes in value. From the earliest period in the history of civilized nations, we find pieces of gold and silver used as money. These metals are scattered over the world in small quantities; they are susceptible of division, capable of easy impression, have more value in proportion to weight and size, and are less subject to loss by wear and abrasion than any other material possessing these qualities. It requires labor to obtain them; they are not dependent upon legislation or the caprices of the multitude; they cannot be manufactured or decreed into existence, and they do not perish by lapse of time. They have, therefore, naturally, if not necessarily, become throughout the world a standard of value. In exchange for pieces of them, products requiring an equal amount of labor, are readily given. When the product and the piece of metal represent the same labor, or an approximation to it, they are freely exchanged. There can be no adequate substitute for these metals. Says Mr. Webster, in a speech made in the House of Representatives in 1815:

"The circulating medium of a commercial community must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able, not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative, and capable of being turned into them at will. So long as bank paper retains this quality it is a substitute for money; divested of this, nothing can give it that character." 3 Webster's Works, 41.

The clause to coin money must be read in connection with the prohibition upon the States to make anything but gold and silver coin a tender in payment of debts. The two taken to-

gether clearly show that the coins to be fabricated under the authority of the general government, and as such to be a legal tender for debts, are to be composed principally, if not entirely of the metals of gold and silver. Coins of such metals are necessarily a legal tender to the amount of their respective values without any legislative enactment, and the statute of the United States providing that they shall be such tender is only declaratory of their effect when offered in payment. When the Constitution says, therefore, that Congress shall have the power to coin money, interpreting that clause with the prohibition upon the States, it says it shall have the power to make coins of the precious metals a legal tender, for that alone which is money can be a legal tender. If this be the true import of the language, nothing else can be made a legal tender. We all know that the value of the notes of the government in the market, and in the commercial world generally, depends upon their convertibility on demand into coin; and as confidence in such convertibility increases or diminishes, so does the exchangeable value of the notes vary. So far from becoming themselves standards of value by reason of the legislative declaration to that effect, their own value is measured by the facility with which they can be exchanged into that which alone is regarded as money by the commercial world. They are promises of money, but they are not money in the sense of the Constitution. The term money is used in that instrument in several clauses; in the one authorizing Congress "to borrow money;" in the one authorizing Congress "to coin money;" in the one declaring that "no money" shall be drawn from the treasury but in consequence of appropriations made by law; and in the one declaring that no State shall "coin money." And it is a settled rule of interpretation that the same term occurring in different parts of the same instrument shall be taken in the same sense, unless there be something in the context indicating that a different meaning was intended. Now, to coin money is, as I have said, to make coins out of metallic substances, and the only money the value of which Congress can regulate is coined money, either of our mints or of foreign

countries. It should seem, therefore, that to borrow money is to obtain a loan of coined money, that is, money composed of the precious metals, representing value in the purchase of property and payment of debts. Between the promises of the government, designated as its securities, and this money, the Constitution draws a distinction, which disappears in the opinion of the court.

The opinion not only declares that it is in the power of Congress to make the notes of the government a legal tender and a standard of value, but that under the power to coin money and regulate the value thereof, Congress may issue coins of the same denominations as those now already current, but of less intrinsic value, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by payment of coins of less real value. This doctrine is put forth as in some way a justification of the legislation authorizing the tender of nominal money in place of real money in payment of debts. Undoubtedly Congress has power to alter the value of coins issued, either by increasing or diminishing the alloy they contain; so it may alter, at its pleasure, their denominations; it may hereafter call a dollar an eagle, and it may call an eagle a dollar. But if it be intended to assert that Congress can make the coins changed the equivalent of those having a greater value in their previous condition, and compel parties contracting for the latter to receive coins with diminished value, I must be permitted to deny any such authority. Any such declaration on its part would be not only utterly inoperative in fact but a shameful disregard of its constitutional duty. As I said on a former occasion: "The power to coin money, as declared by this court, is a great trust devolved upon Congress, carrying with it the duty of creating and maintaining a uniform standard of value throughout the Union, and it would be a manifest abuse of this trust to give to the coins issued by its authority any other than their real value. By debasing the coins, when once the standard is fixed, is meant giving to the coins, by their form and impress, a certificate of their having a relation to that standard different from that which, in truth,

they possess; in other words, giving to the coins a false certificate of their value. Arbitrary and profligate governments have often resorted to this miserable scheme of robbery, which Mill designates as a shallow and impudent artifice, the 'least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of one hundred pounds may be cancelled by the payment of one hundred shillings.'" No such debasement has ever been attempted in this country, and none ever will be so long as any sentiment of honor influences the governing power of the nation. The changes from time to time in the quantity of alloy in the different coins has been made to preserve the proper relative value between gold and silver, or to prevent exportation, and not with a view of debasing them. Whatever power may be vested in the government of the United States, it has none to perpetrate such monstrous iniquity. One of the great purposes of its creation, as expressed in the preamble of the Constitution, was the establishment of justice, and not a line nor a word is found in that instrument which sanctions any intentional wrong to the citizen, either in war or in peace.

But beyond and above all the objections which I have stated to the decision recognizing a power in Congress to impart the legal tender quality to the notes of the government, is my objection to the rule of construction adopted by the court to reach its conclusions, a rule which fully carried out would change the whole nature of our Constitution and break down the barriers which separate a government of limited from one of unlimited powers. When the Constitution came before the conventions of the several States for adoption, apprehension existed that other powers than those designated might be claimed; and it led to the first ten amendments. When these were presented to the States they were preceded by a preamble stating that the conventions of a number of the States had at the time of adopting the Constitution expressed a desire, "in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added." One of them is found in the Tenth Amendment, which declares

that "the 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." The framers of the Constitution, as I have said, were profoundly impressed with the evils which had resulted from the vicious legislation of the States making notes a legal tender, and they determined that such a power should not exist any longer. They therefore prohibited the States from exercising it, and they refused to grant it to the new government which they created. Of what purpose is it then to refer to the exercise of the power by the absolute or the limited governments of Europe, or by the States previous to our Constitution. Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. The power to commit violence, perpetrate injustice, take private property by force without compensation to the owner, and compel the receipt of promises to pay in place of money, may be exercised, as it often has been, by irresponsible authority, but it cannot be considered as belonging to a government founded upon law. But be that as it may, there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld. It seems, however, to be supposed that, as the power was taken from the States, it could not have been intended that it should disappear entirely, and therefore it must in some way adhere to the general government, notwithstanding the Tenth Amendment and the nature of the Constitution. The doctrine, that a power not expressly forbidden may be exercised, would, as I have observed, change the character of our government. If I have read the Constitution aright, if there is any weight to be given to the uniform teachings of our great jurists and of commen-

tators previous to the late civil war, the true doctrine is the very opposite of this. If the power is not in terms granted, and is not necessary and proper for the exercise of a power which is thus granted, it does not exist. And in determining what measures may be adopted in executing the powers granted, Chief Justice Marshall declares that they must be appropriate, plainly adapted to the end, not prohibited, and *consistent with the letter and spirit of the Constitution.* Now, all through that instrument we find limitations upon the power, both of the general government and the State governments, so as to prevent oppression and injustice. No legislation, therefore, tending to promote either can consist with the letter and spirit of the Constitution. A law which interferes with the contracts of others and compels one of the parties to receive in satisfaction something different from that stipulated, without reference to its actual value in the market, necessarily works such injustice and wrong.

There is, it is true, no provision in the Constitution of the United States forbidding in direct terms the passing of laws by Congress impairing the obligation of contracts, and there are many express powers conferred, such as the power to declare war, levy duties, and regulate commerce, the exercise of which affects more or less the value of contracts. Thus war necessarily suspends intercourse between citizens or subjects of belligerent nations, and the performance during its continuance of previous contracts. The imposition of duties upon goods may affect the prices of articles imported or manufactured, so as to materially alter the value of previous contracts respecting them. But these incidental consequences arising from the exercise of such powers were contemplated in the grant of them. As there can be no solid objection to legislation under them, no just complaint can be made of such consequences. But far different is the case when the impairment of the contract does not follow incidentally, but is directly and in terms allowed and enacted. Legislation operating directly upon private contracts, changing their conditions, is forbidden to the States; and no power to alter the stipulations of such contracts by direct legis-

lation is conferred upon Congress. There are also many considerations, outside of the fact that there is no grant of the power, which show that the framers of the Constitution never intended that such power should be exercised. One of the great objects of the Constitution, as already observed, was to establish justice, and what was meant by that in its relations to contracts, as said by the late chief justice in his opinion in *Hepburn* v. *Griswold*, was not left to inference or conjecture. And in support of this statement he refers to the fact that when the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in framing the ordinance for the government of the Northwest Territory, in which certain articles of compact were established between the people of the original States and the people of the Territory "for the purposes," as expressed in the instrument, "of extending the fundamental principles of civil and religious liberty, whereon these republics [the States united under the confederation], their laws and constitutions, are erected." That Congress was also alive to the evils which the loose legislation of the States had created by interfering with the obligation of private contracts and making notes a legal tender for debts; and the ordinance declared that in the just preservation of rights and property no law "ought ever to be made, or have force in the said Territory, that shall in any manner whatever interfere with or affect private contracts, or engagements, *bona fide* and without fraud, previously formed." This principle, said the chief justice, found more condensed expression in the prohibition upon the States against impairing the obligation of contracts, which has always been recognized "as an efficient safeguard against injustice;" and the court was then of opinion that "it is clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency." Soon after the Constitution was adopted the case of *Calder* v. *Bull* came before this court, and it was

there said that there were acts which the federal and State legislatures could not do without exceeding their authority; and among them was mentioned a law which punished a citizen for an innocent act, and a law which destroyed or impaired the lawful private contracts of citizens. "It is against all reason and justice," it was added, "for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it." 3 Dallas, 388. And Mr. Madison in one of the articles in the Federalist, declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact, and to every principle of sound legislation. Yet this court holds that a measure directly operating upon and necessarily impairing private contracts, may be adopted in the execution of powers specifically granted for other purposes, because it is not in terms prohibited, and that it is consistent with the letter and spirit of the Constitution.

From the decision of the court I see only evil likely to follow. There have been times within the memory of all of us when the legal tender notes of the United States were not exchangeable for more than one-half of their nominal value. The possibility of such depreciation will always attend paper money. This inborn infirmity no mere legislative declaration can cure. If Congress has the power to make the notes a legal tender and to pass as money or its equivalent, why should not a sufficient amount be issued to pay the bonds of the United States as they mature? Why pay interest on the millions of dollars of bonds now due, when Congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, if the printing press can furnish the money that is needed for them?

FIVE PER CENT. CASES.

IOWA *v.* McFARLAND, Commissioner.

ILLINOIS *v.* McFARLAND, Commissioner.

ORIGINAL.

Argued November 1st, and 2d, 1883.—Decided March 3d, 1884.

Military Land Warrants—Five per cent. Act.

Under the act of March 3d, 1845, ch. 76, relating to the admission of Iowa into the Union, or the act of April 18th, 1818, ch. 67, for the admission of the State of Illinois into the Union, by which "five per cent. of the net proceeds" of public lands lying within the State, and afterwards "sold by Congress," shall be reserved and appropriated for certain public uses of the State, the State is not entitled to a percentage on the value of lands disposed of by the United States in satisfaction of military land warrants.

These were petitions filed in this court by each of the States of Iowa and Illinois, at the relation of its governor, relying upon the provision of an act of Congress relating to its admission into the Union, by which it was agreed that "five per cent. of the net proceeds" of lands lying within the State, and afterwards "sold by Congress," should be appropriated for certain public uses of the State; contending that the State was thereby entitled to five per cent. of the value, computed at the rate of one dollar and twenty-five cents per acre, of lands disposed of by Congress in satisfaction of military land warrants; and praying for a writ of mandamus to the Commissioner of the General Land Office, to compel him, in accordance with section 456 of the Revised Statutes, to state an account between the United States and the State, for the purpose of ascertaining the sum of money so due to the State, and to transmit the account to the Comptroller of the Treasury for his examination and action, to the end that that sum might be allowed and paid by the United States.

The provisions of the acts of Congress, on which the petitioners relied were as follows:

The sixth section of the act of Congress of March 3d, 1845,

ch. 76, supplemental to the act of the same day by which the State of Iowa was admitted into the Union, contained, among the propositions offered to the legislature of the State for its acceptance or rejection, and which, if accepted under the authority conferred on the legislature by the convention which framed the Constitution of the State, should be obligatory upon the United States, the following:

"Fifth. That five per cent. of the net proceeds of sales of all public lands lying within the said State, which have been or shall be sold by Congress from and after the admission of said State, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said State, as the legislature may direct: *Provided*, That the five foregoing propositions herein offered are on the condition that the legislature of the said State, by virtue of the powers conferred upon it by the convention which framed the Constitution of the said State, shall provide, by an ordinance, irrevocable without the consent of the United States, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed on lands the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the State, whether for State, county, township, or any other purpose, for the term of three years from and after the date of the patents, respectively." 5 Stat. 790.

The sixth section of the act of Congress of April 18th, 1818, ch. 67, to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of the State of Illinois into the Union, contained among the propositions offered to the convention of the Territory, and which, if accepted by the convention, should be obligatory upon the United States, the following:

Statement of Facts.

"Third. That five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress from and after the first day of January, one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated, by the legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university:" "*Provided always*, That the four foregoing propositions, herein offered, are on the conditions that the convention of the said State shall provide, by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January, one thousand eight hundred and nineteen, shall remain exempt from any tax laid by order or under any authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale. *And further*, That the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt, as aforesaid, from all taxes, for the term of three years from and after the date of the patents respectively; and that all the lands belonging to citizens of the United States, residing without the said State, shall never be taxed higher than lands belonging to persons residing therein." 3 Stat. 430, 431.

By the act of Congress of March 2d, 1855, ch. 139, entitled: "An Act to settle certain accounts between the United States and the State of Alabama," it was enacted as follows:

"That the commissioner of the general land office be, and he is hereby, required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, under the sixth section of the act of March second, eighteen hundred and nineteen, for the admission of Alabama into the Union; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow

and pay to said State five per centum thereon, as in case of other sales." 10 Stat. 630.

By the act of June 3d, 1857, ch. 104, entitled "An Act to settle certain accounts between the United States and the State of Mississippi and other States," it was enacted as follows:

"SECT. 1. That the commissioner of the general land office be, and he is hereby, required to state an account between the United States and the State of Mississippi for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principle of allowance and settlement as prescribed in the 'Act to settle certain accounts between the United States and the State of Alabama,' approved the second of March, eighteen hundred and fifty-five; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State five per centum thereon, as in case of other sales, estimating the lands at the value of one dollar and twenty-five cents per acre.

"SECT. 2. That the said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre." 11 Stat. 200.

Each petition alleged that the State had accepted the propositions and faithfully kept and performed on its part the conditions set forth in the act of admission; that, prior to the dates of the passage of the acts of 1855 and 1857 respectively, the five per cent. on the cash sales of the public lands lying within the States of Alabama and Mississippi had been regularly and periodically paid to those States respectively, so that at those dates there were no unsettled accounts, growing out of the five per cent. clause of the acts for the admission of those States into the Union, except for lands entered and purchased with military land warrants; and that by the act of 1857 it was the duty of the Commissioner of the General Land Office,

when required to do so, to state an account between the United States and each State upon the same principles of allowance as prescribed in the act of 1855, and by that act it was his duty, upon proper application, to state such an account for the purpose of ascertaining what sum or sums of money, theretofore unsettled under the act for the admission of the State into the Union, were due to it on account of lands lying within the State, disposed of by the United States for, or in the satisfaction and redemption of, military land warrants issued by the United States for military services.

Each petition further alleged that the government of the United States, in disposing of the public lands by sale in this and other western States, adopted two methods, one for cash, the other for the redemption of its outstanding military warrants or obligations, calling for a specific quantity of land, issued to the soldiers who had enlisted and served in the different wars of the country, under statutes enacted in advance of their enlistments, and as a compensation for their military services.

Each petition suggested that by the act of August 14th, 1848, ch. 180, 9 Stat. 332, military land warrants were made receivable, at the rate of $1.25 per acre for the number of acres therein contained, in payment for any of the public lands subject to private entry; and that by the act of March 22d, 1852, ch. 19, 10 Stat. 3, all military land warrants, theretofore and thereafter issued, were made assignable by the persons to whom they were issued, and also made receivable from their assignees, at the rate aforesaid per acre, in payment for any of the public lands located and taken up under the pre-emption laws of the United States.

Each petition further alleged that the five per cent. had been allowed and paid to the petitioner, at stated and proper periods, on sales for cash, but had been withheld on lands located and purchased with military land warrants; that the sum so withheld amounted to $881,006.60 in the case of Iowa, and $595,853.31 in the case of Illinois; that the respondent, though formally requested, had refused to state an account as prayed for; and that the duty of stating such an account was purely

ministerial and mandatory in its character, leaving no room for the exercise of his own judgment and discretion in its performance.

Upon each of these petitions a rule to show cause was granted at the last term. The Commissioner of the General Land Office at this term filed an answer, in the nature of a return to each rule, admitting that upon the facts stated in the petition, as modified and explained by the facts set forth below, he refused to state the account prayed for, and alleging that the grounds of his refusal were these:

First. That neither the act of Congress relating to the admission of the State into the Union, nor the acts of 1855 and 1857, authorized the State to claim a percentage upon public lands disposed of by the United States to the holders of bounty land warrants.

Second. That the meaning of those statutes had been established, as between the parties, by the contemporaneous and continuous construction thereof by the General Land Office and the State in numerous and important transactions, each of which suggested a question, if one existed, as to their construction.

In the case of the State of Iowa, the answer alleged that between August, 1848, and July, 1858, eleven different settlements had been made in the General Land Office for the percentage due to the State, covering in all the sum of $580,710.49, in none of which was the present claim suggested, although from time to time during that period large amounts of the public lands lying within the State had been disposed of by the United States to the holders of such warrants; that this contemporaneous practical construction had governed all transactions with the nineteen States interested in the statutory provision under consideration; that on September 7th, 1858, the State of Iowa made a formal demand upon the Secretary of the Interior as the official superior of the then Commissioner of the General Land Office, to be allowed the percentage now claimed; and that its demand was refused, for the reason stated by the Secretary in the following letter to the Governor of Iowa:

Statement of Facts.

"Department of the Interior, September 20th, 1858.

"In reply to your letter of the 7th instant, in relation to the application for an allowance of five per centum, claimed to be due the State of Iowa on military land warrant locations, I have the honor to state that, in my opinion, the act of 1847, to which you refer, is a bounty land act, and that no distinction can properly be made between locations made under it and those made under other bounty land laws. The location of warrants issued under the act of 1847 is not considered as constituting a sale of the public lands, as contemplated by the act admitting Iowa into the Union. That act appropriated five per cent. of the net proceeds of sales of all public lands for making public roads and canals within the State. There being no net proceeds accruing from locations by military land warrants, the allowance of five per centum on such locations cannot be regarded as having been appropriated or provided for by law.

"J. THOMPSON, Secretary.

"Governor R. P. Lowe, Iowa.

The answer in the case of the State of Iowa further alleged that this was the only demand ever made by the State of Iowa, or by any other State, upon the Secretary of the Interior or upon the Commissioner of the General Land Office, in accordance with the claim now set up; and that the State of Iowa had ever since practically acquiesced in the construction suggested by the Secretary of the Interior, and had confined its efforts to applications to Congress for a change in the statutes.

In the case of the State of Illinois, the answer alleged that from November, 1830, to September, 1863, thirty-three different settlements had been made, covering in all the sum of $711,744.82, and of which that made in 1863, for $1,565.80, was for Indian reservations only, in none of which was the present claim suggested, although from time to time during fifteen or more years of that period large amounts of the public lands lying within the State were disposed of by the United States to holders of bounty land warrants.

Each answer concluded by denying that the petitioner, in any view of the case, was entitled to a writ of mandamus.

Opinion of the Court.

Mr. Allen G. Thurman, *Mr. William M. Evarts*, *Mr. Samuel Shallabarger*, *Mr. R. P. Lowe* and *Mr. W. W. Wiltshire* for petitioners.

Mr. M. L. Woods on behalf of the State of Alabama, also by leave of court filed a brief for the petition.

Mr. Solicitor-General opposing.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the foregoing language, he continued:

The first question argued in each of these cases may be shortly stated thus: Is the State, under the compact made with it by Congress at the time of its admission into the Union, by which "five per cent. of the net proceeds" of public lands lying within the State, and "sold by Congress" after such admission, shall be reserved and appropriated for the benefit of the State, entitled to a percentage on the value of lands, not sold by the United States for cash, but disposed of by the United States in satisfaction of military land warrants?

This question is rendered important by the large sums of money involved, and by the fact that similar stipulations are contained in acts passed by Congress relating to seventeen other western or southern States, beginning with § 7 of the act of April 30th, 1802, ch. 40, for the admission of the State of Ohio into the Union. 2 Stat. 175.

Upon full consideration of the question, with the aid of the able arguments of counsel, the court is of opinion that lands disposed of by the United States in satisfaction of military land warrants are not sold, within the meaning of the statutes upon which the petitioners rely.

A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent. When property or money is transferred or paid as a compensation for service, the property or money may be said to be the price of the service; but it can hardly be said that the service is the price of the property or money, or that the property or money is sold to the person performing the service. Nor can it be said that the pay of an officer or soldier in the army or navy is

sold to him by the government in consideration of a price paid by him.

Land or money, other than current salary or pay, granted by the government to a person entering the military or naval service of the country, has always been called a bounty; and while it is by no means a gratuity, because the promise to grant it is one of the considerations for which the soldier or sailor enters the service, yet it is clearly distinguishable from salary or pay measured by the time of service. For example, it was held by Lord Mansfield and the Court of King's Bench in 1784, that though the master of an apprentice was entitled by the act of Parliament of 2 & 3 Anne, ch. 6, § 17, to the wages of his apprentice enlisting into the navy, yet the apprentice's share of prize money belonged to himself, and not to his master, because it was not wages, but the bounty of the crown. *Carsan* v. *Watts*, 3 Doug. 350; *Eades* v. *Vandeput*, 4 Doug. 1. Upon like grounds, it has been held that bounty money paid by the United States, or by a State, city or town, upon the enlistment of a minor as a soldier, during the recent war, belonged to him, and not to his father or master. *Banks* v. *Conant*, 14 Allen, 497; *Kelly* v. *Sprout*, 97 Mass. 169. See also *Alexander* v. *Wellington*, 2 Russ. & Myl. 35, 56, 64.

The learned counsel for the State of Iowa referred to General Washington's Circular Letter of June 8th, 1783, to the governors of the States, and especially to the passage in which he insisted that the half pay and commutation promised by the Congress of the Confederation to the officers of the army, during the war of the Revolution, "should be viewed, as it really was, a reasonable compensation offered by Congress, at a time when they had nothing else to give, to the officers of the army for services, then to be performed; it was the only means to prevent a total dereliction of the service; it was a part of their hire; I may be allowed to say, it was the price of their blood and of your independency; it is therefore more than a common debt; it is a debt of honor; it can never be considered as a pension or gratuity, nor be cancelled until it is fairly discharged." But in the very next paragraph he spoke of "the bounties many of the soldiers have received," "besides the donation of lands."

The question before us is not whether the promise by the government of a bounty in land or money to persons entering the military service is a contract for valuable consideration; but whether, when carried into effect, it constitutes a sale by the government; and it is quite clear that land granted by way of reward for military services has never been treated, in the legislation of the United States upon the subject, as sold, but has always been considered as analogous to money paid in a gross sum by way of bounty.

By the resolution of September 16th, 1776, the Congress of the Confederation resolved that "twenty dollars be given as a bounty" to each non-commissioned officer and private soldier enlisting to serve during the war, and that "Congress make provision for granting lands" to officers and soldiers in certain proportions; "such lands to be provided by the United States," and any necessary expenses in procuring them to be paid and borne by the United States in the same proportion as the other expenses of the war. 2 Journals of Congress, 357.

The act of Virginia of December 20th, 1783, to cede the Northwest Territory to the United States, and the deed of cession of March 1st, 1784, were upon the following conditions: That the Territory so ceded should be laid out and formed into States, to be admitted members of the Federal Union. That,

"A quantity, not exceeding one hundred and fifty thousand acres of land, promised by this State, shall be allowed and granted" to General George Rogers Clarke and his officers and soldiers. "That in case the quantity of good lands on the southeast side of the Ohio, upon the waters of Cumberland River, and between the Green River and Tennessee River, which have been reserved by law for the Virginia troops upon Continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States, and not reserved for or appropriated to any of the before mentioned

purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation or federal alliance of the said States." 1 Constitutions and Charters, 427, 428.

The acts of Congress under the Constitution, containing grants of land or money to soldiers, have habitually and repeatedly spoken of them as bounties, using the words "bounty of three months' pay and one hundred and sixty acres of land;" "military bounty lands;" "military land bounties;" "bounty in money and land;" "money bounty;" "bounty of one hundred and sixty acres of land;" "bounty in land;" "bounty right;" "bounty land;" and "military land bounty." Acts of December 24th, 1811, ch. 10, § 2; January 11th, 1812, ch. 14, § 12; May 6th, 1812, ch. 77; December 12th, 1812, ch. 4, § 3; 2 Stat. 669, 673, 729, 788; January 28th, 1814, ch. 9, § 2; February 10th, 1814, ch. 11, § 4; December 10th, 1814, ch. 10, §§ 3–5; 3 Stat. 96, 97, 147; February 11th, 1847, ch. 8, § 9; September 28th, 1850, ch. 85; 9 Stat. 125, 520. See also *French* v. *Spencer*, 21 How. 228; *Maxwell* v. *Moore*, 22 How. 185. They have never spoken of such grants of lands as sales, or of the lands granted as sold.

The very provisions of the acts for the admission of the States of Illinois and Iowa into the Union, which are the foundation of the claims now urged, clearly mark the distinction between lands sold for money, and bounty lands granted for military services.

In the Illinois act, the agreement on the part of the United States is that "five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress," "shall be reserved," part "to be disbursed," under the direction of Congress, in making roads leading to the State, and the rest "to be appropriated," by the legislature of the State, for the encouragement of learning. And among the conditions to be performed on the part of the State are: First. "That every and each tract of land sold by the United States" shall remain exempt from all State taxation for "five years from and after

the day of sale." Second. "That the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs," be exempt from State taxation for "three years from and after the date of the patents respectively." To hold that "lands sold by Congress" included "bounty lands granted for military services" would make these two conditions contradictory of each other; for "every and each tract of land sold by the United States" was to be absolutely exempt from State taxation for five years, whereas military bounty lands were to be exempt only while held by the patentees or their heirs, and not exceeding three years.

The Iowa act manifests the same distinction; for, while it omits the provision exempting "lands sold by the United States" from State taxation, it retains the provision exempting from taxation "bounty lands granted for military services;" and it emphasizes the meaning of the leading clause of the proposition, by inserting therein the words "of sales," so as to read "five per cent. of the net proceeds of sales of all public lands, lying with the said State, which have been or shall be sold by Congress from and after the admission of said State, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said State, as the legislature may direct."

When each of these acts speaks of lands "sold by Congress," "five per cent. of the net proceeds" of which shall be reserved, and be "disbursed" or "appropriated" for the benefit of the State in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the treasury, out of which the five per cent. may be reserved and paid to the State; and does not intend to include lands promised and granted by the United States as a reward for military service, for which nothing is received into the treasury. The question depends upon the terms in which the compact between the United States and each State is expressed, and not upon any supposed equity extending those terms to cases not fairly embraced within their meaning.

Opinion of the Court.

From the very beginning of our existence as a nation, the reward of military service has been treated as a national object and a public use, to which the national domain might justly and lawfully be applied. As new States have been successively formed out of the territory of the United States, and admitted into the Union, the acts of admission have reserved, for the making of public highways and other public uses of the State, a twentieth part of the net proceeds of public lands lying within the State, and afterwards sold by the United States. But public lands taken up on military land warrants issued under general laws, passed for the national object of encouraging and rewarding military service, and not limited to any particular State, have no more been regarded as lands sold, for any portion of the value of which the national government should account to the State in which the lands are actually taken up, than lands reserved and used for forts, arsenals or light-houses.

Some reliance is placed by the petitioners upon the acts of Congress of August 14th, 1848, ch. 180, and March 22d, 1852, ch. 19, by which military land warrants are made assignable, and are also made receivable, either from the original grantee or from his assignee, in payment for public lands, at the rate of one dollar and twenty-five cents per acre. But the promise of the United States is made to the soldier at the time of his entering the service, and the grant, in execution of that promise, is made when the warrant is issued to him, and in consideration of services then already performed. At that time, no particular land is transferred to him, nor even the State designated in which the land shall be. The selection of the land, which first determines the State where it is to be taken up, is the act, not of the government, but of the holder of the warrant. The government receives no new consideration, and makes no new promise or grant, when the warrant is assigned by the soldier, or when it is actually located by himself or his assignee, and the land and the State in which it lies thereby for the first time designated; and never, at any stage of the transaction, receives into the treasury any money from any person.

The fact that the registers and receivers of the land office, performing services in locating military bounty land warrants,

are authorized by § 2 of the act of 1852 to demand and receive for their services, from the assignees or holders of such warrants, the same compensation "to which they are entitled by law for sales of the public lands for cash, at the rate of one dollar and twenty-five cents per acre," has no tendency to show that the United States, under their agreement to pay to the State five per cent. of the net proceeds of lands sold by Congress, are bound to pay five per cent. on the value of lands which they have never sold, and for which they have received no money.

The acts of March 2d, 1855, ch. 139, and March 3d, 1857, ch. 104, requiring five per cent. to be paid to the States on the value of lands included in reservations under treaties with Indian tribes, had reference only to lands reserved to the Indians by stipulations in such treaties. The fact that the words "as in case of other sales" are used in speaking of lands reserved for that purpose, and have never been so applied to lands disposed of in satisfaction of military land warrants, appears to us, so far as it has any bearing, to imply an intention to exclude the latter from the class of lands sold, rather than to include them in this class.

That class of decisions of which *United States* v. *Watkins*, 97 U. S. 219, is an example, in which, under an act of Congress, providing that in case lands within territory ceded to the United States, claimed under grants previously made by foreign governments and since confirmed, should be sold by the United States before the confirmation, or could not be surveyed and located, the claimant should be entitled to so much public land in lieu thereof, it was held that lands granted by the United States to settlers thereon were included, rests upon the reasons that the claimant had been deprived of so much of his private property by the act of the United States, and that the statutes *in pari materia* used the words "sold or disposed of." Neither of those reasons is applicable to the cases before us.

The conclusion to which the court is brought, upon a consideration of the language of the statutes relied on, and of the nature of the subjects to which they refer, accords with the contemporaneous and uniform construction given to them by

the executive officers charged with the duty of putting them in force. If the court had a doubt of the true meaning of their provisions, this practical construction would be entitled to great weight. *Edwards* v. *Darby*, 12 Wheat. 206; *United States* v. *State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 Pet. 1; *Surgett* v. *Lapice*, 8 How. 48; *Smythe* v. *Fiske*, 23 Wall. 374; *United States* v. *Moore*, 95 U. S. 760; *United States* v. *Pugh*, 99 U. S. 265; *Swift Co.* v. *United States*, 105 U. S. 691, 695.

The petitioners failing to prove any lawful claim against the United States, it becomes unnecessary to determine the further question, discussed at the bar, whether the writ of mandamus is an appropriate remedy in such cases.

Petitions dismissed.

Mr. Justice Miller, with whom concurred Mr. Justice Field, dissenting.

I do not concur in the judgment of the court in this case, if that can be called a judgment in which the court, declining to consider the question of its jurisdiction, decides that if it had jurisdiction the petitioners make no case for relief.

I doubt very much whether this court has jurisdiction in a suit by a State to establish an obligation of the United States to pay to the State a sum of money, by compelling one of the auditing officers of the United States to state an account under the direction of the court according to a rule which the court may prescribe to him.

I discuss this matter no further, but to observe that if the court has no such jurisdiction its opinion is of no value beyond the force of its argument and the weight of character of the judges who concur in it.

The opinion concedes that the acts of Congress under which the States of Illinois and Iowa were admitted into the Union, and the acceptance of their provisions, are compacts. If any less sanctity is due to these provisions by calling the matter a compact instead of a contract it is not perceptible to me. It is not denied that the State and the United States were capable of contracting. It is not denied in the opinion that they *did*

contract. Taking the case of the State of Iowa, the sixth section of the act for her admission, 5 Statutes, 789, says that, in lieu of the propositions submitted to Congress by the convention of the Territory, which are rejected, the following propositions are hereby offered to the legislature of the State of Iowa, which, if accepted, shall be obligatory on the United States. They were accepted. The propositions were the result of a negotiation, of items accepted and others rejected in that negotiation. It was a fair bargain between competent parties. The fifth item of this contract is as follows:

"*Fifth.* That five per cent. of the net proceeds of sales of all public lands lying within the said State, which have been or shall be sold by Congress, from and after the admission of said State, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said State, as the legislature may direct: *Provided,* That the five foregoing propositions herein offered are on the condition that the legislature of the said State, by virtue of the powers conferred upon it by the convention which framed the Constitution of the said State, shall provide by an ordinance, irrevocable without the consent of the United States, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed on lands the property of the United States, and in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted or hereafter to be granted for military services during the late war shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the State, whether for the State, county, or township, or any other purpose, for the term of three years from and after the dates of the patents respectively.

"Approved March 3d, 1845."

The legal expression of this contract is that the State of Iowa has the right to tax all the lands of the government as soon as the government sells them. She may have other rights with regard to the disposal of these lands by the United

States, as, for instance, in regard to title to aliens or corporations in perpetuity unacceptable to the State.

Now, in consideration that she agrees to make no interference with the primary disposal of the soil or any regulations of Congress for that purpose, that she will tax no non-resident in regard to said lands higher than she does residents, that she will impose no tax on the property of the United States, and no tax on lands granted for military services for three years after the dates of the patents, either for State, county or township purposes, there shall be paid to the State five per cent. of the net proceeds of sales of all public lands lying within the State which have been or shall be sold by Congress from and after the admission of the State.

The question raised here is whether the word *sales* in this act of Congress is limited to sales made for money, or whether lands used in payment for the services of her military and naval officers and soldiers are sold within the meaning of the statute.

It seems probable that a false impression has been made by calling these latter bounties; and it is true that in some cases where, *after* the service has been rendered, Congress has granted lands as gratuity to the soldier or sailor, it is a bounty, and is not a sale in fact, or within the meaning of the statute. But the large body of these land warrants were issued under statutes, which, in calling the men into service and prescribing their compensation in advance, declared that for so many months' service they should, in addition to their monthly cash payment, receive so many acres of land, according to the length of their service.

This was as much a part of the pay which the government agreed to make for his services as the cash payment. And to show that the government so considered it, a reference to the acts of 1847, to raise troops for the Mexican war, under which the largest part of the sales in Iowa was made, is all that is necessary.

The 9th section of that act, 9 Stat. 125, authorizes the soldier to receive, at his option, a land warrant for one hundred and sixty acres, to be located on any public lands, or

treasury scrip for $100; such scrip to be redeemable at the pleasure of the government, and to bear interest at six per cent. per annum until paid.

It was also enacted that those land warrants should be received at the land office in payment of any congressional subdivision of the public land, at the rate of $1.25 per acre, the purchaser paying any balance above the value of the land warrant in cash. 9 Stat. 332.

And still later, it was enacted that a person having a pre-emption right to a tract of land should be entitled to use any such land warrant in payment of the same, at the rate of $1.25 per acre.

That they might be thus freely used in the purchase of the public lands, these warrants were by statute early made assignable, and it may be safely said that for years the largest part of the public lands sold by the land officers were paid for by these land warrants.

Blackstone defines a sale to be "a transmutation of property from one man to another in consideration of some price." 2 Blackstone, 446. And Kent says "a sale is a contract for the transfer of property from one person to another for valuable consideration, and three things are requisite to its validity, viz.: the thing sold, which is the object of the contract, the price, and the consent of the contracting parties." 2 Kent, 468. And though there is some controversy whether, in reference to personal property, the consideration is not to be paid in money, the use of the old phrase "bargain and sale" in regard to land, never required that the consideration should be exclusively a money payment. 2 Bouvier's Law Dictionary, 494, clause 6, Sale.

But it surely was never contemplated in this compact between a State of the Union and the general government that if the government could dispose of her public lands, and secure their full price in other valuable consideration than money, the State should thus be cheated out of the five per cent. of that value which she had a right to expect.

The United States made these warrants the equivalent of money in purchase of these lands by the holders. They gave

them the equivalent purchasing power of money and the quality of negotiability, and they gave the soldier the option of a treasury draft or a land warrant when he had rendered the service.

It is the merest quibble to say that where a man purchased a quarter-section of the public lands with one of these warrants, the government had not sold him that land at a dollar and a quarter an acre.

No importance can be attached to the previous construction of the government. The amount in controversy attracted no attention until the location of the land warrants for service in the Mexican war, and the lands in the Territories were not subject to this five per cent. As early as 1858, when the locations under the Mexican war claims were thickest, Governor Lowe of Iowa asserted this right in a letter to Mr. Thompson, Secretary of the Interior. This was immediately after the act of 1857, making it the duty of the land commissioner to state these accounts. The claim has been urged by that State ever since, except during the disastrous period of the civil war; and the Senate of the United States passed a law recognizing the justice of the claim and that of other States, and ordering their payment, during the last Congress, but, on a motion to reconsider, it was tied up and has not been acted on since.

I entertain no doubt of the legal as well as the moral obligation of the United States to pay to the States concerned the five per cent. on these sales which they have thus far withheld.

Mr. Justice Field concurs with me in this opinion.

PENNSYLVANIA RAILROAD COMPANY *v.* LOCOMOTIVE ENGINE SAFETY TRUCK COMPANY.

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

Argued October 12th, 1883.—Decided March 3d, 1884.

Patent.

The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

In trucks already in use on railroad cars, the king-bolt which held the car to each truck passed through a bolster supporting the weight of the car, and through an elongated opening in the plate below, so as to allow the swivelling of the truck upon the bolt, and lateral motion in the truck; and the bolster was suspended by divergent pendent links from brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the track. *Held*, That a patent for employing such a truck as the forward truck of a locomotive engine with fixed driving wheels was void for want of novelty.

Suit in equity for alleged infringement of letters patent for an improvement in trucks for locomotives by the employment of pilot wheels to allow of lateral motion to the engine. The defence was: 1st. Public use for more than two years before the patentee's application; 2d. Want of novelty. The court below found that the invention had been in use on cars prior to the patent, but not as applied to locomotives, and a decree was entered sustaining the patent, from which the defendant below appealed.

Mr. George Harding, *Mr. A. McCallum*, and *Mr. F. F. Chambers* for appellant.

Mr. S. S. Hollingsworth and *Mr. Edmund Wetmore* for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by the defendant below from a decree against it upon a bill in equity for the infringement of letters

patent granted on February 11th, 1862, to Alba F. Smith, for an improvement in trucks for locomotive engines, the specification annexed to which, except the drawings and the letters referring to them and the formal beginning and conclusion, was as follows:

"Several laterally moving trucks have heretofore been made and applied to railroad cars. My invention does not relate broadly to such laterally moving trucks; but my said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels provided with pendent links, to allow of a lateral movement, so that the driving wheels of the locomotive engine continue to move correctly on a curved track, in consequence of the lateral movement allowed by said pendent links, the forward part of the engine travelling as a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of the curve. In the drawing, I have represented my improved truck itself. The mode of applying the same to any ordinary locomotive engine will be apparent to any competent mechanic, as my truck can be fitted in the place of those already constructed, or the same may be altered to include my improvement."

The specification then refers to the drawings, showing the wheels, the axles, and the frame of any ordinary locomotive truck, made in any usual manner, with the centre cross-bearing plate or platform, of two thicknesses of iron plate riveted together, strengthened by cross-bars beneath, and embracing at its ends the upper bars of the frame; a bolster, made of a flanged bar; the king-bolt, passing through the centre of the bolster and also through an elongated opening in the plate, so as to allow of lateral motion to the truck beneath the bolster, and at the same time becoming a connection to hold the truck to the engine; the bolster taking the weight of the engine in the middle, and itself suspended at the ends of bars attached to the moving ends of pendent links attached by bolts at their upper ends to brackets on the frame, and the distance between the bars, transversely of the truck, slightly more than between

the bolts, so that the pendent links diverge slightly. The specification then proceeds:

"When running upon a straight road, the engine preserves great steadiness, because any change of position transversely of the track, in consequence of the engine moving over the truck, or the truck beneath the engine, is checked by the weight of the engine hanging upon the links, and, in consequence of their divergence, any side movement causes the links on the side towards which the movement occurs to assume a more inclined position, while the other links come vertical, or nearly so; hence the weight of the engine acts with a leverage upon the most inclined links, to bring them into the same angle as the others, greatly promoting the steadiness of the engine in running on a straight line. As the pilot or truck wheels enter a curve, a sidewise movement is given to the truck, in consequence of the engine and drivers continuing to travel as a tangent to the curve of the track. This movement, and the slight turn of the whole truck on the king-bolt, not only causes the wheels to travel correctly on the track, with their axles parallel to the radial line of the curve of track, but also elevates the outer side of the engine, preventing any tendency to run off the track upon the outer side of the curve. Upon entering a straight track, the truck again assumes the central position, and in case of irregularity in the track, or any obstruction, the truck moves laterally, without disturbing the movement of the engine.

"I do not claim laterally moving trucks, nor pendent links, separately considered; but what I claim, and desire to secure by letters patent, is the employment, in a locomotive engine, of a truck or pilot wheels fitted with the pendent links, to allow of lateral motion to the engine, as specified, whereby the drivers of said engine are allowed to remain correctly on the track, in consequence of the lateral motion of the truck, allowed for by said pendent links when running on a curve, as set forth."

The invention then, as claimed, is for the combination, with a locomotive engine, of a truck, of which the king-bolt, forming the connection to hold the truck to the engine, passes through a bolster, and through an elongated opening in the plate or platform of the truck, so as to allow the truck to have a lateral

motion beneath the bolster; and the bolster takes the weight of the engine in the middle, and is suspended from the frame of the truck by pendent and slightly divergent links, so that any movement of the engine or truck sidewise, as in entering upon or passing over a curve of the track, causes the links on the side toward which the engine moves to assume a more inclined position, and the other links to become nearly vertical, and the weight of the engine, hanging upon the links, checks its own lateral movement, and tends to bring both sets of links back to their original angle.

In railroad cars, the trucks were allowed to swivel around the king-bolt before 1841; the transverse slot and pendent links, allowing a lateral motion, were used by Davenport and Bridges in 1841; in 1859 Kipple and Bullock made the pendent links divergent; and at the time of Smith's invention the trucks of railroad cars had all the elements of the truck put by him under the front of a locomotive engine.

The question therefore is, whether employing, as the forward truck of a locomotive engine with fixed driving wheels, a truck already in use on railroad cars, has the novelty requisite to sustain a patent.

After carefully considering the evidence and arguments in this case, and the reasons assigned for sustaining Smith's patent, in the opinion of the court below, reported in 1 Banning & Arden, 470, and in the opinion rendered by the Circuit Court in the Second Circuit in *Locomotive Engine Safety Truck Co.* v. *Erie Railway Co.*, reported in 6 Fisher Pat. Cas. 187, and in 10 Blatchford, 292, this court finds itself unable to escape from the conclusion that the application of the old truck to a locomotive engine neither is a new use, nor does it produce a new result.

In both engine and car, the increased friction against the rails and the danger of being thrown off the track, in entering upon or passing along a curve, are due to the impulse of forward motion in a direction tangential to the curve, and to the influence of centrifugal force. In the engine, as in the car, the object and the effect of the transverse slot, allowing a slight lateral motion, and of the divergent pendent links, by means of

which the weight of the engine or car itself helps to keep it upon the track, are to secure steadiness and safety by lessening the friction against the rails and the danger of being thrown off the track. The only difference is, that by reason of the fixed position of the driving wheels of the engine, the truck, which has before been applied at each end of a car, can only be applied at the forward end of the engine, and therefore the accommodation of the movement of the engine to the curve of the track may be less complete than in the case of the car. The effect of the invention upon the engine, as compared with its effect upon the car, is the same in kind, though perhaps less in degree.

It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Hotchkiss* v. *Greenwood*, 11 How. 248; *Phillips* v. *Page*, 24 How. 164, 167; *Jones* v. *Morehead*, 1 Wall. 155, overruling *S. C. nom. Livingston* v. *Jones*, 1 Fisher Pat. Cas. 521; *Hicks* v. *Kelsey*, 18 Wall. 670; *Smith* v. *Nichols*, 21 Wall. 112; *Brown* v. *Piper*, 91 U. S. 37; *Roberts* v. *Ryer*, 91 U. S. 150; *Keystone Bridge Company* v. *Phœnix Iron Company*, 95 U. S. 274, 276; *Planing Machine Company* v. *Keith*, 101 U. S. 479, 491; *Pearce* v. *Mulford*, 102 U. S. 112; *Heald* v. *Rice*, 104 U. S. 737, 754–756; *Atlantic Works* v. *Brady*, 107 U. S. 192.

In the well known case of *Crane* v. *Price*, in which the English Court of Common Pleas upheld a patent for using anthracite, instead of bituminous coal, with the hot blast in smelting iron ore, the evidence, as Chief Justice Tindal remarked, proved beyond doubt that, in the result of the combination of the hot air blast with the anthracite, not only was the yield of the furnace more, and the expense of making the iron less, but "the nature, properties and quality of the iron were better," than under the former process by means of the combination of the hot air blast with bituminous coal. 4 Man. & Gr. 580, 604; 5

Scott N. R. 338, 389; 1 Webster Pat. Cas. 393, 410. And the decision rests, as was pointed out by Chief Baron Pollock and Baron Parke in *Dobbs* v. *Penn*, 3 Exch. 427, 432, 433, and by Mr. Justice Bradley in *Hicks* v. *Kelsey*, above cited, upon the ground that a new metal or composition of matter was produced. As observed by Mr. Justice Bradley, "in compositions of matter a different ingredient changes the nature of the compound, whereas an iron bar in place of a wooden one, and subserving the same purpose, does not change the identity of a machine." 18 Wall. 674.

So in *Smith* v. *Goodyear Dental Vulcanite Company*, in this court, as was observed by Mr. Justice Strong, in delivering its judgment, "A new product was the result, differing from all that had preceded it, not merely in degree of usefulness and excellence, but differing in kind, having new uses and properties." 93 U. S. 486, 494. See also *Goodyear Dental Vulcanite Company* v. *Davis*, 102 U. S. 222.

Upon the principles which must govern this case, the decisions of this court and of the highest courts of England are in full accord, as will appear by referring to three cases, fully argued and considered, all of which were carried to the Exchequer Chamber, and two of which were finally decided in the House of Lords.

In *Bush* v. *Fox*, a patent for constructing the interior of a caisson or cylinder with successive chambers to work in, "in such manner that the work-people may be supplied with compressed air, and be able to raise the material excavated, and to make or construct foundations and buildings," under water, when a similar apparatus had already been used for working underground on land, was held by Chief Baron Pollock, by the Court of Exchequer Chamber, and by the House of Lords, to be void for want of novelty, after able arguments in support of the patent by Sir Alexander Cockburn, then Attorney-General, and by Mr. Webster, the accomplished patent counsel, at the successive stages of the case. Macrory Pat. Cas. 152, 167, 179; 9 Exch. 651; 5 H. L. Cas. 707.

So the Court of Queen's Bench held that the finishing of yarns of wool or hair by a process previously applied to yarns of cot-

ton and linen, by subjecting them, while distended and kept separate, to the action of rotatory beaters or burnishers, by which they would be burnished or polished on all sides, was not the subject of a patent, because, as Lord Campbell said, in order to sustain a patent for the application of an old process to a new purpose, "there must be some invention in the manner in which the old process is applied;" "here there is no novelty in the mode of application," "but merely the application of a known process by a known means to another substance." *Brook* v. *Aston*, 27 Law Journal (N. S.) Q. B. 145; *S. C.* 4 Jurist (N. S.) 279; *S. C.*, with the opinion less fully reported, 8 E. & B. 478. The judgment was unanimously affirmed in the Exchequer Chamber. Of the opinions there delivered, it is sufficient to quote from that of Baron Martin, who, after expressing his concurrence in the statement of Mr. Justice Willes, in *Patent Bottle Envelope Company* v. *Seymer*, 28 Law Journal (N. S.) C. P. 22, 24; *S. C.* 5 C. B. (N. S.) 164, 173; that "the application of a well known tool to work previously untried materials, or to produce new forms, is not the subject of a patent," added, "When a machine is well known, it becomes in fact a tool." 28 Law Journal (N. S.) Q. B. 175, 176; 5 Jurist (N. S.) 1025, 1027.

But perhaps the most important English case is that of *Harwood* v. *Great Northern Railway Company*, 2 B. & S. 194, 222, and 11 H. L. Cas. 654.

In that case a patent was obtained for "improvements in fishes and fish joints for connecting the rails of railways." In the specification, the patentee stated that in securing the joints of rails it had been found advantageous to attach to each side of the rails, by means of bolts and rivets, pieces of iron commonly called "fishes;" and described his invention as consisting in making the fishes with a groove or recess in their outer surfaces, so as to receive the square heads of the bolts or rivets, and to prevent them from turning round while the nuts on the other side were being screwed on or off, and also to avoid the danger of the flanges of the wheels of the carriages striking against the heads; and he claimed "the constructing fishes for connecting the rails of railways, with a groove adapted for re-

ceiving the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways."

In an action for the infringement of that patent, it appeared that fishes for connecting the rails of railways had never before been made with a groove or recess in their outer surfaces, so as to receive the square heads of the bolts. But it was proved that, in the construction of several railway bridges, beams of timber had been laid horizontally one above the other, and fastened or bolted together with bolts and nuts; horizontal bars or plates of iron placed beneath, parallel to and in contact with the beams, and fastened or bolted by the same bolts and nuts; and each of these bars or plates of iron constructed with a groove in its under surface, which received the square heads of the bolts, and which served the double purpose of strength and of preventing the heads of the bolts from turning round. In those bridges there were no joints to be fished by the bars or plates of iron, nor were there corresponding bars or plates of iron above the horizontal beams of timber. But it was also proved that a bridge, known as the Hackney bridge, having too great a span to be conveniently crossed by a single beam, had been constructed with two horizontal longitudinal beams of timber on each side, the ends of which met and were joined together in the middle of the bridge by scarf-joints; that beneath those beams were transverse planks, constituting the flooring of the bridge, and beneath the planks were bars of grooved iron, like those used in the other bridges, carried under the scarf-joints and under the whole length of the horizontal beams; that above and immediately over each scarf joint, extending eighteen inches beyond each end of the joint, and resting immediately upon the longitudinal beam, was a horizontal flat plate of iron thirteen feet in length; and that the bolts passed upwards through the grooved iron bars, the transverse planking and the longitudinal beams, and also, at the middle of the bridge, through the plates of iron over the scarf-joints.

A verdict supporting the patent was obtained under the rulings of Lord Chief Justice Cockburn, and affirmed by the Court of Queen's Bench. But its judgment was unanimously

reversed in the Exchequer Chamber in a considered judgment delivered by Mr. Justice Willes; and the judgment of reversal was affirmed by the House of Lords, in accordance with the opinions of Lord Chancellor Westbury, Lord Cranworth and Lord Wensleydale, and of a majority of the judges who attended, upon the ground, as stated by the Lord Chancellor, that the application of the channelled iron horizontally under the timbers of a bridge being well known, "the channelled iron was applied in a manner which was notorious, and the application of it to a vertical fish would be no more than the application of a well known contrivance to a purpose exactly analogous or corresponding to the purpose to which it had been previously applied." 11 H. L. Cas. 683. And all who gave opinions in the House of Lords concurred with the Court of Exchequer Chamber in the proposition of law that the mere application of an old contrivance in an old way to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent. 2 B. & S. 228; 11 H. L. Cas. 666, 672, 682, 684, 685.

In the case at bar, the old contrivance of a railroad truck, swivelling upon the king-bolt, with transverse slot, and pendent divergent links, already in use under railroad cars, is applied in the old way, without any novelty in the mode of applying it, to the analogous purpose of forming the forward truck of a locomotive engine. This application is not a new invention, and therefore not a valid subject of a patent.

The decree of the Circuit Court must therefore be reversed, and the case remanded with directions to *Dismiss the bill.*

IRWIN *v.* WILLIAR & Another.

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

Argued October 17th, 18th, 1883.—Decided March 3d, 1884.

Contract—Partnership—Principal and Agent—Wagers.

A contract of partnership for the buying of grain, both wheat and corn, and its manufacture into flour and meal, and the sale of such grain as might accumulate in excess of that required for manufacturing, and the use, with the knowledge of all the partners in the partnership business, of cards and letter-heads describing the firm as millers and dealers in grain, do not necessarily imply as matter of law authority to deal in the partnership name in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market, and to bind the partnership thereby.

Dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market, is not as matter of law an essential characteristic of every business to which the name of dealing in grain may properly be assigned.

If under guise of a contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void.

When a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering into the illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction.

Generally, in this country, wagering contracts are held to be illegal and void as against public policy.

A custom among brokers in the settlement of differences which works a substantial and material change in the principal's rights or obligations is not binding upon the principal without his assent; and that assent can be implied only from knowledge of the custom which it is claimed authorizes it.

The defendants in error were plaintiffs below, and brought this action against the plaintiff in error, as surviving partner of the firm of Irwin & Davis, to recover a balance alleged to be due, growing out of certain sales of wheat for future delivery, claimed to have been made by the defendants in error for the firm of Irwin & Davis upon their order. The liability of the plaintiff in error was denied on two grounds: 1. That the trans-

actions were made by Davis, the deceased partner, without the knowledge, assent or authority of the plaintiff in error, and were not within the scope of the partnership business; and 2. That the sales were wagering contracts and void.

The bill of exceptions showed that there was evidence on the trial tending to prove the following state of fact:

Irwin, the plaintiff in error, and Davis, who died in October, 1877, became partners in 1872 in the ownership and operation of a flouring-mill and appurtenances at Brazil, Clay County, Indiana. Their contract of partnership contemplated the buying of grain—both wheat and corn—and its manufacture into flour and meal, and the sale of such grain as might accumulate in excess of that required for manufacturing; and did not contemplate, as between themselves, the buying and selling of grain in large quantities for speculation. The capacity of the mill did not exceed sixty barrels of flour per day; its average manufacture was thirty. The working capital of the firm varied from $2,000 to $4,000. Irwin resided at Butler, in Pennsylvania, and visited Brazil rarely. Appurtenant to the mill was a warehouse, for the storage of grain, equipped with appliances for loading and unloading grain, in bulk, into and from railroad cars. Soon after the formation of the partnership, and as a part of its business, Davis, in its name, began and continued to ship corn and oats to Indianapolis, and corn and flour to Baltimore, for sale and immediate delivery, in consignments not exceeding $1,000 each in value; and in the year 1875 several such consignments had been made to the defendants in error at Baltimore for sale on account of the firm by Davis. In all their business correspondence, including that with the defendants in error, who were commission merchants and grain brokers in Baltimore, the cards and letter-heads were as follows: "Brazil Flouring Mills, Irwin & Davis, millers and dealers in grain, Brazil, Ind." This letter-head was used with the knowledge of Irwin, who, however, had no knowledge of any transactions by Davis, on account of the firm, in the purchase or sale of grain for future delivery. Prior to 1877, in point of fact, Davis had given no orders for the purchase of grain in Baltimore, or any Eastern market, and during that year, in the

months of July, August and September, he shipped to defendants in error thirty-one car loads of wheat, of about three hundred and eighty bushels each, for sale, which was accounted for.

The transactions which form the subject of this suit were as follows: On July 12th, 1877, Davis, by cipher telegrams and letters, gave an order to defendants in error to sell 20,000 bushels of wheat for delivery in August, and followed that up with similar orders until the last, on September 3d, a period of fifty-three days, making an aggregate of 30,000 bushels for delivery in August, 105,000 bushels in September, and 30,000 bushels in October, in all 165,000 bushels. These orders were reported by the defendants in error as executed at the prices named, amounting in gross to $251,794.84. At or before maturity these contracts of sale were settled by defendants in error on account of Davis and Irwin according to the custom of the Corn and Flour Exchange in Baltimore, of which the former were members, at and through the members of which substantially all the business of buying and selling grain at that city was done. In these settlements the differences between the prices at which the wheat had been sold and those which the brokers would have been compelled to pay, or did pay, as the market prices, at the time of settlement, for wheat to deliver or in fact delivered in execution of the sales, amounted to $17,217.95, which was the balance sued for and recovered in this action. Davis did not consign or deliver to defendants in error any of the wheat so contracted to be sold on their account, although he had during the same period consigned other wheat to defendants in error, as above stated, but which, pursuant to orders given at the time, had been sold on arrival, but not applied on contracts of sale for future delivery. The defendants in error actually delivered on account of Davis and Irwin about 40,000 bushels of wheat on their contracts, which they purchased in open market for that purpose, but as to the rest, settled by paying the differences between the contract and market prices.

There was evidence tending to show that among the general usages and customs obtaining at Baltimore among grain commission merchants were the following, which were well known

and which had long existed and been uniformly observed among the members of said Corn and Flour Exchange and others engaged in the buying and selling of grain on commission at said city, viz.:

1st. That a commission merchant buying or selling grain upon the order of a customer for future delivery entered into such contract in his own name, thereby becoming personally responsible to the party with whom he contracted for the performance of the contract, the name of his principal being never, or but rarely, disclosed.

2d. That such commission merchant held himself and stood responsible to his principal or customer for the performance by the other party with whom he entered into such contract of purchase or sale of such contract, and for making good the contract to his principal in case of the insolvency or default from any cause of such other party.

3d. That purchases or sales to fill orders of customers are usually made on the floor of the Corn and Flour Exchange, by open public offer to the members of the board there assembled. That when it so occurs as that a commission merchant, who upon the order of one customer has sold to (or *vice versa* purchased from) another commission merchant grain for a certain future delivery, and afterwards, upon the order of another customer, buys (or *vice versa* sells) a like amount of like grain for the same future delivery, from (or to) the same commission merchant, the two commission merchants as between themselves set off one contract against the other and mutually surrender or cancel them, settling between them the difference in price, each substituting on his books in the place and stead of the other the new or second customer, upon whose order he made the second purchase or sale. Thus if commission merchant A, upon the order of his customer X, has sold grain for a designated future delivery to commission merchant B, and afterwards upon the order of customer Y, buys like grain for like delivery from B, A and B adjust the difference, cancel their contracts, and surrender any margins that may have been put up by them, and in such case A substitutes his second customer Y in place of B, so that the grain he had sold on the

order of X would be delivered to Y instead of to B; A standing as guarantor to Y that X will deliver the grain, and to X that Y will receive and pay for it, and that X shall receive the full price at which the grain had been contracted to B.

4th. That where such second transaction is not with the same commission merchant with whom the first had occurred, but a different one, and it is found that a circuit of like contracts exists, by which commission merchant A has sold grain to merchant B, who has sold like grain to C, who has made like sale to A, the commission merchants settle as among themselves by what is called a "ring." The parties in such case do not make successive deliveries until the grain comes round again to the commission merchant from whom it started, nor does each buyer pay the full amount of his purchase money to his immediate seller, but receives or pays, as the case may be, the amount of the net profit he would have received or of net loss he would have sustained if the settlement had not been made by a "ring."

In such case all margins put up by the commission merchants are restored, the contracts surrendered, and the contracts or orders of their undisclosed principals, upon whose instructions they had entered into those contracts, are held in lieu of the contracts so surrendered, each commission merchant being responsible to each of his customers for performance by the other.

The settlements of differences, made by defendants in error on account of Davis and Irwin, were made in pursuance of these customs, but there was no evidence that Davis and Irwin had any actual knowledge of them.

There was evidence also tending to prove that Irwin had no knowledge of the transactions between Davis and the defend ants in error until after they had been completed.

On the trial it was claimed on behalf of the defendant below that the transactions in question were not authorized by the partnership agreement, that they were not in the regular course of the partnership business, and were not within its apparent scope.

On that point, among other things, the Circuit Court charged the jury as follows:

"4. If Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name; and if Irwin knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he is responsible as partner for all contracts made by Davis in the firm name, within the apparent scope of the business of dealing in grain. If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter-heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business, and if before and at the time of the dealings with the plaintiffs, Irwin knew that the firm was thus held out as grain dealers, he is liable as a partner. If, therefore, you believe from the evidence that Irwin & Davis held themselves out as dealers in grain as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced their own money in fulfilling such contracts, you should find for the plaintiffs in whatever sum the evidence may show them to be entitled to on account of such advancements, unless you think the defendant has shown that the transactions between the plaintiffs and Irwin & Davis were gambling transactions."

This was excepted to, and was assigned for error.

Mr. John M. Butler for plaintiff in error.

Mr. J. A. Hendricks and *Mr. C. Baker* for defendants in error.

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

The proposition contained in this charge is that the business of dealing in grain, no matter how much it may be restricted by agreement between the partners, and no matter how it may have been qualified by the actual practice of the firm, necessa-

rily authorizes each partner to bind the others by unknown contracts in distant markets for unlimited sales and purchases of grain for future delivery. And so the jury must have understood it; for they were told that "if Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name;" and "if Davis, as partner, did in fact buy and sell grain, and if, in his correspondence with customers and others, including the plaintiffs, he employed printed letter-heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business;" and "if, therefore, you believe from the evidence that Irwin & Davis held themselves out as dealers in grain as well as in flour, and that the plaintiffs dealt with Davis, supposing they were dealing with the firm, &c., you should find for the plaintiffs," &c. This was equivalent to directing the jury to find a verdict for the plaintiffs in the action, for the only facts to which their attention was directed as material were not disputed, viz., that the firm had been in the habit of buying and selling grain, and had constantly used letter-heads describing themselves as dealers in grain.

In this, we think, there was error. The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partner-

ship itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged.

In the present case the partnership agreement cannot affect the question, because it is not claimed on the one hand that it conferred actual authority to make the transactions in dispute, nor, on the other, that the defendants in error had any notice of its limitations.

And so, too, any implication that might have arisen from a previous course of business of this character, carried on by Davis with the knowledge of Irwin, must be rejected, for it is not claimed that any foundation in proof existed for it.

The only remaining ground for the implied authority by which it can be claimed that Irwin was bound by the contracts of his partner is that arising from the intrinsic nature of the business in which the partnership was actually engaged, or from the usual and ordinary course of conducting it at the locality where it was carried on.

What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members. The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners. Dealing in grain is not a technical phrase from which a court can properly infer as matter of law authority to bind the firm in every case irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is matter of fact to be established by proof and found by a jury. It may mean one thing

at Brazil in Indiana, another at Baltimore. It may not be the same when standing alone with what it is in connection with a flouring-mill in a small interior town. It may mean dealing in grain on hand for present delivery for cash or on credit, or it may mean, also, dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market. We are quite clear that the latter feature of the business, as it may sometimes be prosecuted, is not as matter of law an essential characteristic of every business to which the name of dealing in grain may be properly assigned. And yet this is distinctly what in the present case was given to the jury as the law, and in that respect the Circuit Court erred.

As the judgment now under review would have to be reversed for the error just pointed out, it is not necessary for the purpose of disposing of the present writ of error to proceed further to examine other assignments; but as the case must be remanded for a new trial, in which the remaining questions may again arise, it seems appropriate now to dispose also of them.

It was contended on the part of the defendant below, that the transactions on which the suit was founded were void as wagering transactions.

On this point, the court charged the jury as follows:

"5. If you find that the dealings with the plaintiffs were within the scope of the partnership, you will next consider whether the dealings were gambling transactions. The burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling.

"A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face

is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be.

"The proof must go further, and show that this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.

"6. It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfilment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their contracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis were liable to the plaintiffs, even though they meant to gamble, and nothing more."

No objection seems to be made to this charge, so far as it defines what constitutes a wagering contract, and we accept it as a correct statement of the law upon that point.

The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not

to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by force of the statute of 8 & 9 Vict. c. 109, s. 18, altering the common law in that respect. Benjamin on Sales, §§ 541, 542, and notes to 4th Am. Ed. by Bennett.

In *Reed* v. *Anderson*, 48 L. T. N. S. 74, the defendant was nevertheless adjudged liable to refund to the plaintiff the amount lost by the latter by a bet on a horse race, made in his own name, but for the defendant, at his request; and this was followed in *Thacker* v. *Hardy*, 4 Q. B. D. 685. There the plaintiff was employed by the defendant as a broker to speculate for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts into which the plaintiff entered on his behalf, but the plaintiff was to arrange matters so that nothing but "differences" should be actually payable to or by the defendant. The plaintiff having entered into such contracts on the defendant's behalf, in respect of which he became, by the rules of the Stock Exchange, personally liable, he sued the defendant for his commissions and for indemnity against the liability he had incurred. It was held that the agreement between the plaintiff and defendant was not a gaming contract, within the meaning of the statute. The case was distinguished from *Grizewood* v. *Blane*, 11 C. B. 526, which was an action on a contract for the future delivery of railway shares, in which Jervis, C. J., left it to the jury to say "what was the plaintiff's intention and what was the defendant's intention at the time of making the contracts, whether either party really meant to purchase or to sell the shares in question, telling them that if they did not, the contract was, in his opinion, a gambling transaction and void." This ruling was held to be correct. In *Rountree* v. *Smith*, 108 U. S. 269, it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected

with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.

In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable, *Thacker* v. *Hardy*, *ubi supra*, while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. *Dickson's Executor* v. *Thomas*, 97 Penn. St. 278; *Gregory* v. *Wendell*, 40 Mich. 432; *Lyon* v. *Culbertson*, 83 Ill. 33; *Melchert* v. *American Union Telegraph Company*, 3 McCrary, 521; *S. C.* 11 Fed. Rep. 193, and note; *Barnard* v. *Bockhaus*, 52 Wis. 593; *Kingsbury* v. *Kirwan*, 77 N. Y. 612; *Story* v. *Salomon*, 71 N. Y. 420; *Love* v. *Harvey*, 114 Mass. 80.

The charge of the court, however, is objected to on behalf of the plaintiff in error as misleading by the statement embodied in it, that "on their face these transactions are legal."

We presume that nothing more was meant by this than what had just before been said in the charge, that the burden of proof to show the illegality of the transactions was upon the defendant, who affirmed it; the presumption being that men ordinarily in their business transactions do not intend to violate the law. It is argued, however, that the expression is ambiguous and misleading, as calculated to convey to the jury an opinion that the transactions as disclosed by the evidence were not merely lawful in form, but also in fact, without other proof to the contrary. We do not doubt, that the question whether

the transactions came within the definition of wagers, is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties; for, as was properly said in the charge, "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." It might therefore be the case, that a series of transactions, such as that described in the present record, might present a succession of contracts, perfectly valid in form, but which on the face of the whole, taken together, and in connection with all the attending circumstances, might disclose indubitable evidences that they were mere wagers. The jury would be justified in such a case, without other evidence than that of the nature and circumstances of the transactions, in reaching and declaring such a conclusion.

Objection was made at the trial by the plaintiff in error to proof of the customs of the grain commission merchants operating through the Corn and Flour Exchange, and exception was taken to its admission. They were also made the subject of a charge to the jury, to which exception was taken. That portion of the charge is as follows:

"7. The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and where it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up, and that from that time forth the first commission merchant holds for the benefit of the

customer for whom he sold the order or contract of the purchaser for whom he bought, so that the wheat of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer.

"The evidence further tends to show a custom obtaining among commission merchants at Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another, who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust the price differences between themselves, and surrender all margins that had been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been cancelled or surrendered, and that he guarantees to his customer the performance of the contract originally made on his behalf.

"I say to you, gentlemen, that these customs are founded in commercial convenience; that they are not in contravention of the law, and that they are valid."

The case which the plaintiffs below stated in their declaration was, that in pursuance of orders from the defendant's firm they had sold to responsible purchasers the wheat mentioned for future delivery, and on failure of Irwin & Davis to forward the grain for delivery when due, upon instructions from them, the plaintiffs had purchased the necessary quantity and delivered the same in performance of the contracts, the recovery sought being for the difference between what it cost them to purchase the grain delivered and the prices received on the contracts of sale.

The proof was, except as to 40,000 bushels actually delivered, that the settlements in pursuance of which these advances were made by the plaintiffs below on account of Irwin & Davis were

made according to the customs of the Grain and Flour Exchange, which were admitted in evidence.

The bill of exceptions states that "there was evidence tending to show that after the making of divers of the contracts for sale of wheat in the declaration mentioned, which were made to members of said Corn and Flour Exchange, the same were, before the expiration of the respective times therein named for the delivery of the wheat, settled and cancelled as between the plaintiffs and the said respective parties with whom they had in the first instance contracted said sales by mutual surrender of contracts pursuant to the customs aforesaid; and that the orders of customers in the fulfilment of which said cancelled contracts had been made were substituted by the plaintiffs in lieu of such cancelled or surrendered contracts, and held in the lieu and stead thereof for the use and benefit of said Irwin & Davis, in accordance with the usages and customs aforesaid, the plaintiffs standing as guarantors to said Irwin & Davis that the respective parties so ordering the wheat would accept and pay for it on delivery, and that said Irwin & Davis should receive the full price at which the respective sales on their behalf had originally been made."

The question is, there being no evidence that Irwin & Davis had any knowledge of the existence of these customs, whether they were bound by them.

The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they allege in their declaration, did obtain a responsible purchaser; so that the plaintiff in error would, upon the contract of sale against such purchaser when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself; for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of settlement, in anticipation of the maturity of the contracts, the brokers, by an arrangement among themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging con-

tracts, so as to substitute new purchasers and new sellers respectively for the balances. The question is not whether in a given case, without the assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the Exchange, without other knowledge of the custom, makes it part of his contract with the broker.

In *Nickalls* v. *Merry*, L. R. 7 H. L. 530, it was said by Lord Chelmsford, p. 543, that the contract "having been made between a broker and a jobber, members of the *Stock Exchange*, the usage of that body enters into, and to a certain extent determines and governs, the nature and effect of the contract." To what extent such a custom shall be allowed to operate, as between the broker and his principal, was very thoroughly considered and finally decided by the House of Lords in the case of *Robinson* v. *Mollet*, L. R. 7 H. L. 802, after much division of opinion among the judges. The custom questioned in that case was one established in the London tallow trade, according to which brokers, when they received an order from a principal for the purchase of tallow, made a contract or contracts in their own names, without disclosing their principals, either for the specific quantity of tallow so ordered, or to include such order with others in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought note for the specific quantity ordered by them. When a broker so purchased in his own name, he was personally bound by the contract. On the usual settling days the brokers balanced between themselves the purchases and sales made, and made or received deliveries to or from their principals, as the case might be, or if their principals refused to accept or deliver, then they sold or bought against them, and charged them with the loss, if any; or if delivery was not required on either side, then any difference arising from a rise or fall in the market was paid by one to the other. It was held that this custom did not bind a principal giving an order to a broker to purchase for him, being ignorant of its ex-

istence. It was admitted by Lord Chelmsford, p. 836, "that if a person employs a broker to transact for him upon a market, with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character;" and he added, "of course, if the appellant knew of the existence of the usage, and chose to employ the respondents without any restriction upon them, he might be taken to have authorized them to act for him in conformity to such usage." Mr. Justice Brett, in his opinion, p. 816, points out very clearly that the custom, if allowed to prevail, would work a change in the relation between the broker and his principal, by permitting the agent to buy, to convert himself into a principal to sell. Mr. Baron Cleasby, p. 828, said:

"The vice of the usage set up in the present case cannot be appreciated by examining its parts separately. It must be looked at as a whole, and its vice consists, I apprehend, in this, that the broker is to make the contract of purchase for another whose interest as buyer is to have the advantage of every turn of the market; but if the broker may eventually have to provide the goods as principal, then it becomes his interest as seller that the price which he is to receive should have been as much in favor of the seller as the state of the market would admit. Thus the two positions are opposed."

The principle of this decision seems to us to be incontrovertible, and applies in the present case.

The ground of the action is, that the defendants in error, at the request of Irwin & Davis, had made certain contracts for the sale and future delivery of grain; that these contracts were made in the name of the brokers, on which therefore they were personally liable, but in which Irwin & Davis were the principals; that the latter were bound to perform them, or to place in the hands of their brokers means of performance within the proper period, or to indemnify them against the consequences of non-performance; that Irwin & Davis in all these particulars became in default, and the plaintiffs were required to perform

out of their own means, which they did by purchasing grain for delivery at the market price, or paying the difference between that and the contract price. The custom proved was offered to show this performance and consequent loss; and in doing so it disclosed that the brokers did not perform the original contracts of sale actually made, but delivered equal quantities of grain, or its market value, in fulfilment of contracts of purchase made by them for others, and which, by the process of mutual exchange authorized by this custom, had come into their hands for that purpose. This exchange and substitution, and payment of differences to effect it, working as it does a complete change in the nature of the seller's rights and obligations, cannot be made without his assent, and that assent can be implied only from knowledge of the custom which it is claimed authorizes it.

The Circuit Court therefore erred in permitting proof of this custom, without evidence that the defendant below had knowledge of it, and in not instructing the jury to disregard it, if they were satisfied from the evidence that such knowledge had not been satisfactorily shown.

The judgment of the Circuit Court is therefore reversed, with directions to grant a new trial, and

It is so ordered.

HURTADO *v.* PEOPLE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Argued January 22d, 23d, 1884.—Decided March 3d, 1884.

Constitutional Law.

1. The words "due process of law" in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder.
2. The Constitution of California authorizes prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury, in the discretion of the legislature. The Penal Code of the State makes provision for an examination by a magistrate, in the presence of the accused, who is entitled to the aid of counsel

Statement of Facts.

and the right of cross-examination of witnesses, whose testimony is to be reduced to writing, and upon a certificate thereon by the magistrate that a described offence has been committed, and that there is sufficient cause to believe the accused guilty thereof, and an order holding him to answer thereto, requires an information to be filed against the accused in the Superior Court of the county in which the offence is triable, in the form of an indictment for the same offence: *Held*, That a conviction upon such an information for murder in the first degree and a sentence of death thereon are not illegal by virtue of that clause of the Fourteenth Amendment to the Constitution of the United States, which prohibits the States from depriving any person of life, liberty or property without due process of law.

The Constitution of the State of California, adopted in 1879, in article I., section 8, provides as follows:

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

Various provisions of the Penal Code regulate proceedings before the examining and committing magistrate in cases of persons arrested and brought before him upon charges of having committed public offences. These require, among other things, that the testimony of the witnesses shall be reduced to writing in the form of depositions; and section 872 declares that if it appears from the examination that a public offence has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the depositions an order, signed by him, to that effect, describing the general nature of the offence committed, and ordering that the defendant be held to answer thereto. Section 809 of the Penal Code is as follows:

"When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offence is triable, an information charging the defendant with such offence. The information shall

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be in the name of the people of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offence."

In pursuance of the foregoing provision of the Constitution, and of the several sections of the Penal Code of California, the district attorney of Sacramento County, on the 20th day of February, 1882, made and filed an information against the plaintiff in error, charging him with the crime of murder in the killing of one José Antonio Stuardo. Upon this information, and without any previous investigation of the cause by any grand jury, the plaintiff in error was arraigned on the 22d day of March, 1882, and pleaded not guilty. A trial of the issue was thereafter had, and on May 7th, 1882, the jury rendered its verdict, in which it found the plaintiff in error guilty of murder in the first degree.

On the 5th day of June, 1882, the Superior Court of Sacramento County, in which the plaintiff in error had been tried, rendered its judgment upon said verdict, that the said Joseph Hurtado, plaintiff in error, be punished by the infliction of death, and the day of his execution was fixed for the 20th day of July, 1882.

From this judgment an appeal was taken, and the Supreme Court of the State of California affirmed the judgment.

On the 6th day of July, 1883, the Superior Court of said county of Sacramento ordered that the plaintiff in error be in court on the 11th day of July, 1883, in order that a day for the execution of the judgment in said cause should be fixed. In pursuance of said order, plaintiff in error, with his counsel, appeared at the bar of the court, and thereupon the judge asked him if he had any legal reason to urge why said judgment should not be executed, and why an order should not then be made fixing the day for the execution of the same.

Thereupon the plaintiff in error, by his counsel, objected to the execution of said judgment and to any order which the court might make fixing a day for the execution of the same, upon the grounds:

"7th. That it appeared upon the face of the judgment that the

plaintiff in error had never been legally, or otherwise, indicted or presented by any grand jury, and that he was proceeded against by information made and filed by the district attorney of the county of Sacramento, after examination and commitment by a magistrate of the said county.

"8th. That the said proceedings, as well as the laws and Constitution of California, attempting to authorize them, and the alleged verdict of the jury, and judgment of the said Superior Court of said county of Sacramento, were in conflict with and prohibited by the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and that they were therefore void.

"9th. That the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."

Thereupon the court overruled the said objections, and fixed the 30th day of August, 1883, as the time for the execution of the sentence. From this latter judgment the plaintiff in error appealed to the Supreme Court of the State.

On the 18th day of September, 1883, the Supreme Court of the State affirmed the said judgment, to review which the present writ of error was allowed and has been prosecuted.

Mr. A. L. Hart for plaintiff in error.

Mr. John T. Cary for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law.

The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of California, in the judgment now under review, followed its own previous decision in *Kalloch* v. *Superior Court*, 56 Cal. 229, in which the question was deliberately adjudged. Its conclusion was there stated as follows:

"This proceeding, as [it] is regulated by the Constitution and laws of this State, is not opposed to any of the definitions given of the phrases 'due process of law' and 'the law of the land;' but, on the contrary, it is a proceeding strictly within such definitions, as much so in every respect as is a proceeding by indictment. It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law."

And the opinion cites and relies upon a decision of the Supreme Court of Wisconsin in the case of *Rowan* v. *The State*, 30 Wis. 129. In that case the court, speaking of the Fourteenth Amendment, says:

"But its design was not to confine the States to a particular mode of procedure in judicial proceedings, and prohibit them from

prosecuting for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law' in the amendment do not mean and have not the effect to limit the powers of State governments to prosecutions for crime by indictment; but these words do mean law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and, if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our State Constitution and nothing in the Fourteenth Amendment to the Constitution of the United States which prevents them from doing so."

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the

great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones* v. *Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." . . . "It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of various kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated, on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com. 310."

Referring again to the passage from Lord Coke, he says, p. 343:

"This may not be conclusive, but, being a construction adopted by a writer of high authority before the emigration of our ancestors, it has a tendency to show how it was then understood."

This passage from Coke seems to be the chief foundation of the opinion for which it is cited; but a critical examination and

comparison of the text and context will show that it has been misunderstood; that it was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used. In beginning his commentary on this chapter of Magna Charta, 2 Inst. 46, Coke says:

"This chapter containeth nine several oranches:

"1. That no man be taken or imprisoned but *per legem terræ*, that is, by the *common law, statute law, or custom of England;* for the words *per legem terræ*, being towards the end of this chapter, doe referre to all the precedent matters in the chapter, etc.

"2. No man shall be disseised, etc., unless it be by the lawful judgment, that is, verdict of his equals, (that is of men of his own condition,) *or by the law of the land, (that is to speak it once for all,) by the due course and process of law.*"

He then proceeds to state that, 3, no man shall be outlawed, unless according to the law of the land; 4, no man shall be exiled, unless according to the law of the land; 5, no man shall be in any sort destroyed, "unlesse it be by the verdict of his equals, or according to the law of the land;" 6, "no man shall be condemned at the King's suite, either before the King in his bench, where the pleas are *coram rege*, (and so are the words *nec super eum ibimus* to be understood,) nor before any other commissioner or judge whatsoever, and so are the words *nec super eum mittemus* to be understood, but by the judgment of his peers, that is, equals, or according to the law of the land."

Recurring to the first clause of the chapter, he continues:

"1. No man shall be taken (that is) restrained of liberty by petition or suggestion to the King or to his councill, unless it be by indictment or presentment of good and lawfull men, where such deeds be done. This branch and divers other parts of this act have been notably explained by divers acts of Parliament, &c., quoted in the margent."

The reference is to various acts during the reign of Edward

III. And reaching again the words "*nisi per legem terræ*," he continues:

"But by the law of the land. For the true sense and exposition of these words see the statute of 37 E. 3, cap. 8, where the words, by the law of the land, are rendered, without due proces of the law, for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold without proces of the law, that is, by indictment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law. Without being brought in to answere but by due proces of the common law. No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land. Wherein it is to be observed that this chapter is but declaratory of the old law of England."

It is quite apparent from these extracts that the interpretation usually put upon Lord Coke's statement is too large, because if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offences, and the conclusion would be inevitable that informations as a substitute for indictments would be illegal in all cases. It was indeed so argued by Sir Francis Winninton in *Mr. Prynn's Case*, 5 Mod. 459, from this very language of Magna Charta, that all suits of the King must be by presentment or indictment, and he cited Lord Coke as authority to that effect. He attempted to show that informations had their origin in the act of 11 Hen. 7, c. 3, enacted in 1494, known as the infamous Empson and Dudley act, which was repealed by that of 1 Hen. 8, c. 6, in 1509. But the argument was overruled, Lord Holt saying that to hold otherwise "would be a reflection on the whole bar." Sir Bartholomew Shower, who was prevented from arguing in support of the information, prints his intended argument in his report of the case under the name of *The King* v. *Berchet*, 1 Show. 106, in which, with great thoroughness, he arrays all the learning of the time on the subject. He undertakes to "evince that this method of prosecution is noways con-

trariant to any fundamental rule of law, but agreeable to it." He answers the objection that it is inconvenient and vexatious to the subject by saying (p. 117):

"Here is no inconvenience to the people. Here is a trial *per pais*, fair notice, liberty of pleading *dilatories* as well as *bars*. Here is *subpœna* and *attachment*, as much time for defence, charge, &c., for the prosecutor makes up the record, &c.; then, in case of malicious prosecution, the person who prosecutes is known by the note to the coroner, according to the practice of the court."

He answers the argument drawn from Magna Charta, and says:

"That this method of prosecution no way contradicts that law, for we say this is *per legem terræ et per communem legem terræ*, for otherwise there never had been so universal a practice of it in all ages."

And referring to Coke's comment, that "no man shall be taken," *i. e.*, restrained of liberty by petition or suggestion to the King or his Council unless it be by indictment or presentment, he says (p. 122):

"By petition or suggestion can never be meant of the King's Bench, for he himself had preferred several here; that is meant only of the the King alone, or in Council, or in the Star Chamber. In the King's Bench the information is not a suggestion to *the King*, but to the *court* upon record."

And he quotes 3 Inst. 136, where Coke modifies the statement by saying, "The King cannot put any to answer, but his court must be apprized of the crime by indictment, presentment, or *other matter of record*," which, Shower says, includes an information.

So it has been recently held that upon a coroner's inquisition taken concerning the death of a man and a verdict of guilty of murder or manslaughter is returned, the offender may be prosecuted and tried without the intervention of a grand jury. *Reg.* v. *Ingham*, 5 B. & S. 257. And it was said by Buller, J., in

Rex v. *Joliffe*, 4 T. R. 285–293, that if to an action for slander in charging the plaintiff with felony a justification is pleaded which is found by the jury, that of itself amounts to an indictment, as if it had been found by the grand jury, and is sufficient to put the party thus accused on his trial.

The language of Lord Coke applies only to forfeitures of life and liberty at the suit of the King, and hence appeals of murder, which were prosecutions by private persons, were never regarded as contrary to Magna Charta. On the contrary, the appeal of death was by Lord Holt "esteemed a noble remedy and a badge of the rights and liberties of an Englishman." *Rex* v. *Toler*, 1 Ld. Raymond, 555–557; 12 Mod. 375; Holt, 483. We are told that in the early part of the last century, in England, persons who had been acquitted on indictments for murder were often tried, convicted and executed on appeals. Kendall on Trial by Battel (3d Ed.), 44–47. An appeal of murder was brought in England as lately as 1817, but defeated by the appellant's declining to accept the wager of battel. *Ashford* v. *Thornton*, 1 B. & Ald. 405. The English statutes concerning appeals of murder were in force in the Provinces of Pennsylvania and Maryland. *Report of Judges*, 3 Binn. 599–604; Kilty on Maryland Statutes, 141, 143, 158. It is said that no such appeal was ever brought in Pennsylvania; but in Maryland, in 1765, a negro was convicted and executed upon such an appeal. *Soper* v. *Tom*, 1 Har. & McHen. 227. See note to *Paxton's Case*, Quincy's Mass. Rep. 53, by Mr. Justice Gray.

This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in *Jones* v. *Robbins*, 8 Gray, 329, who states his conclusions in these words:

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words, 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also *State* v. *Starling*, 15 Rich. (S. C.) Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ*,

"But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says:

"The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

This accords with what is said in *Westervelt* v. *Gregg*, 12 N. Y. 202, by Denio, J., p. 212:

"The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely*, 4 Wheat. 235–244:

"As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356:

"The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may

be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law.

But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. For at first the words *nisi per legale judicium parium* had no reference to a jury; they applied only to the *pares regni*, who were the constitutional judges in the Court of Exchequer and *coram rege*. Bac. Abr. Juries, 7th Ed., Lond., note, Reeve, H. L. 41. And as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs' Charters, 143–150. By the latter of these, which was a republication of the former, it was provided, that "if any one is accused before the justices of our Lord the King of murder, or theft, or robbery, or of harbouring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strictness of justice (*pro rigore justitiæ*), that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King."

"The system thus established," says Mr. Justice Stephens, 1 Hist. Crim. Law of England, 252, "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least."

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an un-

defined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep. 115, 118 *a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of

Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions, might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. In *Munn* v. *Illinois*, 94 U. S. 113–134, the Chief Justice, delivering the opinion of the court, said:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken

away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

And in *Walker* v. *Savinet*, 92 U. S. 90, the court said:

"A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of State."

In *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. 480, the question was whether a mode of trying the title to an office, in which was no provision for a jury, was due process of law. Its validity was affirmed. The Chief Justice, after reciting the various steps in the proceeding, said:

"From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act."

And Mr. Justice Miller, in *Davidson* v. *New Orleans*, 96 U. S. 97–105, after showing the difficulty, if not the impossibility of framing a definition of this constitutional phrase, which

should be "at once perspicuous, comprehensive, and satisfactory," and thence deducing the wisdom "in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require," says, however, that:

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." See also *Missouri* v. *Lewis*, 101 U. S. 22–31; *Ex parte Wall*, 107 U. S. 288–290.

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds]: "Nor be deprived of life, liberty, or property, without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally

irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

"The Fourteenth Amendment" [as was said by Mr. Justice Bradley in *Missouri* v. *Lewis*, 101 U. S. 22–31] "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall

hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case, *Brown* v. *Levee Commissioners*, 50 Miss. 468, speaking of the meaning of the phrase "due process of law," says:

"The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

This court, speaking by Mr. Justice Miller, in *Loan Association* v. *Topeka*, 20 Wall. 655–662, said:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government

which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which it is no doubt justly said in Swift's Digest, 17, that

"This sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land."

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com. 305):

> "And as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in His Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*

Mr. Justice Harlan, dissenting.

The plaintiff in error, Joseph Hurtado, now under sentence of death pronounced in one of the courts of California, brings this writ of error upon the ground that the proceedings against him are in violation of the Constitution of the United States. The crime charged, and of which he was found guilty, is murder. The prosecution against him is not based upon any presentment or indictment of a grand jury, but upon an information filed

by the district attorney of the county in which the crime was alleged to have been committed. His contention is that an information for a capital offence is forbidden by that clause of the Fourteenth Amendment of the Constitution of the United States which declares that no State shall "deprive any person of life, liberty, or property without due process of law." As I cannot agree that the State may, consistently with due process of law, require a person to answer for a capital offence, except upon the presentment or indictment of a grand jury, and as human life is involved in the judgment rendered here, I do not feel at liberty to withhold a statement of the reasons for my dissent from the opinion of the court.

The phrase "due process of law" is not new in the constitutional history of this country or of England. It antedates the establishment of our institutions. Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life and liberty, and property, which had long been deemed fundamental in Anglo-Saxon institutions. In the Congress of the Colonies held in New York in 1765, it was declared that the colonies were entitled to all the essential rights, liberties, privileges, and immunities, confirmed by Magna Charta to the subjects of Great Britain. Hutch. Hist. Mas. Bay, Appendix F. "It was under the consciousness," says Story, "of the full possession of the rights, liberties and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them." 1 Story Const. § 165. In his speech in the House of Lords, on the doctrine of taxation without representation, Lord Chatham maintained that the inhabitants of the colonies were entitled to all the rights and the peculiar privileges of Englishmen; that they were equally bound by the laws, and equally entitled to participate in the constitution of England. On the 14th of October, 1774, the delegates from the several Colonies and Plantations, in Congress assembled, made a formal declaration of the rights to which their people were entitled, by the immutable laws

of nature, the principles of the English Constitution, and the several charters or compacts under which the colonial governments were organized. Among other things, they declared that their ancestors who first settled the colonies were, at the time of their immigration, "entitled to all the rights, liberties, and immunities of free and natural born subjects within the realm of England;" that "by such immigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them as their local and other circumstances entitle them to exercise and enjoy;" and that "the respective colonists are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journal of Congress, 27–8–9.

These declarations were subsequently emphasized in the most imposing manner, when the doctrines of the common law respecting the protection of the people in their lives, liberties and property were incorporated into the earlier constitutions of the original States. Massachusetts, in its Constitution of 1780, and New Hampshire in 1784, declared in the same language that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land;" Maryland and North Carolina in 1776 and South Carolina in 1778, that "no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land;" Virginia in 1776, that "no man be deprived of his liberty except by the law of the land or the judgment of his peers;" and Delaware, in 1792, that no person "shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." In the ordinance of 1789 for the government of the Northwestern Territory, it was made one of the articles of compact between the original States and the people and States to be formed out of

that Territory—"to remain forever unalterable unless by common consent"—that "no man shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." These fundamental doctrines were subsequently incorporated into the Constitution of the United States. The people were not content with the provision in section 2 of article 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury." They desired a fuller and broader enunciation of the fundamental principles of freedom, and therefore demanded that the guaranties of the rights of life, liberty, and property, which experience had proved to be essential to the safety and security of the people, should be placed beyond all danger of impairment or destruction by the general government through legislation by Congress. They perceived no reason why, in respect of those rights, the same limitations should not be imposed upon the general government that had been imposed upon the States by their own Constitutions. Hence the prompt adoption of the original amendments, by the Fifth of which it is, among other things, provided that "no person shall be deprived of life, liberty, or property, without due process of law." This language is similar to that of the clause of the Fourteenth Amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general government.

"Due process of law," within the meaning of the national Constitution, does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government. If particular proceedings conducted under the authority of the general government, and involving life, are prohibited, because not constituting that due process of law required by the Fifth Amendment of the Constitution of the United States, similar proceedings, conducted under the authority of a State, must be deemed illegal as not being due process of law within the meaning of the Fourteenth Amendment. What, then, is the meaning of the words "due process of law" in the latter amendment?

In seeking that meaning we are, fortunately, not left without authoritative directions as to the source, and the only source, from which the necessary information is to be obtained. In *Murray's Lessees* v. *Hoboken, &c.*, 18 How. 272, 276–7, it was said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*"

Magna Charta—upon which rested the rights, liberties and immunities of our ancestors—was called, said Coke, "the Charter of the Liberties of the Kingdom, upon great reason, because *liberos facit*, it makes the people free." Hallam characterizes the signing of it as the most important event in English history, and declares that the instrument is still the keystone of English liberty. "To have produced it," said Mackintosh, "to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." By that instrument the King, representing the sovereignty of the nation, declared that "no freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we [not] pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."

"The words due 'process of law' were undoubtedly intended," said this court, in *Murray's Lessees* v. *Hoboken, &c.*, "to convey the same meaning as the words 'by the law of the land' in *Magna Charta*." That the one is the equivalent of the other was recognized in *Davidson* v. *New Orleans*, 96 U. S. 97. See also 2 Kent, 13; 2 Story Const. § 1789; Cooley's Const. Lim. 353; Pomeroy's Const. Law, § 245; *Greene* v. *Briggs*, 1 Curtis, 325. Whether the phrase in our American constitutions, national or State, be "law of the land" or "due process of law," it means in every case the same thing. Cooley's Const. Lim. 352.

Declining to follow counsel in their search for precedents in England in support or in refutation of the proposition that the common law permitted informations in certain classes of public offences, and conceding that in some cases, such as *Mr. Prynn's Case*, 5 Mod. 459, which was an information for a riot, tried before Chief Justice Holt, the requirement of due process of law was met by that mode of procedure, let us inquire—and no other inquiry is at all pertinent—whether according to the settled usages and modes of proceeding to which, this court has said, reference must be had, an information for a capital offence was, prior to the adoption of our Constitution, regarded as due process of law.

Erskine, in his speech delivered in 1784, in defence of the Dean of St. Asaph, said, in the presence of the judges of the King's Bench: "If a man were to commit a capital offence in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it. If it be said that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information, I answer, that for that reason it becomes doubly necessary to preserve the power of the other jury which

is left." That this defender of popular rights against official oppression was not in error when saying that no person could be arraigned for a capital offence except upon the presentment or indictment of a grand jury, is shown upon almost every page of the common law.

Blackstone says: "But to find a bill there must be at least twelve of the jury agree; for, so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the King of any capital offence, unless by an unanimous voice of twenty-four of his equals and neighbors, that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial." 4 Bl. Com. 306. The same author, after referring to prosecutions by information, describing their different kinds, and stating that the mode of prosecution by information (or suggestion) filed on record by the King's attorney-general, or by his coroner or master of the crown office in the Court of King's Bench, was as ancient as the common law itself, proceeds: "But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it." 4 Bl. Com. 309–10. Again, in his discussion of the trial by jury, Blackstone, after observing that the English law has "wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown," says: "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer the King for any capital crime, unless upon the peremptory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of any accusation, whether preferred in the shape of an indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all

open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of jurors in questions of the most momentous concern." 4 Bl. Com. 349–50.

Hawkins, in his Pleas of the Crown (Bk. 2, chap. 26), after saying that it is every-day practice to proceed by information in certain cases, says: "But I do not find it anywhere holden that such an information will lie for any capital crime, or for misprision of treason." In Wooddeson's Lectures on the Laws of England (Lect. 38), it is said that "informations cannot be brought in capital cases, nor for misprision of treason." Bacon, in his Abridgment, lays it down: "But though, as my Lord Hale observes, in *all* criminal causes the most regular and safe way, and most consonant to the statute of Magna Charta, &c., is by presentment or indictment of twelve sworn men, yet he admits that, for crimes *inferior to capital ones*, the proceedings may be by information." Title Information A. See also 2 Hal. Hist. P. C. c. 201; Jacobs' Law Dictionary, Title Information; Broom's Com. Laws England, vol. 4, p. 396; Story's Const. § 1784.

I omit further citations of authorities, which are numerous, to prove that, according to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not consistent with the "law of the land," or with "due process of law." Such was the understanding of the patriotic men who established free institutions upon this conti-

nent. Almost the identical words of Magna Charta were incorporated into most of the State Constitutions before the adoption of our national Constitution. When they declared, in substance, that no person should be deprived of life, liberty, or property, except by the judgment of his peers or the law of the land, they intended to assert his right to the same guaranties that were given in the mother country by the great charter and the laws passed in furtherance of its fundamental principles.

My brethren concede that there are principles of liberty and justice, lying at the foundation of our civil and political institutions, which no State can violate consistently with that due process of law required by the Fourteenth Amendment in proceedings involving life, liberty, or property. Some of these principles are enumerated in the opinion of the court. But, for reasons which do not impress my mind as satisfactory, they exclude from that enumeration the exemption from prosecution, by information, for a public offence involving life. By what authority is that exclusion made? Is it justified by the settled usages and modes of proceedure existing under the common and statute law of England at the emigration of our ancestors, or at the foundation of our government? Does not the fact that the people of the original States required an amendment of the national Constitution, securing exemption from prosecution, for a capital offence, except upon the indictment or presentment of a grand jury, prove that, in their judgment, such an exemption was essential to protection against accusation and unfounded prosecution, and, therefore, was a fundamental principle in liberty and justice? By the side of that exemption, in the same amendment, is the declaration that no person shall be put twice in jeopardy for the same offence, nor compelled to criminate himself, nor shall private property be taken for public use without just compensation. Are not these principles fundamental in every free government established to maintain liberty and justice? If it be supposed that immunity from prosecution for a capital offence, except upon the presentment or indictment of a grand jury, was regarded at the common law any less secured by the law of the land, or

any less valuable, or any less essential to due process of law, than the personal rights and immunities just enumerated, I take leave to say that no such distinction is authorized by any adjudged case, determined in England or in this country prior to the adoption of our Constitution, or by any elementary writer upon the principles established by Magna Charta and the statutes subsequently enacted in explanation or enlargement of its provisions.

But it is said that the framers of the Constitution did not suppose that due process of law necessarily required for a capital offence the institution and procedure of a grand jury, else they would not in the same amendment prohibiting the deprivation of life, liberty, or property, without due process of law, have made specific and express provision for a grand jury where the crime is capital or otherwise infamous; therefore, it is argued, the requirement by the Fourteenth Amendment of due process of law in all proceedings involving life, liberty, and property, without specific reference to grand juries in any case whatever, was not intended as a restriction upon the power which it is claimed the States previously had, so far as the express restrictions of the national Constitution are concerned, to dispense altogether with grand juries.

This line of argument, it seems to me, would lead to results which are inconsistent with the vital principles of republican government. If the presence in the Fifth Amendment of a specific provision for grand juries in capital cases, alongside the provision for due process of law in proceedings involving life, liberty, or property, is held to prove that "due process of law" did not, in the judgment of the framers of the Constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be, likewise, held that the right not to be put twice in jeopardy of life and limb for the same offence, nor compelled in a criminal case to testify against one's self—rights and immunities also specifically recognized in the Fifth Amendment—were not protected by that due process of law required by the settled usages and proceedings existing under the common and statute law of England at the settlement of this country. More than that, other amendments of the Con-

stitution proposed at the same time, expressly recognize the right of persons to just compensation for private property taken for public use; their right, when accused of crime, to be informed of the nature and cause of the accusation against them, and to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed; to be confronted by the witnesses against them; and to have compulsory process for obtaining witnesses in their favor. Will it be claimed that these rights were not secured by the "law of the land" or by "due process of law," as declared and established at the foundation of our government? Are they to be excluded from the enumeration of the fundamental principles of liberty and justice, and, therefore, not embraced by "due process of law?" If the argument of my brethren be sound, those rights —although universally recognized at the establishment of our institutions as secured by that due process of law which for centuries had been the foundation of Anglo-Saxon liberty— were not deemed by our fathers as essential in the due process of law prescribed by our Constitution; because,—such seems to be the argument—had they been regarded as involved in due process of law they would not have been specifically and expressly provided for, but left to the protection given by the general clause forbidding the deprivation of life, liberty, or property without due process of law. Further, the reasoning of the opinion indubitably leads to the conclusion that but for the specific provisions made in the Constitution for the security of the personal rights enumerated, the general inhibition against deprivation of life, liberty, and property without due process of law would not have prevented Congress from enacting a statute in derogation of each of them.

Still further, it results from the doctrines of the opinion—if I do not misapprehend its scope—that the clause of the Fourteenth Amendment forbidding the deprivation of life or liberty without due process of law, would not be violated by a State regulation, dispensing with petit juries in criminal cases, and permitting a person charged with a crime involving life to be tried before a single judge, or even a justice of the peace, upon a rule to show cause why he should not be hanged. I do no

injustice to my brethren by this illustration of the principles of the opinion. It is difficult, in my judgment, to over-estimate the value of the petit jury system in this country. A sagacious statesman and jurist has well said that it was "the best guardian of both public and private liberty which has been hitherto devised by the ingenuity of man," and that "liberty can never be insecure in that country in which the trial of all crimes is by the jury." Mr. Madison observed, that while trial by jury could not be considered as a natural right, but one resulting from the social compact, yet it was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 Lloyd's Deb. 430. "When our more immediate ancestors," says Story, "removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power." Story's Const. § 1779. I submit, however, with confidence, there is no foundation for the opinion that, under Magna Charta or at common law, the right to a trial by jury in a capital case was deemed of any greater value to the safety and security of the people than was the right not to answer, in a capital case, upon a mere information filed by an officer of the government, without previous inquiry by a grand jury. While the former guards the citizen against improper conviction, the latter secures him against unfounded accusation. A State law which authorized the trial of a capital case before a single judge, perhaps a justice of the peace, would—if a petit jury in a capital case be not required by the fundamental principles of liberty and justice—meet all the requirements of due process of law, as indicated in the opinion of the court; for such a law would not prescribe a special rule for particular persons; it would be a general law which heard before it condemned, which proceeded upon inquiry, and under which judgment would be rendered only after trial; it would be embraced by the rule laid down by the court when it declares that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the public

good, which regards and preserves those principles of liberty and justice, must be held to be due process of law.

It seems to me that too much stress is put upon the fact that the framers of the Constitution made express provision for the security of those rights which at common law were protected by the requirement of due process of law, and, in addition, declared, generally, that no person shall "be deprived of life, liberty or property without due process of law." The rights, for the security of which these express provisions were made, were of a character so essential to the safety of the people that it was deemed wise to avoid the possibility that Congress, in regulating the processes of law, would impair or destroy them. Hence, their specific enumeration in the earlier amendments of the Constitution, in connection with the general requirement of due process of law, the latter itself being broad enough to cover every right of life, liberty or property secured by the settled usages and modes of proceeding existing under the common and statute law of England at the time our government was founded. Pomeroy's Municipal Law, 366, 372.

The views which I have attempted to express are supported by the Supreme Judicial Court of Massachusetts, in *Jones* v. *Robbins*, 8 Gray, 329, reaffirmed in *Nolan's Case*, 122 Mass. 330, 332, and in *Commonwealth* v. *Honeman*, 127 Mass. 450. Among the questions there presented was whether a statute of Massachusetts which gave a single magistrate authority to try an offence punishable by imprisonment in the State prison, without the presentment by a grand jury, violated that provision of the State Constitution which declared that "no man shall be arrested, imprisoned, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." It was held that it did.

"This clause, in its whole structure," said Chief Justice Shaw, speaking for the court, "is so manifestly conformable to the words of Magna Charta, that we are not to consider it as a newly invented phrase, first used by the makers of our Constitution; but we are to look at it as the adoption of one of the great securities of private right, handed to us as among the liberties and privileges which our ancestors enjoyed at the time of

their emigration and claimed to hold and retain as their birthright.

"These terms, in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of their trial; because the laws may be shaped and altered by the legislature, from time to time; and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The legislature might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights." After recognizing "law of the land" in Magna Charta and in the Constitution of Massachusetts as having the same meaning as "due process of law," and after stating that the people of the original States deemed it essential for the better security of their rights of life, liberty, and property, that their Constitutions should set forth and declare the fundamental principles of free government, Chief Justice Shaw proceeds: "Most of the State Constitutions did contain these declarations, more or less detailed and explicit; but the general purpose was to assert and maintain the great rights of English subjects, as they had been maintained by the ancient laws, and the actual enjoyment of civil rights under them. 'The sense of America was,' says Chancellor Kent, 'more fully ascertained, and more explicitly and solemnly promulgated, in the memorable Declaration of Rights of the first Continental Bill of Rights, in October, 1774, and which was a representation of all the States except Georgia. That declaration contained the assertion of several great and fundamental principles of American liberty; and it constituted the basis of those subsequent bills of rights which, under various modifications, pervaded all our Constitutional charters' 2 Kent, 5, 6.

"The right of individual citizens to be secure from an open

and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

Chancellor Kent, referring to the rights of personal security, as guarded by constitutional provisions, which were transcribed into the Constitutions of this country from Magna Charta and other fundamental acts of the English Parliament, says: "And where express constitutional provisions on the subject appear to be wanting, the same principles are probably asserted by declaratory legislative acts; and they must be regarded as fundamental doctrines in every State, for the colonies were parties to the national declaration of rights in 1774, in which the trial by jury, and the other rights and liberties of English subjects, were peremptorily claimed as their undoubted inheritance and birthright. It may be received as a proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseized of his freehold or estate, or exiled or condemned, or deprived of life, liberty, or property, unless by the law of the land or the judgment of his peers. The words *by the law of the land*, as used originally in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of these words." And Kent immediately adds: "The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

Because of this general definition of due process of law, that distinguished jurist, it seems is claimed as authority for the present decision. When Lord Coke said that indictment or presentment was due process of law, he had reference, of course, to proceedings in cases in which, by the law of the land, that kind of procedure was required. In no commentary upon Magna Charta is it more distinctly stated than in Coke's that

informations were consistent with the law of the land in certain cases, and no one has more emphatically declared that, in capital cases, informations are not allowed by that law and were not due process of law. He referred to indictments and presentments to illustrate what was due process of law in prosecutions against persons accused of the higher grades of crime, and not for the purpose of giving a full definition of the phrase "due process of law," as applicable to both civil and criminal cases. The definition by Kent of "due process of law" was, therefore. better and larger, because it embraced cases civil and criminal, *in rem* and *in personam*, and included proceedings affecting every right, whether of life, liberty, or property, guaranteed by the law of the land. He was very far from saying that every proceeding, involving new methods of trial, was due process of law, because declared by the legislature to be such, or because it may be regular in the sense that it is established by a general statute.

It is said by the court that the Constitution of the United States was made for an undefined and expanding future, and that its requirement of due process of law in proceedings involving life, liberty and property, must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the State which adopts it has entered upon an era of progress and improvement in the law of criminal procedure. Even the statute of H. 7, c. 3, allowing informations, and, "under which Empson and Dudley, and an arbitrary star chamber, fashioned the proceedings of the law into a thousand tyrannical forms," expressly declared that it should not extend "to treason, murder or felony, or to any other offence wherefor any person should lose life or member." So great, however, were the outrages perpetrated by those men, that this statute was repealed by 1 H. 8, c. 6. Under the local statutes in question, even the district attorney of the county is deprived of any discretion in the premises; for,

if in the judgment of the magistrate before whom the accused is brought—and, generally, he is only a justice of the peace—a public offence has been committed, it becomes the duty of the district attorney to proceed against him by information for the offence indicated by the committing magistrate. Thus, in California, nothing stands between the citizen and prosecution for his life, except the judgment of a justice of the peace. Had such a system prevailed in England, in respect of all grades of public offences, the patriotic men who laid the foundation of our government would not have been so persistent in claiming, as the inheritance of the colonists, the institutions and guaranties which had been established by her fundamental laws for the protection of the rights of life, liberty and property. The royal governor of New York would not have had occasion to write in 1697 to the home government that the members of the provincial legislature were "big with the privileges of Englishmen and Magna Charta." 3 Bancroft, 56. Nor would the Colonial Congress of 1774, speaking for the people of twelve colonies, have permitted, as it did, the journal of their proceedings to be published with a medallion on the title-page, "representing Magna Charta as the pedestal on which was raised the column and cap of liberty, supported by twelve hands, and containing the words '*Hanc Tuemur, Hac Nitimur.*'" Hurd on Habeas Corpus, 108. Anglo-Saxon liberty would, perhaps, have perished long before the adoption of our Constitution, had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the crown, should certify that he had committed a capital crime. That such officers are, in some of the States, elected by the people, does not add to the protection of the citizen; for, one of the peculiar benefits of the grand jury system, as it exists in this country and England, is that it is composed, as a general rule, of a body of private persons, *who do not hold office at the will of the government, or at the will of voters.* In many if not in all of the States civil officers are disqualified to sit on grand juries. In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning

public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehold, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies. "Grand juries perform," says Story, "most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies." Story's Const. § 1785.

To the evidence already adduced to show the necessity and value of that system, I may add the testimony of Mr. Justice Wilson, formerly of this court, and one of the foremost of the great men who have served the cause of constitutional government. He said that "among all the plans and establishments which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution is, at least in the present times, the peculiar boast of the common law. The era of its commencement, and the particulars attending its gradual progress and improvement, are concealed behind a thick veil of a very remote antiquity. But one thing concerning it is certain. In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes." 3 Wilson's Works, 363–4.

Mr. Justice Field, referring to the ancient origin of the grand jury system in England, said, that it was, "at the time of the settlement of this country, an informing and accusing tribunal, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest

between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." 2 Sawyer, 668–9. He quoted with approval the observations of a distinguished judge to the effect that "into every quarter of the globe in which the Anglo-Saxon race have formed settlements, they have carried with them this time-honored institution, ever regarding it with the deepest veneration, and connecting its perpetuity with that of civil liberty." In their independent action," said the same jurist, "the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppressions of power, the virulence of malice, and the intemperance of prejudice."

We have already seen that for centuries before the adoption of our present Constitution, due process of law according to the maxims of Magna Charta and the common law—the interpreters of constitutional grants of power—which even the British Parliament with all its authority could not rightfully disregard, Cooley's Const. Lim. 175, absolutely forbade that any person should be required to answer for his life except upon indictment or presentment of a grand jury. And we have seen that the people of the original States deemed it of vital importance to incorporate that principle into our Constitution, not only by requiring due process of law in all proceedings involving life, liberty, or property, but by specific and express provision giving immunity from prosecution, in capital cases, except by that mode of procedure.

To these considerations may be added others of very great significance. When the Fourteenth Amendment was adopted, all the States of the Union, some in terms, all substantially, declared, in their constitutions, that no person shall be deprived

of life, liberty, or property, otherwise than "by the judgment of his peers, or the law of the land," or "without due process of law." When that Amendment was adopted, the constitution of each State, with few exceptions, contained, and still contains, a Bill of Rights, enumerating the rights of life, liberty and property which cannot be impaired or destroyed by the legislative department. In some of them, as in those of Pennsylvania, Kentucky, Ohio, Alabama, Illinois, Arkansas, Florida, Mississippi, Missouri and North Carolina, the rights so enumerated were declared to be embraced by "the general, great and essential principles of liberty and free government;" in others, as in those of Connecticut, in 1818, and Kansas, in 1857, to be embraced by "the great and essential principles of free government." Now, it is a fact of momentous interest in this discussion, that, when the Fourteenth Amendment was submitted and adopted, the Bill of Rights and the constitutions of twenty-seven States expressly forbade criminal prosecutions, by information, for capital cases;* while, in the remaining ten States, they were impliedly forbidden by a general clause declaring that no person should be deprived of life otherwise than by "the judgment of his peers or the law of the land," or "without due process of law."† It may be safely affirmed that, when that Amendment was adopted, a criminal prosecution, by information, for a crime involving life, was not permitted in any one of the States composing the Union. So that the court, in this case, while conceding that the requirement

* Ala., 1867, Art. 1, § 10; Ark., 1868, Art. 1, § 9; Cal., 1849, Art. 1, § 8; Conn., 1818, Art., 1, § 9; Del., 1831, Art. 1, § 8; Flor., 1868, Art. 1, § 9; Ill., 1848, Art. 13, § 10; Iowa, 1857, Art. 1, § 11; Ky., 1850, Art. 13, § 13; Me., 1820, Art. 1, § 7; Mass., 1780, Pt. 1, Art. 12, as contained in *Jones* v. *Robbins*, 8 Gray 329; Minn., 1857, Art. 1, § 7; Miss., 1868, Art. 1, § 31; Mo., 1865, Art. 1, § 24; Nebraska, 1866–7, Art. 1, § 8; Nev., 1864, Art. 1, § 8; N. J., 1844, Art. 1, § 9; N. Y., 1846, Art. 1, § 6; N. C., 1868, Art. 1, § 12; Ohio, Art. 1, § 10; Penn., 1838, Art. 9, § 10; R. I., 1842, Art. 1, § 7; S. C., 1868, Art. 1, § 19; Tenn., 1834, Art. 1, § 14; Tex., 1868, Art. 1, § 8; W. Va., 1861–3, Art. 2, § 1; Wis., 1848, Art. 1, § 8.

† Geo., 1868, Art. 1, § 3; Ind., Art. 1, § 12; Kansas, 1859, Bill of Rights, § 18; La., 1868, Telle. 1, Art. 10; Md., 1867, Declaration of Rights, Art. 23; Mich., 1850, Art. 6, § 32; N. H., 1792, Pt. 1, Art. 15; Oregon, 1857, Art. 1, § 10; Vt., 1793, Chap. 1, Art. 10; Va., 1850, Bill of Rights, Art. 8.

of due process of law protects the fundamental principles of liberty and justice, adjudges, in effect, that an immunity or right, recognized at the common law to be essential to personal security, jealously guarded by our national Constitution against violation by any tribunal or body exercising authority under the general government, and expressly or impliedly recognized, *when the Fourteenth Amendment was adopted*, in the Bill of Rights or Constitution of every State in the Union, is, yet, not a fundamental principle in governments established, as those of the States of the Union are, to secure to the citizen liberty and justice, and, therefore, is not involved in that due process of law required in proceedings conducted under the sanction of a State. My sense of duty constrains me to dissent from this interpretation of the supreme law of the land.

MR. JUSTICE FIELD did not take part in the decision of this case.

WASHER *v.* BULLITT COUNTY.

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

Argued February 1st, 1884.—Decided March 3d, 1884.

When an amended complaint demands a sum different from that demanded in the original, the amended and not the original complaint is to be looked to in determining the question of jurisdiction.

At common law a county may be required or have authority to maintain a bridge or causeway across its boundary line and extending into the territory of an adjoining county.

A statute of Kentucky which enacts that "County Courts have jurisdiction to . . . erect and keep in repair necessary . . . bridges and other structures and superintend the same, . . . provide for the good condition of the public highways of the county; and to execute all of its orders consistent with law and within its jurisdiction" confers upon a County Court authority to erect a bridge across a boundary stream and construct approaches to it in the adjoining county.

The power conferred upon County Courts of adjoining counties by statute, to construct bridges across boundary streams at joint expense is not exclusive, and does not take away the common-law right in each of the counties to erect such bridges at its sole cost.

Statement of Facts.

This was an action at law brought by the plaintiffs in error against the county of Bullitt, in the State of Kentucky, on a contract dated July 8th, 1878, made between the plaintiff Washer and the defendant county, for the construction of a bridge by Washer over Pond Creek, the boundary between Bullitt and Jefferson Counties.

The contract, which is attached as an exhibit to the petition, was executed by Washer and J. W. Ridgway, commissioner of Bullitt County. It provided that Washer should erect an arched stone bridge with earthen embankments across Pond Creek, at the Branner foundation site, according to certain specifications, for specified prices per cubic yard of masonry and embankment. Bullitt County guaranteed payment for the whole work.

The petition alleged that on August 29th, 1878, Washer transferred by his indorsement in writing the contract made by him with the county of Bullitt, and all moneys due to him thereon, to his co-plaintiffs, Danenhauer and Baecker. It averred that on December 10th, 1878, there was due to the plaintiffs from Bullitt County on the contract the sum of $5,325.14, which it refused to pay, or any part thereof, "except the sum of $1,800, leaving a balance due thereon of $3,525.14," from which latter amount was to be deducted the sum of $340.75, which the plaintiffs had agreed might be paid by the defendant directly to the Smith Bridge Company for materials furnished by it for the bridge, leaving a balance due the plaintiffs of $3,184.39.

The defendant filed a general demurrer to the petition, which the court sustained, with leave to the plaintiffs to amend. They afterwards filed an amended petition, in which it was averred that before the contract mentioned in the petition was made the owners and occupants in possession of the lands approaching the bridge on both sides of Pond Creek appeared in open County Court, and relinquished of record the right of way to and across the bridge; and thereafter, and before the contract was made, the County Court of Bullitt County, being composed of the presiding judge and a majority of the justices thereof, appointed commissioners and notified the Jefferson

County Court thereof, and requested it to appoint like commissioners to contract for the bridge, which the Jefferson County Court did; and the commissioners so appointed met at the place proposed for erecting the bridge, and at the place mentioned in the contract, but could not and did not agree upon a plan for erecting the bridge, nor contract for the erection thereof; that thereupon the County Court of Bullitt County, composed of the county judge and a majority of the justices of the county, decided that it was necessary to erect the bridge, and having exhausted all means provided by statute for securing the aid of Jefferson County in building the same, decided to erect the bridge; and that, on July 16th, 1877, said County Court, composed as aforesaid, authorized J. W. Ridgway to report plans and specifications for the erection of the bridge, and W. Carpenter, the county judge, to receive and accept bids for the same; and that, in pursuance of this authority, the county judge accepted the bid of Washer; and that Ridgway, being thereunto authorized by an order of the County Court, entered into the contract with Washer appended to the petition, and that the making of the contract was subsequently ratified by orders made and entered of record by the County Court of Bullitt County, composed of the county judge and a majority of the justices of the county, directing the levy of taxes to pay for the work done under the contract, and the application of the money so raised to that purpose.

The amended petition also averred that "the bridge was necessary for the public use of the people and travel of Bullitt County, and that said proceedings and orders and the contract so entered into by defendant were valid and binding upon it."

By the amended petition the allegations of the original petition in respect to the payment of $1,800 for the work done under the contract, and in respect to the sum of $340.75 due the Smith Bridge Company for materials for the bridge, and the averment that there was a balance due upon work performed by the plaintiff Washer of $3,184.39, were withdrawn; and the amended petition averred that the defendant had failed to perform its contract or to pay plaintiffs for work done there-

under, to their damage in the sum of $5,325.14, for which amount they demanded judgment.

To this amended petition the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action.

The Circuit Court sustained the demurrer, and the plaintiffs electing to stand by their amended petition the court rendered judgment "that the plaintiffs take nothing by their petition, and that the defendant go hence without day and recover of the plaintiffs its costs," &c.

The plaintiffs sued out their writ of error.

Mr. Augustus E. Willson (*Mr. James Harlan* was with him) for plaintiffs in error.

Mr. James Speed for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

The defendant in error contends that the appeal should be dismissed because the amount in controversy is less than $5,000, and therefore not sufficient to give this court jurisdiction. This contention is based on the averments of the original petition, which showed that the suit was brought to recover only $3,184.39, the balance due for work done under the contract sued on and for $500 damages.

In the amended petition all the averments of the original petition by which the amount in controversy was reduced below $5,000 were withdrawn, and it was averred that the sum of $5,325.14 was due to the plaintiffs for work done under the contract. It was as competent for the plaintiffs, when leave had been given them to amend their petition, to amend it in respect to the sum for which judgment was demanded as in any other matter. The admission in the original petition of the payment of $1,800 was specifically withdrawn in the amended petition, and after the withdrawal of that admission it nowhere appeared in the record that said sum was ever paid. The admission might have been made by the inadvertence or mistake of the plaintiffs or their counsel, but however made it was within their power to withdraw it without assigning reasons for the

withdrawal. They were not inexorably bound by the averments of the original petition. When a petition is amended by leave of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition. If its averments show that this court has jurisdiction, the jurisdiction will be maintained without regard to the original petition. It has been held by this court that after a case had been dismissed by it for want of jurisdiction, the pleadings being technically defective, the Circuit Court might allow an amendment so as to show the jurisdiction, and on a decree newly rendered the case might be again brought to this court. *Jackson* v. *Ashton*, 10 Pet. 480.

As the amended petition avers that there is due the plaintiffs a sum exceeding $5,000, we are of opinion that the jurisdiction of this court is plain upon the face of the record.

We now come to the merits of the case. The demurrer admits the execution of the contract by Ridgway, the county commissioner, under authority of an order of the County Court; its subsequent ratification by orders of the County Court, composed of the county judge and a majority of the justices of the county, directing the levy of taxes to pay for work done under the contract and directing the application of the money so raised to that purpose; and admits that there is due the plaintiffs the sum of $5,325.14 for the work so done. The County of Jefferson raises no objection to the building of the bridge. So far as appears it is quite willing that Bullitt County should erect the bridge, provided it does so at its own expense. The land owners at the Jefferson County end of the bridge, over and on whose premises a part of the bridge rests, make no objection. On the contrary, they have granted a right of way to Bullitt County over their lands to and across the bridge. The only controversy between the parties is whether Bullitt County had authority to make the contract sued on, by which it undertook at its own cost to build across a boundary stream a bridge, one end of which was within the territory of another county.

Opinion of the Court.

The statute law of Kentucky applicable to this question is as follows:

Section 1 of article 16, chapter 28 of the General Statutes of Kentucky, page 305, provides:

"County Courts have jurisdiction to lay and superintend the collection of the county levy, erect and keep in repair necessary public buildings, bridges, and other structures, and superintend the same; regulate and control the fiscal affairs and property of the county; . . . provide for the good condition of the public highways in the county; and to execute all of its orders consistent with law and within its jurisdiction."

Sections 36 and 37 and 38 of art. 1, chap. 94, General Statutes, page 767, declare as follows:

"§ 36. When the County Court of any county shall deem it advisable to erect a bridge or causeway over any place between that and an adjoining county, the court shall appoint a commissioner, and notify the court of the adjoining county thereof, and request the latter to appoint a like commissioner, and it shall be the duty of the court so requested to appoint such commissioner. The persons so appointed shall meet at the place so proposed for erecting the bridge or causeway, and agree on a plan for the same, and contract for the erection thereof; and each of said county courts shall levy the costs of such work on its county, in proportion to the number of tithables in each county.

"§ 37. When the County Court of one county shall think it expedient to build a bridge or causeway, and shall appoint a commissioner on its part as provided in the preceding section, and the court of the adjoining county shall refuse to appoint a commissioner, . . . the Circuit Court of the county refusing may issue a writ of mandamus to the County Court to show cause why an order shall not be entered up directing the appointment of the commissioner, and the erection of such bridge or causeway, &c.

"§ 38. When the mandamus is returned, the Circuit Court shall hear and consider such evidence touching the matter as either party may adduce, and shall either dismiss the proceedings or award a peremptory mandamus, as may seem proper."

At common law a bridge was a common highway, and the county was bound to repair it. *Reg.* v. *Sainthill*, 2 Ld. Raym. 1174; 3 Salk. 76; *Rex* v. *W. R. of Yorkshire*, 2 East. 342. Under the statute of 22 Henry 8, which has been held to be merely declaratory of the common law, when part of a bridge happened to be in one shire and the other part in another, the respective shires were bound to repair within their respective limits. Woolrych on Ways, 200. But when a bridge which crossed a river dividing two counties was maintained by one of the counties under the statute of 23 H. 8, it was held that under the same statute it was compellable to repair the highway as a part of the bridge for a distance of three hundred feet from each end of the bridge, although one end was in another county. *Rex* v. *Inhabitants of Devon*, 14 East. 477.

It is therefore clear that at the common law a county might be required to maintain a bridge or causeway across its boundary line, and extending into the territory of an adjoining county. The same rule prevails in this country.

"A county is one of the territorial divisions of a State created for public political purposes connected with the administration of the State government, and being in its nature and objects a municipal organization the legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization." *Commissioners of Talbot County* v. *Queen Anne's County*, 50 Maryland, 245.

It may even impose on one county the expense of an improvement by which it mainly is benefited, but in which the whole State is interested. *County of Mobile* v. *Kimball*, 102 U. S. 691.

"A county is created almost exclusively, with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, education, provision for the poor, military organization, and of means of travel and transportation," &c. *Hamilton County* v. *Mighels*, 7 Ohio St. 109.

Opinion of the Court.

In the case of *Agawam* v. *Hampden*, 130 Mass. 528, it was said by the court that,

"It is well settled that the legislature may enact that a particular road or bridge shall be a public highway, or may direct it to be laid out as such by county commissioners, and in either case may order the cost thereof, . . . as well as the cost of maintaining it or keeping it in repair, to be paid either by the commonwealth or by the counties, cities, or towns in which it lies, or which may be determined by commissioners appointed by the counties to be specially benefited thereby."

See also *Norwich* v. *County Commissioners*, 13 Pick. 60; *Attorney-General* v. *Cambridge*, 16 Gray, 247; *Scituate* v. *Weymouth*, 108 Mass. 128.

It is, therefore, not open to question that the legislature may, in its discretion, authorize or require one county to build, at its own expense, a bridge or road across the boundary line between it and another county.

When, therefore, the legislature of Kentucky authorized the County Court of any county to erect and keep in repair necessary public bridges, the act may well be construed to authorize the County Court of one county to build at its own expense a bridge, which it should adjudge to be necessary for the use of the people of the county, over a stream which formed the boundary line of the county. The power conferred upon the County Court by the statute of Kentucky to erect and keep in repair necessary public bridges, includes within its terms a bridge across the county boundary as well as one wholly within the county limits. Unless, therefore, there is other legislation which modifies the power thus conferred, the authority of Bullitt County to contract for the erection of the bridge in question is plain.

It is insisted by the defendant in error that sections 36 and 37 of article 1, chapter 94, above quoted, furnish an invariable rule, which must be followed before the County Court can make any contract for the erection of a bridge across the county boundary; that is to say, the bridge must be adjudged necessary to the people of both counties in proportion to their taxable

property; commissioners must be appointed for each county, and they must agree upon the plans and enter into a contract for the erection of the bridge; and that unless all these things concur there can be no bridge. We think such a construction of the statute is not tenable.

It may frequently happen that a bridge or causeway across the boundary line between two counties may be of vital necessity to one and of little use to the other. It may often happen that a county to be little or not at all benefited by a proposed bridge may successfully oppose before the Circuit Court the entering of an order directing the appointment of a commissioner in its behalf, or the erection of the bridge in part at its expense in proportion to its taxable property. To hold that the adjoining county could not under these circumstances build at its own expense a bridge necessary for the use of its inhabitants would be an unwarrantable construction of the statute.

In our opinion these proceedings are necessary only when the county desiring to erect a bridge over a stream dividing it from an adjoining county seeks to compel the adjoining county to bear its share of the expense. If its County Court adjudges that the bridge is necessary for the inhabitants of their county, but is of opinion that it is not of sufficient importance to the people of the adjoining county to justify the laying of a tax to aid in its erection, in proportion to the taxable property of such adjoining county, they may build the bridge at the expense of their own county. It is not necessary to go through the formalities prescribed by the statute to compel involuntary aid from the adjoining county, when it is clear that such aid ought not to be and cannot be exacted.

But according to the averments of the declaration the statute was pursued in this case as far as was possible. The County Court of Bullitt County appointed its commissioner and notified the fact to the County Court of Jefferson County, and requested it to appoint a like commissioner, which it did. The commissioners so appointed met at the place proposed for the erection of the bridge, but they could not and did not agree upon a plan, or make a contract for the construction of the bridge. Nothing further could be done under sections 36 and

37. Bullitt County therefore fell back upon the power conferred by section 1 of article 16, chapter 28, and made a contract by which it became responsible for the entire cost of the bridge. Its power to do this was, we think, clear.

We find nothing in the decisions of the Court of Appeals of Kentucky contrary to this view.

The case of *Nelson County* v. *Washington County*, 14 B. Mon. 92, is much relied on by the defendant in error. We have been able to see nothing in that case applicable to the controversy in this. The proceeding was one begun in the Circuit Court by Washington County, under section 7 of the act of 1797, which is similar to sections 36 and 37 of article 1, chapter 94, *supra*, to compel the justices of Nelson County to appoint commissioners to act with commissioners appointed by Washington County in fixing the manner and conditions of building a bridge across Chaplin River, the boundary between the two counties, and to show cause why they should not "lay a levy" to build such bridge. The Court of Appeals merely decided that Nelson County could not be compelled to levy a tax to build the bridge until commissioners had been appointed to decide upon its site and cost, and before it had united in the contract to build the bridge.

It is true the court said that "until a joint commission is constituted to act in obedience to the requisitions of the statutes, neither of the counties is bound, nor can either be compelled, to tax their citizens in any way to raise the money to build the bridge." That might be true when the proceeding was to compel the building of a bridge at the joint cost of the two counties; but this remark can have no application to this case, where one of the two counties has by her contract undertaken to pay the entire cost of the bridge under the general power conferred by section 1 of article 16, chapter 28.

In our opinion the County Court of Bullitt County had power to contract for the construction, at the cost of Bullitt County, of the bridge in question, having adjudged that it was necessary for the public use. It follows that the demurrer to the amended petition should have been overruled.

The judgment of the Circuit Court sustaining the demurrer must be reversed and the cause remanded for further proceedings in conformity with this opinion.

KILLIAN and Another, Trustees, *v.* EBBINGHAUS, Trustee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued January 30th, 1884.—Decided March 3d, 1884.

Equity.

A bill of interpleader will not lie if the complainant sets up an interest in the subject-matter of the suit, and the relief sought relates to that interest.

A bill in the nature of a bill of interpleader cannot be maintained unless the relief sought is equitable relief.

A bill in equity will not lie if it is in substance and effect an ejectment bill, and if the relief it seeks can be obtained at law by an action in ejectment.

This was a suit in equity commenced by defendant in error as plaintiff below, against persons in possession of a tract of land in Washington and claiming title, to have a trust declared in the plaintiff below as to said land, and the legal beneficiaries under the trust ascertained. The defendants below denied the trust and set up adverse title. The decree below was in favor of the plaintiff there, from which the defendants below appealed.

Mr. Henry Wise Garnett and *Mr. Conway Robinson, Jr.*, for appellants.

Mr. F. P. Cuppy and *Mr. P. E. Dye* for appellee.

Mr. Justice Woods delivered the opinion of the court.

The bill in this case was filed by John W. Ebbinghaus, the appellee, as trustee for the German Calvinist Society and their legal representatives. His appointment as trustee was brought about in the following manner: On July 16th, 1877, August Sievers, Edward Kolb and Ludwig Freund, as trustees of the First German Reformed Church of Washington, D. C., filed their petition in the Supreme Court of the District of Columbia, in which they represented that on June 28th, 1793, one D. Reintzel held, as trustee, in trust for the "German Calvinist Society," lot 9 in square 80 of the City of Washington; that the "German Reformed Church" was the legal counterpart and successor of the "German Calvinist Society," and that the

petitioners were the only beneficiaries of the trust estate; that Reintzel, the trustee, was dead and no successor had been appointed. They, therefore, prayed that John W. Ebbinghaus, the pastor of the First Reformed Church of the city of Washington, might be appointed trustee, as the successor of Reintzel.

On the day on which the petition was filed, the Supreme Court of the District, without notice or service of process, appointed Ebbinghaus trustee in the place of Reintzel, to hold, as trustee, the said property "for the German Calvinist Society and their legal successors, in accordance with the intent of Jacob Funk, the original donor."

Ebbinghaus believed, for he so testifies, that the real estate in question was the property of the First Reformed Church. When giving his deposition in this case he was asked: "Do you consider that this lot belongs to your church? His answer was, "Yes, sir; most emphatically."

With this belief, on the day next after his appointment as trustee, and in pursuance of an understanding entered into with the trustees of his church before his appointment, he filed the bill in this case.

It alleged that the appellee, Ebbinghaus, was the trustee and legal owner of lot 9, in square 80, in the City of Washington, in the District of Columbia; that the property mentioned was given in trust by one Jacob Funk to D. Reintzel, as trustee, to hold for the use and benefit of the "German Calvinist Society," and that he held the property as the successor to D. Reintzel, deceased, for said society and their legal representatives, in accordance with the intent of Jacob Funk, the original donor.

The bill further averred that Ebbinghaus held the property in trust for the legal successors and beneficiaries of the trust, whoever they might be, and was ready to pay the rents, issues, and profits arising therefrom into court to be disposed of as the court might direct, and faithfully perform the duties of trustee; and that he brought his bill to have the court decide who were the legal beneficiaries under said trust.

The bill further averred that the defendants John G. Killian, John Schenck, and John Schneider, trustees of the German

Evangelical Concordia Church of the City of Washington, claimed to be the legal beneficiaries and entitled to the rents and profits of the trust property for religious purposes, and had already received and converted to their own use a large sum of money, the rents of the property, without the consent of Reintzel or his legal representative, or of the appellee.

The bill also averred that the defendants August Sievers, Edward Kolb, and Ludwig Freund, trustees of the First Reformed Church of the City of Washington, claimed to be the legal successors of the German Calvinist Society, and the legal beneficiaries of the trust, and entitled to the rents, profits and estate of and in said property, and were "expected to sue the complainant for the recovery of their supposed rights."

The prayer of the bill was for an account of the rents and profits of the trust estate received by the trustees of the German Evangelical Concordia Church, and for the payment into court of the amount found due from them; that the trustees of the two church societies mentioned in the bill might be respectively enjoined from bringing suit against Ebbinghaus on account of, and from further interference with, the trust property during the pendency of the present suit, and that they might be required to interplead together, and that Ebbinghaus might be indemnified.

The defendants Schenck and Schneider filed their joint answer, in which they denied that Ebbinghaus was the trustee and legal owner of the real estate described in the bill, and averred that they and the defendant John G. Killian, their associate trustee, were the only lawful and equitable trustees of the property. They denied that Ebbinghaus, whom they averred to be an interloper, held the property as trustee or successor to D. Reintzel, or as successor of any one having title thereto, or that he held it for the benefit of the legal successors and beneficiaries of the trust.

The defendants Siever, Kolb and Freund, styling themselves trustees of the First Reformed Church, filed their joint answer admitting all the averments of the bill.

Upon final hearing of the case upon the pleadings and evidence the Supreme Court of the District of Columbia, in special

term, dismissed the bill without prejudice. Upon appeal to the Supreme Court of the District, in general term, the decree of the special term was reversed, and the court decreed that Ebbinghaus, as trustee as aforesaid, be authorized and empowered to take possession of the property described in the bill, and hold the same as trustee for the First Reformed Church, in the city of Washington, D. C., and receive the rents and profits thereof, and account therefor as such trustee to said First Reformed Church; that the trustees of the German Evangelical Concordia Church be enjoined from further interfering with said real estate, or with the receipt of the rents and profits thereof by Ebbinghaus, and that they account to him for the rents received by them since the filing of the bill in this case. The present appeal brings this decree under review.

The appellants contend that the decree of the court below should be reversed because the suit is not one of which a court of equity could take jurisdiction, and the decree is not one which it was competent for such a court to make. We think this contention is well founded.

The bill is either a bill of interpleader or a bill in the nature of a bill of interpleader. It is clear that it cannot be sustained as a bill of interpleader. In such a bill it is necessary to aver that the complainant has no interest in the subject-matter of the suit; he must admit title in the claimants and aver that he is indifferent between them, and he cannot seek relief in the premises against either of them. *Langston* v. *Boylston*, 2 Ves. Jr. 101; *Angell* v. *Hadden*, 15 Ves. Jr. 244; *Mitchell* v. *Hayne*, 2 Sim. & Stuart, 63; *Aldrich* v. *Thompson*, 2 Bro. Ch. 149; *Metcalf* v. *Hervey*, 1 Ves. 248; *Darthez* v. *Winter*, 2 Sim. & Stuart, 536; *Bedell* v. *Hoffman*, 2 Paige Ch. 199; *Atkinson* v. *Manks*, 1 Cow. 691. In this case the bill fails to comply with any of these requirements.

If the complainant were in possession of the property in question, holding it for the party beneficially interested, and had custody of rents and profits derived therefrom, and the two sets of defendants asserted conflicting claims to the property and to the rents, the facts might sustain a bill of interpleader. But the complainant is out of possession; he has no

rents in his custody. He is, therefore, in no jeopardy from the conflicting claims of the defendants, and cannot call on them to interplead. Instead of admitting title in the two sets of claimants, and asking the court to decide between them, he sets up title in himself for the benefit of one set, and seeks relief against the other.

To avoid these obstacles to the maintenance of the suit, the appellee insists that it can be maintained as a bill in the nature of a bill of interpleader. In support of this view, his counsel cites section 824 of Story's Equity Jurisprudence (11th ed.), where it is said that "there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons."

But in all such cases the relief sought is equitable relief. *Mohawk, &c., Railroad* v. *Clute*, 4 Paige, 384; *Parks* v. *Jackson*, 11 Wend. 442; *McHenry* v. *Hazard*, 45 N. Y. 580. The authority cited by the appellee does not, therefore, aid the bill in this case, which is that of a party out of possession claiming the legal title to real estate, seeking to oust the parties in possession, who also claim the legal title, and compel them pay over the rents and profits.

The fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity in the nature of a bill of interpleader as an action of ejectment. The record makes this apparent. At the instance of the trustees of the First Reformed Church, the appellee was appointed by the Supreme Court of the District of Columbia to hold the property in trust for that church. His appointment was obtained that he might bring this suit in the interest of the First Reformed Church against the trustees of the German Evangelical Concordia Church. He alleges in his bill that he has the legal title to the premises in controversy, of which it is clear from the record that he is out of possession. Having no rents or profits in his keeping, he seeks to recover them from one body of trustees, and asks the court to decide to which of the two bodies of trustees claiming the property he shall pay them when he has recovered them.

Opinion of the Court.

The answer of Schenck and Schneider denies that the appellee is the legal owner of the property, or that he holds it as trustee. They aver that the title to the property is in them as trustees of the German Evangelical Concordia Church. Upon the filing of the answer the point of controversy between the parties plainly appeared. Both claimed to own the legal title, and the defendants were in possession. The issue thus raised could only be tried in an action at law. The decree of the court below is the equivalent of the judgment of a court of law in an action of ejectment, namely, that the plaintiff recover possession of the premises; and also of the judgment of a court of law in an action of trespass for mesne profits, that he recover rents and profits. There is no ground for calling such a suit a bill of interpleader of any kind.

There are no averments in the bill which disclose any other grounds of equity jurisdiction. It is clear that an action of ejectment would have afforded the appellee a plain and adequate remedy.

The case is similar to the leading case of *Hipp* v. *Babin*, 19 How. 271, which was dismissed by the Circuit Court on the ground that there was an adequate remedy at law. Upon appeal to this court the decree was affirmed. This court, speaking by Mr. Justice Campbell, described the case as follows:

"The bill in this case is in substance and legal effect an ejectment bill. The title appears by the bill to be merely legal. The evidence to support it appears from documents accessible to either party, and no particular circumstances are stated showing the necessity of the courts interfering, either for preventing suits or other vexation, or for preventing an injustice irremediable at law."

And the court declared as a result of the argument, "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury." See also *Parker* v. *Winnepiseogee Lake Cotton and Woolen Manu-*

facturing Company, 2 Black, 545; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Lewis* v. *Cocks*, 23 Wall. 466.

And this objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. *Parker* v. *Winnepiseogee Lake Cotton and Woolen Manufacturing Company*, and *Lewis* v. *Cocks*, *ubi supra*.

These and many similar authorities, which it is unnecessary to cite, are applicable to the case in hand. They show that the court below was without jurisdiction to entertain the suit and render the decree appealed from.

Its decree is therefore reversed, and the cause remanded, with directions to dismiss the bill without prejudice.

HOPT *v.* PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted January 4th, 1884.—Decided March 3d, 1884.

Criminal Law—Evidence—Practice—Statutes.

1. The trial, in Utah, by triers, appointed by the court, of challenges of proposed jurors, in felony cases, must be had in the presence as well of the court as of the accused; and such presence of the accused cannot be dispensed with.
2. The rule that hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge, reaffirmed.
3. Where, under the statute, it is for the jury to say whether the facts make a case of murder in the first degree or murder in the second degree, it is error for the court to say, in its charge, that the offence, by whomsoever committed, was that of murder in the first degree.
4. A confession freely and voluntarily made is evidence of the most satisfactory character. But the presumption upon which weight is given to such evidence, namely that an innocent man will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made, either in consequence of inducements of a temporal nature held out by one in authority, touching the charge preferred, or because of a threat or promise made by, or in the presence of, such person, in reference to such charge.

A confession made to an officer will not be excluded from the jury merely because it appears that the accused was previously in the custody of another officer; and the court will not, as a condition precedent to the admission of such evidence, require the prosecution to call the latter, unless the circumstances render it probable that the accused held a conversation with the first officer upon the subject of a confession, or justify the belief of collusion between the officers.

5. A statute which simply enlarges the class of persons who may be competent to testify, is not *ex post facto* in its application to offences previously committed; for it does not attach criminality to any act previously done, and which was innocent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree, or lessen the amount or measure, of the proof made necessary to conviction for past offences. Such alterations relate to modes of procedure only which the State may regulate at pleasure, and in which no one can be said to have a vested right.

The plaintiff in error and one Emerson were jointly indicted in a court of Utah for the murder, in the first degree, of John F. Turner. Each defendant demanded a separate trial, and pleaded not guilty. Hopt being found guilty was sentenced to suffer death. The judgment was affirmed by the Supreme Court of the Territory. But, upon writ of error to this court, that judgment was reversed, and the case was remanded with instructions to order a new trial. *Hopt* v. *People*, 104 U. S. 631.

Upon the next trial the defendant being found guilty was again sentenced to suffer death. That judgment was affirmed by the Supreme Court of the Territory. This writ of error was sued out to review the judgment of the Supreme Court.

Mr. Thomas Marshall and *Mr. Lee J. Sharp* for plaintiff in error.

Mr. Assistant Attorney-General Maury, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

We are now required to determine whether the court of original jurisdiction, in its conduct of the last trial, committed any error to the prejudice of the substantial rights of the defendant.

1. The validity of the judgment is questioned upon the

ground that a part of the proceedings in the trial court were conducted in the absence of the defendant.

The Criminal Code of Procedure of Utah, § 218, provides that,

"If the indictment is for a felony, the defendant must be personally present at the trial; but if for a misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the prosecuting attorney, by an order or warrant, require the personal attendance of the defendant at the trial."

The same code provides that a juror may be challenged by either party for actual bias, that is, "for the existence of a state of mind which leads to a just inference in reference to the case that he will not act with entire impartiality," §§ 239, 241; such a challenge, if the facts be denied, must be tried by three impartial triers, not on the jury panel, and appointed by the court, § 246; the juror so challenged "may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry," § 249; "other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge," § 250; "on the trial of the challenge for actual bias, when the evidence is concluded, the court must instruct the triers that is their duty to find the challenge true, if in their opinion the evidence warrants the conclusion that the juror has such a bias against the party challenging him as to render him not impartial, and that if from the evidence they believe him free from such bias they must find the challenge not true; that a hypothetical opinion on hearsay or information supposed to be true is of itself no evidence of bias sufficient to disqualify a juror. The court can give no other instruction," § 252; "the triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true the juror must be excluded." § 253.

It appears that six jurors were separately challenged by the

defendant for actual bias. The grounds of challenge in each case were denied by the district attorney. For each juror triers were appointed, who, being duly sworn, were, "before proceeding to try the challenge," instructed as required by section 252 of the Criminal Code; after which, in each case, the triers took the juror from the court-room into a different room and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. Their findings were returned into court, and the challenge, being found not true, the jurors so challenged resumed their seats among those summoned to try the case. Of the six challenged for actual bias, four were subsequently challenged by the defendant peremptorily. The other two were sworn as trial jurors, one of them, however, after the defendant had exhausted all his peremptory challenges.

No objection was made to the triers leaving the court-room, nor was any exception taken thereto during the trial. The jurors proposed were examined by the triers, without any testimony being offered or produced, either by the prosecution or the defence.

It is insisted, in behalf of the defendant, that the action of the court in permitting the trial in his absence of these challenges of jurors, was so irregular as to vitiate all the subsequent proceedings. This point is well taken.

The Criminal Code of Utah does not authorize the trial by triers of grounds of challenge to be had apart from the court, and in the absence of the defendant. The specific provision made for the examination of witnesses "on either side," subject to the rules of evidence applicable to the trial of other issues, shows that the prosecuting attorney and the defendant were entitled of right to be present during the examination by the triers. It certainly was not contemplated that witnesses should be sent or brought before the triers without the party producing them having the privilege, under the supervision of the court, of propounding such questions as would elicit the necessary facts, or without an opportunity to the opposite side for cross-examination. These views find some support in the further provision making it the duty of the court "when the evi-

dence is concluded," and before the triers make a finding, to instruct them as to their duties. In the case before us the instructions to the triers were given before the latter proceeded with the trial of the challenges.

But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be "personally present at the trial." The argument in behalf of the government is that the trial of the indictment began after and not before the jury was sworn; consequently, that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position, in decisions construing particular statutes in which the word "trial" is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken, in the absence of the accused and after the case is called for trial, which involves his substantial rights. The requirement is, not that he must be personally present at the trial by the jury, but "at the trial." The Code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the "trial" of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.

But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court-room, or to their trial of the several challenges in his absence.

We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority." 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused.

2. Another assignment of error relates to the action of the court in permitting the surgeon who had made a post mortem examination of the body of a corpse which was claimed by the prosecution to be that of John F. Turner, to state that one Fowler identified the body to him.

The surgeon testified that the body examined by him was on the platform at the railroad depot in Salt Lake City, in a wooden case and coffin. The father of the deceased testified that he did not communicate personally with the surgeon, nor see that his son's body was delivered to him; that he left it at the railroad depot in Salt Lake City, in a wooden coffin, inclosed in a box; and the fact that the body of the deceased was originally placed in such a coffin was proved by a witness who put it in the coffin. And yet there was testimony showing that there was a body in the same depot, at or about the time referred to by the surgeon, which, having been placed in a metallic case covered by a wooden box, had been shipped from Echo, by rail, to Salt Lake City; also that it showed injuries "generally similar" to those described by the surgeon. Were there two bodies of deceased persons, at the same depot, about the same time, one "in a wood coffin enclosed in a box," and the other "in a metallic case covered by a wooden box?" There would be some ground to so contend did not the bill of exceptions, in its reference to the body shipped from Echo in a metallic case, imply that there was testimony showing it to be the one that "had been identified as the body of the deceased, John F. Turner." The confusion upon the subject arises from the failure to state that the body which the father of the deceased left at the railroad depot was the same as that shipped from Echo to Salt Lake City. It was, perhaps, to this part of the case the court referred when, in the charge to the jury, it said that the prosecution "has introduced a vast amount of circumstantial evidence." Be this as it may, it was a material question before the jury whether the body examined by the surgeon was the same one that the father of the deceased had left at the depot, and, therefore, the body of the person for whose murder the defendant and Emerson were indicted. If it was not, then all that he said was immaterial. If it was, the evidence otherwise connecting defendant with the death of John F. Turner, the statements of that witness as to the condition of the corpse, the nature of the injuries—whether necessarily fatal or not—observable upon the body examined by him, and how the blows, apparent upon inspection of it, were probably inflicted, became

of great consequence in their bearing upon the guilt or innocence of the defendant of the crime of murder.

No proper foundation was laid for the question propounded to the surgeon as to who pointed out and identified to him the body he examined as that of John F. Turner. He had previously stated that he did not personally know the deceased and did not recognize the body to be his; he did not know that it was the body which the father of deceased desired him to examine; consequently his answer could only place before the the jury the statement of some one, not under oath, and who, being absent, could not be subjected to the ordeal of a cross-examination. The question plainly called for hearsay evidence, which, in its legal sense, "denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person." 1 Greenleaf Ev. § 99; 1 Phil. Ev. 169. The general rule, subject to certain well established exceptions as old as the rule itself—applicable in civil cases, and, therefore, to be rigidly enforced where life or liberty is at stake—was stated in *Mima Queen* v. *Hepburn*, 7 Cranch, 290, 295, to be, "that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." "That this species of testimony," the court further said, speaking by Chief Justice Marshall, "supposed some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is inadmissible." The specific fact to be established by proof of what some one else said to the surgeon as to the identity of the body submitted to his examination was, that it was the body of John F. Turner. What Fowler—who was not even shown to have been placed in charge of the body, nor commissioned to deliver it to the surgeon, nor to be acquainted with the deceased—said, in the absence of the prisoner, as to the identity of the body, was, plainly, hearsay evidence, within the rule recognized in all the

adjudged cases. As such it should, upon the showing made, have been excluded.

3. The next assignment of error relates to that portion of the charge which represents the court as saying: "That an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling."

By the statutes of Utah, "murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious or premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Compiled Laws Utah, 1873, p. 585. The punishment of murder in the first degree is death, or, upon the recommendation of the jury, imprisonment at hard labor in the penitentiary at the discretion of the court; while the punishment for murder in the second degree is imprisonment at hard labor in the penitentiary for not less than five nor more than fifteen years. Ib. 586.

In view of these statutory provisions, to which the attention of the jury was called, it is clear that the observation by the court that "an atrocious and dastardly murder has been committed by some person," was, naturally, regarded by them as an instruction that the offence, by whomsoever committed, was murder in the first degree; whereas, it was for the jury, having been informed as to what was murder, by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree.

It was competent for the judge, under the statutes of Utah, to state to the jury "all matters of law necessary for their information," and, consequently, to inform them what those statutes defined as murder in the first degree and murder in the

second degree. Laws of Utah, 1878, p. 120; Code of Crim. Pro. § 283–4. But it is expressly declared by the Code of Criminal Procedure that, while he may "state the testimony and declare the law," he "must not charge the jury in respect to matters of fact." § 257. The error committed was not cured by the previous observation of the judge that by the laws of Utah the jury are "the sole judges of the credibility of the witnesses and of the weight of the evidence and of the facts." It is rather more correct to say that the effect of that observation was destroyed by the statement at the conclusion of the charge that the murder, by whomsoever committed, was an atrocious and dastardly one, and therefore, as the jury might infer, in view of the language of the statute, was murder in the first degree. The prisoner had the right to the judgment of the jury upon the facts, uninfluenced by any direction from the court as to the weight of evidence.

For the reasons stated, the judgment of the Supreme Court of the Territory must be reversed and the case remanded, with directions that the verdict and judgment be set aside and a new trial ordered.

The assignments of error, however, present other questions of importance which, as they are likely to arise upon another trial, we deem proper to examine.

4. The first of these questions relates to the action of the court, in permitting Carr, called as a witness for the defence, to give in evidence a confession of the prisoner. That confession tended to implicate the accused in the crime charged.

The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion. It is unnecessary in this case that we should lay down any general rule on the subject; for we are satisfied that the action of the trial court can be sustained upon grounds which, according to the weight of authority, are

sufficient to admit confessions made by the accused to one in authority.

It appears that the defendant was arrested at the railroad depot in Cheyenne, Wyoming, by the witness Carr, who is a detective, on the charge made in the indictment. The father of the deceased, present at the time, was much excited, and may have made a motion to draw a revolver on the defendant; but of that fact the witness did not speak positively. The witness may have prevented him from drawing a weapon, and thinks he told him to do nothing rash. At the arrest a large crowd gathered around the defendant; Carr hurried him off to jail, sending with him a policeman, while he remained behind, out of the hearing of the policeman and the defendant. In two or three minutes he joined them, and immediately the accused commenced making a confession. What conversation, if any, occurred between the latter and the policeman during the brief period of two or three minutes preceding the confession was not known to the witness. So far as witness knew, the bill of exceptions states, "the confession was voluntary and uninfluenced by hopes of reward or fear of punishment; he held out no inducement, and did not know of any inducement being held out to defendant to confess." This was all the evidence showing or tending to show that the confession was voluntary or uninfluenced by hope of reward or fear of punishment.

While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Regina* v. *Bald*, 2 Den. Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach, 263, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers."

Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate,

voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. 1 Greenleaf Ev. § 215; 1 Archbold Cr. Pl. 125; 1 Phillips' Ev. 533–34; Starkie Ev. 73.

But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, threats or promises seems to have been negatived by the statement of the circumstances under which it was made.

But it is contended that the court erred in not excluding this proof until the prosecution produced the policeman and proved that nothing was said or done by him, in the absence of Carr, which unduly influenced the making of the confession. The argument is, that, possibly, the policeman offered such inducements, or made such threats or promises, that the prisoner, when joined by Carr, was not in a condition of mind to make a confession which the law would deem voluntary. This position, although plausible, is not sustained by authority, nor consistent with sound reason. The circumstances narrated by the witness proved the confession to be voluntary, so far as anything was said or done by him on the immediate occasion. There was nothing disclosed which made it the duty of the court to require as a condition precedent to the admission of the evidence, that the prosecution should call the policeman and show that he had not, when alone with the accused, unduly influenced him to make a confession.

In *Rex* v. *Clewes*, 4 Carr. & Payne, 221; *S. C.* 3 Russell on

Crimes, Sharswood's Edit. 431–32, the prosecution proposed to give in evidence a confession made by the accused before the coroner. It appearing that a magistrate had previously an interview with the prisoner, it was suggested that as he may have been told by that officer that it was better to confess, the prosecution should call him. But the court said that while it would be fair in the prosecutors to call the magistrate, it would not compel them to do so, but if they did not the prisoner might do so if he chose. In *Rex* v. *Williams*, Roscoe's Crim. Evi. 7th Amer. Edit. 54; 3 Russell on Crimes, Ib. 432, it appeared that a prisoner, being in the custody of two constables on a charge of arson, a third person went into the room. The prisoner immediately asked him to go into another room, as he wished to speak to him. They went into that room and the prisoner made a statement to that person. It was contended that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. But Taunton, J., after consulting with Littledale, J., said:

"We do not think according to the usual practice that we ought to exclude the evidence because a constable may have induced the prisoner to make the statement; otherwise he must in all cases call the magistrates or constables before whom or in whose custody the prisoner has been."

In *Rex* v. *Warner*, 3 Russ. on Crimes, Sharswood's Edit. 432, the prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to one previously made to a constable. It was remarked by the court that although it was not deemed necessary that a constable, in whose custody a prisoner had been, should be called in every case, yet, in view of the reference to him, he should be called. The constable being called proved that he did not use any undue means to obtain a confession, but he disclosed the fact that he had received the prisoner from another constable, to whom the prisoner had made some statements. As it did not appear that any confession was made to the latter, and only appeared that a statement was made that might either be a confession, a denial, or an exculpation, the

court would not require him to be called. S. C. Roscoe's Crim. Evi., 7th Amer. Edit. 54–5.

Roscoe (p. 554) states the rule to be, that "in order to induce the court to call another officer in whose custody the prisoner has been, it must appear either that some inducement has been used by or some express reference made to such officer." Russell says:

"For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made." Vol. 3, p. 431.

While a confession made to one in authority should not go to the jury unless it appears to the court to have been voluntary, yet as the plaintiff in error chose to let its admissibility rest upon the case made by the detective, without any intimation that it would be different if the policeman was examined, and since there was nothing in the circumstances suggesting collusion between the officers, we do not think the court was bound to exclude the confession upon the sole ground that the policeman was not introduced.

5. The last question relates to the action of the court in admitting, as a witness in behalf of the prosecution, Emerson, then serving out a sentence of confinement in the penitentiary for the crime of murder, and the judgment against whom had never been reversed. His testimony tended to implicate the defendant in the crime charged against him. Objection was made to his competency as a witness, but the objection was overruled.

At the time the homicide was committed, and when the indictment was returned, it was provided by the Criminal Procedure Act of Utah of 1878 that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this act." And the Civil Practice Act of that Territory provided, § 374, that "all persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. Facts which, by the common law, would cause the

exclusion of witnesses, may still be shown for the purpose of affecting their credibility," Compiled Laws Utah, 505; further, § 378, that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses."

On the 9th day of March, 1882, after the date of the alleged homicide, but prior to the trial of the case, an act was passed which repealed the section of the Civil Practice Act last quoted.

It is contended that such repeal, by which convicted felons were made competent witnesses in civil cases, did not make them competent in criminal cases; in other words, for such is the effect of the argument, those who were excluded as witnesses, under the Civil Practice Act, at the time the Criminal Procedure Act of 1878 was adopted, remained incompetent in criminal cases, unless their incompetency, in such cases, was removed by some modification of the Civil Practice Act expressly declared to have reference to criminal prosecutions.

In this view we do not concur. It was, we think, intended by the Criminal Procedure Act of 1878 to make the competency of witnesses in criminal actions and proceedings depend upon the inquiry whether they were, when called to testify, excluded by the rules determining their competency in civil actions. If competent in civil actions, when called, they were, for that reason, competent in criminal proceedings. The purpose was to have one rule on the subject applicable alike in civil and criminal proceedings.

But it is insisted that the act of 1882, so construed, would, as to this case, be an *ex post facto* law, within the meaning of the Constitution of the United States, in that it permitted the crime charged to be established by witnesses whom the law, at the time the homicide was committed, made incompetent to testify in any case whatever.

The provision of the Constitution which prohibits the States from passing *ex post facto* laws was examined in *Kring* v. *Missouri*, 107 U. S. 221. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases,

as well as upon principle, held, that a provision of the Constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of offence—under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed—was in conflict with the Constitution of the United States.

That decision proceeded upon the ground that the State Constitution deprived the accused of a substantial right which the law gave him when the offence was committed, and, therefore, in its application to that offence and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed.

But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected

by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged.

Judgment reversed.

SWANN *v.* WRIGHT'S EXECUTOR & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Argued December 18th, 19th, 1883.—Decided March 3d, 1884.

Estoppel—Foreclosure Sale—Mortgage.

A purchaser of a railroad at a sale under decree of foreclosure of a first mortgage, and of sale of the mortgaged property, which recites that the sale shall be made subject to liens established or to be established (on references before had or then pending, to a master, with right to bondholders to appear and oppose) as prior and superior liens to the lien of the bonds issued under the mortgage, cannot dispute the validity of the liens thus established, even on the ground of fraud alleged to have been discovered after confirmation of the master's report fixing the amount of the liens.

Whether holders of the mortgage bonds may not contest such liens, and, if successful, be substituted to so much thereof as was established for the benefit of the fraudulent claims is not decided.

Opinion of the Court.

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

Mr. David Clopton and *Mr. S. F. Rice* for appellant.

Mr. Moorfield Storey and *Mr. P. Hamilton* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a final decree dismissing a bill filed by John Swann against the executors of John S. Wright and the Alabama Great Southern Railroad Company, a corporation created under the laws of Alabama. Swann was the assignee of Wilder and McMillen, who were the purchasers at the sale in a foreclosure suit instituted on the 30th of May, 1872, by the trustees for the holders of bonds of the Alabama and Chattanooga Railroad Company, secured by a first mortgage upon its road, rights, franchises and property. With the assent of Wilder and McMillen, Swann was reported as purchaser, and the sale being confirmed a deed was made to him. Subsequently he conveyed all his right, title and interest to the Alabama Great Southern Railroad Company.

The complainant seeks to reopen the long-protracted contest in the foreclosure suit, between the first mortgage bondholders and the executors of John S. Wright, as to whether certain claims of the latter were liens upon the mortgage security. Appellees urge as a controlling consideration that the first mortgage bondholders acquiesce in the allowance of the Wright claims as having priority of lien over them; and they also contend that, in view of the several orders in the foreclosure suit, particularly the decree under which the sale of the mortgage property was had, and under which Swann claimed and received a deed, he has no standing in a court of equity to question the allowance of the Wright claims as superior liens upon the property. This proposition is controverted by appellant.

In order that appellant's relations to the property may be understood, and the questions involved in this appeal clearly comprehended, it is necessary to examine, somewhat in chronological order, the various steps taken in the foreclosure suit.

By an order made, in that suit, on the 26th day of August, 1872, Lewis Rice and W. J. Haralson were appointed receivers, with authority to put the Alabama and Chattanooga railroad and other property embraced in the first mortgage in repair; to complete any uncompleted portions thereof; to procure rolling stock, machinery, and other necessary things for operating the road; and to manage it to the best advantage, so as not only to prevent the property—then in a dilapidated condition, and being recklessly wasted—from further deterioration, but to preserve it for the benefit as well of the first mortgage bondholders as of all others having an interest in it. It was also ordered that all claims on account of moneys raised through the receivers by loan, or upon advances for the foregoing purposes, not exceeding $1,200,000, "shall be a first lien, prior to all others, on the said railroad and other property, and to be paid for, before the said first mortgage bondholders, out of the proceeds of said property." The receivers were directed to issue certificates for moneys so raised, the loan to be made upon such terms as they might deem expedient:

"*Provided*, that said certificates shall not be disposed of for less than ninety cents to the dollar of their face, and, *also provided*, that interest thereon shall not be allowed at a greater rate than eight per cent. per annum, payable half-yearly; and such certificates shall not be issued until the same shall be countersigned by a majority of the trustees for said first mortgage bondholders, without which countersigning they shall not be entitled to the lien and priority aforesaid."

On the 23d day of January, 1874, a decree was passed for a sale of all the mortgage property as an entirety—the purchaser, upon confirmation of the sale and payment of the purchase money, to receive a conveyance, in fee simple, of all the right, title, and interest of the company, and of all persons claiming under it, in the railroad, premises, franchises, and property covered by the mortgage, and free from the claim of the defendants in that suit.

It was further decreed that the proceeds to arise from the sale, and which had arisen or should arise, in the hands of the

receivers, from the prosecution of the business of the company, or which had arisen or might arise in any other way from the property, are in law and equity liable to be applied in the following order: *First.* To the necessary expenses incident to the execution and due preservation of the trust created by the mortgage, including reasonable compensation to trustees and their counsel, and to the receivers, and all legal and necessary expenses then remaining unpaid, which had been properly incurred, with the authority of the court, in relation to the property. *Second.* To the payment of all taxes, charges, assessments, and liens prior in law to the lien of the mortgage; all sums expended in perfecting the title to the right of way, or to any property formerly claimed by the company and then claimed to be embraced by the mortgage; and "all liabilities incurred by the receivers, including such receivers' certificates or other receivers' indebtedness as may be sanctioned or ordered to be paid by this court, in accordance with the provisions hereinbefore contained." *Third.* To the payment of such of the first mortgage bonds, with their interest warrants, as may be reported by the master to have been *bona fide* issued and to be outstanding and unpaid. *Fourth.* The residue to be subject to such order and priority in distribution as the court should establish and decree, reserving for future consideration certain described bonds.

By the same decree it was declared:

"that all moneys which have been raised by said receivers by loan, or which may have been advanced by them for the purposes aforesaid, and which shall be ascertained by the decretal orders of this court to have been expended, or which may be expended, for the purposes contemplated by and in accordance with the said orders of this court, not exceeding the sum of $1,200,000, shall be a first lien prior to all others on the said railroad and other property, and to be paid before the said first mortgage bonds out of the proceeds of said property; and nothing in this decree . . . shall impair the claims or rights of the creditors of the receivers appointed under either of said orders, or the owners of certificates issued by said receivers under said orders, or the holders of said certificates under

hypothecation to the extent of money loaned and advanced on the same for the purposes aforesaid, with the interest and expense added thereto."

The cause was referred to Joseph W. Burke, as special commissioner, with directions to report all amounts necessary and proper to be paid out of the proceeds of sale as indicated by the decree.

On the 25th of April, 1874, an order was entered, upon the petition of the bondholders, suspending the sale of the property until the matters involved and under reference should be reported on and settled by the court; and allowing bondholders to appear in their own right before the commissioner and the court, and to contest any and all demands embraced by the order of reference, or that might arise before the court touching the property to be sold.

The reports of Commissioner Burke, made June 18th, 1874, and May 31st, 1875, show, that among the claims contested before, and allowed by him, were two by John S. Wright—those already referred to—one based upon receivers' certificates issued by Rice and Haralson, amounting, principal and interest, to $52,000, and the other, based upon like certificates, aggregating $56,444.44, which had been hypothecated to Wright as security for money advanced, as was alleged, to the receivers. For reasons, not disclosed by the record, this report was not satisfactory to the parties; and, by an order of June 11th, 1875, the court approved and gave effect to a written agreement between the contesting bondholders, the trustees, and the holders of receivers' certificates, whereby it was stipulated that the matters of reference involved in the cause should be referred to some well known lawyer and thorough business man, with authority to inquire into and settle the same. That agreement provided that such settlement should be final between the parties thereto, when confirmed by the court. Philip Phillips was thereupon appointed a special commissioner, with directions to review and re-examine, so far as the parties desired, the matters theretofore referred. If any of the receivers' certificates were objected to by either party, the commissioner was directed

to inquire and report whether they were issued and used in accordance with the orders in the cause, what disposition was made of them, what certificates should be allowed, and what rejected. Among the claims re-examined were those held by Wright. They were allowed, as shown by his report dated September 8th, 1875, and filed November 18th, 1875.

The cause was heard upon exceptions to the reports of Commissioners Burke and Phillips, and a comprehensive order made on the 14th day of February, 1876. As to the Wright claims, the order provided that nothing be then allowed thereon, and that:

"The whole matter of said claims, in respect of said sale, loan, and hypothecation [of receivers' certificates in the hands of Wright], and all circumstances connected with said transactions, be and the same are hereby referred to Lyman Gibbons as special master commissioner to take evidence upon, examine into and report upon said matters fully, with the evidence taken by him. Upon the coming in and confirmation of said special master's report the court will make a further decree thereon."

On the 4th of December, 1876—no report having been then made upon the Wright claims by the commissioner last appointed—the court made a decree for the sale of the mortgaged property, to take place on the 22d day of January, 1877. That decree provided that the sale "shall be subject to the liens established, or which may be established, by said court in this cause on references heretofore had and now pending, as prior and superior to the lien of the holders of bonds issued under the first mortgage, decreed to be foreclosed by former decree in said cause;" further, "that all money paid as earnest under this decree"—the sum of $300,000 was required for that purpose—"shall forthwith be reported to this court and be subject to its order, and that upon the confirmation of the sale made under this decree the purchaser shall have and be invested with a good title to the said railroad and property sold under this decree, subject only to what may remain unpaid of the claims and liens established by this court as paramount and superior to the liens of the first

mortgage and first mortgage bondholders;" still further, the balance of the purchaser's bid remaining after paying said earnest money was directed to be paid in such manner and at such time as the court may direct, "except that said balance may be paid by the purchaser in any claims which may have been established by the court in this cause as paramount and superior to the lien of said first mortgage and said first mortgage bondholders."

It has already been stated that Wilder and McMillen became the purchasers of the property. The amount bid by them was $600,000. Swann succeeded to their rights by an agreement made March 30th, 1877. The sale was reported to court on April 3d, 1877, the report showing that the benefits of the purchase had been transferred to Swann. Four days thereafter, April 7th, 1877, Commissioner Gibbons made his report in relation to the Wright claims, sustaining the conclusions reached by Commissioner Phillips, and expressing his entire conviction that those claims were correct and just.

On the 13th of June, 1877, that report came up for consideration. Swann, in his capacity as purchaser of the mortgaged property, moved that the Wright claims be re-submitted to the commissioner, with leave to produce additional evidence in opposition to them. That motion was denied. He then asked leave to file exceptions to the report. That application was also denied, and the report was in all things confirmed.

On the 15th of June, 1877, the sale to Swann was confirmed. By the decree of confirmation conveyances were required to be executed to him, covering all the property and rights purchased. It also provided that the deeds of conveyance

"Shall severally contain a provision to the effect that the same are made and executed, and the estate thereby granted and conveyed is made, executed, granted, and conveyed subject to all liens established at and before the decree made in this cause on the 4th day of December, 1876, or which may have been or may be established by this court in the cause, on reference heretofore had, and then pending, as prior and superior to the lien of the holders of bonds issued under the first mortgage,

decreed to be foreclosed by a former decree in said cause, so far as the several amounts secured by said prior liens remained unpaid at the time of said sale, and subject to the terms and requirements of this decree imposed upon or affecting the said purchaser . . . . And it is hereby declared and decreed that the said sale was and is subject to such prior liens (and that the said property is and shall be bound therefor, and for all interest that may accrue thereon ; and also subject to the same terms and requirements of this decree last above mentioned)." [Again, in the same decree:] "It is further ordered, adjudged, and decreed that the said sale was made subject to the payment of all valid and outstanding receivers' certificates heretofore established as valid by decree of this court or by this decree, including those which have been suspended on account of liability of the holders thereof on any official bond or bonds of any receiver or trustee, or on account of the indebtedness of such holder or holders to the trust fund ; but the amount due or to become due on such suspended certificates shall be paid, according to the tenor thereof, into this court in liquidation of such official bond or bonds, and of such indebtedness of the holder or holders thereof to the trust fund, to be disposed of as the court shall further direct."

This suit was commenced February 13th, 1878, after Swann had sold and conveyed such rights as he had acquired to the Alabama Great Southern Railroad Company. It proceeds upon the general ground that the transaction by which John S. Wright obtained the receivers' certificates in question was, as between him on one side and a trustee in the first mortgage and one of the receivers on the other side, in known violation of their respective duties, and contrary to law and public policy ; also, that Wright and his executors had, by fraud and imposition and by a concealment of the real facts, obtained, as well from the special masters the favorable reports hereinbefore referred to, as from the court, the decree confirming the report last made. It was dismissed by the court below, not only because, upon the showing, no case was made on the merits for the relief asked, but because the orders and decrees under which the sale was had and confirmed, and the deed made, required Swann to pay the liens established by the court

in the foreclosure suit, and precluded him from disputing them after they had been so established.

In our view of this case it is unnecessary to determine whether the bill is one of review for new evidence, or an original bill to impeach a decree for fraud, or an original bill in the nature of a bill of review; for we are of opinion that, whether belonging to one class or the other, it was properly dismissed. The claim of appellant, as the purchaser of the property, to reopen the litigation, to which he was not a party, and which related to liens expressly subject to which the property was sold, purchased, and conveyed, and which liens were fully examined upon issues between and notice to those who, at the time the decree of sale was rendered, were alone interested in their recognition or rejection, does not seem to rest upon any foundation of justice or equity. We have seen that the original purpose of those promoting the foreclosure suit was to have the mortgaged property sold, at an early day after the commencement of the litigation, entirely free from encumbrance, leaving the court to provide, out of the proceeds of sale, for the expenses of the trust, and to make such distribution of the balance as was consistent with the rights of those having an interest in or liens upon the property. But this idea was abandoned, at the instance of the bondholders, and the sale suspended in order to ascertain, if possible, before sale, the exact amount of all claims superior to the lien given by the mortgage. Among those alleged to be of that character were the claims presented originally by Wright and subsequently prosecuted by his executors. They were vigorously contested before Commissioners Burke and Phillips by those who were directly interested in defeating them, namely, the bondholders and their trustees. They received the approval of each of these commissioners; and while they were under examination by Commissioner Gibbons, before whom that contest was renewed, the court, feeling doubtless that the sale of the mortgaged property had been already deferred sufficiently long, made an order for its sale on a day named. That order materially modified the original decree. Instead of selling the property free of all encumbrances, so that the purchaser, as a con-

dition of receiving a complete title, would only be required to pay the amount bid, the sale was ordered expressly subject, not simply to liens which had then (December 4th, 1876), been established as prior and superior to the lien of the bondholders, but to all liens of that character which might be established on references theretofore ordered, and then pending. The claims of Wright were being pressed before the special commissioner as belonging to that class. The latter had before him all parties in interest, either in person or by representation. And his examination was being conducted under a reference previously made, and then pending. So that, as respects these claims, purchasers were explicitly warned that they must buy the property, and take title thereto, subject to their future allowance by the court. That warning was as distinct as if the claims had been specifically described in the decree by the names of the parties prosecuting them. Wilder and McMillen, therefore, purchased, and their assignee or vendee obtained the property, subject to a prior lien in favor of Wright's estate, if any such lien should be thereafter established on pending references. And although Swann has conveyed the property to the Alabama Great Southern Railroad Company, not only without covenants of warranty, but with a clause in the deed distinctly declaring that it shall not be construed "to express or imply any covenant" by him, he now asks the court to recognize his right, as purchaser, upon newly discovered evidence, to show that the lien established in behalf of Wright's estate ought not to have been recognized. When his assignors or vendors purchased, they knew, or, by inspection of the record, could have known of the pendency of the Wright claims. Before the sale was confirmed the court declined to permit him, as purchaser, to reopen the dispute as to those claims. He made no suggestion that he purchased in ignorance, either of their existence, or of the reservation by the court of its right to establish them as superior liens upon the property; nor that they had been allowed for larger amounts than originally contended for; nor did he ask, in view of their allowance, that he be permitted to surrender his purchase, so that the property could be resold for the benefit, primarily, of

those having first liens. On the contrary, without objection from him, the sale was confirmed, upon the condition, explicitly declared in the order of court, that the purchaser bought subject to all liens of the character described in the decree of sale, and that such subordination of his and their rights to those liens should be expressed in the conveyance to him. The conveyance was so drawn, and was accepted by him; and in his deed to the Alabama Great Southern Railroad Company, under date of November 30th, 1877, he states that the conveyance to him "of said railroad, equipments, appurtenances, and property has been executed and delivered" by commissioners of court, "in accordance with the orders and decrees of said court." He here proceeds upon the assumption that, while asserting title in himself, under and by virtue of the decree of sale, he may claim the aid of a court of equity in repudiating the essential conditions upon which he received title; and, that, too, without offering, or being in a condition to offer, a return of the property, in which contingency—the Wright claims belng disallowed—it might be resold for the benefit of the bondholders, unencumbered by those claims. The property was sold with the possibility, present in the minds as well of the parties in the foreclosure suit as of purchasers, that the latter would be required to take subject to a lien in behalf of Wright's estate; and, consequently, that to the extent of such lien, the first mortgage bondholders would fail in having their demands satisfied out of the property. If, therefore, the appellant were granted the relief asked, the result—upon his theory of the respective rights of himself and the bondholders —would be, not to benefit those who caused the property to be sold, but, in effect, to give the amount of the Wright claims to Swann; or, if not to him, then indirectly to the company to which he has conveyed, and which must assert its rights, whenever assailed, under one who has taken title expressly subject to a lien in favor of those claims.

It may be observed, in this connection, that the appellant's counsel lay great stress upon that part of the order of June 15th, 1877, which declares that the sale, then confirmed, had been made subject to the payment of "all valid and outstand-

ing receivers' certificates." They insist that the certificates to Wright were not valid, because obtained, as alleged, by fraud and imposition, and in violation of the duty of the trustee and receiver who conducted the negotiations with Wright. It is sufficient to say, that, according to any proper interpretation of that order, all receivers' certificates were to be deemed valid, so far as purchasers were concerned, that were within the aggregate amount limited for certificates, and which, being embraced in references theretofore made or then pending, had been, or might be, established, between the holders and the mortgagees, as liens upon the property.

If the court had, in the decree of sale, reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and, therefore, not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first mortgage bondholders. We do not mean to decide that the bondholders, as such (had they moved in due time), might not have maintained a suit like the present one, and, if successful, required the purchaser to pay them an additional amount equal to the claims established for the benefit of Wright's estate. Upon the question involved in that suggestion we express no opinion. All that we decide is, that in view of the express terms of the decree of sale, and since neither the purchaser nor his grantee proposes to surrender the property to be resold for the benefit of those concerned, such purchaser has no standing in court for the purpose of re-litigating the liens expressly subject to which he bought and took title. The allegations of fraud and imposition alleged to have been practised by Wright and others by means whereof, it is contended, the claims in question were approved and established—whatever consideration they would have been entitled to in a suit brought by the bondholders—do not present matters which, under the circumstances, concern the appellant as purchaser of the prop-

erty. If the receiver and trustee referred to in the bill were guilty of fraud and imposition in respect of the Wright claims, it was competent for the bondholders and the parties interested in the property, before title was passed to the purchaser, to waive any grounds of complaint which they may have had on that account. And they had the right to acquiesce, and so far as the record discloses, have acquiesced in their allowance, thereby consenting that the proceeds of sale, to the amount of such claims, should be applied in payment thereof, rather than in satisfaction of their own demands. The appellant presents no grounds upon which he can be relieved from his obligation to comply with the terms of purchase as set forth in the decree of sale and as expressed as well in the order of confirmation, as in the conveyance to him.

Upon the grounds indicated the decree is

Affirmed.

SWANN & Others *v.* CLARK & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Argued December 18th, 19th, 1883.—Decided March 3d, 1884.

Contract—Equity—Hypothecation—Mortgage—Receiver.

While a railroad was in the hands of a receiver, appointed in a suit for the foreclosure of a mortgage upon it, the court authorized the receiver to borrow money and to issue certificates of indebtedness, to be a lien upon the property prior to the mortgage debt, and to part with them at a rate not less than ninety cents on the dollar. The receiver borrowed money on hypothecation of some of these certificates. The property was decreed to be sold subject to liens established on then pending references. *Held,* That the hypothecated certificates were not liens to the extent of their face, but that a decree directing the debts secured by them to be paid in them at the rate of ninety cents on the dollar to the extent of the money actually advanced, and making that amount of certificates a lien, would be upheld in equity.

Mr. David Clopton and *Mr. S. F. Rice* for appellants.

Mr. Moorfield Storey and *Mr. P. Hamilton* for appellees.

Opinion of the Court.

The facts making the case are stated in the opinion of the court.

Mr. Justice Harlan delivered the opinion of the court.

This case is an outgrowth of a foreclosure suit brought by the trustees in a first mortgage executed by the Alabama & Chattanooga Railroad Company upon its road, property, rights, and franchises, to secure the payment of bonds by it issued. The history of that suit is given in the opinion just rendered in *Swann* v. *Wright's Ex'or.* The terms of the several orders and decrees in the foreclosure suit, so far as they affect the rights of parties now before us, are set forth in that opinion, and need not be here repeated.

Among the claims presented against the trust fund in the foreclosure suit was one by appellee Clark for alleged loans made to the receivers, for which the latter hypothecated to him forty-five receivers' certificates. Commissioner Phillips found that such hypothecation was unauthorized by the orders of the court under and in virtue of which the certificates were issued. But he reported that upon principles of equity those claims, to the extent of moneys actually advanced to the receivers and applied to the benefit of the trust estate, should be allowed and paid in certificates, at ninety cents on the dollar. The amount advanced by Clark was ascertained to be $16,760.89; and for that sum, with interest to September 1st, 1875, amounting in all to $19,658.01, the commissioner reported that he should be allowed, in certificates, the sum of $21,842.23. These conclusions were sustained by the court; but, as it appeared that the Clark certificates were, or were supposed to be, in the hands of different parties, and inasmuch as the rights of those parties could not be determined from the reports of the commissioner, those certificates were not allowed, and the parties were required to litigate their respective rights with each other, by bills filed in the same court, thereby "to ascertain and settle the amount that the said trust fund is liable for, and who are entitled to any and which of said certificates."

It was in consequence of this direction that the present suit was brought by appellees, who unitedly held thirty-seven

of the forty-five certificates (as to two of which no further claim on the trust fund was asserted by Clark), the remaining six being held by some person to appellees then unknown. The object of the suit was to obtain a decree adjudging that receivers' certificates to the amount of the moneys advanced by Clark, with interest thereon, be allowed to the petitioners and to the holder of the six certificates—the certificates so allowed to be established as a prior lien upon the railroad and other property purchased by Swann. The latter appeared and answered; and, admitting that Clark had loaned the receivers $16,760.89, he denied that he or any persons claiming under him were entitled to be paid in said certificates, or any of them, or that the claim asserted was a lien on the property to the prejudice of the rights of himself or of the Alabama Great Southern Railroad Company. A decree was rendered wherein it was found that the amount, principal and interest, of the loan by Clark was, on September 1st, 1875, $21,842.23. It was adjudged that the appellees, as the holders of thirty-seven of the certificates, were entitled to thirty-seven forty-thirds of the total amount due, or the sum of $18,794.47. At the instance of Swann, the court required appellees to hold three certificates, subject to the further order of the court, for the protection of the unknown holder of the six certificates, who, it was suggested, might show himself entitled to be paid in full; and petitioners were given leave to move at the next term for the allowance of the suspended certificates. All the other certificates, as well as the notes given by the receivers for the moneys so loaned to them, were surrendered and destroyed. The certificates so allowed were established by the decree as liens on the mortgaged property.

A rehearing was asked by Swann at the succeeding term, but the application therefor was denied. At that term appellees asked to have the suspension placed upon the beforementioned three certificates removed. Thereupon E. J. Fallon presented his petition in the cause, showing that the beforementioned six certificates had come into the possession of the Alabama Great Southern Railroad Company through a settlement had between it and J. C. Stanton, by the terms of which

the latter agreed to deliver to that company a large number of receivers' certificates of admitted and ascertained validity; that the company did not concede the six certificates to be valid, but received them from said Stanton to be held as security only for his delivery of a like number of admitted and ascertained validity; which being done, they were to be returned to him. For that purpose, and in that manner, Fallon averred in his petition, the said six certificates were held by him as agent of the company. He claimed that they had been originally transferred to D. N. Stanton, from whom J. C. Stanton acquired them, and that if any of the forty-five certificates were allowed, the six above named were entitled to be paid in full before appellees received anything. He asked that he and J. C. Stanton be made parties defendant, to the end that none of the rights of said Stanton should be prejudiced by any neglect upon the part of the company. He was made a defendant, and his petition directed to be taken as his answer.

Upon final hearing the three suspended certificates, with coupons maturing after September 1st, 1875, were allowed to the appellees, while three certificates in full and a fourth one for $47.75 were allowed to Fallon—the excess in certificates and coupons held by Fallon to be surrendered.

From this decree Swann, Fallon, and the Alabama Great Southern Railroad Company appealed.

The main question to be determined is that which arises between Swann and the appellees touching the alleged lien upon the property sold in the foreclosure suit, for the certificates allowed to the appellees. If the lien established in favor of appellees for the amount of those certificates belongs to the class subject to which the property was sold, purchased, and conveyed, then, for the reasons stated in *Swann* v. *Wright's Ex'r*, Swann is not at liberty to raise any objection to the allowance of such certificates to the extent of the moneys originally advanced by Clark to the receivers. The decree of August 26th, 1872, under and in virtue of which the receivers' certificates were issued, reserved a prior lien to secure the payment of all moneys raised through the receivers by loan, or which might be advanced to them for the purposes expressed in the orders

of the court. While the receivers were adjudged not to have authority to hypothecate certificates, as was done in Clark's case, yet, as early in the litigation as January 23d, 1874, the date of the first decree of sale, the court—having before it the report of Commissioner Burke, and being thereby informed of Clark's claim, as well for moneys advanced to the receivers as of a lien therefor—declared in that decree that nothing therein should impair the rights of "holders of certificates under hypothecation to the extent of money loaned and advanced on the same" for the purposes contemplated by its orders, "with interest and expense added thereto." And the decree of February 14th, 1876, based upon the report of Commissioner Phillips, shows upon its face that the court recognized the soundness of the rule suggested by him, which required the payment, in certificates, of all claims for moneys in good faith advanced to the receivers, and applied to the benefit of the trust estate. By that decree it was ordered that the holders of the forty-five certificates interplead in the same court, so that the court would be informed as to the amount for which the trust fund was liable. This was not a disallowance of these claims as liens, but only a suspension of them until the suit thus directed to be brought was ended. They were pending and undetermined when the decree of December 4th, 1876, was made. That decree, we have seen, required the sale to be made "subject to all liens established, or which shall be established, by said court in this cause, on references heretofore had and now pending, as prior and superior to the lien of the holders of bonds issued under the first mortgage." The claims in question had theretofore been the subject of reference to commissioners; and, within any just interpretation of the words of the decree, they were the subject of pending references, unless it be that the court, by requiring the parties to litigate them in a new suit between themselves, instead of requiring them to disclose their interests before a commissioner, intended to make a distinction between liens established by means of a formal reference to the commissioner, and those established in an independent suit brought in conformity with its orders. But that supposition is inadmissible, especially in view of the fact, apparent upon

the face of the decree of February 14th, 1876, that numerous claims, similar in their origin to Clark's, and secured by hypothecated certificates, were then, before the final decree of sale, allowed, payable in certificates at 90 cents on the dollar. It is manifest from the decree that the court would then have allowed the Clark claims, to the extent of money actually loaned to the receivers, and applied for the benefit of the trust, and paid them in certificates, had it been possible at that time to determine the actual ownership of the forty-five certificates. And this view is strengthened by the further fact that, in the decree of June 19th, 1877, confirming the sale to Swann, subject to the liens described in the decree of December 4th, 1876, the court expressly freed the trust estate from liability to certain persons on account of hypothecated certificates held by them, but does not name the forty-five certificates as among the number so cut off.

It seems to us entirely clear that, by the decree of sale, the liens which were attached to such certificates as the court might award, on account of the moneys loaned to the receivers by Clark, were among those expressly subject to which Swann purchased, and received title to, the property. Consequently, for the reasons stated in *Swann* v. *Wright's Ex'r*, the property is liable to the holders of such certificates.

This disposes of all that there is of substance in the case. We perceive nothing of merit in the appeals of Fallon and the Alabama Great Southern Railroad Company. Upon the issue as to whether the property was liable for the amount of the certificates awarded to appellees, the only necessary party defendant was Swann, the purchaser. The railroad company was a purchaser *pendente lite*, and was not entitled to be made a party to issues pending and undetermined when it purchased. That company was, upon the showing made by its agent, the holder of the before-mentioned six certificates which were made payable to bearer. It placed the certificates in his hands for the purpose of having him present them in court for allowance in full. He did appear and was made a party. Waiving any inquiry as to whether the amount involved in the appeal, so far as it concerns Fallon or those whom he represents, is

large enough for our jurisdiction, it is sufficient to say that no facts were disclosed which entitled the six certificates to be paid in full. We perceive no error in the decree as to him or the company, and it is

Affirmed.

NORTHERN BANK OF TOLEDO *v.* PORTER TOWNSHIP TRUSTEES.

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

Argued January 21st, 1884.—Decided March 3d, 1884.

Estoppel—Municipal Bonds—Statutes of Ohio.

The act of the legislature of Ohio of March 21st, 1850, as amended March 25th, 1851, authorized county commissioners to submit to the people at special elections the question whether the county would subscribe to the stock of a railroad company and issue bonds in payment thereof; and if the subscription should not be authorized by the county, then that the question of subscriptions by township trustees might be submitted to the people of the respective townships. *Held*, That until refusal by the counties to subscribe, either by direct vote or by failure within a reasonable time to call an election for the purpose, the townships were without legislative authority to subscribe, or to issue township bonds in payment of subscriptions.

A municipal corporation which issues a bond reciting on its face that it is issued in part payment of a subscription to the capital stock of a railroad made by the corporation in pursuance of the several acts of the general assembly of the State and of a vote of the qualified electors of the corporation taken in pursuance thereof, is estopped thereby from denying that an election was held, or that it was called and conducted in the mode required by law; but it is not estopped from showing that the corporation was without legislative authority to issue the bonds.

The facts which a municipal corporation, issuing bonds in aid of a railroad, is not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued. The cases relating to this point examined and reviewed.

This was an action to recover principal and interest of bonds

issued by the defendant in error (also defendant below), in payment of a subscription to a railroad. The defence of want of legislative authority is set forth in the opinion of the court. Verdict for the defendants. The plaintiffs excepted to the charge, and brought the case here by writ of error.

Mr. E. W. Kittredge, for plaintiff in error.

Mr. W. M. Ramsey, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

On the 15th day of April, 1851, the commissioners of Delaware County, Ohio, passed an order submitting to the voters of that county, at a special election to be held on the 17th day of June thereafter, a proposition to subscribe the sum of $50,000 to the capital stock of the Springfield and Mansfield Railroad Company, a corporation created under the laws of that State, and whose name was subsequently changed to that of the Springfield, Mount Vernon and Pittsburgh Railroad Company. This proposition was approved by the electors, and subsequently, August 4th, 1851, the county commissioners made a subscription of the amount voted, payable in bonds of the county.

On December 6th, 1851, the commissioners signed the requisite number of bonds, payable to the railroad company, and deposited them with the auditor for delivery when the road was located and a contract made for its construction through the county. It having been claimed that these bonds were defectively executed, others were signed by the commissioners on the 27th day of December, 1852, to be retained by the auditor until those first signed were returned, which being done that officer was directed to deliver the new bonds to the company or to some person authorized to receive them.

After the vote in favor of a county subscription of $50,000, and two days before the formal subscription in its behalf by the county commissioners, that is, on the 2d day of August, 1851, the trustees of Porter Township, in Delaware County, passed an order submitting to the voters of that township, at a special election to be held on the 30th day of August thereafter, a proposition for a subscription of not exceeding $10,000 and

not less than $8,000 to the capital stock of the same company, payable in township bonds, upon the condition that the road should be permanently located and established through that township. The proposition was approved by the voters, and subsequently, on May 6th, 1853, township bonds for the amount voted with interest coupons attached were issued. They were made payable to the railroad company or its assignees, and were in the customary form of negotiable municipal bonds. Each one recited that it was "issued in part payment of a subscription of one hundred and sixty shares of $50 each to the capital stock of the said Springfield, Mount Vernon and Pittsburgh Railroad Company, made by the said township of Porter in pursuance of the provisions of the several acts of the general assembly of the State of Ohio and of a vote of the qualified electors of said township of Porter taken in pursuance thereof."

This action involves the liability of the township upon these bonds. The judgment below necessarily proceeded upon the ground that they were void for want of legal authority in the township to issue them. In behalf of the plaintiff in error, the present holder of the bonds, it is claimed that there was statutory authority for their issue, and that, apart from any question of such authority, the township is estopped by their recitals, and by numerous payments of annual interest, from disputing its liability. Whether the township had legal authority to execute them, is the first question to be considered.

By the first section of an act of the general assembly of Ohio, passed February 28th, 1846, it is provided that whenever county commissioners should thereafter be authorized to subscribe to the capital stock of any railroad company incorporated in that State, it shall be their duty "to give at least twenty days' notice . . . to the qualified voters of said county to vote at the next *annual* election to be held in the several townships . . . in said county for or against the subscription as aforesaid; and if a majority of the electors aforesaid, voting at said election for or against a subscription as aforesaid, shall be in favor of the same, such authorized subscription may be made, but not otherwise." 1 S. & C., note, 275.

By the charter of the Springfield and Mansfield Railroad

Company, granted March 21st, 1850, it is provided that "the county commissioners of any county through which said railroad may be located, shall be, and they are hereby, authorized to subscribe to the capital stock of said company any sum not exceeding $50,000," and for the payment thereof power was given to borrow money, lay and collect taxes, &c.; further, that "if the county commissioners of any county through which said road shall pass, shall *not* be authorized by the vote of said county to subscribe stock to said road, the trustees of any township through which said road may be located shall be, and they are hereby, authorized to subscribe any sum of money not exceeding $50,000 to the capital stock of said company, and provide for the payment of said stock in the same manner that county commissioners aforesaid are authorized: *Provided*, That the total amount which may be subscribed to the capital stock of said company by any county, and the townships therein, on the line of said road, shall not exceed $100,000;" still further, that "no subscription shall be made by the county commissioners of any county, or the trustees of any township through which said road may be located, until a vote of the qualified voters of said county or township has been declared in favor of such subscription, in the manner pointed out in the mode of proceeding when county commissioners may be authorized by law to subscribe to the capital stock of railroads, turnpike roads, or other incorporated companies in this State, passed February 28th, 1846." 48 O. L. 294; Act March 21st, 1850, §§ 4, 5, and 6.

But by an act passed March 25th, 1851, county commissioners of the several counties, through or into which the Springfield and Mansfield Railroad shall be located, were authorized to cause the question of subscription provided for in the act of March 21st, 1850, "to be submitted to the qualified voters of their respective counties, at a *special* election, to be by them called for that purpose, at any time thereafter, having first given twenty days' previous notice;" further, that "if the commissioners of any of the counties aforesaid shall *not* be authorized by the vote as aforesaid to subscribe to the capital stock of said company on behalf of their respective counties, *then*,

and in that case, the question of subscription by township trustees provided for in the same act incorporating said railroad company shall be submitted to the people of the respective townships, at a *special* election, to be called as provided for in the first section of this act"—such elections to be conducted in all respects in the same manner provided for in the charter of the company, except as modified by the said act of March 25th, 1851.

The authority of Porter Township to issue the bonds in question must be derived from the provisions of these acts of assembly. If not found in them, it must be adjudged that no such authority existed.

The fundamental proposition advanced in behalf of plaintiff is, that immediately upon the passage of the act of March 21st, 1850, Porter Township was vested with power to make a subscription to the stock of the company, that the non-authorization of the commissioners, by a vote of the electors, to make a county subscription, was only a condition precedent to the exercise of that power; consequently, that the township is estopped by the recitals in the bonds, and its acquiescence for a series of years, as evidenced by payments of interest, to rely upon the non-fulfilment of that condition. In this construction of the acts in question we are unable to concur. It is entirely clear, we think, that the township was without power to make a subscription until the time arrived when it could be properly said that the county, as such, had not been authorized by a vote of the electors to make a subscription. We do not mean to say that the right of townships on the line of the road to make subscriptions could be indefinitely postponed by the mere neglect or failure of the county commissioners to submit the question of subscription to a popular vote. That construction, the Supreme Court of Ohio correctly said in *Shoemaker* v. *Goshen Township*, 14 Ohio St. at p. 580, "would defeat the manifest intention of the statute, which contemplates and authorizes the submission of the question to townships, when subscription on behalf of the county is refused." Such refusal would undoubtedly exist, whenever the electors upon a submission of the question expressed their disapproval of a county

subscription. But within any just interpretation of the words of the statutes, the power of townships to act would come into existence, not only by a direct refusal of the commissioners to submit the question of subscription to popular vote, but upon their failure within a reasonable time to call an election for that purpose. *Shoemaker* v. *Goshen Township*, *supra*.

The first annual election in townships after the passage of the act of March 21st, 1850,—which act, by reference to that of 1846, contemplated that the question of subscription would be determined at an annual election—was on the first Monday in April of that year. No submission, however, of that question could have been ordered for *that* election, because it occurred within twenty days after the passage of the act of 1850. The short time intervening between those dates prevented the requisite notice being given; consequently, the first annual election in townships at which the county commissioners could, under that act, have taken the sense of the electors, was that fixed by law for the second Tuesday of October, 1850. Did the mere failure to submit the question of a county subscription at the last-named election justify the township in claiming that the commissioners had not been authorized by a vote of the county to make a subscription? Were townships, from and after that date, and solely because of such failure, invested with power to move in the matter of subscriptions to the stock of this company? These questions we deem it unnecessary to determine; for, if answered in the affirmative, it still appears that no such power was in fact exercised by Porter Township prior to the passage of the act of March 25th, 1851; by which act, as correctly adjudged by the Supreme Court of Ohio in *Shoemaker* v. *Goshen Township*, the former statutes were so far modified as not only to renew the power of county commissioners to subscribe for the stock of this company, if thereunto authorized by the voters at a special election, but in language more direct and specific than employed in former statutes, to make the authority of townships to subscribe depend upon the county commissioners not having been authorized to make a county subscription. The general assembly of Ohio, it must be presumed, knew at the passage of the act of March 25th, 1851, what particular

counties and townships had then made subscriptions to the stock of this railroad company. That act was passed with reference to the situation as it actually was. When, therefore, upon the basis of non-authorization of the commissioners to make a county subscription, it was provided, in the act of March 25th, 1851, that "then, and in that case" townships might subscribe, it must have been intended that the authority of any township, which had not *then* acted, to subscribe should exist only where, after the passage of the latter act, a county subscription had been negatived either by a vote of the people or by the refusal or failure of the commissioners within a reasonable time to submit the question to a popular vote. If this be not so, then Porter Township would have been authorized in its discretion to vote on a proposition to subscribe either at the annual election in April, 1851, or at any special election thereafter held, notwithstanding the county may have previously made a subscription. But such we cannot suppose to be a correct interpretation of the statute. Consequently, from and after March 25th, 1851, it was apparent from the terms of the act of that date that Porter Township had no legal authority to make a subscription of stock, except in the contingency—which the township could not control, but of which it and all others were bound to take notice—that the commissioners had not been authorized to subscribe for the county. So far from that contingency ever arising, the commissioners (before the township election was called) had been authorized by popular vote to subscribe, and they did in fact subscribe, the sum of $50,000. It cannot, therefore, be said that the commissioners were not authorized by a vote of the county to subscribe at the time Porter Township voted; consequently, the latter was without legal authority to make a subscription. This conclusion is satisfactory to our minds, and is, besides, sustained by the decision of the Supreme Court of Ohio in *Hopple* v. *Trustees of Brown Township in Delaware County*, 13 Ohio St. 311, reaffirmed in *Hopple* v. *Hipple*, 33 Ohio St. 116.

It is, however, contended, that by the settled doctrines of this court, the township is estopped by the recitals of the bonds in suit, to make its present defence. The bonds, upon their

face, purport to have been issued "in pursuance of the provisions of the several acts of the general assembly of the State of Ohio, and of a vote of the qualified electors in said township of Porter, taken in pursuance thereof." These recitals, counsel argue, import a compliance, in all respects, with the law, and, therefore, the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens* v. *Virginia*, 6 Wheat. 264, and again in *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287, that it was "a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." An examination of the cases, in which those general expressions are found, will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation precluded an inquiry, even where the rights of a *bona fide* holder were involved, as to the existence of legislative authority to issue them.

A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the

power, estopped the county from alleging or proving, to the prejudice of a *bona fide* holder, that requisite notices of the election had not been given. In *Bissell* v. *City of Jeffersonville*, 24 How. 287, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a *bona fide* holder, to call in question the determination of the facts, which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued.

Probably the fullest statement of the settled doctrine of this court is found in *Town of Coloma* v. *Eaves*, 92 U. S. 484. In that case the authority to make the subscription was made, by the statute, to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with, was left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court said: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine was reaffirmed in *Buchanan* v. *Litchfield*, 102 U. S. 278, and in other cases, and we perceive no just ground to doubt its correctness, or to regard it as now open to question in this court.

But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a munic-

ipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the statutes of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital, by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township, not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription. Whether they had not been so authorized, that is, whether the question of subscription had or not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the sense of the people as to show that they had not, within the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection, and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued "in pursuance of the provisions of the several acts of the general assembly of Ohio," is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of

this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power which, under the law, did not exist. In the view we have taken of this case, *McClure* v. *Township of Oxford*, 94 U. S. 429, is instructive. That was a case of municipal subscription to a railroad corporation. The act conferring the authority provided that it should take effect (and, therefore, should not be a law except) from and after its publication in a particular newspaper. Thirty days' notice of the election was required. But the election was held within thirty days from the publication in the paper named in the act. The bonds recited that they were issued in pursuance of the statute, describing it by the date of its passage, not the date of its publication in the newspaper designated. They showed upon their face that the election was held April 8th, 1872. But the purchaser was held bound to know that the act was not in fact published in that newspaper until March 21st, 1872; that, therefore, it did not become a law until from and after that date. He was, consequently, charged with knowledge that the election was held upon insufficient notice. The bonds were, for these reasons, declared to be not binding upon any township. The publication of the act, plainly, was not a matter with which the township trustees, as such, had any official connection. It was not made their duty to have it published. The time of publication would not necessarily appear upon the township records; but publication in a named newspaper was, as the face of the act showed, vital, not simply to the exercise but to the very existence of the power to subscribe. We may repeat here what was said in *Anthony* v. *Jasper County* 101 U. S. 693, 697, that purchasers of municipal bonds "are charged with notice of the laws of the State, granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created." So here,

Syllabus.

Porter Township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it not estopped to show that it was without legislative authority to order the election of August 30th, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance.

The judgment is affirmed.

MR. JUSTICE MATTHEWS having been of counsel, did not sit in this case or participate in its decision.

McDONALD *v.* HOVEY & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued January 30th and 31st, 1884.—Decided March 3d, 1884.

Limitations, Statute of—Statutes, Construction of.

The construction usually given to statutes of limitations, that a disability mentioned in the act must exist at the time the action accrues in order to prevent the statute from running, and that after it has once commenced to run no subsequent disability will interrupt it, is to be given to Rev. Stat. § 1008, prescribing the time within which writs of error shall be brought or appeals taken to review in this court judgments, decrees or orders of a Circuit or District Court in any civil action at law or in equity.

Where English statutes, such as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.

Upon a revision of statutes a different interpretation is not to be given to them without some substantial change of phraseology other than what may have been necessary to abbreviate the form of the law. *Pennock* v. *Dialogue*, 2 Pet. 1, cited and approved.

The English and American cases construing statutes of limitations as affected by disability provisos reviewed.

The only question decided in this case relates to the taking of the appeal: It was not taken within the two years named in Rev. Stat. § 1008. The appellant set up the disability of imprisonment as cause for the delay.

Mr. J. Noble Hayes and *Mr. Skipwith Wilmer* for appellant.

Mr. George F. Edmunds and *Mr. Chas. W. Hornor* for appellees.

Mr. Justice Bradley delivered the opinion of the court.

The decree appealed from in this case was rendered on the 17th of April, 1878, and the appeal was not taken until the 6th of September, 1883. § 1008 of the Revised Statutes declares that

"No judgment, decree, or order of a Circuit or District Court in any civil action, at law or in equity, shall be reviewed by the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: *Provided*, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."

As more than five years elapsed after the entry of the decree in this case before the appeal was taken, of course the appeal was barred by lapse of time unless the appellant was within one of the exceptions contained in the proviso. He claims that he was within one of these exceptions. He states in his petition of appeal, and the fact is not disputed, that being sued

in the city of New York upon the decree appealed from, and judgment being rendered against him, his body was taken in execution, and on the 7th of February, 1879, he was thrown into the county jail of New York, where he has ever since remained, and is now kept in close confinement. As only ten months elapsed after the entry of the decree when the appellant was thrown into prison, and as he has been in prison ever since, he contends that two years, exclusive of the term of his imprisonment, had not expired when his appeal was taken.

This answer cannot avail the appellant if that construction be given to the statute which has almost uniformly been given to similar statutes in England and this country. The construction referred to is, that some or one of the disabilities mentioned in the proviso, must exist at the time the action accrues, in order to prevent the statute from running; and that after it has once commenced to run, no subsequent disability will interrupt it. This was the rule adopted in the exposition of the statute of 21 Jac. 1, c. 16, the English statute of limitations in force at the time of the first settlement of most of the American colonies. It is provided by the seventh section of that statute,

"That if any person entitled to bring any of the personal actions therein mentioned, shall be 'at the time of any such cause of action given or accrued,' within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned or beyond the seas, such person shall be at liberty to bring the same actions within the times limited by the statute, after his disability has terminated." (Angell on Lim., chap. XIX).

It is true that the express words of this statute refer to disabilities existing "at the time" the cause of action accrues, and do not literally include disabilities arising afterwards. The courts, however, held that such was not only the literal, but the true and sensible meaning of the act; and that to allow successive disabilities to protract the right to sue would, in many cases, defeat its salutary object, and keep actions alive perhaps for a hundred years or more; that the object of the statute was to put an end to litigation, and to secure peace and repose; which would be greatly interfered with and often

wholly subverted, if its operation were to be suspended by every subsequently accruing disability. A very exhaustive discussion of the subject had arisen in the time of Queen Elizabeth, in the case of *Stowell* v. *Zouch*, Plowd. 353*a*, in the construction of the Statute of Fines, passed in 4 Hen. 7, c. 24, which gave five years to persons not parties to the fine to prosecute their right to the land; but if they were women covert, or persons within the age of twenty-one years, in prison, or out of the realm, or not of whole mind at the time of the fine levied, they were allowed five years to prosecute their claim after the disability should cease. In that case, a person having a claim to land, died three years after a fine was levied upon it without commencing any suit, and leaving an infant heir; and it was held that the heir could not claim the benefit of his own infancy, but must commence his suit for the land within five years from the levying of the fine; because the limitation commenced to run against his ancestor, and having once commenced to run, the infancy of the heir did not stop it. The same construction was given, as already stated, to the general statute of limitations of 21 Jac. 1, before referred to. In *Doe* v. *Jones*, 4 T. R. 300, Lord Kenyon said:

"I confess I never heard it doubted till the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion on the words of the statute of fines, on the uniform construction of all the statutes of limitation down to the present moment (1791), and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and to make distinctions between the cases of voluntary and involuntary disabilities [as was attempted in that case]; but in both cases, when the disability is once removed, the time begins to run."

To the same effect are *Doe* v. *Jesson*, 6 East, 80, and many cases in this country referred to in Angell on Limitations, *qua supra*, and in Wood on Limitations, sect. 251. In a case that

came to this court from Kentucky, in 1816, Ch. Justice Marshall said:

"The counsel for the defendants in error have endeavored to maintain this opinion by a construction of the statute of limitations of Kentucky. They contend, that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed as that statute, and all other acts of limitation founded on it, have been construed." *Walden* v. *Gratz's Heirs*, 1 Wheat. 292, 296.

And in the subsequent case of *Mercer's Lessee* v. *Selden*, 1 How. 37, 51, the court took the same view in a case arising in the State of Virginia, in which the right of action accrued to one Jane Page, an infant within the exception of the statute; and it was insisted that her marriage before she was twenty-one added to her first disability (of infancy) that of coverture. But the court held otherwise, and decided that only the period of infancy, and not that of coverture, could be added to the time allowed her for bringing the action. The same doctrine was held in *Eager* v. *Commonwealth*, 4 Mass. 182; *Fitzhugh* v. *Anderson*, 2 Hen. & Mun. 306; *Parsons* v. *McCracken*, 9 Leigh, 495; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129; *Bunce* v. *Wolcott*, 2 Conn. 27.

In most of the State statutes of limitation the clauses of exception or provisos in favor of persons laboring under disabilities employ terms equivalent to those used in the English statute, expressly limiting the exception to cases of disability existing when the cause of action accrues. But this is not always the case. The statutes of New York in force prior to the Revised Statutes limited the time for bringing real actions to twenty-five years after seizin or possession had, and the proviso in favor of persons laboring under disabilities was in these words:

"Provided always, That no part of the time during which the plaintiff, or person making avowry or cognizance, shall have been within the age of twenty-one years, insane, *feme covert*, or imprisoned, shall be taken as part of the said limitation of twenty-five years." 1 Rev. Laws, 1813, p. 185, sect. 2; 2 Greenleaf's Laws, 95, sect. 6.

It will be observed that this proviso is stronger in favor of cumulative and subsequently accruing disabilities than that of the act of Congress which we are now considering; yet the Supreme Court of New York, and subsequently this court, gave it the same construction in reference to such disabilities as had always been given to the English statute of fines and statute of limitations. In the case of *Bradstreet* v. *Clarke*, 12 Wend. 602, which was a writ of right, and was argued by the most eminent counsel of the State, it was strenuously contended that the proviso referred to, being different from that of the English statutes in not referring to disabilities existing when the cause of action accrued, a different construction ought to be given to it, and the disabilities named, though commencing subsequently, and even after the statute began to run, ought to be held to interrupt it. The court, however, did not concur in this view, but held that the coverture of the demandant occurring after the statute began to run could not be set up against its operation. Mr. Justice Sutherland said:

"It is believed that the same construction has uniformly been given to this proviso in this respect as to that in relation to possessory actions [contained in a different section of the act], that where the statute has once begun to run a subsequently accruing disability will not impede or suspend it."

Although the case did not finally turn on this point, the attention given to it by counsel and the apparent unanimity of the court, then consisting of Savage, chief justice, and Sutherland and Nelson, justices, give to that opinion a good deal of weight.

The same question afterwards arose in this court in the case of *Thorp* v. *Raymond*, 16 How. 247. That was an action

of ejectment, used in place of a writ of right, to try the title to lands in New York. The plaintiff's grandmother acquired a right of entry to the lands in 1801, but was then insane, and remained so till her death in 1822. Her only daughter, and heir, was a married woman, and remained such till the death of her husband in 1832. The action was not commenced until 1850. The plaintiff contended that, under the proviso referred to, the daughter's disability of coverture ought to be added to the mother's disability of insanity; and that this would save the action from the bar of the statute, whether under the limitation of twenty-five years or that of twenty years. But the court held that the disabilities could not be connected in this way. Mr. Justice Nelson, delivering the opinion, and having shown that the proposed cumulation was inadmissible under the third section of the act, considering the action as one of ejectment, disposed of the other view as follows:

"But it is supposed that the saving clause in the second section of this act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received the same construction in the courts of New York as that given to the third section." [Citing the case of *Bradstreet* v. *Clarke*, in the decision of which the learned justice had participated.]

The statute of limitations of Texas is another instance in which language is used quite different from that of the English statute. After prescribing various limitations, the eleventh section provides for disabilities, as follows:

"No law of limitations, except in the cases provided for in the eighth section of this act, shall run against infants, married women, persons imprisoned, or persons of unsound mind, during the existence of their respective disabilities; and when the law of limitations did not commence to run prior to the existence of

these disabilities, such persons shall have the same time allowed them after their removal that is allowed to others by this and other laws of limitations now in force." Oldham & White, Art. 1352.

According to the literal sense of this section, if one disability should prevent the statute from running until another supervened, the latter would be equally effectual to interrupt it. But the Supreme Court of Texas, in *White* v. *Latimer*, 12 Texas, 61, held otherwise, and decided that one disability cannot be tacked on to another; but that the long-established rule in construing statutes of limitations must be applied. The court say:

"The 11th section of the statute is not in its terms materially different from the exception contained in the statute of James, and cannot claim a different construction from that; and a departure from the rule so long and well established, that it applies to the particular disability existing at the time the right of action accrued, would introduce the evil so strongly deprecated by the most eminent English and American judges, of postponing actions for the trial of rights of property to an indefinite period of time, by the shifting of disabilities, from infancy to coverture, and again from coverture to infancy, an evil destructive of the best interests of society, and forbidden by the most sound and imperious policy of the age."

The authority of these cases goes far to decide the one before us. The proviso in the New York statute certainly was more general in its terms in describing the disabilities which would stay the operation of the statutes—described them more independently of the time when the cause of action accrued—than the act of Congress under consideration; and the courts, in giving it the construction they did, seemed to be largely influenced by the established interpretation given to similar statutes in *pari materia*, without having in the statute construed any express words to require such a construction. But in the case before us, the fair meaning of the *words* leads to the same result. The language is as follows:

"No judgment, decree or order . . . shall be reviewed in the Supreme Court, . . . unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree or order: *Provided*, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted or such an appeal may be taken within two years after the judgment, decree, or order, exclusive of the term of such disability."

"*Is* an infant," when? "*Is* an insane person, or imprisoned," when? Evidently, when the judgment, decree or order is entered. That is the point of time to which the attention is directed. The evident meaning is, that if the party is an infant, insane, or in prison when the judgment or decree is entered, and therefore when he or she becomes entitled to the writ of error or appeal, the time to take it is extended. In all the old statutes this was expressed in some form or other; this was their settled meaning. It will also be deemed to be the meaning of this statute unless its language clearly calls for a different meaning. But, as seen, it does not.

Section 1008 of the Revised Statutes was taken directly from the "Act to further the administration of justice," approved June 1st, 1872, and is a mere transcript from the second section of that act. 17 Stat. 196. But this was a revision of the twenty-second section of the Judiciary Act of 1789, and if we turn back to that section we shall find that, with regard to the point under consideration, its language was, in effect, substantially the same as that of the present law. It was as follows:

"Writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability."

"*Be* an infant," *when?* "*Be* a *feme covert*, *non compos*, or imprisoned," *when?* The same answer must be given as before, namely: when he or she becomes entitled; *i.e.*, when the judgment or decree is entered.

The phraseology of the act of 1872, and of the 1008th section of the Revised Statutes is so nearly identical with that of the 22d section of the act of 1789, in reference to the point under consideration, that we must presume they were intended to have the same construction, and the act of 1789 contains no language which requires that it should have a different construction from that which had long been established in reference to all the statutes of limitation then known, whether in the mother country or in this. On the contrary, as we have seen, the terms of the act of 1789 fairly call for the same construction which had for centuries prevailed in reference to those statutes.

It is a received canon of construction, acquiesced in by this court,

"That where English statutes, such, for instance, as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock* v. *Dialogue*, 2 Pet. 1, 18; Smith's Commentaries on Stat. and Const. Law, § 634; Sedgwick on Construction of Stat. and Const. Law, 363.

And even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. Chief Justice Green said:

"Where two or more statutes, whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated act as was given to the original statutes. A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated." *In re Murphy*, 3 Zab. 180.

So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedgwick on Const. Stat. 365. As said by the New York Court for the Correction of Errors, in *Taylor* v. *Delancey*, 2 Caines' Cas. 143, 150:

"Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change." And see *Yates' Case*, 4 Johns. 317; *Theriat* v. *Hart*, 2 Hill, 380; *Parmelee* v. *Thompson*, 7 Hill, 77; *Goodell* v. *Jackson*, 20 Johns. 693; *Croswell* v. *Crane*, 7 Barb. 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." *Mooers* v. *Bunker*, 29 N. H. 421.

So the Supreme Court of Alabama has held that the legislature of that State in adopting the Code, must be presumed to have known the judicial construction which had been placed on the former statutes; and, therefore, the re-enactment in the Code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction. *Duramus* v. *Harrison*, 26 Ala. 326.

"A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent." Sedgwick on Construction, 2d ed. 229, note.*

Of course, a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law. *Young* v. *Dake*, 1 Seld. 463.

In view of these authorities and of the principles involved in

*Referring to *Hughes* v. *Farrar*, 45 Me. 72; *Burnham* v. *Stevens*, 33 N. H. 247; *Overfield* v. *Sutton*, 1 Metc. (Ky.) 621; *McNamara* v *Minnesota Central Railway Company*, 12 Minn. 388; *Conger* v. *Barker*, 11 Ohio St. 1.

them, and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of Congress, either in the 22d section of the act of 1789, or in the 2d section of the act of 1872, or in the 1008th section of the Revised Statutes, to change the rule which had always, from the time of Henry Seventh, been applied to statutes of limitation, namely, the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it.

This conclusion disposes of the case. As the appellant was free from any disability for several months after the entry of the decree appealed from, the statute commenced to run at that time, and, therefore, the time for taking the appeal expired several years before it was actually taken.

The appeal is therefore dismissed.

WAPLES *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 2d, 1884.—Decided March 3d, 1884.

Confiscation—Deed—Judicial Sale.

In a sale under the Confiscation Act, of July 17th, 1862, 12 Stat. 589, the purchaser is presumed to know that if the offender had no estate in the premises at the time of seizure, nothing passed to the United States by decree or to him by purchase, and general language of description in his deed will not operate as a warranty or affect this presumption; and this rule prevails as to the United States, although a different rule may prevail in the State where the property is situated as to judicial sales under State laws.

Mr. C. W. Hornor and *Mr. Mason Day* for appellant.

Mr. Solicitor-General for appellee submitted the case on his brief.

Mr. Justice Field delivered the opinion of the court.

In March, 1865, the plaintiff purchased for the sum of $7,400

certain real property in New Orleans at a sale upon a decree rendered by the District Court of the United States in proceedings for its confiscation under the act of July 17th, 1862, and subsequently obtained a deed of the property from the marshal. The proceedings were instituted in the usual form by a libel of information filed on the 7th of August, 1862, by the district attorney of the Eastern District of Louisiana on behalf of the United States, against ten lots of ground alleged to be the property of Charles M. Conrad. The libel sets forth that the marshal of the district, under authority from the district attorney, given pursuant to instructions of the Attorney-General, had seized the lots of ground, which are fully described, as forfeited to the United States; that they were owned by Conrad then, and on the 17th of July, 1862, and previously; that after that date he had acted as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of Congress, or as a judge of a court, or as a cabinet officer, or as a foreign minister, or as a commissioner, or as a consul of the so-called Confederate States. Indeed, many other official positions he is charged in the alternative with holding, the district attorney evidently regarding him as a person of so much consequence that he must have been called to some official position by the Confederate government, in which he gave aid and comfort to the enemies of the United States, and therefore his right, title, and estate in the property was forfeited, and ought to be condemned. Publication of monition followed, and no one appearing to answer, judgment by default was entered, declaring that the lots of land, the property of Conrad, were condemned as forfeited to the United States, and a decree for their sale was entered. In the writ issued to the marshal and in his deed of sale, the lots are described as the property of Conrad. Under the act of Congress no other interest than that of Conrad was forfeited, and no other interest was sold. It was for his alleged offences that the libel was filed and the forfeiture sought. It was undoubtedly in the power of Congress to provide for the confiscation of the entire property as being within the enemy's country, without restricting it to the estate of the defendant, but Congress

did not see fit to so enact; and as we said in speaking of the proceedings in this case: "The court cannot enlarge the operations of the stringent provisions of the statute. The plaintiff had notice of the character and legal effect of the decree of condemnation when he purchased, and is therefore presumed to have known that if the alleged offender possessed no estate in the premises at the time of their seizure, nothing passed to the United States by the decree or to him by his purchase." *Burbank* v. *Conrad*, 96 U. S. 291.

This would be true with reference to any layman who might have been the purchaser, but with special force may it be applied to the plaintiff, who as the district attorney directed the seizure and conducted the proceedings to the decree.

It turned out in other litigation that at the time of the seizure Conrad possessed no estate in the premises. He had transferred the property by a public act of sale before a notary on the 31st of May, 1862, before the confiscation statute was passed, which applied only to the property of persons thereafter guilty of acts of disloyalty and treason. In express terms it withheld from its application the property of persons who before its passage may have offended in those respects. Conrad's power of disposition when he made his sale to his sons was not impaired by anything he may previously have done. This was expressly adjudged by this court in the case of Conrad, the son, against the plaintiff. 96 U. S. 279.

But because of the general language used in the description of the property in the libel of information and in the deed of the marshal, it is contended that something more than the estate of the offender Conrad was warranted by the United States to the purchaser, and the warranty having failed, that he is entitled to a return of the purchase money; but this position is without even plausible foundation. As already stated, the plaintiff was presumed to know the law on the subject, and that by his purchase under the decree he could only acquire such an estate as the alleged offender possessed, to hold during the offender's life; and that if the offender had no estate none was forfeited to the United States, or sold under the decree of the court. So no false assurance could have been made to the purchaser which

could be suggested as a possible ground for the return of the money; nor could there have been any mistake of fact which would be recognized as a ground for relief even in equity, for the fact suggested as having been misunderstood was declared by the law.

Besides, the title to the property sold under judicial process is not warranted by the party obtaining the judgment of the court. Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly. Any different rule prevailing on this subject in Louisiana or any other State by statute cannot change the position of the United States with respect to judicial sales in proceedings instituted by them.

Nor is this position at all affected by the doctrine that upon the reversal of a judgment under which a sale has been had, the purchaser is entitled to a return of his money. There has been no reversal of the judgment in the confiscation proceedings against Conrad. On the contrary, it has been affirmed.

Judgment affirmed.

MITCHELL & Another *v.* CLARK.

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

Argued December 14th, 17th, 1883.—Decided March 3d, 1884.

Jurisdiction—Limitations, Statute of.

When a defendant in a suit pending in a State court pleads a provision of the State constitution as a defence, a judgment there overruling the plea presents no federal question to give jurisdiction to this court.

Congress has the constitutional power to prescribe the law of limitations for suits which may by law be removed into the courts of the United States; and when Congress has exercised that power it is binding upon State courts as well as upon Federal courts. *Arnson* v. *Murphy*, 109 U. S. 238, approved.

A suit by a lessor to recover of a lessee rents which, during the rebellion, by order of the commanding general in the department where the property was situated, had been paid to the military authorities and appropriated to the use of the United States, is an action subject to the limitations prescribed by the Act of March 3d, 1863, 12 Stat. 755, and May 11th, 1866, 14 Stat. 46,

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for the commencement of suits for seizures made during the rebellion by virtue or under color of authority derived from or exercised under the President or under any act of Congress. *Harrison* v. *Myer*, 92 U. S. 111, cited and approved.

In a plea setting up the defence of the limitations prescribed by the statutes of March 3d, 1863, 12 Stat. 755, and May 11th, 1856, 14 Stat. 46, it is not necessary to set forth the language of the order of the commanding general. This case distinguished from *Bean* v. *Beckwith*, 18 Wall. 510.

This was a writ of error to the Supreme Court of Missouri.

The plaintiff below sued the plaintiffs in error for rent due on a lease of two storehouses in St. Louis for the months of August, September, and October, 1862, at the rate of $583.33 per month. The defendants answered with four pleas, as follows:

"And now come said defendants, by leave of court, for amended answer to plaintiff's petition, admit the execution of said lease and the occupancy of said premises under and by virtue of the same as alleged in said petition; and defendants say that after the making of said lease, to wit, on or about the first of May, A.D. 1861, certain evil-disposed and wicked persons in the State of Missouri, and in other of the United States, did raise an insurrection and rebellion against the lawful government of the United States, and did seek by force and arms to overthrow said government, and for this purpose did raise a large force of armed men, and did incite and carry on a civil war with said government of the United States; that during all the year 1862, and for a long time prior and subsequent thereto, civil war prevailed throughout the State of Missouri, where said premises were located and where defendants and plaintiff resided; that in order to suppress said insurrection and rebellion and maintain the lawful authority of the government of the United States said government was compelled to raise, and did raise, equip, and put into the field in said State of Missouri, where said war was raging, a large army, and did place said State of Missouri and the city of St. Louis, where said premises were located and defendants resided, under military law; and the said city and county of St. Louis were under military law, and under the military control of J. M. Schofield, a Major-General of the Army of the United States, as the military commander of the District of Missouri, which embraced the entire

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State of Missouri aforesaid ; that by reason of said civil war the courts of said State of Missouri were suspended and unable to perform their ordinary functions and administer the law of the land, except as they were protected and allowed to do so by the said military authorities thus in control of said State ; that in order to prosecute said civil war on behalf of the government of the United States, and put down and suppress said insurrection and rebellion, and overpower the insurgents and rebels and protect the loyal citizens of the said State of Missouri, it became and was necessary for the military authorities in control of said State of Missouri as aforesaid to take, seize, and appropriate to the public use the private property of the citizens of Missouri ; and the said military authorities who were in lawful command and control in said State, by order of said Schofield, then the lawful commanding general in said State, did seize and appropriate to the public use in suppressing said rebellion the private property of divers citizens of said State, and among other things did levy upon, seize, and appropriate to such public use the property, credits, and effects of said plaintiff, especially the rents due and owing from defendants under and by virtue of said lease of defendants in their hands for said months of August, September, and October, 1862 ; and the said defendants were compelled by the overpowering military force then in lawful control of said State to pay, and did pay long before the commencement of this suit, to wit, on or about the 24th day of November, 1862, the said rents for said months of August, September, and October, 1862, and every part thereof, to said military authorities, for and on account and as the property and effects of said plaintiff so seized and appropriated to the public use as aforesaid; that said seizure and appropriation were necessary means for carrying on said war for the suppression of said insurrection and rebellion and for the defence and protection of the loyal citizens of Missouri. Wherefore defendants say that plaintiff ought not to have or maintain his aforesaid action against them, and they pray judgment, &c.

"And for a further defence defendants say that the said rents reserved in said lease and due and owing for said months of August, September, and October, 1862, were seized in the hands of defendants and appropriated as the property of plaintiff for public use in the city of St. Louis, while said city was under military law, under the authority, or color of authority, exercised by said

General Schofield, who was then and there duly vested with the military command of said city by the President of the United States and under his authority, and said payment was made by defendants for and on account of plaintiff, as aforesaid, under said authority; and defendants plead and set up as a defence to this action the act of Congress entitled 'An Act relating to habeas corpus, and regulating judicial proceedings in certain cases, approved March 3d, 1863, and say that by reason thereof and of the payment aforesaid plaintiff ought not to have and to maintain this action, and they pray judgment, &c.

"And for a further defence defendants say that they paid the said rent for and on account of said plaintiff in the manner and for the purposes in their first plea hereinbefore stated, after the first day of January, 1861, by and in pursuance of orders received by them from the said General J. M. Schofield, who was vested with military authority by the said government of the United States to make said order and to seize and to apply to the public use the said property and effects and credits of said plaintiff; and defendants plead in bar of said action the fourth section of article eleven of the Constitution of the State of Missouri, and pray judgment, &c.

"And for a further defence to said action defendants say that the cause of action in plaintiff's petition alleged, if any such does or ever did exist, arose out of certain acts done, that is to say, out of or from an alleged failure or omission to pay the rent reserved in said lease for the months of August, September, and October, A. D. 1862, to the said plaintiff, and from a payment thereof made for and on account of plaintiff by defendants to the provost-marshal of said district of Missouri, for the public use, under and by virtue of the order and command of General J. M. Schofield, who was then in military command of the military district of Missouri, which embraced the State of Missouri; that said payment was omitted to be paid to the plaintiff, and was in fact made for and on account of the plaintiff, for the public use as aforesaid, as a necessary means of carrying on the military operations of the government of the United States against the insurgents, who were then seeking to overthrow said government in said State of Missouri, by virtue or under color of authority derived from and exercised under the President of the United States; and said cause of action, if any such there be or ever

was, arose more than two years before the commencement of this action, and said action was commenced more than two years after the passage of an act by the Congress of the United States entitled, 'An Act relating to habeas corpus, and regulating judicial proceedings in certain cases,' approved March 3d, 1863.

"And defendants set up and plead the limitations contained in said statute in bar of said actions and pray judgment."

To these defences the plaintiff demurred, and the demurrer was sustained in the court of original jurisdiction, and in the St. Louis Court of Appeals, as to the three first pleas and overruled as to the fourth. On appeal to the Supreme Court, however, the demurrer was sustained as to all the pleas, and judgment being rendered on that ruling for plaintiff in the court below and affirmed in the Supreme Court, this writ of error was sued out.

Mr. George P. Strong for appellants.

Mr. George F. Edmunds for appellee.

Mr. Justice Miller delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

The first of these defences is intended to assert the validity of the military order by which defendants under compulsion of that order paid the rent which as tenants of Clark they then owed to him, into the military chest of General Schofield, and that said order being lawful and valid is a full protection to them and a bar to this action.

We shall not undertake to decide in this case whether General Schofield had such authority as would make that payment a discharge of the debt or not.

The third plea, conceding that the order of General Schofield may not of itself be a sufficient defence to the action, invokes the aid of the fourth section of article eleven of the Constitution of the State of Missouri as making the facts set out in the first plea a good defence.

The language of this section is as follows:

"No person shall be prosecuted in any civil action or criminal proceeding for or on account of any act by him done, performed, or executed after the first day of January, 1861, by virtue of military authority vested in him by the government of the United States or that of this State to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall heretofore have been or shall hereafter be instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

This constitutional provision was adopted in 1865, and was clearly intended to protect the military officers or those acting under them from liability, civil or criminal, for acts done under their orders. Whether it covers the present case or not is not a question within our province to decide. The plea is made in a State court and sets up a defence under the State law, and however much the party may be aggrieved by that court's decision he in that plea sets up an immunity under a State law and not under the law of the United States. Of such matter this court has no jurisdiction, and we consider it no further.

The second and fourth pleas both set up the act of March 3d, 1863, 12 Stat. 755, as a defence; the second plea relying upon the fourth section of the act as a full defence to any suit at all in such case as the present, and the fourth plea setting up the specific defence of the statute of limitation found in the 7th section of that act.

The fourth section is as follows:

"That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea or under the general issue."

And the seventh section declares:

"That no suit or prosecution, civil or criminal, shall be main-

tained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to have been done ; *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act."

The act of May 11th, 1866, to amend this act, 14 U. S. Stat. 46, by its first section declares that the benefit of this defence shall extend to any acts done or omitted to be done during said rebellion by any officer or *person*, under and by virtue of any order, *written* or *verbal*, *general* or *special*, issued by the President or Secretary of War, or by any military officer of the United States holding command of the department, district or place within which such acts . . . were done or omitted to be done, either by the *person* or officer to whom the order was addressed, or for whom it was intended.

The act of 1863 also makes elaborate provision for the removal of this class of cases, including any act done under color of authority derived from the President, from a State court into a Federal court, which provision is also made more effectual by the act of 1866.

It is not at all difficult to discover the purpose of all this legislation.

Throughout a large part of the theatre of the civil war the officers of the army, as well as many civil officers, were engaged in the discharge of very delicate duties among a class of people who, while asserting themselves to be citizens of the United States, were intensely hostile to the government, and were ready and anxious at all times, though professing to be non-combatants, to render every aid in their power to those engaged in active efforts to overthrow the government and destroy the Union.

For this state of things Congress had provided no adequate legislation, no law by which the powers of these officers were so enlarged as to enable them to deal with this class of persons dwelling in the midst of those who were loyal to the government.

Some statutes were passed after delay of a general character, but it was seen that many acts had probably been done by these officers in defence of the life of the nation for which no authority of law could be found, though the purpose was good and the act a necessity.

For most of these acts there was constitutional power in Congress to have authorized them if it had acted in the matter in advance. It is possible that in a few cases, for acts performed in haste and in the presence of an overpowering emergency, there was no constitutional power anywhere to make them good.

But who was to determine this question? and for service so rendered to the government by its own officers and by men acting under the compulsory power of these officers could Congress grant no relief?

That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it.

In the legislation to which we have referred in the act of 1863, and the amendatory act of 1866, Congress seems to have well considered this subject. By the fourth section of the act of 1863 it undoubtedly intended to afford an absolute defence, as far as it had power to do so, in this class of cases.

By sections five and six it was enacted that the person sued for any of this class of acts, performed or omitted under orders of officers of the government, even when there was only color of authority, could, instead of having his case tried in a State court, where both court and jury might be prejudiced against him, remove his case into a court of the United States for trial.

That this act is constitutional, so far as it authorizes this removal, was settled in the case of *The Mayor* v. *Cooper*, 6 Wall. 247.

The defendant, however, for some reason did not attempt to remove this case into the Circuit Court of the United States, probably because the Supreme Court of the State had decided in the case of the *State* v. *Gatzweiler*, 49 Mo. 17, that the limitation clause of the act of Congress was valid and was binding on the State court.

The third measure of relief which those statutes provided for said case was this statute of limitations, found in the seventh section of the act of 1863.

This limitation of the right of action, like the right of removal, did not depend by the terms of the statute on the validity of the authority set up by the party. In one case it is obvious that that question must be inquired into after the removal. In the other, if the action had not been brought within two years, it was immaterial; for the plaintiff could not recover, however void the authority under which defendant acted.

Had Congress power to pass such a law? The suit being one which, under the act of Congress, could be removed into the courts of the United States, Congress could certainly prescribe for it the law of limitations for those courts. If for such actions in those courts, why not in all courts? Otherwise there would be two rules of limitation of actions in different courts holding pleas of the same cause.

But there are other considerations which lead to the conclusion that Congress must have the right to prescribe the rule of limitations for all courts in this class of cases.

The act complained of is done for the benefit of the government by one of its officers, or by his imperative orders, which could not be resisted. If done under a necessity or a mistake, the government should not see him suffer. In such a case as the present, where the money collected went into the military chest, and was either turned over to the treasury or used to pay the military expenses of the United States, the government is bound in equity, if not legally, to repay the defendant,

if judgment goes against him, what it received, with interest and costs. It has a right to say in such cases that the suit, which is to establish this liability, must be brought within reasonable time in whatever court it is brought, and to determine what is that reasonable time. The government which thus exposes its officers and others, acting under its compulsory exercise of power, to be sued, while not denying redress for the illegal exercise of such power, must have the authority to require that suits brought for such redress shall be commenced within reasonable time.

The question in all such cases is one that arises under the Constitution and laws of the United States, because the act questioned is one done or omitted under color of authority claimed to be derived from the government, and, therefore, involves the consideration whether such authority did in fact, or could in law, exist. It is one, consequently, that falls within the constitutional jurisdiction of the judicial power of the United States. Hence it follows that Congress might vest that jurisdiction exclusively in the courts of the United States, and might regulate all the incidents of suits brought in any jurisdiction authorized to entertain them.

It is upon this principle that the case of *Arnson* v. *Murphy*, 109 U. S. 238, was decided. The question there was whether the statute of limitations of the State or of Congress should govern, the suit having been brought to recover for duties illegally assessed. And though the action was one properly brought originally in the State court, and which might have been tried there, it was held that as the money collected by the collector had been paid into the treasury, and the United States was responsible for the judgment which might be recovered against him, and Congress having also modified the right of action which plaintiff had at common law, the provisions of the act in regard to time of commencing the action governed the case, and that they were necessarily exclusive.

The Supreme Court of Missouri in the case of *The State* v. *Gatzweiler*, 49 Mo. 17, held that the seventh section of the act of 1863 is not only valid, but is binding on the State courts. Quoting from the case of *Clark* v. *Dick*, 1 Dillon, 8, it concurs

with the Circuit Court that if Congress has the right to determine in what courts such questions must be tried, it must necessarily have the power to regulate the remedy, including the right to prescribe the time within which the suit must be brought. That court further cites from the same opinion with approval, as follows:

"Nor is the objection sound that in such cases the action, if tried in the State courts, will be subject to the laws of limitations prescribed by the States, while in the federal courts a different rule would prevail. For the act of Congress by its terms applies to all cases of the character described in the statute, and we see no reason to limit its application to the federal courts. If Congress has a right to legislate on this subject, it has the right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration."

That a similar statute in regard to suits by or against an assignee in bankruptcy governs the State courts, see *Jenkins* v. *The Bank*, 106 U. S. 571, and *Jenkins* v. *Lowenthal*, 110 U. S. 222.

It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the States; and where the question of the *power* of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself.

In regard to the States, which are expressly forbidden to impair by legislation the obligation of contracts, it has been repeatedly held that a statute of limitation which reduces materially the time within which suit may be commenced, though passed after the contract was made, is not void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right.

Such is the case before us, for the statute leaves two years after its passage, and two years after cause of action accrued, within which suit could be brought.

It is said that the plea does not bring the case within the provisions of the act of Congress, because this is an action to recover of the defendant the rents which are due from him to the plaintiff on a contract in writing, and that the trespass committed on the defendant by order of General Schofield is no answer to plaintiff's right under the contract.

But we are of opinion that both the language and the spirit of the statute embrace the present case.

The plea makes it plain that it was the purpose of the Schofield order to seize the debt due from defendant to plaintiff, to confiscate it for military purposes. The sum enforced from Mitchell was the precise sum due to Clark for those rents. It was to answer Clark's obligation or default the order was made and enforced against Mitchell. He could not help himself.

It could as well be said that the garnishee in attachment is not protected when paying under the order of the court, because there was error in the proceeding against his creditor.

In all the confiscation of debts in the cases arising out of the late rebellion the same thing was done by the courts that was done here by the military power, namely, a debt due by a debtor, who was present, was seized and paid over to the United States. Can it be held that this was no proceeding against the creditor? It cannot be denied that such a procedure, if well conducted, is a good defence. It was the purpose of this statute to make it a defence here, though done without authority, if the creditor's right was not asserted by suit within two years.

The language of the statute is, that no suit shall be maintained unless brought within two years, for any wrongs done or committed or act omitted to be done, by virtue or under color of authority, derived from or exercised by, or under, the President. The act done here was the payment, under summary confiscation, of the debt due Clark to the military officer.

The act omitted was the omission by Mitchell, during all these years, under that order, to pay to Clark. The two years' statute was intended to cover the act done by Mitchell in paying according to the order of Schofield, and the omission, in refusing to pay to Clark.

The case of *Harrison* v. *Myers*, 92 U. S. 111, was a case where the rent due under a lease from an absconding malcontent, was seized by a military order. This court held that the lessor could not afterward insist on the contract. *His* property was seized, says the court, and the tenant was no longer responsible to him, who could no longer secure him possession, and as the lessee was obliged to render obedience to paramount authority, it was entirely competent for him to enter into a new contract to protect his interest.

It is said, however, that the Supreme Court of Missouri held the plea to be bad because it did not set out a copy of the order of General Schofield on which the defence is founded, either in *hæc verba* or in substance, and that this, not being a question of federal law, is sufficient to sustain the judgment of that court.

But there are several sufficient answers to this:

1. The opinion of the Supreme Court, while mentioning this objection *en passant*, does not decide that it is of itself sufficient to invalidate the plea.

2. It *does* proceed in a lengthy discussion of the plea on its merits, and rests its judgment on the ground that Congress had no power to pass the statute of limitations in question.

3. The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of federal law; for the question is and must be, does the plea state facts which under the act of Congress constitute a good defence?

4. In this particular matter Congress made even the manner of pleading the defence a question of federal law by the provisions of the statutes on this subject.

By section four of the act of 1863, 12 Stat. 756, it is enacted that the defence which it affords may be made by special plea or under the general issue; and by section one of the act of 1866, 14 Stat. 46, that the order which shall be a sufficient defence may be written or verbal, general or special.

These provisions furnish the rules by which the manner of setting up the defence is to be governed, and they leave no doubt in our mind that the liberality which they intended to

prescribe in the matter requires that the present plea of the statute of limitations, being good in substance, is sufficient in form of statement.

If the order was verbal, if it was general, if it could be given in evidence under the general issue, it is sufficiently set out in this plea as an order of General Schofield, in command of that military department, under which defendant was compelled to pay to that officer's subordinate the rent he owed to plaintiff.

In the case of *Bean* v. *Beckwith*, 18 Wall. 510, the defendants did not rely upon the statute of limitations of 1863, but pleaded as a special defence that one of them was a provost-marshal, and the other acted under his orders; and that they both acted under the authority and by the order of Abraham Lincoln, President of the United States. But whether there was in that case a special order of the President to the provost-marshal, or whether he assumed to arrest and imprison the plaintiff under some proclamation or general order, did not appear by the plea, and as it was a case of arrest and imprisonment this court held that the authority of the defendants to make it should be specifically set forth.

That is not the present case, for the defendant here did as he was compelled to by others, and probably never saw the order under which he was forced to pay the money, and has not now within his control the order under which the officer acted. He has, besides, given with sufficient clearness the substance of General Schofield's order to enable plaintiff to deny its existence, if he can, or to make any other reply appropriate to the merits of the case, and if the order was verbal no better statement of it can be exacted.

We concur in the opinion of the lower courts in Missouri that the plea of the statute of limitations is a good plea and is sufficiently set out; and for the error in sustaining the demurrer to this plea

The judgment of the Supreme Court of Missouri is reversed, and the case remanded to that court for further proceedings, not inconsistent with this opinion.

Mr. Justice Field, dissenting.

I cannot agree with my associates in the judgment in this case.

I know of no law that was ever enacted in the United States, which would justify a military officer in enforcing the payment to him of a debt due from one loyal citizen to another loyal citizen, neither being in the military service, or residing in a State declared to be in insurrection, or in which the courts of law were not open and in the peaceful exercise of their jurisdiction. Such a law, in my opinion—I say it with respect—would dishonor the statute-book of the United States; and that which has never been enacted by legislative power can never be rightly adjudged to exist by a judicial tribunal.

The averment of the answer that the payment was enforced as a means of carrying on military operations by the United States, we know to be untrue. At that time the government appropriated the requisite funds to prosecute the war, and our legislation and history show that no plundering of loyal citizens in loyal States, nor any forced contribution from them, was ever ordered or sanctioned by public authority.

The enforced payment in question could, therefore, be no defence to the claim of the plaintiff. And it is difficult to understand how the act of Congress of March 3d, 1863, 12 Stat. 755, or the amendatory act of May 11, 1866, 14 Stat. 46, fixing a limitation to actions against military officers for certain acts done by them during the war, or against parties acting under their direction, can be invoked in this case. The fourth section of the act of March 3d, 1863, makes the order or authority of the President a defence only to actions "for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done, under and by virtue of such order or under color of any law of Congress." It has reference to acts affecting the person or such property as is subject to physical seizure. It does not apply to actions for breaches of contract between citizens in loyal States, or to any questions arising out of such contracts. Debts being intangible things, were incapable of seizure in any proper sense of that term; and the debtors were not discharged from liability because of

an unlawful exaction from them of equivalent sums. What was thus exacted could under no circumstances be regarded as anything more than a forced loan. By no possible alchemy could it be converted into the payment of their debt to another. Its effect upon others was not a matter which concerned the military officer. His object, according to the defendant's theory, was to raise funds for military operations; if so the relations of debtor to creditor were not affected by his exactions from one of them. *Williams* v. *Bruffy*, 96 U. S. 176, 187. The debt of the defendants to the plaintiff was not thereby discharged; it is still owing. It can only be discharged when paid to him or to others by his direction. Independently of this consideration, the statute cannot be construed to give protection to any one in the commission of unlawful acts. Neither the President nor Congress can confer immunity for acts committed in violation of the rights of citizens. An army in the enemy's country may do all things allowed by the rules of civilized warfare, and its officers and soldiers will be responsible only to their own government. But in loyal States, or in such parts as are not in insurrection, or declared to be so, and in which the courts are open, the rights of citizens are just as much under constitutional security and protection in time of war as in time of peace. Because civil war was raging in one part of the country the constitutional guaranties of the rights of person and property were not suspended where no such war existed. We sometimes hear the opposite doctrine advanced; but it has no warrant in the principles of the common law, or in the language of the Constitution. As I observed on a former occasion, our system of civil polity is not such a rickety and ill-jointed structure that when one part is disturbed the whole is thrown into confusion and jostled to its foundation. The existence of insurrection and war in other States than Missouri, or in parts of that State distant from St. Louis, did not suspend the Constitution or any of its guaranties in that city. No proclamation of the President had ever declared Missouri to be in a state of insurrection, and it is a matter within our judicial knowledge that St. Louis, so far from being the theatre of actual warfare, was a city where supplies were

collected for military operations in other quarters, and where the courts were in the undisturbed exercise of their jurisdiction. It is true that where rebellion exists, and the public safety requires it, the privilege of the writ of *habeas corpus* may be suspended, and to that extent one of the safeguards of the right of personal liberty may be withdrawn, but this suspension in no respect affects the claims of private citizens against each other arising out of contracts between them, or the means of their enforcement. The Constitution does not forbid, during such suspension or by reason of it, the institution of suits for such claims, or authorize Congress to forbid it.

Congress may provide for indemnifying those who, in great emergencies, acting under pressing necessities for the public, invade private rights in support of the authority of the government; but between acts of indemnity in such cases, and the attempt to deprive the citizen of his right to compensation for wrongs committed against him or his property, or to enforce contract obligations, there is a wide difference, which cannot be disregarded without a plain violation of the Constitution.

As the fourth section of the act of 1863 refers only to seizures, arrests and imprisonments committed, or acts omitted, by order or authority of the President, or under color of an act of Congress, it has no bearing upon actions for breaches of contract between citizens. The seventh section, fixing a limitation to actions for such arrests, imprisonment and other trespasses, does not therefore apply to the case before us. And the amendatory act of 1866 only extends the benefit of the limitation to actions for similar acts or omissions, when committed by a person acting under the order of the President, or the Secretary of War, or of a military commander. It does not, any more than the act of 1863, govern actions for breaches of contract between private parties. Could it be construed to embrace a case like the present, it would clearly be unconstitutional. The right of a lessor to sue his lessees for breach of contract, is in no way dependent upon any act or authority of Congress. It is a matter purely of State concern, and Congress can no more declare within what time he shall sue for his rent, than it can prescribe the court in which the action shall be

brought, or the form of the proceedings by which it shall be conducted. Its power to fix a limitation to actions can apply only to such as are in the first instance brought in the courts of the United States, and to those wherein the right or interest claimed depends upon a law of Congress. If such a law gives the right or interest claimed, it may prescribe the time in which it shall be asserted, but not otherwise. It would hardly be pretended that Congress can enlarge the time prescribed by the State for bringing in her courts actions upon contracts; and if it cannot enlarge, how can it limit the time? Indeed, it cannot be held that Congress may interpose a limitation to the right of enforcing in the courts of a State debts existing between her citizens, unless it be also held that, as to all actions in State tribunals, it can say when they may and when they may not be brought. It will be long, I trust, before the States will become thus helpless to enforce in their own tribunals contracts between their own citizens.

The argument of the court, in its opinion, is substantially this:—an action in which a defence under an act of Congress is set up may be removed from a State court to a federal court; therefore Congress may prescribe the law of limitation for it in the latter court; and if in that court, it may in all courts, as otherwise there would be two rules of limitations of actions in different courts holding pleas of the same cause. It is easy to see that this mode of reasoning would necessarily lead to the conclusion that Congress may prescribe the limitation to all actions in State courts between citizens, because actions commenced there may be removed to a federal court when they are between citizens of different States; and, on the assumption of the argument, Congress may prescribe the law of limitation for such cases in the federal court; and if in that court, it may, says the opinion, in all courts, as otherwise there would be two rules of limitations of actions upon the same causes in different courts, one if the action remain in the State court and another if it be removed to the federal court. The length to which the argument leads proves the error of the assumption on which it is founded. The true doctrine is the reverse of this; the limitation of actions in the State courts for

Syllabus.

the enforcement of rights which are not dependent upon acts of Congress or upon the Constitution, is a matter purely of State regulation, which the federal courts must follow when such actions are transferred to them. The object of the Constitution in extending the judicial power of the United States to controversies between citizens of different States, was to avoid, what was at the time of its adoption apprehended, the existence of State attachments and State prejudices, which might injuriously affect the administration of justice in the State courts against non-residents. To carry out this purpose the Judiciary Act provides for the removal to a Federal court of actions commenced in a State court involving such controversies. It has no other object; and the removal in no respect affects the rights of the parties, either the claims on the one hand or the defences on the other. Only the tribunal and, in some respects, the modes of procedure are changed. The limitations prescribed by the State law govern in both tribunals.

EX PARTE YARBROUGH, Petitioner.

ORIGINAL.

Argued January 23d, 24th, 1884.—Decided March 3d, 1884.

Constitutional Law—Indictment—Jurisdiction.

This court has no general authority to review on error or appeal the judgments of Circuit Courts in cases within their criminal jurisdiction.

When a prisoner is held under sentence of a court of the United States in a matter wholly beyond the jurisdiction of that court, it is within the authority of the Supreme Court, when the matter is properly brought to its attention, to inquire into it, and to discharge the prisoner if it be found that the matter was not within the jurisdiction of the court below.

Errors of law committed by a Circuit Court which passed sentence upon a prisoner, cannot be inquired into in a proceeding on an application for *habeas corpus* to test the jurisdiction of the court which passed sentence.

An indictment which charges in the first count that the defendants conspired to intimidate A. B., a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and that in the execution of that conspiracy they beat, bruised, wounded, and otherwise

maltreated him ; and in the second count that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises, contains a sufficient description of an offence embraced within the provisions of §§ 5508, 5520 Rev. Stat.

In construing the Constitution of the United States, the doctrine that what is implied is as much a part of the instrument as what is expressed is a necessity by reason of the inherent inability to put all derivative powers into words.

§ 4 of article I. of the Constitution, which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time make or alter such regulations, except as to the place of choosing senators," adopts the State qualification as the federal qualification for the voter ; but his right to vote is based upon the Constitution and not upon the State law, and Congress has the constitutional power to pass laws for the free, pure and safe exercise of this right.

Although it is true that the Fifteenth Amendment gives no affirmative right to the negro to vote, yet there are cases, some of which are stated by the court, in which it substantially confers that right upon him. *United States* v. *Reese*, 92 U. S. 214, qualified and explained.

Petition for a writ of *habeas corpus* for the release of several persons convicted, sentenced and imprisoned for conspiracy to intimidate a person of African descent from voting at an election for a member of Congress. The facts making the case appear in the opinion of the court.

Mr. Henry B. Tompkins for petitioner.

Mr. Solicitor-General opposing.

Mr. Justice Miller delivered the opinion of the court.

This case originates in this court by an application for a writ of *habeas corpus* on the part of Jasper Yarbrough and seven other persons, who allege that they are confined by the jailer of Fulton County, in the custody of the United States marshal for the Northern District of Georgia, and that the trial, conviction, and sentence in the Circuit Court of the United States for that district, under which they are held, were illegal, null and void.

The court, on the filing of this petition, issued a rule on the

marshal, or on any person in whose custody the prisoners might be found, to show cause why the writ of *habeas corpus* should not issue for their release.

It appears, by the returns made to this rule, that the sentence of the court which ordered their imprisonment in the Albany penitentiary in the State of New York, at hard labor for a term of two years, has been so far executed that they are now in that prison. The rule having been served on John McEwan, superintendent of the penitentiary, he makes return that he holds the prisoners by virtue of the sentence of the Circuit Court for the Northern District of Georgia, and annexes to his return a transcript of the proceeding in that court.

As this return is precisely the same that the superintendent would make if the writ of *habeas corpus* had been served on him, the court here can determine the right of the prisoners to be released on this rule to show cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the superintendent; and such is the practice of this court.

That this court has no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18.

It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and of the offence for which he was tried, and has not exceeded its

powers in the sentence which it pronounced, this court can inquire no further.

This principle disposes of the argument made before us on the insufficiency of the indictments under which the prisoners in this case were tried.

Whether the indictment sets forth in comprehensive terms the offence which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law, which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction.

Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court.

This principle is decided in *Ex parte Tobias Watkins*, 3 Pet. 203, and *Ex parte Parks*, 93 U. S. 18.

This, however, leaves for consideration the more important question—the one mainly relied on by counsel for petitioners—whether the law of Congress, as found in the Revised Statutes of the United States, under which the prisoners are held, is warranted by the Constitution, or being without such warrant, is null and void.

If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged.

Though several different sections of the Revised Statutes are brought into the discussion as the foundation of the indictments found in the record, we think only two of them demand our attention here, namely, sections 5508 and 5520. They are in the following language:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same,

or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"SEC. 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

The indictments, four in number, on which petitioners were tried, charge in each one, all of the defendants with a conspiracy under these sections, directed against a different person in each indictment. On the trial the cases were consolidated, and as each indictment is in the identical language of all the others, except as to the name of the person assaulted and the date of the transaction, the copy which is here presented will answer for all of them:

"We, the grand jurors of the United States, chosen, selected, and sworn in and for the Northern District of Georgia, upon our oaths, present: That heretofore, to wit, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-three, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green, all late of said Northern District of Georgia, did, within the said Northern District of Georgia, and within the jurisdiction of this court, commit the offence of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yar-

brough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green did then and there, at the time and place aforesaid, combine, conspire, and confederate together, by force, to injure, oppress, threaten, and intimidate Berry Saunders, a person of color and a citizen of the United States of America of African descent, on account of his race, color, and previous condition of servitude, in the full exercise and enjoyment of the right and privilege of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States of America, and because the said Berry Saunders had so exercised the same, and on account of such exercise, which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States of America, the said Berry Saunders being then and there lawfully entitled to vote in said election, and having so then and there conspired the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green did unlawfully, feloniously, and wilfully beat, bruise, wound, and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"*Second Count.*—And the jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-three, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green, all late of said Northern District of Georgia, within the said Northern District of Georgia and within the jurisdiction of this court, did commit the offence of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green, having then and there conspired together, by force, to injure, oppress, threaten, and intimidate Berry Saunders, a person of color and a citizen of the United States of America of African descent, on account of his race, color, and previous condition of servitude, did then and there unlawfully, wilfully, and feloniously go in disguise on the highway, and on the premises of Berry Saunders, with the intent to prevent and hinder his free exercise and enjoy-

ment of the right to vote at an election for a lawfully qualified person as a member of the Congress of the United States of America, which said right had then and there been guaranteed to the said Berry Saunders by the Constitution and laws of the United States of America, the said Berry Saunders being then and there lawfully qualified to vote at said election; and having so conspired, with intent as aforesaid, the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes, and E. H. Green did then and there beat, bruise, wound, and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"EMORY SPEER, *U. S. Atty.*

"A true bill. Oct. 12th, 1883.

"J. C. KIRKPATRICK, *Foreman.*"

Stripped of its technical verbiage, the offence charged in this indictment is that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and in the execution of that conspiracy they beat, bruised, wounded and otherwise maltreated him; and in the second count that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises.

If the question were not concluded in this court, as we have already seen that it is by the decision of the Circuit Court, we entertain no doubt that the conspiracy here described is one which is embraced within the provisions of the Revised Statutes which we have cited.

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each

of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.

The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution. Article I., sec. 8, clause 18.

We know of no express authority to pass laws to punish theft or burglary of the treasury of the United States. Is there therefore no power in the Congress to protect the treasury by punishing such theft and burglary?

Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offences? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction.

It is said that the States can pass the necessary law on this subject, and no necessity exists for such action by Congress. But the existence of State laws punishing the counterfeiting of the coin of the United States has never been held to supersede the acts of Congress passed for that purpose, or to justify the United States in failing to enforce its own laws to protect the circulation of the coin which it issues.

It is very true that while Congress at an early day passed criminal laws to punish piracy with death, and for punishing all ordinary offences against person and property committed within the District of Columbia, and in forts, arsenals, and other places within the exclusive jurisdiction of the United States, it was slow to pass laws protecting officers of the government from personal injuries inflicted while in discharge of their official duties within the States. This was not for want of power, but because no occasion had arisen which required such legislation, the remedies in the State courts for personal violence having proved sufficient.

Perhaps the earliest attempt of Congress to protect government officers while in the exercise of their duty in a hostile community, grew out of the nullification ordinance of South Carolina, and is found in the "Act further to provide for the collection of duties on imports." That act gave a right of action in the courts of the United States to any officer engaged in the collection of customs who should receive any injury to his person or property for or on account of any act done by him under any law of the United States for the protection of the revenues. And where any suit or prosecution should be commenced against him in a State court on account of any act done under the revenue laws of the United States, or under color thereof, the case might, on his petition, at any time before trial, be removed into the Circuit Court of the United States. Act of March 2d, 1833, 4 Stat. 632.

When early in the late civil war the enforcement of the acts of Congress for obtaining soldiers by draft brought the officers engaged in it into hostile neighborhoods, it was found necessary to pass laws for their protection. Accordingly, in 1863, an act was passed making it a criminal offence to assault or ob-

struct any officer while engaged in making the draft or in any service in relation thereto. 12 Stat. 731. And the next year the act was amended by making it applicable to the enrolment and resistance made thereto, and adding that if any assault on any officer or other person engaged in making such enrolment shall result in death, it shall be murder and punished accordingly. 13 Stat. 8, § 12. Under this statute Scott was found guilty of murder in the Circuit Court of the United States for the District of Indiana, and the case was brought here by a certificate of division of opinion.

It was not doubted for a moment by court or counsel that Congress had the power to pass these statutes, but it was held that serving notice of a draft, in doing which the man was killed, was not a service in the enrolment as charged in the indictment. *Scott* v. *United States*, 3 Wall. 642.

In the case of *United States* v. *Gleason*, Woolworth, 128, the defendant was convicted and sentenced to death for the murder of an enrolling officer while engaged in making the enrolment, and his sentence being commuted to imprisonment for life, he died in the Iowa penitentiary while undergoing the modified sentence. It was never suggested that Congress had no power to pass the law under which he was convicted.

So, also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution.

This section declares that:

> "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time make or alter such regulations, except as to the place of choosing senators."

It was not until 1842 that Congress took any action under the power here conferred, when, conceiving that the system of electing all the members of the House of Representatives from a State by general ticket, as it was called, that is, every elector voting for as many names as the State was entitled to representatives in that house, worked injustice to other States which did not adopt that system, and gave an undue preponderance

of power to the political party which had a majority of votes in the State, however small, enacted that each member should be elected by a separate district, composed of contiguous territory. 5 Stat. 491.

And to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States, Congress, by the act of February 2, 1872, thirty years later, required all the elections for such members to be held on the Tuesday after the first Monday in November in 1876, and on the same day of every second year thereafter.

The frequent failures of the legislatures of the States to elect senators at the proper time, by one branch of the legislature voting for one person and the other branch for another person, and refusing in any manner to reconcile their differences, led Congress to pass an act which compelled the two bodies to meet in joint convention, and fixing the day when this should be done, and requiring them so to meet on every day thereafter and vote for a senator until one was elected.

In like manner Congress has fixed a day, which is to be the same in all the States, when the electors for President and Vice-President shall be appointed.

Now the day fixed for electing members of Congress has been established by Congress without regard to the time set for election of State officers in each State, and but for the fact that the State legislatures have, for their own accommodation, required State elections to be held at the same time, these elections would be held for congressmen alone at the time fixed by the act of Congress.

Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud?

If this be so, and it is not doubted, are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors because State officers are to be elected at the same time? *Ex parte Siebold*, 100 U. S. 371.

These questions answer themselves; and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted.

But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.

It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by Congress does not stand on the same ground.

But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.

In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

This proposition answers also another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of Congress is not dependent upon

the Constitution or laws of the United States, but is governed by the law of each State respectively.

If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result.

But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election.

Its language is:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Article I., section 2.

The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense

which makes the exercise of the right to depend exclusively on the law of the State.

Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor* v. *Happersett*, 21 Wall. 162, that "the Constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument.

But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men.

In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. It is in the following language:

"SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

While it is quite true, as was said by this court in *United States* v. *Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. *Neal* v. *Delaware*, 103 U. S. 370.

In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

In the case of *United States* v. *Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that "it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amend-

ment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.

But is a waste of time to seek for specific sources of the power to pass these laws. Chancellor Kent, in the opening words of that part of his commentaries which treats of the government and constitutional jurisprudence of the United States, says:

"The government of the United States was created by the free voice and joint will of the people of America for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness." 1 Kent's Com. 201.

It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption.

In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.

Such has been the history of all republics, and, though ours

has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

The rule is discharged, and the writ of habaes corpus is denied.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY *v.* DENVER & NEW ORLEANS RAILROAD COMPANY.

DENVER & NEW ORLEANS RAILROAD COMPANY *v.* ATCHISON, TOPEKA & SANTE FE RAILROAD COMPANY.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Submitted January 16th, 1884.—Decided March 3d, 1884.

Connecting Railroads—Their Rights and Duties.

The provision in the Constitution of Colorado, that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad com-

Statement of Facts.

pany, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes no greater obligation on a railroad company than the common law would have imposed upon it.

The provision in the Constitution of Colorado that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," only implies a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not of itself imply the right of connecting business with business.

At common law a railroad common carrier is not bound to carry beyond its own line; and if it contracts to carry beyond it, it may, in the absence of statutory regulations, determine for itself what agencies it will employ; and there is nothing in the provisions of the Constitution of Colorado which takes away such right, or imposes any further obligation.

A railroad company has authority to establish its own stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them, and in the absence of statutory obligations, it is not required in Colorado to establish stations for those purposes at a point where another railroad company has made a mechanical union with its road.

A provision in a State Constitution which prohibits a railroad company from discriminations in charges and facilities does not, in the absence of legislation, require a company which has made provisions with a connecting road for the transaction of joint business at an established union junction station, to make similar provisions with a rival connecting line at another near point on its line, at which the second connecting line has made a mechanical union with its road.

A provision in a State Constitution which forbids a railroad company to make discrimination in rates is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.

This was a bill in equity filed by the Denver & New Orleans Railroad Company, a Colorado corporation, owning and operating a railroad in that State between Denver and Pueblo, a distance of about one hundred and twenty-five miles, against the Atchison, Topeka & Sante Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company, a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa

Fé Company formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans for Denver business.

It appeared that when the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones. In the division of prices the Denver & Rio Grande Company was allowed compensation at the rate of a mile and a half for every mile of actual haul. As the distance from the Missouri River to Pueblo by this route was about the same as to Denver by the other routes, the through rates over

this line to and from Denver were usually made about the same as the rates to and from Pueblo. This was necessary to compete successfully with other lines for Denver business. Afterwards another agreement, known as the "tripartite agreement," was entered into between the Atchison, Topeka & Santa Fé, the Denver & Rio Grande, and the Union Pacific Railroad Companies, by which rates were established between Denver and the Missouri River, and arrangements made for a division of business among those companies, and for the regulation of their conduct towards each other with a view to avoiding competition between themselves or from others.

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver & New Orleans Company erected at its junction with the Atchison, Topeka & Santa Fé platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A. T. & S. F. R. R., or reached by either line; that a system of

through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka, & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company.

By the Constitution of Colorado, art. 15, corporations can only be formed in that State under general laws, subject to alteration and repeal, and the law under which the Pueblo & Arkansas Valley Railroad Company was organized, conferred power, among others:

"Second. To cross, intersect, or connect its railroad with any other railway.

"Third. To connect at State line with roads of other States and Territories.

"Fourth. To receive and convey passengers and property on its railway.

"Fifth. To erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction and operation of said railway.

Statement of Facts.

"Sixth. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor." General Laws of Colorado, 1877.

Sections 4 and 6 of article 15 of the Constitution of Colorado are as follows:

"SEC. 4. All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States or Territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

"SEC. 6. All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

No other provisions of the Constitution or of the statutes of the State were referred to as affecting the questions involved in the suit.

A large amount of testimony was in the record as to the custom of connected roads in respect to the interchange of business and the formation of through lines. From this it appeared that, while through business was very generally done on through lines formed by an arrangement between connecting roads, no road could make itself a part of such a line, so as to participate in its special advantages, without the consent of the others. Oftentimes new roads, opening up new points, were admitted at once on notice, without a special agreement to that effect, or in reference to details; still, if objection was made, the new road must be content with the right to do business over the line in such a way as the law allowed to others that have no special contract interest in the line itself. The manner

in which its business must be done by the line would depend not alone on the connection of its track with that of the line, but upon the duty which the line as a carrier owed to it as a customer. No usage was established which required one of the component companies of a connecting through line to grant to a competitor of any of the other companies the same privileges that were accorded to its associates, simply because the tracks of the competing company united with its own and admitted of a free and convenient interchange of business. The line was made up by the contracting companies to do business as carriers for the public; and companies, whose roads did not form part of the line, had no other rights in connection with it, than such as belonged to the public at large, unless special provision was made therefor by the legislature or the contracting companies.

Upon this state of facts the Circuit Court entered a decree requiring the Atchison, Topeka & Santa Fé Company to stop all its passenger trains at the platform built by the Denver & New Orleans Company where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Santa Fé Company to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Company was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Company or any other competitor of the Denver & New Orleans Company for business. In short, the decree, as entered, establishes, in detail, rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in con-

nection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Company to place the Denver & New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and perhaps, the compulsory interchange of cars.

From this decree both companies appealed; the Atchison, Topeka & Santa Fé Company, because the bill was not dismissed; and the Denver & New Orleans Company because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Company for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage.

Mr. H. C. Thatcher, *Mr. Charles E. Gast*, *Mr. George R. Peck* and *Mr. William M. Evarts* for the Atchison, Topeka & Santa Fé Railroad Company.

Mr. E. T. Wells for the Denver & New Orleans Railroad Company.

Mr. Chief Justice Waite delivered the opinion of the court. After reciting the facts in the foregoing language he continued:

The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The

Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver and New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Company for itself, and the Atchison, Topeka & Santa Fé Company does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of Colorado, the Denver & New Orleans Company has a constitutional right, which a Court of Chancery can enforce by a decree for specific performance, to form the same business connection, and make

the same traffic arrangement, with the Atchison, Topeka & Santa Fé Company as that company grants to, or makes with, any competing company operating a connected road.

The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of sec. 23 of the charter of the Baltimore & Ohio Railroad Company, given by Maryland on the 28th of February, 1827, Laws of Maryland, 1826, c. 123, which is in these words:

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the State."

At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to put carriages thereon, subject only to the payment of tolls and to reasonable regulations as to the manner of doing business, *Lake Sup. & Miss. R. R. Co.* v. *United States*, 93 U. S. 442; but that the word "connect," as here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Company, and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Maryland Laws of 1832, c. 175, sec. 16. The charter of the Baltimore & Ohio Company was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the States to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was

required, the additional requirement was not distinctly stated and defined by the legislature.

Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began at a very early day in the history of railroad construction. As long ago as 1842 a general statute upon the subject was passed in Maine, Stats. of Maine, 1842, c. 9; and in 1854, c. 93, a tribunal was established for determining upon the "terms of connection" and "the rates at which passengers and merchandise coming from the one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their relations have become more and more complicated, statutory regulations have been more frequently adopted and with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but we have found no case in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies.

No provision is to be found in any of the constitutions of the several States, having special reference to the government of railroad corporations, before that of Illinois, which was ratified by a vote of the people on the second of July, 1870. Sec. 12 of art. 11 of that Constitution is as follows:

"Railways heretofore constructed or that may hereafter be constructed in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads of this State."

During the same year an amendment to the Constitution of Michigan was adopted in these words:

"Sec. 1. The legislature may, from time to time, pass laws

establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State; and shall prohibit running contracts between such railroad companies, whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

The Constitution of West Virginia, adopted in 1872, contained (sec. 9, art. 11) an exact copy of sec. 12, art. 11 of the Constitution of Illinois, with an addition of these words:

"And providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties."

In 1873 a new Constitution was adopted in the State of Pennsylvania. Secs. 1 and 3 of art. 17 are as follows:

"SEC. 1. All railroads and canals shall be public highways, and all railroads and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination."

"SEC. 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the State, or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion tickets may be issued at special rates."

Since that time new constitutions have been adopted in Alabama, Arkansas, California, Colorado, Georgia, Louisiana,

Missouri, Nebraska, and Texas. In Georgia, sec. 2, art. 4, authority was given the legislature to regulate fares and freights and to prevent unjust discriminations; and in Nebraska, sec. 4, art. 11, the provision in the Constitution of Illinois was substantially followed; but in Alabama, sec. 21, art. 13, Arkansas, sec. 1, art. 17, California, sec. 17, art. 12, Louisiana, art. 243, Missouri, secs. 12, 13, 14, art. 12, and Texas, sec. 1, art. 10, the whole of sec. 1, art. 12 of that of Pennsylvania is included without any material change of phraseology. In Colorado, however, while all the rest of that section is adopted, these words are omitted: "and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." And so, while the first sentence of sec. 3, art. 12 is included, in language almost identical, the last sentence, which provides that passengers and property shall be delivered at all stations at charges not exceeding the charges to a more distant station, is left out, and the following inserted in its place: "and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." Both these alterations are significant, and we cannot avoid the conclusion that their purpose was to leave the legislature free to act in the regulation of the duties of connected roads towards each other as the public good might require, for it is always to be borne in mind that while constitutional provisions of this character are intended as securities for the rights of the people, they may operate also as limitations on the powers of the legislature. To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of

the case, to wit, the relative rights of the two companies at common law and under the Constitution as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;

2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and

3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor

2. That companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select

his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeka & Santa Fé Company just as any other customer does, and with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make

use of the station of another. Each company in the State has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which

forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the

Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande.

Our attention has been called to several cases in the English courts where the question of reasonable or unreasonable preference by railway companies has been considered, but they all arose under the "Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, and furnish but little aid in the determination of the present case. They are instructive and of high authority as to what would be undue or unreasonable preferences among competing customers, but none of them relate to the rights of connected railroads where there is no provision in law for their

operation as continuous lines for business. And here it is proper to remark that in the very act under which these cases arose it is provided that "every railway company . . . . working railways . . . . which form part of a continuous line of railway . . . . communication . . . . shall afford all due and reasonable facilities for receiving and forwarding by one of such railways . . . . all the traffic arriving by the other, without any unreasonable delay, and without any . . . . preference or advantage, or prejudice or disadvantage, ... and so that no obstruction may be offered to the public desirous of using such railways . . . . as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways . . . . of the several companies, be at all times afforded to the public in that behalf." If complaint was made of a violation of this provision, application could be made to the courts for relief. Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done, and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy.

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do

with this case as it is now presented. The question here is whether the Denver & New Orleans Company would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to

Dismiss the bill without prejudice.

DALLAS COUNTY *v.* McKENZIE.

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

Submitted January 16th, 1884.—Decided March 3d, 1884.

Evidence—Municipal Bonds.

Ralls County v. *Douglas*, 105 U. S. 728, relating to bonds in counties in Missouri issued in payment of subscriptions to railway stock, approved and followed.

Marcy v. *Township of Oswego*, 92 U. S. 637, *Humboldt Township* v. *Long*, 92 U. S. 642, and *Wilson* v. *Salamanca*, 99 U. S. 499, relating to the validity of such bonds in the hands of a bona fide holder, approved and followed.

When the records of a County Court show that orders for subscriptions to stock were made at adjourned and special terms at which all the judges were present, and that the last order was made at a regular term, it will be presumed, in the absence of anything to the contrary, that the adjourned and special terms were regularly called and held.

This was an action to recover the amounts due on interest coupons of municipal bonds issued in payment of a subscription for $85,000 to railway stock. The bonds contained the following recital:

"This bond is issued pursuant to an order of the County Court of the county of Dallas, made on the 18th of May, A. D. 1871, and amended on the 19th of June, A. D. 1871, and on the 12th of August, A. D. 1871."

There was no vote of the taxpayers of the county to authorize the subscription. The order of the County Court made on the 18th May, purported to be made at "an adjourned term." The record did not show how this became an adjourned term. It was assigned as error that "the Circuit Court erred in admitting in evidence the orders of the County Court of Dallas County over the objections of plaintiff in error."

Mr. John P. Ellis for plaintiff in error.

Mr. J. B. Henderson, *Mr. Thomas C. Fletcher* and *Mr. Geo. D. Reynolds* for defendant in error.

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

It is no longer an open question in this court that bonds issued by counties in Missouri, during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies without a vote of the people, are valid if the subscription was made under authority granted before the adoption of the Constitution of 1865 which did not require such a vote to be taken. In *Ralls County* v. *Douglass*, 105 U. S. 728, the cases in the Supreme Court of the State and in this court bearing on that question are referred to, and our conclusion distinctly stated. We there declined to follow the case of *State* v. *Dallas County Court*, 72 Mo. 329, decided in 1878, which substantially overruled a long line of cases in the Supreme Court of the State on which our earlier decisions were predicated.

In *Marcy* v. *Township of Oswego*, 92 U. S. 637, and *Humboldt Township* v. *Long*, Ib. 642, followed in *Wilson* v. *Salamanca*, 99 U. S. 499, it was expressly decided that municipal bonds were not invalid in the hands of a *bona fide* holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue. It is an admitted fact in this case that McKenzie, the defendant in error, is a *bona fide holder* for value of the coupons sued on, and the recitals, which are almost in the exact language of those in *Wilson* v. *Salamanca*, *supra*, imply authority for the issue of the bonds from which they were cut. Consequently, in this case, the excessive issue is no defence.

Syllabus.

The records of the County Court which were put in evidence show affirmatively that all the justices were present and acting at the adjourned and special terms, when the orders were made directing the subscription to the stock and providing as to the terms of the contract. The last order was made at a regular term. Under these circumstances, it is certainly to be presumed, in the absence of anything to the contrary, that the terms were regularly called and held. It was, therefore, not error to admit the records in evidence without proof of the order for the adjourned term, or the call for the special term. The fact that the order of the 7th of August, 1871, is referred to in the recitals of the bond as having been made on the 12th, is unimportant. *Smith* v. *County of Clark*, 54 Mo. 58.

The judgment is affirmed.

UNITED STATES *v.* BRINDLE.

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

Argued January 18th, 1884.—Decided March 3d, 1884.

Office—Public Lands—Salary—Statutes.

A receiver of public moneys for a district of public lands subject to sale where the annual salary is $2,500, is only entitled to retain from the military bounty-land fees received by him during his term of office sufficient, with his commissions on cash sales of public lands, to make up his annual salary. *United States* v. *Babbit*, 1 Black, 55, adhered to.

A receiver of moneys from the sale of public lands whose annual salary amounted to $2,500, was also appointed agent for the sale of Indian trust lands under the treaty of July 17th, 1854, with the Delaware Indians, 10 Stat. 1048: *Held*, That he was entitled to commissions on the sales of Indian lands made by him, although they increased his annual compensation to a greater amount than $2,500.

§ 18 of the Act of August 31st, 1852, 10 Stat. 100 [Rev. Stat. § 1763], which provided that "no person hereafter who holds or shall hold any office under the government of the United States, whose salary or annual compensation shall amount to the sum of $2,500, shall receive compensation for discharging the duties of any other office," did not forbid the allowance of extra

compensation to such an officer for the performance of duties not imposed upon him by an office under the government of the United States. *Converse* v. *The United States*, 21 How. 463, cited and approved to this extent.

The plaintiff in error as plaintiff below sued the defendant to recover a balance claimed to be in his hands as receiver of moneys from the sale of public lands in Kansas. The defendant answered, denying liability, and setting up a claim to commissions on the amount received by him from sales of public lands, and also a claim to commissions on amounts received by him from sales of Indian lands. The latter claim was set up on sales made by him as agent under the treaty of July 17th, 1854, with the Delaware Indians, 10 Stat. 1048.

A *pro forma* judgment was entered below for the defendant. The plaintiff below brought the cause here by writ of error.

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

Mr. M. F. Morris (*Mr. R. T. Merrick* and *Mr. John H. Sloane* were with him), for defendant in error.

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

Two general questions are presented by the special verdict in this case:

1. Whether Brindle, the defendant in error, as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, is entitled to the military bounty-land fees received by him during his term of office, over and above the amount required, with his commissions on cash sales of public lands, to make up his annual salary of $2,500 per year; and,

2. Whether he is entitled to commissions on sales of Indian trust lands in addition to his compensation as such receiver of public moneys.

The first of these questions is answered in the negative on the authority of *United States* v. *Babbit*, 1 Black, 55, decided in 1861, and reaffirmed in 1877. 95 U. S. 335. The rule settled in that case ought not to be disturbed at this late day.

The facts on which the claim for commissions on sales of Indian trust lands depend are these:

On the 17th of July, 1854, a treaty was concluded with the

Delaware tribe of Indians, 10 Stat. 1048, the material parts of which are as follows:

"Art. 1. The Delaware tribe of Indians hereby cede, relinquish, and quit-claim to the United States all their right, title, and interest in and to their country," describing it, and also their right, title, and interest in what was then known as "the outlet."

"Art. 2. The United States hereby agree to have the ceded country (excepting the said 'outlet'), surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed, such survey to be commenced and prosecuted as the President of the United States may deem best. And the said President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

"Art. 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quit-claim to the United States, the said tract of country hereinbefore described as the 'outlet.' And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sale of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same."

Another article provided for the permanent investment of such of the proceeds as were not required for the present

wants of the Indians, and for the disposition of the interest on the investments.

On the 10th of August, in the same year, the Kaskaskias and Peorias, and certain tribes of the Piankeshaw and Wea Indians, ceded certain of their lands to the United States by a treaty the same in its general provisions as that of the Delawares. 10 Stat. 1082.

§ 5 of the act of March 3d, 1855, c. 204, 10 Stat. 700, passed after these treaties were concluded, is as follows:

"That to enable the President of the United States to carry out, in good faith, the recent treaties with the . . . Delawares . . . and the united tribes of Kaskaskias and Peorias, Piankeshaws and Weas, . . . there shall be, and hereby is, appropriated, the sum of twenty thousand dollars, in addition to the appropriations heretofore made, for the execution of the surveys required by said treaties; and where the net proceeds of the lands ceded by either of said treaties are required to be paid over to the Indians, the President shall cause said lands, or such parts thereof as he may deem proper, to be classified and valued, and when such classification and valuation have been made to his satisfaction, he shall cause said lands to be offered at public sale, by legal subdivisions or town lots, at such times and places, and in such manner and quantity, as to him shall appear proper and necessary to carry out faithfully the stipulations in said treaties; and said lands shall not be sold at private sale for a less price than that fixed by the valuation aforesaid, nor shall any land be sold at a less price than one dollar and twenty-five cents per acre, for three years, and thereafter as may be directed by law pursuant to the treaty."

By an act of July 9th, 1832, c. 174, 4 Stat. 564, as afterwards amended, and now § 463 of the Revised Statutes, the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, has the management of Indian affairs, and of all matters arising out of Indian relations. The same act (now § 462 Rev. Stat.) also provides that all accounts and vouchers for claims and disbursements connected

with Indian affairs shall be transmitted to the commissioner for administrative examination, and by him passed to the proper accounting officer of the Treasury Department for settlement. The Second Auditor of the Treasury is charged by law with the duty of receiving and examining all accounts relating to Indian affairs and transmitting them to the second comptroller for his decision thereon. Rev. Stat., § 277, subdivision second.

There must be appointed a register of the land office and a receiver of public moneys for each land district established by law, to reside at the place where the land office to which he is appointed is kept. Rev. Stat., §§ 2234, 2235, re-enacting other statutes to the same effect.

The Commissioner of the General Land Office has power to audit and settle all public accounts relating to the public lands, and to transmit the accounts and vouchers to the First Comptroller of the Treasury for his examination and decision thereon. Rev. Stat., § 456.

§ 18 of the act of August 31, 1852, "making appropriations for the civil and diplomatic expenses of the government," c. 108 10 Stat. 100, is as follows:

> "No person hereafter who holds or shall hold, any office under the government of the United States, whose salary or annual compensation shall amount to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office."

On the 24th of October, 1856, Brindle, the defendant in error, "was duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the Territory of Kansas, under the treaty with the Delaware tribe of Indians." On the 18th of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the 15th of May, 1857, he was duly appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw

and Wea Indian confederated tribes of Indians at Paoli, Kansas Territory.

These Indian trust lands were never public lands of the United States, and were never subject to sale at the Lecompton land office. The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. The treaties are full of evidence to that effect. It is unnecessary to state it in detail.

It follows that it was never any part of the official duty of Brindle, as receiver of public moneys at the Lecompton land office, to sell the trust lands or receive the payments therefor. His duties in connection with that office were to receive and account for moneys paid for public lands, that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times in equity the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the lands.

When, therefore, Brindle was appointed special receiver and superintendent, to assist the special commissioner in disposing of the trust lands, he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office. The President was, both by the treaties and the act of 1855, charged with the duty of selling the lands, and under his instructions Brindle was employed to assist in that work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect.

In *Converse* v. *United States*, 21 How. 463, it was decided that provisions in appropriation acts, like section 18 of the act of August 31st, 1852, prohibiting an officer from receiving more than one salary, could not by "fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." P. 471. In the present case the employment was for a special service in connection with a special trust assumed by the United States for the benefit of certain Indian tribes, in which express provisions were made for the payment of expenses. In legal effect, the appointment was to an agency for the sale of lands for the Indians, with an implied understanding that a reasonable compensation would be paid for the services rendered. So far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid. This case comes, therefore, within the rule in *Converse* v. *United States*, and Brindle is not excluded by the act of 1852 from demanding compensation for this service by reason of his being receiver of the land office.

What we have already said disposes of one of the incidental questions presented by the verdict, to wit, whether the first or second Comptroller of the Treasury was the proper officer under the law to state the accounts of Brindle as special receiver, &c. As the lands were Indian lands and the accounts related to and were connected with Indian affairs, the law required them to be transmitted to the Commissioner of Indian Affairs, to be passed by him to the second auditor, and by him to the second comptroller for examination and certificate of the balances arising thereon. This disposes of all the questions presented in the argument.

It follows that the judgment in favor of Brindle for $50,979.19 was erroneous, and that it should have been for $14,541.78, according to the alternative finding marked G in the special verdict.

The judgment is therefore reversed, and the cause remanded with instructions to enter another judgment in favor of the defendant in error in accordance with the finding G; that is to say, for $14,541.78, *as of June 13th,* 1879, *the date of the verdict, the judgment to draw interest from that date.*

RICE *v.* SIOUX CITY & ST. PAUL RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Submitted January 14th, 1884.—Decided March 3d, 1884.

Public Lands—Statutes.

Claimants against the government under legislative grants of public land must show a clear title, as gifts of public domain are never to be presumed.

The grant of swamp lands to each of the States of the Union by the act of September 28th, 1850, 9 Stat. 519, did not confer a similar grant upon the Territories; and the subsequent admission of a Territory as a State under an act which provided that all laws of the United States not locally inapplicable should have the same force and effect within that State as in other States of the Union did not work a grant of swamp lands under the act of 1850.

Mr. John B. Sanborn for appellant.

Mr. E. C. Palmer for appellee.

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

This case briefly stated is as follows:

On the 28th of September, 1850, what is now known as the swamp-land act, c. 8, 9 Stat. 519, was passed by Congress. By sections 1, 2, and 3 swamp lands were defined and a special

grant made to the State of Arkansas. Section 4 is in these words:

"That the provisions of this act be extended to, and their benefits conferred upon, each of the other States of the Union, in which such swamp and overflowed lands, known or designated as aforesaid, may be situated."

Minnesota was then a Territory, and on the 3d of March, 1857, an act of Congress, c. 99, 11 Stat. 195, was passed, granting to that Territory, for the purpose of aiding in the construction of certain railroads, "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads." If when the lines of a road were definitely fixed it should appear that any of the sections included in the terms of the grant had been sold or otherwise appropriated by the United States, authority was given for the selection of others in lieu within fifteen miles of the line. All lands before reserved to the United States for the purpose of aiding in any object of internal improvement or for any other purpose whatever were excluded from the operation of the act, except for the right of way.

On the 11th of May, 1858, Minnesota was admitted into the Union as a State. 11 Stat. 285, c. 31. By the act of admission (sec. 3) "all the laws of the United States," "not locally inapplicable," were "to have the same force and effect within that State as in other States of the Union."

The line of what is now the Sioux City & St. Paul Railroad, built by a company entitled to the privileges of the act of March 3d, 1857, c. 99, was located in April, 1859, and the lands involved in this suit are odd numbered sections within the six mile limits according to that line.

On the 12th of March, 1860, Congress passed an act, c. 5, 12 Stat. 3, extending the provisions of the act of September 28th, 1850, c. 84, to the States of Minnesota and Oregon, subject to a proviso, as follows:

"That the grant hereby made shall not include any lands which

the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act."

The lands now in dispute were certified to the State under this act, and conveyed by the governor to Rice, the appellant. This suit was brought by the railroad company to establish its title under the railroad grant by the act of March 3d, 1857, c. 99, as against the swamp-land certificate. The Circuit Court sustained the claim of the railroad company and decreed accordingly. To reverse that decree Rice took this appeal. The single question presented is, whether the lands passed under the railroad or the swamp-land grant.

That the swamp-land act of 1850 operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions is well settled. *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345. As Minnesota was a Territory in 1850, it is conceded that the title to the swamp lands within its territorial limits did not pass out of the United States at that time, because there was then no grantee in existence. It is contended, however, that on the admission of the State into the Union in 1858, the grant, which had before rested in compact only, became absolute, and carried the title to the State, as against the United States and subsequent grantees, from the date of the original act, September 28th, 1850, or at least from the date of the admission of the State.

In *French* v. *Fyan*, *supra*, it was said in the opinion, at one place, "that this court has decided more than once that the swamp-land act was a grant *in præsenti* by which the title to those lands passed at once to the State in which they lay, except to States admitted to the Union after its passage;" and at another, "for while the title under the swamp-land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards." From these expressions it is argued that the question of the right of new States to claim the benefits conferred by

the provisions of the act has been settled. The case which was then before the court related only to the operation of the act in a State which was in existence at the time of its passage, and called for no consideration of its effect on new States. All that was said as to new States was merely incidental to the main question, and by no means intended as an authoritative declaration of the law applicable to that class of cases. We feel quite at liberty, therefore, to consider that question an open one and to treat it accordingly.

Donations of the public domain for any purpose are never to be presumed. Those who claim against the government under legislative grants must show a clear title. The grant under the act of 1850 was to Arkansas and "the other States of the Union." Arkansas was an existing State, and the grant was to all the States *in præsenti*. It was to operate upon existing things, and with reference to an existing state of facts. It granted "the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act." The Secretary of the Interior was required to make out, "as soon as practicable," lists and plats of lands, the greater part of which were "wet and unfit for cultivation," and to transmit the lists, &c., to the governor of the proper State. There is not a word in the act to show that the grant was to be a continuing one. It was to take effect at once, between an existing grantor and several separate existing grantees. There were undoubtedly at that time lands "wet and unfit for cultivation" in the Territories as well as in the States. Confessedly no grant was made to the Territories or any of them. This shows clearly the intention of Congress not to dispose of any more swamp lands, at that time and in that way, than those in the States. It was clearly within the power of Congress to make the same grants to Territories if it had been considered desirable. Cases are numerous in which grants were made to Territories to aid in building railroads. The act of March 3d, 1857, making the grant to the Territory of Minnesota is one instance of that kind. The swamp-land grants were made to enable the States to construct the necessary levees and drains for the reclamation of the lands. They were, therefore,

in aid of public improvements, and could as well be made to the Territories as to the States.

At the time of the original grant it was not known when another State would be admitted into the Union, nor what would then be the wants of the United States or the condition of the swamp lands. Events might happen that would render such a grant at that time entirely inappropriate. Seven States have been admitted since, three before the late civil war began and four afterwards, and in six of them there must have been public lands which were in part wet and unfit for cultivation, Minnesota was the first and Oregon the second State admitted. None were admitted until nearly eight years after the act was passed, and the last did not come in until nearly twenty-five years had elapsed. If the interpretation which has been put on the act by the appellant is the true one, every parcel of public land in the Territories, as subdivided under the law for sale, the greater part of which was "wet and unfit for cultivation" on the 28th of September, 1850, was from that date reserved to and set apart by the United States for donation to any new State that might thereafter be admitted to the Union, within whose boundaries it should fall. Nothing was reserved from the railroad grant to the Territory of Minnesota on the 3d of March, 1857, except lands theretofore reserved by the United States for some purpose; and if these lands were reserved at all, they were for the purposes of this donation. If reserved, they could neither be sold to purchasers nor settled upon for pre-emption, for the reservation is of lands unsold at the date of the passage of the act.

Such a reservation was clearly not in the mind of Congress, and the subsequent legislation as well as the language of the act shows it. Of the language of the act enough has already been said. We, therefore, turn to the subsequent legislation. As has been seen, Minnesota was admitted into the Union as a State on the 11th of May, 1858. Oregon was admitted on the 14th of February, 1859. 11 Stat. 383, c. 33. In the acts of admission there were specific grants of land to each State for certain purposes, but no reference was made directly or indirectly to the swamp lands. All the grants made were in

consideration, among other things, of an undertaking on the part of the State, irrevocable without the consent of the United States, that the State should never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress might find necessary for securing the title in the soil to *bona fide* purchasers. It is of some significance also that the act of Congress authorizing the people of the Territory of Minnesota to form a State government preparatory to their admission into the Union, c. 6, 11 Stat. 166, in which the propositions for grants of lands were contained, was passed on the same day with the act making the railroad grant under which the appellee now claims. Following this, on the 12th of March, 1860, nearly two years after Minnesota was admitted, and one year after the admission of Oregon, the act extending in express terms the provisions of the swamp-land act to these States was passed. In this way, as we think, for the first time the swamp lands falling within the description of the act of 1850, and then unsold or otherwise disposed of, were granted. No similar laws have been passed in favor of States which have since been admitted into the Union. In 1873, when the statutes of the United States were revised, the swamp-land acts were re-enacted in sections 2479 and some others which followed. § 2479 is as follows:

"To enable the several States (but not including the States of Kansas, Nebraska and Nevada) to construct the necessary levees and drains to redeem the swamp and overflowed lands therein, the whole of the swamp and overflowed lands made unfit thereby for cultivation and remaining unsold on or after the 28th day of September, A. D. 1850, are granted and belong to the several States respectively in which such lands are situated: *Provided, however*, That said grant of swamp and overflowed lands, as to the States of California, Minnesota and Oregon, is subject to the limitations, restrictions and conditions hereinafter named and specified as applicable to said three last States respectively."

Then follows, § 2490, continuing in force the specific provisions in the act of March 12th, 1860, extending the benefits of the act to Minnesota and Oregon.

Statement of Facts..

Much stress was laid in the argument on the provision in the act admitting Minnesota into the Union, to the effect that "all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in the other States of the Union." This is disposed of by what has already been said. As the act of 1850 related only to States in existence when it was passed, it was locally inapplicable to Minnesota until its provisions were actually extended to that State by the act of March 12th, 1860. It follows that the title of the railroad company under the act of 1857 is superior to that of the appellant. The lands were not at the time of the passage of that act reserved to the United States for any purpose, and they were not, therefore, excepted from its operation.

The decree of the Circuit Court is affirmed.

CHEELY & Others *v.* CLAYTON.

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

Submitted January 10th, 1884.—Decided March 10th, 1884.

Divorce.

A decree of divorce from the bond of matrimony, obtained by a husband in a Territorial Court, upon notice to his absent wife by publication, insufficient to support the jurisdiction to grant the divorce under the statutes of the Territory, as repeatedly and uniformly construed by the highest court of the State after its admission into the Union, is no bar to an action by the wife, after the husband's death, in the Circuit Court of the United States, to recover such an estate in his land as the local statutes give to a widow.

This was a writ of error sued out by Sarah A. Clayton and her tenant, Richard Mackey, citizens of Colorado, to reverse a judgment of the Circuit Court of the United States for the District of Colorado, in an action brought against them by Sarah A. Clayton, describing herself a citizen and resident of Illinois, and widow and heir-at-law of James W. Clayton, deceased, to recover a tract of land in the County of Jefferson

and State of Colorado, and a lode, mining claim and quartz mill in Gilpin County in that State, and the rents, issues and profits thereof.

Trial by jury having been duly waived, the case was tried by the court, which found the following facts:

"1st. That the plaintiff and James W. Clayton intermarried at Wheeling, in the State of Virginia, on the 3d of May, 1855.

"2d. That on the first day of March, 1867, the said James W. Clayton filed his bill for divorce against the said plaintiff in the District Court of Gilpin County, Colorado Territory, which was a court of competent jurisdiction in that behalf; that the cause alleged in said bill as ground for divorce was that the said James W. Clayton had in 1863 taken the defendant therein, the plaintiff in this suit, to the State of Illinois, and that she had refused to return to Colorado, and had refused to live with said James W. Clayton, although he had often requested her to do so, and had offered to furnish to her a home and sufficient maintenance in Colorado.

"3d. That the plaintiff in this suit was, on the said first day of March, 1867, and thereafter until the present time, a citizen and resident of the State of Illinois.

"4th. That at the time of filing said bill in the District Court of Gilpin County, a summons was issued out of said court, directed to the sheriff of said Gilpin County to execute, commanding him to summon the said plaintiff to answer the said bill, which summons was in all respects as required by the law of the Territory then in force regulating such matters.

"5th. That the sheriff of Gilpin County, on the same first day March, 1867, returned the said summons into the said District Court of Gilpin County with his indorsement thereon that the defendant therein, the plaintiff in this suit, was not found in his county.

"6th. That a notice of the pendency of said suit in the said District Court of Gilpin County was published in a weekly newspaper printed and published in the said Gilpin County, for four weeks, beginning with and next after the first day of March, 1867; and the first publication of said notice was more than thirty days before the return day of said summons; that the certificate showing such publication was to the effect that the first publication of

such notice was on the 1st of March, 1867, and the last publication was on the 26th of March, 1867 ; that said certificate was filed in said cause on the 22d of March, 1867.

"7th. That the defendant in the said divorce suit (the plaintiff in this suit) was not notified of the pendency thereof except as aforesaid.

"8th. That a decree was entered in the said suit, brought in the said District Court of Gilpin County, on the 26th of June, 1868, divorcing the said James W. Clayton from the defendant therein (the plaintiff in this suit), which said decree recites at the comment thereof that it appearing to the court that due service had been had upon said defendant before the 4th of April, 1867, and that such service had been made, according to the laws of the Territory of Colorado and the rules and practice of that court, more than ten days previous to the first day of the April term of said court, and that the defendant was called and defaulted.

"9th. That the said James W. Clayton and the defendant in this suit, Sarah A. Clayton, intermarried in the year 1870, at and within the State of Colorado.

"10th. That the said James W. Clayton departed this life about the 10th of October, 1874, leaving the said plaintiff, and two children, issue of his marriage with the said plaintiff, him surviving.

"11th. That at and before the time of his death the said James W. Clayton was seized in fee of the premises described in the complaint as situated in Jefferson County.

"12th. That at and before the time of his death the said James W. Clayton was the owner of the premises described in the complaint as situated in the County of Gilpin, and in virtue of such ownership was entitled to hold, occupy and possess the same.

"13th. That the value of the use and occupation of the said premises since the 3d of April, 1877, and the rents, issues, and profits thereof, as to the undivided one-half part thereof, is seventeen hundred and twenty-five dollars."

Upon the facts so found, the court made the following rulings and conclusions in matter of law :

"First. That because the said defendant therein (the plaintiff in this suit) was not properly notified of the pendency of said

suit in the District Court of Gilpin County, the decree of divorce entered therein was and is void and of no effect.

"Second. That the said plaintiff in this suit, in virtue of her marriage with the said James W. Clayton, was and is, with the surviving children before mentioned, his heir at law, and as such is entitled to one-half part of his estate.

"Third. That the said plaintiff is the owner in fee of the undivided one-half part of the estate described in the complaint as situated in Jefferson County.

"Fourth. That the said plaintiff is the owner and under the laws of the State is entitled to hold, occupy and possess the undivided one-half part of the estate described in the complaint as situated in Gilpin County.

"Fifth. That the said plaintiff is entitled to recover of the said defendants, as and for the rents, issues, and profits of said premises, and damages for the detention thereof, the said sum of seventeen hundred and twenty-five dollars."

Judgment was accordingly rendered for the plaintiff on March 3d, 1879; and the defendants tendered a bill of exceptions, and sued out this writ of error. The plaintiff in error Clayton having died since the entry of the case in this court, her heirs have been made parties in her stead.

Mr. Willard Teller for plaintiffs in error.

Mr. L. C. Rockwell for defendant in error.

Mr. Justice Gray delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

The true question in this case is, which of the two Sarah A. Claytons was the lawful wife of James W. Clayton at the time of his death, and as such entitled by the statutes of Colorado to inherit one-half of his real estate. Revised Statutes of 1867, ch. 23; General Laws of 1877, ch. 26. In order to avoid the confusion arising from the identity of name, from their transposition on the docket of this court, and from the death of one of them pending the writ of error, it will be convenient to designate them, as in the record of the court below, the defendant in error as the plaintiff, and the plaintiff in error as the

defendant. Mackey, the other plaintiff in error, occupied the land as tenant only, and needs no further mention.

The courts of the State of the domicil of the parties doubtless have jurisdiction to decree a divorce, in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offence for which the divorce is granted; and a divorce so obtained is valid everywhere. Story Conflict of Laws, § 230 *a*; *Cheever* v. *Wilson*, 9 Wall. 108; *Harvey* v. *Farnie*, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State. *Burlen* v. *Shannon*, 115 Mass. 438; *Hunt* v. *Hunt*, 72 N. Y. 218. But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires.

The decree of divorce set up in this case was obtained before the admission of Colorado into the Union, and under the Revised Statutes of 1867 of the Territory of Colorado.

By chapter 26 of those statutes, relating to divorce and alimony, each District Court of the Territory, sitting as a court of chancery, had jurisdiction, upon the like process, practice and proceedings as in other cases in chancery, to decree a divorce from the bond of matrimony to either husband or wife, for the other's wilful desertion and absence for one year without reasonable cause.

Chapter 13 of the same statutes, relating to chancery proceedings, contained the following provisions: By §§ 5, 6, upon the filing of the bill the clerk was to issue a summons, returnable at the next term after its date, directed to the sheriff of the county in which the defendant resided, if a resident of the Territory, requiring him to appear and answer the bill on the return day of the summons. By § 7, service of the summons

was to be made by reading it to the defendant, or leaving a copy with one of his family at his usual place of abode, ten days before the return day. By § 8, whenever any complainant filed in the clerk's office an affidavit showing that a defendant resided or had gone out of the Territory, the clerk was to cause notice to be published in a newspaper in the Territory for four successive weeks, the first publication to be made at least thirty days before the return day. At the end of that section was this clause: "But this proceeding shall not dispense with the usual exertion, on the part of the sheriff, to serve the summons." By § 9, if thirty days intervened between the filing of such affidavit and the return day, or if service of process was made, and the defendant did not appear on the return day, the bill might be taken for confessed. By § 10, if the case was continued for want of due publication or service, the like proceeding might be had at the next term as might have been had at the first term. By § 11, if the summons was not returned, executed, on the return day, the clerk might issue a further summons. By § 12, the complainant might cause personal service to be made, on any defendant residing or being out of the Territory, not less than thirty days before the commencement of the term at which he was required to appear; and such service, proved by affidavit, was to be as effectual as if made in the usual form within the limits of the Territory. By § 15, any defendant, not summoned or notified to appear, as above required, and against whom a final decree should be entered, might within one year after notice to him in writing of the decree, or within three years after the decree, if no such notice should be given him, apply to the court and obtain a hearing, as if he had seasonably appeared and no decree had been made; and at the end of three years the decree, if not so set aside, should be deemed and adjudged confirmed against him, and the court might make such further order in the premises as should be requisite and just.

Under those statutes, as repeatedly and uniformly construed by the higher courts of Colorado, when the sheriff returns the summons on the day of its date, instead of keeping it in his possession until the return day for the purpose of making the

usual exertions to serve it, a notice by publication only will not sustain a decree.

The Supreme Court of the Territory, at February Term, 1873, in *Palmer* v. *Cowdrey*, 2 Colorado, 1, and *Wise* v. *Brocker*, Ib. note, reversed decrees in ordinary proceedings in chancery for such a defect, and assigned its reasons as follows:

"The law intends that service of the summons shall be made on the defendant, if he can be found within the jurisdiction during the life of the writ. If the defendant is not in the county at the time the summons is placed in the hands of the officer, he may come into the county before the return day, and if notice by publication has been given, it is nevertheless the duty of the officer to serve the summons, if he can find the defendant in his bailiwick. To the performance of this duty it is necessary that the officer should retain the summons in his hands until the return day; for after the return of *non inventus* of course the officer cannot obey the command of the writ. In the present case the sheriff returned the summons more than one month before the return day, and thereafter he could not comply with the statute by making the usual exertion to serve it. Whether the defendant came into the county after the return and during the life of the writ, we do not know, nor can we be informed except by the return of the proper officer. By the return as it stands in the record, it does not appear that service could not have been made during the life of the writ, and the court had no authority to proceed upon notice by publication without such evidence." 2 Colorado, 6.

Since the admission of Colorado into the Union, the Supreme Court of the State, at December Term, 1877, made a like decision, for the same reasons, and said:

"Without holding the writ until the return day and a proper return accordingly, the publication of notice will not avail to confer jurisdiction upon the court to render final decree upon the petition." *Vance* v. *Maroney*, 4 Colorado, 47, 49.

Upon the strength, and as the necessary result, of those decisions, the Supreme Court of the State has twice held that

decrees of divorce, obtained under such circumstances, were wholly void, for want of jurisdiction in the court that granted them; that the provision of the statute, allowing a defendant, on whom constructive service only had been made, to apply within three years to set aside the decree, did not make the decree valid when the constructive service was so defective; and that such a decree of divorce was no bar to an action by the wife to recover as the husband's widow a share of his real estate. One of the cases in which it was so held, decided at December Term, 1878, before the judgment of the Circuit Court in the case at bar, was an action by this plaintiff against this defendant and the administrator of James W. Clayton, in which the defendants set up the decree of divorce now in question. *Clayton* v. *Clayton*, 4 Colorado, 410. The other is a very recent decision, not yet officially published. *Israel* v. *Arthur*, 7 Colorado.

The fact that the statutes of the Territory, relating to chancery proceedings, having been repealed by the Code of Civil Procedure of the State of Colorado, were no longer in force at the time of the last two decisions, does not lessen the weight of those decisions of the highest court of Colorado as evidence of the law of Colorado upon the construction of its statutes affecting the status of citizens of the State, and the title in, or right of possession of, land within its limits.

That James W. Clayton was a citizen of Colorado is necessarily implied in the record, and especially in the finding of the court below that the Territorial court had jurisdiction to entertain his application for divorce; and it is the very foundation of the argument in support of this writ of error. But the service in the proceedings for divorce was exactly the same as was held insufficient to support the jurisdiction of the court to make a decree in each of the cases in the Colorado Reports, above cited. The notice and return, appearing of record in the proceedings for divorce, control the general recital in the decree that due service had been made upon the defendant therein. *Galpin* v. *Page*, 18 Wall. 350; *Settlemier* v. *Sullivan*, 97 U. S. 444.

The decree of divorce being void for the insufficiency of the

service, and the status of Clayton and this plaintiff therefore that of husband and wife, according to the law of Colorado, as declared by its highest court, she was entitled as his widow to the share which the law of that State gives to a widow in the husband's land within the State.

We do not rest our judgment merely upon the ground that the land of which possession is demanded is in Colorado; for, if the parties had been domiciled and divorced elsewhere, the question whether they were husband and wife at the time of his death might, even as affecting her right in his land in Colorado, have been governed by the law of their domicil, although the share which a widow should take in her husband's land would of course be determined by the law of the State in which the land was. See *Meister* v. *Moore*, 96 U. S. 76; *Ross* v. *Ross*, 129 Mass. 243, 247, 248, and cases cited.

Nor do we give any weight to the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the State of Illinois; for it is hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicil in another State; or how, if the Territorial court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce.

However that may be, the wife, since the husband's death, had the right to elect her own domicil, and at the time of bringing the present action was a citizen of Illinois, and as such entitled to sue in the Circuit Court of the United States. And the ground upon which we affirm the judgment of that court is, that by the law of Colorado, as declared by the Supreme Court of the State, the decree of divorce was void, for want of the notice to her required by the local statutes.

There could hardly be a better illustration of the fitness and justice of this conclusion than is afforded by the facts of this case. To reverse the judgment of the Circuit Court would be to leave the status of the plaintiff, as widow and heir of James W. Clayton, established by the State court as to one parcel of

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land, and denied by this court as to other lands within the same State. It was said in argument, indeed, that part of the land sought to be recovered was the same in both actions; but this does not appear upon the record before us.

Judgment affirmed.

FREEDMAN'S SAVINGS & TRUST COMPANY *v.* EARLE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued February 1st, 1884.—Decided March 10th, 1884.

Judgment Lien on Equity of Redemption.

It was decided in *Morsell* v. *First National Bank*, 91 U. S. 357, that in the District of Columbia, following the laws of Maryland, judgments at law were not liens upon the interest of judgment debtors who had previously conveyed lands to a trustee in trust for the payment of a debt secured thereby. It is now decided that the creditor of such judgment debtor, by filing his bill in equity to take an account of the debt secured by the trust deed, and to have the premises sold subject thereto and the proceeds of the sale applied to the satisfaction of the judgment, may obtain a priority of lien upon the equitable interest of the judgment debtor in the property, subject to payment of the debt.

The doctrine of equitable assets considered and the English and American cases reviewed.

The appellee recovered a judgment against Robert P. Dodge in the Supreme Court of the District of Columbia on January 4th, 1878, for $7,700, with interest and costs, which was revived April 2d, 1879, and on which a *fi. fa.* was issued April 9th, 1879, and returned *nulla bona.*

On June 1st, 1877, Dodge, the judgment debtor, being then seized in fee simple of certain real estate in the city of Georgetown in this district, conveyed the same by deed duly recorded to Charles H. Cragin, Jr., in trust, to secure to Nannie B. Blackford payment of the sum of $2,000, with interest, according to certain promissory notes given therefor, and which were indorsed to Charles H. Cragin.

On April 10th, 1879, the appellee filed his bill in equity, to

which Dodge, Charles H. Cragin, Jr., Charles H. Cragin, and Nannie B. Blackford were made defendants, the object and prayer of which were to take an account of the debt secured by the trust deed, and, subject thereto, to have the premises sold and the proceeds of the sale applied to the satisfaction of the appellee's judgment.

The defendants having appeared and answered, a decree according to the prayer of the bill was rendered June 11th, 1879.

On December 27th, 1879, leave therefor having been obtained, the appellants filed a petition in the cause, setting forth the recovery of a judgment in their favor against the defendant Dodge in the sum of $7,386.47, with interest and costs, on February 11th, 1879, in the Supreme Court of the District of Columbia, and that on December 2d, a *fi. fa.* had been issued thereon and returned *nulla bona* December 19th, 1879; and praying that they may be made parties complainant in the cause; that the equitable interest of Dodge in the real estate described be subjected to the satisfaction of their judgment; that the same be sold, and the proceeds of sale be brought into court and distributed according to law. To this petition Dodge answered, admitting the recovery of the judgment as alleged.

On May 25th, 1880, the trustee appointed for that purpose under the decree of June 11th, 1879, reported a sale of the premises for $5,525, and the same, on June 25th, 1880, was confirmed. The cause was then referred to an auditor to state the account of the trustee to sell, whose report showed an appropriation of the proceeds of the sale, after payment of costs, in payment to that extent of the appellee's judgment. On exceptions to this report, a final decree confirming the same was made September 14th, 1880, which decree on appeal to the general term was affirmed on December 10th, 1880. From that decree this appeal was prosecuted.

Mr. Enoch Totten for appellant.

Mr. Calderon Carlisle and *Mr. J. D. McPherson* for appellee.

Opinion of the Court.

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the foregoing language he continued:

As ground of reversal, it is assigned by the appellant that the proceeds of the sale of the equitable interest of Dodge, the judgment debtor, should have been distributed *pro rata* between the appellees and the appellants, instead of having been awarded exclusively to the appellee. It is contended on behalf of the appellants that the interest of the judgment debtor in the land, being an equity merely, is not subject to execution at law; and as it can be reached by judgment creditors only through the intervention and by the aid of a court of equity, it becomes of the nature of equitable assets, and when sold, the proceeds will be applied, according to the maxim that equality is equity, ratably among the creditors.

In the case of *Morsell* v. *First National Bank*, 91 U. S. 357, it was decided that, under the laws of Maryland in force in this District, judgments at law were not liens upon the interest of judgment debtors who had previously conveyed lands to a trustee in trust for the payment of a debt secured thereby. Mr. Justice Swayne said (p. 361): "The judgments in nowise affected the trust premises until the bill was filed. That created a lien in favor of the judgment creditors. There was none before." And it was accordingly held that in the distribution of the proceeds of sale the judgments must be postponed to debts secured by other deeds of trust made before the filing of the bill, but subsequent to the rendition of the judgments. But that decision leaves open the question arising here between judgment creditors seeking satisfaction in equity out of the debtor's equitable estate. It becomes necessary, therefore, to determine the nature of the right and the principle of distribution which arises from it.

At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the *cestui que trust* for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution creditor could

acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the *cestui que trust*, the latter would be entitled to relief, by injunction or otherwise, in equity. Lewin on Trusts, 181, 186; 2 Spence Eq. Jur. 39.

But as courts of equity regarded the *cestui que trust* as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the legal title was made subservient, so in its eyes, the estate of the *cestui que trust* came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of the law from being made the means and instruments of wrong, injustice and oppression.

Thus equitable estates were held to be assignable and could be conveyed or devised; were subject to the rules of descent applicable to legal estates; to the tenancy by courtesy, though not to dower, by an anomalous exception afterwards corrected by statute, 3 and 4 Will. IV., c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was applied by the court of chancery by analogy to a trust estate. 1 Spence Eq. Jur. 502.

As judgment creditors, after the statute of Westminster, 13 Ed. I, c. 18, were entitled, by the writ of *elegit*, to be put in the possession of a moiety of the lands of the debtor, until satisfaction of the judgment; and as it would be contrary to equity to permit a debtor to withdraw his lands from liability to his judgment creditors, this analogy was at an early date extended, so as to give to judgment creditors similar benefits in respect to the equitable estate of their debtors; and as the remedies in favor of judgment creditors by way of execution upon the legal estate of their debtors have been enlarged, they have been imitated by a corresponding analogy as to equitable

estates by courts of equity. This is in pursuance of the principle stated in a pregnant sentence by Lord Northington, in *Burgess* v. *Wheate*, 1 Eden, 177–261, where he said; "For my own part, I know no instance where this court ever permitted the creation of a trust to affect the right of a third party." Ib. 151. It is embodied in the maxim, *æquitas sequitur legem.*

It was accordingly held by Lord Nottingham, in the anonymous case cited in *Balch* v. *Wastall*, 1 P. Wms. 445, "that one who had a judgment, and had lodged a *fieri facias* in the sheriff's hands, to which *nulla bona* was returned, might afterwards bring a bill against the defendant, or any other, to discover any of the goods or personal estate of the defendant, and by that means to effect the same;" and although Lord Keeper Bridgman, in *Pratt* v. *Colt*, Freeman's Cas. in Ch. by Hovenden, 139, refused to permit a trust estate, which had descended to the heir, to be extended upon an *elegit* on a judgment against his ancestor, the reporter adds, "but note that this hath not been taken to be a good demurrer by the old and best practisers, as little according with good reason, for the heir-at-law is as much chargeable with the ancestor's judgment as the executor with the testator's debts, and so equity ought to follow the law." Three years subsequently to this decision, the Statute of Frauds, 29 Car. II., c. 3, was enacted, the 10th section of which made trust estates in fee simple assets for the payment of debts, and subject to an *elegit* upon judgment against the *cestui que trust.* But this statute did not extend to chattels real, to trusts under which the debtor had not the whole interest, to equities of redemption, or to any equitable interest which had been parted with before execution sued out. *Forth* v. *Duke of Norfolk*, 4 Mad. 503. The statute of 5 Geo. II. c. 7, which made lands within the English colonies chargeable with debts, and subject to the like process of execution as personal estate, was in force in Maryland; but as it did not interfere with the established distinction between law and equity, it did not permit an equitable interest to be seized under a *fieri facias.* *Lessee of Smith* v. *McCann*, 24 How. 398. But as the effect of these statutes was to enlarge the operation of executions upon legal estates, so the

corresponding equitable remedy as to equitable estates was also enlarged, and as to them equitable executions were enforced to the same extent to which executions at law were enforceable upon estates subject to seizure under them.

This mere equity, consisting in the right to obtain the aid of the court in subjecting the equitable interest of the debtor, not being a lien at law or a specific charge in equity, nevertheless constitutes such an interest, and creates such a privity, as entitles the judgment creditors to redeem a prior mortgage, and succeeding thus to the rights of the mortgagee in England, where the doctrine of tacking prevailed, he was permitted to hold the whole estate as security for his judgment also, even when, by virtue of an *elegit* at law, he would be entitled only to a moiety of the debtor's land. And he could file his bill to redeem without previously issuing an execution. *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 407. The reason for this, assigned by Lord Cottenham in the case just cited, is, that inasmuch as the court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases; it gives to the party the right to come in and redeem other encumbrances upon the property.

But in other cases, when the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution, unsatisfied, which, however, is not essential. Lewin on Trusts, 513. But the execution must be sued out; for if the estate sought to be subjected is a legal estate and subject to be taken in execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law. *Jones* v. *Green*, 1 Wall. 330; and if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment creditor is bound nevertheless to put himself in the same position as if the estate were legal, because the action of the court converts the estate, so as to make it subject to an execution, as if it were

legal. The ground of the jurisdiction therefore is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior encumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the encumbrancers according to the order in which they may be entitled to participate. *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538.

It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, dates from the filing of the bill. "The creditor," says Chancellor Walworth, in *Edmeston* v. *Lyde*, 1 Paige Ch. 637–640, "whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;" and it would "seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit." As his lien begins with the filing of the bill, it is subject to all existing encumbrances, but is superior to all of subsequent date. As was said by this court in *Day* v. *Washburn*, 24 How. 352:

> "It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a court of chancery will enforce."

This is in strict accordance with the analogy of the law, as it was recognized that the judgment creditor who first extends

the land by *elegit* is thereby entitled to be first satisfied out of it. It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. *Rockhill* v. *Hanna*, 15 How. 189, 195; *Payne* v. *Drew*, 4 East. 523. The filing of the bill, in cases of equitable execution, is the beginning of executing it.

The passage cited from the opinion in *Day* v. *Washburn*, *supra*, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in *McDermott* v. *Strong*, 4 Johns. Ch. 687. He there said: "But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference, or lien on the property so placed in trust;" and "admitting that the plaintiffs had acquired, by their executions at law, *a legal preference to the assistance of this court* (and none but execution creditors at law are entitled to that assistance), that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, *pari passu*, yet whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court." The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent, the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors.

This case, often cited and never questioned, shows that the doctrine of equitable assets, to which we are referred by the appellant as the ground of his claim, has no application to the case. Ordinarily and strictly, the term, *equitable assets*, applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the pay-

ment of debts generally, or which, being non-existent at law, have been created in equity, under circumstances which fasten upon them such a trust. Adams on Equity, 254. But, as was said by Chancellor Kent in *Williams* v. *Brown*, 4 Johns. Ch. 682, the doctrine "does not apply to the case of a debtor in full life, for there is no equitable trust created and attached to the distribution of the effects in the latter case." Property held by a trustee for the testator is legal assets, for, although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet the analogy of the law will regulate the application of the fund. To constitute equitable assets, the trust imposed by the party, or by the court, must be for the benefit of creditors generally.

It is true that in *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119 (7 Am. Dec. 478), Chancellor Kent held surplus money arising from the sale of mortgaged premises to be equitable assets, but that was in a case where the mortgagor was deceased and the fund was in a court of equity for distribution, and when the judgment to which priority was refused was confessed by the administrator. In *Purdy* v. *Doyle*, 1 Paige, 558, the rule was stated by Chancellor Walworth, in these words:

"If it is such property as the judgment creditors could obtain a specific or general lien on at law, they are entitled to the fruits of their superior vigilance, so far as they have succeeded in getting such lien. But if the property was in such a situation that it could not be reached by a judgment at law, and the fund is raised by a decree of this court, and the creditors are obliged to come here to avail themselves of it, they will be paid on the footing of equity only."

But a specific lien, whether legal or equitable, on property liable as equitable assets, was always respected by courts of equity. *Freemoult* v. *Dedire*, 1 Peere Wms. 429; *Finch* v. *Earl of Winchelsea*, Ib. 277; Ram on Assets, 318. And Lord Chancellor Parker, in *Wilson* v. *Fielding*, 2 Vern. 763, 10 Mod. 426, drew the distinction between property which is assets in a court of equity only and certain property which a creditor cannot come at without the aid of a court of equity. In that case

the mortgage debt had been paid out of the personal estate by the executor, thus exonerating the mortgaged premises which had descended to the heir. The unsatisfied creditors filed a bill to require the heir at law to refund, which was "a matter purely in equity and a raising of assets where there were none at law."

And see *Atlas Bank* v. *Nahant Bank*, 3 Met. (Mass.) 581; *Codwise* v. *Gelston*, 10 Johns. 507, 522; *Tenant* v. *Strong*, 1 Richardson Eq. 221; 1 Story Eq. Jur. § 553; 2 White & Tudor's Lead. Cas. in Eq. pt. 1, 390.

We have already seen that the filing of a bill by an execution creditor to subject the equity of the debtor in his lifetime, created a lien and gave him a legal preference. And in the English chancery, although equities of redemption after the death of the mortgagor are classed as equitable assets, the rule of distribution *pari passu* is modified in its application to them in respect to judgment creditors by permitting them to retain their priority over other claims, because, if such priority were not allowed, the judgment creditor might acquire it by redeeming the mortgage. Adams Eq. 256. Legal assets, according to the definition of Mr. Justice Story, Eq. Jur. § 551, "are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law *virtute officii* to dispose of in the course of his administration. In other words, whatever an executor or administrator takes *qua* executor or administrator, or in respect to his office, is to be considered legal assets." And this is the modern doctrine in England. In *Lovegrove* v. *Cooper*, 2 Sm. & Giff. 271, it was held, for that reason, that the proceeds of real estate directed to be sold for the payment of debts, and paid by the purchaser into court, were legal and not equitable assets.

It follows from this, that in this country generally, where the real estate of a decedent is chargeable with the payment of debts, and, in case of a deficiency of personal property for that purpose, may be subjected to sale and distribution as assets, by the personal representative, in the ordinary course of administration, the distinction between legal and equitable assets has ceased to be important. In every such case the equity of re-

demption could only be applied after sale by the executor or administrator in the ordinary course of administration, subject to whatever liens may have been imposed upon it in the lifetime of the mortgagor, and among them, as we have seen, is that of an execution creditor who has filed his bill to subject it to the payment of his judgment. So, in other cases where the rule of equality in distribution, as to equitable assets, applies, as in cases of assignments by the debtor himself for the payment of debts generally, and in cases of bankruptcy and insolvency, except as otherwise expressly provided by statute, the estate passes, subject to existing liens, including that of an execution creditor who had previously filed a bill to subject the equitable interest of the debtor, and his priority is respected and preserved. The lien is given by the court in the exercise of its jurisdiction to entertain the bill and to grant the relief prayed for; and to distribute the proceeds of the sale for the benefit of others, equally with the execution creditor first filing the bill, would be to contradict the very principle of the jurisdiction itself, and defeat the very remedy it promised; for the fruits of litigation, according to the rule of equality, would have to be divided, not only with other judgment and execution creditors, but, as well, with all creditors, whether their claims had been reduced to judgment or not.

For these reasons, the decree appealed from is affirmed.

CUTLER *v.* KOUNS & Another.

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

Argued January 9th, 1884.—Decided March 10th, 1884.

Rebellion—Restrictions upon Trade.

Under authority derived from § 8 of the act of July 2d, 1864, 13 Stat. 375, and the Treasury Regulation of May 9th, 1865, a treasury agent at New Orleans took on the 6th of June, 1865, possession of cotton brought to New Orleans, from Shreveport and from the State of Texas, and before releas-

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ing it to the owners exacted the payment of one-fourth of its market value in New York. Payment was made under protest by instalments, viz.: June 12th, June 15th, and June 20th, 1865, and the money paid into the treasury. June 13th, 1865, the President issued his proclamation removing the restrictions upon trade east of the Mississippi, and on the 24th his proclamation removing them from the country west of the Mississippi. On the 1st of July, 1871, the owners of the cotton commenced suit against the agent to recover the sums so paid. *Held*, (1) That all cotton arriving at New Orleans before the proclamation of June 13th, became thereby subject to the treasury regulation. (2) That the President could not exempt it therefrom by proclamation subsequent to its arrival, and that the time granted by the agent to make the payments had no effect upon the liability to make them. (3) That the proclamation relating to trade east of the Mississippi did not affect cotton arriving at New Orleans from the country west of the river. (4) That the action was subject to the limitations prescribed by § 7 of the act of March 3d, 1863, 12 Stat. 757.

By section 3 of the act of July 13th, 1861, 12 Stat. 255, it was enacted that it should be lawful for the President by proclamation to declare that the inhabitants of any State or part of a State in rebellion against the United States were in a state of insurrection, and that "thereupon all commercial intercourse by and between the same and citizens thereof and the citizens of the rest of the United States should cease and be unlawful so long as such condition of hostilities should continue."

By his proclamation, dated August 16th, 1861, 12 Stat. 1262, the President declared, among others, the States of Louisiana and Texas to be in a state of insurrection against the United States (excepting such parts thereof as might, from time to time, be occupied by the forces of the United States), and forbade all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States.

On April 26th, 1862, the city of New Orleans was occupied by the forces of the United States, and remained in their possession until the close of the civil war. From the date named New Orleans was, therefore, excepted from the operation of the non-intercourse act.

In this state of affairs, on July 2d, 1864, an act of Congress was passed, entitled "An Act in addition to the several acts concerning commercial intercourse between loyal and insur-

rectionary States, and to provide for the collection of captured and abandoned property, and the prevention of fraud in States declared in insurrection." 13 Stat. 375. Section 8 of the act provided as follows:

"That it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, at such places therein as shall be designated by him, at such prices as shall be agreed on with the seller, not exceeding the market value thereof at the place of delivery, nor exceeding three-fourths of the market value thereof in the city of New York, at the latest quotations known to the agent purchasing."

In pursuance of the authority thus conferred, the Secretary of the Treasury designated certain cities, among them the city of New Orleans, as places of purchase, and appointed purchasing agents. By regulations dated May 9th, 1865, he directed that to meet the requirements of the 8th section of the act of July 2d, 1864, the agents should receive all cotton brought to the places designated as places of purchase, and forthwith return to the seller three-fourths thereof, or retain out of the price thereof the difference between three-fourths the market price and the full price thereof in the city of New York.

While the statute and these regulations were in force, to wit, on June 6th, 1865, the defendants in error, George L. Kouns and John Kouns, brought to the city of New Orleans about nine hundred bales of cotton, which they had caused to be transported, a part from near Shreveport, in the State of Louisiana, and the residue from Jefferson, in the State of Texas. At the time last mentioned, Cutler, the plaintiff in error, was the purchasing agent in New Orleans appointed by the Secretary of the Treasury. As such agent he took possession of the cotton, and before releasing it to the plaintiffs in error exacted from them the one-fourth of its market value in New York, which they paid under protest. They paid the money in three instalments—$13,695.92 on June 12th; $7,200 on June 15th; and $8,588.41 on June 20th. The money so paid was paid into the treasury by Cutler.

Opinion of the Court.

On July 1st, 1871, the defendants in error brought this suit against Cutler to recover back the money so paid. Cutler set up several defences, only two of which it is necessary to notice. These were, first, that the seizure of the cotton and the exaction of the money paid to him were authorized by section 8 of the act of July 2d, 1864, and the regulations of the Secretary of the Treasury made in pursuance thereof; and, second, that the suit was barred by the limitation enacted by section 7 of the act of March 3d, 1863, entitled "An Act relating to habeas corpus, and regulating judicial proceedings in certain cases." 12 Stat. 755.

Upon the trial of the case in the Circuit Court the defendant Cutler moved the court to direct the jury to return a verdict for him on the ground that the exaction of the money sued for was lawful. The court refused to give this instruction. The defendant also moved the court to direct the jury to return a verdict for him on the ground that the action was barred by section seven of the act of March 3d, 1863, because the suit had not been commenced within two years after the wrong done to redress which the suit was brought. This motion was also denied, and the court instructed the jury that the plaintiffs were entitled to recover the sum of $7,200 paid by them to the defendant on June 15th, and the sum of $8,588.41 paid on June 20th, with interest.

In pursuance of this instruction the jury returned a verdict for the plaintiffs for $29,679.55, for which the court rendered judgment in their favor against the defendant.

This writ of error was prosecuted by the defendant, now the plaintiff in error, to reverse that judgment.

Mr. Solicitor-General for plaintiff in error.

Mr. Henry C. Bliss and *Mr. Henry S. Neal* for defendants in error.

Mr. Justice Woods delivered the opinion of the court.

The errors assigned are, first, the refusal of the Circuit Court to direct a verdict for the defendant on the ground that the money sued for was lawfully exacted from the defendants in

error; and, second, its refusal to give a similar direction on the ground that the action was barred. We think both these assignments are well founded.

It is not disputed that on June 6th, 1865, when the cotton was brought to New Orleans, the exaction by Cutler, the purchasing agent, of one-fourth its market value in the city of New York was lawful, and that under the statutes and the treasury regulations it was his duty to make it. The contention of the defendants in error is that by the proclamation of the President dated June 13th, 1865, the right of the purchasing agent to buy the cotton in question at three-fourths its market price in New York, or, what is in substance the same thing, to take possession of the cotton and hold it until one-fourth of its market value in New York was paid to him by the owner, was taken away, and that after that date the exaction of one-fourth the market price of the cotton was unlawful.

The material part of the proclamation of June 13th, 1865, was as follows:

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, do hereby declare that all restrictions upon internal, domestic and coastwise intercourse and trade, and upon the removal of products of States heretofore declared in insurrection, reserving and excepting only those relating to contraband of war, as hereinafter recited, and also those which relate to the reservation of the rights of the United States to property purchased in the territory of an enemy, heretofore imposed in the territory of the United States east of the Mississippi River, are annulled, and I do hereby direct that they be forthwith removed." 13 Stat. 763.

As throwing light upon the question in hand, it should be stated that on June 24th, 1865, the President issued another proclamation, which, after reciting that, "whereas it now seems expedient and proper to remove restrictions upon internal, domestic, and coastwise trade and commercial intercourse between and within the States and Territories west of the Mississippi River," proceeded as follows:

"Now, therefore, be it known that I Andrew Johnson, President of the United States, do hereby declare that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the purchase and removal of products of States and parts of States and Territories heretofore declared in insurrection, lying west of the Mississippi (except only, &c.), are annulled, and I do hereby direct that they be forthwith removed." 13 Stat. 769.

The cotton in this case was the product of a country west of the Mississippi River. It was brought to New Orleans under authority of the act of July 2d, 1864. When it arrived on June 6th it was subject to the exaction enforced by the plaintiff in error. When the proclamation of June 13th was issued, a part of the money due the United States had been paid. If the defendants in error were relieved from the payment of the residue it was by virtue of that proclamation. Leaving out the parts not applicable to this case, it declared "that all restrictions . . . upon the removal of products of States . . . declared in insurrection . . . heretofore imposed in the territory of the United States east of the Mississippi River are annulled." Its clearly expressed purpose was to annul the restrictions imposed upon the removal from the territory east of the Mississippi River of the products of that territory.

If we adopt the view of the defendants in error it would follow that all cotton produced west of the Mississippi, which could only be transported to New Orleans by virtue of the act of July 2d, 1864, and on the condition that it was there to be sold to a purchasing agent, and to be subject to an exaction of one-fourth its value, would the moment it arrived be relieved of all the conditions imposed on it by the statute under authority of which it was removed. In other words, the law imposing restrictions upon the removal of cotton west of the Mississippi would have been nullified by a proclamation of the President which applied in terms only to the territory east of the Mississippi.

The policy of the President was not to remove, and he did not remove, the restrictions upon products of the country west of the Mississippi until his proclamation of June 24th. But the defendants in error contend, in effect, that by transporting their

cotton to a place east of the Mississippi, where they were under the implied obligation to pay the United States one-fourth its value, they can escape that exaction and get the benefit of the repeal of the restrictions upon cotton grown east of the Mississippi River. But until the restrictions upon the removal of cotton produced west of the Mississippi had been repealed, such cotton, if removed from the place where it was grown, would, while the restrictions were in force, remain subject thereto, no matter what might be the regulations concerning the products of the place to which it was removed.

The proclamation of June 13th refers to places declared to be in insurrection, and annuls restrictions placed upon the removal from such places of the products thereof. The construction contended for by the defendants in error would apply it to a city not in insurrection but in the possession of the federal forces, and to a place where the product was not grown, and where no restrictions upon the removal of articles there produced were in force. Such, in our opinion, was not the effect of the proclamation of June 13th.

There is another view of the question which also appears to us to be conclusive. The money exacted by the plaintiff in error from the defendants in error was paid into the treasury by him. If he should be compelled to return it to the defendants in error, the United States would in justice and honor be bound to make him whole. The suit is, therefore, in substance and effect, an action brought by the defendants in error against the government to recover the money collected by its officers and paid into its treasury, and is to be considered in that light.

We think the money sued for is the money of the United States. When the cotton reached New Orleans on June 6th, it was subject to an exaction of one-fourth its market value in New York. The owners had been allowed to bring in their cotton upon the implied promise and understanding that they would sell it to the government for three-fourths the market price. Upon its arrival in New Orleans the rights of the government in the cotton became fixed. One-fourth its value was as much the property of the government as the other three-fourths were the property of the defendants in error. No

proclamation of the President could transfer the property of the government to them. The purchasing agent, for the accommodation of defendants in error, had allowed them to pay the amount due the government in three instalments. The fact that the proclamation intervened between the payment of the first and the second instalments could not relieve the defendants in error from the payment of money actually due to the United States. The President had no more power to exonerate them from the payment of the sum due, than he has to relieve an importer from the payment of duties on his imported merchandise.

It follows, from these views, that the plaintiff in error had authority under the law and regulations of the Treasury Department to exact the money which the defendants in error brought this suit to recover.

But even if the defendants in error had a good cause of action, we are of opinion that the Circuit Court erred in refusing to instruct the jury that it was barred by the limitation prescribed by section seven of the act of March 3d, 1863, 12 Stat. 755. That section provides:

"That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to be done: *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this act," &c., 12 Stat. 757.

The act of the plaintiff in error, which is charged in the complaint to be a wrong inflicted by him upon the defendants in error, was, as appears by the bill of exceptions, an act done during the rebellion under color of authority derived from the President of the United States and an act of Congress. The bill of exceptions shows that the last of the two sums of money

for which the judgment was rendered was exacted on June 20th, 1865. This suit was not brought until July 1st, 1871. If, therefore, the limitation relied on is applicable to this case, the action was barred. The defendants in error insist, however, that the limitation does not apply to the present action. Their contention is that the suits barred are for arrests, imprisonments, and other crimes *ejusdem generis*, and that the limitation only applies to trespasses upon and wrongs done the person, and not the property, of the plaintiff. In support of this view they rely upon the rule, as their counsel state it, that when general words follow particular words, the former must be construed as applicable to the things or persons particularly mentioned.

We think the construction insisted on is too narrow. The rule of interpretation correctly stated is, that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified. Dwarris, 2d Ed. 621. But this rule, even if applicable to the statute under consideration, is subject to the qualification that general words will be construed more broadly than specific, where such construction is clearly necessary to give effect to the meaning of the legislature. *Foster* v. *Blount*, 18 Ala. 687; *United States* v. *Briggs*, 9 How. 351.

The 4th section of the statute of which the section under consideration forms a part throws light upon the general purpose of Congress in its enactment. That section provides that "any order of the President or under his authority made at any time during the existence of the present rebellion shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress." 12 Stat. 756.

It would be a strained construction to hold that, while § 4 expressly protected the party who made a search, seizure, or arrest, or subjected another to imprisonment under the order of the President, § 7 applied the two years limitation to an action brought to recover damages for the arrest or imprison-

ment, but not to an action brought to recover damages for a search or seizure.

The general purpose of Congress in the passage of that act appears plainly to have been to give a degree of protection to all persons acting during the rebellion under authority of the President or Congress of the United States. A construction which gives the benefit of one of its provisions to parties charged with offences against the person, and not to those charged with wrongs and trespasses to the property of the citizen, robs the act of a great part of its intended effect, and is clearly unsound and untenable.

But it is unnecessary to discuss further this assignment of error. The point has been expressly decided against the contention of the defendants in error by this court at the present term in the case of *Mitchell* v. *Clark*, *ante*, 634, where it was held that the limitation of the statute applied to wrongs to the estate as well as to the arrest and imprisonment of the person of the plaintiff.

The judgment of the Circuit Court must be reversed, and the case remanded to that court, with directions to order a new trial.

Mr. Justice Field did not sit in this case or take any part in its decision.

UNITED STATES *v.* RYDER & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued December 12th, 1883.—Decided March 10th, 1884.

Subrogation—Recognizance.

Without an express contract of indemnity a surety on a recognizance for the appearance of a person charged with committing a criminal offence against the laws of the United States, cannot maintain an action against the principal to recover any sums he may have been obliged to pay by reason of forfeiture of the principal, and he is not entitled to be subrogated to the

Statement of Facts.

rights of the United States, and to enjoy the benefit of the government priority.

Subrogating a surety on a recognizance in a criminal case to the peculiar remedies which the government enjoys is against public policy, and tends to subvert the object and purpose of the recognizance.

§ 3468 Rev. Stat. conferring on sureties on bonds to the United States who are forced to pay the obligation the priority of recovery enjoyed by the United States does not apply to recognizances in criminal proceedings, and does not authorize an action in the name of the United States.

The bill in this case was filed at the suit of the United States to obtain payment of a recognizance for $10,000 from the property of one Edward P. Williams, or the proceeds thereof, in the hands of Seth B. Ryder, one of the defendants. The recognizance was entered into on the 8th day of November, 1876, by Williams and three other persons, conditioned that Williams "should appear in person at Trenton, before the United States District Court there, and submit to such sentence as the said court should order and direct."

Williams did not appear according to the condition of the recognizance, but absconded, and, as the bill alleges, "became a fraudulent, absconding, concealed and absent debtor, and at the same time was a convicted criminal and a fugitive from justice," and never has since appeared nor been found. The bill further alleges that a *scire facias* was issued, and a judgment entered upon the recognizance, and an execution issued to the marshal of the district against the goods and lands of the cognizors; and that certain real estate of the sureties was levied upon, insufficient (as alleged) to satisfy the execution; but that no levy was made upon the goods and lands of Williams, for the reason that they were in the possession of said Ryder, who claimed the right to hold the same partly as assignee under a general assignment made by Williams for the benefit of his creditors in July, 1876, and partly as auditor in attachment appointed by the Circuit Court for the county of Union, in the State of New Jersey, under an attachment issued against Williams on the 15th of November, 1876, and levied on the 23d of same month. The bill alleges that Ryder has since sold the property in his possession by order of the Circuit

Court of Union County, and has in his hands the proceeds, amounting to several thousand dollars.

The defendant demurred to the bill, and the demurrer was sustained and the bill dismissed. From that decree the plaintiff appealed to this court.

Mr. Assistant Attorney-General Maury said that the United States had no interest in the suit: that the real promoters were the sureties on the bond, who claimed to be subrogated in the place of the United States.

Mr. J. Hubley Ashton for Woodruff, Clarke, and Kipling, sureties of Williams.

Mr. John R. Emery for appellees.

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

The grounds on which relief seems to be claimed by the bill, as far as can be gathered from the statements and the argument of counsel, are: *First.* That the United States is a judgment and execution creditor, whose remedy at law is exhausted, and that the funds in the hands of Ryder are equitable assets which ought to be applied in satisfaction of the judgment: *Second.* That the recognizance operated as a lien on the real estate of Williams from the time of its acknowledgment and recordation: *Third.* That under the act of Congress in that behalf, the United States is entitled to priority over all other creditors of Williams, he being insolvent, and having made a general assignment of his property for the benefit of his creditors, and his property being attached as that of an absconding debtor: *Fourth.* That the sureties of Williams have, by way of subrogation, a right to the enforcement of all the remedies which the United States is entitled to against Williams' property, before resort can be had against them and their property, or to indemnify them in case of their satisfying the claim of the United States; it being conceded on the argument that the bill was filed, and that the suit is prosecuted in the interest and

for the benefit of the sureties. The allegation on this subject in the bill is as follows:

"And your orator further shows that the said sureties, being aware that the said Seth B. Ryder has in his hands a large amount of money belonging to their principal and subject to the statutory claim of your orator to priority, as aforesaid, have claimed, as a right belonging to them as sureties, that your orator before selling their lands under said execution should seek relief in this court to compel the said Seth B. Ryder to apply the said fund to the satisfaction of said execution, as he is bound to do by the statute, giving your orator a priority upon said fund, in order that the said moneys of their principal in the hands of said Ryder may be applied to your orator's claim in exoneration of the said sureties, so far as the same will extend."

At the coming on of the argument on this appeal, the Solicitor-General of the United States stated, in open court, that the government has no interest in the suit, the amount of the recognizance having been paid by the sureties; and that the suit is prosecuted for the benefit of the sureties only; and this statement was admitted by the counsel for the sureties, who alone argued the cause for the appellants.

The questions for us to decide are:

First, Whether, since the recognizance has been paid by the sureties, they are subrogated to the rights of the United States:

Secondly, Whether, if thus subrogated, they are entitled to prosecute in the name of the United States:

Thirdly, If the first two questions are to be answered in the affirmative, whether a case is made by the bill to entitle the complainants to relief.

First: Are the sureties subrogated to the rights of the United States? The general right of sureties, when paying the debt of their principal, to be subrogated to the rights of the creditor, whether as a mortgagee, pledgee, or holder of a judgment or execution, or any other security, has been so often and so fully discussed that nothing further need be added on that subject. The recent treatise of Mr. Sheldon on the Law of Sub-

rogation, and the notes to *Dering* v. *Earl of Winchelsea*, in 1 White and Tudor's Leading Cases in Equity, 100, refer to the authorities, and exhibit the general results deducible therefrom; and in Mr. Burge's Treatise on Suretyship the rules of the civil law on the same subject are fully set forth. The doctrine is, that a surety paying the debt for which he is bound, is not only entitled to all the rights and remedies of the creditor against the principal for the whole amount, but against the other sureties for their proportional part. This is clearly the rule where the principal obligation is the payment of money or the performance of a civil duty. And in England the sureties of a debtor to the King (as for duties, taxes, excise, &c.), have always, since Magna Charta at least, had the right, upon paying the debt, to have the benefit of prerogative process, such as extent, or other Crown process adapted to the case, to aid them in coercing payment from the principal, and compelling contributions from co-sureties. Thus, where upon a *scire facias* issued against the heir and executor of one surety, the defendant paid the debt, it was ordered that he should stand in the place of the Crown, and have the aid of the court to recover either the whole against the principal, or a moiety against a co-surety. Manning's Exch. Pract. 563. And where a collector of a township [or parish] was a defaulter, and the township was re-taxed for the deficit, the same relief was given. Macdonald, Ch. Baron, said:

"The parish stands very much in the nature of sureties; and it is a reasonable practice that the party who has made good the Crown the default of the defendant, should have the same remedy that the Crown itself would have; it is besides unanswerable that this is a debt upon record and still subsisting; nor can it be satisfied by the re-assessment of the parish." *Rex* v. *Bennett*, Wightwick, 1, and cases in note. See also *Regina* v. *Salter*, 1 Hurlst. & Nor. 274.

The last observation of the Chief Baron (that the debt of the collector was still subsisting), was made in view of the opinion which long prevailed in England, that payment of the debt by the surety extinguished it, and took away the remedies for en-

forcing it, even a judgment recovered, and thereby deprived the surety himself of all advantage of such remedies, and left him to his action for money paid—a result not recognized or admitted by most of the courts of this country, and remedied in England by the Mercantile Law Amendment Act, 19 and 20 Vict., c. 97, by virtue of which a payment of the debt by the surety has virtually the effect of an assignment thereof to him. Sheldon on Subrogation, §§ 135–138.

This rule of subrogation in favor of the sureties to the prerogative rights and remedies of the Crown seems to be confined to cases of Crown debtors, such as collectors, receivers, accountants and other fiscal officers, and persons bound for customs duties, excise taxes and other civil duties. We have not been able to find any English case in which it has been applied, or allowed, in favor of bail in a criminal proceeding. It has even been held that the law raises no liability on the part of the person bailed to indemnify his bail for what they have been compelled to pay on their recognizance by reason of his default. It is said in Highmore on Bail, 204, "if a principal do not appear, and the recognizance be forfeited, and paid by the bail, yet the principal shall remain open and liable to the law whenever he can be taken, for the penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof, and has no connection with the principal; they could not sue him thereon for money paid to his use, or on his account, for it was paid on their own account, and for their own neglect." In a subsequent edition, it is true, it is said to have been settled that where a person is bail for another he is entitled to recover all the expenses he has incurred incidental to that situation; and the same statement is made in Petersdorff on Bail, 517; but the only authority cited for the position is the case of *Fisher* v. *Fallows*, 5 Esp. 171, which was a case of bail in a civil proceeding, and consequently was no authority for the proposition as applied to criminal cases.

In *Jones* v. *Orchard*, 16 C. B. 614, an action on an implied promise to indemnify bail in a criminal case was sustained in regard to the costs which he was obliged to pay on default of the principal under an act of Parliament, but it was virtually con-

ceded that no such promise of indemnity would be implied for the non-appearance of the principal, because it would be against public policy. In the course of the argument, Jervis, C. J., said: "As to the non-appearance of the defendant, there can, I apprehend, be little doubt; but a very different question may arise as to the costs; and here the recognizance was estreated only because Orchard failed to pay the costs." And in the final opinion he said:

"The rule [to set aside a verdict for the plaintiff] was moved on the ground that a contract, in a criminal case, to indemnify the bail against the consequences of a default of the principal's appearance on the trial of the indictment, is contrary to public policy, and therefore that the law will not presume any such contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only, instead of two."

In the subsequent case of *Chipps* v. *Hartnoll*, 4 B. & S. 414, it was held by the Court of Exchequer Chamber, upon much consideration, that an express contract to indemnify the bail in a criminal case might be sustained, but that no such contract is implied by law. In that case, the plaintiff had become bail for defendant's daughter upon his promise to hold the plaintiff harmless. The daughter making default, and the plaintiff being obliged to pay his recognizance, sued the defendant on his promise. The latter set up the statute of frauds, and the question was whether the promise was or was not a collateral one; if the person for whose appearance bail was given (the daughter of the defendant) was in law liable to indemnify her bail, then the promise of the father was a collateral one, and void by the statute of frauds for not being in writing; if she was not thus liable, then the father's promise was an original promise of indemnity, and the statute of frauds did not apply. The case was fully argued, first in the King's Bench, 2 B. & S. 697, and afterwards in the Exchequer Chamber on error. The King's Bench held, in deference to a former case of *Green* v.

Cresswell, 10 A. & E. 453, that the daughter was primarily liable, and that the promise of the father was collateral. But in the Exchequer Chamber it was pointed out that *Green* v. *Cresswell* was a case of bail in a civil, and not in a criminal, proceeding. and therefore not an authority in the case under consideration; and the court held that the daughter was not legally liable, and that the promise was not a collateral one; and reversed the judgment of the Court of King's Bench. Chief Baron Pollock, after pointing out the distinction, said:

"Here the bail was given in a criminal proceeding; and, where the bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be."

This decision (made in 1863) has not, so far as we are aware, been shaken by any subsequent case in England or in this country; and we think it is based on very satisfactory grounds. This may be more apparent when we consider the peculiar character and objects of bail in criminal cases as compared with the object and purpose of bail in civil cases. The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; whilst payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal may at any time be retaken and brought into court. To enable the bail, however, to escape the payment of their recognizance by performing that which the recognizance bound them to do, the government will lend them its aid in every proper way, by process and without

process, to seize the person of the principal and compel his appearance. This is the kind of subrogation which exists in criminal cases, namely, subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the government may have for collecting the penalty; for this would be to aid the bail to get rid of their obligation, and to relieve them from the motives to exert themselves in securing the appearance of the principal. Subrogation to the latter remedies would clearly be against public policy by subverting, as far as it might prove effectual, the very object and purpose of the recognizance. It would be as though the government should say to the bail, "We will aid you to get the amount of your recognizance from the principal so that you may be relieved from your obligation to surrender him to justice." If payment of the recognizance operated as a satisfaction or composition of the crime, then the subrogation contended for might be free from this objection; for then the government would be satisfied in regard to the principal matter intended to be secured.

We have been referred by the appellant's counsel to two cases in this country which are supposed to maintain a contrary doctrine to that of the English cases above cited. These are *Reynolds* v. *Harral*, 2 Strobhart, 87, and *Simpson* v. *Roberts*, 35 Ga. 180. In *Reynolds* v. *Harral* (which was decided in 1847) it was indeed held that bail in a criminal case may maintain an action against their principal for money paid, to indemnify them for what they have been obliged to pay on their recognizance. But the case stands alone, and the point was very little discussed; and the court relied for authority upon the observation in Petersdorff on Bail, already referred to, which, as we have seen, was based on a decision at *nisi prius* in a civil proceeding, and was expressly overruled as applied to criminal cases in *Chipps* v. *Hartnoll*. The other case, *Simpson* v. *Roberts*, was one in which the principal executed a mortgage to the bail to induce him to enter into the recognizance, and the mortgage was sustained by the court. This decision entirely accords with that of *Chipps* v. *Hartnoll*. Neither of

the cases cited, therefore, can be regarded as affecting the authority of that case.

As to the act of Congress which declares that sureties on bonds given to the United States shall have the same right of priority which the United States have by law, we do not think that it contains anything to modify the result to which we have come. The act referred to is now to be found in § 3468 Rev. Stat., and is as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, in either of such cases any surety on the bond, or the executor, administrator, or assignee of such surety, pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain suit upon the bond in law or equity, in his own name, for the recovery of all moneys paid thereon."

We do not understand that this section was intended to embrace recognizances in criminal cases. The section is taken from, and is substantially a reproduction of, the proviso of the 65th section of the act to regulate the collection of duties, approved March 2d, 1799, 1 Stat. 676. That section related to bonds given for the payment of duties, and declared that, if not satisfied when due, they should be prosecuted without delay; and in all cases of insolvency, or where an estate in the hands of executors, administrators, or assignees should be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, should be first satisfied; and any executor, administrator, or assignee who should pay other debts before paying the United States, should be personally liable; and the proviso then declared that if the principal in any bond given for duties on goods, wares, or merchandise imported, or other penalty, should be insolvent, or if, being deceased, his estate should be insuffi-

cient to pay all his debts, and if, in either of such cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety, should pay to the United States the money due upon such bond or bonds, such surety, &c., should have the like advantage, priority, or preference for the recovery of the said moneys out of the estate of such insolvent, or deceased principal, as were reserved or secured to the United States, and should and might bring and maintain a suit or suits upon said bond or bonds in law or equity in his, her, or their own name or names for the recovery of all moneys paid thereon.

The only difference between section 3468 of the Revised Statutes and this proviso is, that the latter in terms relates to bonds given for duties, whilst the former uses the more general terms "whenever the principal in any bond given to the United States is insolvent, &c." If it was intended by Congress to enlarge the scope of the section so as to include other bonds than those given for duties (as seems to be the necessary inference from the language), still it is restricted to "*bonds:*" the words are, "whenever the principal in any *bond* given to the United States is insolvent, &c.," and any "surety on the *bond*" pays the money due upon "such *bond*," such surety shall have the like priority, &c., and may bring and maintain a suit upon "the *bond*" in his own name, &c. This cautious phraseology, so carefully avoiding any general words of enlargement beyond the article of "bonds" alone, seems to imply that, in extending the peculiar privileges given to sureties, it was only intended to do so in reference to obligations of the same general character with those referred to in the original act, that is to say, bonds conditioned for the payment of money, or, at most, to embrace, besides, those conditioned for the performance of some civil duty, such as the faithful discharge of the duties of an office, &c. Had it been intended to include sureties for appearance in criminal cases, the word "recognizance," or some other appropriate term, or some general word adapted to the purpose, would naturally have been used. The revisers would not have proposed, nor would Congress have made, such a fundamental change in the law as the extension of this provision to criminal

cases, without employing more appropriate terms for that purpose than those which the section contains. It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed. *McDonald* v. *Hovey*, *ante*, p. 619.

Our opinion is that the right of subrogation does not exist in this case.

But if the sureties were entitled under the act to the same priority which the United States have, they are not entitled to use the name of the United States in prosecuting their claim. The statute expressly declares that they must sue in their own names. The reason is obvious. The government has many advantages in proceeding which are not possessed by individuals, and is not liable to costs; and individuals prosecuting claims against other individuals ought not to have the advantage of the name and prestige of the United States. In the case of *United States* v. *Preston*, 4 Wash. Cir. Rep. 446, the surety in a duty bond, having paid the judgment recovered on it, brought an action in the name of the United States, for his own use, against the assignees of the principals, and contended that he was entitled to every advantage which the United States are entitled to in such a suit, as to sue in the federal court, to require special bail, to demand a trial at the return of the writ, to exclude equitable defences, &c. The court, by Mr. Justice Washington, held that the action could not be brought in the name of the United States, but only in the name of the surety himself, and that the only advantage which the law gave to the surety was that of priority over other creditors, and not in the form and modes of proceeding.

As it is conceded that the United States have received full satisfaction of the recognizance on which the present suit is based, and that this suit is not prosecuted for the benefit of the United States, but solely for the benefit of the sureties, we are of opinion that it cannot be sustained; but that the bill ought to be dismissed, as well on the ground that the sureties are not subrogated to the rights of the United States, as on the ground that they cannot sue in the name of the United States.

This conclusion does not touch the merits of the case as set

up in the bill, considered as a bill filed by the United States on their own behalf and for their own use; but the bill itself shows that it was filed for the benefit of the sureties, although they may not have paid their recognizance when it was filed. Without deciding, therefore, whether, on demurrer, the bill might or might not have been sustained, considered purely as a bill filed by the United States on their own behalf, we are satisfied that its dismissal by the court below was right, considered as a bill filed on behalf, and for the benefit of, the sureties. And as it is now admitted that the United States have been satisfied and paid, and as, for this reason, if for no other, the bill should be dismissed, our conclusion is that

The decree of the court below be affirmed, but without costs—each party to pay their own costs on this appeal.

LEGGETT *v.* ALLEN, Assignee.

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

Submitted March 3d, 1884.—Decided March 10th, 1884.

Bankruptcy.

This court has no jurisdiction to review a judgment of a Circuit Court rendered in a proceeding upon an appeal from an order of a District Court rejecting the claim of a supposed creditor against the estate of a bankrupt. *Wiswall* v. *Campbell*, 93 U. S. 347, affirmed.

Motion to dismiss.

Mr. A. J. Falls for appellee, moving.

Mr. Thorndike Saunders for appellant, opposing.

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

This motion is granted on the authority of *Wiswall* v. *Campbell*, 93 U. S. 347, in which it was decided that this court has no jurisdiction to review a judgment of the Circuit Court, rendered in a proceeding upon an appeal from an order of the

Statement of Facts.

District Court rejecting the claim of a supposed creditor against the estate of the bankrupt, and for the reason that a proceeding to prove a debt is part of the suit in bankruptcy, and not an independent suit at law or in equity. Such being the nature of the proceeding, it is a matter of no consequence whether the appeal from the District Court to the Circuit Court was taken by the creditor or the assignee, for it has always been held that this court has no control over judgments or orders made by the Circuit Courts in mere bankruptcy proceedings. It is unnecessary to repeat here what was said in *Wiswall* v. *Campbell*. This case and that are in all material respects alike.

Dismissed.

THE MAMIE.

PARCHER & Another *v.* CUDDY, Administrator.

ORIGINAL MOTION, ENTITLED IN A CAUSE PENDING ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Submitted March 4th, 1884.—Decided March 10th, 1884.

Injunction—Limited Liability.

This court will refuse an application for injunction to stay proceedings begun in a State court before the filing of a libel to obtain the benefit of the limited liability act, Rev. St. §§ 4283–4–5, when it appears that both courts below decided against the petitioner's right to the benefit of the act, and that no cause for granting the petition is shown except the expense consequent upon trials in the State court pending the appeal.

The steam yacht Mamie, engaged in carrying passengers on the Detroit River, came into collision with another steamer and sank, by reason of which several passengers were drowned. Their administrator commenced suits in the State court to recover damages from the owners of the yacht. The owners then commenced proceedings in admiralty in the District Court for the Eastern District of Michigan, to obtain the benefit of the limited liability act. The District Court dismissed the libel

on the ground that the vessel was not one of the class described in the act. Appeal was then taken to the Circuit Court, where the decree of the District Court was affirmed. The owners of the yacht appealed to this court. Pending the appeal here they prayed for a writ of injunction to restrain the prosecution of the suits in the State courts by the administrator.

Mr. Geo. F. Edmunds, made the motion and filed a brief in support of it.

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

Without deciding whether an injunction may be granted under any circumstances by this court to stay proceedings in the State courts during the pendency of an appeal in a suit brought by the owners of a vessel to obtain the benefit of the limitation of liability provided for by §§ 4283, 4284, 4285, and 4286 of the Revised Statutes, we are all of the opinion that this motion should be denied. Both of the courts below have decided that the vessel owned by the appellants did not come within the purview of the statute, and consequently that the relief asked for should not be granted. If the suits in the State courts go on and judgments are rendered against the appellants, there is a way in which decisions overruling defences set up under the statute may be brought here for review, and the errors, if any, corrected.

In view of these facts we are not inclined to use the extraordinary writ of injunction to stay proceedings in suits begun in the State courts before the appellants filed their libel in the District Court, simply because of the expense that will be consequent upon trials pending the appeal. If we have the power it should not be used in a doubtful case, and after two judgments below denying the relief, unless the reasons are imperative.

Writ refused.

INDEX.

ABATEMENT.

1. The rule at common law, that *qui tam* actions on penal statutes do not survive, prevails in the federal courts as to actions on penal statutes of the United States, even in States where the statutes of the State allow suits on State penal statutes to be prosecuted after the death of the offender. *Schreiber* v. *Sharpless*, 76.
2. An action to recover penalties and forfeitures for the infringement of a copyright under the provisions of § 4965 Rev. Stat. is abated by the death of the defendant. *Id.*

ACTION.

See ABATEMENT;
JURISDICTION, B, 7;
PARTNERSHIP, 2.

ALABAMA.

See EXECUTOR AND ADMINISTRATOR;
LIMITATIONS, Statute of, 3, 4;
PLEADING, 2, 3.

AMENDMENT.

See JURISDICTION, A. 14.

APPEAL.

See JURISDICTION, A, 8, 9, 10;
SUPERSEDEAS.

ASSIGNEE IN BANKRUPTCY.

A, residing in Maryland, and a stockholder in a manufacturing corporation in Rhode Island, pledged with B, also residing in Maryland, as security for a debt due from A to B, bonds of the company secured

by mortgage of all its property. The company became embarrassed and unable to pay its debts, and its stockholders became individually liable to its creditors. A became bankrupt, and B agreed with the assignee to receive the bonds and a sum of money in payment of A's debt, and to indemnify the assignee against loss or damage as holder of the stock. B then instituted proceedings to enforce the individual liability of other stockholders: *Held*, That, the agreement with the assignee was not an agreement to save A harmless against liability as stockholder; that neither the assignee in bankruptcy nor the bankrupt's property in his hands was subject to the liability which attached to the stock, and that B assumed no liability which could be set up by a stockholder as a defence against his individual liability to B. *American File Company* v. *Garrett*, 288.

ATTORNEY AT LAW.

A contract with an attorney to prosecute a claim against the United States for a contingent fee is not void; and under the circumstances of the case, the parties having agreed upon fifty per cent. of the claim as a contingent fee, the court is not prepared to assume that the division is extortionate. *Stanton* v. *Embrey*, 93, U. S. 548, approved and followed. *Bemiss* v. *Bemiss*, 42.

See CONTRACT, 3.

AWARD.

See CLAIMS CONVENTION WITH MEXICO, 1.

BANK.

See ESTOPPEL, 1;
PRINCIPAL AND AGENT, 1.

BANKRUPTCY.

Property was sold to H, by order of a court of bankruptcy. He not paying for it, the court, without notice to him, vacated the order of sale, and made an order selling it to C, who paid for it, and went into possession of it. Afterwards, on review, the sale to C was set aside, and the sale to H reinstated. H, having paid for the property, received possession of it, and afterwards the money paid by C was repaid to him: *Held*, that C was not liable to pay to H the profits derived by him from the use of the property while he had it. *Conro* v. *Crane*, 403.

See JURISDICTION, A, 19.

BILL OF EXCHANGE.

When a bank, the owner and holder of a bill of exchange on a foreign country, remits it for collection to its correspondent abroad, and the bill is not paid at maturity, and is protested, the correspondents are not entitled to damages on the protest, as against the owner, even though the owner may have failed before maturity of the bill, being largely indebted to the correspondent. *Hambro* v. *Casey*, 216.

BOND.

See INTERNAL REVENUE, 2.

BOUNDARIES.

See COUNTY.

BRIDGE.

See COUNTY;
NEBRASKA.

BROKERS.

See CUSTOM.

CHAMPERTY.

See CONTRACT, 3.

CIRCUIT COURTS OF THE UNITED STATES.

See JURISDICTION, B.

CLAIMS AGAINST FOREIGN GOVERNMENT.

See CLAIMS CONVENTION WITH MEXICO.

CLAIMS AGAINST THE UNITED STATES.

Payment of a claim against the United States, to a tutrix appointed under the laws of Louisiana is a valid payment making her responsible to the minors, if wronged, for the receipt of the money by herself or by her authorized attorney. *Bemiss* v. *Bemiss*, 42.

See ATTORNEY AT LAW;
GUARDIAN AND WARD;
TAX SALE.

CLAIMS CONVENTION WITH MEXICO.

1. By the Claims Convention of July 4th, 1868, between the United States and Mexico, it was agreed that "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic," should be submitted to the decision of a commission to be created under the treaty; that it should "be competent for each government to name one person to attend the commission as agent on its behalf, to present and support claims on its behalf;" and that the parties would "consider the result of the proceedings of this commission as a full, perfect and final settlement:" *Held*, That, though the awards made by the commissioners under this authority are on their face final and conclusive as between the United States and Mexico, they are only so until set aside by agreement between the two governments or otherwise; and that the United States may treat with Mexico for a retrial of any case decided by the commission, and that the President may withhold from any claimant his distributive share of any sums paid by Mexico under the treaty, while negotiating with that republic for a retrial of his case. *Frelinghuysen* v. *Key*, 63.
2. When it is alleged that a decision in an international tribunal against a foreign government was obtained by the use of fraud, no technical rules of pleading as applied in municipal courts should be allowed to stand in the way of the national power to do what is right. *Id.*
3. The relations between a claimant in an international tribunal and the foreign government, and between the claimant and his own government examined and considered. *Id.*
4. § 1, act of June 18th, 1878, ch. 262, 20 Stat. 144, authorized and required the Secretary of State to receive all sums paid by Mexico in pursuance of that convention, and to distribute them in ratable proportions among those in whose favor awards had been made: *Held*, That this only provided for the receipt and distribution of the sums paid without such a protest or reservation on the part of Mexico as in the opinion of the President was entitled to further consideration, and that it did not set new limits on executive power. *Id.*
5. § 5 of that act requested the President to investigate charges of fraud made by Mexico respecting the proof of certain claims before the commission, and pointed out some subsequent executive acts that might be done in the premises: *Held*, That this was only an expression of the desire of Congress to have the charges investigated, but did not limit or increase the executive powers in that respect under pre-existing laws. *Id.*

COLORADO.

See CORPORATION, 1; DIVORCE; JUDGMENT, 3; PLEADING, 1; RAILROAD; SHERIFF'S SALE.

CONSTITUTIONAL LAW.

A, OF THE UNITED STATES.

1. Laws requiring gas companies, water companies and other corporations of like character to supply their customers at prices fixed by the municipal authorities of the locality, are within the scope of legislative power unless prohibited by constitutional limitation or valid contract obligation. *Spring Valley Water Works* v. *Schottler*, 347.
2. The Constitution of a State provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes, and that all laws, general and special, passed pursuant to that provision might be from time to time altered and repealed. A general law was enacted by the legislature for the formation of corporations for supplying cities, counties and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners to be appointed in part by the corporations and in part by municipal authorities. The Constitution and laws of the State were subsequently changed so as to take away from corporations which had been organized and put into oper-

CORPORATION.

COUNTY.

COURT OF CLAIMS.

DEED.

DISTILLERY BOND.

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DIVISION OF OPINION.

DIVORCE.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, A, 4, 5.

EJECTMENT.

See EQUITY, 8.

EQUITY.

1. A statute of Nebraska provided that an action might be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming the title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to such real estate: *Held*, That it dispensed with the general rule of courts of equity, that in order to maintain a bill to quiet title, it is necessary that the party should be in possession, and in most cases that his title should have been established by law, or founded on undisputed evidence, or long-continued possession. *Clark* v. *Smith*, 13 Pet. 195, with reference to a Kentucky statute in some respects similar, approved and followed. *Holland* v. *Challen*, 15.
2. Jurisdiction over proceedings to quiet title and prevent litigation is inherent in courts of equity; and although the courts have imposed limitations upon its exercise, it is always competent for the legislative power to remove those restrictions. *Id.*
3. Under the Nebraska statute cited above, a bill to quiet title which, on its face, presented a good title in the complainant, gave him the right to call upon the defendant to produce and disclose whatever estate he had in the premises in question to the end that its validity might be determined, and, if adjudged invalid, that the title of the plaintiff might be quieted. *Id.*
4. In order to obtain equitable relief against a judgment alleged to have been fraudulently obtained it must be averred and shown that there is a valid defence on the merits. *White* v. *Crow*, 183.
5. The powers both of courts of equity and courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient; as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law. *Krippendorf* v. *Hyde*, 276.
6. A bill of interpleader will not lie if the complainant sets up an interest in the subject-matter of the suit, and the relief sought relates to that interest. *Killian* v. *Ebbinghaus*, 568.
7. A bill in the nature of a bill of interpleader cannot be maintained unless the relief sought is equitable relief. *Id.*
8. A bill in equity will not lie if it is in substance and effect an ejectment

bill, and if the relief it seeks can be obtained at law by an action in ejectment. *Id.*

See CONTRACT, 4 ; CORPORATION, 2 ; GUARDIAN AND WARD, 2 ; JURISDICTION, B, 7, 8.

EQUITABLE ASSETS.

See JUDGMENT-LIEN.

ERROR.

When the record does not contain all the evidence in a case, the appellate court is not warranted in assuming that the refusal by the court at *nisi prius* to permit a question to be put to a witness worked no injury to the party questioning. The farthest that any court has gone has been to hold that when it can be seen affirmatively that the refusal worked no injury to party appealing, it will be disregarded. *Gilmer* v. *Higley*, 47.

See JURISDICTION, A, 16, 18 ; B, 6 ; LIMITATIONS, STATUTE OF, 5.

ESTOPPEL.

1. That which directors of a bank ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business. *Martin* v. *Webb*, 7.
2. A municipal corporation which issues a bond reciting on its face that it is issued in part payment of a subscription to the capital stock of a railroad made by the corporation in pursuance of the several acts of the general assembly of the State and of a vote of the qualified electors of the corporation taken in pursuance thereof, is estopped thereby from denying that an election was held, or that it was called and conducted in the mode required by law ; but it is not estopped from showing that the corporation was without legislative authority to issue the bonds. *Northern Bank of Toledo* v. *Porter Township*, 608.
3. The facts which a municipal corporation, issuing bonds in aid of a railroad, is not permitted, against a *bona fide* holder to question, in face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and

EVIDENCE.

EXECUTION.

EXECUTIVE POWER AND DISCRETION.

EXECUTIVE PROCLAMATION.

EXECUTOR AND ADMINISTRATOR.

FORECLOSURE.

FRAUD.

FRAUDS, STATUTE OF.

IMPLIED WARRANTY.

See CONTRACT, 1.

INDICTMENT.

An indictment which charges in the first count that the defendants conspired to intimidate A B, a citizen of African descent, in the exercise of his right to vote for a member of Congress of the United States, and that in the execution of that conspiracy they beat, bruised, wounded, and otherwise maltreated him; and in the second count that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises, contains a sufficient description of an offence embraced within the provisions of §§ 5508, 5530 Rev. Stat. *Ex parte Yarbrough*, 651.

See CONSTITUTIONAL LAW, A, 4, 5.

INFORMATION.

See CONSTITUTIONAL LAW, A, 5.

INJUNCTION.

See LIMITED LIABILITY.

INSURANCE.

A policy of insurance against loss by fire contained a clause to the effect that in case of loss the assured should submit to an examination under oath by the agent of the insurer, and that fraud or false swearing should forfeit the policy. The assured, after loss, submitted to such examination, and made false answers under oath respecting the purchase and payment of the goods assured. Although it appeared that the statements were not made for the purpose of deceiving the insurer, but for the purpose of covering up some false statements previously made to other parties: *Held*, That the motive which prompted them was immaterial, since the questions related to the ownership and value of the goods, and were material, and that the attempted fraud was a breach of the condition of the policy and a bar to recovery. *Claflin* v. *Commonwealth Insurance Company*, 81.

INTEREST.

See JUDGMENT, 1, 2.

LIMITED LIABILITY.

MUNICIPAL BONDS.

PATENT.

pass into a chamber beneath the reservoir, the area of which is co-extensive with the entire surface of the bottom of the reservoir, and the vertical passage out of such chamber is not one outside of the rear of the reservoir, but is one in and through the body of the reservoir, and removable with it. *Id.*

3. The claim of letters patent No. 142,933, granted to David H. Nation and Ezekiel C. Little, as inventors, September 16th, 1873, for an "improvement in reservoir cooking-stoves," namely, "1. The combination, with the back-plate I of the cooking-stove A, of the reservoir C, arranged on a support about midway between the top and bottom plates of the stove, and the air-chamber *b* between the stove back and reservoir front, open at the top, and communicating with the air in the room, substantially as and for the purposes set forth; 2. The combination, with the stove A and reservoir C, of the small opening *a*, the sheet-flue G under the entire bottom of the reservoir, and the small exit-passage or pipe E, all substantially as and for the purposes herein set forth," are void for want of novelty. *Id.*
4. The claims of letters patent No. 142,934, granted to said Nation and Little, September 16th, 1873, for an "improvement in reservoir cooking-stoves," namely, "1. The detachable base-pan or flue-shell D, attached to the body at a point near the centre of the back plate of the stove, by means of hooks *a a* cast on the base-pan, and pins *b b* on the stove body, substantially for the purposes herein set forth; 2. The portable reservoir F, with the flue E in the rear side, in combination with the portable base-pan or flue-shell D, substantially as and for the purposes herein set forth; 3. The combination, with a three-flue stove having damper H arranged as described, of the portable base-pan or flue-shell D and warming-closet G, all substantially as and for the purpose herein set forth," are void for want of novelty. *Id.*
5. There was no invention, in claim 1, in using, to attach the base-pan, an old mode used in attaching other projecting parts of the stove. *Id.*
6. Claims 2 and 3 are merely for aggregations of parts and not for patentable combinations. *Id.*
7. A patent was issued June 22d, 1865, to one Jennings (and subsequently assigned to appellants), for an improvement in self-acting cocks and faucets. The first claim was for a "screw follower H in combination with the valve of a self-closing faucet, substantially as set forth, and for the purpose described." This screw follower was a round stem "provided with a coarse screw thread or threads." It projected upward through the faucet, and terminated in a handle for the purpose of turning it downward to let on the water. At its lower end it rested upon a valve, which was supported by a spiral spring, the object of this spring being to keep the valve closed when the pressure was removed. It appearing that for ten or fifteen years before the date of J's patent B had manufactured and sold faucets in which an inclined plane or cam was used as a means of producing

PAYMENT.

See CLAIMS AGAINST UNITED STATES.

PENALTY.

See ABATEMENT.

PLEADING.

POWER.

PRACTICE.

PRINCIPAL AND AGENT.

1. Although a cashier of a bank ordinarily has no power to bind the bank except in the discharge of his customary duties; and although the ordinary business of a bank does not comprehend a contract made by a cashier without delegation of power from the board of directors, involving the payment of money not loaned by the bank in the customary way; nevertheless: (1) A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors. (2) His authority may be by parol and collected from circumstances or implied from the conduct or acquiescence of the directors. (3) It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank; and (4) When, during a series of years, or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. *Martin* v. *Webb*, 7.
2. The deposit of a promissory note with the agent of a third party upon condition that it should be used by the agent's principal for a specified purpose, confers no authority upon the principal to hold the note for a different purpose. *Quebec Bank of Toronto* v. *Hellman*, 178.

PRIVILEGED COMMUNICATIONS.

PROBATE COURT.

REBELLION.

been long pending in a State Court, and the highest court in the State had decided some of the points in controversy, and had remanded the cause to the court below to have other issues determined, A became interested in the property by grant from one of the parties to the suit, and intervened in it by leave of the State Court to protect his rights at a time when the right of removing the cause from the State Court to the Federal Court had expired as to all the parties: *Held*, That under the circumstances the intervention of A was to be regarded as incident to the original suit; and that he was subject to the disabilities resting on the party from whom he took title; and that the time for removal having expired before he intervened, his right of removal was barred by that fact. *Cable* v. *Ellis*, 389.

See JURISDICTION, B, 2, 3, 4.

REVIEW.

See LIMITATION, STATUTE OF, 5.

SALARY.

1. A receiver of public moneys for a district of public lands subject to sale where the annual salary is $2,500, is only entitled to retain from the military bounty land fees received by him during his term of office sufficient, with his commissions on cash sales of public lands, to make up his annual salary. *United States* v. *Babbit*, 1 Black, 55, adhered to. *United States* v. *Brindle*, 688.
2. A receiver of moneys from the sale of public lands whose annual salary amounted to $2,500, was also appointed agent for the sale of Indian trust lands under the treaty of July 17th, 1854, with the Delaware Indians, 10 Stat. 1048: *Held*, That he was entitled to commissions on the sales of Indian lands made by him, although they increased his annual compensation to a greater amount than $2,500. *Id.*
3. § 18 of the Act of August 31st, 1852, 10 Stat. 100 [Rev. Stat. § 1763], which provided "that no person hereafter who holds or shall hold any office under the government of the United States, whose salary or annual compensation shall amount to the sum of $2,500, shall receive compensation for discharging the duties of any other office," did not forbid the allowance of extra compensation to such an officer for the performance of duties not imposed upon him by an office under the government of the United States. *Converse* v. *The United States*, 21 How. 463, cited and approved to this extent. *Id.*

SHERIFF'S SALE.

When a judgment creditor in Colorado, prior in lien, received from the sheriff a certificate of sale of real estate sold to the creditor on execu-

and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. *Id.*

B. Statutes of the United States.

C. Statutes of States and Territories.

SUBROGATION.

1. Without an express contract of indemnity, a surety on a recognizance for the appearance of a person charged with committing a criminal offence against the laws of the United States, cannot maintain an action against the principal to recover any sums he may have been obliged to pay by reason of forfeiture of the principal, and he is not entitled to be subrogated to the rights of the United States, and to enjoy the benefit of the government priority. *United States* v. *Ryder*, 729.
2. Subrogating a surety on a recognizance in a criminal case to the peculiar remedies which the government enjoys is against public policy, and tends to subvert the object and purpose of the recognizance. *Id.*
3. § 3468 Rev. Stat. conferring on sureties on bonds to the United States

UTAH.

See CRIMINAL LAW, 1.

VESSELS.

See LIMITED LIABILITY.

WAGERS.

1. Dealing in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market, is not as matter of law an essential characteristic of every business to which the name of dealing in grain may properly be assigned. *Irwin* v. *Williar*, 499.
2. If under guise of a contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void. *Id.*
3. When a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering into the illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction. *Id.*
4. Generally, in this country, wagering contracts are held to be illegal and void as against public policy. *Id.*

WARRANTY.

See CONTRACT, 1, 2;
DEED, 2.

WITNESS.

See ERROR.